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The Impoundment Control Act does not apply to the lapsing of budget authority resulting from ineffective or unwise program administration, unless such actions are accompanied by, or derived from, an intention to withhold the budget authority. Without concrete evidence of such intent, we may not, under the guise of an impoundment review, stand in the shoes of an agency and second-guess managerial policies and actions otherwise committed by law to the agency's discretion.

Mr. Paul A. Adams Inspector General Department of Housing and Urban Development Washington, D.C. 20410

Dear Mr. Adams:

At your request, we reviewed in light of the Impoundment Control Act the non-use of funds appropriated in fiscal year 1986 for two Department of Housing and Urban Development (Department) programs: the section 202 housing program for the elderly and handicapped and the section 8 housing assistance payments program. You advised that because of certain policy decisions, the Department allowed $48.2 million of section 202 loan authority to lapse (even though the Department had received sufficient fundable loan applications) and did not use $36.5 million of section 8 budget authority. We have determined that the Department's actions did not result in impoundments.

You asked four questions pertaining to this matter; we address each question in our discussion below.

BACKGROUND

Section 202 of the Housing Act of 1959 authorizes the Secretary, Housing and Urban Development, to make loans to corporations and public bodies to provide rental housing to the elderly and handicapped. 12 U.S.C. Sec. 1701q. Section 8 authorizes the Secretary to make assistance payments to owners of housing developments in order to reduce the amount of rent charged lower income families. 42 U.S.C. Sec. 1437f.

Federal law requires that the Secretary, in determining the feasibility of a section 202 project, consider the availability of section 8 assistance, and ensure a mix of low and moderate income families. Pub. L. No. 93-383, Sec. 210(g), 88 Stat. 633, 671 (1974), codified at 12 U.S.C. Sec. 1701q note. The Secretary requires, by regulation, that a minimum of 20 percent of the units in a section 202 housing development be rented to families receiving section 8

assistance. 24 C.F.R. Sec. 885.210(b)(3)(ii). /1/

When the Department approves an application for section 202 assistance, the Department issues the applicant a "Notice of Section 202 Fund Reservation.. 24 C.F.R. Sec. 885.225(a). This notice identifies not only the amount of section 202 loan authority held in reserve to finance construction of the housing project, but also the amount of section 8 assistance funds reserved for that project. Id. /2/

The Department calculates the section 8 fund reservation after determining the fair market rent for the units it will subsidize. As a general matter, the Department uses a two step process to establish the rents. First, the Department ascertains the rents paid for recently constructed dwelling units of similar design within a particular market area. To account for the special needs of the elderly and the handicapped (e.g., emergency call buttons, grab bars), the Department multiplies this rent by a factor of 1.05. 2 4 C.F.R. Sec. 888.103(e)(1). Second, the Department adjusts such rent to allow time for processing the section 202 loan and section 8 assistance contracts and for construction of the project. 24 C.F.R. Sec. 888.103(a). The Secretary may establish rents for purposes of section 8 at 10 percent higher, and in some circumstances, 20 percent higher, than the fair market rent. 42 U.S.C. Sec. 1437f(c)(1). In fiscal year 1986, the Department set aside section 8 budget authority on the basis of rents set at 110 percent of the fair market rent.

In your audit of the Department's fiscal year 1986 activities, you found that the Department did not use $48.2 million of its section 202 loan authority, the availability of which expired at the end of the fiscal year, and $36.5 million of its section 8 budget authority.

You found that the Department allowed the $48.2 million to lapse, even though it had on hand sufficient fundable loan applications. The lapse of the $48.2 million stemmed from the Department's incorrect determination that it had depleted the section 8 budget authority available for fiscal year 1986. This determination resulted, you concluded, from the following:

(1) the Department's decision to reserve section 8 budget authority in fiscal year 1986 on the basis of rents set at 110 percent of the fair market rent; and,

(2) the fact that the Department, overestimating the amounts it would need in fiscal year 1986 to adjust fiscal year 1984 fund reservations, allocated too much section 8 budget authority for such adjustments.

Department officials explained that in their judgment, and based on previous experience, reserving section 8 budget authority at 110 percent of fair market rent would reflect the true cost of the section 8 subsidy. They pointed out that most section 202 housing units, at that time, were renting at that level, and they thought that the Department could close relatively few projects at 100 percent of the fair market rent. Consequently, reserving section 8 budget authority at 110 percent of the fair market rent, in their opinion, would reduce the need for adjusting section 8 assistance at the time of section 202 loan closings 2 years later.

Indeed, these same fears, of having to add funds to those already reserved, appear to have led to the Department's overestimating the fiscal year 1986 adjustments that it would need to make to fiscal year 1984 reservations. At the

beginning of each fiscal year, the Assistant Secretary for Housing allocates funding authority to each field office for/both the section 8 and section 202 programs. 24 C.F.R. Sec.(s) 380.301(a),/885.200(a). Included in the section 8 allotment for fiscal year 1986 were funds the Department estimated it would need at loan closings to add to the section 8 reservations made in fiscal year 1984 when it set aside funds at only 100 percent of the fair market rent. Department officials admitted to you that when they allocated the fiscal year 1986 section 8 budget authority, they probably overestimated the amounts field offices would need for such adjustments.

These overestimates also resulted, you found, in the Department's failure to use the $36.5 million of section 8 budget authority. You discovered, during the course of your audit, that the Department did not, in fact, need to make as many adjustments to earlier section 8 reservations as it had expected. An a result, of the amount the Department had set aside for adjustments, $36.5 million remained available.

DISCUSSION

In your letter, you ask four questions concerning the application of the Impoundment Control Act to the Department's fiscal year 1986 implementation of these two housing programs. Implicit in your questions is the notion that because such actions, as it turned out, were not advisable, at least to the extent that they led to the lapsing of budget authority, they might constitute impoundments. For example, you point out that in fiscal year 1984, the Department reserved funds on the basis of rents set at 100 percent of the fair market rent; at loan closings two years later, in fiscal year 1986, the Department had to make so few adjustments to those reservations that it did not use all of its section 8 budget authority. This, you suggest, belies the Department's assertion that it had to reserve funds in fiscal year 1986 on the basis of rents set at 110 percent of the fair market rent.

We conclude that the Department's actions did not constitute impoundments under the terms of the Impoundment Control Act. We have held that the Act does not apply to delays or the lapsing of budget authority resulting from ineffective or unwise program administration, unless such actions are accompanied by, or derived from, an intention to withhold the budget authority. See, e.q., B-228838, March 2, 1988. It is often difficult to discern the intent of agency officials. However, without concrete evidence of an intent to withhold budget authority, we may not, under the guise of an impoundment review, stand in the shoes of an agency and second-guess managerial policies and actions otherwise committed by law to the agency's exercise of discretion.

Answers to your specific questions follow:

1. "Does the [Impoundment Control] Act apply to authorized FY 1986 appropriations for the 'Housing For the Elderly or Handicapped Fund' under Public Law 99-160 (Department of HUD-Independent Agencies Appropriations Act, 1986)?"

Yes. The Department's fiscal year 1986 Appropriations Act provided, under the heading "Housing for the Elderly or Handicapped Fund," $631,033,000 of direct loan authority for section 202 loans. /3/ The Act requires the President to report impoundments of "budget authority. See 2 U.S.C. Sec.(s) 683, 684. "Budget authority, for purposes of the Act, is defined as

"authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government.. Id. Sec. 622(2).

Although the statutory definition specifically excludes loan guarantee authority, we have consistently held that loan authority is subject to the Impoundment Control Act. See B-211398, July 24, 1984; B-115398, June 19, 1975.

2. "Do the actions taken by HUD in FY 1986 relative to the nonuse of its appropriated Section 202 loan authority constitute a situation; requiring reporting to Congress under Section 1012(a) of the Act relating to rescissions of authority??

No. Section 1012(a) requires that the President propose a rescission of budget authority whenever he decides to -reserve from obligation until the end of the fiscal year budget authority provided only for that fiscal year. 2 U.S.C. Sec. 683(a). The lapsing of budget authority at the end of a fiscal year as happened with regard to the $48.2 million of section 202 funds, raises the question whether the lapse resulted from an impoundment. To conclude that Executive actions constitute an impoundment, however, requires the finding of an intention on the part of responsible agency officials to refrain from obligating the budget authority. See B-228838, Mar. 2, 1988; B-200769, Nov. 1, 1980; B-115398, Sept. 28, 1976.

You concluded that this lapse occurred because of certain actions taken by the Department which, at least in hindsight, appear inadvisable. Although one may question the advisability of the Department's actions, especially in light of their results, these, actions were within the Secretary's discretion, see 42 U.S.C. Sec. 1437f(c)(1). The Department' s explanation of these actions does not evidence any intention to withhold the section 202 funds until their availability expired at the end of the fiscal year. A lapse resulting from programmatic or operational factors, such as the suspected depletion of corresponding section 8 assistance funds, is not an impoundment. See, e.g., GAO/AFMD-84-54, May 29, 1984.

3. "Does the nonuse of the_$36.5 million of FY 1986 Section 8 authority constitute a reportable deferral under Section 1013 of the Act in view of the City of New Haven v. U.S. decision declaring that Section of the Act to be unconstitutional?.

No. Section 1013 requires that the President report to the Congress any withholding or delay in the obligation or expenditure of budget authority, or any Executive action or inaction that effectively precludes the obligation or , expenditure of budget authority. 2 U.S.C. Sec. 684; 2 U.S.C. Sec. 682. Not all delays constitute impoundment, however. Delays resulting from legitimate programmatic or operational considerations, rather than fiscal policy concerns, are not impoundments. See B-96983, B-225110, Sept. 3, 1987;l B-224882, Aug. 3, 1987.

Programmatic considerations appear to underlie the delay associated with the $36.5 million of section 8 budget authority. To assure the availability of sufficient budget authority upon completion of section 202 loan processing, the Department cautiously estimated the amount of section 8 budget authority it would need. Based upon these estimates, the Department determined it necessary

to allocate part of the fiscal year 1986 budget authority for purposes of adjustment.

To establish that the Department had impounded the $36.5 million would require us to demonstrate that the Department's estimates, when made at the beginning of the fiscal year and before actual costs were known, were intentionally and unreasonably high. Reviewing the estimates in hindsight, one might suggest estimating methodologies that might reduce the Department's margin of error. Showing that the Department might improve its estimates does not, however, lead to the conclusion that the estimates actually used by the Department resulted in an impoundment. /4/

The City of New Haven decision, /5/ to which you refer in your question, is not relevant to this delay, because the delay did not constitute an impoundment. In that decision,, the United States Court of Appeals for the District of Columbia invalidated section 1013 because it contained an unconstitutional legislative veto provision. The Congress has amended the Act, however, to restore the reporting requirement, but without the legislative veto provision. Pub. L. No. 100-119, Sec. 206(a),vl01 Stat. 754, 785 (1987).

4. "If HUD's nonuse of the $48.2 million of FY 86 Section 202 loan authority and $36.5 million of Section 8 authority are reportable under the Act, what remedy will be required?"

The Department's actions resulting in the lapse of $48.2 million of section 202 loan authority and the delay in obligating $36.5 million of section 8 budget authority did not constitute impoundments under the terms of the Act. A Therefore, we need not answer this question.

We trust that this is responsive to your inquiry.

Sincerely yours,

James F. Hinchman General Counsel

APPROPRIATIONS/FINANCIAL MANAGEMENT Budget Process Funds Impoundment Statutory restrictions

1. The regulations note that if an applicant for section 202 assistance contemplates not using section 8 assistance in some of the proposed project's units, he must demonstrate that sufficient market demand exists for the unsubsidized units to assure the project feasibility.

2. At the time of settlement on permanent financing, usually one or two years after the notice of fund reservation, the Department adjusts the amount of section 8 assistance set aside for the project. 12 U.S.C. Sec. 1701q(g).

3. After the President, under the Balanced Budget and Emergency Deficit Control Act, ordered a sequestration in this account, $603,899,000 was available.

4. Indeed, the Congress recognized the imperfect nature of the task of estimating fair market rents several years in the future by directing the Secretary, upon settlement on permanent financing, to make an "appropriate adjustment" in the amount of section 8 assistance to be provided. 12 U.S.C. Sec. 1701q(g).).

5. City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987), aff'd 634 F. Supp. 1449 (D.D.C. 1986).