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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548



IN REPLY REFER TO: B-193347

OFFICE OF GENERAL COUNSEL

December 21, 1978

[Claim Settlement by D.C. Department of Housing and Community Development]
The Honorable Newton I. Steers, Jr.
House of Representatives

Not available to public reading

Dear Mr. Steers:

CNO 00435

This is in response to your request for assistance from this Office in reviewing an opinion of the Director, Department of Housing and Community Development, District of Columbia, that he lacks authority to compromise and settle a claim of approximately \$28,000, asserted by your constituent, Mr. Richard Colburn, for additional expenses he incurred in site preparation of a piece of property leased to him by the aforementioned Department.

You explain that Mr. Colburn entered into a 99-year lease on the property with the District of Columbia Redevelopment Land Agency (RLA), a subordinate agency of the Department of Housing and Community Development (Department). In June 1977 Mr. Colburn's construction contractor started excavating for the foundation of a new building and discovered parts of an old foundation. The discovery of the old foundation required a costly redesign of the planned construction. Prior to the discovery, Mr. Colburn was unaware of the foundation. However a search of the RLA files indicated that the existence of the foundation had been known to that agency for at least 10 years. Notwithstanding the existence of this information in its files, RLA failed to disclose it to Mr. Colburn when it provided him other information, describing the site, upon which he relied to make his selection. Mr. Colburn contends that RLA had an obligation to disclose the existence of this old foundation to him and its failure to do so should make it liable for the additional construction expenses caused thereby.

The Department has steadfastly maintained that it is unable to grant Mr. Colburn the remedy he seeks. Accordingly you have requested this Office to advise you whether the Department is correct in its opinion.

A review of internal RLA communications indicates that it does not dispute the fact that it had information concerning the old foundation in its files that it did not disclose to Mr. Colburn. However, RLA does not concede that it was obliged to disclose such data. Rather, the RLA appears to rely on the terms and conditions of the agreement it executed with Mr. Colburn, which contained disclaimer clauses regarding the condition of the property.

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Letter restra

A July 20, 1978, letter to Mr. Colburn, from Mr. Lorenzo W. Jacobs, Jr., Director of the Department, pointed out that under the terms of the agreement, Mr. Colburn accepted the property in its existing condition. Again, in an August 25, 1978, letter to you, Director Jacobs explained that he was unable to give Mr. Colburn any relief. The Director stated that, in view of the disclaimer clauses in the agreement, the only possible basis for any claim by Mr. Colburn would be fraud or breach of contract. The Director concluded that the facts do not show a breach of the agreement on the part of the Department.

Finally, in an October 11, 1978, letter responding to your request that he reconsider his earlier decision, Mr. Jacobs again emphasized that Mr. Colburn has failed to allege facts showing that additional construction costs resulted from the RLA's failure to perform any of the obligations it assumed under the lease agreement. Apparently, the Director has concluded that he was under no obligation under the terms of the contract to disclose data available within the Department concerning the old foundation, and thus he has concluded that Mr. Colburn would be unable to prevail if the matter were litigated. The Director is of the opinion that RLA has no authority to settle the claim, because:

"It is not asserted as a contractual right * * * but rather, is in the nature of a claim for damages for breach of contract or misrepresentation. I am advised by counsel that administrative agencies and officers of the government have no authority to settle such unliquidated claims * * *."

The statutory authority of the RLA is set forth in 5 D.C. Code § 703(b) which reads as follows:

"(b) The said District of Columbia Redevelopment Agency is hereby made a body corporate of perpetual duration, the powers of which shall be vested in and exercised by the board of directors thereof, consisting of the five members thereof appointed as above set forth, except that nothing in this section shall prohibit the District of Columbia government from dissolving the corporation, eliminating the board of directors, or taking such other action with respect to the powers and duties of such Agency, including those actions specified in subsection (c), as is deemed necessary and appropriate. It shall have the power to adopt, alter, and use a corporate seal which shall be judicially noticed; to make contracts; to sue and be sued, to complain and

defend in its own name in any court of competent jurisdiction, State, Federal, or municipal; to make, deliver, and receive deeds, leases, and other instruments and to take title to real and other property in its own name; to adopt, prescribe, amend, repeal, and enforce by-laws, rules, and regulations for the exercise of its powers under sections 5-701 to 5-719 or governing the manner in which its business may be conducted and the powers granted to it by sections 5-701 to 5-719 may be exercised and enjoyed, including the selection of officers other than its chairman, together with provisions for which committees and the functions thereof as it may deem necessary for facilitation of its work; to protect and enforce any right conferred upon it by sections 5-701 to 5-719, or otherwise acquired, including any lease, sale, or other agreement made by or with it; and in general to exercise all the powers necessary or proper to the performance of its duties and functions under sections 5-701 to 5-719."

As can be seen from the above-quoted statute, RLA has a broad grant of authority to engage in corporate activities, including the power to sue and be sued and to exercise all the powers necessary or proper to the performance of its duties and functions. This broad grant of authority implies that RLA has the power to settle claims made against it. Pursuant to this power, it can disallow claims that it determines have no legal merit and allow claims that it determines have legal merit. This authority would apparently permit RLA officials to compromise claims where there is a prima facie case of legal liability on the part of RLA and when a private individual would be liable under the same circumstances. The burden is on the claimant to establish RLA's liability and the claimant's right to payment. By the same token, RLA officials would have no authority to compromise claims where such officials believed there was no legal liability on the part of the agency. Therefore, it is not enough for the claimant to demonstrate that he sustained damages; he must also demonstrate that the agency was legally responsible for such damages.

In view of the foregoing, RLA has authority to settle and compromise valid claims. However, in Mr. Jacobs' view, Mr. Colburn has not presented his claim in terms that establish a legal liability on the part of RLA

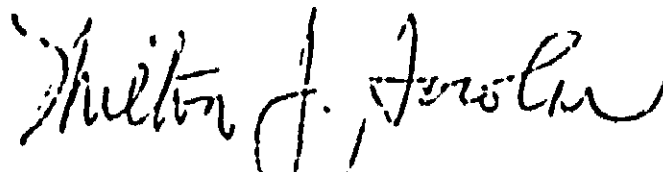
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for the damages he has suffered, and Mr. Jacobs expressly rejects breach of contract or misrepresentation as theories under which he would have authority to settle this claim.

We express no opinion on the legal merits of Mr. Colburn's claim or on any defenses that may be asserted by RLA. It is the function of legal counsel to make such judgments. In this connection, Mr. Colburn should consider retaining legal counsel to present his claim in its most favorable light and also to realistically evaluate the probability of recovery.

We trust this information will be useful to you in responding to your constituent.

Sincerely yours,



Milton J. Socolar
General Counsel