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Pittsburgh Field Office
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October 27, 2015*

MEMORANDUM FOR: Jaqueline Molinaro-Thompson, Director, Pittsburgh Office of Public Housing, Pittsburgh Field Office, 3EPH

FROM: James A. Mazzocco, Attorney-Advisor, Office of Counsel, Pittsburgh Field Office, 3EC

SUBJECT: [REDACTED] County Housing Authority – Borough of [REDACTED] Rental Registration Fee

This memorandum is in response to your request that Pittsburgh OGC assist your office in responding to an inquiry by the [REDACTED] Housing Authority (the “[REDACTED]” as to whether a certain rental registration fee (as more fully described below, the “Registration Fee”) imposed on [REDACTED] by the Borough of [REDACTED] (“[REDACTED]” constitutes an impermissible tax or special assessment under the August 5, 1950 cooperation agreement between [REDACTED] and [REDACTED] (the “Cooperation Agreement”) or is otherwise an impermissible tax for purposes of HUD requirements. Please note that our response here should only be construed as an advisory memorandum directed to the attention of Pittsburgh PIH and should not be construed as a legal opinion of HUD for either internal or external purposes. To this end we ask that any information disseminated from this memorandum to [REDACTED] include a disclaimer indicating that it is not a legal opinion of HUD.

As more fully discussed below, the Registration Fee would probably not be considered an impermissible tax or special assessment on [REDACTED] for purposes of the applicable federal law and HUD requirements because it appears to be a regulatory or licensing fee rather than a tax on real or personal property, though additional factual information could change this analysis. Please note, however, that this analysis is largely limited to questions of federal law and HUD requirements because such appear to be the areas of HUD’s direct concern in this context. There may be independent Pennsylvania state law considerations as to whether the Registration Fee is an impermissible tax under state law or otherwise a violation of the Cooperation Agreement, though such strictly state law considerations should be addressed by [REDACTED] solicitor.

I. Facts

The following facts and information are drawn from the correspondence and documentation provided with [REDACTED]’s request. The Registration Fee, along with other inspection and minimum living standard requirements, was established by [REDACTED] Ordinance #

1374 (the "Ordinance"), which became effective on January 1, 2015.¹ Section 1 of the Ordinance states:

"The purpose of this ordinance and the resulting policy of the Borough of [REDACTED] shall be to protect and promote the public health, safety and welfare of its citizens, to establish rights and obligations of owners (landlords) and occupants relating to residential rental, lease, or rent to own units in the Borough, and to encourage owners and occupants to maintain and improve the quality of rented, leased, or rent to own housing within the community. As a means to these ends, this ordinance provides for a systematic rental inspection program, registration and permitting of residential rental units and owners (landlords), and penalties for any violations of this Ordinance."

Section 9 of the Ordinance then provides that "[i]t shall be unlawful for any owner of real property within the Borough of [REDACTED] to let or to rent to another for occupancy any residential rental unit in the Borough of [REDACTED] unless a Residential Rental Unit Registration, being a permit, has been issued for that particular unit by the Code Endorsement Office". A subsequent section of the Ordinance then provides for a "\$50.00 per rental unit annual inspection fee" though it is not clear if this is the precise fee constituting the Registration Fee at issue here. The excerpted copy of the Ordinance provided here does not reference the term "tax" or refer to any taxing authority. It also does not describe the use to which any fees collected under the Ordinance will be put (e.g., whether such fees are to be used by [REDACTED] strictly for offsetting administrative costs incurred pursuant to the Ordinance or for general municipal purposes).

Pursuant to the Ordinance, the Office of Code Enforcement of [REDACTED] sent [REDACTED] a "Final Notice to Landlords" letter, which [REDACTED] received on May 14, 2015. This letter stated that "all rental units within the Borough of [REDACTED] must be annually registered . . . [a] \$50.00 annual registration fee shall be incurred if the rental unit is registered between April 01, 2015 and June 30, 2015; a \$65.00 annual registration fee plus fines, penalties, and Magistrate fees shall be incurred for rental unit registration after June 30, 2015." The notice also references the need for an annual inspection for all rental units with each rental unit inspection incurring a fee of \$50.00, though it is not clear if this is distinct from the \$50.00 annual registration fee.

In response to the May 14, 2015 letter, [REDACTED] apparently declined to pay the Registration Fee. [REDACTED] Executive Director forwarded a copy of the Cooperation Agreement to [REDACTED] Code Enforcement Officer and articulated that it was his position that the registration fee represented a "special assessment" that was prohibited under such Cooperation Agreement. The Cooperation Agreement provides in relevant part that "Under the constitution and statutes of the Commonwealth of Pennsylvania, all [REDACTED] Projects are exempt from all real and personal property taxes (and special assessments)

¹ We have only received a partial copy of the Ordinance itself and, therefore, cannot fully interpret its provisions directly and must instead rely on certain information and interpretation in some of the additional correspondence presented.

levied or imposed by any Taxing Body” and that “[redacted] agrees that it will not levy or impose any real or personal property taxes (or special assessments) upon [redacted projects] or upon [redacted] with respect thereto.”

[redacted] responded with another “Notice to Landlords” letter dated August 24, 2015 in which [redacted] appears to affirm that the fees levied pursuant to the Ordinance do not violate the Cooperation Agreement. This August 24th letter specifically states that [redacted] does not consider the fees under the Ordinance to be a “special assessment” because “there is no capital improvement from the enforcement [of the Ordinance,] only the enforcement of minimum health and safety standard [sic] of the tenants.” The letter also includes an Invoice for fees in the amount of \$6,110.00 (for 94 units at \$65.00 per unit) with the subject line “Registration fee for 2015”. For purposes of this memorandum, we will consider this the precise Registration Fee at question as it is unclear if there may be separate rental inspection fees or other fees implicated under the Ordinance.

Sometime after this response, [redacted] contacted the HUD Pittsburgh Field Office for guidance as to whether this Registration Fee was an impermissible tax or special assessment under the Cooperation Agreement.

II. Analysis

A. Federal Law and HUD Requirements

The underlying federal requirement that housing authorities be exempt from state and local property taxes ultimately originates from Section 6(d) of the U.S. Housing Act of 1937 (the “Act”), which provides in relevant part that an Annual Contributions Contract (“ACC”) between HUD and a housing authority for purposes of providing project funds must include a provision that “no contributions by [HUD] shall be made available for [the public housing project] unless such project . . . **is exempt from all real and personal property taxes levied or imposed by the State, city, county, or other political subdivision . . . and such contract shall require the public housing agency to make payments in lieu of taxes**” [emphasis added].² Section 5(e)(2) of the Act also provides that HUD “shall not make any contract for loans . . . or for contributions pursuant to this Act unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Secretary pursuant to this Act.”³ Both of these sections are embodied in certain promulgated regulations of HUD that provide that a public housing authority “must enter into a Cooperation Agreement with the applicable local governing body”, with “Cooperation Agreement” being defined for purposes of this provision as an “agreement, in a form prescribed by HUD, between a PHA and the applicable local governing body or bodies **that assures exemption from real and personal property taxes**” [emphasis added].⁴ Finally, these statutory and regulatory requirements are further embodied in the text of the terms and conditions of a housing

² 42 U.S.C. § 1437d(d).

³ *Id.* § 1437c(e)(2).

⁴ 24 C.F.R. § 905.108 and .602 (2015).

authority's ACC with HUD.⁵

Thus, from the perspective of HUD's authority, the [REDACTED] tax exemption requirements embodied in the Cooperation Agreement at issue here ultimately stem from Section 6(d) of the Act and the HUD regulations promulgated thereto. **Accordingly, we believe the primary legal inquiry for HUD's purposes should be whether the Registration Fee is a real or personal property tax under Section 6(d) of the Act and the attendant regulations. Note, however, although the term "special assessment" does not expressly appear in Section 6(d) of the Act, we will separately consider whether the Registration Fee is a "special assessment" for purposes of the Cooperation Agreement in our review of state law considerations, below.**

The term "property tax" in the context of the Act is not expressly defined under the Act itself or any applicable HUD regulations. In addition, HUD has apparently not issued program guidance as to what it considers a "property tax" in this context either. Furthermore, we also could not locate any authoritative case law in which relevant courts have directly interpreted the meaning or extent of the term "property tax" under Section 6(d) of the Act specifically.⁶ Thus, in the absence of any direct legal authority or existing HUD guidance as to what constitutes a "property tax" for purposes of the Act, we must analyze the Registration Fee and Ordinance under the Act by referencing other legal authorities.

Although no relevant courts have directly addressed the scope or definition of "property tax" under the Act specifically, a number of federal cases have interpreted whether other types of charges or fees should be considered a "tax" for purposes of *other* federal statutes that reference matters of state taxation.⁷ Such line of cases may be persuasive in interpreting "property tax" under the Act. **Under such line of cases, the term "tax" under the examined federal statutes is read to exclude "regulatory fees". A "tax" is characterized as being "imposed by a legislature upon many, or all citizens" and it "raises money, contributed to a general fund, and [is] spent for the benefit of the *entire* community. [emphasis added]"⁸ By contrast, a "regulatory fee" is "imposed by an agency upon those subject to its regulation [and] . . . it may serve regulatory purposes . . . indirectly by . . . raising money placed in a special fund to help defray the agency's regulation-related expenses". [emphasis added]⁹ Furthermore, in examining situations where a particular charge lies somewhere between these "classic tax" and "regulatory fee" designations, courts "have tended . . . to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays**

⁵ See Section 6 and the definition of "Cooperation Agreement" under the current ACC between HUD and [REDACTED]

⁶ A few state courts have indirectly considered this section of the Act, though all of the cases we were able to examine appear to have been decided under parallel state law requirements or other grounds and thus do not provide any further guidance to us. *See, e.g., King County Fire Prot. Dist. No. 16 v. Hous. Auth.*, 872 P.2d 516 (Wash. 1994); *Jersey City Sewerage Authority v. Housing Authority of Jersey City*, 190 A.2d 870 (N.J. 1963).

⁷ *See, e.g., San Juan Cellular Telephone Company v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992) (finding that a "periodic fee" imposed on a private cellular telephone carrier by a public service commission was a fee rather than tax for purposes of the federal Tax Injunction Act and Butler Act).

⁸ *Id.* at 685.

⁹ *Id.*

the agency's cost of regulation [emphasis added].¹⁰ One additional consideration may be how proportionate the revenues raised are in comparison to the expenses of the regulatory body.¹¹

Looking at the Act under this framework, the term “property tax” would likely be read to exclude “regulatory fees” as is the case in other federal statutes referencing “taxes”. Furthermore, under the above-discussed framework, the Registration Fee under the Ordinance appears to be more in the nature of a “fee” rather than a “tax”. First, like the classic “regulatory fee”, the Registration Fee is not imposed upon the general public or a large subset of the population of [REDACTED] and is instead imposed by the code enforcement office on owners of rental property (presumably a small subset of the general population). Next, based on the portion of the Ordinance stating that the Ordinance is to provide for a “systematic rental inspection program, registration and permitting of residential rental units and owners (landlords), and penalties for any violations”, it would seem that the Registration Fee is likely not being used to raise revenue for general municipal purposes, like a classic tax, but instead is being used to help defray the cost of regulation under the Ordinance itself, like a classic regulatory fee. Finally, the Ordinance itself does not directly indicate that it has been enacted to raise revenue pursuant to any taxing power authorized under state law and is instead enacted to “promote the public health, safety and welfare of its citizens.”

Although the above information counsels in favor of the Registration Fee not being a tax for purposes of the Act, additional information may shift this analysis. It is not clear based on the excerpt of the Ordinance provided whether any of the fees collected under the ordinance, including the Registration Fee assessed on [REDACTED] are to be segregated from the general revenues raised by [REDACTED] from other sources of revenue, including property taxes. It is also not completely clear if such revenues from fees will be used for other general public purposes outside of the rental registration and inspection regime described under the Ordinance. Related to this point, there has been no information provided to indicate whether the revenues raised under the Ordinance are proportionate to the costs of the registration and inspection regime. **If the Registration Fee is in fact being funneled directly to [REDACTED] general revenue fund, if such funds are being used by [REDACTED] to finance other purposes outside the scope of the inspection and registration regime itself, or if the total revenues raised greatly exceed the actual cost of administering the program, such factors may result in the Registration Fee being considered an impermissible tax under the Act.**

Finally, note that the above analysis of whether the Registration Fee is an impermissible “property tax” under the Section 6(d) of the Act, which is a federal statute, does not reference Pennsylvania state law interpretations about whether such rental registration fees are appropriately designated a tax, even though the Registration Fee is being assessed by a Pennsylvania entity ([REDACTED]) pursuant to Pennsylvania law. The reason for this is that additional federal court cases have held that terms in a federal statute that implicate actions under state law, including the term “tax” specifically, should not be dependent upon state law unless there is a clear indication that Congress intended the contrary.¹² No such clear intent to make Section 6(d)

¹⁰ *Id.*

¹¹ *See id.* at 687.

¹² *See, e.g., Miss Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989); *Robinson Protective Alarm Co. v.*

dependent upon state law is apparent in the Act itself. However, to the extent state law should be consulted in interpreting the meaning of the term “property tax” under the Act or the Cooperation Agreement, we address such state law issues below.

B. State Law Considerations; “Special Assessments”

Although the Cooperation Agreement and its tax exemption provisions are required pursuant to the Act and HUD regulations, Pennsylvania state law provides certain independent requirements that housing authorities like ██████ be exempt from property taxes and special assessments. Furthermore, Pennsylvania courts have also developed their own interpretations as to whether a rental registration fee should be considered a tax or a fee, though, as discussed above, such interpretations do not necessarily impact the interpretation of “tax” for purposes of the federal Act. As to these independent state law requirements that do not directly impact HUD’s requirements, we generally must refer ██████ to its own solicitor; however, we will provide a brief overview of these state law considerations for informational purposes.

Pennsylvania housing authorities, like ██████ are “bodies, corporate and politic” created under the Pennsylvania Housing Authorities Law (the “Housing Authorities Law”).¹³ In similar fashion to the federal Act, Section 1563 of the Housing Authorities Law provides that housing authorities “shall be exempt from all taxes and special assessments . . . of the city, the county, the Commonwealth, or any political subdivision thereof”, except that such housing authorities may make certain payments in lieu of taxes.

Like the federal Act, neither the term “tax” or “special assessment” are defined under the Housing Authorities Law itself, nor does there appear to be any Pennsylvania case law directly interpreting whether a rental registration fee in the nature of the Registration Fee at question here would be considered an impermissible tax or special assessment for purpose of the Housing Authorities Law specifically. However, Pennsylvania courts have generally addressed whether rental registration fees like the Registration Fee at issue here are to be considered a “tax”, and such case law may be controlling as to the Housing Authorities Law as well. Under such case law, annual rental registration fees have been found to be a “licensing fee”, which is a charge “imposed pursuant to a sovereign’s police power for the privilege of performing certain acts, **and which is intended to defray the expense of the regulation**” [emphasis added].¹⁴ Such a licensing fee is to be distinguished from a tax, which is “a revenue producing measure, which is characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision.”¹⁵ Further, a license fee “**must be commensurate with the expense incurred by the City in connection with the issuance and supervision of the license or privilege**” such that “**if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license**” [emphasis added].¹⁶ Finally, the party challenging a licensing fee has the burden

Philadelphia, 581 F.2d 371, 374-75 (3d Cir. 1978).

¹³ 35 P.S. § 1544

¹⁴ *Greenacres Apartments, Inc. v. Bristol Township*, 482 A.2d 1356, 1359 (Pa Commw. Ct. 1984) (holding that an annual \$5 inspection and registration fee for rental units was legitimate license fee rather than an impermissible tax).

¹⁵ *Id.*

¹⁶ *Thompson v. City of Altoona Code Appeals Bd.*, 934 A.2d 130, 133 (Pa Commw. Ct. 2007) (holding that a \$40 per

of proving that the amount of the fee is unreasonable.¹⁷ All doubt must be resolved in favor of the reasonableness of the fee because the municipality must be given reasonable latitude in anticipating the expense of the ordinance.¹⁸

Assuming this line of cases does apply to “taxes” under the Housing Authorities Law, the Registration Fee would probably be construed as a permissible license fee rather than an impermissible tax, especially because the party challenging the ordinance has such a high burden to overcome the “reasonable latitude” given to the municipality. However, as with the analysis under the federal law, additional factual information about whether the fees collected under the Ordinance were grossly disproportionate to the cost of the program itself could change the outcome. Again, this analysis would ultimately have to be addressed by [REDACTED] and its solicitor.

Finally, although the term “special assessment” is not expressly defined under the Housing Authorities Law and is apparently not addressed in related case law, the Registration Fee would appear to fall outside of the definition of this term as well. The term “assessment” generally designates an amount to be paid into the public treasury as a part of a benefit specially received by reason of some local improvement.¹⁹ For example, assessments may be imposed for the installation of sewers, water pipes, paving, sidewalks, curbs, etc., as distinguished from an ordinary tax, which is not an annual or recurring imposition.²⁰ Because the Registration Fee here does not appear to be for the purpose of some local physical improvement in the nature of a sewer system, etc., it would seem to be inapplicable, though it may be possible that additional facts and information regarding the ordinance would determine otherwise.

* * *

III. Conclusion

The Rental Registration fee is likely not an impermissible property tax for purposes of Section 6(d) of the U.S. Housing Act of 1937, and is thus not likely in violation of the Cooperation Agreement for HUD’s purposes. The Registration Fee appears on its face to be a regulatory fee assessed on [REDACTED] as a regulated party to help defray the cost of the regulation contemplated under the Ordinance. However, additional facts regarding how [REDACTED] uses the proceeds of fees like the Registration Fees and how proportionate such fees are in comparison to the cost of administering the registration and inspection program could tip the balance in favor of the Registration Fee being an impermissible tax. Although Pennsylvania state law does not directly concern HUD in this context and should be considered independently by [REDACTED] and its solicitor, Pennsylvania case law also appears to support the Registration Fee being a “licensing fee” rather than a tax, and thus not prohibited by the Cooperation Agreement or the Pennsylvania Housing Authorities Law. Finally, “special assessment” as discussed in the Cooperation Agreement and the Housing Authorities law is a term of art under state tax law and contemplates charges for capital improvements rather than anything related to the Registration Fee.

unit annual rental inspection fee was a valid license fee because the fees generated were not disproportionate to the cost of operating the program).

¹⁷ *Talley v. Commonwealth*, 553 A.2d 518, 520 (Pa. Commw. Ct. 1989)

¹⁸ *Id.*

¹⁹ *See, e.g., Philadelphia v. Philadelphia Transp. Co.*, 26 A.2d 909 (Pa. 1942)

²⁰ *Id.*