Memo

Date: March 27, 2008

To: Fran Davis, Compliance Officer

From: John Gause, Commission Counsel

Re: [redacted]

We have been asked whether a housing provider that receives "tax credits" is "financed in whole or in part with public funds" within the meaning of the Maine Human Rights Act, 5 M.R.S.A. § 4582, for purposes of imposing the Act's accessibility design and construction requirements. I think tax credits do constitute public assistance if they are for the specific program receiving the financial assistance.

Neither the Act nor our regulations define "public funds." There are also no Maine decisions on point. Looking to decisions interpreting analogous provisions of federal law, there is a split among the courts on the issue. *See McGlotten v. Connally*, 338 F.Supp. 448, 461 (D.C.D.C. 1972) ("We hold that assistance provided through the tax system is within the scope of Title VI of the 1964 Civil Rights Act, and thus turn to the particular provisions challenged by Plaintiff."). *But see Chaplin v. Consolidated Edison Co. of New York, Inc.*, 628 F.Supp. 143, 145-146 (S.D.N.Y. 1986) ("The investment tax credit does not subject Con Ed to the in-depth regulation [under the Rehab Act] plaintiffs propose."); *Bachman v. American Soc. of Clinical Pathologists*, 577 F.Supp. 1257, 1264 (D.C.N.J. 1983) ("I find that the tax exempt status of ASCP is not 'federal financial assistance' rendering the organization as a whole subject to the requirements of section 504.").

In *Chaplin*, the court noted that the tax credits plaintiffs relied contradicted the program-specific requirement of Section 504 because the credits were taken on many, if not all, of the defendant's divisions. *Chaplin*, 628 F.Supp. at 145. In *Bachman*, the court noted that "[t]he term "assistance" connotes a transfer of government funds by way of subsidy, not merely an exemption from taxation." 577 F.Supp. at 1264. The court also found it significant that the administrative definition did not include tax benefits, and that courts finding coverage under Title IX "have relied on the indirect benefits such institutions receive from federal grants and student loans and not on the tax exempt status of the schools themselves." *Id.* at 1265.

I think the reasoning of *McGlotten* is more persuasive. In *McGlotten*, the court held that tax deductions for charitable purposes constituted the receipt of "federal financial assistance," with reasoning as follows:

> In the absence of strong legislative history to the contrary, the plain purpose of the statute is controlling. Here that purpose is clearly to eliminate discrimination in programs or activities benefitting from

> federal financial assistance. Distinctions as to the method of distribution of federal funds or their equivalent seem beside the point, as the regulations issued by the various agencies make apparent.

Id. at 461. I think the same rationale applies to the MHRA.

Of course, the funds need to be targeted to the specific program at issue. *See Jackson v. State*, 544 A.2d 291, 297 (Me. 1988) ("for liability to attach under the Rehabilitation Act, Jackson must establish that the discrimination occurred under a specific program that receives federal funds").

Cc: Patricia E. Ryan