

This is a copy of electronic correspondence sent to Assistant Attorney General Joseph Ruccio from DHCD Chief Counsel Alexander Whiteside. The response to this memo follows.

From: Whiteside, Alexander (OCD)
Sent: Monday, November 15, 2004 4:22 PM
To: 'Joseph.Ruccio@ago.state.ma.us'
Subject: Municipal Leasing for Affordable Housing

In recent months a number of municipalities have come to the Department of Housing and Community Development for advice with respect to the applicability of the bidding laws to municipal leases of land for affordable housing. DHCD is the state's housing agency (of which I am Chief Counsel) and is a prime proponent for creation of additional affordable housing. We recognize that there are cases where municipal leases of land (rather than outright transfer of the fee) are necessary if affordable housing is to be created on the land and that development of such housing would in most cases not be possible if private developers were required to comply with the bidding laws. However, we believe that with care these private developers can construct affordable housing on land leased from municipalities and not be subject to the bidding laws.

We have written the attached memorandum in an effort to provide guidance to municipalities and private developers on how to avoid the pitfalls when dealing with municipally leased land. As you will see we have used your letter of 10/17/03 as a starting point and added a fair amount of further elaboration. We should very much appreciate comments and suggestions from your office on the memorandum since these views are so important. We recognize that there are constraints on the advice which you can give but hope that you can advise us whether your office detects any flaws in our reasoning or in our conclusions or whether there are other areas which should be further developed.

We receive frequent questions about our views on this subject. We also attend a number of meetings where the matter comes up. We have offered opinions with the caution that the opinions are subject to being updated or modified. The sooner we know your views on our views, the better we will be able to give sound advice. Thanks in advance.



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February 17, 2005

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Re: Municipal Leasing for Affordable Housing

Dear Mr. Whiteside:

This is in response to your letter of November 17, 2004, in which you ask for comments on the memorandum accompanying your letter. The memorandum addresses the applicability of the bidding laws for public construction to municipal leases that contemplate the construction of affordable housing by a private developer on public land (affordable housing leases). In the memorandum, you conclude that such a lease will not implicate these laws so long as it contains certain terms. Based on our bid protest decision, New England Regional Council of Carpenters v. City of Pittsfield (August 13, 2004) (the Wahconah Park decision), we agree.¹

The Wahconah Park decision clarified the factors that we would consider, and the weight to be attributed to each, to determine whether the bidding laws for public construction apply to an affordable housing lease.² At issue there was a \$1 license agreement for a Park owned by the City of Pittsfield (the City), but the underlying issue was the same as that addressed in your memorandum. The license required the private licensee to "provide professional baseball games at the Park" and to perform yearly renovations to the Park pursuant to a "[financial] formula." Wahconah Park at 4.³

Before reaching the license agreement, we discussed Helmes v. Com. 406 Mass. 873 (1990), Town of Plymouth v. Snow, No. 90-0252-A (Mass. Super Jan. 14, 1993), and G.M. Builders, Inc. v. Town of Barnstable, 18 Mass. App. 664 (1984). We cited Helmes

¹ This letter should not be construed as a legal opinion. Our ability to render legal opinions extends only to opinion requests by state officials, district attorneys, and committees of the Legislature. See M.G.L. c. 12 §§3, 6 and 9.

² With respect to such complex bidding issues, we generally do not form positions unless the issue or a similar issue has been the subject of a bid protest. The adversarial bid protest process ensures a thorough treatment of an imminent issue. When we hear a bid protest and render a decision, we are acting in our enforcement capacity. See M.G.L. c. 149, § 44H (charging the Attorney General with the responsibility for enforcing the bidding statutes for public works and building projects, and the designer selection law).

³ A copy of the decision is attached to this letter.

for the proposition that "where an agent enters into a construction contract on behalf of a public agency, the contract may be subject to the competitive bidding statutes [for public construction] nonetheless." Wahconah Park at 8 (citing Helmes, 406 Mass. at 876).

To flesh out this concept of agency, we turned to the Snow decision.⁴ See Wahconah Park at 9-10. There, rather than comply with the construction bid laws, the Town of Plymouth (the Town) issued a Request for Proposals (RFP) to interested developers for the construction and operation of a garage on Town owned land. See Snow at 1-2. Proposals were to include construction qualifications and architectural plans, and the Town retained the right to reject a selected proposal after reviewing additional submissions. See id. at 3. The court held that the bidding laws for public construction applied because the lease was based on the lessee's agreement to construct a garage according to guidelines in the RFP and because "at some point . . . the lease Town will assume ownership of the parking garage." Id. at 6. The court noted that if the lease was not subject to these laws, a public agency could sidestep their safeguards and "merely lease public land to a favored contractor who would construct the desired building." Id. at 7 and n.2.

Finally, we drew guidance from G.M. Builders, Inc. v. Town of Barnstable, 18 Mass. App. 664 (1984), which involved renovations by a private lessee on a publicly owned restaurant and the applicability of an analogous law – the payment bond law for public construction – to these renovations. See Wahconah Park at 10-12. The court held that this law did not apply, largely because while the lease acknowledged the lessee's right to make specified renovations, it "did not require" the lessee to undertake any renovations; they remained the "sole responsibility" of the lessee. See 18 Mass. App. 668-69 (Emphasis in original). The G.M. Builders court also distinguished a general right, reserved in a public lease, to ensure that renovations are "consistent with the public interest," from a right giving more control over the exact construction to be performed. See id. at 669 and n.5.

When we turned to the Wahconah Park license agreement, we made the following observations:

In its current form, the license raises serious concerns about the applicability of the [construction] bidding statutes. However, this is a close case. During the hearing of this matter, it became apparent that the City did not consider the reasoning of the G.M. Builders case in entering the license agreement. Further, while both the City and the Club view the license as having a 15 year term, the language of the license provides [for an initial obligation of approximately 18 months]. Finally, based on testimony provided at the hearing, the parties to the license did not intend for the City to have the right to withhold approval for concession stand alterations except where there are violations of health, safety and welfare regulations.

⁴ A copy of this decision is also attached.

Wahconah Park at 13. It appeared that the City had unintentionally included the very clauses that raised concerns about whether or not the construction bid laws applied, or at least had yet to attempt to structure them in a way that avoided these concerns. We therefore remanded the matter to the City for further consideration.

The lease terms you propose in your memorandum would seem to avoid these concerns. After discussing a letter that addresses GM Builders, you advise that the term of the affordable housing lease should be "no less than what is computed to be the actual useful life of the housing." You further note that it "might also be useful for the lease to contain a provision that the lessee shall own the buildings so constructed or for the lease to provide that the lessee . . . may remove any improvements." You also state that, beyond restricting the housing to "income-eligible households," the municipality should not "manage the construction or thereafter operate the housing." With respect to the rent, you suggest that the municipality should "charge [the lessees] a reasonable amount for the affordable housing use."

We agree that an affordable housing lease containing these terms would not give a municipality the type of control over construction referenced in Helmes, Snow and GM Builders as that which would implicate the bidding laws for public construction.⁵ Such a lease would, however, seem to be subject to the bidding law for public leases.⁶ Please contact the Inspector General at (617) 727-9140 with any questions that you may have about compliance with this law.

Very Truly Yours,



Joseph E. Ruccio, III
Assistant Attorney General

⁵We also agree with your assertion that state and federal assistance for the construction of affordable housing, such as tax credits, grants or loans, is not enough in itself to subject an otherwise private project to the bidding laws for public construction. See Helmes, 406 Mass. at 876; Cf. Salem Bldg. Supply Co. v. I.B.L. Constr. Co., 10 Mass. App. Ct. 360, 362 (1980) (privately owned, but publicly financed, low income housing project not subject to G.L. c. 149, § 29, the payment bond law for public construction).

⁶ See M.G.L. c. 30B, § 16.

DHCD Guidance on Long-term Leasing



Commonwealth of Massachusetts DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT

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There is a requirement in G.L. c. 149 § 44A (2) that “[e]very contract for the construction...of any building by a public agency estimated to cost more than twenty-five thousand dollars...shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in the provisions of section forty-four B to forty-four H inclusive...”

Various municipalities would like to lease certain land to private developers for the purpose of their providing affordable housing to low or moderate income households. Some question has arisen as to possible circumstances in which these private developers would be subject to the public bidding laws for the construction of such affordable housing.

In July 2003 the Barnstable town administrator wrote to the Attorney General’s Office and requested a determination whether construction of affordable housing on municipally leased land would be subject to the bidding laws (G.L. c. 7 §§ 38C to 38N, G.L. c. 30 § 39M and G.L. c. 149 §§ 44A et seq.) On October 17, 2003 Assistant Attorney General Ruccio replied that his office could not render a formal legal opinion to the Town. However, he pointed out that, when land is leased by a municipality to a developer with a requirement that the developer provide affordable housing to low or moderate income households, such a requirement constitutes a certain degree of control over the construction of the housing. He noted that the “amount of [such] control that a public agency exerts over a construction project during a public lease is a significant factor to be considered in determining whether the public bidding laws apply to the project.” He also indicated that another factor to be considered is the fact that the improvements to be constructed will at the end of the lease revert to the municipality and become public property.

In his letter AAG Ruccio referenced an earlier letter from his office to the Division of Capital Planning and Operations and to the Office of the Inspector General as to “whether or not any construction work performed pursuant to, or during, [a] building lease agreement would be subject to the statutory bidding laws...” In this earlier letter AAG Flaherty identified four areas of inquiry to help determine the intent of the parties in entering the lease. These four areas of inquiry focused on whether the substance of a transaction is such so that a lease should be treated the same as a public construction contract. They are:

- (1) Ownership. Does the public entity as owner receive benefit from construction required by the lease?
- (2) Control. Is the public entity in effective control of the construction?
- (3) Lease Terms. How long is the lease? Does it require that construction, which makes significant alterations to the building, be performed.
- (4) Use of Building. Is the building to have a public or private use during the lease term?

DHCD recognizes that in some cases a public entity could attempt to use a lease with a private developer as a means to circumvent the bidding laws on a construction project which the public entity would otherwise undertake itself. For example, the Attorney General's Bid Protest Unit in four separate decisions (In re Sabis International Charter School (9/17/97), In re Sabis International Charter School (2/1/00), In re Enlace DeFamilias DeHolyoke/Holyoke Community Charter School (7/15/02) and In re Renovations to 160 Ashlane Avenue, Springfield, MA, New Leadership Charter School (5/7/03) has held that, although certain buildings were being constructed by private entities, the construction was subject to the bidding laws because the buildings would be used for a public purpose as charter schools and because the funding was public.

In the case of the affordable housing to be developed in Barnstable, there does not appear to be any intent to circumvent the bidding laws on a project which in usual circumstances the town or its housing authority would undertake. The state's public housing program (administered by DHCD) is not at present developing any significant amount of new public housing. Housing authorities are concentrating on rehabilitation and modernization of the existing public housing stock. There is reliance on private developers for production of most new affordable housing in the state. Barnstable's proposal for private development of new housing is consistent with current practice.

One possibly problematical part of a lease of municipal land to a private developer for affordable housing lies in the fact that at the end of the lease term the municipality will own the buildings constructed by the private developer. Although DHCD does not believe that in and of itself potential future municipal ownership would make the bidding laws applicable, if the lease term is short and the municipality would be receiving a valuable asset at the end of the short lease term, the circumstances would lend some support to a conclusion that the bidding laws are applicable. In order to avoid such receipt of a valuable asset it would be advisable for any municipal lease for affordable housing to have a term no less than what is computed to be the actual useful life of the housing. It might also be useful for the lease to contain a provision that the lessee shall own the buildings so constructed or for the lease to provide that the lessee may, at its option, remove any improvements.

Together with provisions assuring an adequately long lease term so that construction of the improvements will not substantially benefit the town at the end of the lease term, the town should avoid control of construction and of operation of the housing during the term of the lease. While it is fair for there to be provisions permitting the town to ensure that the housing is properly built and is thereafter restricted to income-eligible households, the municipality should not itself as a municipal enterprise manage the construction or thereafter operate the housing. The private developer should be in charge of construction. The developer may thereafter manage the property. In the event that the developer seeks outside management, if a municipal or other public entity such as the local housing authority is to be considered, there must be a selection process of a manager based on merit.

State and federal assistance is currently available to private developers for construction of affordable housing (for example the federal and state low-income housing tax credits). Receipt of such assistance does not subject the developers to the bidding laws. Although municipalities should avoid directly paying contractors for the cost of construction, assistance by means of loans or grants to private developers from sources, such as local affordable housing trusts or Community Preservation Act funds, will not cause the bidding laws to be applicable.

With respect to rent, the municipality may decide to charge a reasonable amount for the affordable housing use. This would be much less than rent for a market-rate housing use. Rent for affordable housing use would be based on the value of the land as used for affordable housing. In this way a municipality could charge a fair market rent for the restricted affordable use and still charge much less than what would be charged for market housing. Although DHCD does not believe that charging a nominal rent would be a municipal involvement sufficient to implicate the bidding laws, it might be considered a factor. Such a result can be avoided by computing a low rent which is nevertheless appropriate for the affordable housing use.

DHCD recognizes that there is a variety of reasons why it may be impractical for a municipality to convey land outright to developers for affordable housing use. Such a municipality should have the ability to lease land in order to permit development of affordable housing. It is DHCD's view that development of such housing by a private developer on municipally leased land will result in an essentially private use and will not be subject to the bidding laws so long as proper precautions, as outlined in this letter, are taken.