

Not-For-Profit Corporation Law § 1411; General Municipal Law Article 18-A, §§ 852, 854(4), 854(7), 854(14), 854(15), 856(2), 858, 858(4), 858(9), 858(10), 858(11); Public Authorities Law §§ 1020-f(o), 1020-I, 1974(12)

An industrial development agency (IDA) is not authorized to create a subsidiary in order to fulfill its designated function or to provide grants or loans from its own moneys to public or private interests.

September 9, 2014

David Kidera
Director
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P.O. Box 2076
Albany, New York 12220-0076

Formal Opinion
No. 2014-F1

Dear Mr. Kidera:

You have requested an opinion relating to the powers of an industrial development agency (IDA). You have explained that the Authorities Budget Office (ABO) is authorized to review and assess the operations and practices of state and local public authorities for compliance with state law. In the course of exercising this authority, the ABO has discovered that several IDAs have formed subsidiaries, often as local development corporations organized pursuant to Not-for-Profit Corporation Law § 1411. You believe that this is being done to circumvent statutory limitations placed on IDAs. Also, the ABO has found IDAs using their revenues to support civic, charitable, or educational causes unrelated to the IDA's purpose or to provide money for loan programs managed by other public entities. You ask whether an IDA is authorized to form a subsidiary or to use its revenues in the above manner. As explained below, we are of the opinion that both of these activities are unauthorized.

Article 18-A of the General Municipal Law authorizes the creation of and governs municipal IDAs. IDAs are a vehicle by which the State encourages and supports economic growth through the local development of commerce and industry. General Municipal Law § 852. An IDA is created for the benefit of a particular municipality. See General Municipal Law Art. 18-A, tit. 2. An IDA's fundamental purpose is to promote, develop, encourage, and assist in the acquiring, constructing, maintaining, and furnishing of industrial, manufacturing, commercial, and recreation facilities ("projects"). General Municipal Law §§ 854(4), 858. It performs this function by providing financial assistance, typically through a lease of property, to an entity occupying a project. General Municipal Law §§ 854(14),(15), 858(10); *Postler & Jaeckle Corp. v. County of Monroe Indus. Dev. Corp.*, 153 Misc.2d 392, 393-94 (Sup. Ct. Monroe Co.); *aff'd*, 188 A.D.2d 1039 (4th Dep't 1992). By fulfilling its primary purpose, an IDA advances the job opportunities, health, general prosperity and economic welfare of the

people of the state of New York and improves their recreation opportunities, prosperity and standard of living. General Municipal Law § 858.

To accomplish its functions, an IDA is granted numerous powers by statute. The powers of an IDA include the following:

- To acquire, hold, and dispose of personal property for its corporate purposes;
- To acquire and to use real property necessary for its corporate purposes;
- To dispose of its real property;
- To make bylaws for the regulation of the use of a project or projects;
- To make contracts and leases, and to execute instruments necessary or convenient with any person, firm, partnership, or corporation, either public or private;
- To acquire, construct, reconstruct, lease, improve, maintain, equip, or furnish one or more projects;
- To accept gifts, grants, loans, or contributions from, and enter into contracts or other transactions with, federal or state agencies, municipalities, public or private corporations, or other legal entities, and to use such gifts, grants, loans, or contributions for its corporate purposes;
- To borrow money, to issue bonds, and to provide for the rights of bondholders;
- To grant options to renew a lease with respect to a project and to grant options to buy a project at a price the IDA deems desirable;
- To enter into agreements requiring payments in lieu of taxes; and
- To do all things necessary or convenient to carry out its purposes and to exercise the powers expressly given by Article 18-A. General Municipal Law § 858.

An IDA is a corporate governmental agency constituted as a public benefit corporation. General Municipal Law § 856(2). It is a creature of statute. *Matter of AG-II Acquisition Corp. v. Bd. of Assessors of Co. of Nassau*, 21 Misc. 3d 543, 545 (Sup. Ct. Nassau Co. 2008). As such, an IDA has only the powers granted by express or necessarily implied legislative delegation. *See Matter of Flynn v. State Ethics Com'n*, 87 N.Y.2d 199, 202 (1995).

With respect to your first question, nothing in the enabling statutes governing IDAs expressly authorizes the creation of a subsidiary – a power explicitly granted other public benefit corporations, *see, e.g.*, Public Authorities Law §§ 1020-f(o), 1020-i (LIPA); *id.* § 1974 (12) (Battery City Park Authority). Moreover, an IDA is fully able to fulfill its purpose without creating a subsidiary and thus the power to create a

subsidiary is not necessarily implied from the powers expressly granted. *See Community Bd. 7 v. Schaffer*, 84 N.Y.2d 148, 159 (1994).

Likewise, in our opinion, the creation of a subsidiary is not permitted by the authority to “do all things necessary or convenient” to carry out its purposes and exercise its powers. Courts and agencies have interpreted this clause in the context of the purposes and powers granted by statute, as authorizing those activities incidental to an expressly-granted power rather than a broad grant of power itself. *See, e.g., Abiele Contracting, Inc. v. New York City Sch. Const. Auth.*, 91 N.Y.2d 1, 11 (1997); Op. Att’y Gen. No. 2007-F4; Op. Att’y Gen. No. 99-F1; Op. Att’y Gen. No. 84-F21; Op. St. Comptr. No. 2011-1. A more expansive interpretation would render meaningless the Legislature’s careful delineation of express powers. An IDA does not need to create a subsidiary in order to fulfill its designated function and we therefore conclude that creation of a subsidiary is not authorized.

Second, you ask whether an IDA can provide grants or loans from its own moneys to public or private interests. An IDA collects revenues by leasing, selling, or otherwise disposing of its projects. General Municipal Law §§ 854(7), 858(4),(9),(10). You have explained that the ABO often has found IDAs using revenues to support civic, charitable, or educational causes unrelated to their public mission or to provide seed money for loan programs managed by other public entities. We are of the opinion that these activities are not authorized. While an IDA is expressly permitted to *accept* gifts, grants, loans and contributions from various entities and to use such moneys for its corporate purposes, General Municipal Law § 858(11), the enabling statutes do not explicitly authorize an IDA to make grants or loans of its money to any type of entity. Nor do we believe that these activities are necessary for an IDA to completely exercise the powers granted by the Legislature. We therefore conclude that an IDA may not provide grants or loans from its own moneys to public or private interests. This conclusion is consistent with the view previously taken by the Office of the State Comptroller. *See* 1999 Op. St. Comptr. No. 99-4 (no express authority for IDA to make grant of moneys to municipality); 1982 Op. St. Comptr. No. 82-360 (no express authority for IDA to loan its moneys).

Very truly yours,

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