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October 5, 2011

Richard W. Crager, Deputy Director
Oregon Housing and Community
Services Department
725 Summer Street NE, Suite B
Salem, OR 97301-1266

Re: Opinion Request OP-2011-2

Dear Mr. Crager:

You have asked whether a nonprofit corporation with certain characteristics may act as a "public housing agency" in Oregon. Your specific question and our short answer are set forth below, followed by our analysis.

QUESTION PRESENTED

A state or local government outside of Oregon creates a nonprofit corporation to act as an instrumentality of that government. In the state where it is created, that corporation has authority to act as a "public housing agency" as that term is defined in 42 USC §1437a(b)(6). The corporation is authorized to conduct business in Oregon pursuant to ORS 65.714. Does Oregon law authorize the corporation to act as a "public housing agency" within the state of Oregon?

SHORT ANSWER

No.

DISCUSSION

For purposes of the United States Housing Act of 1937, as amended, a "public housing agency" is "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 USC §1437a(b)(6)(A). As described in the question, the nonprofit corporation at issue is an instrumentality of a "governmental entity," but not of an Oregon governmental entity. The corporation satisfies the requirements of 42 USC §1437a(b)(6) in the state of its creation, and thus may act as a "public housing agency" within that state.

However, the laws of another state cannot confer authority to exercise Oregon government functions. Only Oregon law can do that. *See Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 US 493, 501, 59 S Ct 629, 83 L Ed 940 (1939) ("[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty,

precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.") Nor do other states' governmental entities possess inherent authority to govern in Oregon. *See Nevada v. Hall*, 440 US 410, 99 S Ct 1182, 59 L Ed2d 416 (1979) (Nevada is not sovereign in California and thus has no inherent sovereign immunity when sued in California courts for its acts within California). Indeed, Oregon government authority exists only where a statutory or constitutional provision expressly grants that authority or necessarily implies it. *See, e.g., Ochoco Construction, Inc. v. Department of Land Conservation and Development*, 295 Or 422, 426-427, 667 P2d 499 (1983) (state agency "has no inherent power, but only such power and authority as has been conferred upon it by its organic legislation") (citing cases); *City of Sandy v. Metro*, 200 Or App 481, 485-486 115 P3d 960 (2005) (validity of a Metro ordinance depends on conclusion that the ordinance is within the authority granted by Metro's charter, which in turn must be within the authority conferred on Metro by Oregon Constitution and statutes); *see also id.* at 495 (noting that the Oregon Constitution is the source of the legislature's generally plenary authority and can impose limits on that power). Thus, although the entity at issue is a governmental entity of an out-of-state government, and can act with the authority of that out-of-state government to the full extent permitted by the laws of the other state, only Oregon laws can give the entity authority to carry out functions of Oregon government. Furthermore, as *Nevada v. Hall* explains, such an entity is generally subject to Oregon's laws when it acts in Oregon, even if it is properly acting as a governmental entity of its origin state.

Authorization to conduct business as a corporation under ORS 65.714 does not constitute authority to act as an Oregon governmental entity. Instead, that provision confers upon a foreign corporation authorized to transact business in Oregon "the same but no greater rights and * * * the same but no greater privileges as, and except as otherwise provided by this chapter * * * the same duties, restrictions, penalties and liabilities now or later imposed on, a domestic corporation of like character." ORS 65.714(1).

As discussed above, a governmental entity of another state does not possess authority to act as an Oregon governmental entity. Thus, a "domestic corporation of like character" to the nonprofit corporation at issue would be a domestic corporation created by an entity lacking Oregon governmental authority. ORS 65.077 provides that the corporate form, by itself, confers only "the same powers as an individual" to carry out the corporation's affairs. Consequently, a governmental entity of another state cannot use the corporate form to confer upon itself the power to act as an Oregon governmental entity. Any Oregon "governmental entity" with "authori[ty] to engage in or assist in the development or operation of public housing" must be specifically authorized by Oregon law.

And in fact, Oregon has enacted specific statutes that authorize particular entities to act as public housing agencies within the meaning of 42 USC §1437a(b)(6)(A). But those statutes apply, by their terms, to Oregon governmental entities at the state and local level.

The "Housing Authorities Law," codified at ORS 456.055 to 456.235, largely governs public housing agencies at the county and municipal level. Specifically, ORS 456.075 provides,

in part, that "[i]n each city, as defined in ORS 456.055, and county there hereby is created a public body corporate and politic to be known as the 'housing authority' of the city or county." A housing authority established under this section cannot "transact any business or exercise its powers until or unless the governing body of the city or the county, by proper resolution, declares that there is need for an authority to function in such city or county." ORS 456.075. ORS 456.120 generally describes the powers granted to a local housing authority; those powers include "all the powers necessary or convenient to carry out and effectuate the purposes of the Housing Authorities Law." Among twenty powers specifically enumerated by ORS 456.120 are the power to "lease or rent any housing, lands, buildings, structures or facilities embraced in any housing project," ORS 456.120(8), and the power to enter into arrangements with other parties to "finance, plan, undertake, construct, acquire, manage or operate a housing project," ORS 456.120(18). ORS 456.145 separately confers the power to utilize eminent domain.

ORS 456.060 circumscribes the geographic area within which a municipal or county "housing authority" may act. Inside of those geographic bounds, the powers granted to the governmental "housing authorities" created by ORS 456.055 to 456.235 qualify them as "public housing agencies" within the meaning of 42 USC §1437a(b)(6)(A). We do not believe it is plausible to infer authority for government entities of other states to operate as public housing authorities throughout Oregon, when Oregon's county and municipal governments are subject to this express geographic limitation.

In addition to these local bodies, the various powers statutorily conferred upon the Oregon Housing and Community Services Department (OHCS) qualify OHCS as a "public housing authority" within the meaning of 42 USC §1437a(b)(6)(A). ORS 456.625 enumerates the powers of OHCS. Subsection (7) of that statute confers broad authority to exercise the power described in 42 USC §1437a(b)(6)(A), including power to make or participate in the making of residential loans to qualified individuals or housing sponsors for acquisition, improvement, rehabilitation and other purposes, to purchase and sell such loans, to foreclose on mortgages and security interests, to acquire or take possession of property subject to such interests and to complete, conserve, improve or otherwise use such property. In addition, ORS 456.625(12) authorizes OHCS to "contract for, act on or perform any other duties that [OHCS] determines necessary or appropriate to carry out housing programs and community services programs." These provisions confer on OHCS authority "to engage in or assist in the development or operation of public housing" within the meaning of 42 USC §1437a(b)(6)(A).

Indeed, ORS 456.550(5) establishes OHCS as Oregon's "central source" for "housing information, planning, educational services and technical assistance and a revolving fund." And ORS 456.559(1)(f) requires OHCS to act as "the central state department to apply for, receive and distribute, on behalf of appropriate state agencies, governmental bodies and public or private housing sponsors in the state, grants, gifts, contributions, loans, credits or assistance from the federal government or any other source for housing programs except when the donor, grantor, or lender of such funds specifically directs some other agency to administer them." Taken together, these various statutes indicate that OHCS is the sole "public housing authority" granted state-wide power by the Oregon Legislative Assembly.

As noted above, the power to act as an Oregon government entity requires constitutional or statutory provisions that expressly confer or necessarily imply such authority. The laws of other states cannot make an entity into an Oregon government entity. Oregon statutes qualify OHCS to operate statewide as a "public housing agency" within the meaning of 42 USC §1437a(b)(6)(A). And each of the "housing authorities" established by ORS 456.075 may operate as a "public housing agency" within its area of operation, provided that the governing body of the relevant locality has issued the required resolution. No Oregon statutes confer similar authority on governmental entities of other states. By itself, the authority to carry on business as a corporation in Oregon merely confers "the same powers as an individual" to carry on a business. The corporate form of the entity in question does not give it Oregon governmental powers.

We conclude that Oregon law does not authorize a nonprofit corporation created by a governmental entity of another state to act as a "public housing authority" within Oregon. That is true even if the laws of the corporation's state of origin would authorize the corporation to fulfill that role in that state. Under Oregon law, only OHCS is a "governmental entity or public body * * * authorized to engage in or assist in the development or operation of public housing" on a statewide basis.

Of course, federal law could authorize entities to act as "public housing agencies" for purposes of federal law, regardless of their authority under the laws of the relevant state. In fact, the relevant federal statute does precisely that under some circumstances related to "the provision of tenant-based assistance" under 42 USC §1437f. One such exception applies to "any * * * private nonprofit entity that * * * was administering any program for tenant-based assistance" as of the effective date of the Quality Housing and Work Responsibility Act of 1998. 42 USC §1437a(b)(6)(B)(ii). Perhaps more telling is 42 USC §1437a(b)(6)(B)(iii)(II). That provision permits "a public housing agency for another area" to act as a "public housing agency," "notwithstanding any provision of State or local law," but only "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." We are informed that the Secretary has not made any such determination regarding the Oregon Department of Housing and Community Services. We are not aware of any basis that would support such a determination by HUD.

Sincerely,

David E. Leith
Associate Attorney General and
Chief Counsel, General Counsel Division

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