

FREEDOM OF INFORMATION COMMISSION  
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

FINAL DECISION

Kirk Carr,

Complainant

against

Docket #FIC 2017-0155

Arthur Isaacson, Chairman,  
Clinton Housing, Inc.

Respondent

January 10, 2018

The above-captioned matter was heard as a contested case on May 25, 2017, at which time the complainant and the respondent appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint. This case was consolidated for hearing with Docket #FIC 2017-0167, Kirk Carr v. Jose Lopez, President, Liberty Place Affordable Housing Partnership; and Liberty Place Affordable Housing Partnership.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. By letter of complaint filed March 21, 2017, the complainant appealed to the Commission, alleging that Clinton Housing, Inc. was the functional equivalent of a public agency and that the respondent had violated the Freedom of Information (“FOI”) Act by denying his request for certain records. The complainant requested, among other remedies, the imposition of a civil penalty against the respondent Chairman of Clinton Housing, Inc.
2. It is found that the complainant made a March 3, 2017 request to the respondent for “a copy of any and all sales or purchase agreement(s) active or expired for property at 8 Liberty Place in Clinton, Connecticut between Clinton Housing, Inc. (aka Clinton Senior Housing Inc.) and 8 Liberty Place LLC.”
3. It is found that the respondent denied the request on March 9, 2017, asserting that Clinton Housing is not a public agency within the meaning of the FOI Act.
4. Section 1-200(1), G.S., defines “public agency,” as:
  - ... (A) Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough,

municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions, and for purposes of this subparagraph, “judicial office” includes, but is not limited to, the Division of Public Defender Services; (B) Any person to the extent such person is deemed to be the functional equivalent of a public agency pursuant to law; or (C) Any “implementing agency,” as defined in section 32-222.

5. It is found that Clinton Housing, Inc., is not a public agency within the meaning of §1-200(1)(A) or (C), G.S. The complainant contended that Clinton Housing, Inc., is a public agency within the meaning of §1-200(B), G.S.

6. It is found that Clinton Housing, Inc., formerly known as Clinton Senior Housing, Inc. (“Clinton Housing”) was organized as a private, non-stock corporation in 2013 to procure funding for the construction of affordable elderly housing primarily by a combination of loans and low income tax credits that could be claimed by private equity investors.

7. It is found that Clinton Housing entered into a contract with 8 Liberty Place, LLC in September 2015 to acquire certain real property known as 8 Liberty Place, Clinton, Connecticut (the “Property”).

8. It is found that, in 2016, Clinton Housing applied for and secured zoning and other approvals, and a tax abatement, for the development of an affordable 21-unit residential apartment building on the Property (the “Project”) that would exclusively serve individuals or families earning 50% or less of the area median income.

9. It is found that, after zoning approvals were obtained, Clinton Housing entered into an “arrangement” with Mutual Housing Association of South Central Connecticut, Inc. d/b/a Neighborworks New Horizons (“Neighborworks”), pursuant to which rights to the Project would be transferred to a new entity to be controlled primarily by Neighborworks, and Neighborworks would assume day-to-day management responsibilities.

10. It is found that in furtherance of this arrangement, in January 2017 Clinton Housing and Neighborworks formed Liberty Place Affordable Housing General Partner LLC (“GP”), a limited liability company, of which Neighborworks is the manager and Clinton Housing is a non-managing minority member.

11. It is found that the GP then formed Liberty Place Affordable Housing Limited Partnership (“LP”) to own and develop the Project. GP’s interest in LP is one-tenth of one

percent, with the balance being owned by a private investor limited partner, NDC Corporate Equity Fund XIII, L.P. (the "Private Investor").

12. It is found that, under the Operating Agreement between Clinton Housing and Neighborworks, Clinton Housing has no say in the day-to-day management of GP, LP or the Project.

13. It is found that, in May 2017, LP (i) purchased the Property, (ii) closed on about \$1.95 million of equity financing from the Private Investor, (iii) closed on a loan from the Connecticut Housing Finance Authority ("CHFA") in the amount of about \$8.3 million, and (iv) repaid a \$216,000 bridge loan that Clinton Housing had previously obtained from the Connecticut Department of Housing.

14. With respect to whether Clinton Housing is the "functional equivalent" of a public agency pursuant to §1-200(1)(B), G.S., four factors must be considered: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by government. See Board of Trustees of Woodstock Academy v. Freedom of Information Commission, 181 Conn. 544, 554 (1980). "All relevant factors are to be considered cumulatively, with no single factor being essential or conclusive." Connecticut Humane Society v. Freedom of Information Commission, 281 Conn. 757, 761 (1991).

15. With respect to whether Clinton Housing was created by government, it is found that the Clinton Housing Authority, a town agency, is separate from Clinton Housing. According to the affidavit of the president of Clinton Housing, Clinton Housing was not and is not affiliated with, or in any way sponsored by, the Clinton Housing Authority or the Town of Clinton.

16. Nonetheless, it is found that two of the five founding members of Clinton Housing were appointed members of the Clinton Housing Authority.

17. It is found that the specific purpose for the formation of Clinton Housing was to create a private entity that could obtain funding for an elderly affordable housing project because the town was unwilling to become obligated on loans that would have been required had the town undertaken the project.

18. It is found that the same attorney (John Bennet) who represented the town of Clinton also drafted Clinton Housing's organizational documents for filing with the Connecticut Secretary of the State, as he had previously done with Clinton Senior Housing, Inc. Bennet also prepared a portion of its application for income tax exemption with the IRS. It is found that Bennet is an attorney in private practice with clients that include the town. Bennet did not bill for his time representing Clinton Housing. The cost of filing, \$105.00, was initially billed by Bennet to, and paid for by, the town. Clinton Housing reimbursed the town three years later.

19. Also, it is found that since at least 1979, the Town of Clinton has itself had an Elderly Housing Committee, sometimes known as the Committee to Study Elderly Housing, and most recently known as the Senior Housing Project Committee. The Senior Housing Project

Committee and the Housing Authority shared a goal of creating affordable senior housing in the town of Clinton.

20. It is found that the Senior Housing Project Committee voted at its February 7, 2012 special meeting to work with the Clinton Housing Authority to “form a nonprofit,” i.e., Clinton Housing, Inc.

21. It is also found that two of the five founding members of the respondent Clinton Housing were members of the town’s Elderly/Senior Housing Committee.

22. While Clinton Housing was not expressly created by government in the same way that, for example, Woodstock Academy was created by a special corporate charter of the Connecticut state legislature in 1802 (see Woodstock Academy, above, at 546), it is found that Clinton Housing was nonetheless created by officials of the Town Housing Authority and the Elderly Housing Committee. It is additionally found that the respondent was created in order to undertake a project that the town itself would have considered undertaking absent the need to be obligated on a loan for the requisite funds. It is also found that the respondent was created with the authorization of the Senior Housing Project committee, and utilizing the services of the town’s attorney who billed the Town for his costs. While the respondents claimed that the billing was an error, the billing was paid by the Town at the time and not “corrected” until three years later when the respondent reimbursed the Town.

23. It is concluded that Clinton Housing was created by government.

24. With respect to the second prong for functional equivalence, level of governmental funding, it is found that the Project was funded by loans from the Connecticut Housing Finance Authority (“CHFA”) in the combined amount of approximately \$8.3 million, private investment in the amount of approximately \$1.95 million, by a \$216,000 pre-development loan from the State of Connecticut Department of Housing (“DOH”), and by an annual \$3,500 tax abatement from the town of Clinton.

25. It is concluded that none of these sources of funding is “governmental funding,” as that term has been interpreted in any prior Commission decision. The governmental loans must be paid back, and the private investment is clearly not governmental funding.

26. With respect to the third prong for testing functional equivalence, the complainant contended that there is a high extent of governmental involvement or regulation because the GP is regulated by the state and federal departments of housing, because Clinton Housing has applied for and received a permit for an affordable housing floating zone, because Clinton Housing has received a tax abatement, because the IRS has designated Clinton Housing as a public charity as opposed to a private foundation under §501(c)(3) of the Internal Revenue Code, and because the GP is subject to regulation by the Clinton Fair Rent Commission, Connecticut River Area Health District and the Connecticut Department of Energy and Environmental Protection.

27. In Hallas v. Freedom of Information Commission, 18 Conn. App. 291, 296, *cert. denied*, 212 Conn. 804 (1989), the court concluded that, in order to satisfy the government regulation prong of the functional equivalent test, the entity “must operate under direct,

pervasive or continuous regulatory control.” Based upon all of the facts set forth above, it is found that, although the town and state and federal agencies exercise the same kind of general oversight over Clinton Housing, GP and LP as they do other private entities, neither the town, the state nor the federal government exercise the type of “extensive, detailed and virtually day-to-day supervision” required by the courts to satisfy the governmental involvement or regulation prong of the Woodstock test. Accordingly, it is found that the level of government involvement or regulation is not substantial.

28. With respect to whether Clinton Housing performs a governmental function, the complainant contended that this Commission has previously decided that the provision of elderly affordable housing is a governmental function in Docket #FIC 2001-442, Najarian v. First Church Village Housing, Inc. (“First Church”).

29. The Commission in First Church found that the respondent “operated a Section 8 housing program for the town of Wethersfield, the State of Connecticut and the United States of America.” First Church at ¶7. However, the Project at issue in this case is not a “Section 8” project and is not operated for any level of government. A “Section 8 project” is sometimes called a “project-based” Section 8 program, in which the owner reserves some or all of the units in a building for low-income tenants, in return for a federal government guarantee to make up the difference between the tenant’s contribution and the rent in the owner’s contract with the government. The First Church project was such a “project-based” Section 8 project. An owner of a project-based Section 8 program must enter into a contract with the U.S. Department of Housing and Urban Development under which substantial on-going regulatory oversight is imposed and there is substantial involvement by the local public housing authority in leasing decisions.

30. In contrast, it is found that the Project in this case, although it may accept Section 8 vouchers, just as any private landlord may, is not a “project-based” Section 8 program with the kinds of regulatory control, and rent guarantees, of such a project. If the mere acceptance of Section 8 vouchers made the Project a “Section 8 project” of the type described in First Church, then all residential rental properties accepting vouchers would be “Section 8 projects” and all such landlords the functional equivalents of public agencies.

31. It is therefore concluded that First Church provides little guidance for the instant case. Aside from the specific “project-based” section 8 project described in First Church, this Commission has never concluded that the provision of affordable housing is a governmental function.

32. While federal, state and local assistance to private developers for the purpose of the encouragement and provision of affordable housing demonstrates that there are governmental policies to provide such assistance, the mere provision of that assistance does not convert the private construction and operation of that housing into a governmental function. The governmental function is the provision of assistance, not the construction or operation itself.

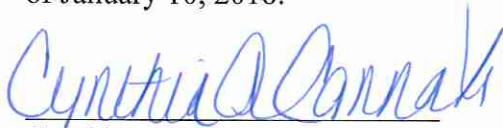
33. In summary, it is concluded that only one prong of the Woodstock test is satisfied in this case. Considering all four factors cumulatively, it is concluded that Clinton Housing is not the “functional equivalent,” of a public agency, under §1-200(1)(B), G.S.

34. Accordingly, it is concluded that Clinton Housing is not a public agency, and that the Commission lacks jurisdiction over the respondent in his capacity as President of Clinton Housing.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The complaint is dismissed.

Approved by Order of the Freedom of Information Commission at its regular meeting of January 10, 2018.



Cynthia A. Cannata  
Acting Clerk of the Commission

PURSUANT TO SECTION 4-180(c), G.S., THE FOLLOWING ARE THE NAMES OF EACH PARTY AND THE MOST RECENT MAILING ADDRESS, PROVIDED TO THE FREEDOM OF INFORMATION COMMISSION, OF THE PARTIES OR THEIR AUTHORIZED REPRESENTATIVE.

THE PARTIES TO THIS CONTESTED CASE ARE:

**KIRK CARR**, 9 Osprey Commons South, Clinton, CT 06413

**ARTHUR ISAACSON, CHAIRMAN, CLINTON HOUSING INC.**, c/o Attorney David S. Hoopes, Hoopes, Morganthaler & Scaramozza LLC, City Place II, 185 Asylum Street, Hartford, CT 06103



Cynthia A. Cannata  
Acting Clerk of the Commission