



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2014

Mr. J. Paul Oxer, Chair
Governing Board
Texas Department of Housing and
Community Affairs
Post Office Box 13941
Austin, Texas 78711-3941

Opinion No. GA-1060

Re: Authority of the Texas Department of
Housing and Community Affairs over
implementation of the at-risk development set-
asides under the low income housing tax credit
program in Government Code sections
2306.6702(a)(5) and 2306.6714 (RQ-1167-GA)

Dear Mr. Oxer:

You ask whether the governing board of the Texas Department of Housing and Community Affairs (“TDHCA”) is authorized to treat certain housing developments as eligible to receive a tax credit that has been set aside for “at-risk developments” under Government Code section 2306.6714.¹ You explain that TDHCA administers the state’s low income housing tax credit program²—governed by chapter 2306, subchapter DD, of the Government Code—under which tax credits are competitively awarded to developers of low income housing. Request Letter at 1; *see generally* TEX. GOV’T CODE ANN. §§ 2306.6701–.6735 (West 2008 & Supp. 2013). You state that subchapter DD “provides for the establishment of certain set-asides.” Request Letter at 1. A “set-aside” is defined under chapter 2306 as “a reservation of a portion of the available housing tax credits to provide financial support for specific types of housing . . . or serve specific types of applicants.” TEX. GOV’T CODE ANN. § 2306.6702(a)(14) (West Supp. 2013). Your question concerns the set-aside for “at-risk developments” under section 2306.6714. *See id.* § 2306.6714(a).

As background, you explain that the United States Department of Housing and Urban Development created the Rental Assistance Demonstration (“RAD”) program, by which a “public housing annual operating subsidy . . . under Section 9 of the United States Housing Act

¹See Letter from Mr. J. Paul Oxer, Chair, Tex. Dept. of Housing & Cmty. Affairs, to Honorable Greg Abbott, Tex. Att’y Gen. at 1 (Nov. 13, 2013), <http://www.texasattorneygeneral.gov/opin> (“Request Letter”).

²Federal law provides for the allocation and awarding of federal tax credits at the state level to developers of low income housing. *See generally* 26 U.S.C.A. § 42 (West Supp. 2013).

of 1937 . . . converts to a rental subsidy under Section 8 of the Act.” Request Letter at 1. You describe TDHCA’s belief that “many of the [public housing authorities] in Texas will be seeking to convert operating subsidies [to rental subsidies] under the RAD program.” *Id.* at 2. Your question is whether TDHCA may, as the administrator of the low income housing tax credit program, treat public housing developments undergoing a RAD conversion as eligible to compete for the at-risk set-aside under section 2306.6714. *Id.*

Like the courts, when construing a statute we seek to draw the Legislature’s intent from the statute’s plain language. *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). Section 2306.6714 provides in relevant part:

- (a) [TDHCA] shall set aside for eligible at-risk developments not less than 15 percent of the housing tax credits available for allocation in the calendar year.
- (a-1) An at-risk development described by Section 2306.6702(a)(5)(B) is eligible for housing tax credits set aside under Subsection (a) if:
 - (1) a portion of the public housing operating subsidy received from [TDHCA] is retained for the development; and
 - (2) a portion of the units of the development are reserved for public housing as specified in the qualified housing plan.

TEX. GOV’T CODE ANN. § 2306.6714 (West Supp. 2013). Subsection (a) provides that tax credits shall be set aside for “eligible at-risk developments.” *Id.* § 2306.6714(a). Subsection (a-1) then imposes conditions for eligibility on “[a]n at-risk development described by Subsection 2306.6702(a)(5)(B).” *Id.* § 2306.6714(a-1). Subsection 2306.6702(a)(5) contains two possible definitions of “at-risk development” that are differentiated by the form of federal subsidy assistance a development receives. *See id.* § 2306.6702(a)(5)(A) (describing, in part, a development that receives federal subsidy under Section 8); (a)(5)(B) (describing, in part, a development that receives or has received federal subsidy under Section 9).

Subsection 2306.6714(a-1) limits the eligibility of subsection 2306.6702(a)(5)(B) developments, but it does not affect, much less eliminate, the eligibility of subsection 2306.6702(a)(5)(A) developments. Thus, a development that undergoes a RAD conversion and no longer satisfies subsection 2306.6702(a)(5)(B) would still be eligible for the at-risk set-aside if it satisfied subsection 2306.6702(a)(5)(A).

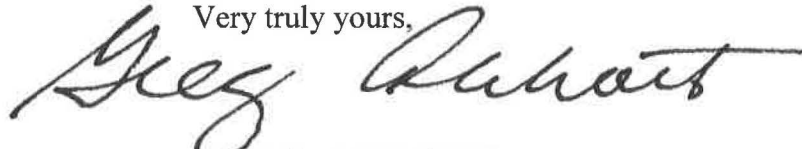
As the administering agency of the low income housing tax credit program, TDHCA has discretion to determine whether a development has satisfied the eligibility requirements for competing for a set-aside. *Id.* §§ 2306.6701 (West 2008), .67022 (West Supp. 2013). A development is an at-risk development under subsection 2306.6702(a)(5)(A) if it “has received

the benefit of a subsidy in the form of a . . . rental subsidy, [or] Section 8 housing assistance payment.” *Id.* § 2306.6702(a)(5)(A)(i). If TDHCA determines that a development undergoing a RAD conversion has received assistance under section 8 of the Act and consequently is eligible for the at-risk set-aside, a court is not likely to disturb that determination. *See R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011) (stating that courts will generally uphold a state agency’s interpretation of a statute it is charged with administering, so long as the construction is reasonable and not contrary to the statute’s language).

S U M M A R Y

A court would likely conclude that it is within the authority of the Texas Department of Housing and Community Affairs ("TDHCA") to consider a development undergoing a conversion pursuant to the United States Department of Housing's Rental Assistance Demonstration program as eligible to compete for the at-risk set-aside under Government Code section 2306.6714 if TDHCA determines that all applicable eligibility requirements have been satisfied.

Very truly yours,

A handwritten signature in black ink, appearing to read "Greg Abbott", written in a cursive style.

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