



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**Lisa Madigan**  
ATTORNEY GENERAL

June 11, 2012

Ms. Mary R. Kenney  
Executive Director  
Illinois Housing Development Authority  
401 North Michigan Avenue, Suite 700  
Chicago, Illinois 60611

Dear Ms. Kenney:

I have your letter inquiring: (1) whether the Illinois Housing Development Authority (IHDA) constitutes the only in-State public housing agency authorized by Illinois law to operate statewide; and (2) whether, under Illinois law, an instrumentality of an out-of-state public housing agency may act as a public housing agency in Illinois. Because of the nature of your inquiry, I do not believe that the issuance of an official opinion of the Attorney General is appropriate. I will, however, comment informally on the questions you have raised.

**BACKGROUND**

Based on the information you have provided, on March 23, 2011, the United States Department of Housing and Urban Development, Office of Housing Assistance Contract Administration Oversight (HUD), issued an invitation<sup>1</sup> to receive applications from public housing agencies seeking to administer project-based Section 8 housing assistance payment contracts as performance-based contract administrators (PBC Administrator). The IHDA, in partnership with Quadel Consulting, submitted an application to serve as the PBC Administrator for Illinois, and on July 1, 2011, HUD awarded the position to the IHDA. On August 11, 2011, however, the IHDA received correspondence from HUD stating that it would not proceed with the PBC Administrator process in several states, including Illinois, because protests had been

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<sup>1</sup>The invitation was issued pursuant to section 8 of the United States Housing Act of 1937 (the 1937 Act) (42 U.S.C. §1437f *et seq.* (2006 & Supp. IV 2010)) (Section 8). Programs under Section 8 may be "project-based" (rental assistance is attached to a specific building), or "tenant-based" (rental assistance is not project-based, and allows eligible families to select suitable housing and move to other suitable housing). *See* 42 U.S.C. §1437f(f)(6), (7) (2006 & Supp. IV 2010).

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filed with the United States Government Accountability Office.<sup>2</sup> Also on August 11, 2011, HUD notified IHDA of its intention to rebid the Illinois PBC Administrator position through a Notice of Funding Availability (NOFA).<sup>3</sup> The NOFA was published on March 9, 2012, and provides, in pertinent part:

Crossing State Lines. HUD believes that nothing in the 1937 Act prohibits an instrumentality PHA [public housing agency] that is "authorized to engage in or assist in the development or operation of public housing" within the meaning of section 3(b)(6)(A) of the 1937 Act from acting as a PHA in a foreign State. However, *HUD will consider applications from out-of-State applicants only for States for which HUD does not receive an application from a legally qualified in-State applicant. Receipt by HUD of an application from a legally qualified in-State applicant will result in the rejection of any applications that HUD receives from an out-of-State applicant for that state.* (Emphasis added.)<sup>4</sup>

The NOFA also states that in order to serve as a PBC Administrator, an in-State applicant must demonstrate that it: (1) satisfies the definition of a public housing authority set out in section 1437a(b)(6)(A) of the 1937 Act; and (2) has the legal authority to operate throughout the entire State. On March 15, 2012, HUD issued a technical correction to the NOFA, changing the application deadline to June 11, 2012.<sup>5</sup>

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<sup>2</sup>Per your inquiry, protests concerning the selection of the IHDA as PBC Administrator were filed by two entities: National Housing Compliance f/k/a Georgia HAP Administrators, Inc. (a Georgia not-for-profit 501c(4) corporation) and Chicago Housing Consulting, Inc., NFP.

<sup>3</sup>The NOFA was issued pursuant to 42 U.S.C. §3545 (2006 & Supp. IV 2010) and 42 U.S.C. §1437f(c)(8)(A) (2006 & Supp. IV 2010).

<sup>4</sup>See Department of Housing and Urban Development, Docket No. FR-5600-N-33, HUD's Fiscal Year (FY) 2012 Notice of Funding Availability (NOFA) for the Performance-Based Contract Administrator (PBCA) Program for the Administration of Project-Based Section 8 Housing Assistance Payments Contracts at 4, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=2012pbcasec8NOFA.pdf>.

<sup>5</sup>See Department of Housing and Urban Development, Docket No. FR-5600-N-33-C1, HUD's Fiscal Year (FY) 2011 NOFA for the Performance-Based Contract Administrator (PBCA) Program Technical Correction, *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=PBCA\\_NOFA\\_tech\\_3\\_15\\_12.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=PBCA_NOFA_tech_3_15_12.pdf).

## ANALYSIS

### **IHDA as a Public Housing Agency Authorized to Operate Statewide**

As a result of HUD's decision to rebid the Illinois PBC Administrator contract, you have inquired whether the IHDA constitutes the only in-State public housing agency authorized by Illinois law to operate statewide. The term "public housing agency" is not defined in Illinois law. Therefore, we will assume that your inquiry relates to the definition of the term "public housing agency" set out in section 1437a(b)(6)(A) of the 1937 Act,<sup>6</sup> which provides:

the term "public housing agency" means any State, county, municipality, or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing. 42 U.S.C. §1437a(b)(6)(A) (2006 & Supp. IV 2010).

When statutory language is plain and unambiguous, it should be applied as written. *Goodman v. Ward*, 241 Ill. 2d 398, 408 (2011). Under the plain and unambiguous language of section 1437a(b)(6)(A), any "State \* \* \* or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of public housing" constitutes a public housing agency, for purposes of the 1937 Act. It is necessary, therefore, to review the powers and duties of the IHDA to determine whether it possesses the necessary authority to properly be characterized as a "public housing agency."

### **Illinois Housing Development Act**

In 1967, the Illinois General Assembly enacted the Illinois Housing Development Act (the Housing Development Act) (20 ILCS 3805/1 *et seq.* (West 2010)) to address the "serious shortage, of decent, safe, and sanitary housing available at low and moderate rentals to persons and families of low and moderate income" in Illinois. 20 ILCS 3805/3 (West 2010). To assist in addressing this housing shortage, the Housing Development Act established the IHDA as a body politic and corporate (20 ILCS 3805/4 (West 2010)) with the "power to issue notes and

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<sup>6</sup>This is the only definition applicable to public housing agencies participating in *project-based* assistance programs under Section 8. A more inclusive definition applies with respect to public housing agencies participating in Section 8 *tenant-based* assistance programs. See 42 U.S.C. §1437a(b)(6)(B) (2006 & Supp. IV 2010).

bonds in order to make loans for the acquisition, construction and rehabilitation of housing, community facilities and housing related commercial facilities, acquire and develop land for large-scale planned developments and new communities and, as a means of encouraging home ownership, make loans to and purchase residential mortgages from private lending institutions." 20 ILCS 3805/3 (West 2010).

Further, the General Assembly has delegated significant authority to the IHDA, including the power to: make non-interest bearing advances to not-for-profit corporations for the construction of affordable housing (20 ILCS 3805/7.1 (West 2010)) and make mortgages or other loans to not-for-profit corporations and limited-profit entities for the acquisition, construction, or rehabilitation of housing for low or moderate income persons or families (20 ILCS 3805/7.2 (West 2010)); undertake studies and analyses of the housing needs within the State (20 ILCS 3805/7.3 (West 2010)); encourage research to improve the quality and supply of housing for low and moderate income persons and make interest free grants or loans to facilitate this result (20 ILCS 3805/7.5 (West 2010)); enter into agreements with any Federal, State, or local governmental agency in furtherance of its corporate purposes (20 ILCS 3805/7.11 (West 2010)); borrow money and issue negotiable notes and bonds to fund its statutory endeavors (20 ILCS 3805/7.14 (West 2010)); accept "gifts or grants or loans of funds or property or financial or other aid from any federal or state agency or private fund" (20 ILCS 3805/7.20 (West 2010)); form or consent to the formation of instrumentality corporations pursuant to the General Not For Profit Corporation Act of 1986 (805 ILCS 105/101.01 *et seq.* (West 2010)) or the State Housing Act (310 ILCS 5/1 *et seq.* (West 2010)) and supervise and direct the activities of such instrumentalities (20 ILCS 3805/7.24c (West 2010)); and do anything necessary or convenient to carry out its purposes and exercise the powers it has been granted (20 ILCS 3805/7.25 (West 2010)). Additionally, the Housing Development Act designates the IHDA as the State land development agency (charged with carrying out new community development programs), and State Housing Credit Agency (charged with administering low-income housing tax credits allocated to Illinois under applicable provisions of the Internal Revenue Code of 1986, as amended). 20 ILCS 3805/7.22, 7.24g (West 2010); *see also Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 477 (1988).

This office has previously determined that the IHDA is an "agency or instrumentality of the State" by virtue of its statutory purposes, authority, and duties. *See* Ill. Att'y Gen. Inf. Op. No. I-97-009, issued April 9, 1997. Further, the scope of the Housing Development Act establishes the General Assembly's intent to create a comprehensive statewide program to fund low and moderate income public housing programs throughout Illinois, and to

vest the power and authority to oversee those programs in the IHDA.<sup>7</sup> The Housing Development Act does not limit or restrict the IHDA's authority to act within any area of the State. Consequently, the IHDA constitutes a public housing agency authorized by Illinois law to operate statewide.

Two other Illinois statutes provide for the creation of entities to assist in providing affordable housing for Illinois residents. The State Housing Act (310 ILCS 5/1 *et seq.* (West 2010)) authorizes the formation of "housing corporations" under Illinois law "to acquire, construct, alter, maintain, and operate lands and buildings when authorized by and subject to the supervision of the Illinois Housing Development Authority[.]" 310 ILCS 5/3 (West 2010). Housing corporations may be not-for-profit or limited profit entities, but in all instances "[e]very housing corporation shall remain at all times subject to the supervision and control of the Illinois Housing Development Authority[.]" 310 ILCS 5/3 (West 2010).

Similarly, the Housing Authorities Act (310 ILCS 10/1 *et seq.* (West 2010)) authorizes the governing body of any city, village, or incorporated town with more than 25,000 inhabitants, or of any county, to adopt a resolution establishing the need for a municipal or county housing authority. 310 ILCS 10/3 (West 2010). While housing authorities created under the Housing Authorities Act are municipal corporations (310 ILCS 10/8 (West 2010)) with broad powers to act with respect to the funding and provision of low-income housing, including but not limited to accepting and disbursing Federal funds (*see* 310 ILCS 10/27 (West 2010)), the jurisdiction of these municipal and county authorities is limited to the geographic locations that constitute their respective areas of operation. Accordingly, housing authorities established pursuant to the Housing Authorities Act do not have statutory authority to operate statewide. 310 ILCS 10/3 (West 2010). Based on the foregoing, the IHDA constitutes the only in-State public housing agency authorized by Illinois law to operate statewide.

**Instrumentality of an Out-of-State Public Housing Agency  
as a Public Housing Agency in Illinois**

You have also asked whether Illinois law authorizes an instrumentality of a public housing agency of another state to act as a public housing agency in Illinois. A review of pertinent Illinois statutes failed to yield specific reference to an out-of-state public housing

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<sup>7</sup>"The IHDA finances the creation and preservation of affordable housing in all the counties of Illinois, in its ultimate objective of providing decent and safe places for people of low or moderate income. IHDA does not own the properties, rent apartments or manage buildings. Rather, IHDA is a financial entity created to help to finance affordable housing \* \* \*. \* \* \* IHDA serves as administrator of state and federal affordable housing financing programs." 20 Ill. Prac., Estate Planning & Admin., §324:2 (4<sup>th</sup> ed. 2008).

agency acting as a public housing agency in Illinois. Rather, the State Housing Act contemplates the organization and operation of Illinois housing corporations under the provisions of the State Housing Act (310 ILCS 5/3 (West 2010)). Similarly, the Housing Authorities Act specifically authorizes the creation of Illinois municipal corporations to administer that Act's provisions (310 ILCS 10/2 (West 2010)). Neither the State Housing Act nor the Housing Authorities Act authorizes out-of-state agencies or instrumentalities to act as housing corporations or housing authorities in Illinois.

Although the State Housing Act and the Housing Authorities Act do not contemplate an out-of-state agency or instrumentality serving as a public housing agency in Illinois, it might be possible for such an entity to do so pursuant to the provisions of the Intergovernmental Cooperation Act (5 ILCS 220/1 *et seq.* (West 2010)). Under that Act:

Any power or powers, privileges, functions, or authority exercised or which may be exercised by a public agency of this State may be exercised, combined, transferred, and enjoyed jointly with any other public agency of this State, *and jointly with any public agency of any other state* or of the United States to the extent that laws of such other state or of the United States do not prohibit joint exercise or enjoyment and except where specifically and expressly prohibited by law. (Emphasis added.) 5 ILCS 220/3 (West 2010).

As used in the Intergovernmental Cooperation Act, the term "public agency" refers to "any unit of local government as defined in the Illinois Constitution of 1970, \* \* \* the State of Illinois, any agency of the State government or of the United States, or of any other State, any political subdivision of another State, and any combination of the above pursuant to an intergovernmental agreement which includes provisions for a governing body of the agency created by the agreement." 5 ILCS 220/2(1) (West 2010). Section 5 of the Act (5 ILCS 220/5 (West 2010)), relating to intergovernmental contracts, further provides:

Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity or undertaking or to combine, transfer, or exercise any powers, functions, privileges, or authority which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be approved by the

governing bodies of each party to the contract and except where specifically and expressly prohibited by law.

The administration of public housing in Illinois constitutes a "governmental service, activity or undertaking" within the meaning of section 5 of the Intergovernmental Cooperation Act. As noted above, while Illinois law clearly authorizes the IHDA to act, statewide, with respect to public housing matters, it does not expressly prohibit out-of-state public agencies from joining together with in-state public agencies, including the IHDA, to accomplish legitimate governmental services, activities, or undertakings. Conceivably, for example, the IHDA could enter into an intergovernmental agreement with an agency of a sister State to administer certain programs in Illinois. For this reason, we are unable to conclude that there are no circumstances under which an out-of-state public housing agency could be authorized to act as a public housing agency within the State.<sup>8</sup>

### CONCLUSION

For the reasons stated above, the Illinois Housing Development Authority constitutes the only Illinois public housing agency expressly authorized by Illinois law to operate throughout the State. While Illinois law does not explicitly authorize an instrumentality of an

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<sup>8</sup>Additionally, Federal law may preempt Illinois law with respect to public housing matters. The Supremacy Clause of article VI of the United States Constitution provides that the laws of the United States "shall be the supreme Law of the Land; \* \* \* any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. Since the United States Supreme Court's decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been recognized and settled that any State law found to conflict with Federal law is "without effect." *Funeral Financial Systems, Ltd. v. Metropolitan Life Insurance Company*, 323 Ill. App. 3d 1133, 1136 (2001). Preemption may occur if: (a) the Federal law clearly expresses the intent of Congress to preempt State law; (b) there is no express congressional directive, but preemption may be inferred because there is a direct conflict between Federal and state law; and (c) Federal law creates a pervasive regulatory scheme, allowing a reasonable inference that Congress left no room for supplemental state laws regarding a given topic. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992). The Illinois Supreme Court has determined that Federal court decisions supply the rule of law for interpreting Federal statutes, and Illinois appellate courts have held that Federal decisions determine the preemptive reach of Federal statutes. Ill. Att'y Gen. Op. No. 96-037, issued December 3, 1996, at 5. There is no evidence, however, that Federal law preempts State law with respect to the authority of out-of-state public housing agencies to administer in-state *project-based* Section 8 programs. Federal law expressly provides that, with regard to *tenant-based* Section 8 programs, "notwithstanding any provision of State or local law, a public housing agency for another area that contracts with the Secretary [may] administer a program for housing assistance under section 1437f of this title, without regard to any otherwise applicable limitations on its area of operation." (Emphasis added.) 42 U.S.C. §1437a(b)(6)(B)(iii)(II) (2006 & Supp. IV 2010). No corresponding Federal provision relates to the administration of *project-based* Section 8 programs.

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out-of-state public housing agency to act as a public housing agency in Illinois, the Intergovernmental Cooperation Act does authorize public agencies of the State to partner with the agencies of any other State, or the United States, in order to provide governmental services, activities, or undertakings. Pursuant to the Intergovernmental Cooperation Act, therefore, it is conceivable that an out-of-state public housing agency, acting in consort with a public agency of this State, could be authorized to provide public housing services within the State.

This is not an official opinion of the Attorney General. If we may be of further assistance, please advise.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lynn E. Patton", written over a large, light-colored oval scribble.

LYNN E. PATTON  
Senior Assistant Attorney General  
Chief, Public Access and Opinions Division

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