

Opinion No. 75-48

September 10, 1975

OPINION OF: TONEY ANAYA, Attorney General

BY: W. Royer, Assistant Attorney General

TO: Mr. Vincent J. Montoya, Director Department of Finance and Administration 421 State Capitol Building Santa Fe, New Mexico 87503

QUESTIONS

1. Is the New Mexico Mortgage Finance Authority, created pursuant to Sections 13-19-1, et seq., NMSA, 1953 Comp. (1975 Interim Supp.), a state agency?
2. If the New Mexico Mortgage Finance Authority is not a state agency, does the Department of Finance and Administration have the authority to require the Authority's compliance with the statutory provisions pertaining to budgets contained in Sections 11-4-1.1, et seq., NMSA, 1953 Comp?
3. If the New Mexico Mortgage Finance Authority is not a state agency, does the State Personnel Board have the authority to require the Authority's compliance with the Personnel Act (Sections 5-4-28, et seq., NMSA, 1953 Comp.)?

CONCLUSIONS

1. No.
2. Yes.
3. Yes.

ANALYSIS

{*131}

The First Session of the Thirty-Second Legislature of New Mexico enacted the Mortgage Finance Authority Act, Chapter 303, Laws of 1975, compiled as Section 13-19-1, **et seq.**, NMSA, 1953 Comp. (1975 Interim Supp.). The act creates the "New Mexico mortgage finance authority" (hereinafter the "Authority") for the "performance of essential public functions as defined by the legislative findings and declaration of purpose." Section 13-19-2, **supra**. The Authority is "a public body politic and corporate, separate and apart from the state, constituting a governmental instrumentality". Section 13-19-4, **supra**. A state agency is defined as "any board, authority, agency, department, commission, public corporation, body politic or instrumentality of the state." Section 13-

19-3(0), **supra**. Your first question relates to the application of the definition of a state agency to the Authority.

The definition of a state agency uses several terms that are used in defining the Authority: "authority," "public corporation," "body politic," and "instrumentality." The modifier of the definition, "of the state", is the distinguishing characteristic. The Authority is specifically established as "separate and apart from the state." The question is then whether a state, by legislation, may establish a governmental instrumentality and delegate to it governmental power for the performance of a state function without making the instrumentality the alter ego of the state.

In **Ciulla v. State**, 77 N.Y.S. 2d 545 (1948), the New York Court of Claims was required to investigate the nature of the New York City Housing Authority. The New York City Housing Authority (hereinafter the "City Authority") is similar, but not identical, to the Authority in question here. The New York Public Housing Law, under which the City Authority was operating, declared the New York policy regarding housing to "require the creation of agencies, instrumentalities and corporations . . . , which are declared to be agencies and instrumentalities of the state for the purpose of attaining the ends herein recited." 77 N.Y.S. 2d at 547. The City Authority was organized by the City of New York pursuant to state enabling legislation to erect housing projects for families of low income. The mayor of the City of New York appointed the members of the City Authority and such members could be removed by him. Neither the City nor the state appropriated funds to the City Authority; both dealt with it on a contractual, arm's length basis. The court held the City Authority to be an independent corporation, specifically a "public corporation." The court cited the following factors as indicative of the "independent" nature:

1. The members of the City Authority were appointed by the mayor of the municipality, but not more than one member could be an official of the municipality.
2. The City Authority directly engaged and determined the qualifications of its personnel, but the {*132} employees came under the jurisdiction of the municipal civil service commission.
3. The City Authority was granted the power to contract; to own real and personal property in its own name; to have a seal, and to have perpetual succession.
4. The City Authority could undertake projects independent of financial aid from any branch of government.
5. Neither the state nor the municipality were liable on the bonds or other obligations issued by the City Authority.
6. The City Authority's administrative expenses could not be paid from the funds of any state aided project.

7. The City Authority could condemn property in its own name.

8. The City Authority's funds were kept in its own accounts and the City Authority made payments therefrom without vouchers, warrants or signature from any state or city official.

The court concluded:

"The very name 'authority' given to this type of public corporation imports a distinct historical connotation of separateness and judicial distinction from the State and from the municipal corporations of the state. . . .

* * *

An agency constituted and functioning in the manner thus described can hardly be viewed as an agent either of the State or of a municipality.

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There is a distinct difference in legal connotation between words like "agency" and "instrumentality" on the one hand and the word "agent" on the other. The distinction is well elucidated in *Pantees v. Saratoga Springs Authority*, 1938, 255 App. Div. 426, 8 N.Y. S.2d 103, 105, as follows:

"There are activities which are governmental in their nature which are carried on directly by the State, although through an agency employed for that purpose; and there are still others for the carrying out of which the State has delegated to an agency the necessary powers to that end.

* * *

"Where the State assumes to act directly in the carrying out of its governmental function, even though it create and use a corporation for that purpose, it assumes responsibility for the conduct of its agent. Thus the State may choose to create and maintain a state system of parks, and thereby subject itself to liability for the negligence of its officers and employees (Court of Claims Act, § 12-a; *Maltby v. County of Westchester*, 267 N.Y. 375, 379, 196 N.E. 295, 297); or, with like liability, it may provide for the imprisonment of young delinquents, and commit their custody to an authorized institution for the purpose. *Paige v. State of New York*, 269 N.Y. 352, 199 N.E. 617. but when the State **delegates** the governmental power for the performance of a state function, the agency exercises its independent authority as delegated, as does a city, and its responsibility for its acts must be determined by the general law which has to do with that class {*133} of agent and corporate activity, apart from liability on the part of the State. That is the case when the State delegates its state function of education to a school board, its public health function to a local board of health, when it delegates broader governmental functions to a county, city or village. In such instances, there is

no authority for making claim against the State, but the agency exercising the delegated authority must respond for its own actionable conduct." (Italics supplied.)

In this case the Saratoga Springs Authority was held not to be a state agent, although in many respects it was much more closely and directly linked to the State than is a housing authority. For example, its employees were under the jurisdiction of the State Civil Service Commission and were members of the state retirement system, its moneys were directed to be paid to the State Department of Taxation and Finance and be paid out on a warrant to the State Comptroller, its property was ultimately to have reverted to the State, and the State made appropriations towards its expense. If the Saratoga Springs Authority is not an agent of the State, then, a fortiori, a housing authority is not. **Ciulla v. State, supra**, 77 N.Y.S.2d at 547, 550 and 551.

See also **Arkansas Louisiana Gas Co. v. City of Little Rock**, 506 SW. 2d 555 (Ark. 1974); **State v. Parking Authority of City of Trenton**, 102 A.2d 669 (N.J. 1954); **City of Los Angeles v. City of Los Angeles**, 243 P.2d 515 (Cal. 1952); and **New York Post Corp. v. Moses**, 204 N.Y.S. 2d 44 (1960).

From a review of **Ciulla**, the characteristics of the Authority become clearer. The State has delegated the governmental power to perform a state function to the Authority and it has provided the mechanism for the Authority to exercise such power independently of the State. The Authority is governed by seven members; three ex officio members and four public members appointed by the Governor. The public members may not hold other public office. The Governor may remove the members appointed by him, but such removal must be for cause and after hearing. The Governor designates the chairman of the Authority, but the members elect its vice-chairman and elect or appoint, and prescribe the duties of, such other officers as they deem necessary or advisable. The Authority may employ agents and employees and delegate such duties as it deems proper. See Section 13-19-4, **supra**.

A review of the powers granted to the Authority in Section 13-19-5, **supra**, indicates a parallel to the powers granted to the City Authority in **Ciulla**. The powers indicate the independent nature of the Authority.

The debts of the Authority are not the debts of the State of New Mexico, its counties, or its municipalities! nor is the State, its counties, or its municipalities liable thereon. Section 13-19-15, **supra**. The State, its counties, and its municipalities may not pay out general funds or otherwise contribute money to the Authority. The State and state agencies may not purchase any bonds or notes issued by the Authority. Section 13-19-19, **supra**. The Authority handles its funds through its own treasurer. Section 13-19-20, **supra**.

From a review of the above factors, it is our opinion that the Authority is an independent public corporation separate and apart {**134*} from the state. The Authority is not a state agency; its independence negates the modifier "of the state" contained in Section 13-19-3(0), **supra**.

Questions 2 and 3:

The Authority must comply with the statutory provisions pertaining to budgets contained in Sections 11-4-1.1, **supra**, and the provisions of the Personnel Act, Sections 5-4-28, et seq., **supra**. The Authority, although an independent instrumentality or public corporation, must be responsive to legislative policy. **Ciulla v. State, supra; Kelly v. Cohoes Housing Authority**, 280 N.Y.S. 2d 250 (1967); and **Marino v. Town of Rampo**, 326 N.Y.S. 2d 162 (1971). The legislative policy with respect to the budgets of the Authority is established by Section 13-19-20E, **supra**. The legislative policy with respect to the Personnel Act is established by Section 13-19-5D, **supra**. Therefore, even though independent of the State, the Authority must subject itself to the review of the Budget Division of the Department of Finance and Administration and to personnel review by the State Personnel Board.