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RQ-1139-GA

July 24, 2013

Office of the Attorney General of Texas
Honorable Greg Abbott
Opinion_committee@TexasAttorneyGeneral.gov

Re: Opinion Request

Dear Attorney General Abbott:

On behalf of the Washington County Judge John Brieden, I am requesting an opinion as to whether councils of governments are "units of general government" under the Federal HOME Investment Partnerships programs. Attached is a brief supporting our position that councils of governments are "units of general government" under this provision.

I want to waive 402.042(c) requirements.

Thank you for your attention to this matter.

Sincerely,

Renee Ann Mueller

QUESTION

Whether councils of governments are “units of general local government” under the Federal HOME Investment Partnerships program.

INTRODUCTION

The Federal HOME Investment Partnerships program (the “Program”) provides the method for the Department of Housing and Urban Development (“HUD”) to allocate “funds by formula among eligible State and local governments to strengthen public-private partnerships and to expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income families.” 24 C.F.R. § 92.1. In other words, through the Program, HUD provides funds to “participating [state and local] jurisdictions” to assist those jurisdictions in carrying out their home affordability programs. The Brazos Valley Council of Governments (“BVCOG”) hopes to become a participating jurisdiction. *See, e.g., id.*

BACKGROUND

The Program is authorized under the Cranston-Gonzalez National Affordable Housing Act (the “Act”). 42 U.S.C. § 12701. One of the purposes of the Act is to “expand the supply of decent, safe, sanitary, and affordable housing, with primary attention to rental housing, for very low-income and low-income Americans” because “there is a need to strengthen nationwide a cost-effective community-based housing partnership” designed to expand the supply of affordable rental housing and to improve homeownership opportunities. 42 U.S.C. § 12721(7); *Id.* § 12722(1). Congress determined that the federal support to accomplish these goals would be delivered through “participating jurisdictions” of state or local government. *Id.* § 12723.

BVCOG comprises the local governments of seven counties: Brazos, Burleson, Grimes, Leon, Madison, Robertson, and Washington. *See* Brazos Valley Council of Governments, *available at* www.bvcog.org (last visited July 1, 2013). The Brazos Valley Affordable Housing Corporation and the Brazos Valley Community Development Corporation are member entities. *Id.* *available at* www.bvcog.org/programs/brazos-valley-affordable-housing-corporation/ (last visited July 1, 2013) (redirects to www.bvahc.org).

Washington County, Texas previously organized the Washington County HOME Consortium (as HUD would not accept the BVCOG as a unit of general local government) and successfully administered the program by contracting with the BVCOG for administrative services, as allowed and initially approved by HUD. The Consortium consisted of the seven (7) counties which make up the BVCOG including many of the incorporated communities within. The success of the program led to three additional counties joining the consortium, each from other Councils of Government outside of the BVCOG region. The Washington County HOME Consortium successfully administered the HOME program for eight (8) years. Upon the planned retirement and request of the long time Washington County Judge, the BVCOG attempted to

switch the “lead entity” position to Burleson County. HUD requires that to switch lead entities, the initial consortium must be dissolved and a new one must be created in its place. In doing so, HUD declined the formation of the Burleson County HOME Consortium for lack of administrative capacity and would not allow said capacity to be obtained by contracting with the BVCOG as had been previously approved under Washington County. Nor would they acknowledge capacity after Burleson County hired experienced staff that had current HUD certifications in both regulations and administration of the HOME Program. When the newly elected County Judge for Washington County took office he was in favor of Washington County continuing to serve as the lead entity, yet HUD refused to accept the continued administration by the BVCOG and forced the termination of the Washington County HOME Consortium.

Washington County would like to recreate and participate in a HOME Consortium and would prefer that BVCOG be allowed to serve as the lead entity. BVCOG is in agreement and intends to manage the HOME program but HUD refuses to recognize BVCOG as a unit of general local government. It is our opinion BVCOG meets the requirements to become a participating jurisdiction. By HUD refusing to approve both the Washington County HOME consortium and the BVCOG as lead entity, the rural Brazos Valley has very limited ability to work with the Federal Government on low income housing. For these reasons and those outlined below, BVCOG should be recognized as a unit of general local government.

ANALYSIS

The Program provides that a “unit of general local government” may become a participating jurisdiction. *See* 24 C.F.R. § 92.1. A “unit of general local government” includes: “a city, town, township, county, parish, village, or other general purpose political subdivision of a State; a consortium of such political subdivisions recognized by HUD in accordance with § 92.101; and any agency or instrumentality thereof that is established pursuant to legislation and designated by the chief executive to act on behalf of the jurisdiction with regard to provisions of this part” *Id.* § 92.2. Thus, to be a participating jurisdiction, among other requirements, BVCOG must be a unit of general local government.

BVCOG meets the definition of “unit of general local government” in three ways. It is a general purpose political subdivision Texas. It is a consortium of general purpose political subdivisions due to be recognized as such by HUD. Or it is an agency or instrumentality of general purpose political subdivisions, established by legislation, that will request designation by the chief executive as soon as said person is identified.

A. General Purpose Political Subdivision

Local Government Code chapter 391 grants local governments the authority to form commissions to cooperate with each other to improve the “health, safety, and general welfare of their residents[,]” among other things. TEX. LOC. GOV’T CODE ANN. § 391.001(a)(1). Councils of governments are one type of these collaborative commissions. *Id.* § 391.002(2) (defining “commission” to include a council of governments). Commissions created under chapter 31 are “political subdivisions of the state.” *Id.* § 391.003(c). As political subdivisions of the state, COGs are “local governments” under the rules and regulations of the Texas Department of Housing and Community Affairs (“TDHCA”), the state agency in charge of coordinating the use

of the housing funds HUD provides through the Program. *See* TEX. GOV'T CODE ANN. §§ 2306.001(4), 2306.004(19), 2306.111; 10 TEX. ADMIN. CODE 23.1.

Not only are these commissions considered local governments by TDHCA, they also have the authority to exercise the “planning, powers, and duties” that each commission member has under Texas law. TEX. LOC. GOV'T CODE ANN. § 391.003(e). Thus, not only are COGs expressly defined to be political subdivisions, because they can exercise the “planning, powers, and duties” of municipalities and counties, they are general purpose political subdivisions to the same extent that municipalities and counties are. *Id.* §§ 391.003(c), (e).

Significantly, in its HOME rules, HUD expressly treats municipalities and counties as general purpose political subdivisions. *See* 24 C.F.R. § 92.2 (including cities, towns, and counties in a list of general purpose political subdivisions of a state). Therefore, because COGs are general purpose political subdivisions as defined by state law and they exercise the same “planning, powers, and duties” of municipalities and counties, which are treated by HUD as general purpose political subdivisions, COGs are general purpose political subdivisions under both state and federal law. Alternatively, if COGs are not general purpose political subdivisions, they are consortiums awaiting recognition by HUD.

B. Consortium

The HUD rules provide that a “consortium of geographically contiguous units of general local government is a unit of general local government for purposes of” the Program. *Id.* § 92.101(a). To become a consortium, the group of local governments must satisfy certain requirements, including providing the “qualification documents” listed in the HUD rules. *Id.* § 92.101(a)(2). However, there is no question that municipalities and counties are units of general local government. *Id.* § 92.2 (including cities, towns, and counties in the definition of “unit of general local government”). As mentioned, BVCOG comprises the municipal and county governments of seven contiguous counties, and it is prepared to secure the necessary documentation required by the HUD rules precedent to recognizing BVCOG as a Program consortium. *Id.* § 92.101(a)(2). Thus, BVCOG should be recognized as a consortium of units of general local government. Alternatively, if COGs are not Program consortiums, they are agencies or instrumentalities of units of general local government, created pursuant to legislation, that will seek designation to act on behalf of the unit of local government with regard to the Program.

C. Agency or Instrumentality

A COG can be a unit of general local government if it is an agency or instrumentality of such a unit, if it is established pursuant to legislation, and if it is designated by the chief executive to act on behalf of its principal in relation to the Program. *Id.* § 92.2. COGs are created under the authority of the local government code. TEX. LOC. GOV'T CODE ANN. § 391.001(a)(1), (2). COGs are the instrumentality by which local governments can “join and cooperate to improve the health, safety, and general welfare of their residents” and “plan for the future development of communities, areas, and regions . . .” *Id.* As such, COGs are an agency

through which municipalities and counties provide assistance to the residents of their coverage area and plan for and encourage the development of their region.

BVCOG was originally organized in 1966 under federal law, and after a few reorganizations, in 1997, it became BVCOG under state law. *See* <http://www.bvcog.org/about-us/> (last visited July 10, 2013). It serves as an instrumentality and agency of the county and local governments of seven contiguous counties, and the Brazos Valley Affordable Housing Corporation, among others. *Id.* At the appropriate time, its chief executive will designate BVCOG to act on its members' behalves with regard to the provisions of the HOME rules. *See* 24 C.F.R. 92.2. Thus, COGs in general, and BVCOG specifically, are agencies or instrumentalities of units of general local government.

CONCLUSION

Because COGs are general purpose political subdivisions, consortiums of general purpose political subdivisions, or agencies or instrumentalities of units of general local government, BVCOG should be considered a unit of general local government such that it qualifies to be named a participating jurisdiction under the Program.