

HOUSING:
HOUSING AUTHORITY:
MISSOURI HOUSING
DEVELOPMENT
COMMISSION:
PUBLIC HOUSING
AUTHORITY:
HOUSING AND URBAN
DEVELOPMENT:

The Missouri Housing Development Commission is the only entity authorized to operate as a public housing agency throughout the entire state of Missouri.

OPINION NO. 130-2012

October 2, 2012

The Honorable Jolie Justus
State Senator, District 10
State Capitol, Room 330
Jefferson City, MO 65101

Dear Senator Justus,

In your request, you ask whether the Missouri Housing Development Commission (MHDC) is the only entity qualified to operate as a public housing agency (PHA) throughout the state of Missouri under 42 U.S.C. § 1437a(b)(6). It is.

FACTS

The facts you provided state that the Department of Housing and Urban Development (HUD) asked for applications to administer Section 8 housing assistance payments. Only an entity that is a PHA can enter the “competition” to become the new Performance Based Contract Administrator (“PBCA”). The MHDC originally won the “competition” to become the new PBCA. Losing applicants, however, filed protests in Missouri and forty-one other states. HUD decided to avoid these protests by “withdrawing” its “competition” in those states and “reissuing” the “competition” through a Notice of Funding Availability, because there is no protest process for that mechanism. Now, there is concern that entities from other states are

asserting that they are authorized to act as PHAs throughout Missouri, when in fact they are not.

DEFINITION OF PHA

The primary rule of statutory interpretation is to ascertain and apply the intent of the legislature as evidenced in the plain terms of the statute. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *Fannie Mae v. Truong*, 361 S.W.3d 400, 404 (Mo. banc 2012). Congress' intent in enacting the Housing Act ("Act") was to help states, and political subdivisions of states, fix the problem of a lack of decent, safe housing for low-income families. 42 U.S.C. § 1437(a)(1)(A)-(B). The Act uses units of state or local government called PHAs to administer the requirements of the Act. *See, e.g.*, 42 U.S.C. § 1437a(a)(2)(A)(i); 42 U.S.C. § 1437c-1.

The general definition of a PHA is as follows: "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." 42 U.S.C. § 1437a(b)(6)(A). This definition requires the PHA to be a creature of state or local government, and requires it to have a grant of authority for public housing work. *Id.*

Because your question concerns Section 8 housing, the definition of PHA contained in subparagraph (B) applies. *Id.* Under this subparagraph, the term PHA includes those entities that meet the general definition of PHA, but also includes more entities. *Id.* Under this subparagraph, a PHA could be a group of individual PHAs, but only if the Secretary has determined that the group would be efficient. 42 U.S.C. § 1437a(b)(6)(B)(i). A PHA could also be a public or private nonprofit entity, if it had certain contractual

relationships prior to 1998. 42 U.S.C. § 1437a(b)(6)(B)(ii).¹ If there is no PHA willing and able to perform Section 8 work in the area, a PHA could be a private nonprofit entity that contracts with the Secretary. 42 U.S.C. § 1437a(b)(6)(B)(iii)(I). Finally, if there is no PHA willing and able to perform Section 8 work in the area, a PHA for that area could be a PHA that has been organized in any other area, even if state or local law would prohibit it and even if the new area was geographically outside the area in which it was authorized to operate. 42 U.S.C. § 1437a(b)(6)(B)(iii)(II).

QUALIFYING AS A PHA IN MISSOURI UNDER FEDERAL STATUTES

Under both the general definition of PHA and the expanded Section 8 definition of a PHA, the MHDC qualifies as a PHA. The MHDC qualifies under the general definition because it is a state governmental entity with statutory powers and responsibilities to provide and oversee public housing. *See* § 215.020.1, RSMo (the MHDC is a governmental instrumentality); § 215.030.1(1) (power to make and purchase mortgages needed to build or rehabilitate low- or moderate-income housing); § 215.030.1(15) (power to purchase properties, manage them, and rent them to tenants); § 215.030.1(23)-(24) (power to help build or remodel low- and moderate-income residential housing units); *see also* §§ 215.010-215.250 (powers and responsibilities of the MHDC). Because the Section 8 definition includes the general definition, the MHDC also qualifies under the expanded Section 8 definition of a PHA.

In contrast, an entity from another state cannot qualify as a PHA in Missouri under either definition. Under the general definition, a PHA must be a creature of state or local government, authorized to perform public housing duties. 42 U.S.C. § 1437a(b)(6)(A). Although a state may give *permission* to its businesses and other entities to operate in other states, that

¹ This provision reads: “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.”

state has no *authority* to grant this right outside its own borders. *See Carroll v. Lanza*, 349 U.S. 408, 413-14 (1955) (Missouri had authority to make its workers' compensation act the exclusive remedy for injury compensation, but Arkansas was not required to follow Missouri's rule); *State v. Bray*, 774 S.W.2d 555, 556 (Mo. App. W.D. 1989) (although person had Kansas City driver's license, Missouri could refuse to allow him to drive on Missouri roads); *Home Owners' Loan Corp. v. Caplan*, 164 S.W.2d 652, 655 (Mo. App. St. L. Dist. 1942) (If a corporation is created under a foreign state's laws, the "corporation can have no legal standing in this state except as it may be permitted to enter with this state's consent under principles of legislative comity"); Art. I, § 4, Mo. Const. (Missouri is a free and independent state subject only to the United States Constitution). The only entity Missouri has authorized to act as a PHA throughout this state is the MHDC.² *See* §§ 215.010-215.250.

Nor can an out-of-state entity qualify as a PHA under the expanded Section 8 definition. Although the federal government can use its authority to trump state sovereignty on this issue, the only circumstance in the federal statute where it has chosen to do so is where there is no PHA organized, or able and willing, to perform Section 8 work in the area. 42 U.S.C. § 1437a(b)(6)(B)(iii)(I)-(II).³ In that circumstance, HUD may authorize a PHA from another area to perform Section 8 work there, whether or not the state or local authority expressly prohibits that PHA from operating within the state. *Id.* This exception does not apply here, however, because the MHDC is organized, and is able and willing to perform Section 8 work, as shown by its successful application for the very project in question.

In 42 U.S.C. § 1437a(b)(6)(B)(iii)(II), Congress specifically set out the particular circumstance under which an out-of-state PHA can operate in

² Local PHAs are not authorized to operate state-wide, as discussed below.

³ If there is no PHA willing and able to perform Section 8 work in the area in question, the federal government can authorize a public or private nonprofit entity to perform the functions of a PHA. 42 U.S.C. § 1437a(b)(6)(B)(iii)(I). But this exception does not trump state or local law that limits the area of operation of the public or nonprofit entity.

another state. This language would be mere surplusage if all PHAs authorized in one state were considered to be “authorized” in every other state, even if the other state had not granted it any authority to operate within its boundaries. *Freeman v. Quicken Loans, Inc.*, 132 S.Ct. 2034, 2042-43 (2012) (in interpreting statutes courts generally avoid a construction that treats statutory terms as surplusage); *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193, 196 (Mo. banc 2009) (“a court should not interpret a statute so as to render some phrases mere surplusage”). Therefore, under the plain terms of the statute, only the MHDC is authorized to act as a PHA throughout Missouri.

Accordingly, no out-of-state PHA or nonprofit entity can meet either the general or the expanded Section 8 definition of a PHA.

QUALIFYING AS A PHA IN MISSOURI UNDER HUD’S APPLICATION MATERIALS

The information you have provided also includes HUD’s materials for applicants. If anything in these materials conflicts with the statutory grant of authority to HUD, then the statutes control. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). But if a regulation is within the statutory grant of authority, and there is ambiguity or silence in the statutes, HUD’s interpretation of the statutes and resulting regulation will be given deference. *Id.* at 843-44.

HUD requires that PHAs applying to become the PBCA show that they are either a “governmental entity” or an instrumentality of a governmental entity (“instrumentality entity”). *HUD Application Materials*, §§ 2.4-2.5. To be a “governmental entity,” HUD requires the entity to have been “created under a statute that explicitly authorized the entity to operate throughout the entire State⁴ in which the entity proposes to serve as a PBCA or that evidences a legislative intent for such entity to have such authority.” *HUD*

⁴ This does not mean merely that the entity has merely any sort of business license—the entity is required to be authorized to act as a PHA. *HUD Application Materials* § 2.1. Also, such an interpretation would conflict with the federal statutes discussed above, making the regulation invalid. *Chevron*, 467 U.S. at 842-43.

Application Materials, § 2.4(3). As shown above, Missouri statutes authorize the MHDC to operate throughout the entire State, and do not give any out-of-state PHAs this power.

A local Missouri PHA cannot be a “governmental entity,” because local Missouri PHAs are not authorized to operate throughout the entire state of Missouri, but are discrete municipal corporations that can only operate within a certain geographic area, and only after a proper local ordinance is passed. § 99.020(1); § 99.040.1; § 99.080.1; *St. Louis Housing Authority v. City of St. Louis*, 239 S.W.2d 289, 294-95 (Mo. banc 1951) (local PHA is a municipality performing “public and essential governmental functions”). Therefore, no local PHA can qualify as a “governmental entity.”

To be an “instrumentality entity,” HUD requires that the instrumentality must have been “created under a statute that explicitly authorizes entities created there under [sic] to operate throughout the entire State in which the entity proposes to serve as PBCA or that evidences a legislative intent for such entities to have such authority.” *HUD Application Materials*, § 2.5(6). No out-of-state PHA has authority under a Missouri statute explicitly authorizing it to operate throughout the entire state of Missouri, so none could qualify as an “instrumentality entity.” And even if an out-of-state PHA contracted with a local Missouri PHA, § 70.220.1, § 99.110.1, Art. VI, § 16, Mo. Const., its operations would still be limited to the geographic area of the local Missouri PHA—it could not operate throughout the entire state. Therefore, no out-of-state entity can qualify as an “instrumentality entity” under HUD’s application materials.

Accordingly, because only the MHDC is authorized to operate throughout the entire state of Missouri, only the MHDC can qualify as a “governmental entity” or “instrumentality entity” under HUD’s application materials.

LETTER REQUIREMENT IN HUD’S APPLICATION MATERIALS

Even if an applicant qualifies to apply as either a “governmental entity” or an “instrumentality entity,” if the applicant is proposing to serve as a PBCA in a state other than the state in which it was formed, there is an

additional requirement. Because this requirement is in addition to the other requirements, merely meeting the letter requirements cannot overcome a deficiency in qualifying as a “governmental entity” or “instrumentality entity.” The additional requirement is that an applicant must provide a letter from an attorney licensed in the state in which the applicant proposes to serve, showing that that state’s laws neither “explicitly nor implicitly prohibit the applicant from acting as a PHA throughout the entire State.” *HUD Application Materials*, § 2.6.

As shown above, only the MHDC can meet the federal statute’s requirements for being a PHA throughout the entire state, and only the MHDC can meet HUD’s requirements of being a “governmental entity” or “instrumentality entity.” No letter could cure these defects in an applicant’s submission.

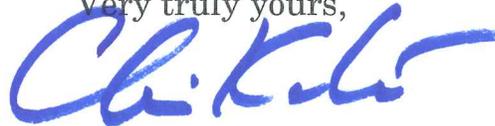
Even so, Missouri statutes do “explicitly or implicitly” prohibit entities other than the MHDC from acting throughout the entire state of Missouri. The only statutes that create, empower, and limit housing authorities in Missouri are void of any provision that authorizes an out-of-state PHA to operate as a housing authority throughout the entire state of Missouri.⁵ See §§ 70.210-70.320; §§ 99.010-99.230; §§ 215.010-215.250. Also, Missouri PHAs are thoroughly regulated by Missouri statutes, implying that the legislature did not intend that an out-of-state entity could operate as a PHA throughout Missouri without being subject to any of these regulations. See *Borron v. Farrenkopf*, 5 S.W.3d 618, 622, 624 (Mo. App. W.D. 1999) (where state legislature thoroughly regulates an area, it implies that there is no room for local regulations on the subject). Therefore, Missouri statutes implicitly prohibit entities other than the MHDC from acting as a PHA throughout the entire state.

⁵ General nonprofit entities, for example, are not granted the powers needed to act as PHAs themselves, see §§ 355.001-355.881, although they may contract with PHAs. § 99.080.1(10); § 215.030.1(4).

CONCLUSION

In conclusion, the MHDC is the only entity authorized to operate as a PHA throughout the entire state of Missouri.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Chris Koster", written in a cursive style.

CHRIS KOSTER
Attorney General