



1 of 220 DOCUMENTS

Office of the Attorney General for the District of Columbia

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December 8, 2006 (Rev.)

SYLLABUS:

[*1]

The National Capital Revitalization Corporation ("NCRC") and its Subsidiaries

REQUESTBY:

Honorable Anthony A. Williams
Mayor of the District of Columbia
1350 Pennsylvania Avenue, N.W., 6th Floor
Washington, D.C. 20004

OPINIONBY:

EUGENE A. ADAMS, Interim Attorney General for the District of Columbia

OPINION:

This opinion, which is issued pursuant to Reorganization Order No. 50 of 1953, as amended, and which is the guiding statement of law to be followed by all District employees in the performance of their official duties, in the absence of specific action by the Mayor or the Council, or until overruled by controlling court decision, addresses these questions:

1. Is the NCRC part of the District of Columbia Government (the "District")?
2. Is the NCRC subject to
 - a) the federal Anti-Deficiency Act; or
 - b) the District's Anti-Deficiency Act? n1
3. Is the NCRC statutorily authorized to borrow money from a private commercial bank, execute a limited-recourse promissory note and secure that note with a deed of trust encumbering two of its properties? And, if yes, is it nevertheless prohibited from doing so under either Anti-Deficiency Act? Furthermore, assuming the NCRC may borrow money from private commercial [*2] banks, to what extent does the NCRC have authority to establish special, revolving funds as provided in D.C. Official Code § 2-1219.17 (2001)?

n1 District of Columbia Anti-Deficiency Act of 2002, effective April 4, 2003 (D.C. Law 14-285; D.C. Official Code § 47-355.01, *et seq.* (2005 Supp.)) (hereinafter "D.C. Anti-Deficiency Act" or "D.C. ADA"). For pur-

poses of this Opinion, all references to the provisions of the District of Columbia statutes will be to the D.C. Official Code.

BACKGROUND

The questions presented arise out of the following circumstances. The NCRC received assignment of numerous property interests (in many cases, properties in Southwest D.C. that were encumbered with long-term ground leases on terms highly favorable to the ground tenants) from the Redevelopment Land Agency ("RLA") at the time the RLA was dissolved. Most of these property interests were transferred by the NCRC to its land-holding subsidiary, the RLA Revitalization Corporation ("RLARC"). Some of the NCRC property interests [*3] and some RLARC properties encumbered by ground leases are to be transferred to the newly-formed Anacostia Waterfront Corporation ("AWC") for the purpose of redevelopment under the Anacostia Waterfront Initiative. In the course of negotiations regarding the transfer of assets to take place among the District, AWC, NCRC and RLARC, the NCRC disclosed that it had borrowed \$ 6,700,000 from Bank of America, N.A. (the "Bank") in September 2002, and secured that loan with some of its property holdings, including the revenues generated by two ground leases held by the NCRC. The property subject to the two ground leases is referred to herein as the "Waterfront Property." The NCRC signed a limited-recourse promissory note titled "Promissory Note Secured by Security Instrument" on September 10, 2002 (the "Note"). The promissory note was secured by a Leasehold Deed of Trust, also dated September 10, 2002, and recorded in the land records as Document No. 2002104179 (the "Deed of Trust"). I have been advised that \$ 5,000,000 of the loan proceeds were used to purchase the interests of the tenant in one of the ground leases encumbering the Waterfront Property (presumably so that the NCRC could lease [*4] that property to another tenant who would redevelop the property and lease the ground on more favorable terms) and the remaining proceeds were used for other capital projects of the NCRC (collectively, the "Project"). I do not have any written documentation verifying the use of the loan proceeds.

DISCUSSION

I. THE NCRC IS PART OF THE DISTRICT GOVERNMENT

The NCRC is a statutorily created instrumentality of the District government created by the Council of the District of Columbia (the "Council"), and it is a governmental unit contemplated by the District of Columbia Home Rule Act ("Home Rule Act"), approved December 24, 1973 (87 Stat. 777; D.C. Official Code § 1-201.01, *et seq.* (2001 & 2005 Supp.)).

A. The NCRC Statute

The National Capital Revitalization Corporation Act of 1998, effective September 11, 1998 (D.C. Law 12-144; D.C. Official Code § 2-1219.01, *et seq.* (2001 & 2005 Supp.)) ("NCRC Statute") created the NCRC as a body corporate and an independent instrumentality of the District, with a legal existence separate from that of the District government. n2 The NCRC was tasked with the broad mission of engaging in economic development and revitalization [*5] activities for the benefit of the District and was given mandates to retain and expand businesses located in the District, to attract new businesses to the District, to induce economic development and job creation in the District, to provide incentives and assistance, to remove slum and blight, and to coordinate the District's efforts to achieve these purposes. n3

n2 *See* D.C. Official Code § 2-1219.02(a) (2001).

n3 D.C. Official Code § 2-1219.02(b) (2001).

B. Authority of the District Government to Create an "Independent Instrumentality of the District"

The District's government was created as a municipal corporation and:

is constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this Code. n4

n4 Section 1 of An Act to Provide a Government for the District of Columbia, approved February 21, 1871 (16 Stat. 419; D.C. Official Code § 1-102 (2001)). *See also* section 717(a) of the Home Rule Act, D.C. Official Code § 1-207.17(a) (2001).

[*6]

The Home Rule Act established a charter for the District which provides for the District's current means of governance and delegates certain legislative powers to the District. The Home Rule Act serves as an enabling act, determining what the District, through its three branches of government, can and cannot do. Section 404 of the Home Rule Act (D.C. Official Code § 1-204.04 (2001)), delegates certain legislative powers to the Council. Among those powers, as set out in section 404(b) of the Home Rule Act, is the Council's power to:

create, abolish, or organize, any office, agency, department, or **instrumentality** of the government of the District and to define the powers and duties, and responsibilities of any such office, agency, department, or **instrumentality**. (Emphasis supplied.)

The Council clearly has the authority under the Home Rule Act to create an instrumentality of the District government and define its powers, duties and responsibilities. However, the Council can only create an entity outside of the District government if the Council is expressly granted the power to do that by Congress.

The typical municipal corporation is subject to Dillon's Rule, which [*7] means it can exercise only those powers: (1) granted in express words; (2) necessarily or fairly implied in or incident to the powers expressly granted; and (3) essential to the declared objects and purposes of the municipal corporation -- not simply convenient, but indispensable. The Rule takes its name from an opinion of John F. Dillon in 1868, a federal circuit judge, chief justice of the Iowa Supreme Court, and noted law professor. *See* Dillon on Mun. Corp. (3rd ed.), sec. 89. Dillon's Rule applied to all agencies and instrumentalities of the District government before the 1975 home rule District government, because the pre-home rule government was only a government of specifically delineated executive and quasi-legislative powers. By contrast, the home rule government is virtually the opposite: a tri-partite government patterned after the federal one, *see, e.g., Wilson v. Kelly*, 615 A.2d 229, 231 (D.C. 1992), with broadly-delegated executive and legislative powers, subject only to such specific limitations of those powers as are contained in the Home Rule Act. Instead of the typical "limitation of power charter" under Dillon's Rule, the District [*8] has a classic "grant of power charter." *See id.*

However, the conclusion that Dillon's Rule does not apply to the current District government does not mean that the government's broad legislative power embraces the creation of entities outside the government. This is true because of the provision already quoted in section 404(b) of the Home Rule Act, which authorizes the Council to create any office, agency, department, or instrumentality "of the government of the District." By its terms, this provision does not authorize the Council to create any entity outside or otherwise not "of" the government. Under the well-settled rule of statutory construction known as *expressio unius est exclusio alterius* (which means that the express provision of one thing should be understood as the exclusion of other related things, *see, e.g., Shook v. District of Columbia Financial Responsibility and Management Assistance Authority*, 132 F.3d 775, 782 (D.C. Cir. 1998); 2A *Sutherland Statutory Construction*, § 47.23, pp. 216-17 (5th ed. 1992), citing, *inter alia*, *National Rifle Association v. Potter*, 628 F. Supp. 903, 909 (D.D.C. 1986), [*9] and *McCray v. McGee*, 504 A.2d 1128, 1130 (D.C. 1986)), section 404(b) of the Home Rule Act should be read as a limitation on the Council's powers regarding the creation of the entities it describes. While the *Shook* decision at 782-83 cautions against using the *expressio* rule to create a negative inference from legislative language that is merely intended to clarify what might otherwise be doubtful, in this case -- under section 404(b) of the Home Rule Act -- such an inference is proper because there could be no doubt regarding the Council's power to create new entities of the government, and Congress's failure to also provide expressly for the Council's power to create extra-governmental entities cannot reasonably be viewed as a mere oversight. The failure of Congress to include such a power in the Home Rule Act, in light of its mention of the power to create government entities, must be accorded significance. Hence, the Home Rule Act limits the Council to the creation of entities that are part of the District government.

Absent an act of Congress (not just a Council act that has sat before Congress for passive review), the District cannot [*10] create any office, agency, department, or other instrumentality that is outside the District government. Construing the NCRC Statute to the maximum extent of the Council's powers, the description of the NCRC as "an independent instrumentality of the District, with a legal existence separate from that of the District government" -- standard, boilerplate language that appears in most of the enabling laws for the District's independent agencies -- means that the NCRC, while still a part of the District government, is nevertheless independent and separate from all other government entities, including the Executive Office of the Mayor. n5

n5 The legislative history of the NCRC Statute reflects the Council's intent that the NCRC remain part of the government, notwithstanding the statutory phrase, "with a legal existence separate from that of the District government." The Report of the Committee on Economic Development to the Council dated February 13, 1998 (the "Report") reflects a vision of the NCRC as a public entity that would harness the talent, capital and drive of the private sector and focus those assets on addressing many of the social ills, and the physical deterioration, plaguing the District through a coordinated economic development strategy. The Report characterized the to-be-formed NCRC as "a business development instrumentality of the District government" and "an independent public instrumentality." Report at 3. The legislative history also reflects the Council's knowledge and understanding that the NCRC would be a public entity that is part of the District government. This point is made repeatedly throughout the legislative history, in statements like ". . . the bill provides to the [NCRC] an array of governmental instrumentality powers, including the condemnation of property under existing D.C. laws and procedures . . .", Report at 3, and "[t]he powers conferred by this act are for public uses and purposes for which public powers may be employed, public funds may be expended, and the power of eminent domain and the police power may be exercised, and the granting of such powers is necessary and in the public interest." Report at 5. Given this legislative history, a court likely would not give any effect to the statutory phrase, "with a legal existence separate from that of the District government," even if the Council had the power to create an entity outside the government. *See, e.g., Dyer v. D.C. Department of Housing, 452 A.2d 968, 969-70 (D.C. 1982)*. Moreover, even if the legislative history were not so clear, because the Council lacks the power to create an entity outside the government, the general rule of severability would apply to strike a broad interpretation of the statutory phrase "with a legal existence separate from that of the District government." The general rule of severability is contained in D.C. Official Code § 45-201 (2001), which in relevant part states that "if any provision of any act of the Council of the District of Columbia or the application thereof to any person or circumstance is . . . beyond the statutory authority of the Council of the District of Columbia, or otherwise invalid, the . . . invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of each act of the Council of the District of Columbia are deemed severable."

[*11]

C. The NCRC as an Instrumentality of the District Government

The foregoing analysis makes it clear that the District's instrumentalities, including the NCRC, are part of its government. This conclusion is reinforced by the definition of "District instrumentality" in section 490(n)(2) of the Home Rule Act (D.C. Official Code § 1-204.90(n)(2) (2001)), which means "any agency or instrumentality (including an independent agency or instrumentality), authority, commission, board, department, division, office, body, or officer of the District of Columbia government duly established by an act of the Council or by the laws of the United States, whether established before or after August 5, 1997." Additionally, the NCRC Statute expressly reserves substantial control and oversight of its activities to the Council beyond the limitations contained in the Home Rule Act. The list of areas where the Council reserved its ability to control the NCRC includes:

1. Council Review of Board of Director Nominees; n6
2. Council Review of all disposition of real property; n7
3. Council review of the NCRC's adoption of written guidelines or rules and procedures pertaining to:

- a. Gifts, grants, [*12] or subsidies;
 - b. Procurement of goods and services; and
 - c. Disposition of Property; n8
- 4. Council review of any revitalization plan; n9
 - 5. Council review of the creation of any subsidiary; n10
 - 6. Council review of the public purpose of any bond undertaking; n11
 - 7. Council review of any exercise of the power of eminent domain; n12 and
 - 8. Reservation of title to all NCRC property in the District upon the corporation's dissolution. n13

n6 D.C. Official Code § 2-1219.03 (2005 Supp.).

n7 D.C. Official Code § 2-1219.07 (2005 Supp.).

n8 D.C. Official Code § 2-1219.10 (2001).

n9 D.C. Official Code § 2-1219.12 (2005 Supp.).

n10 D.C. Official Code § 2-1219.16 (2001).

n11 D.C. Official Code § 2-1219.18 (2001).

n12 D.C. Official Code § 2-1219.19 (2005 Supp.).

n13 D.C. Official Code § 2-1219.28 (2001).

Of course, the ultimate reservation of control over the NCRC is the Council's authority under section 404 of the Home Rule Act to create, abolish, or organize any department, agency or instrumentality. [*13] It is not reasonable to interpret the Council's authority to extend to the creation of the NCRC, but not its abolition (which the Council might not have authority to do if the NCRC were outside of the District government). In addition to the Home Rule Act limitation on the Council's power to create extra-governmental entities, the Council's reservation of the degree of control listed above is inconsistent with a conclusion that the Council intended the NCRC, as an instrumentality of the District, to be outside the District government. Rather, the NCRC Statute reflects a clear intent of Council that the NCRC be part of the District government. n14 This conclusion is supported by the NCRC Statute's legislative history, as described earlier.

n14 I note there is recent case law that the D.C. **Water and Sewer Authority** (WASA) is not entitled to the protections afforded the District government under D.C. Official Code §§ 12-301 and 12-309 (statute of limitations and statutory pre-suit notice). See *D.C. Water and Sewer Authority v. Hampton & Assocs.*, 851 A.2d 410 (D.C. 2004); and *Dingwall v. D.C. Water and Sewer Authority*, 800 A.2d 686 (D.C. 2002). However, those rulings do not stand for the proposition that WASA is not part of the District government for all purposes, but rather that, as a matter of statutory interpretation, the particular sections of District statutes at issue in the cases were not intended to extend certain statutorily-imposed protections of portions of the District government to WASA.

[*14]

This conclusion is further supported by the observation that, were the NCRC a completely independent, non-governmental body, and thus not subject to the laws that apply to the District as a government, then the federal tax-exemption of bonds issued by the NCRC might be questioned by the Internal Revenue Service. Despite numerous changes to the federal Internal Revenue Code, it has been a constant that tax-exempt bonds must be direct or collateral obligations of: (1) a state; (2) a political subdivision of a state; (3) a constituted authority with the right to issue obligations on behalf of a state or a political subdivision; (4) certain types of special assessment districts; or (5) certain types of quasi-public corporations qualified under the Internal Revenue Code or the implementing regulations. Generally, a

political subdivision is a division of a state or local government unit which has been delegated the right to exercise part of the sovereign powers of that unit. Sovereign powers include eminent domain, taxing powers, and police powers. However, because the NCRC has the delegated authority to issue tax-exempt bonds derived from section 490 of the Home Rule Act, and because [*15] the NCRC has other powers of a sovereign entity, such as eminent domain powers, the NCRC would be hard-pressed, indeed foolhardy, to assert that it is not a duly-constituted entity of the District government.

II. THE NCRC IS SUBJECT TO THE ANTI-DEFICIENCY ACTS

The District government is subject to two anti-deficiency acts: (1) the federal Anti-Deficiency Act, *31 U.S.C. §§ 1341, 1342, 1349- 1351* 1511-1519 (2004) (the "Federal ADA"), and D.C. Official Code §§ 1-206.03(e) and 47-105 (2001); and (2) the District of Columbia Anti-Deficiency Act, D.C. Official Code §§ 47-355.01 -- 355.08 (2005 Supp.) (the "D.C. ADA" and together with the Federal ADA, the "Anti-Deficiency Acts"). Generally, the Anti-Deficiency Acts are intended to prevent federal and District government employees from (1) (a) making or authorizing an expenditure or obligation that exceeds an amount available in an appropriation or fund for the expenditure or obligation, or (b) involving either government in a contract or obligation for the payment of money before [*16] an appropriation is made unless authorized by law; and (2) accepting voluntary services for either government or employing personal services exceeding that authorized by law in the absence of an agreement setting forth the cost and method of payment, if any, for such services.

A. The Federal Anti-Deficiency Act

The Federal ADA applies to federal agencies and the District government and ensures that, before a public official obligates the government to spend money, the funds are available and appropriated for the purpose for which they are obligated. The Federal ADA was intended to keep an agency's level of operations within the amounts Congress appropriates for that purpose. *See* the General Accounting Office's *Principles of Federal Appropriations Law*, Vol. II (2nd ed. 1992) at 6-56. n15

n15 The General Accounting Office is now known as the Government Accountability Office.

The two basic prongs of the Federal ADA are:

1. *31 U.S.C. § 1341(a)*: prohibiting both federal [*17] and District government employees from (a) making or authorizing an expenditure or obligation that exceeds an amount available in an appropriation or fund for the expenditure or obligation, or (b) involving either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law; and
2. *31 U.S.C. § 1342*: prohibiting any officer or employee of the federal or District governments from accepting voluntary services outside of the authorized procurement process for either government or employing personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This provision is intended to prevent a government officer from accepting unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. *30 Op. Atty. Gen. 51 (1913)*. This rule is supported by the rationale that, if an agency cannot directly obligate in excess or advance of its appropriations, it should not be able to accomplish the same thing indirectly by accepting ostensibly [*18] "voluntary" services and then presenting Congress with the bill -- a strategy referred to as "coercive deficiency."

As part of the District government, the NCRC is subject to the Federal ADA until such time as Congress enacts a statute exempting it from the appropriations process or the Federal ADA itself.

B. The D.C. Anti-Deficiency Act ("D.C. ADA")

The D.C. ADA expressly applies to any of the following: "a District agency head, deputy agency head, agency chief financial officer, agency budget director, agency controller, manager, or other employee." *See* D.C. Official Code § 47-355.01 (2005 Supp.). In addition, the D.C. ADA expressly defines the term "Agency" to include an "**instrumentality of the District Government.**" n16

n16 D.C. Official Code § 47-355.01 (1) (2005 Supp.). (Emphasis supplied.)

Much like the Federal ADA, any person to whom the D.C. ADA is made applicable may not:

1. Make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund;
2. Involve [*19] the District in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
3. Approve a disbursement without appropriate authorization; or
4. Defer recording a transaction incurred in the current fiscal year to a future fiscal year. n17

n17 D.C. Official Code § 47-355.02 (2005 Supp.).

The D.C. ADA imposes a series of reporting requirements and extends budgetary and expenditure restrictions beyond those imposed by the Federal ADA. For example, the D.C. ADA makes it a violation: (1) to knowingly report incorrectly on spending to date or on projected total annual spending; and (2) to fail to adhere to a spending plan. n18 In addition, the District created a Board of Review for Anti-Deficiency Violations to ascertain the culpability of employees responsible for violations of the D.C. ADA and to recommend appropriate disciplinary actions, which may include termination of employment. This Board is to report to the Council regarding each violation and the actions taken [*20] or proposed to be taken as a result.

n18 D.C. Official Code § 47-355.06 (2005 Supp.).

The NCRC is, by its express terms, subject to the provisions of the D.C. ADA. Moreover, the Council has not statutorily modified the D.C. ADA to exempt or exclude any District agency or instrumentality, including the NCRC. Indeed, the Council recently made amendments to the NCRC Statute without including any exemption from the D.C. ADA. n19

n19 See Section 233 of FY 2004 Budget Support of 2003, effective November 13, 2003 (D.C. Law 15-39; D.C. Official Code § 2-1219.01 *passim* (2005 Supp.)).

C. The Anti-Deficiency Acts and Section 446 Exemptions

Borrowing money, which then must be repaid with interest and other fees, is inherently contradictory to the purposes and application of both Anti-Deficiency Acts.

Congress recognized this contradiction, and also [*21] the importance to the District government of borrowing funds from either private lenders or the public markets for certain purposes. Therefore, it created certain exceptions to the application of the Federal ADA in the Home Rule Act to authorize such borrowing. These exceptions are, for the most part, set forth in section 446 of the Home Rule Act (D.C. Official Code § 1-204.46 (2005 Supp.)). They are:

1. Obligations or expenditures of excess revenues of **Water and Sewer Authority** for capital projects; n20
2. Obligations or expenditures of District revenues to secure general obligation bonds or notes; n21

3. Obligations or expenditures for the payment of principal of, interest on, or redemption premium for general obligation notes; n22
4. Obligations or expenditures for payment of principal of, interest on, or redemption premium for revenue anticipation notes; n23
5. Obligations or expenditures for payment of principal of, interest on, or redemption premium for bond anticipation notes; n24
6. Amounts set aside in a debt service fund under section 481(a) of the Home Rule Act (D.C. Official Code § 1-204.81(a) (2005 Supp.)); amounts obligated or expended for the payment of principal [*22] of, interest on, or redemption premium for any general obligation bond or note issued under sections 461(a), 471(a), or 472(a) of the Home Rule Act (D.C. Official Code §§ 1-204.61(a), 1-204.71(a) and 1-204.72(a) (2001)); amounts obligated or expended as provided by the Council in any annual budget (or amendment or supplement thereto) for the District pursuant to section 483(a) of the Home Rule Act (D.C. Official Code § 1-204.83(a) (2005 Supp.)); or any amount obligated or expended pursuant to section 483(b) of the Home Rule Act (for debt service on general obligation bonds); n25 and
7. Revenue bonds and other obligations (issued by the District, the Housing Finance Agency, **Water and Sewer Authority**, or District of Columbia Tobacco Settlement Financing Corporation). n26

n20 D.C. Official Code § 1-204.45a(b) (2001).

n21 D.C. Official Code § 1-204.67(d) (2001).

n22 D.C. Official Code § 1-204.71(c) (2001).

n23 D.C. Official Code § 1-204.72(d)(2) (2001).

n24 D.C. Official Code § 1-204.75(e)(2) (2001).

n25 D.C. Official Code § 1-204.83(d) (2001).

n26 D.C. Official Code §§ 1-204.90(f), (g), (h)(3), and (i)(3) (2001).

[*23]

Congress further recognized that certain instrumentalities, such as the District of Columbia **Water and Sewer Authority**, would need similar borrowing powers and, therefore, both authorized specific entities to exercise such borrowing authority and authorized the Council to delegate certain borrowing authority powers to District instrumentalities in the future. *See, e.g.*, section 490(a)(6)(A) of the Home Rule Act ("The Council may by act delegate to any District instrumentality the authority of the Council under subsection (a)(1) of this section to issue taxable or tax-exempt revenue bonds, notes or other obligations to borrow money for the purposes specified in this subsection.").

Because section 446 of the Home Rule Act governs the process by which the District obtains appropriated funds, an exemption from section 446 of the Home Rule Act effectively functions to exempt an activity, obligation or expenditure (depending on the nature of the exemption) from the Anti-Deficiency Acts. n27 Therefore, an exemption from section 446 of the Home Rule Act means that funds used pursuant to an enumerated exemption are not subject to the appropriations process authorized by Congress and, [*24] further, that obligations and expenditures of the monies so exempted are not subject to limitation by the appropriations process.

n27 Section 446 of the Home Rule Act obligates the District to submit its annual budgets to Congress for approval and specifies that, except as provided in certain sections of the D.C. Official Code, "no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act." This is the "appropriations requirement." As stated above, the Federal ADA prohibits the making or authorizing of an expenditure or obligation that exceeds an amount available in an appropriation or fund for the expenditure or obligation or involving the government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. Thus, if no appropriation is required, there can be no violation of the appropriations requirement in the Federal ADA.

The exemptions from Section 446 of the Home Rule Act also apply to the D.C. ADA. If the D.C. ADA were construed to make unlawful -- albeit under local, not federal, law -- the very same conduct that section 490 of the Home Rule Act expressly makes lawful, there would be a conflict in which the enforcement of local law would frustrate congressional intent. Since section 602(a) of the Home Rule Act (D.C. Official Code § 1-206.02(a) (2001)) prohibits the Council from passing any act contrary to the Home Rule Act, the D.C. ADA would be void if it were construed to limit powers of the District in ways that Congress expressly granted to it. Under the rule of statutory construction that a statute should be construed so as to make it lawful, the D.C. ADA should be construed as not prohibiting expenditures and obligations that Congress expressly permitted under the exceptions to section 446 of the Home Rule Act.

[*25]

Notwithstanding the foregoing, funds that are appropriated by Congress for specific purposes must be spent in accordance with such purposes (unless the funds are reprogrammed or transferred, or the appropriation is later modified), and are not available for expenditure for the exempt purposes specified in section 446 of the Home Rule Act if such expenditure would be inconsistent with the appropriation that governs them. Appropriated funds cannot generally be diverted for such exempt uses (unless expressly authorized by Congress) because doing so would frustrate the express directive of Congress to use appropriated funds in the manner specified. However, the exemptions under section 446 of the Home Rule Act permit the District to use certain revenue streams that it creates or receives outside the appropriations process without restriction by appropriation laws. Section 490(f) of the Home Rule Act is one such exemption from section 446 of the Home Rule Act. It permits the District to pledge certain District assets to secure revenue bonds, notes or other obligations ("revenue bonds") that it issues, and to use the proceeds of such revenue bonds, without going through the normal budgeting [*26] and appropriations process so long as the District pledges such assets and uses such proceeds in accordance with the requirements of the exemption in section 490 of the Home Rule Act.

Subsection (f) of section 490 of the Home Rule Act (which is exempted from the budgeting and appropriations process under section 446 of the Home Rule Act) states:

(f) The fourth sentence of [Section 446] shall not apply to:

- (1) Any amount (including the amount of any accrued interest or premium) obligated or expended from the proceeds of the sale of any revenue bond, note or other obligations issued under subsection (a)(1) of this section;
- (2) Any amount obligated or expended for the payment of the principal of, interest on, or any premium for any revenue bond, note or other obligation issued under subsection (a)(1) of this section;
- (3) Any amount obligated or expended pursuant to provisions made to secure any revenue bond, note or other obligations issued under subsection (a)(1) of this section; and
- (4) Any amount obligated or expended pursuant to commitments made in connection with the issuance of revenue bonds, notes or other obligations for repair, maintenance, and capital improvements [*27] relating to undertakings financed through any revenue bond, note or other obligation issued under subsection (a)(1) of this section.

III. THE NOTE IS INVALID BECAUSE IT WAS NOT ISSUED IN CONFORMITY WITH A DELEGATION GRANTED BY ACT OF THE COUNCIL

Home Rule Act section 490(n)(1) defines "revenue bonds, notes, or other obligations" to include obligations used to borrow money to finance an undertaking referred to in section 490(a)(1) -- one that is secured as provided in section 490(a)(3) and that does not obligate the full faith and credit of the District. The NCRC Statute (D.C. Official Code § 2-1219.01(8) (2005 Supp.)) defines "bonds" as "revenue bonds, notes, or other obligations, including refunding revenue bonds, notes, or other obligations and tax increment revenue bonds authorized to be issued by the [NCRC] pursuant to

[the NCRC Statute]." Thus, the terms "debt" and "debt obligations" are used in this Opinion to refer to all forms of debt authorized to be issued by the NCRC -- revenue bonds, notes, or other obligations as defined in Home Rule Act section 490(n).

A. The NCRC Does Not Possess Independent Home Rule Act Authority to Incur Debt

Generally, authority to [*28] incur municipal debt must be expressly granted by constitution, general law or charter and cannot be implied from other powers, such as the power to acquire property or the power to build and operate facilities. n28 In addition, the delegated grant of authority to incur debt is strictly construed; there can be reasonable doubt of the intention to grant the authority. n29

n28 The majority of courts still require express statutory authorization behind municipal powers, especially when construing the power to borrow. *McQuillin Mun Corp* § 39.07 (3rd Ed). "It is well established and illustrated by numerous decisions that municipal corporations are rigidly restricted as to their power to raise and expend money to the purposes specified, through the officers and channels authorized by law, and they cannot transcend the bounds imposed. *Id.* at § 39.17. "The general rule is that there is no authority to issue bonds unless it has been expressly conferred." *Id.* at § 43.18. "At present it is the law that municipal corporations have no power to issue bonds unless expressly authorized to do so...: and the power cannot be implied from the ordinary police powers conferred upon municipalities." *Id.* at § 43.19.

[*29]

n29 *See, e.g., McQuillin Mun Corp* §§ 39.17 & 43.21 (3rd Ed). For example, although D.C. Official Code § 2-1219.15(a)(17) (2001) grants to the NCRC the authority to mortgage or pledge its property, actions usually associated with the creation of debt, this subsection does not confer independent authority to issue debt. Rather, this subsection grants the NCRC the ability to secure debt otherwise validly issued.

The Home Rule Act authorizes the District government to borrow money by issuing general obligation bonds (sections 461-467), to borrow money by issuing short-term notes (sections 471-475), to impose taxes to pay bonds and notes (sections 481-483), to declare bonds and notes issued by the Council exempt from taxation (section 485), and to issue revenue bonds for undertakings by the District or by any authorized District instrumentality (section 490). The Home Rule Act does not contain authority for any independent agency to incur debt. However, section 490(a)(6)(A) authorizes the Council to delegate to District instrumentalities its authority to issue the debt obligations that the Council [*30] can issue pursuant to section 490(a)(1).

Under the rule of *expressio unius est exclusio alterius* discussed on page 4, the specific grant of debt authority to the Council, when combined with both the failure to grant debt authority to any other District entity and the grant of Council authority to delegate to District instrumentalities some portions of the Council's debt authority, compels a conclusion that the NCRC does not possess direct Home Rule Act authority to incur debt and that the Council cannot delegate to the NCRC authority to borrow money in excess of the Council's own Home Rule Act authority to borrow money. To declare that the NCRC possesses direct Home Rule Act debt authority would frustrate the language and purposes of the Home Rule Act, which grants the District specific, enumerated rights to borrow money and reserves to the Council the power to delegate that authority to District instrumentalities.

B. The NCRC Has a Council Delegation of Authority to Incur Debt

Home Rule Act section 490(a) authorizes the Council to issue "taxable and tax-exempt revenue bonds, notes or other obligations to borrow money to finance, refinance, or reimburse and to assist in [*31] the financing, refinancing, or reimbursement of capital projects and other undertakings of the District or by any District instrumentality...."

Section 490(a)(6) constitutes the only Home Rule Act authorization for general Council delegation of its authority to issue revenue bonds. n30 Section 490(a)(6)(A) allows the Council to delegate -- "by act" -- to any District instrumentality the Council's section 490(a)(1) authority to issue taxable or tax-exempt revenue bonds.

n30 Sections 490(g), (h) and (i) contain specific delegations of the authority to issue revenue bonds, notes and other obligations to housing finance agencies, the District of Columbia **Water and Sewer Authority** and the District of Columbia Tobacco Settlement Financing Corporation, respectively.

Pursuant to section 490(a)(6)(A), the Council properly adopted an act delegating to the NCRC the Council's authority to issue section 490 debt. n31 D.C. Official Code § 2-1219.15(a)(14) (2001) grants the NCRC the power to issue debt "in accordance with §§ 2-1219.18 [*32] and 2-1219.23." D.C. Official Code § 2-1219.18 (2001) permits the NCRC Board of Directors (the "NCRC Board") to authorize the issuance of debt. D.C. Official Code § 2-1219.23 (2001) permits the NCRC Board to issue tax increment bonds. n32

n31 Sections 16(a)(14), 19, and 24 of the NCRC Statute contain the Council grants of authority to NCRC to issue debt obligations. These provisions will be referenced in this Opinion by use of the D.C. Official Code section.

n32 The process for an NCRC issuance of tax increment bonds pursuant to D.C. Official Code § 2-1219.23 (2001) differs from the process required for other revenue bonds pursuant to D.C. Official Code § 2-1219.18 (2001), but the differences are not relevant to this Opinion.

C. The NCRC's Borrowing Authority Derives from D.C. Official Code §§ 2-1219.15(a)(14), 2-1219.18 and 1-1219.23 (2001)

As stated above, municipal debt authority must be express. The Council created the NCRC through the NCRC Statute. Subsections 2-1219.15(a)(1)-(31) (2001) contain a list [*33] of specific powers granted to the NCRC. Section 2-1219.15(a)(14) authorizes the NCRC to issue debt in accordance with D.C. Official Code §§ 2-1219.18 and 2-1219.23 (2001).

D.C. Official Code § 2-1219.15(a)(31) (2001) states that the NCRC may "[e]xercise any other power usually possessed by, and incident to, public enterprises performing similar functions or private corporations organized under the business corporation law of the District, respectively, *to the extent that the exercise of such powers is not inconsistent with applicable federal or District law or the purposes of [the NCRC Statute].*" (Emphasis supplied.) This qualification places a substantial limit on the authority conveyed by section 2-1219.15(a)(31). Section 2-1219.15(a)(31)'s broad language is a "savings" provision designed to provide requisite and corollary authority necessary to exercise the powers listed in the preceding sections 2-1219.15(a)(1) through (a)(30). Section 2-1219.15(a)(31) does not constitute a separate and independent grant of additional authority which imbues NCRC with all of the powers of private corporations organized under the Business Corporation Act. Such an interpretation would render [*34] superfluous and repetitive the enumeration of the 30 specific powers preceding section 2-1219.15(a)(31) because many of those powers are possessed by private corporations organized under the Business Corporation Act. Had the Council intended such an interpretation, it simply would have granted the NCRC all powers available to private corporations under the law and enumerated only those additional governmental powers granted to the NCRC, such as the section 2-1219.15(a)(14) authority to issue tax-exempt bonds.

As part of the District government, the NCRC cannot act as if it were nothing more than just another business corporation. First, the NCRC is an instrumentality of the District government with governmental powers that an ordinary business corporation does not possess, such as the power of eminent domain and the power to issue tax-exempt debt. Second, the NCRC cannot possess any powers not available to the District government because the Council cannot grant such powers to a District instrumentality. Third, if the NCRC were a private business corporation completely separate and apart from the District government (as if created by the District government in much the same way [*35] as the Congress charters private corporations which are not part of the federal government), it might be required, unless otherwise exempted by some other provision in law (*i. e.*, as a non-profit organization) to register its securities offerings with the federal Securities and Exchange Commission. n33

n33 See Securities Act of 1933 (15 U.S.C. § 77a, et seq.); Securities Exchange Act of 1934 (15 U.S.C. § 78a, et seq.). Generally, securities issued or guaranteed as to principal or interest by government entities such as the District (or a public instrumentality of the District) are exempt from most of the requirements of the federal securities laws, including the registration requirements, if the interest on the securities is excludable from gross income under the Internal Revenue Code.

In addition, section 2-1219.15(a)(31) cannot constitute a grant to NCRC of borrowing authority in addition to, and separate and apart from, the [*36] borrowing authority granted in section 2-1219.15(a)(14), because such a grant would violate Home Rule Act section 490(a)(6)(A), which requires that a Council delegation of debt authority "shall specify for what undertakings [the debt] may be issued under each delegation made...." Section 2-1219.15(a)(31) does not contain such specificity.

Finally, only section 2-1219.15(a)(14), and the two D.C. Official Code sections to which it refers, expressly grants the NCRC the authority to incur debt. Thus, under the rule of *expressio unius est exclusio alterius* and for the other reasons stated above, I conclude that section 2-1219.15(a)(31) confers no general borrowing authority and that the NCRC's sole authority to incur debt is contained in D.C. Official Code §§ 2-1219.15(a)(14), 2-1219.18 and 2-1219.23 (2001).

D. The NCRC's Borrowing in 2002 Did Not Comply With All of the Requirements of the Home Rule Act and the Council Delegation of Authority to Issue Revenue Bonds

I understand that the NCRC executed a \$ 6,700,000 note with the Bank in September 2002. My staff has reviewed the Note and, in substance, the Note created an obligation to pay a debt. As such, it should have been [*37] issued pursuant to the provisions of Home Rule Act section 490(a)(6) and D.C. Official Code § 2-1219.18 (2001). n34 Before issuing that debt, the NCRC must have satisfied the following requirements:

1. The NCRC Board must have adopted a resolution issuing debt. See section 490(a)(6)(B) of the Home Rule Act. The NCRC Board, in that resolution, must have provided for the available revenues to be pledged to secure the debt. See D.C. Official Code § 2-1219.18(g) (2001).

n34 Although D.C. Official Code § 2-1219.18 (2001) contains varied references to "taxable and tax-exempt revenue bonds," "revenue bonds, notes, or other obligations," "revenue bonds," "bonds or other borrowings" and "bonds", the intent is that the provisions of D.C. Official Code § 2-1219.18 (2001) apply to all debt instruments issued by the NCRC. Furthermore, an argument that the requirements of D.C. Official Code § 2-1219.18 (2001) apply only to *revenue bonds*, as narrowly construed, and that they do not apply to "other obligations," which is a term included in addition to revenue bonds in the NCRC Statute's definition of "bonds," fails. First, D.C. Official Code § 2-1219.18 (2001) of the NCRC Statute applies to "revenue bonds, notes, or other obligations" (emphasis supplied) and refers back to Home Rule Act section 490(a)(6)(A), which groups these three terms together and addresses them collectively, just as this Opinion has. Furthermore, D.C. Official Code § 2-1219.18 (2001) evidences no intent to narrowly construe the term "revenue bonds." Nor is there any other provision in the NCRC Statute delegating Home Rule Act section 490 authority to the NCRC pursuant to which such "other obligations" could be issued. In order to be a valid debt instrument, the Note could only be a "bond" as that term is defined in the NCRC Statute (D.C. Official Code § 2-1219.01(8) (2005 Supp.)), which defines a "bond" as "revenue bonds, notes or other obligations".

[*38]

Although the NCRC Board adopted a resolution approving the loan, that resolution did not conform to the requirements of a resolution authorizing the issue of section 2-1219.18 debt.

The Note is a limited recourse promissory note of the NCRC, which means that, in most circumstances, the Note is secured only by the collateral referenced in the Deed of Trust. Pursuant to the Home Rule Act and the NCRC Statute, the

debt can be secured only by a limited set of assets that are not already appropriated for another particular purpose because a debt obligation can neither interfere with another existing appropriation nor become a general obligation of the governmental entity issuing such debt (and therefore must be secured by designated revenues or other assets that are not subject to another appropriation).

If the Note is a debt instrument, the security for such debt must be limited to assets lawfully available for the repayment of the Note, must be specified by the NCRC Board in its approval resolution, and must not include any revenues that are appropriated for other purposes. Yet, the Note contains (1) terms providing for recourse liability, and (2) uncapped environmental indemnities, [*39] fee-shifting provisions, and cost-shifting provisions.

2. The debt must fund a project eligible under Home Rule Act section 490(a)(1) in furtherance of the NCRC's established statutory purposes and may not be used to make a monetary grant. *See* D.C. Official Code § 2-1219.18(a) (2001).

Based on statements made by the NCRC, I believe the debt proceeds have been spent in accordance with purposes permitted under section 490(a)(1) of the Home Rule Act.

3. The NCRC must have submitted to the Council a resolution of project approval accompanied by a summary description of the proposed project and a listing of the public purpose benefits to be derived from the proposed undertaking for a 45-day period of Council review. The Council must have approved or disapproved the project by resolution within such 45-day period. *See* D.C. Official Code § 2-1219.18(b)(1) (2001).

The NCRC did not obtain the required Council resolution approving the project to be financed.

4. The debt cannot constitute an indebtedness of the District and cannot be a general obligation of the District, nor can the debt be secured by a pledge of the full faith and credit of the District. The debt [*40] instrument must have contained a statement setting forth these limitations. *See* D.C. Official Code § 2-1219.18(p) (2001).

The NCRC failed to satisfy certain technical requirements set forth under D.C. Official Code § 2-1219.18 (2001) regarding the express statements that must be set forth on the face of the debt instrument, including the D.C. Official Code § 2-1219.18(p) (2001) requirement of a disclaimer of a pledge of the full faith and credit of the District of Columbia.

Thus, because the proper statutory procedures were not followed, and because the Note does not comply with the Home Rule Act and D.C. Official Code § 2-1219.18 (2001), the debt was not properly authorized by District law.

E. Failure to Properly Issue Debt Creates Negative Consequences, But the NCRC Can Correct the Deficiencies

If government debt is not validly authorized, such *ultra vires* debt generally is void and unenforceable and loses its federal tax-exemption. n35 Furthermore, because the Note was not issued in compliance with either section 490 of the Home Rule Act or the delegated section 490 authority contained in D.C. Official Code § 2-1219.18, the Note did not receive the exemption [*41] from the appropriations requirement under section 446 of the Home Rule Act accorded to revenue bonds properly issued under section 490. Because the Note appears to have been issued for a period greater than one fiscal year without appropriations for payment, the obligations undertaken pursuant to the Note, as well as payments made under it, in all probability violated both the Federal ADA and the D.C. ADA.

n35 See *Scofield Engineering Co. v. City of Danville*, 35 F.Supp. 668 (W.D. Va. 1940), *aff'd* 126 F.2d 942 (4th Cir. 1942); *Chemical Bank v. Washington Public Power Supply*, 99 Wash. 2d 772, 666 P.2d 329 (1983). See also *McQuillin Mun Corp* § 43.20 (3rd Ed): "In the exercise of the power to issue bonds, it is generally held that all mandatory provisions of the applicable law must be observed in all substantial respects, otherwise bonds issued in disregard of essential legal requirements may be shown to be invalid."

[*42]

Some corrective actions are not available. First, a Council resolution alone cannot correct the deficiencies in the Note. Home Rule Act section 490(a)(6)(A) requires a Council act to delegate the Council's borrowing authority to the NCRC. The NCRC Statute, specifically D.C. Official Code §§ 2-1219.18 and 2-1219.23, is the only Council act that meets that requirement for the NCRC. n36 Thus, if the NCRC issues debt without complying with the procedures set forth in those sections, the debt would not have been issued pursuant to a Council act. n37 To retroactively approve the Note, the Council must either adopt an act retroactively amending the NCRC Statute to allow the issue of debt pursuant to the procedures used by the NCRC for the Note or adopt an act retroactively approving the Note, which action also constitutes an amendment of the NCRC Statute. But because the Council cannot amend an act except by adoption of another act, prior or subsequent approval by Council resolution would not suffice to satisfy the requirements of section 490 of the Home Rule Act.

n36 The distinction emphasized by section 490(k) of the Home Rule Act (*i.e.*, between approval by act, rather than resolution, of Council in the event of government borrowing), is fundamental because an act passed by Council gives Congress the opportunity to review the District's attempt to create borrowing authority during the normal congressional layover period required for the passage of an act of the Council, whereas neither a Council nor a NCRC resolution provides this opportunity. This must be read in the context of section 490(a)(6)(A), which requires a Council act to delegate borrowing authority to a District instrumentality. A properly adopted Council act delegating debt authority to an instrumentality would constitute the requisite Council act under the Home Rule Act and would obviate the need for the Council to approve, by act, the delegated instrumentality's subsequent issue of section 490 debt in compliance with the provisions of the Home Rule Act and the Council delegation act.

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n37 On this point, section 490(a)(6)(A) of the Home Rule Act cautions that "[a]ny instrumentality may exercise the authority and the powers incident thereto delegated to it by the Council as described in the first sentence of this paragraph [authorizing Council delegations of the authority to issue revenue bonds] *only in accordance with* this paragraph and *shall be consistent with* this paragraph and the terms of the [Council act of] delegation." (Emphasis supplied.)

Second, Home Rule Act section 490(a)(6)(B) provides: "Revenue bonds, notes or other obligations issued by a District instrumentality under a delegation of authority described in [section 490(a)(6)(A) of the Home Rule Act] shall be issued by resolution of that instrumentality, and any such resolution shall not be considered to be an act of the Council." In addition, D.C. Official Code § 2-1219.18(b) (2001) requires a Council resolution approving the issue of NCRC debt. Thus, the NCRC cannot substitute its approval resolution for either the Council act delegating, or amending its delegation of, borrowing authority to the NCRC or [*44] the Council resolution approving the issue of the debt.

However, District law contains ways to cure the deficiencies in the Note and Deed of Trust. First, the NCRC may issue new debt for the same purpose as the Note in accordance with the law and use the proceeds to repay the Note, although this does not cure the deficiencies with the Note. n38 Second, the NCRC may properly approve the entire existing debt package (with altered documents to comply with applicable law as described above) and substitute the new debt package for the existing debt package as a novation. n39 Third, another District instrumentality may properly authorize debt and substitute itself for the NCRC in the Note and Deed of Trust.

n38 The new debt cannot be a tax-exempt refunding obligation because such an obligation may refund only valid, existing tax-exempt bonds. However, under certain circumstances, the new debt could be tax-exempt if it qualified as a timely reimbursement of qualified taxable debt.

n39 NCRC could also reaffirm and continue the existing debt by: a) amending the existing Note to include the mandatory provisions, b) adopting a resolution authorizing issuance of the reformed Note, c) obtaining a Council resolution approving the Project, and d) obtaining a Council act retroactively approving the Note. However, although not significantly different from the second option, this process is more cumbersome than the alternatives described in the accompanying text.

[*45]

In addition, the Council may delegate additional, limited or different borrowing authority to the NCRC and create a different set of requirements applicable to that debt, such as requiring no subsequent Council approval or expedited Council approval. To do so, the Council must adopt an act delegating such authority, and that act must specify those undertakings for which the debt may be used, which debt must comply with Home Rule Act section 490.

IV. THE NCRC LACKS AUTHORITY TO ESTABLISH SPECIAL FUNDS BEYOND THE ESTABLISHMENT OF FUNDS PERMITTED UNDER SECTION 490 OF THE HOME RULE ACT BECAUSE SUCH AUTHORITY CANNOT BE DELEGATED BY THE COUNCIL

The broad authorization to the NCRC to establish special funds, granted pursuant to D.C. Official Code § 2-1219.17 (2001), represents an impermissible attempt by the Council to delegate a non-delegable duty. Section 450 of the Home Rule Act (D.C. Official Code § 1-204.50 (2001)) provides: "The Council may from time to time establish such additional special funds as may be necessary for the efficient operation of the government of the District." This provision grants the Council the authority to segregate funds from the General Fund, which [*46] is used to pay the operating expenses of the government. *Id.* However, unless permitted in the Home Rule Act, the Council does not have the authority to delegate this power. Nevertheless, the Council, in the NCRC Statute, attempted not only to create a special fund in which the NCRC could deposit certain monies and keep them separate from the General Fund, but to delegate to the NCRC the ability to create additional special funds not necessarily associated with Home Rule Act section 490 debt, separate and apart from the General Fund. *See* D.C. Official Code § 2-1219.17 (2001).

As noted above, this is an impermissible attempt to delegate a non-delegable duty. In *Hampton v. United States*, 276 U.S. 394, 405-06 (1928), the Supreme Court discusses the maxim "*Delegata potestas non potest delegari*," n40 and explains that such maxim "is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law," and that it is especially applicable to agency law. It is a breach of fundamental constitutional law if the legislative branch, in this case the Council, attempts to transfer its legislative [*47] authority to either of the other two branches of government. *Id.* Although the separation of powers is not absolute, in "determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id. at 406.* The legislature may vest authority in the executive branch in some circumstances. *Id.* There is a strong distinction, however, between the power to make the law and conferring the authority to make a decision on how to execute that law. *Id. at 407.* Here, the Council did not respect this distinction when it passed D.C. Official Code § 2-1219.17 (2001).

n40 A delegated power cannot be delegated. Black's Law Dictionary 512 (5th ed. 1979).

The plain language of the provision delegates to NCRC the Council's exclusive power to create special funds, and does so without limiting the number of special funds the [*48] NCRC can create, or the purposes for which they can be created. *See* D.C. Official Code § 2-1219.17 (2001). The procedures enacted for the NCRC to establish funds are broadly written so as to have indiscernible boundaries. *Id.* The NCRC has discretion as to whether or not it establishes additional special funds, and if so, how many and for what purposes. *Id.* By vesting such unbridled discretion in the NCRC, the Council has clearly given legislative functions to a non-legislative authority. The Council has not merely "conferred upon [the NCRC] an authority and discretion, to be exercised in the execution of the law, and under the pursuance of it,

which is entirely permissible," but has "delegated to the [the NCRC] any authority or discretion as to what the law shall be." *State v. Chicago, Milwaukee & St. Paul Railway Company*, 38 Minn. 281, 301 (1888). This delegation is a breach of the long-standing principle of separation of powers.

While section 490 of the Home Rule Act permits the Council to grant the NCRC the authority to create special funds associated with the issuance of revenue bonds, it does not permit the broad grant of authority [*49] set forth in D.C. Official Code § 2-1219.17 (2001). Furthermore, if the NCRC fails to comply with the requirements in those sections of the Home Rule Act that contemplate the establishment of special funds incidental to the issuance of revenue bonds, the NCRC does not have the authority to create even those limited special funds.

* * *

If you have any questions concerning this Opinion, please do not hesitate to call me at 724-1520, Bruce E. Brennan, Acting Deputy Attorney General for the Commercial Division, at 442-9834, or Wayne C. Witkowski, Deputy Attorney General for the Legal Counsel Division, at 724-5524.

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