

STATE OF NEW HAMPSHIRE
REAL ESTATE COMMISSION

**DECLARATORY RULING ON THE APPLICABILITY OF RSA 331-A:13, IV TO THE
SALE OF HUD-OWNED PROPERTIES**

Pursuant to Rea 201.08(a), Nathan Dickey, petitioned the New Hampshire Real Estate Commission (the “Commission”) for a declaratory ruling that the requirements related to the withdraw of escrow deposits set forth in RSA 331-A:13, IV do not apply to the sale of HUD-owned properties in the Single Family Property Disposition Program because that provision is preempted by federal law. The Commission agrees.

Facts

Real Estate Brokers that participate in the sale of HUD-owned properties are required to follow the federal regulations for the Single Family Property Disposition Program, 24 C.F.R. pt. 291, and the HUD Handbook 4310.5, which identifies the procedures for disposing of such property. Specifically, federal regulations provide that “[e]arnest money deposits are subject to total or partial forfeiture for failure to close a sale.” 24 C.F.R. §291.205(h)(2).

HUD implements this provision of the regulation by providing the following provisions in its Property Disposition Program Sales Contract:

Should Purchaser refuse or otherwise fail to perform in accordance with this contract, including the time limitation, Seller may, at Seller’s sole option, retain all or a portion of the deposit as liquidated damages. The Seller reserves the right to apply the earnest money, or any portion thereof, to any sums which may be owed by the Purchaser to the Seller for rent.¹

In addition, the following provision is included in the Notice to Purchaser, “Should the Selling broker, Agent and/or Purchaser refuse or fail to fulfill the contractual obligations, HUD reserves the right to retain all or a portion of the Purchaser’s deposit as liquidated damages.”² Further, the second page of the notice details out the circumstances when all or a portion of the deposit is returned and/or forfeited.³

¹ Ex B, page 1, para 12.

² Ex B, page 3

³ Ex B, page 4. Para: Earnest Money Forfeiture and/or Return

Similar provisions are found in the Buyer Select Closing Agent program forms:

As the closing agency/company identified above, we agree that no release, whether written or oral, will be required from the buyer or any other entity prior to forwarding the earnest money to [HUD] should the earnest money be determined as forfeited in par or whole, and such determination is provided in writing by HUD...in accordance with HUD's Earnest Money Policy which the purchaser has signed.⁴

State law limits when deposits may be withdrawn from escrow accounts. Specifically, RSA 331-A:13, IV provides that "none of the contract deposits shall be withdrawn until the contract has been terminated by performance, by contemporaneous agreement in writing between all parties, or by order of a court of competent jurisdiction, except as provided by paragraph VI of this section."

Discussion

The Commission finds that it is not possible to comply with both the requirements of RSA 331-A:13, IV and the federal regulations and procedures for the Single Family Property Disposition Program contained within 24 C.F.R. pt. 291 and the HUD Handbook 4310.5. Specifically, the standard program contract language clearly requires the forfeiture of escrow deposits in certain circumstances. In addition, the program requires that the buyer agree that "no further release" is required to provide the deposit to HUD in event of forfeiture. These requirements conflict with the state law requirement in RSA 331-A:13, IV for a court order or contemporaneous agreement in order to release a deposit from an escrow account.

As a result, the Commission rules that state law conflicts with federal law related to the sale of HUD-owned properties under the Single Family Property Disposition Program. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 371-72, (2000) (holding that Congress implicitly preempts state law when Congress intends federal law to "occupy the field," or if Congress has not occupied the field, state law is preempted to the extent of any conflict with a federal statute.)

⁴ Ex B, page 10

Conclusion

RSA 331-A:13, IV does not apply to the sale of HUD-owned properties in the Single Family Property Disposition Program because that provision is preempted by federal law.

BY ORDER OF THE BOARD

Dated: May 17, 2017


Linda Capuchino,
Division Director