



HENRY McMASTER
ATTORNEY GENERAL

December 2, 2008

The Honorable Leon E. Stavrinakis
Member, House of Representatives
375 Meadow Breeze Lane
Charleston, South Carolina 29414

Dear Representative Stavrinakis:

We received your letter requesting an opinion of this Office on behalf of the Lowcountry Housing Trust, Inc. (the "Trust") concerning the effect of the William C. Mescher Local Housing Trust Fund Enabling Act of 2007 (the "Act") on the operations of the Trust. You explain as follows:

The Trust was formed in 2004 as a 501(c)(3) organization in partnership by the City of Charleston to serve as the region's housing trust determining being a separate non-profit organization was the best way to maximize funds and provide more efficient and effective financing of affordable housing. The purpose of the Trust is to provide financing and resources for affordable housing. It was initially funded by the County of Charleston, and later by the City of Charleston. Shortly thereafter, the City of North Charleston committed funds and joined the Trust to help serve affordable housing needs in North Charleston, and the name of the Trust was changed from the Charleston Housing Trust, Inc. to the Lowcountry Housing Trust, Inc. to better suit its expanding role as a Regional Housing Trust Fund. Since 2004, the Trust has received annual funding from Charleston County, and since 2005, the Trust has received annual funding from the Cities of Charleston and North Charleston. In 2005, the Trust received \$1,000,000.00 from the State Housing Trust in order to serve the affordable housing needs of the Tri-county area (Berkeley, Dorchester, and Charleston).

Considering this information, you ask us to address the following three questions:

QUESTION ONE: Does the Trust satisfy the Act's definition of an RHTF?

QUESTION TWO: What is the effect of the income eligibility guidelines in the Mescher Act's definition of "affordable housing" in the Trust's current operations?

QUESTION THREE: May the Trust, acting as a designated RHTF, use other sources of income to assist individuals or families whose income is above that included in the Act's definition of "affordable housing"?

Law/Analysis

As you mentioned in your letter, in 2007, the Legislature passed the Act, which allows local governments to create and operate local housing trust funds and regional housing trust funds. 2007 S.C. Acts 78. Section 31-22-10(B) of the South Carolina Code (Supp. 2007), pursuant to the Act, states that the purpose of the Act is to "is to authorize a local government to individually or jointly create and operate a local housing trust fund or regional housing trust fund to promote the development of affordable housing, as defined in this chapter." In section 31-22-30 of the South Carolina Code (Supp. 2007), the Legislature gives local governments the authority to create and operate local housing trust funds ("LHTFs") and regional housing trust funds ("RHTFs"). This provision states:

A local government, including a municipality or county, may create and operate an LHTF or RHTF by ordinance, or join an existing trust fund to implement either a local or regional program for affordable housing as defined in this chapter. A local government may jointly form a regional housing trust fund by ordinance. A regional housing trust fund created under this chapter is subject to the same requirement and has the same power as a local housing trust fund created by an individual local government.

S.C. Code Ann. § 31-22-30(A). Section 31-22-20(3) of the South Carolina Code (Supp. 2007) defines an LHTF as "a local government fund separate from the general fund established by the governing authority of a municipality or county government with one or more dedicated sources of public revenue and authorized expenditures as provided in this chapter." Moreover, the Act defines an RHTF as "a multi-jurisdictional government fund separate from the general fund and established jointly by the governing authorities of one or more municipalities or county governments with one

or more dedicated sources of public revenue and authorized expenditures as provided in this chapter.” S.C. Code Ann. § 31-22-20(4) (Supp. 2007).

In your first question to us, you ask whether the Trust satisfies the Act’s definition of an RHTF. Section 31-22-20 of the Act provides under both the definitions for an LHTF and an RHTF that such funds have “one or more dedicated sources of public revenue” According to you, the Trust lacks a dedicated source of funding from any particular governmental entity.

Section 31-22-30(B) of the South Carolina Code describes the funding of LHTFs and RHTFs. According to this provision, local governments creating LHTFs and RHTFs may finance such trusts with “money available to the local government through its budgeting authority unless expressly prohibited by the law of this State.” S.C. Code Ann. § 31-22-30(B). This provision continues on to list sources of these funds as donations, bond proceeds, and grants and loans. *Id.* However, this provision states such sources include those listed “but are not limited to” these sources. Thus, in reading this provision, we believe the Trust’s use of annual appropriations may qualify as its dedicated source of public revenue. However, even if a court were to find that the Trust lacks a dedicated source of funding, we believe the Legislature intended for the provisions of the Act to apply to the Trust.

Based on the plain language used in the Act, we conclude that the legislative purpose of the Act is to provide a means for the creation and regulation of local governmental housing trusts. In your letter, you informed us that the Trust, which predates the Act, was not established by any one governmental entity. In our conversations with legal counsel for the Trust, we understand that it was originally established by the City of Charleston. However, we are not aware as to whether the other governmental entities funding the Trust have taken formal action with regard to the Trust. While the Trust was created prior to the Act, presumably under the City’s general powers under section 5-7-30¹, we believe the Legislature intended for the Act to apply to housing trusts established by local governments prior to the Act. The Legislature acknowledged this intent in section 31-22-35, which refers to LHTFs and RHTFs created prior to the Act. Because the City of Charleston originally established the Trust and the purpose of the Trust is to implement an affordable housing program, we believe the Legislature intended for the Act to govern the Trust, even if it lacks a dedicated source of funding.

Next, you inquire as to what effect the income eligibility guidelines in the Act’s definition of affordable housing have on the Trust’s operations. Section 31-22-20(1) defines affordable housing as “residential housing for rent or sale that is appropriately priced for rent or sale to a person or family whose income does not exceed eighty percent of the median income for the local area, with

¹See our opinion dated January 11, 2006 opining that municipalities have authority to establish local housing trust funds pursuant to their powers under section 5-7-30 of the South Carolina Code. Op. S.C. Atty. Gen., January 11, 2006.

adjustments for household size, according to the latest figures available from the United States Department of Housing and Urban Development (HUD).” According to your letter, the Trust’s charter, adopted prior to the Act, states that “the Trust may provide funds to any person or family whose income is less than or equal to 120% of the adjusted median income for the local area, based on HUD data.” Thus, the definition of affordable housing under the Act is more restrictive than the definition provided in the Trust’s charter. If a court were to conclude that the Trust is neither an LHTF or RHTF due to its lack of a dedicated source of public revenue, we do not believe the Trust would be required to adhere to the more restrictive definition in the Act because the provisions of the Act would not apply to the Trust.

However, assuming a court finds the Trust is an LHTF or RHTF pursuant to the Act, you question whether section 31-22-55 of the South Carolina Code (Supp. 2007) provides the Trust with an exemption from compliance with section 31-22-20(1)’s definition of affordable housing. Section 31-22-55 states: “An LHTF or RHTF existing on the effective date of this act shall not be required to alter the existing terms of its governing documents; provided, however, that any alteration or amendment to such governing documents must conform to the provisions of this act.” Based on this statute, unless the Trust chooses to change its affordable housing requirement in its charter, we believe it may continue to use its maximum adjusted median income level for determining eligibility for Trust benefits.

Lastly, you ask whether the Trust can use other sources of funds to assist individuals and families with income above that included in the Act’s definition of affordable housing. As concluded above, we believe the Trust is generally required to comply with the provisions of the Act, with the exception of conflicting provisions of the Trust’s governing documents adopted prior to the Act’s enactment. Furthermore, we do not find any provision in the Act allowing for an exception to the affordable housing requirement in the case of a certain type of funding. Accordingly, we believe the Trust must generally comply with the affordable housing definition as required by the Act no matter what source of funding it uses to provide assistance to individuals and families. However, as explained in our answer to your second question, because the Trust was created prior to the enactment of the Act and because its charter provides for its own definition of affordable housing, unless the Trust amends its charter, we believe the charter’s requirements will control.

Conclusion

If the Trust lacks a dedicated source of public revenue, it would appear not to fall within the definitions of either an LHTF or an RHTF under the Act. However, given that the Trust receives annual appropriations from local governmental entities, this source of funding appears to be contemplated by section 31-22-30(B) describing the methods by which LHTF or RHTFs may be funded. Nonetheless, assuming the Trust does not have a dedicated source of funding, we believe the Legislature intended for the provisions of the Act to apply to the Trust. However, we do not

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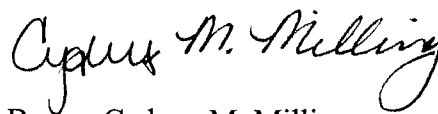
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believe the income eligibility guidelines will impact the Trust's current operations as section 31-22-35 states that the Act will not require existing trusts to alter their governing documents to conform to the provisions of the Act. Thus, we believe unless and until the Trust's charter is amended with regard to who may benefit from the Trust, we are of the opinion that the guidelines in the charter control. However, in such cases in which the Act controls, we do not believe the Trust may apply a different standard for those receiving benefits funded by sources other than a local government entity.

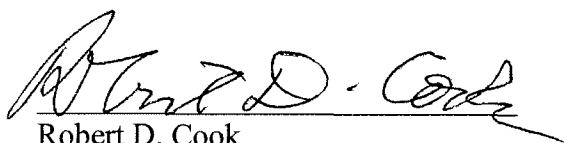
Very truly yours,

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