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RICHARD S. COHEN
ATTORNEY GENERAL



STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333
June 13, 1980

Charles H. Abbott, Esq.
Skelton, Taintor & Abbott
465 Main Street
Lewiston, Maine 04240

Re: Requirement for LDCs

Dear Mr. Abbott:

You have requested that this office render an opinion on the question of whether the Maine Guarantee Authority ("the Authority") may insure mortgages where the mortgagor is not a "local development corporation" (an "LDC") as that term is defined in Section 703(4) of the Maine Guarantee Authority Act, 10 M.R.S.A. § 701 et seq. ("the Act"). We answer this question in the affirmative, with the caveat that the matter is not completely free from doubt.

The source of the Authority's power to guarantee mortgages derives, in the first instance, from the Maine Constitution. Article IX, Sec. 14-A of the Maine Constitution authorizes the Legislature to enact laws to "insure the payment of mortgage loans on real estate and personal property within the State" for "industrial, manufacturing, fishing, agriculture and recreational enterprises." No mention is made of any requirement that an LDC must be interposed between the Authority and the lender as part of this guarantee process.

Nor is any such requirement specifically stated in the Act, which was enacted pursuant to the authority granted by the Maine Constitution. Section 752(23) of the Act provides that the Authority may "issue insurance with respect to the financing of any eligible facility as hereinafter provided." Section 753 of the Act provides that the "Authority is authorized to insure the payment of mortgage loans, secured by eligible projects" consistent with

1/ The term "eligible facility" is not defined by the Act but Section 703(3) defines "eligible project" in terms of the type of projects which, under Art. IX, Sec. 14-A of the Maine Constitution, may be eligible for guarantee insurance.

the terms of the Maine Constitution. Finally, Section 803 of the Act specifies that the Authority is authorized to insure a percentage of a first mortgage of an eligible project "upon receipt of a proposal from the proposed tenant."^{2/}

The only direct source for a requirement that the Authority may only insure mortgages of an LDC is found in the original definition of a "mortgagor,"^{3/} as contained in Section 703(9) of the Act, prior to its amendment in 1977. That original definition read as follows:

"Mortgagor" shall mean the original borrower under a mortgage and his successors and assigns, and shall be limited to local development corporations. [Emphasis added].^{4/}

In 1977 this definition was changed to provide that a mortgagor may include but is not limited to LDCs. The 1977 amended definition, as currently in effect, reads as follows:

"Mortgagor" shall mean the original borrower under a mortgage and his successors and assigns, and may include:

A. Local development corporations, as defined in this section, except that this limitation may be waived at the sole discretion of the authority when deemed necessary for compliance with the terms and conditions of governmental grants, loans or subsidies made or to be made for the planning or financing of eligible projects;

B. Any borrowers for those eligible projects.

^{2/} The quoted provision does create some ambiguities about the requirement for LDCs because the use of the term "tenant" or "lessee" assumes the existence of an LDC. This particular section will be discussed in greater detail, infra.

^{3/} The original language was amended in 1968, P.L. 1967, c. 525, but that amendment is not relevant to our analysis.

^{4/} This method of mandating the existence of an LDC differs from that found in the Community Industrial Buildings In Maine Act, 10 M.R.S.A. §671, et seq., also administered by the Authority. There the declared purpose of the Act is "to provide financial aid and technical assistance to municipalities through their local development corporations...." Section 671 [Emphasis added].

10 M.R.S.A. §703(9), as amended by P.L. 1977, c. 489 [Emphasis added]. This change from "shall be limited" to "may include" is critical because, in our view, it evidences a clear legislative intent, in light of the significance of the definition of mortgagor to the operation of the Act as a whole, to eliminate the LDC requirement.^{5/}

We perceive no constitutional impediment to the elimination of the LDC requirement. As explained above, the Maine Constitution specifically authorizes the issuance of mortgage guarantees without any reference to any such requirement. Nor is there any compelling policy reason that would prevent the Legislature from eliminating the requirement. The Maine Supreme Judicial Court, in the context of the original requirement, has stated that the policy reasons for requiring LDCs are of no concern to the courts:

The Legislature in the Enabling Act has chosen to place the local development corporation between the industry on the one hand and the Bank or mortgagee on the other. . . . In this manner the Legislature brings the locality directly benefited or developed by industrial expansion into the picture through the control to be exercised by the local development corporation "to whose members no profit shall enure" The local development corporation, with its control of the project, seems also designed to lessen opportunity for speculation in industrial buildings or projects financed by insured mortgages. The wisdom of the policy is for the Legislature to determine and is not our concern.

Martin v. Maine Savings Bank, 154 Me. 259, 272-73, 147 A.2d 131, 138-39 (1958). [Emphasis added].^{6/}

^{5/} We are, of course, aware that use of the word "may" in a statute is not always permissive. See Collins v. State, 161 Me. 445, 213 A.2d 835 (1965). Where, as here, however, it is in clear contrast to previous mandatory language, it must be concluded that the legislative intent, which must, above all, control statutory construction, was to change the statute from a mandatory to a permissive one. See Boynton v. Adams, Me., 331 A.2d 370 (1975).

^{6/} If these were the policy reasons for the original LDC requirement, they do not appear to be reflected in the current practices of the Authority as we understand them. In most, if not all, cases of guarantees recently issued to LDCs, the LDC is merely a financing "straw corporation" set up and entirely controlled by the actual borrower.

Our only pause in concluding that the change in the statutory definition of a mortgagor effectively eliminates the requirement for LDCs arises from the continued references in the Act to "tenants" and "lessees," both of which, in the context of the Act, can be interpreted to mean tenants or lessees of an LDC^{7/}. Most significantly, Section 803 of the Act requires a proposal from the "proposed tenant" as a part of the application for a mortgage guarantee.^{8/}

In our view the failure of the Legislature either to eliminate this reference to an LDC or expand the wording of the section to include other eligible applicants is attributable to legislative oversight. This oversight, in all probability, resulted from the focus given by the Legislature on the Maine Guarantee Authority Revenue Obligation Securities Act, 10 M.R.S.A. §861, et seq. (the "Securities Act") when the definition of a mortgagor was changed in 1977. The Statement of Fact attached to the Legislative Document which ultimately enacted P.L. 1977, c. 489 (both amending the definition of mortgagor and enacting the Securities Act) explains that the changed definition, along with a number of other changes in the bill, "relate to the new authority for the [Authority] to aid business development better through the use of" the Securities Act. L.D. 1886, Statement of Fact (108th Legislature, 1977). However, the LD does not state that the advent of the Securities Act was the exclusive purpose for the changed definition. Indeed, the same Statement of Fact explains that "[a]ll of the program changes and additions are designed to increase the authority's flexibility to support economic development within its existing financial limits." Id. [Emphasis added]

7/ Neither of these terms is defined in the Act.

8/ Prior to 1975, Section 803 required a proposal from the "proposed mortgagee." Since the amendment adopting the present language was enacted prior to the change in the definition of mortgagor discussed herein, we do not view it as significant for purposes of our analysis.

In addition to Section 803, Sections 808 (defaults by LDC) and 852 (records confidential) still retain references to lessees or tenants. However, none of these references is inconsistent with the Legislature's abrogation of the local development corporation requirement because, while LDCs are no longer required by the Act, they are still permitted. Thus, it is still possible to have lessees and tenants.

Further evidence that the continued reference to a "proposed tenant" in Section 803 is a result of a legislative oversight can be found by examining the Act itself. Section 803 describes certain conditions for insurance of mortgages and is applicable both to guarantees of conventional mortgages and to guarantees of revenue obligation securities issued under the Securities Act. As just pointed out, the Legislature expressly intended to eliminate the requirement for LDCs in connection with revenue obligation securities. Therefore, if Section 803 were to be interpreted as reflecting the Legislature's intent to retain the requirement for LDCs, the statute would be a "self-defeating absurdity" - by first eliminating the requirement (in Section 703(9)) and then reinstating it (in Section 803) for both conventional mortgages and revenue obligation securities. Such a result is "not to be attributed to the Legislature if there are reasonable alternatives by which it may be avoided." State v. Denis, Me., 304 A.2d 377, 381 (1973). Rather, the Act should be "viewed in its overall entirety in order to reach an harmonious result which we presume the Legislature intended." Finks v. Maine State Highway Comm., Me., 328 A.2d 791, 795 (1974); In re Belgrade Shores, Inc., Me., 359 A.2d 59 (1976); Delano v. City of Portland, Me., 405 A.2d 222, 227 (1979). Here this means we should read the Act as eliminating the requirement for an LDC notwithstanding the failure of the Legislature to amend all sections of the Act which continue to refer or allude to LDCs.

In conclusion, the issue you have raised has not been an easy one to resolve. We do conclude that the Legislature, by amending the definition of mortgagor in section 703(9) of the Act, did intend to eliminate the requirement that the local development corporation must be the mortgagor of the Authority guaranteed loan. Nevertheless, because of the statutory inconsistencies referred to in this opinion, we strongly recommend further legislation to remove any doubt about this conclusion.

If you have any further questions, please feel free to contact me.

Sincerely,


RUFUS E. BROWN
Senior Assistant Attorney General

REB:jg
cc: Philip Clifford, III.