The use of the word "recipient" in the HCDA of 1974 and the UDAG regulations, beginning at 24 CFR 570.460(c), does not endow a grant applicant who receives preliminary grant approval with an unconditional entitlement to payment of the grant funds. Rather, the term "recipient" is intended merely to describe cities and urban counties that have entered into a grant agreement with HUD under the UDAG program. The term does not signify any absolute right to, let alone actual receipt of, the grant funds; it merely evidences conditional authority for the funds. Indeed, the regulations specifically provide at § 570.460(c)(5)

Preliminary approval does not become final until legally binding commitments between the recipient and the private and public participating parties have been submitted and approved by HUD. Release of grant funds is contingent upon the recipient's meeting each and every condition set forth in the grant agreement.

Approved legally binding commitments, as required by the regulations and the grant agreement, are the touchstone that the project is fully financed and has met all conditions necessary for it to move forward to completion with the assistance of the grant funds. In other words, the recipient has no authority or right to receive any grant money until and unless it submits on a timely basis acceptable legally binding commitments that HUD approves.

Also supporting HUD's position is the fact that recipients knowingly invest in a UDAG project at their peril with regard to receiving federal grant funds until legally binding commitments are approved and their line of credit is funded. Each recipient is afforded every opportunity to know that its investment in the project in connection with an activity to be paid for, in whole or in part, with grant funds may not be recoverable if the recipient incurs costs before HUD's approval of the legally binding commitments and the funding of the recipient's line of credit. The regulations at 24 CFR 570.462(b) specifically state that:

The recipient and participating parties may voluntarily, at their own risk, and upon their own credit and expense, incur costs as authorized in paragraph (a) of this section, but their authority to reimburse or to be reimbursed out of grant funds shall be governed by the provisions of the grant agreement applicable to the payment of costs and the release of funds by the Secretary.

The regulations, as well as the grant agreement, thus make it clear that any authorized costs incurred by a recipient or by a participating party to the project that is the subject of the grant shall be

incurred at the risk of the recipient or other party, without any assurance of reimbursement out of grant funds. Accordingly, every reasonable effort should be made by a recipient to submit acceptable evidentiary materials in order that the grant funds contingently set aside at the time of preliminary approval of the grant may expeditiously be provided to the project and not remain dormant and unavailable for use by HUD. HUD's experience clearly indicates that the primary cause of recipients' failure to comply with the provisions of the HCDA of 1974, the regulations, and the grant agreement has been their failure to submit satisfactory legally binding commitments to HUD within the time agreed under their grant agreements.

The fact that termination of grants is more likely to occur before disbursement of the funds, rather than after, does not serve to alter HUD's determination in this interpretive rule. A potential practical effect cannot undo HUD's reasonable interpretation of Congress' chosen statutory language, made in light of the overall program operation discussed above. Moreover, even as to practical considerations, there have been, to date, more than 263 terminations of grants for cause before the legally binding commitments have been approved and the recipient's line of credit funded. Requiring a formal hearing prior to termination would thus be extremely burdensome upon HUD's limited resources.

While HUD determines that recipients lack a formal hearing right under section 111(a) prior to final approval of the grant, it is significant that HUD nevertheless provides extensive notice and opportunities to resolve the problems. HUD consistently makes every effort to resolve problems that a recipient is experiencing in its attempt to comply with requirements of the HCDA of 1974, the regulations, or the grant agreement before giving final notice of termination to the recipient. Efforts include an invitation to the recipient's representatives to meet with HUD officials to discuss the issues and attempt to correct the problems that may be causing noncompliance. It has been HUD's practice to afford a recipient every reasonable opportunity to comply substantially with the requirements of the HCDA of 1974, the regulations, and the grant agreement. Only after HUD has exhausted all available means to resolve the issues has it been compelled to advise the recipient that its failure to correct the default may result in termination of a grant agreement by HUD. Often a recipient has responded favorably to HUD's efforts to assist in

clearing the noncompliance and the project has been timely funded.

If HUD's attempts to work with the recipient to resolve the issues ultimately do not succeed, HUD will provide the recipient a written notice of its intention to terminate the grant agreement at least 35 days before taking action to terminate the grant agreement. Often this period of time is extended by HUD to provide additional opportunities to the recipient to remedy the noncompliance. Thus, recipients are not, in fact, deprived of procedural protection at the stage when, according to the U.S. Court of Appeals for the District of Columbia Circuit, it is arguably most needed. City of Kansas City, Missouri v. HUD, 923 F.2d 188, 193 (D.C. Cir. 1991). To the contrary, HUD provides extensive notice and opportunities to resolve the dispute. albeit not through a formal hearing.

Accordingly, this interpretive rule sets forth HUD's determination that, before such time as the UDAG grant has received final approval by HUD and the grant funds have been paid to the recipient under its line of credit, the HCDA of 1974 does not require that a UDAG recipient be entitled to an opportunity for a hearing concerning the recipient's failure to comply substantially with any provision of the HCDA of 1974, the regulations, or the grant agreement that HUD has decided to terminate. In addition, it has been determined that an opportunity for a hearing will be available to a recipient with regard to the termination of a grant that has been partially funded, but only with regard to the grant funds covered by legally binding commitments that HUD approved before the termination of a grant (or part of a grant) due to the failure of a recipient to comply substantially with any provision of the HCDA of 1974, the regulations, or the grant agreement.

This interpretive rule shall not apply to recipients who have received grants in states under the jurisdiction of the U.S. Court of Appeals for the First Circuit. In *City of Boston v. HUD*, 898 F.2d 828 (1st Cir. 1990), the court held that the recipient City of Boston was entitled to notice and opportunity for a hearing prior to termination of its UDAG grant, even though the City of Boston had not received final approval by HUD for its grant, let alone received any disbursement of funds.

Authority: 42 U.S.C. 3535(d). Dated: February 17, 1995.

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