

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30754
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

May 24, 2012

Mr. Gary Heidel
Executive Director
Michigan State Housing Development Authority
735 East Michigan Avenue
Lansing, MI 48912

Re: HUD Statewide Authority

Dear Mr. Heidel:

As requested by you in connection with the proposed Notice of Funding Availability for project-based Section 8 contract administration (Docket No. FR 5600-N-33) posted by the U.S. Department of Housing and Urban Development ("HUD"), we have provided to you a letter containing certain opinions of the Finance Division of the Michigan Department of Attorney General dated May 23, 2012. Following is a summary of the questions we addressed, and of the conclusions we reached:

1. Does a city, village, township or county housing commission formed under the Housing Facilities Act of 1933 (18 PA 1933; MCL 125.651, et seq) (the "Local Act") or an instrumentality of that housing commission have the explicit authority to administer a federal housing program outside its territorial boundaries and throughout the entire state of Michigan?
2. If explicit authority is lacking, does a local housing commission or its instrumentality have the implied authority to do so?
3. Does a corporation formed under the laws of this state by an out-of-state public housing agency have the authority to act as a public housing agency within the state of Michigan?

Our answer to all three questions was "No", based on four conclusions that we reached after analyzing Michigan statutes and applicable case law:

First, municipal corporations cannot exercise powers beyond their territorial limits unless the power to do so is expressly or impliedly (such as a case of public necessity) authorized by statute, and that the Michigan case law supporting this conclusion can logically be applied analogously to determine the powers of a housing commission formed by a municipal corporation under the Local Act, as well as an instrumentality of the housing commission.

Second, there is no sound argument that explicit or implied authority exists, or that it is necessary or at least manifestly desirable for a municipal corporation or its instrumentality, i.e., a local housing commission, to contract to provide these services outside the limits of the municipality.

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Third, in light of the State Housing Development Authority Act of 1966 (346 PA 1966; MCL 125.1401, et seq) (the "State Act") for the creation of a state-wide housing authority, the laws of statutory construction applicable to conflicting or overlapping areas of law would seemingly prohibit a local housing commission incorporated under the Act (or instrumentality thereof) from operating throughout the entire state of Michigan.

Fourth, neither the state nor federal law intended that governmentally-created public housing agencies or their instrumentalities would have the power to act as public housing agencies in any other jurisdiction for purposes of the project-based Section 8 subsidy program. Such an intention would need to be clearly expressed.

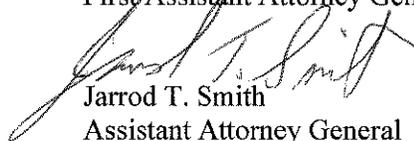
We concluded that, because the Michigan legislature has clearly chosen to create a state-wide housing authority to carry out state-wide programs relating to housing, and because of the limitations on municipal corporations and their subsidiaries and instrumentalities to act outside of their own borders, especially in light of the substantial overlap between the State Act and the Local Act, no local government or instrumentality of that local government has the authority to implement programs of housing assistance throughout the State of Michigan. We reached the same conclusion with respect to any out-of-state governmental entity. While the purpose of our communication to you was not to opine as to federal law, we concluded that no such authority has been granted or intended by Congress or Michigan's legislature. In fact, the State Act advances the legislature's intent for housing programs to be addressed by a state authority that possesses unique knowledge of the housing landscape within the State of Michigan.

As stated in our letter and herein, this is division-level advice of the Finance Division of the Michigan Department of Attorney General, and is not a formal opinion of the Attorney General.

Sincerely,



Ronald H. Farnum
First Assistant Attorney General



Jarrod T. Smith
Assistant Attorney General

Finance Division
517-373-1130

RHF:JTS/sh
Enc.
cc: Molly Jason

STATE OF MICHIGAN
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May 23, 2012

Mr. Gary Heidel
Executive Director
Michigan State Housing Development Authority
735 East Michigan Avenue
Lansing, MI 48912

Re: HUD Statewide Authority

Dear Mr. Heidel:

In connection with the proposed Notice of Funding Availability for project-based Section 8 contract administration (Docket No. FR 5600-N-33), posted by the U.S. Department of Housing and Urban Development ("HUD"), you have asked whether a city, village, township or county housing commission formed under the Housing Facilities Act of 1933 (18 PA 1933; MCL 125.651, et seq) (the "Local Act") or an instrumentality of that housing commission has the explicit authority to administer a federal housing program outside its territorial boundaries and throughout the entire state of Michigan. Second, you have asked, if explicit authority is lacking, does a local housing commission or its instrumentality have the implied authority to do so? Third, you have asked whether a corporation formed under the laws of this state by an out-of-state public housing agency has the authority to act as a public housing agency within the state of Michigan.

Our answer to all three questions is "No."

Our answer is based on four underlying conclusions:

- I. Municipal corporations cannot exercise powers beyond their territorial limits unless the power to do so is expressly or impliedly (such as a case of public necessity) authorized by statute, and the Michigan case law supporting this conclusion can logically be applied analogously to determine the powers of a housing commission formed by a municipal corporation under the Local Act, as well as an instrumentality of the housing commission.
- II. There is no sound argument that explicit or implied authority exists, or that it is necessary or at least manifestly desirable for a municipal corporation or its instrumentality, i.e., a local housing commission, to contract to provide these services outside the limits of the municipality.
- III. In light of the State Housing Development Authority Act of 1966 (346 PA 1966; MCL 125.1401, et seq) (the "State Act") for the creation of a state-wide housing authority, the laws of statutory construction applicable to conflicting or overlapping areas of law would seemingly prohibit a local housing commission incorporated under the Act (or instrumentality thereof) from operating throughout the entire state of Michigan.

IV. Neither the state nor federal law intended that governmentally-created public housing agencies or their instrumentalities would have the power to act as public housing agencies in any other jurisdiction for purposes of the project-based Section 8 subsidy program. Such an intention would need to be clearly expressed.

Background

The constitutionality of the Local Act and the validity of the Michigan Legislature's delegation to cities, villages, townships and counties of the power to deal with local housing concerns and to create housing commissions to own and operate public housing on behalf of the incorporating municipality are discussed in detail in In re Brewster Street Housing Site in City of Detroit, 291 Mich 313; 289 NW 493 (1939). Excerpts from this case that tell the history of the origins of the Local Act are set forth in Exhibit A to this letter. In brief, the Local Act authorizes Michigan cities, villages, townships and counties to eliminate housing conditions that are detrimental to the public peace, health, safety, morals or welfare, and to purchase, acquire, construct, maintain, operate, improve, extend or repair housing facilities and engage in numerous other activities related to the elimination of housing conditions detrimental to the public peace, health, safety, morals or welfare. In furtherance of these goals, cities, villages, townships and counties were authorized to form housing commissions as public bodies corporate with the powers enumerated in the statute and such other powers as may be necessary to carry out the purposes of the Local Act.

I. Limits on the Powers of Municipal Corporations

The power of cities, villages, townships and counties (referred to herein as municipal corporations) in Michigan to govern themselves flows from the general authority for self-government set forth in the Michigan Constitution adopted in 1963 (the "State Constitution"), as more fully discussed below. Additional powers may be conferred by the legislature, such as the authority granted to cities, villages, townships and counties under the Local Act to establish housing commissions and the powers granted to housing commissions to carry out the purposes of the Local Act. "The legislature creates municipal corporations, defines and limits their powers, enlarges or diminishes them at will, points out the agencies which are to exercise them, and exercises a general supervision and control of them as it shall deem proper and needful for the public welfare." See Board of Park Commissioners v Common Council of Detroit, 28 Mich 227 (1873). See also Dooley v City of Detroit, 370 Mich 194; 121 NW2d 724 (1963), in which the court cites City of Kalamazoo v Titus, 208 Mich 252, stating: "... home-rule cities do not possess plenary powers and may not, absent legislative grant, assume powers *not essential to local self-government*." (emphasis added)

It is axiomatic that the law defining the powers of municipal corporations must also apply to agencies, instrumentalities and subdivisions of municipal corporations. It is also axiomatic that the powers granted to a housing commission by the incorporating municipal corporation pursuant to a legislative grant cannot exceed the powers that may be exercised by the municipal corporation in its own right. The results if the law were to be interpreted otherwise would be absurd. Therefore, defining the power that may be exercised by a housing commission created under the Local Act can be done by examining the law applicable to municipal corporations.

Article 7, Section 22 of the State Constitution provides the basic grant of legislative power to cities and villages. "Each such city and village shall have power to adopt resolutions and ordinances *relating to its municipal concerns, property and government*, subject to the constitution and law." (emphasis added) Because of the implied restriction on the power of municipal corporations - that they

have no authority to act outside their territorial boundaries - other sections of the 1963 Constitution expressly grant authority to act outside the local boundaries when deemed necessary to the proper exercise of their powers (e.g., see Article 7, Sections 23 and 24, which give explicit authority to cities and villages to acquire property or to establish public service facilities outside their corporate limits for works involving public health or safety, or supplying utilities to their inhabitants. See also the Home Rule City Act, 279 PA 1909, MCL 117.4e and 117.4f(c), which gives express authority to a city to provide in its charter that it may act outside city limits to acquire property, or for the construction of public utilities, or other matters of public necessity).

The case law on the subject is clear. In City of Coldwater v Tucker, 36 Mich 474 (1877), the City of Coldwater had constructed a drainage ditch across private property lying outside city limits. In its review of whether the city had the power to do so, the court wrote: "The general doctrine is clear that a *municipal corporation cannot usually exercise its powers beyond its own limits.* (emphasis added) If it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it. There are cases where considerations of public policy have induced the legislature to grant such power. The commonest instances are where a supply of water can only be obtained from a distance." The court went on to reason "In the present case, for example, if there can be any implication that sewerage may be provided beyond the city, it must arise from the existence of a state of facts which renders it either actually necessary, or at least manifestly desirable." (Tucker pp 477-478)

In Sabaugh v City of Dearborn, 384 Mich 510; 185 NW2d 363 (1971), a useful analysis on the extent of municipal power is set forth in the dissenting opinion of Justice Adams. Citing Davock v Moore, 105 Mich 120, he wrote:

Municipal corporations are of a two-fold character, -- the one public, as regards the State at large, in so far as they are its agents in government; the other private, in so far as they are to *provide the local necessities and conveniences* for the citizens. (Emphasis added.)

* * *

Turning next to the authority of municipal corporations ... the powers to be exercised are (1) those granted by express words, (2) those implied in, or incident to, the powers expressly granted, or (3) such powers as are essential to the declared objects or purposes of the corporation."

* * *

The nature and extent of territorial municipal power is analyzed in 37 Am Jur, Municipal Corporations, §122, pp 736, 737 as follows: "*The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness, and public interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits; therefore, the general rule is that municipal corporations have no extra-territorial powers, but their jurisdiction ends at the municipal boundaries and cannot, without specific legislative authority, extend beyond their geographical limits. The legislature may, however, confer jurisdiction upon municipal corporations for sanitary and police purposes, and for license regulation under the police power, over territory contiguous to the corporation.the rule has been announced that when a power granted*

to a municipal corporation cannot be exercised without going outside the corporate limits, the requisite authority to do so will be implied.” (pp 528-530)

II. No Explicit or Implied Authority

Given the general limitations on municipal corporations to act without express or implied authority to do so, the next question is whether there is a sound argument that there is explicit or implied authority, or that it is necessary or at least “manifestly desirable” for a municipal corporation or its instrumentality, i.e., a local housing commission, to contract to provide services outside the limits of the municipality. Given the existence of a state-wide housing agency, as discussed below, it does not appear that such authority exists.

Nowhere in the Local Act is a housing commission or an instrumentality of a housing commission explicitly authorized to act outside its boundaries. The question then follows whether such authorization is implicit. Referring again to Article 7, Section 22 of the State Constitution, a proper analysis must determine whether the activity in question is related specifically to the municipal corporation's municipal concerns, property or government. For such authorization to be implicit, the power to act as a public housing authority and carry out a federal housing program for the entire state of Michigan and to serve residents throughout the state must be necessary to the objects of local municipal self-government.

The specific purposes of the Local Act, as expressed by the Michigan Legislature, are as follows:

AN ACT to authorize any city, village, township, or county to purchase, acquire, construct, maintain, operate, improve, extend, and repair housing facilities; to eliminate housing conditions which are detrimental to the public peace, health, safety, morals, or welfare; and for any such purposes to authorize any such city, village, township, or county to create a commission with power to effectuate said purposes, and to prescribe the powers and duties of such commission and of such city, village, township, or county; and for any such purposes to authorize any such commission, city, village, township, or county to issue notes and revenue bonds; to regulate the issuance, sale, retirement, and refunding of such notes and bonds; to regulate the rentals of such projects and the use of the revenues of the projects; to prescribe the manner of selecting tenants for such projects; to provide for condemnation of private property for such projects; to confer certain powers upon such commissions, cities, villages, townships, and counties in relation to such projects, including the power to receive aid and cooperation of the federal government; to provide for a referendum thereon; to provide for cooperative financing by 2 or more commissions, cities, villages, townships, or counties or any combination thereof; to provide for the issuance, sale, and retirement of revenue bonds and special obligation notes for such purposes; to provide for financing agreements between cooperating borrowers; to provide for other matters relative to the bonds and notes and methods of cooperative financing; for other purposes; and to prescribe penalties and provide remedies.

The primary power of local housing commissions is expressed in Section 2 of the Local Act (MCL 125.652):

Any city, village, township or county of the state of Michigan may purchase, acquire, construct, maintain, operate, improve, extend or repair housing facilities and eliminate

housing conditions which are detrimental to the public peace, health, safety, morals or welfare.

The enumerated powers of local housing commissions under the Local Act are many – those which, in pertinent part, provide authority to a housing commission to administer federal housing programs are expressed in Sections 6(2) and 46 (MCL 125.656 and 125.696):

Sec. 6.

(2) A commission may solicit, accept, and enter into agreements relating to, grants from any public or private source, including the state or federal government or any agency of the state or federal government, and may carry out any federal or state program related to the purposes for which the commission is created. The governing body of an incorporating unit may adopt a resolution that requires approval by the governing body before the commission may accept or enter into agreements relating to 1 or more types of grants.

* * *

Sec. 46.

In addition to the powers conferred by other provisions of this act, any borrower shall have power to borrow money or accept grants or other financial assistance from the federal government for or in aid of any housing project It is the purpose and intent of this act to authorize every borrower or commission created by such borrower to do any and all things necessary or desirable to secure the financial aid or cooperation of the federal government in the purchasing, acquiring, constructing, maintaining, operating, improving, extending and/or repairing of housing facilities and/or the elimination of housing conditions which are detrimental to the public peace, health, safety, morals and/or welfare.

The power of a housing commission under the Local Act to administer federal programs within its territorial limits is clear. Is there, however, implicit authority for a housing commission or an instrumentality thereof to provide such services outside those limits and for residents throughout the state? Without more than what is provided in the sections quoted above, it cannot be inferred that the grants of power to local housing commissions were intended to go beyond the borders of the municipalities within which they operate.

In Michigan Municipal Liability and Property Pool v Muskegon County Board of County Road Commissioners, 235 Mich App 183; 597 NW2d 187 (1999), a county road commission entered into an employment agreement with the City of Norton Shores in connection with a road improvement project. The agreement was for the purpose of employing the City's engineer to provide services to the project being undertaken by the road commission and included an agreement to indemnify the City in the event of any claim arising out of the services to be provided. Following a judgment obtained by a third party against the road commission and the City for damages arising out of the engineer's design, the City of Norton Shores assigned its rights under the indemnification agreement to a self-insurance pool of which the City was a member. In response to a suit by the insurance pool, the county road commission argued that the indemnification agreement was unenforceable as being ultra vires, or outside the scope of its authority. The insurance pool argued that other enumerated powers of the road commission, including the

power to enter into employment contracts, gave the road commission the implicit power to enter into an indemnification agreement relating to the employment contract, nor did the road commission statute expressly prohibit indemnification agreements.

The court wrote:

The Legislature is granted the authority to create the county road law and the road commission pursuant to Const. 1963, art. 7, § 16. However, a county's authority, like the authority of townships, cities, and villages, is derived from and limited by the constitution and valid state statutes. Arrowhead Development Co. v. Livingston Co. Rd. Comm., 413 Mich. 505, 511-512, 322 N.W.2d 702 (1982); Gray v. Wayne Co., 148 Mich.App. 247, 384 N.W.2d 141 (1986). Our Supreme Court "has repeatedly stated, local governments have no inherent powers and possess only those limited powers which are *expressly conferred* upon them by the state constitution or state statutes or which are *necessarily implied* therefrom." Hanselman v. Wayne Co. Concealed Weapon Licensing Bd., 419 Mich. 168, 187, 351 N.W.2d 544 (1984), citing Alan v. Wayne Co., 388 Mich. 210, 200 N.W.2d 628 (1972); Mason Co. Civic Research Council v. Mason Co., 343 Mich. 313, 72 N.W.2d 292 (1955). *A power is "necessarily implied" if it is essential to the exercise of authority that is expressly granted.* See, generally, Dries v. Chrysler Corp., 402 Mich. 78, 79, 259 N.W.2d 561 (1977) (power of Worker's Compensation Appeal Board to dismiss appeals for noncompliance with its rule requiring that appealing party file transcript within thirty days of filing of claim for review is necessarily implied from statute granting board authority to make rules on appellate procedure, in that power to dismiss is essential to enforcement of such procedural rules); Stebbins v. Judge of Superior Court of Grand Rapids, 108 Mich. 693, 698, 66 N.W. 594 (1896) ("Municipal corporations possess only those powers which are expressly conferred or necessarily implied, in consequence of their being essential to the exercise of their proper functions."); Vance v. Ananich, 145 Mich.App. 833, 836, 378 N.W.2d 616 (1985) ("Subpoena power not expressly conferred will not be implied unless essential to fulfillment of the objectives of a statute.")

M.C.L. § 224.10; M.S.A. § 9.110 does not empower a county road commission to enter into an indemnification agreement as a condition to hiring an engineer or consultant, because that power is not *necessarily implied* from a county road commission's *expressly* granted authority to hire such professionals. In our view, *the power to enter into indemnification agreements is not essential to any power that has been expressly conferred* on a county road commission. If the Legislature determines to grant such authority to county road commissions, it may do so, but we will not infer a power that is not essential to the proper exercise of expressly conferred authority.

It is not essential to the exercise of the authority of a housing commission incorporated under the Local Act or any instrumentality (including nonprofit or for profit corporations) that may be formed by such a housing commission to administer a federal housing program for the entire state of Michigan. Therefore, such power may not be implied.

III. State-wide Jurisdiction of State Housing Authority

Even if we were to conclude above that there is implied authority for a municipal corporation or an agency or instrumentality thereof to agree to administer federal housing programs for the benefit of

residents outside its borders and carry out those duties over the entire state, it is our opinion that the powers and authority granted to the Michigan State Housing Development Authority (the "Authority") under the State Act would preempt such implicit grant under the Local Act. The Local Act was first enacted in 1933 for the purpose of enabling municipal corporations throughout the state to provide housing for their low income residents, accept benefits being made available by the federal government during the Depression, and eliminate housing conditions detrimental to the health, safety and welfare of their residents. In 1966, the Michigan Legislature created the Authority as a state-wide housing authority. The governing body of the authority includes three heads of principal departments of the executive branch of state government and five persons all appointed by the governor with the advice and consent of the Michigan senate. The wide-ranging powers to deal with housing matters in this state that were granted to the Authority under the State Act overlap with and far exceed the powers of municipal corporations and their housing commissions under the Local Act. The powers granted to the Authority include the power:

- to undertake and carry out studies and analyses of housing needs *within the state* and ways of meeting those needs;
- to make the results of those studies and analyses available to the public and the housing and supply industries;
- to survey and investigate housing conditions and needs, both urban and rural, *throughout the state*, and make recommendations to the governor and the legislature to alleviate any existing housing shortage *in the state*;
- to make loans to private individuals and business organizations for the construction or rehabilitation of housing and related facilities;
- to encourage community organizations to assist in initiating housing projects;
- to engage and encourage research in new and better techniques and methods for increasing the supply of housing for eligible persons;
- *to accept gifts, grants, loans, appropriations, or other aid from the federal, state, or local government, from a subdivision, agency, or instrumentality of a federal, state, or local government, or from a person, corporation, firm or other organization;*
- to lease real or personal property and to *accept federal funds for, and participate in, federal programs of housing assistance;*
- to provide technical assistance in the development of housing projects and in the development of programs to improve the quality of life for *all the people of the state*;
- to encourage and engage or participate in programs to accomplish the preservation of housing *in the state*; and
- to issue Bonds and Notes to finance *housing projects* and the making or purchasing of loans for the rehabilitation of residential real property. (emphasis added)

By creating a state-wide housing authority, the Legislature effectively excluded municipally-created housing commissions from exercising the powers of the Local Act on a state-wide basis, or even beyond their own borders. This is more obvious when considering that the State Legislature bestowed state-wide authority in the State Act, and there being no similar mention in the Local Act. In State Bar of Michigan v Galloway, 124 Mich App 271; 335 NW2d 475 (1983), the court stated: "It is presumed that the Legislature knows of and intends to legislate in harmony with existing law. Therefore, where statutes are in pari materia, each must be given effect if such can be done without repugnancy, absurdity, or unreasonableness." If the jurisdiction and powers of the local housing commissions were construed to be the same as that of the state housing authority, or if a local housing commission was authorized to carry out its purposes to serve residents within the boundaries of another municipality that had also incorporated its own housing commission, then either the Local Act or the State Act would be rendered entirely redundant. It is our opinion that the Michigan Legislature cannot have intended such an absurd

result. In fact, Section 3(d) of the Local Act does address the situation of a county that forms a housing commission whose jurisdiction overlaps with the area incorporated into a city located within that county - in essence where there are two municipal corporations acting in the same territory - and in that case, the Local Act provides that the county housing commission shall only have such functions, rights, powers, duties and liabilities as may be provided by contractual agreement between the county and the incorporated area. No similar provision for a housing commission endeavoring to act throughout the state-wide jurisdiction of the Authority (or *vice versa*) is found in the Local Act.

Other rules of statutory construction are also in agreement with this conclusion. One such rule is that where two statutes encompassing the same subject matter conflict, the most recently enacted statute generally controls. In Irons v 61st Judicial District Court Employees, 139 Mich App 313, the court reviewed two conflicting laws relating to public employee labor relations and concluded that the more recently enacted law was controlling. The court stated: "In general, where two statutes which encompass the same subject matter conflict, the later enacted statute controls", citing People v Flynn, 330 Mich 130; 47 NW2d 47 (1951). Thus, the Legislature cannot have intended that locally-created housing authorities should have state-wide authority to act in conflict with the clear intent of the later-enacted State Act to grant such power to the Authority. The same court goes on to express another such rule: "Again, where two statutes which encompass the same subject matter conflict, the more specific statute will control", citing People v Shaw, 27 Mich App 325; 183 NW2d 390 (1970). The express powers of the Authority under the State Act must be controlling over the Local Act's very non-specific "for any purpose not inconsistent with the purposes for which the commission was formed."

There are state-level preemption principles that apply by analogy as well, suggesting a limitation on the reach of a local housing commission's authority, when a state-level entity exists with the same or substantially overlapping authority. See People v. Llewellyn, 401 Mich 314 (1977); 257 NW2d 902 (1977). "A municipality is precluded from enacting an ordinance if . . . 2) if the state statutory scheme pre-empts the ordinance by *occupying the field of regulation which the municipality seeks to enter*, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." Llewellyn at 322. (emphasis added). See also Attorney General v City of Detroit, 225 Mich 631, 640; 196 NW 391 (1923), in which the court cited Coleman v LaGrande, 73 Or. 521 (144 Pac. 468): "Within their boundaries cities are clothed with power to regulate matters purely local. . . . Beyond such municipal boundaries *and in matters of general concern not pertaining solely to local municipal affairs*, cities are amenable to the general laws of the State. . . ." (emphasis added) Reviewing these and other similar case law reveals not only the limitation on municipal corporations proposing to act outside their own borders, but even *within* their own borders, if the matter involved is within the general statutory powers of a state-wide body created by the legislature.

IV. Limits on Authority Under State and Federal Law

The functions of housing authorities as instrumentalities of the incorporating municipalities are purely governmental in nature. They are creatures of statute and derive their authority from Michigan's constitution and legislature. A non-profit corporation formed within this state by an out-of-state governmental entity cannot have the power to act as a governmental agency within this state, unless *specifically* authorized to do so by the laws of its own state and of this state. The general authority of municipalities and their instrumentalities to function as public housing agencies in the state of Michigan is found in Section 2 of the Local Act (MCL 125.652): "Any city, village, township or county *of the state of Michigan* may purchase, acquire, construct, maintain, operate, improve, extend or repair housing facilities and eliminate housing conditions which are detrimental to the public peace, health, safety, morals or welfare." (emphasis added)

The jurisdiction of state agencies, municipalities and their instrumentalities must be strictly limited to their own state and municipal boundaries, unless (1) explicit or implicit statutory authority empowers them to act outside those boundaries and (2) there is no existing, governmental authority with similar powers and whose jurisdiction covers the territory in which the out-of-area or out-of-state entity seeks to operate. To allow it to be otherwise would be contrary to sense and reason, and in direct conflict with the laws of the home state. If it were otherwise, the City of Detroit could organize a non-profit corporation in the state of Massachusetts to assume the municipal duties of the City of Boston, for example, or the state of Michigan could form a non-profit corporation to assume the housing program responsibilities of HUD throughout the United States, even though no legislation authorizing these extra-territorial activities in any of the affected jurisdictions had been adopted. The results would be absurd.

The authorizing provisions for public housing authorities to contract with HUD and administer the Section 8 housing program within their jurisdictions is found in 42 U.S.C. 1437a(b)(6)(A):

(A) In general.--Except as provided in subparagraph (B), 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.

Although it is not expressly stated that geographical limits on the authority of any governmental entity or public body to engage or assist in the operation of public housing exist, we believe that Congress recognized and must recognize the natural limitations on state sovereignty and on the authority of governmentally-created entities, and that those limits are implicit. Congress has the power to authorize any public housing agency to act outside its territorial limits for purposes of the federal government; but has not done so in 42 U.S.C. 1437a(b)(6)(A). In 42 U.S.C. 1437a(b)(6)(B) (the subparagraph B referred to above), Congress expressly expanded the definition of public housing agency to include, *but only for purposes of the tenant-based assistance program*:

(ii) any other public or private nonprofit entity that, upon the effective date under section 503(a) of the Quality Housing and Work Responsibility Act of 1998, was administering any program for tenant-based assistance under section 1437f of this title (as in effect before the effective date of such Act), pursuant to a contract with the Secretary or a public housing agency; [OR]

(iii) *with respect to any area in which no public housing agency has been organized or where the Secretary determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance under section 1437f of this title, or is not performing effectively—*

(I) the Secretary or another public or private nonprofit entity that by contract agrees to receive assistance amounts under section 1437f of this title and enter into housing assistance payments contracts with owners and perform the other functions of public housing agency under section 1437f of this title; or

(II) *notwithstanding any provision of State or local law, a public housing agency for another area that contracts with the Secretary to 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)*

Mr. Gary Heidel
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The express language of Section 1437a(b)(6)(B) permits public housing agencies from other jurisdictions and non-profit entities to act as the public housing agency only where no other public housing agency exists or is capable of effective function. This exception cannot apply where an effectively performing public housing agency already exists, is willing to perform and is currently implementing programs for tenant-based assistance. Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion. INS v Cardoza-Fonseca, 480 US 421, 432 (1987) (citations omitted).

Conclusion

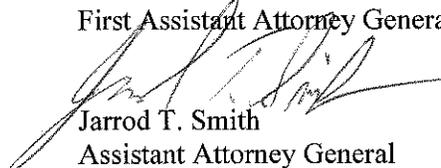
Because the Michigan Legislature has clearly chosen to create a state-wide housing authority to carry out state-wide programs relating to housing, and because of the limitations on municipal corporations and their subsidiaries and instrumentalities to act outside of their own borders, especially given in light of the substantial overlap between the State Act and the Local Act, it is our opinion that no local government or instrumentality of that local government has the authority to implement programs of housing assistance throughout the State of Michigan. We reach the same conclusion with respect to any out-of-state governmental entity. While we are not in a position to opine as to federal law, we are led to conclude that no such authority has been granted or intended by Congress or Michigan's Legislature. In fact, the State Act advances the legislature's intent for housing programs to be addressed by a state authority that possesses unique knowledge of the housing landscape within the State of Michigan.

This letter constitutes advice at the division level and is not the formal opinion of the Attorney General.

Sincerely,



Ronald H. Farnum
First Assistant Attorney General



Jarrod T. Smith
Assistant Attorney General

Finance Division
517-373-1130

RHF:JTS/sh
Enc.
cc: Molly Jason

EXHIBIT A

Excerpts from In re Brewster Street Housing Site in City of Detroit, 291 Mich 313; 289 NW 493 (1939):

In 1933, the congress of the United States, as part of its public works program, provided by the National Industrial Recovery Act, title 2, for the spending of money for low-cost housing and slum-clearance projects. 48 Stat. 195, 200, 40 U.S.C.A. § 401 et seq. The program was directed by a Federal emergency administrator of public works who was empowered, upon such terms as the president should prescribe, to make grants to States, municipalities, or other public bodies for the construction, improvement, or repair of low-cost housing and slum-clearance projects, and to acquire by purchase or the power of eminent domain any real or personal property in connection with the construction of such project. See 40 U.S.C.A. §§ 402, 403(a). Congress appropriated \$3,300,000,000 to carry on the purposes of the act.

In order to make the State eligible to participate, the governor summoned the Michigan legislature to an extra session convening November 22, 1933. While in session, the legislature received a message from the governor which stated in effect that the National Industrial Recovery Act had appropriated \$3,300,000,000 for public works; that, although the people of Michigan were paying their proportion of the appropriated fund, the State and its municipal subdivisions had failed to qualify a single project; that the reason for the failure to qualify was constitutional prohibitions which could be surmounted only by the passage of emergency legislation dealing with the subject; and to that end he presented to the legislature for its consideration a housing bill, drafted by the corporation counsel of the city of Detroit and approved by the public works administrator, which was designed to permit Michigan municipalities to undertake such work. Michigan House J1. (Ex.Sess.1933-1934), pp. 89, 90.

The legislature, January 9, 1934, passed Act No. 18, Pub. Acts 1933 (Ex.Sess.). Section 2 provides that any city or incorporated village having a population of over 500,000 is authorized 'to purchase, acquire, construct, maintain, operate, improve, extend, and/or repair housing facilities and to eliminate housing conditions which are detrimental to the public peace, health, safety, morals, and/or welfare.' Section 3 authorizes any city with a population of over 500,000 to create by ordinance a commission with power to accomplish the purposes set forth in section 2. Section 4 provided that the commission should consist of five members who should serve for five years without compensation, to be appointed by the governor. Act No. 80, Pub. Acts 1935, amended section 4 to provide that the commission shall consist of five members to be appointed by the chief administrative officer of the city or incorporated village. Section 7 provides that the commission shall have the power and duty, (a) to determine in what areas of the city it is necessary to provide sanitary housing facilities for families of low income and for elimination of housing conditions injurious to public health; (b) to

purchase, lease, sell, exchange, transfer, assign and mortgage any property, real or personal, or any interest therein, or acquire the same by gift, bequest, or under the power of eminent domain; to own, hold, clear and improve such property, or alter, improve or extend; to lease or operate any housing project or projects; (c) to rent only to such tenants as are unable to pay for more expensive housing accommodations. ...

* * *

Section 40 states: 'This act, being necessary for and to secure the public peace, health, safety, convenience and welfare of the cities and incorporated villages and the people of the state of Michigan, shall be liberally construed to effect the purposes thereof.'

Section 43 recites that, whereas, there is a demand in congested sections of Michigan for housing of families of low income and for the reconstruction of slum areas and no existing laws or charters provide for the organization of public housing commissions as contemplated in the National Industrial Recovery Act, 'This act is hereby declared to be immediately necessary for the preservation of the public peace, health, safety, convenience and welfare of the people of the state of Michigan.'

* * *

Meanwhile, the congress of the United States ... passed an act, September 1, 1937, which sought to preserve the housing program and avoid the unconstitutional provisions of the National Industrial Recovery Act, title 2. 50 Stat. 888, 42 U.S.C.A. § 1401 et seq. This act and the United States Housing Act had a threefold purpose: (1) to decentralize housing construction by withdrawing the Federal government from housing activity; (2) to insure the continuation of a housing program by the States; and (3) to eliminate substandard homes and confine low-cost housing to persons in the low-income groups. It limits the activity of the Federal government to financing State and municipal housing authorities who will condemn property, establish rental rates and conditions of occupancy. To accomplish the second purpose, the act provides that there shall be created in the department of the interior a United States housing authority which may render financial assistance to municipal housing agencies by (a) loans; (b) loans, plus annual contributions; (c) capital grants. Loans may be as high as 100 per cent of the total cost if repaid within a period not to exceed 60 years, at the going rate of interest plus one-half of one per cent. If annual contributions are made, then the loans may not exceed 90 per cent of the development or acquisition cost of such project. In order to make sure that the money loaned will be spent for low-cost housing and for persons in the low-income groups, the act sets up conditions which the local housing commission must follow. The more important of these conditions are, (1) persons eligible must be in the lowest income group, for whom private enterprise cannot afford to build an adequate

supply of decent, safe and sanitary dwellings; (2) the persons who occupy the dwellings must be persons whose net income does not exceed five times the rental (including the value or cost to them of heat, light, water and cooking fuel), except that in the case of three or more dependents such ratio shall not exceed six to one; (3) the average construction cost shall not exceed the cost of dwellings currently produced in the locality by private enterprise; (4) no annual contributions shall be made unless the project includes the elimination by demolition, condemnation, and effective closing, or the compulsory repair of unsafe or unsanitary dwellings situated in the locality or the metropolitan area, substantially equal in number to the number of newly constructed dwellings provided by the project. In *328 order to withdraw the Federal government from the management of housing projects, it was provided by section 12(b), 42 U.S.C.A. § 1412(b), that 'as soon as practicable the Authority shall sell its Federal projects or divest itself of their management through leases.'

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Before this time, Act No. 18, Pub. Acts 1933 (Ex.Sess.) was amended with a view towards securing funds under the new Federal act. Changes unimportant in the present controversy were made by Act No. 265, Pub. Acts 1937. September 8, 1938, the legislature, in special session, on recommendation of the governor (Senate J1. 1938 [Ex.Sess.], p. 11), made certain amendments and additions to Act No. 18, Pub. Acts 1933 (Ex.Sess.), by Act No. 5, Pub. Acts 1938 (Ex.Sess.). Sections 2 and 3 were amended to provide that any city may by ordinance create a housing commission to construct low-cost housing facilities and eliminate housing conditions detrimental to the public peace, health and welfare. Section 17 provides that for the purpose of defraying the cost of purchasing, constructing, extending or repairing any housing project any commission may borrow money and issue bonds therefor. This section also provides that bonds may be sold to the United States housing authority upon certain enumerated conditions. Section 27 requires all housing commissions to follow certain minimum rental requirements. These requirements are drawn so as to fit together with the conditions in the Federal Housing Act for the expenditure of loans and in effect provide that rentals shall be fixed at the lowest possible rates consistent with providing decent, safe and sanitary dwelling accommodations"