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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Opinion No. 12-IB02

January 17, 2012

REQUESTED BY:

Mr. Anas Ben Addi, Director
Delaware State Housing Authority

OPINION BY:

Peter S. Feliceangeli, Deputy Attorney General
Delaware Department of Justice

and

Lawrence W. Lewis, State Solicitor
Delaware Department of Justice

RE: PUBLIC HOUSING AUTHORITIES IN DELAWARE

OPINION

You have asked what entities may serve as a public housing authority in Delaware, and, specifically, whether a corporate instrumentality of an out-of-state housing authority may operate as a public housing authority under Delaware law. For the reasons set out below, we conclude that only a housing authority that is established and operates under the exacting criteria prescribed by Delaware law may lawfully function as a public housing authority in Delaware.

Preliminarily, it should be noted that the General Assembly has determined that housing authorities are essential to the "health, safety, morals and welfare of the public" and constitute "public objects [that are] essential to the public interest." 31 *Del. C.* § 4302. *See also,*

Wilmington Housing Authority v. Williamson, 228 A.2d 787 (Del. 1967), which will be discussed later in this opinion.

The Delaware State Housing Authority (“DSHA”) is the starting point for an examination of what housing authorities may lawfully operate in the State. DSHA is given broad authority under State law to develop and assist in the development and operation of public housing throughout Delaware.

DSHA is established in the Executive Department of State government to “serve as the Governor’s staff agency in all general housing and community development matters.” 29 *Del. C.* § 8602(1). The head of DSHA is designated as the State Housing Director. 29 *Del. C.* § 8603. DSHA is “a public corporation of perpetual duration,” 31 *Del. C.* § 4010, that is vested with “authority and capacity” to “provide, and to assist others to provide, quality and affordable housing opportunities and appropriate supportive services to responsible low- and moderate-income Delawareans.” 31 *Del. C.* § 4002(a)(1). DSHA is also responsible to “[c]oordinate the housing and redevelopment activities of state agencies and other public agencies and private bodies with such responsibilities within” Delaware. 31 *Del. C.* § 4002(a)(3).

DSHA’s broad duties and functions, including the power of eminent domain and the authority to issue bonds, are set out in 31 *Del. C.* Ch. 40. Most significantly, DSHA is the source from which certificates for the creation of any local housing authority must issue after DSHA has first determined that there is a need for a proposed authority.

The deliberate process established by 31 *Del. C.* Ch. 43 for the formation of a housing authority shows that a corporate instrumentality of a non-Delaware housing authority would be incapable of acting as a public housing authority in Delaware.

A “housing authority” is defined as a corporate body that is organized pursuant to the provisions of 31 *Del. C.* Ch. 43, and a housing authority is declared by statute to be a “public body corporate or politic.” 31 *Del. C.* § 4001(2). The essential governmental function of a housing authority is evident in the statement of legislative purpose in the statute providing for their creation. The General Assembly has determined that housing authorities are necessary “to promote and protect the health, safety, morals and welfare of the public,” that a housing authority is a public corporate body, and that housing authorities “are public objects essential to the public interest.” 31 *Del. C.* § 4302.

The formation or creation of a housing authority starts when “DSHA shall have determined that there is a need for a housing authority in any county or in any part of a county of the State,” and DSHA then “issue[s]...a certification of such determination” for the formation of the authority. 31 *Del. C.* § 4303. The statutes describe in detail the manner in which the commissioners who constitute the local housing authority are appointed by the Governor and mayor of the most populous incorporated municipality in the area of operation of the new authority; the political balance that must be maintained among the commissioners; their terms of office; and the process for their removal for cause. *Id.* After the appointment of the original commissioners of the proposed new authority, the appointing officers file the certificates of appointment with the Secretary of State, and those certificates are “conclusive evidence of the due and proper creation of the [housing] authority.” *Id.*

A local housing authority that is created by the statutorily prescribed method “constitute[s] a body corporate and politic, exercising public powers....” 31 *Del. C.* § 4308(a). All property owned or operated by a housing authority “is deemed public property for public use,” 31 *Del. C.* § 4312, and is “declared to be public property used for essential public purposes”

that is exempt from taxation. 31 *Del. C.* § 4318. A housing authority is responsible to provide housing for low-income persons, 31 *Del. C.* § 4308(a)(1); “may act as agent for the federal government in connection with the acquisition, construction, operation or management of a project”, § 4803(a)(2); and has the power of eminent domain, § 4308(a)(3). A housing authority may not freely cease operations. Rather, the authority must “make application to DSHA for permission to dissolve” when it “desires to discontinue its operations,” and the law controls how an authority dissolves. 31 *Del. C.* § 4317.

~~The question of the nature of a housing authority, which serves an essential public~~
purpose, was before the Delaware Supreme Court in *Wilmington Housing Authority v. Williamson*, 228 A.2d 782 (Del. 1967). The issue was whether a housing authority was a state agency and thus able to raise the defense of sovereign immunity in a personal injury lawsuit. The Court commented on the “extensive powers conferred on” a housing authority by statute, 228 A. 2d at 786, and noted that 31 *Del. C.* §4302 declares housing authorities are “public objects essential to the public interest.” 228 A. 2d at 786. The Supreme Court determined that a housing authority “is a state agency....” 228 A.2d 787. As the Court elaborated:

The Authority is described by law as ‘a body both corporate and politic, exercising public powers.’...The terms ‘public corporate body’ or ‘public corporation’ are generic; they describe any corporate instrumentality *created by the State for public purposes and with the object of administering a portion of the powers of the State....*We think it clear that the Authority before us is a state agency created to discharge a public object essential to the public interest.

228 A.2d at 787, citations omitted, emphasis added.

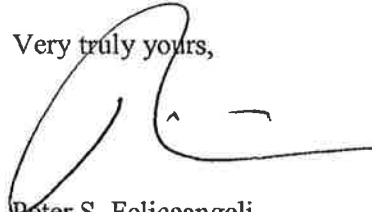
The Delaware Supreme Court recognized, then, that a housing authority, created by the State, through the DSHA, for the public purposes of promoting and protecting the health, safety, and welfare of Delawareans, is a public object essential to the public interest and, therefore, is a

State agency. It is virtually impossible to think that an out-of-state entity could be a State agency.

For the reasons set forth above, we conclude that a corporate instrumentality of a non-Delaware housing authority may not act as a public housing authority within Delaware without meeting the very difficult requirements of Delaware law. Only a housing authority that is created and operates under the exacting strictures of Delaware law may operate as a public housing authority in Delaware.

----- Feel free to contact us should you have any questions about this matter. -----

Very truly yours,

A handwritten signature in black ink, appearing to read 'Peter S. Feliceangeli', with a long horizontal flourish extending to the right.

Peter S. Feliceangeli
Deputy Attorney General

Approved:

A handwritten signature in black ink, appearing to read 'Lawrence W. Lewis', with a long horizontal flourish extending to the right.

Lawrence W. Lewis
State Solicitor