

VOLUME NO. 44

OPINION NO. 23

COMMERCE, DEPARTMENT OF - Authority to administer federal Section 8 housing programs in areas served by municipal housing authority;
HOUSING - Authority of state to administer federal Section 8 housing programs in areas served by municipal housing authority;
LOCAL GOVERNMENT - Municipal housing authority;
MUNICIPAL GOVERNMENT - Municipal housing authority;
CODE OF FEDERAL REGULATIONS - 24 C.F.R. §§ 882.101, 882.102, 882.301, 882.401, 882.701, 882.801, 883.101, 887.1, 887.7;
MONTANA CODE ANNOTATED - Title 7, chapter 15, part 44; sections 7-15-2111, 7-15-4402(1), 7-15-4414(2), 17-3-105, 90-1-106;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 4 (1981);
UNITED STATES CODE - 42 U.S.C. §§ 1437f, 1437f(a).

HELD: The State of Montana, through its Department of Commerce, may administer federal Section 8 certificate and voucher programs and may do so in an area which is served by an existing municipal housing authority.

January 16, 1992

David N. Hull
Helena City Attorney
316 North Park
Helena MT 59623

Dear Mr. Hull:

You have requested my opinion concerning the following question:

Does the State of Montana, through its agent, the Department of Commerce, have authority to operate federal Section 8 certificate and voucher programs and, if so, to administer those programs in an area which is served by an existing municipal housing authority, specifically the Helena Housing Authority?

Section 8 certificate and voucher programs are part of the United States Housing Act of 1937 as amended (42 U.S.C. § 1437f). Such programs provide assistance to low and moderate income persons in the payment of rent in privately owned existing housing. 42 U.S.C. § 1437f(a); 24 C.F.R. §§ 882.101, 882.102, 882.301, 882.401, 882.701, 882.801, 883.101, 887.1.

You indicate that the Helena Housing Authority, hereinafter HHA, was created in accordance with the provisions of Title 7, chapter 15, part 44, MCA. As a municipal housing authority, HHA may participate in and administer federal Section 8 housing programs. 39 Op. Att'y Gen. No. 4 at 20 (1981). Accordingly, HAA has contracted with the United States Department of Housing and Urban Development (HUD) to serve as a public housing agency (PHA) in the administration of Section 8 certificate and voucher programs in the Helena area. HUD regulations define a PHA as "[a]ny State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) which is authorized to engage in or assist in the development or operation of housing for low-income Families." 24 C.F.R. § 882.102.

As you point out, HHA is not the exclusive PHA that has contracted with HUD to administer Section 8 housing programs in the Helena area. The Montana Department of Commerce (Department) also serves as a PHA and performs the identical function of applying for and receiving federal funding and administering Section 8 certificate and voucher programs on a statewide basis, including within the municipality of Helena. Some of these programs are administered independently by the Department, while others are administered in conjunction with HHA pursuant to contract whereby the Department pays HHA a percentage of its federal funding for administrative costs. You suggest not only that the Department has no authority to administer Section 8 certificate and voucher programs, but also that the Department is without authority to administer such programs in an area which is already served by a municipal housing authority such as HHA.

The Montana Department of Commerce has several functions with respect to housing which are spelled out in section 90-1-106, MCA. The authority to apply for and receive federal funding to administer housing programs is not specifically described in that statute. However, consistent with the general functions of the Department as outlined in section 90-1-106, MCA, former Governor Ted Schwinden issued Executive Order No. 27-81 on November 2, 1981, which authorized and directed the Department "to administer the Housing Assistance Payments Program; to apply for and receive any and all grants of federal funds for which the Department may be eligible under the Housing Assistance Payments Program; to execute all necessary applications, agreements, and documents; and to take all steps necessary and appropriate for the successful operation of the Housing Assistance Payments Program." Section 17-3-105, MCA, authorizes the Governor to "accept on behalf of the state any federal assistance funds made available by act of congress for programs that are consistent with the needs and goals of the state and its citizens." This statute

further authorizes the Governor to designate the state agency to administer the accepted federal assistance program, in this case the Montana Department of Commerce. Because the Legislature has statutorily entrusted its legislative function to the executive branch of government, Governor Schwinden's order has the force and effect of law. State ex rel. Bennett v. Bonner, 123 Mont. 414, 423, 214 P.2d 747, 752 (1950).

The Department is therefore authorized under state law to administer HUD's Housing Assistance Payments Program (24 C.F.R., parts 882 and 883) under Section 8, which includes the certificate and voucher programs you specifically mention in your letter. Consequently, the Department fits the definition of a PHA under HUD regulations (24 C.F.R. § 882.102) and, just like HHA, may contract with HUD to perform PHA functions.

Your next question is whether the Department is restricted from operating as a PHA in an area already served by HHA. The only HUD regulation addressing this point is 24 C.F.R. § 887.7 under the housing voucher program, which defines PHA jurisdiction as "the area in which the PHA is not legally barred from entering into housing voucher contracts." I find no statutory provision which precludes concurrent jurisdiction over Section 8 housing program administration between the Department and HHA. Unlike the restriction contained in section 7-15-2111, MCA, which precludes operation of a county housing authority in a city without first obtaining the city's consent, there are no similar provisions pursuant to which HHA can exclude the Department from operating in the Helena area.

You cite section 7-15-4414(2), MCA, as the relevant statute barring concurrent jurisdiction over federal housing programs where a municipal housing authority is already in place:

Problems arising from existence of several overlapping authorities. ...

(2) No housing authority shall operate in any area in which an authority already established is operating without the consent by resolution of the authority already operating therein.

However, the statutory definition of "housing authority" precludes application of this geographic restriction to the Department of Commerce. Section 7-15-4402(1), MCA, defines "authority" or "housing authority" as

a public body and a body corporate and politic organized in accordance with the provisions of this part for the purposes, with the powers, and subject to the restrictions hereinafter set forth.

The Department is not organized under the provisions relating to municipal housing authorities, as is HHA. The restriction in section 7-15-4414(2), MCA,

applies only to municipal housing authorities operating in the same geographic location. It does not restrict the operation of a state agency which is authorized by statute and executive order to administer federal Section 8 housing programs.

The lack of an explicit statutory restriction leads me to conclude that the Department may administer Section 8 certificate and voucher programs despite the fact that HHA currently operates in the same geographic area. I realize that this result is contrary to that reached by the Connecticut Superior Court of Hartford-New Britain in the unpublished opinion of Housing Authority of the Town of East Hartford v. Papandrea, No. CV 90-7007028 (Nov. 2, 1990), which you have cited. That case, however, is readily distinguishable. Although it involved an action by the local housing authority to enjoin the state commissioner of housing from operating any Section 8 housing programs in the town of East Hartford, the injunction issued in that case because the legislation creating the state housing agency specifically barred it, except in limited circumstances, from initiating a housing program in a municipality where a local housing authority already existed. Conn. Gen. Stat. Ann. § 8-120. No similar restrictions are present in Montana's statutes.

THEREFORE, IT IS MY OPINION:

The State of Montana, through its Department of Commerce, may administer federal Section 8 certificate and voucher programs and may do so in an area which is served by an existing municipal housing authority.

Sincerely,

MARC RACICOT
Attorney General