

**DATE:** 10-15-90

**CITATION:** VAOPGCPREC 95-90  
Vet. Aff. Op. Gen. Couns. Prec. 95-90

**TEXT:**

**SUBJECT:** Eligibility of Refinancing Loan for Guaranty;

**QUESTION PRESENTED:**

May VA guarantee a loan which was closed August 21, 1989, for the purpose of replacing financing obtained by the veteran to purchase land and to construct a dwelling, if the amount of the new loan exceeds 90 percent of the value of the dwelling.

**COMMENTS:**

1. In June 1989, the veteran purchased unimproved land for \$7,753 and financed the purchase with a loan for that amount. At the same time, the veteran entered into a contract with a builder for the construction of a dwelling on that land. The veteran obtained separate financing in the amount of \$61,247. The construction loan was secured by a mechanic's lien on the property. Neither loan was submitted to VA for guaranty.

2. The veteran subsequently applied to Lumbermen's Investment Corporation (hereafter "the lender") for permanent financing to replace the initial loans. On August 21, 1989, the lender closed a loan to the veteran in the amount of \$69,000. VA issued evidence of guaranty for this loan on November 20, 1989. On December 12, 1989, VA wrote to the lender advising that the loan was ineligible for guaranty, and demanded return of the guaranty certificate. VA's letter to the lender stated that since this was a refinancing loan, the loan could not exceed \$62,100. Although the lender returned the guaranty certificate, it has questioned VA's determination.

3. Section 7(c) of Public Law 100-198, enacted December 21, 1987, added a new subsection (h) to 38 U.S.C. § 1810 This new Subsection (h) stated:

The amount of a loan guaranteed for the purpose specified in subsection (a)(5) of this section may not exceed the amount equal to 90 percent of the appraised value of the dwelling ... which will secure the loan....

Subsection (a)(5) authorizes VA to guarantee loans: To refinance existing mortgage loans or other liens which are secured of record on a dwelling ... owned and occupied by the veteran....

4. The lender's counsel questions whether the loan which was submitted for guaranty was, in fact, a loan described by 38 U.S.C. § 1810(a)(5). The counsel, in an opinion he

provided to the lender, stated "The dwelling in this case had not been previously owned and occupied by the veteran, and the loan therefore does not come under subsection (a)(5)." The file reviewed by this office contains a Settlement Statement, HUD Form 1, indicating that the veteran purchased the land on June 14, 1989, which was before the closing of the loan in question. Thus, the veteran apparently did own the property before obtaining the loan submitted to VA. We do not know when construction of the dwelling was completed, or when the veteran actually moved in. We do not consider that information material, however. Section 1804(c)(1) of title 38, United States Code, provides:

For the purposes of this chapter the requirement that the veteran recipient of a guaranteed or direct home loan must occupy r intend to occupy the property ... means that the veteran ... actually lives in the property personally as the veteran's residence or actually intends upon completion of the loan and acquisition of the dwelling unit to move into the property personally within a reasonable time and to utilize such property as the veteran's residence.

We, therefore, believe the requirement for occupancy may be fulfilled by the veteran moving into the dwelling within a reasonable time prior to completion of construction and thereafter occupying the property as his home.

5. If the lender's counsel is correct that the loan submitted to VA does not fall within 38 U.S.C. § 1810 (a)(5), then the next question to be answered would be what other paragraph of section 1810(a) authorizes VA to guarantee this loan. The opinion by the lender's counsel did not address that issue. Our review of subsection (a) finds no other applicable authority. This is clearly not a loan to purchase or construct a dwelling since the veteran already owned the land and the structure, and the construction was apparently completed when the loan was closed. The only possible eligible purpose would be a refinancing loan described by paragraph (5). Otherwise, the loan would not be eligible for guaranty under any circumstances.

6. In addition, the lender's counsel claimed that subsection (h) was "intended ... to apply only to cases where the veteran is re-financing for the purpose of cashing out the equity in his home." In support, the counsel cited Senate Report 100-204, 100th Cong. 1st Sess. (Oct. 21, 1987) at 21. While we agree that limiting the cashing out of equity was a major congressional concern of that legislation, there is nothing in the plain language of the statute which limits its effect to such cases. Further, we have reviewed the legislative history cited by the lender's counsel. The Senate Committee on Veterans' Affairs stated that refinancing loans were "usually for the purposes of obtaining the equity of a home which has appreciated in value (section 1810(a)(5))." (emphasis added) Senate Report 100-204 at 20. Thus, the committee expressly recognized that a refinancing loan could be used for other purposes. There is nothing in the history stating the amendment would apply only if the veteran was cashing out his or her equity.

7. Subsequent legislation supports our conclusion. Section 309 of Public Law 101-237, enacted December 18, 1989, repealed 38 U.S.C. § 1810(h), and added new clauses (7)

and (8) to 38 U.S.C. § 1810(b). These new clauses specify the maximum loan amount for a refinancing loan other than an interest rate reduction refinancing loan guaranteed under 38 U.S.C. § 1810 (a)(8). An interest rate reduction loan involves the refinancing of an existing VA guaranteed loan, which is not the case here. The only other refinancing loan authorized by 38 U.S.C. § 1810 (a) is described in paragraph (5).

8. Under the new clause (7), a loan made to refinance a construction loan, an installment land sales contract, or a loan assumed by the veteran which is being refinanced at a lower interest rate may not exceed the lesser of the reasonable value of the property or the outstanding balance on the loan being refinanced plus allowable closing costs. Any other refinancing loan is limited to 90 percent of the reasonable value of the property as provided in the former subsection (h).

9. In reporting these amendments, the Senate Committee on Veterans' Affairs stated

(T)he Committee bill would relax the 90-percent limitation for refinancing loans that are obtained for one of the three limited purposes: refinancing a construction loan....

The first situation in which the committee bill would relax the 90-percent restriction concerns veterans who obtain temporary construction loans to build a home on land already owned by the veteran. When construction is complete, the veteran could replace the initial financing with a 30-year, permanent VA-guaranteed loan.

Senate Report 101-126, 101st Cong., 1st Sess. (Sept. 13, 1989) at 281. This legislative history is a clear indication that the Congress considered the type of loan at issue here to have been subject to the former subsection (h).

10. Public Law 101-237 does not contain an effective date for the refinancing loan amendments. Absent an express provision setting a different effective date, a statute will take effect at 12:01 a.m. on the day it is signed by the President. *U.S. v. Casson*, 434 F.2d 415, 418-419 (D.C.Cir. 1970). The President signed that enactment on December 18, 1989, approximately 4 months after the loan in question was closed. We find no basis for applying this new law retroactively.

#### **HELD:**

The loan in this case, which was obtained by the veteran to replace conventional construction financing and which was closed August 21, 1989, is not eligible for guaranty because the amount of the loan exceeded 90 percent of the value of the property being refinanced. If eligible, the loan would have been guaranteed pursuant to 38 U.S.C. § 1810(a)(5) and, therefore, was subject to the limitation contained in the former 38 U.S.C. § 1810(h).

VETERANS ADMINISTRATION GENERAL COUNSEL  
Vet. Aff. Op. Gen. Couns. Prec. 95-90