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STATE OF TEXAS
HOUSE OF REPRESENTATIVES

J.M. LOZANO

District 43

ENVIRONMENTAL REGULATION, CHAIR • DEFENSE & VETERANS' AFFAIRS

27 July 2020

The Honorable Ken Paxton
Attention: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

RE: Attorney General Opinion Request
Housing Authority Instrumentalities; Public Facility Corporation Act

Dear General Paxton:

I am requesting your opinion regarding a non-profit corporation created by the Housing Authority of the City of New Braunfels, Texas ("Housing Authority"). The Housing Authority is operated pursuant to the provisions of the Texas Housing Authorities Law, Chapter 392 of the Local Government Code and complies with the Texas Open Meetings Act, Chapter 551 of the Government Code. This request seeks clarification of the legal status of a non-profit corporation created by the Housing Authority.

Legal Background

A housing authority is a governmental unit and can only act to promote a public purpose

The Housing Authorities Law describes the governmental nature of housing authorities and outlines their powers and duties. See generally Tex. Loc. Gov't Code Sec. 392.001 et seq. For all purposes, a housing authority is a unit of government and the functions of a housing authority are essential governmental functions and not proprietary functions. Sec. 392.006. An authority is a public body corporate and politic. Sec. 392.011(b).

Other governmental attributes of a housing authority include:

- its property is public property used for essential public and governmental purposes (Sec. 392.005(a));
- it has a territorial area of operation (Sec. 392.014);
- it is authorized to conduct hearings, administer oaths, issue subpoenas, and make findings and recommendations regarding a building or property where conditions exist that are dangerous to the public health, morals, safety, or welfare available to appropriate agencies (Sec. 392.060); and
- it has the power of eminent domain (Sec. 392.061(a)).



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A housing authority is a governmental unit and can only act to promote a public purpose

A housing authority exercises public and essential governmental functions and has the powers necessary or convenient to accomplish the purposes and provisions of the Housing Authorities Law. Sec. 392.051(a). While a housing authority may take actions only to the extent “necessary or convenient to the exercise of the authority's powers.” Sec. 392.065(4). The powers of an authority are vested in the commissioners of the authority, and an authority may delegate a power or duty to an agent or employee as it considers proper. Sec. 392.051(b) and (c). Therefore, it would appear then that an authority can only delegate a power or duty it possesses and cannot otherwise act through a third party to perform acts the authority cannot do for itself or that is necessary or convenient to the exercise of the authority’s powers.

Public Facility Corporation Act

In 1999 and subsequent to creation of the non-profit in question, the Texas Legislature adopted the Public Facility Corporation Act (the “PFC Act”), now codified as Chapter 303 of the Texas Local Government Code. The PFC Act authorizes specified governmental entities, including housing authorities, to create non-profit “public facility corporations.” The public facility corporation (“PFC”) would then carry out authorized activities on behalf of its “sponsor,” the governmental entity which created the PFC. The PFC Act includes the following section:

“Sec. 303.022. CREATION UNDER OTHER LAW. A nonprofit corporation created by a housing authority under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon’s Texas Civil Statutes) is considered a corporation under this chapter and has the rights and powers necessary or convenient to accomplish a corporation’s purposes under this chapter.” (Emphasis supplied)

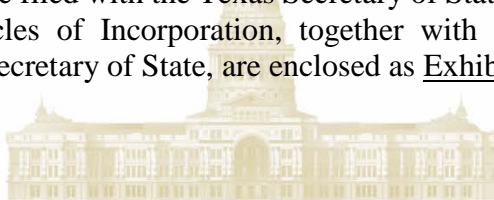
In 1999, the Housing Authorities Law was also amended to add Section 392.066 relating to creation of PFCs by housing authorities.

Factual Background

The Housing Authority creates a non-profit corporation to act as its instrumentality

The following recitation of facts is based on a review of available documents, and for the sake of simplicity, this request for your opinion further requests that you accept these facts as described below unless documents have been provided.

In 1994, the Housing Authority created a non-profit corporation pursuant to the Texas Non-Profit Corporation Act and was originally known as Ellis Townhomes, Inc. (the “non-profit”). The Articles of Incorporation were filed with the Texas Secretary of State on June 23, 1994. Certified copies of the original Articles of Incorporation, together with all amendments and reports subsequently filed with the Secretary of State, are enclosed as Exhibit A.





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Relevant provisions of the non-profit's Articles of Incorporation include the following:

1. Article IV, Section 1 stated that the non-profit is created to "assist and to act as the instrumentality of the Housing Authority of the City of New Braunfels, Texas."
2. Article IV, Section 1(B) stated that the Housing Authority must approve issuance of obligations of the non-profit.
3. Article VI provided that members of the Housing Authority Board of Commissioners serve as members of the non-profit's Board of Directors.
4. Article IX provided that the Articles of Incorporation "may be altered, amended or repealed as provided by law, however, such amendments shall be subject to the approval of the Housing Authority."

It appears that the non-profit was originally created to acquire and operate a 16-unit townhome property that had been made available to the Housing Authority by the Resolution Trust Corporation ("RTC"), an entity established in 1989 by the Financial Institutions Reform Recovery and Enforcement Act to dispose of property acquired by the federal government via foreclosures as a result of the "savings and loan crisis" of the 1980's. Specifically, as part of its disposition process, the RTC provided priority treatment to public entities like public housing authorities. The RTC selected the Housing Authority as a recipient of a 16-unit property named Ellis Townhomes, and the Housing Authority then assigned its rights to acquire the property to its instrumentality non-profit. Further, Housing Authority meeting minutes indicate Housing Authority made Housing Authority funds available to the non-profit to pay for the down payment, closing costs, and initial operating expenses. According to a 1995 audit of the non-profit, the Housing Authority was considered to be its "equity owner."

On January 19, 1995, the Housing Authority Board of Commissioners adopted a resolution approving a Management Agreement with the non-profit for the management of Ellis Townhomes. Housing Authority records indicate that Housing Authority employees for several years managed Ellis Townhomes and the affairs of the non-profit. It seems that employee time was allocated between the two entities based on the amount of time spent on each.

Later, the non-profit in question here began to distance itself from the Housing Authority. On March 15, 2001, the non-profit's Board of Directors adopted Resolution 13, which states in part that "the Board of Directors of Ellis Townhomes, Inc. wishes to govern itself." The non-profit's Board of Directors amended the non-profit's bylaws so that members of the Housing Authority Board of Commissioners no longer automatically served as members of the non-profit's Board of Directors. Replacement board members would now be named by the non-profit's own Board of Directors. However, Section 303.035(a) of the PFC Act would require that at least three individuals



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appointed by the sponsor's governing body serve on a public facility corporation's Board of Directors.

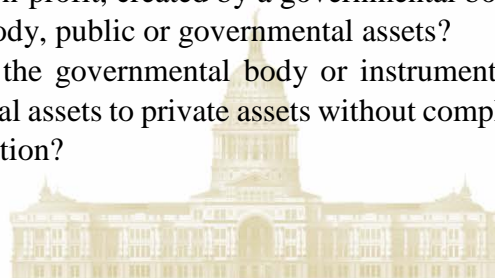
On July 11, 2005, documents purporting to amend the non-profit's Articles of Incorporation were filed by the non-profit with the Secretary of State, stating that Article VI is amended to read: "The Board of Directors shall nominate and appoint the members of the corporation's Board of Directors according to the terms of the bylaws." On April 15, 2013, a Certificate of Amendment was filed and states in part that the non-profit "... SHALL ACT INDEPENDENTLY OF THE HOUSING AUTHORITY OF THE CITY OF NEW BRAUNFELS...." There is no evidence that the Housing Authority approved the purported amendments to the non-profit's original Articles of Incorporation.

On March 16, 2017, at a Housing Authority board meeting, the Housing Authority's Executive Director stated that she would retire from the Housing Authority in May 2019 but would, however, continue to serve as Executive Director of the non-profit, explaining that she would need the two years to separate the two agencies and set up the non-profit at a separate site.

Questions

Considering that housing authorities (and possibly other governmental entities) throughout the State created non-profits prior to the enactment of the PFC Act, what is your response to the following questions raised by the circumstances described above:

1. If the Board of Commissioners of the Housing Authority took no action to approve any amendments to the non-profit's Articles, are the purported amendments void and of no effect? [Article IX of the non-profit's Articles of Incorporation provides that amendments to the Articles are subject to the approval of the Housing Authority.]
2. May a non-profit created by a governmental body, and stated to be an instrumentality of such governmental body, act on its own to cease serving as an instrumentality of the governmental body?
3. May a governmental body that created a non-profit as an instrumentality of such governmental body approve that the non-profit cease serving as an instrumentality in order to become a private non-profit?
4. Are the assets of a non-profit, created by a governmental body to be an instrumentality of such governmental body, public or governmental assets?
5. If so, can the either the governmental body or instrumentality non-profit convert such public or governmental assets to private assets without complying with gifting prohibitions of the Texas Constitution?





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6. Do the provisions of the PFC Act apply to a non-profit corporation created by a governmental agency as the governmental agency's instrumentality pursuant to the Texas Non-Profit Corporation Act prior to the effective date of the PFC Act?
7. If so, do the provisions of the PFC Act invalidate the purported amendments to the non-profit's Articles of Incorporation, filed after the date of enactment of the PFC Act, in the absence of formal Housing Authority approval by its Board of Commissioners? [Section 303.027(a) requires a sponsor resolution be submitted with the amendment. Section 303.027(b) requires the signature of the secretary or clerk of the sponsor to sign the amendment. Section 303.027(c)(5) of the PFC Act states that amendments to a PFC's Articles of incorporation must contain "a statement that the amendment was authorized by the sponsor's governing body." Section 303.027(c)(6) provides that the amendment must also state "the date of the meeting at which the governing body approved the amendment."]
8. If the amendments to the non-profit's Articles are invalid, do the original Articles filed in 1994 remain and govern operation of this non-profit? [Those original Articles provide that members of the Housing Authority Board of Commissioners serve as members of the Board of Directors of the non-profit.]
9. If the amendments to the non-profit's Articles are considered invalid, would the Housing Authority Commissioners automatically constitute the non-profit's Board of Directors, once again, with full authority to govern the affairs of the non-profit?
10. Pursuant to Section 303.035(d), may the Housing Authority remove the non-Commissioner Directors of the non-profit?
11. Pursuant to Section 303.045, may the Housing Authority alter the non-profit's structure and organization?

Thank you in advance for your consideration of these issues. Should you have any questions, or need additional information, please do not hesitate to contact my office.

Sincerely,

A handwritten signature in black ink, appearing to read "J.M. Lozano".

J.M. Lozano

