



The Senate Committee on
Veteran Affairs & Military Installations

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OPINION COMMITTEE

October 28, 2004

The Honorable Greg Abbott
Attorney General, State of Texas
300 W. 15th Street
Austin, Texas 78701

FILE # ML-43996-04

I.D. # 043996

RQ-0284-GA

RE: United States Army's Residential Community Initiative at Fort Bliss, Texas

Dear Attorney General Abbott:

This is a request that you provide an opinion confirming exemption from ad valorem real and personal property taxation of a military housing project to be constructed at Fort Bliss.

BACKGROUND

In 1996, Congress, as a result of the worsening condition of military housing on military installations across the country and the inability to address the crisis through traditional appropriations, enacted the Military Housing Privatization Initiative (see 10 U.S.C. §§2871-2885) (the "Military Housing Initiative"). A copy of the Military Housing Initiative is attached as Exhibit "1". The Military Housing Initiative encourages ownership, operation and maintenance of military housing by public-private ventures and authorizes the United States of America to engage in various activities to promote private sector involvement, including the ability to lease or convey existing property and facilities to public-private entities and to partner with third parties through limited partnerships, limited liability companies or similar structures.

The United States of America acting through the Department of the Army (the "Army") and GMH Military Housing, LLC, a Delaware limited liability company ("GMH"), have agreed to work together pursuant to the Military Housing Initiative and form Fort Bliss/White Sands Missile Range Housing LP (the "Military Housing Partnership"), a public-private limited partnership whose mission and operations will be governed by a partnership agreement entered into by the Army and a subsidiary of GMH (the "Partnership Agreement"). The sole purpose of the limited partnership will be to improve and manage the military housing supporting Ft. Bliss and White Sands Missile Range in New Mexico. Please be advised that all of the Fort Bliss military housing, ancillary facilities, and related improvements and personal property which are the subject matter of this opinion request are (or will be, in the case of any newly constructed improvements) located entirely within the State of Texas. For your information, GMH brought the project to my attention.

After formation of the Military Housing Partnership, the Army will lease certain land at Fort Bliss to Military Housing Partnership pursuant to a ground lease (the "Ground Lease") and convey title to certain existing housing and ancillary facilities and related improvements and personal property currently located at Fort Bliss to Military Housing Partnership by a quitclaim or warranty deed (the "Deed"). Thereafter, Military Housing Partnership will contract for all necessary services, including architectural, engineering and construction services, obtain financing from a private lender, and supervise demolition or renovation of existing housing, and construction of new housing and ancillary facilities in accordance with specifications provided by and plans approved by the Army. It is currently anticipated that the development budget for the Fort Bliss portion of the project will be \$300 million. These sums will be expended over a six (6) year period.

Following construction, Military Housing Partnership will operate, manage and maintain the resulting residential units and related ancillary facilities in cooperation with the Army and subject to rules and regulations specified by the Army for the remaining period of the Ground Lease.

The term of the Ground Lease will be 75 years; however, the Army will have the right to terminate the Ground Lease after the expiration of 50 years. Upon the termination or expiration of the Ground Lease, title to all of the military housing, ancillary facilities, and related improvements and personal property will revert to the Army without consideration or compensation to Military Housing Partnership from the Army.

The Ground lease will be generally in the form attached hereto as Exhibit "2". While the construction lender for the project may require certain revisions to this format, we understand that such revisions, if any, would not alter the basic ownership structure or other essential provisions described in this letter and reflected in the attached form of Ground Lease which are germane to the questions presented in this request.

At all times, operation of the housing units will be under the general supervision of the Army, which has also reserved the right to enter the housing units "for any purpose necessary or convenient in connection with the Army's purposes" and to impose access restrictions on Military Housing Partnership or parties designated by Military Housing Partnership to the housing units. In addition to these restrictions, Military Housing Partnership is required to purchase services which would normally be provided by a municipality, including police, fire and utility services, directly from the Army or the Army's designee. In terms of operations, Military Housing Partnership will prepare an annual operating budget with which to conduct activities, but will be prohibited from implementing any such budget without prior approval by the Army.

Military Housing Partnership will not be authorized to assign, sublet or grant any interest, privilege or license in the Ground Lease without the prior written approval of the Army. Military Housing Partnership also may not mortgage or cause any lien or encumbrance to be placed upon any portion of the housing units other than those mortgages specifically approved in the Ground Lease. Specifically approved mortgages are named in the Ground Lease and are

limited to those mortgages necessary to secure financing to fund construction and rehabilitation of the housing. Similarly, Military Housing Partnership may only encumber its leasehold interest in the project with prior consent of the Army and only to secure funds to be used in connection with the housing units. Thus, the interest that Military Housing Partnership will hold under the Ground Lease will be heavily subject to continuing Army supervision, regulation, and restrictions, unlike a conventional ground lease arrangement between private parties, in which the ground lessee has a high degree of operational independence from the ground lessor.

Prospective military family tenants will be selected for occupancy in the housing units at the installations based on a priority sequence established by the Army. The priority sequence is generally limited to active duty Department of Defense military personnel with dependents. The Army limits the amount of rent that Housing LLC can charge for qualified military tenants. The rent to qualified military tenants is tied directly to the tenants' Basic Allowance for Housing ("BAH"). This limit is based on the applicable U.S. military service personnel BAH, which is set on an annual basis by the Army and based upon such factors as geographic location, pay grade and dependency status of military personnel. Under certain limited circumstances, a housing unit that remains vacant for a specified period of time may be leased to individuals that do not fall within the priority sequence established by the Army. However, given the length of the present waiting list of Fort Bliss military personnel desiring on-base housing, which list is expected to lengthen considerably both as a result of the increased quality of the housing units resulting from this project and as a result of an anticipated increase in the base population, the Army has projected that no Fort Bliss housing units will be available for lease to civilians during the entire term of the Ground Lease. All tenants will enter into a standard form occupancy lease approved by the Army.

Military Housing Partnership will be authorized to use the facilities only for purposes of the Project and its day-to-day operations will be subject to rules and regulations promulgated by the Army. Such rules and regulations include restrictions or prohibitions on the sale or dispensing of alcohol and other intoxicating liquors and the ability of the Army to restrict or prohibit Military Housing Partnership's or its designees' access to Fort Bliss or White Sands Missile Range, as the case may be. Military Housing Partnership is also not authorized to construct or place or allow to be constructed or placed any structure, improvement or advertising except as permitted by the Army.

QUESTIONS

Please accept this letter as a formal request on behalf of GMH and Military Housing Partnership for an opinion confirming the following:

- I. After the Army leases certain Texas land at Fort Bliss to Military Housing Partnership pursuant to the Ground Lease, Military Housing Partnership's leasehold interest in such land will not be subject to ad valorem taxation.
- II. After the Army delivers the Deed to Military Housing Partnership conveying certain existing housing units, ancillary facilities and other related improvements and

- personal property currently located on or attached to the Texas land at Fort Bliss covered by the Ground Lease,, none of such housing units, ancillary facilities, and related improvements and personal property will be subject to ad valorem taxation.
- III. Any housing units, ancillary facilities, and related improvements and personal property owned by Military Housing Partnership and constructed or situated on Texas land leased from the Army pursuant to the Ground Lease will not be subject to ad valorem taxation.
- IV. The exemption from ad valorem taxation contemplated by paragraphs I, II, and III above would extend to the leasehold interest in, and any housing units, ancillary facilities, and related improvements and personal property owned by Military Housing Partnership which is located on any Texas land owned by the Army within Fort Bliss that is subsequently added to the Ground Lease by amendment during the term of the Ground Lease, or any extension thereof.

In regard to my request for the referenced opinions, the following may be pertinent to your review of the issues at hand:

(a) It is my understanding that when the land that will be the subject of the Ground Lease at Fort Bliss was acquired by the federal government, the State of Texas ceded (and the Federal government accepted) "exclusive jurisdiction" over the land. The attorney for GMH has provided me with a copy of the Jurisdiction Manual for Fort Bliss, a copy of which is attached hereto as Exhibit "3". This manual was prepared by the Army.

(b) I have been reminded that the United States Constitution gives the federal government the right to exclusive jurisdiction "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings." U.S. Constitution, Art. 1, Sec. 8. According to an attorney for GMH, exclusive federal jurisdiction was provided to the federal government by virtue of the State's consent to the acquisition by the United States of land in Texas for such purposes, pursuant to the provisions of Texas Government Code, Sections 2204.101-2204.103.

(c) The attorneys for GMH have provided me with a copy of their internal memorandum containing a more detailed statement of facts and a discussion of the legal analysis of the questions set forth below, including their analysis of why federal law precludes state or local taxation of the leasehold estate created under the Ground Lease and military housing units and related facilities, improvements and personal property that will be developed, constructed and/or owned and operated by Military Housing Partnership. A copy of this memorandum is attached hereto as Exhibit "4".

(d) The attorneys for GMH have also provided me with attorney general or equivalent opinions from the States of Virginia and New York confirming exemption from ad valorem taxation for similarly structured military housing projects underway in those states, and a New Mexico Department of Revenue Ruling similarly confirming such exemption for the White

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Sands Missile Range housing project which is the companion to the project that will be undertaken on Fort Bliss property in Texas. The opinions and ruling are attached hereto as Exhibits "5", "6" and "7". I think you will find that the analysis undertaken and conclusions reached by these other jurisdictions is consistent with that of the memorandum provided at Exhibit "4".

CONCLUSION

I am advising GMH that I have solicited your opinion. They have authorized their attorneys, Lawrence J. Brannian Esq., Lawrence J. Brannian, P.C., 8150 North Central Expressway, Suite 1800, Dallas, TX 75206, (214) 691-2500, and Russell P. Love, Esq., McKenna Long & Aldridge LLP, 303 Peachtree Street, Suite 5300, Atlanta, GA 30308 to be solicited if you have any questions.

Thank you for your assistance in these matters. I look forward to your response.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lawrence J. Brannian". The signature is written in a cursive style with a long horizontal flourish at the end.