

Marie Head
Deputy Assistant Secretary
Office of Multifamily Housing Programs
U.S. Department of Housing and Urban Development
451 7th Street SW
Room 6106
Washington, D.C. 20410

Re: Section 8 Project Based Contract Administration in New Mexico

Dear Ms. Head:

As Executive Director of the New Mexico Mortgage Finance Authority (“MFA”), I am writing to bring to your attention a newly-issued opinion of the Attorney General of New Mexico regarding the ability of an out-of-state housing authority, or its instrumentality, to operate as a public housing authority in the State of New Mexico. Please find enclosed a copy of the opinion in its entirety.

We believe that it is critical that HUD officials in the Office of Multifamily Housing Programs be made aware of the Attorney General’s Opinion prior to the release of the Notice of Funding Availability for the PBCA contract for New Mexico. As the Attorney General’s Opinion makes clear, New Mexico law grants exclusive authority to the MFA to act as a public housing authority for and throughout the State of New Mexico, and no out-of-state housing agency may operate as a public housing authority in this state.

Please feel free to contact me with any questions or to discuss this matter further.

Sincerely,



Jay Czar
Executive Director

cc: Michael Backman, Multifamily Hub Director
Joseph Pennel, Director of Operations, Ft. Worth Hub
Kenneth E. Byrd, Director, Albuquerque Program Center



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

January 19, 2012

OPINION
OF
GARY K. KING
Attorney General

Opinion No. 12-02

BY: Stephen A. Vigil
Assistant Attorney General

TO: The Honorable Joni Marie Gutierrez
New Mexico State Representative
Box 842
Mesilla, NM 88046

The Honorable Nancy Rodriguez
New Mexico State Senator
1838 Camino La Canada
Santa Fe, NM 87501

QUESTION:

May an out-of-state public housing authority, or an instrumentality of an out-of-state public housing authority, act as a public housing authority in New Mexico in light of the New Mexico Mortgage Finance Authority Act, NMFA 1978, Chapter 58, Article 18, which designates the New Mexico Mortgage Finance Authority ("MFA") as the single state housing authority in New Mexico?

CONCLUSION:

By statute, MFA is designated as the single state housing authority in New Mexico. An out-of-state public housing authority or instrumentality of an out-of-state public housing authority has no authority to act as a public housing authority within New Mexico.

BACKGROUND:

Our opinion was requested because of the possibility that the U.S. Department of Housing and Urban Development (“HUD”) will award the contract for the administration of HUD’s Project-Based Section 8 Housing Assistant Payments (“HAP”) Contracts Program for the State of New Mexico to a public housing agency incorporated and located out of state, on the premise that the organization will be able to operate as a public housing authority within the state under New Mexico law.

In March 2011, HUD issued an “Invitation for Submission of Applications: Contract Administrators for Project-Based Section 8 Housing Assistance Payments (HAP) Contracts.” The Invitation’s purpose was to solicit applications from public housing agencies to administer the HAP contracts program in each state. The Invitation was issued pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f. Since 2000, MFA had been responsible for administering the New Mexico HAP contracts program. However, after reviewing the applications it received in response to the March 2011 Invitation, HUD announced that it would designate Southwestern Housing Compliance Corporation (“SHCC”), an instrumentality of the Housing Authority of Austin, Texas, to be the contracts administrator for New Mexico.

HUD made similar determinations throughout the United States, selecting entities incorporated outside of those states to administer their HAP contracts programs. MFA, along with similarly-situated public housing agencies in other states, protested the procurement process for the HAP contract administrators. HUD subsequently withdrew the contract award but has since indicated that it will commence another bidding process in which it will accept applications from out-of-state bidders if they include a legal opinion that they are eligible to operate as a public housing agency throughout the state for which they are applying.

ANALYSIS:

MFA was created by the New Mexico legislature in 1975 as:

a public body politic and corporate, separate and apart from the state, constituting a governmental instrumentality ... acting in all respects for the benefit of the people of the state in the performance of essential public functions and ... serving a valid public purpose in improving and otherwise promoting their health, welfare and prosperity....

NMSA 1978, § 58-18-2(F). In 1998, the Legislature consolidated and transferred certain housing programs to the MFA and changed its designation. *See* Laws 1998, ch. 63, § 6. The title of Section 58-18-5.5 of the Mortgage Finance Authority Act (“Act”) is: “Additional powers of authority; *authority designated as single state housing authority ...*” (emphasis added). Pursuant to Section 58-18-5.5(A), MFA “is designated as the state housing authority for all purposes.” Furthermore, the MFA “shall administer federal and state housing programs and federal tax credit provisions associated with those programs.” NMSA 1978, § 58-18-5.5(C). The term “state” is defined as New Mexico. NMSA 1978, § 58-18-13(T). The foregoing provisions make clear that the legislature has designated MFA as the single public housing authority in New Mexico with statewide jurisdiction.¹

For purposes of the U.S. Housing Act of 1937, a “public housing agency” is defined as: “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). Under this definition, an entity must be “authorized” by state law to develop or operate public housing in the state before it can qualify as a public housing agency in that state.²

Our review of state law reveals that it does not allow out-of-state entities, including entities such as SHCC that are public housing authorities under the laws of other states, to act as public housing authorities in New Mexico. MFA is the sole entity authorized by the state legislature “to engage in or assist in the development or operation of public housing” throughout the state. As discussed above, the title of Section 58-18-5.5 states that MFA is the single state housing authority and Subsection A formally designates MFA as such. Furthermore, Subsection C clearly indicates that MFA is in charge of administering federal programs, which would include the Section 8 HAP contracts program. Because MFA is statutorily designated as the state’s only state housing authority with statewide jurisdiction, and New Mexico law does not otherwise authorize an out-of-

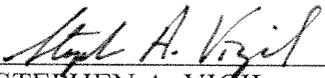
¹ The New Mexico legislature has authorized the creation of other public housing authorities within the state; however, in contrast to MFA, those entities’ jurisdictions are limited. *See* Municipal Housing Law, ch. 3, art. 45 1965, as amended through 2009 (authorizing a city or county to create local housing authorities to operate and manage housing projects and affordable housing programs within the city or county); Regional Housing Law, ch. 11, art. 3A (1994, as amended through 2009) (creating regional housing authorities with operations confined to their respective regions).

² We believe it goes without saying that a state cannot properly authorize a public housing authority created under that state’s law to operate as a public housing authority in another state. Federal law could confer the requisite authority on an out-of-state housing authority but has not done so under the circumstances presented here. *Cf.* 42 U.S.C. § 1437a(b)(6)(B)(iii)(II) (expanding definition of “public housing agency” in the U.S. Housing Act “[f]or purposes of the program for tenant-based assistance under section 8” to include, “notwithstanding any provision of State or local law, a public housing agency for another area that contracts with [HUD] to administer a program for housing assistance under section 8, without regard to any otherwise applicable limitations on its area of operation” when “no public housing agency has been organized or where [HUD] determines that a public housing agency is unwilling or unable to implement a program for tenant-based assistance ... or is not performing effectively ...”).

state entity to act as a public housing authority in New Mexico, we conclude that the law necessarily prohibits out-of-state public housing authorities and their instrumentalities from acting as public housing authorities in New Mexico.



GARY K. KING
Attorney General



STEPHEN A. VIGIL
Assistant Attorney General