



TEXAS HOUSE OF REPRESENTATIVES

 COMMITTEE ON INTERGOVERNMENTAL AFFAIRS

Chairman Cecil Bell, Jr.

March 6, 2025

The Honorable Ken Paxton
 Texas Attorney General
 ATTN: Committee Opinion
 PO Box 12458
 Austin, Texas 78711

Re: Request for legal opinion regarding the application of Chapter 394 of the Texas Local Government Code to properties located outside the boundaries of local governments forming housing finance corporations

Dear General Paxton:

This letter serves as a formal request for your opinion regarding the authority of a housing finance corporation (an "HFC") formed by a local government pursuant to Chapter 394 of the Texas Local Government Code to engage in residential development outside of the geographic boundaries of the local government which formed the HFC with the resulting consequence that such residential development is exempt from taxation in the jurisdiction where the property is located. My request is identical to one made by former Chairman J. M. Lozano of the Urban Affairs committee in the Texas House of Representatives, (RQ-0566-KP). When the rules of the Texas House rolled jurisdiction Urban Affairs into the Intergovernmental Affairs committee, your office no longer had the ability to honor the "Request for Opinion." As I am resubmitting the identical "Request for Opinion", I am also requesting that the timeline from the initial request be used, as your findings on this issue could have a profound impact on pending legislation.

Background

The Texas Housing Finance Corporations Act, codified as Texas Local Government Code Chapter 394 (the "Act"), provides regulations for housing finance corporations which can be created by any local government for the purposes defined therein. A local government is defined as any municipality or county for the purposes of the Act. The stated purpose of the Act is to provide a means to finance the cost of residential ownership and development that will provide decent,

safe, and sanitary housing at affordable prices for residents of local governments. Pursuant to the Act, all property owned by a housing finance corporation and used for public purposes is exempt from all taxes imposed by the state or any political subdivision of the state.

It has come to the attention of the undersigned that certain HFCs formed by local governments are being used to engage in residential development in cities and counties outside of the local governments which formed the HFCs. These deals are generally done as public/private partnerships where a private developer will acquire land for development or an existing multifamily project and convey it to an HFC which will then lease it to a partnership comprised of the private developer and its investors and a subsidiary of the HFC. Generally, the HFC will receive fees paid by the developer and/or project owner and a portion of the cash flow generated by the project. The HFC will have a nominal financial investment in and commitment to the project. The property owner will claim a 100% exemption from property taxes and sales tax on construction materials on the grounds that the project is publicly owned and used for a public purpose.

Where an HFC engages in residential development within the boundaries of the local government that formed it, the elected officials of that local government, or board members appointed by the local government, have the ability to make a cost/benefit analysis with respect to whether the public benefit derived from the affordable housing offered by the project is worth the reduction in tax revenue to the local community due to the tax exemption. If an HFC can own property located outside of the boundaries of the local government which created the HFC, the elected officials of the local government where the property is located do not have the ability to weigh the costs and benefits of the project to the local community.

We are aware that certain HFCs have claimed tax exemptions for property located outside of the boundaries of their sponsoring local governments and that certain appraisal districts have granted exemptions to these types of trans-jurisdictional public/private partnerships. We believe that any such results are based on a misapprehension of the particular requirements of Chapter 394. As written, Chapter 394 precludes these types of out-of-jurisdiction deals by an HFC. Nevertheless, we are aware of current efforts by certain HFCs and private developers to do these types of deals based on advice of counsel that such deals are permitted by the Act and do, in fact, create tax exemptions on property outside of the geographic boundaries of the sponsoring local governments of the HFCs. We have been made aware of legal opinions given in support of the legality of such trans-jurisdictional residential developments and the resulting tax exemptions. We have also been provided with legal analysis to the contrary.

In 2023, the Legislature addressed similar concerns with the use of a public facilities corporation created under Chapter 303 of the Texas Local Government Code to exempt property located outside of the geographic boundaries of the sponsor of the public facilities corporation. H.B. 2071 addressed the jurisdictional issue and also provided for more robust affordable housing requirements, transparency and tenant protections than were previously included in that Chapter. It now seems that some private developers are turning to Chapter 394 in an attempt to avoid the restrictions under Chapter 303 covering public facilities corporations. In its review of

Chapter 303 prior to the enactment of H.B. 2071 in Opinion No. KP-0437, the Attorney General pointed out that Chapter 303 was silent as to the geographic restrictions on public facilities corporations. In contrast, Chapter 394 is not silent with respect to housing finance corporations.

Chapter 394.903(a) plainly states that "a residential development covered by this chapter must be located within the local government". Based on the plain language of this section, we believe that Chapter 394 does not allow an HFC to own a residential development outside of geographic boundaries of the local government which formed the HFC. A brief in support of our position is enclosed with this request.

Request

In light of the foregoing, we respectfully request that the Attorney General provide his opinion with respect to the following questions:

Does a housing finance corporation formed by a local government pursuant to Chapter 394 of the Texas Local Government Code have the authority to engage in residential development outside of the jurisdictional boundaries of the local government which formed it?

If a housing finance corporation does have the authority to engage in residential development outside of its jurisdictional boundaries, is that residential development eligible for a 100% tax exemption?

Thank you for your time and assistance in this matter. We would be glad to provide any additional information you may require with respect to this matter of concern and importance to local governments, taxing authorities, appraisal districts and residents of local communities affected by the practices described herein.

Sincerely,

A handwritten signature in black ink, appearing to read "Cecil Bell, Jr.", with a stylized flourish at the end.

Chairman Cecil Bell, Jr.

Encl.

cc: George Lane, Director of Intergovernmental Relations, Office of the Attorney General

BRIEF IN SUPPORT
OF
REQUEST FOR ATTORNEY GENERAL OPINION

This brief is in support of the letter from Representative Cecil Bell Jr., Chair of the House Intergovernmental Affairs Committee (the “Committee”). This letter, and this request, is identical to a letter sent from Representative J.M. Lozano dated September 2024, addressed to Attorney General Ken Paxton requesting that the Attorney General provide an opinion regarding the following questions:

Does a housing finance corporation formed by a local government pursuant to Chapter 394 of the Texas Local Government Code have the authority to engage in residential development outside of the jurisdictional boundaries of the local government which formed it?

If a housing finance corporation does have the authority to engage in residential development outside of its jurisdictional boundaries, is that residential development eligible for a 100% tax exemption?

The purpose of this brief is to provide additional background information, legal authorities and analysis with respect to the above-referenced request.

Background

The Texas Housing Finance Corporations Act, codified as Texas Local Government Code Chapter 394 (the “Act”), governs the formation, authority and operation of housing finance corporations. See generally TEX. LOC. GOV'T. CODE §§394.001-394.907. A housing finance corporation may be formed by the governing body of a local government upon consideration of a written application for the incorporation of a housing finance corporation filed with the governing body by at least three qualified residents of the local government and the adoption of a resolution by the governing body. Id. §394.011. A joint HFC may also be formed by the governing bodies of more than one local government upon the consideration of the written application for the incorporation of a joint housing finance corporation to act on behalf of the local governments by three qualified residents of each local government and the adoption of a resolution by each governing body. Id. §394.012. For the purposes of the Act, a local government is defined “as any municipality or county.” Id. §394.003(10). The stated purpose of the Act is “to provide a means to finance the cost of residential ownership and development that will provide decent, safe, and sanitary housing at affordable prices for residents of local governments.” Id. §394.002. All property owned by a housing finance corporation and used for public purposes is exempt from all taxes imposed by the state or any political subdivision of the state. Id. §394.905.

The Act only applies to a residential development where ninety percent of the development is occupied by or is intended to be occupied by persons of low and moderate income. Id. §394.004. The term “residential development” is defined in §394.003(13).

HFCs are being used to finance the acquisition, development, ownership and operation of private residential developments. These deals are generally done as public/private partnerships where a private developer will acquire land for development or an existing multifamily project and convey it to an HFC which will then lease it to a partnership comprised of the private developer, its investors and a subsidiary of the HFC. Generally, the HFC will receive fees paid by the developer and/or project owner and a portion of the cash flow generated by the project. The HFC will have a nominal financial investment in the project with no commitment to provide for the future capital needs of the project. All costs of the project are paid by the private developer with investor capital and debt arranged by the developer. The property owner will claim a 100% exemption from property taxes on the grounds that the project is publicly owned and used for a public purpose. A common feature of this structure is the right of the private party to compel the transfer of the HFC’s interests in the property and the partnership for a nominal consideration if the 100% tax exemption is not obtained or is lost.

An example of this structure is described in a proposed Memorandum of Understanding between Pleasanton Housing Finance Corporation and Elevate CIG with respect to an existing multifamily residential development in Weatherford, Texas. Pleasanton Housing Finance Corporation is a housing finance corporation organized by the local government of Pleasanton, Texas pursuant to the Act. Pleasanton is located in Atascosa County, Texas. Weatherford is located in Parker County, Texas. Elevate CIG is the record owner of the property which is the subject of the memorandum. The memorandum contemplates the conveyance of the property to the HFC which will, in turn, enter into a 99 year ground lease with a limited partnership owned by the HFC, the Developer and an investor. All costs of the project are to be paid by the developer. The HFC will receive certain fees and revenue from the project. The parties contemplate that the property will be 100% tax exempt. The MOU provides that, notwithstanding anything to the contrary, if the tax-exempt status of the project is lost for any reason during the first twenty years, the fee title to the property will be transferred to the tenant or its successor for \$1.00.

The Committee believes that the use of HFCs created by one local government to own property within the geographic boundaries of another local government that did not approve the formation of the HFC or have any control over the exemption status of

properties within its boundaries is not supported by the plain reading of the statute. It is also contrary to good public policy. Where an HFC engages in residential development within the boundaries of the local government which formed it, the elected officials of that local government have the ability to make a cost/benefit analysis with respect to whether the public benefit derived from the housing offered by the project is worth the reduction in tax revenue to the local community due to the tax exemption. If an HFC can engage in residential development located outside of the boundaries of the local government which created the HFC, the elected officials of the local government where the property is located do not have that same ability to weigh the costs and benefits of the project to the local community.

Because of the importance of this issue to the residents of local governments of this state, the Committee has requested that the Attorney General issue his opinion regarding the matter and to consider, specifically, whether a housing finance corporation formed by a local government pursuant to Chapter 394 of the Act has the authority to engage in residential development outside of the jurisdictional boundaries of the local government which formed it.

Analysis of Relevant Code Sections

Because HFCs are governed by the Act found in Chapter 394 of the local government code, the question posed to the Attorney General presents a question of statutory construction. Texas courts “interpret statutes by looking to their plain language and construing the text in light of the statute as a whole.” *City of Austin v. Quinlan*, 669 S.W.3d 813, 821 (Tex. 2023). The primary objective of this statutory construction is to give effect to the Legislature’s intent, and Courts seek to give effect to the Legislature’s intent by “enforce[ing] the plain meaning of statutory text, informed by its context.” *Hegar v Health Care Serv. Corp.*, 652 S.W. 3rd 39, 43 (Tex. 2022).

§394.903(a) states that “[a] residential development covered by this chapter must be located within the local government” (emphasis added). A plain reading of this section would suggest that this is referring to the local government which formed the HFC. This interpretation would answer the question and end all inquiry; however, there are contrary interpretations of the chapter being used to justify the participation of HFC’s in residential development projects outside of their sponsoring local governments.

One such argument states that the phrase “within the local government” must be read to mean “any local government” because the definition of “local government” in the chapter is “any municipality or county”. The argument states that replacing the words “local government” with “municipality or county” in the section renders the literal

reading of the phrase “the any municipality or county” which is a grammatical absurdity and, therefore, the language must mean “any local government.” One could just as easily say that such a grammatical absurdity militates against taking this mechanical approach to reading the statute and that the section should be read according to its plain meaning. In other words, “the local government” means “the local government.” And if one reads those words in the context of the chapter as a whole, the phrase refers to the local government which formed the HFC, not the local government where the property is located.

The phrase “the local government” is used 39 times in the chapter. In all but a few of those instances, the phrase is clearly used in the context of the formation and governance of a housing finance corporation to mean the local government which formed the HFC. To replace the definitive article “the” with the word “any” would not make sense in the context of those provisions. For example, §394.011(a) provides “the governing body of a local government shall consider a written application for the incorporation of a housing finance corporation filed with the governing body by at least three residents of the local government who are citizens of this state and at least 18 years of age” (emphasis added). There would be no need to state a residency requirement if any citizens of the state could petition a local government to form an HFC. The other uses of the phrase in the chapter which are not directly related to formation and governance can be read to be consistent with the interpretation that “the local government” means the local government which formed the HFC pursuant to the chapter. In context, the use of the phrase “any municipality or county” in the definition of “local government” in §394.003(10) is not problematic because it merely expresses the intent that there would be no restrictions or conditions (population size, for instance) on who could form an HFC other than that they be a municipality or county. The definition does not define the geographical boundaries of operation or authority. Furthermore, to read §394.903(a) to permit a residential development covered by the chapter to be located in any county or municipality would render that section meaningless which would be contrary to the established rules of statutory construction.

§394.055(c) and §394.055(d) both use the phrase “the state, the local government, or any other municipality, county, or other municipal or political corporation or subdivision of the state.” To replace the words “the local government” with “any municipality or county” in these clauses renders the phrase redundant. Reading it plainly further emphasizes the point that the legislature meant the local government sponsor of the HFC when it used the phrase “the local government”.

§394.902 uses the phrase “the governing body of the local government that authorizes, sponsors, or otherwise participates in the creation of the housing finance corporation

shall cooperate....”(emphasis added). This is further evidence of the legislature’s meaning with respect to the phrase “the local government”. It would be strange that the only place in the chapter those words should be replaced with “any municipality or county” is in §394.903(a). This would ignore the majority of the other times the phrase is used and, in context, can only mean the local government which formed the HFC under the Act.

There are provisions of the chapter that seem, at first blush, to imply that an HFC may own a residential development outside of the jurisdiction which formed it.

§394.002(c)(1) finds that the creation of a housing finance corporation is for the benefit of the people of the state” (emphasis added), and §394.002(c)(3) states that an HFC “performs an essential government function on behalf of and for the benefit of the general public, the local government, and this state (emphasis added). The argument is that it is a public benefit of all residents anywhere in the state and the state government to allow an HFC to own and operate residential developments outside of its sponsoring government’s boundaries. But this provision merely expresses that an HFC performs a governmental function and fulfills a public purpose for the benefit of the state and its residents. It does not address the authorized geographical boundaries of operation or investment of an HFC. An HFC would serve these purposes if its authority was limited to operation within the geographic boundaries of the local government which formed it.

§394.032(e) provides that “[a] housing finance corporation may delegate to the Texas Department of Housing and Community Affairs the authority to act on its behalf in the financing, refinancing, acquisition, leasing, ownership, improvement, and disposal of home mortgages or residential developments, within and outside the jurisdiction of the housing finance corporation, including its authority to issue bond for those purposes” (emphasis added). Whether or not “jurisdiction” in this instance means “geographic boundaries”, this section deals with delegation of an HFC’s authority to the Texas Department of Housing and Community Affairs to act on its behalf. This provision does not authorize an HFC’s direct involvement in public or private residential development outside of its “jurisdiction” which does not involve the HFC delegating its authority to the TDHCA.

Pursuant to §394.039(3) an HFC may “purchase, receive, lease, or otherwise acquire, own, hold, improve, use, or deal in and with real or personal property or interests in that property, wherever the property is located, as required by the purposes of the corporation” (emphasis added). This seems to suggest that an HFC could own any property anywhere in the state. But, the phrase “as required by the purposes of the corporation” qualifies the preceding words in the sentence. The purpose clause of the Act, §392.002(a), states that the purpose is to provide a means to finance the cost or

residential ownership and development that will provide decent, safe and sanitary housing at affordable prices for residents of local governments” (emphasis added). Given the contextual use of the term “local government” throughout the chapter, as discussed above, this suggests that the purpose the chapter was to allow for the use of an HFC to finance the cost of housing for the residents of the local government that formed it. Moreover, this provision does not definitely state that an HFC may operate outside the boundaries of the local government, but does suggest that there are no limitations on where an HFC may own property unless otherwise stated in the statute. Which brings us back again to §394.903(a) which provides such a limitation with respect to “residential development”.

It would be important to note here the distinction between “property” and “residential development”. §394.039(3) concerns “property” of an HFC. §394.903(a) concerns “residential developments”, obviously, a subset of “property”. While the term “property” includes “residential development,” it does not mean only “residential development.” In other words, all “residential developments” are “property” but not all “property” is a “residential development.” This is an important distinction. It is possible that an HFC could own property within a municipality or county other than its sponsoring municipality or county, but, if that property is a residential development, the chapter (including the tax exemption provided in the chapter) does not apply to a residential development unless it is located within the geographic boundaries of the local government which formed the HFC. Other “property” could be owned in another municipality subject to any other limitations in the chapter, including the limitations of §394.005, which is discussed below.

§394.005 states: “[t]his chapter does not apply to property located within a municipality with more than 20,000 inhabitants as determined by the housing finance corporation’s rules, resolutions relating to the issuance of bonds, or financing documents relating to the issuance of bonds, unless the governing body of the municipality approves the application of the chapter to that property.”(emphasis added) This provision seems to allow for an HFC to own a residential development in a municipality other than the municipality which formed it. But here again the distinction between the words “property” and “residential development” is important. It is possible that an HFC could own property within a municipality other than its sponsoring municipality if the requirements of §394.005 are satisfied, but, if that property is a residential development, §394.903(a) would control and the chapter would not apply to such property.

§394.903(b) states, in part, that “[t]he local government may transfer any residential development site to a housing finance corporation by sale or lease” and “[t]he site may be located wholly or partly inside or outside the local government”(emphasis added).

The language of §394.903(b) seems to contradict §394.903(a); however, we believe the two sections can be reconciled and are not contradictory. First, subsection 903(a) addresses the entire chapter and all of its provisions; while subsection 903(b) relates to a more narrow and specific authorization. Subsection 903(b) allows a local government to transfer a residential development site to an HFC. That property could be located anywhere. It does not authorize an HFC acting independently to engage in residential development outside of the geographic location of its sponsoring local government. Subsection 903(a), on the other hand, expressly limits the exercise of the authority granted to an HFC with respect to residential developments to the geographical location of the local government which formed it. While a local government may transfer a residential development wherever located to an HFC, if the HFC is to obtain the benefits of the Act, including the right to issue bonds and obtain the associated tax exemption with respect to the residential development, it must do so within the boundaries of the local government in accordance with Subsection 903(a). This does not render Subsection 903(b) meaningless. A local government could very well transfer property it owns outside its jurisdiction to an HFC formed by the local government where the property is located. A site that is located wholly or partly within or without the local government can be transferred to an HFC. One that is located wholly within a local government other than the local government which formed the HFC would not be covered by the chapter except as provided in §394.012 (with respect to joint housing finance corporations).

§394.012 establishes a procedure for “[t]he governing bodies of more than one local government” to form a “joint housing finance corporation” that can act “on behalf of each of the sponsoring local governments as provided by the articles of incorporation.” §394.012(a), (e). If a local government wants to create an HFC to own and operate a residential development outside of its geographic boundaries, it can do so by joining with other local governments to form a joint HFC. This provision would not be necessary if §394.903(a) allowed residential developments to be located outside the geographic boundaries of the local government which formed the HFC.

Case Law

Collin Cent. Appraisal Dist. v. Garland Hous. Fin. Corp., No. 05-19-01417-CV, 2021 WL 711478 (Tex. App.—Dallas Feb. 22, 2021, pet. denied) (“Collin”) has been cited for the proposition that an HFC can engage in residential development outside of the geographic boundaries of the local government which created it. In that case, an HFC was seeking to obtain a tax exemption under §394.905 for property located outside of the geographic boundaries of the local government which formed it. The court upheld the tax exemption. Collin narrowly focused on the interpretation of §394.005 and did

not address the specific issue presented in this brief and, thus, is not dispositive of the issue.

We have found only one reported opinion discussing §394.903(a). See, *Walker v. U.S. Dep't of Housing & Urban Dev.*, 326 F. Supp. 2d 773, 777 (N.D. Tex. 2004) (“Walker”). *Walker* is a housing authority case under chapter 392 of the Local Government Code in which the court was called upon to determine whether a housing authority created by the City of Dallas could own a “residential development” outside of its statutory area of operation. In reviewing the matter, the court considers §394.903(a). Its analysis of §394.903(a) is instructive.

According to Walker:

“Section 392.066 links the establishment of a public facility corporation by a housing authority to Chapter 303, the Public Facility Corporation Act. It endows a public facility corporation created by a housing authority with the power to “acquire, construct, ... or provide assistance to a residential development described by Section 394.004 or a housing project.” Tex. Loc. Gov't Code Ann. §392.066(a) (1) (Vernon Supp.2004). Section 394.004 applies Chapter 394 to residential development when at least 90% of the residential development serves low or moderate income persons. Tex. Loc. Gov't Code Ann. §394.004 (Vernon 1999). Chapter 394 (the “Texas Housing Finance Corporation Act”) is intended to “provide a means to finance the cost of residential ownership and development.” *Id.* at §394.002(a). It defines residential development as “for the purpose of providing decent, safe, and sanitary housing and nonhousing facilities that are an integral part of or functionally related to any affordable housing project, whether in one or multiple locations.” *Walker*, 326 F. Supp.2d at 776.

“In sum, a housing authority may create a public facility corporation, and that public facility corporation may provide financial assistance to residential developments or housing projects. Texas law specifically restricts a housing authority's power to operate, construct, and lease a “housing project” to its area of operation, but it does not specifically disallow “residential development” outside its area of operation. Residential developments are legally distinct from housing projects, but they must be functionally related or an integral part of an affordable housing project. However, § 394.903(a), which applies to residential development by public facility corporations via § 394.004, restricts residential development to locations within the local government. “Local government” refers to any municipality or county, and in the context of a public facility corporation

created by a housing authority, the housing authority's jurisdiction serves as an appropriate proxy for the limitation.” (emphasis added) Id. at 777.

Conclusion

The Committee strongly believes that the plain language of Chapter 394 permits a housing finance corporation to engage in residential development only within the boundaries of the local government which formed it and that a careful analysis of the statute as a whole supports this conclusion.