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February 27, 2006

EXECUTIVE ADMINISTRATION
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ACTION BY Nancy Fuller
COPY TO Elton Witt

Barry McBe

The Honorable Greg Abbott
Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711

RQ-0457-GA

Re: Whether the requirements of TEX. GOV'T CODE § 2306.6710 violate the separation of powers provisions of the Texas Constitution.

Dear General Abbott:

As Chairman of the Senate State Affairs Committee, I am writing to request an opinion on whether the requirements of TEX. GOV'T CODE § 2306.6710 violate the separation of powers doctrine contained in Article 2, Section 1 of the Texas Constitution.

The federal government allots low income housing tax credits to each state in a fixed amount. The 75th Legislature in 1997 designated the Texas Department of Housing and Community Affairs (TDHCA or Department) as the state entity responsible for crafting Texas' qualified allocation plan which sets forth the manner by which the state's tax credits are to be allotted.

TEX. GOV'T CODE § 2306.6710 as added by the 77th Legislature and amended by the 78th and 79th Legislatures, requires the TDHCA to score and rank applications for the low income housing tax credit program according to statutorily specified criteria. Among those mandatory criteria is (b)(1)(F) which states, "the level of community support for the application, evaluated on the basis of written statements *from state elected officials*." TEX. GOV'T CODE § 2306.6710(b) (1)(F) (emphasis added). Additionally, the section provides:

(f) In evaluating the level of community support for an application under Subsection (b)(1)(F), the department shall award:

- (1) positive points for positive written statements received;
- (2) negative points for negative written statements received; and
- (3) zero points for neutral statements received.

(g) In awarding points under Subsection (f), the department shall give equal weight to each written statement received.



In 2001, when the list of criteria was first placed in statute, the Legislature did not make the list exclusive, but rather included it to provide guidance to the Department. However, as noted in Tex. Atty. Gen. Op. GA-0208, in 2003 the Legislature amended the section to make the criteria and the priority of each item on the list mandatory. The sixth item of priority listed is the level of community support based on letters from elected officials.

Based on § 2306.6710, the TDHCA has a process in place whereby they notify state elected officials of housing tax credit applications in their district.¹ The Department sends a cover letter outlining the processing of the application, the deadlines for elected officials' input and a discussion of the effect of such input, either positive, negative or neutral. The Department then attaches a one-page summary of each application.

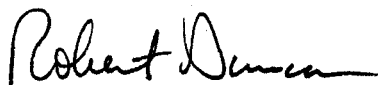
Although state elected officials are not required to submit letters in support or opposition to the applications, the TDHCA is required to add or deduct points based on letters received. Therefore, it is certainly possible that the mandatory points awarded or deducted because of a state elected official's letter could be the deciding factor as to which applications are awarded the tax credits by the agency.

The separation of powers doctrine is contained in Article 2, Section 1 of the Texas Constitution and reads in part, "The powers of the Government of the State of Texas shall be divided into three distinct departments . . . and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

Because power to control an executive function is retained for individual members of the legislative branch in § 2306.6710, a question of constitutionality is raised which should be addressed.

Thank you for your careful consideration of this issue. If you have any questions or need further assistance, please contact me or Jennifer Fagan in the State Affairs Committee office.

Very truly yours,



Robert Duncan

Attachment

¹ See Letter from Brooke Boston, Director, Multifamily Finance Production Division, Texas Department of Housing and Community Affairs, to Robert Duncan (Jan. 23, 2006) (attached hereto).



Texas Department of Housing and Community Affairs
Multifamily Finance Production Division
Notification of Submission of Affordable Housing Applications

January 23, 2006

The Honorable Robert Duncan
Texas State Senate, District 28
Post Office Box 12068
Austin, 78711-2068

Re: Notification of Affordable Rental Housing Application(s) Proposed in Your District

Dear Senator Duncan:

I am writing to provide you with information on one or more rental housing application(s) proposed in the community you represent that has been received by the Texas Department of Housing and Community Affairs for the Housing Tax Credit Program. The Department received the application(s) between January 1 and January 9, 2006. The Department's mission is to help Texans achieve a higher quality of life by building better communities. Through our rental production programs, the Department encourages the new construction or rehabilitation of high-quality multifamily housing, primarily through private developers. These developments benefit Texans in your district by providing qualified families with safe, affordable, quality housing.

This notification is made pursuant to §2306.1114, Texas Government Code, to ensure that you are fully informed of the activity in your district and so that the Department can gather your input on the proposed application(s). The Department greatly appreciates receiving your views concerning the need for affordable housing within your district and how the proposed development(s) addresses that need. A development summary for each application which may be in your district is included with this correspondence.

As provided in §2306.6710(b)(1)(F), Texas Government Code, your comments can have a significant impact on the score, and possibly the eventual success, of the application(s) submitted. To impact the scoring of a competitive Housing Tax Credit application in your district, correspondence from your office must be received by the Department no later than April 1, 2006. In addition, letters must identify the specific development and clearly state support for, or opposition to, the specific development; points are added to or subtracted from the application's overall total score based on your written support or opposition. Letters that express general support for or opposition to affordable housing will be regarded as neutral.

Letters received after April 1, 2006, letters regarding applications that are not in your district, neutral letters, or letters that do not specifically refer to the development will receive neither positive nor negative points for the application(s). These letters will, however, be summarized for the TDHCA Governing Board for their consideration when making a decision to award tax credits to an application.

To solicit additional public comment, the Department will hold a series of public hearings in April 2006 on all competitive (9%) Housing Tax Credit applications received. The Department's Governing Board is tentatively scheduled to make its preliminary decision concerning the proposed development(s) for the 9% Housing Tax Credit Program at its June 26, 2006 meeting and its final decision at its July 27, 2006 meeting. The 9% Housing Tax Credit hearing schedule, announcements regarding further dates, board meeting dates, and other informational notices will be posted on our website at www.tdhca.state.tx.us.

Please mail any comments you may have to the Multifamily Finance Production Division, P.O. Box 13941, Austin, TX 78711-3491 or send them by facsimile to 512.475.0764. If you have any questions or need additional information, please contact Michael Lyttle, Director of the Division of Policy and Public Affairs, at 512.475.4542 or by email at

Sincerely,

Brooke Boston

Brooke Boston
Director, Multifamily Finance Production Division