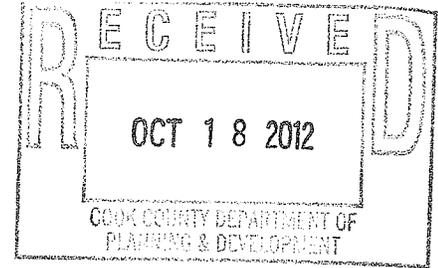




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COOK COUNTY, ILLINOIS
CIVIL ACTIONS BUREAU



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October 18, 2012

Maria Choca-Urban, Director
Cook County Department of Planning and Development
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CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

Re: 12-301: Land Bank Legal Issues

Dear Ms. Choca-Urban:

You have asked this office to address six separate questions with regard to four proposed separate land bank structures: 1) a land bank operated by the Cook County Bureau of Economic Development; 2) a not-for-profit land bank formed under the charter of Cook County government; 3) a not-for-profit land bank formed under the charter of the Housing Authority of Cook County; and 4) a private independent not-for-profit.

You ask that we address the following six questions with respect to each of these four separate entities:

Issues Presented

1. Can such an entity act as an agent of the County in acquiring property through the tax lien process as a No Cash bid or other avenues?
2. Can a land bank entity use the same authority granted to government agencies to clear tax liens when acquiring a property under 35 ILCS 200/21-95 or other statutes?
3. Can a property held by a land bank entity be exempted from taxes in a manner similar to the authority granted to government agencies?
4. Can a land bank entity sign intergovernmental agreements with taxing bodies or other entities? What municipal powers transfer with the signing of such intergovernmental agreements?
5. In order to transfer or dispose of land, what actions must be undertaken by a land bank entity?

6. What other actions might a land bank entity be empowered to undertake (or not) without County Board approval?

Conclusion

Initially, we note that this letter discusses the above questions with respect to two models only: one, an agency of the County and two, a separate not-for-profit, rather than the four models originally suggested. We have determined that as units of local government, neither the County nor the Cook County Housing Authority may create or form a not-for-profit corporation; however, the County, as a home rule unit of local government could appoint persons to serve as directors upon boards of such corporations. The Cook County Housing Authority, as a non-home rule municipal corporation, may exercise only those powers set forth by statute, which powers do not include the authority to operate a land bank, or to appoint persons to serve on the board of directors of not-for-profit corporations. 310 ILCS 10/8.

With regard to the six specific issues you have raised, we conclude as follows:

1. Both a County agency and a separate not-for-profit can act as agents for the County in acquiring property through the tax lien process as a no cash bid or other avenues upon a delegation by the County Board; however, they would both lack the authority to unilaterally acquire properties through a no cash bid or tax lien process as set forth in the Property Code, as these procedures are limited to units of local government. *See*, 35 ILCS 200/21-90, 95.
2. A private land bank entity cannot use the same authority granted to government agencies to clear tax liens when acquiring a property under 35 ILCS 200/21-95, which is limited by its terms to “any county, municipality, school district, or park district.”
3. A property held by a non-governmental land bank entity cannot be exempted from taxes in a manner similar to the authority granted to government agencies. *See*, 1970 Ill. Const., art. IX, § 6; 35 ILCS 200/15-60 (authorizing certain types of exemptions for governmental entities only).
4. While a private land bank entity could not sign “intergovernmental” agreements with governmental entities, it could enter into contracts with these entities. A County agency typically would not have the authority to enter into intergovernmental agreements with other units of government; however, the County could delegate its authority to enter into certain types of agreements to one of its agencies. Further, the power to cooperate intergovernmentally cannot authorize an agreement which would contravene statutory prohibitions or limitations that apply to the participating entities, thus, powers possessed by one entity cannot be transferred to another entity that does not possess these powers. *See*, 2005 Ill. Op. Att’y Gen. No. 05-010.
5. Both the county and a not-for profit corporate land bank entity are authorized to transfer or dispose of land; moreover, the County could delegate its authority to transfer or dispose of land to a County agency or a not-for profit, provided that a proper governmental purpose was served.
6. A land bank entity that is a county agency could undertake a wide range of actions depending on

the delegation of authorities it received from the County Board, including demolition and rehabilitation of the property, as well as leasing the property, and acceptance of governmental grant funding. A not-for-profit corporation could also undertake a wide range of activities with respect to property that it owns.

Discussion

Governmental Participation in Not-for-Profits

The General Not For Profit Act of 1986, 805 ILCS 105/101.01 *et seq.*, establishes the legal framework for creating a not-for-profit corporation in Illinois. Section 102.05 provides that “one or more incorporators may organize a corporation under this Act,” but requires that incorporators “shall be either a corporation, domestic or foreign, whether or not for profit or otherwise, or a natural person of the age of 18 years or more.” 805 ILCS 105/102.05. Units of local government such as the County or the Cook County Housing Authority are not authorized to form not-for-profit corporations.

As a home rule unit of local government, the County may exercise any power and perform any function pertaining to its government and affairs, including participation in efforts to eliminate blighted areas. 1970 Ill. Const., art. VII, § 6(a); *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62 (1977). Pursuant to this broad authority, the County could appoint persons to serve on the board of directors of a not-for profit corporation created for land bank purposes.

By contrast, the Cook County Housing Authority is a municipal corporation established by statute to exercise enumerated statutory powers to provide “decent, safe, affordable” housing to low income persons. 310 ILCS 10/2. Pursuant to article VII, section 8 of the Illinois Constitution, units of government such as the Cook County Housing Authority, which “exercise limited governmental powers or powers in respect to limited governmental subjects, shall have only powers granted by law.” 1970 Ill. Const., art. VII, § 8 (incorporating the concept of “Dillon’s Rule” whereby non-home rule units of local government possess only those powers authorized by the General Assembly). Since no statute specifically authorizes the Cook County Housing Authority to appoint members to serve on the board of directors of a not-for-profit, it lacks the authority to do so. Moreover, while the housing authority has been authorized to acquire land, and to enter into partnerships with both for-profit and not-for-profit developers “for the rehabilitation and development of low-income and this authority mixed-income rental and for-sale housing,” this authority is limited as provided in the Housing Authorities Act to “projects,” as defined by statute. *See*, 310 ILCS 10/8.2, 8.3, 10/17.

1. County Agency/Not-for-Profit as County Agent for Acquiring Property

The County is authorized “[t]o purchase and hold the real and personal estate necessary for the uses of the county, and to purchase and hold, for the benefit of the county, real estate sold by virtue of judicial proceedings in which the county is the plaintiff,” as well as “[t]o sell and convey or lease any real or personal estate owned by the county.” 55 ILCS 5/5-1005.

The Property Tax Code (PTC) authorizes the County to acquire tax delinquent or forfeited property pursuant to a “no-cash” bid. 35 ILCS 200/21-90, 21-260(g). Additionally, section 21-95 of the PTC provides that when the county acquires property through various enumerated judicial proceedings, all

due and unpaid property taxes shall be null and void. 35 ILCS 200/21-95. As set forth in full below, that section lists the numerous methods that the County may acquire property pursuant to legal proceedings:

Sec. 21-95. Tax abatement after acquisition by a governmental unit. When any county, municipality, school district, or park district acquires property through the foreclosure of a lien, through a judicial deed, through the foreclosure of receivership certificate lien, or by acceptance of a deed of conveyance in lieu of foreclosing any lien against the property, or when a government unit acquires property under the Abandoned Housing Rehabilitation Act, or when any county or other taxing district acquires a deed for property under Section 21-90 or Sections 21-145 and 21-260, or when any county, municipality, school district, or park district acquires title to property that was to be transferred to that county, municipality, school district, or park district under the terms of an annexation agreement, development agreement, donation agreement, plat of subdivision, or zoning ordinance by an entity that has been dissolved or is being dissolved or has been in bankruptcy proceedings or is in bankruptcy proceedings, all due or unpaid property taxes and existing liens for unpaid property taxes imposed or pending under any law or ordinance of this State or any of its political subdivisions shall become null and void.

35 ILCS 200/21-95.

In 1977, the Illinois Attorney General specifically considered the issue of whether a non-home rule county could contract with a private corporation to attend real estate sales conducted under then section 216d of the Revenue Act of 1939 (now 35 ILCS 200/21-90) and bid on behalf of the County.

1977 Ill. Op. Att'y Gen. No. S-1210. The contract called for the corporation to : 1) purchase all items offered at the tax sale not receiving a bid and pursue the same to tax deed; 2) advertise and sell to new owners the property acquired for the county; 3) advance all costs and expenses required in obtaining good title in the county; and 4) for the county to reimburse the corporation for expenses incurred in the acquisition and disposal of the property and to pay a percentage based fee of the total sales price or \$100 whichever was greater. The Attorney General noted the explicit statutory authority provided in present PTC Sections 21-90 and 21-260(g) in determining that the county did have the authority to enter into such a contract. Both sections contain the following sentence:

...The presiding officer of the county board, with the advice and consent of the County Board, may appoint some officer or person to attend scavenger sales and bid on its behalf.

35 ILCS 200/21-90, 21-260(g). Pursuant to this language, the County could delegate its authority to acquire property through a "no-cash" bid process to either a County agency or a not-for-profit corporation. Moreover, as a home rule entity, the County's authority to delegate its authority to acquire property to a county agency or to a not-for profit corporation is not limited by statute, and thus is even greater than that approved by the Attorney General.

We caution, however, that the County lacks the authority to contract with private attorneys to

represent the County in foreclosure actions or other judicial actions, or before such bodies as the Board of Review. *See, People v. Ashton*, 384 Ill. 287 (1943) (County lacks authority to hire private attorneys to foreclose properties for which taxes were unpaid; pursuant to the Illinois Constitution, the State's Attorney has exclusive authority to represent the County.)

Additionally, we note only the County can acquire property through eminent domain proceedings; this power is restricted to the "State of Illinois and its various subdivisions and agencies, and all units of local government, school districts and other entities that have the powers of condemnation and eminent domain expressly provided in the Eminent Domain Act and expressly provided in any other provision of law. *See*, 735 ILCS 30/15-1-5.

2. County Agency v. Not-for-Profit Authority to Clear Tax Liens

Only units of government, specifically a "county, municipality, school district, or park district," may benefit from the tax abatement provisions of PTC Section 21-95. 35 ILCS 200/21-95 (set forth in full above). Thus, a not-for-profit corporation acquiring property in its own name may not benefit from this section. We are not aware of any other statute permitting a not-for-profit to abate all liens for unpaid property taxes. The tax sale procedure set forth in both the PTC's annual tax sale and scavenger tax sales would permit a not-for-profit to acquire a tax deed upon property once the redemption period has expired, but these procedures do not permit abatement of all taxes. *See*, 35 ILCS 200/22-40.

3. County Agency v. Not-for Profit Property Tax Exemptions

While the Not-for-Profit Act permits incorporation for a variety of purposes including property ownership and administration, the Illinois Constitution and the Property Tax Code authorize a much smaller category of tax exemptions, including upon property owned by local governments and upon property used exclusively for charitable purposes. *Compare* 805 ILCS 105/103.05, 103.10 with 1970 Ill. Const., art. IX, § 6; 35 ILCS 200/15-60, 15-65. Under the Illinois Constitution, property can only be exempted from taxation for certain purposes. Property owned by the federal, state or a unit of local government may be exempted, and property that is used *exclusively* for "agricultural and horticultural societies, and for school religious, cemetery and charitable purposes." Ill. Const. of 1970, art. IX §6.

While property owned by the County is tax exempt, once that property is leased or sold to a private entity, the tax exempt status is likely lost, unless the private entity also qualifies for a property tax exemption, or the lease is for a public purpose. *See*, 35 ILCS 200/15-60, 15-15, 15-20; *see Ill. Att'y Gen. Op. S-1288* (August 18, 1977) (lease of county owned building for a public purpose); *Skil Corp. v. Korzen*, 32 Ill. 2d 249 (1965). If property is owned by a taxing district, and is "held for future expansion or development", such property qualifies for tax exempt status. 35 ILCS 200/15-60; *County of Hamilton v. Department of Revenue*, 279 Ill. App. 3d 639 (5th Dist. 1996). Sale and "lease-back" arrangements can be entered into, but to be effective for the purposes of qualifying for a property tax exemption, indicia of ownership must remain with the County. *See, OKO, LLC v. Illinois Dept. of Revenue*, 4-10-0500 (4th Dist. 2011); *City of Chicago v. Illinois Dept. of Revenue*, 147 Ill. 2d 484 (1992).

If the property is owned by a corporate entity, even one that has obtained non-profit status, its use

must fall within one of the statutorily designated categories in order for the property to qualify for tax exempt status. Such exempt purposes include property that is used for schools, educational and religious purposes, charitable purposes, cemeteries, and that which is owned by agricultural or horticultural societies and is not used with a view to a profit. *See* 35 ILCS 200/15-35; 15-40; 15-45; 15-65; 15-85. No property tax exemption is authorized for land bank purposes alone. Under the Illinois Constitution, the General Assembly also is limited in the type of exemptions that may be granted by statutory enactment.

4. County Agency v. Not-for Profit Intergovernmental Agreement Authority

Pursuant to article VII, section 10 of the Illinois Constitution and the Intergovernmental Cooperation Act, 5 ILCS 220/1 *et seq.*, the County, as a unit of local government, has been granted the authority to enter into IGAs; however private entities such as a not-for-profit corporation, have not been so authorized. Section 10 of article VII of the Illinois Constitution of 1970 states:

(a) Units of local government and school districts may contract or otherwise associate among themselves, with the State, with other states and their units of local government and school districts, and with the United States to obtain or share services and to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance. Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance. Participating units of government may use their credit, revenues, and other resources to pay costs and to service debt related to intergovernmental activities.

1970 Ill. Const., art. VII, § 10. This section allows units of local government, such as the County, “to exercise, combine, or transfer any power or function, in any manner not prohibited by law or by ordinance,” but does not provide this authority to not-for-profit corporations.

Further, Section 5 of the Intergovernmental Cooperation Act provides in pertinent part as follows:

Any one or more public agencies may contract with any one or more other public agencies to perform any governmental service, activity or undertaking or to combine, transfer, or exercise any powers, functions, privileges, or authority which any of the public agencies entering into the contract is authorized by law to perform, provided that such contract shall be approved by the governing bodies of each party to the contract and except where specifically and expressly prohibited by law.

5 ILCS 220/5. Pursuant to the Act, the term “public agency” shall mean any unit of local government as defined in the Illinois Constitution of 1970 any school district, any public community college district, any public building commission, the State of Illinois, any agency of the State government or of the United States, or of any other State, any political subdivision of another State, and any combination of the above pursuant to an intergovernmental agreement which includes provisions for a governing body of the agency created by the agreement. 55 ILCS 220/2(1). This definition of “public agency” excludes not-for-profit corporations from the authorization to enter into intergovernmental agreements.

In any event, as the Attorney General has observed, “the Intergovernmental Cooperation section of the Constitution and its statutory counterpart, the Intergovernmental Cooperation Act, are not grants of authority to undertake jointly functions that the cooperating entities cannot undertake individually.” *See*, Ill. Op. Att’y Gen. No. 05-010 (opining that IDOT lacked authority to convey land to a joint airport commission created pursuant to intergovernmental agreement). Specifically with regard to the issue of transferring or sharing of powers, the Attorney General noted that these sections “are not an independent grant of authority and cannot authorize an entity to do that which is not otherwise authorized or permitted by law.” Thus, the County could not “transfer” its powers to another entity, which lacked authority to exercise such powers.

A not-for-profit could contract with the County to perform various tasks in connection with the county’s property, including the acquisition and management of such property. *See*, 1977 Ill. Op. Att’y Gen. No. S-1210.

5. County Agency v. Not-for-Profit Ability to Transfer or Dispose of Land

As discussed in Issue 1, above, the County has been authorized by statute “[t]o sell and convey or lease any real or personal estate owned by the county.” 55 ILCS 5/5-1005. As a home rule unit of local government, the County could delegate its authority to sell or lease property to a county agency or contract with a not-for-profit corporation for this purpose. *See*, *Milligan v. Dunne*, 61 Ill. 2d 544 (1975) (While a legislative body cannot delegate its general power to determine what the law shall be, it may delegate to others the authority to do those things which it might properly do itself but cannot do as understandingly or advantageously); 1977 Ill. Op. Att’y Gen. No. S-1210.

Not-for-profit corporations are specifically authorized by statute to:

(d) To purchase, take, receive, lease as lessee, take by gift, devise, or bequest, or otherwise acquire, and to own, hold, hold as trustee, use, and otherwise deal in and with any real or personal property, or any interest therein, situated in or out of this State;

(e) To sell and convey, mortgage, pledge, lease as lessor, and otherwise dispose of all or any part of its property and assets;

805 ILCS 105/103.10 (d), (e).

6. County Agency v. Not-for-Profit Ability to Undertake Land Bank Actions without Board Approval

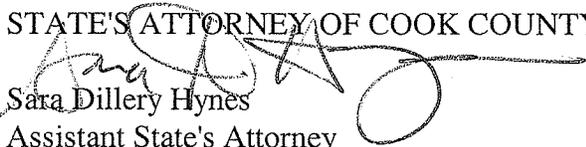
While the County, as a home rule entity, likely has the authority to create a land bank program countywide, the County would have to abide by local zoning, building, demolition and vacant building regulations. *See*, *People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62 (1977)(city, as a home rule unit, had the authority to undertake a program of urban redevelopment including the power to acquire, manage, convey or otherwise dispose of real property); *Lake County Public Building Commission v. City of Waukegan*, 273 Ill. App. 3d 15 (2nd Dist. 1995)(unit of local government must comply with other local governmental unit’s zoning, building, sewer, electrical, plumbing and landscaping ordinances, including permit fee requirements).

The County could delegate its authority to manage and or demolish property to a county agency or could enter into a contract with a not-for profit to undertake many of these activities on its behalf. While the Illinois Supreme Court has determined the sovereign power of the State cannot be conferred upon a private entity and can only be delegated, if at all, to some public agency such as a municipal corporation, commission, local board or public officer, the acquiring, selling, and managing of real property does not appear to be among these sovereign powers. *Compare, People ex rel. Rudman v. Rini*, 64 Ill. 2d 321, 326 (1976) (power of appointment of public officers is sovereign power) *with People ex rel. City of Urbana v. Paley*, 68 Ill. 2d 62 (1977) (approving ordinance authorizing city council to enter into contracts with any public or private agency for the purpose of business district development and redevelopment); 1977 Ill. Op. Att'y Gen. No. S-1210, discussed in Issue 1.

We hope this discussion has been helpful to you. If this Office can be of further assistance to you in this matter please contact us.

Yours truly,

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