

**STATE OF CONNECTICUT
DEPARTMENT OF HOUSING**

In the Matter of:)
)
Petition for Declaratory Ruling)
King Court State Family)
Moderate Rental)
)

December 10, 2018

DECLARATORY RULING

I. Procedural Background

On June 13, 2018, the King Court Residents Association, Mary Hill, Denise L. Lee, and Sharon Suzette Wright, King Court residents and officers of the King Court Residents Association (collectively, "Petitioners"), filed a Petition for Declaratory Ruling (the "Petition") with the State of Connecticut, Department of Housing ("DOH"), pursuant to Section 4-176 of the Connecticut General Statutes ("CGS"). The Petition requested a declaratory ruling as to:

Whether the decision issued April 12, 2017 by Commissioner Klein amending the Declaration of Land Use associated with the Moderate Rental Housing project known as King Court, 086-MR-23, to reflect that the State Moderate Rental Program requirement applied to only 50 of the 80 units on the property, was a valid modification of the final DOH decision issued October 23, 2013 following public hearing in the matter of the proposed disposition of King Court, when: (1) the October 23, 2013 DOH decision pursuant to Conn. Gen. Stat. § 8-64a authorizing the sale ordered that 80 units would remain in the state family moderate rental program; (2) the Purchase and Sale Agreement through which Goodwin College King Court, LLC acquired the property from the East Hartford Housing Authority specified that the purchaser will maintain 80 units subject to the State Family Moderate Rental program guidelines; (3) the Resident Participation Plan required by § 8-64a and signed by Goodwin College King Court, LLC and the King Court Residents Association representatives on September 18, 2014 stated that 80 units would remain part of the moderate rental program; and (4) the Commissioner failed to notify the King Court Residents Association and King Court tenants and provide them with an opportunity to participate prior to modifying the 2013 decision, nor

provided for their rights and privileges, as required by Conn. Gen. Stat. §§ 8-64a and 4-181a(b).

On August 8, 2018, DOH issued a Notice and Order stating that DOH would issue a declaratory ruling limited to the following questions:

- Is Section 8-64a of the Connecticut General Statutes applicable to DOH's April 17, 2017 approval of an amendment to the Declaration of Land Use Restrictive Covenant-Rental Housing (the "Declaration") and the subsequent modification of the Declaration?
- What statutes, regulations, and/or agreements apply to DOH's approval as to whether the modification of the Declaration was authorized?
- Were DOH's April 17, 2017 approval of the amendment to the Declaration and the subsequent modification of the Declaration valid and appropriate under all applicable statutes, regulations and agreements?

On September 4, 2018, Goodwin College King Court LLC ("GCKC") filed a Petition for Party Status, petitioning to be made a party to the matter pursuant to Section 4-177a of the Connecticut General Statutes. On September 7, 2018, DOH granted GCKC's Petition for Party Status.

II. **Statement of Facts**

1. On February 21, 1950, the State of Connecticut entered into an Assistance Agreement with the Housing Authority of the Town of East Hartford ("EHHA") pursuant to CGS § 8-69 *et seq.*, providing assistance to EHHA to construct new dwelling units to be known as King Court, which were subject to the restrictions of the State Moderate Rental Program ("SMRP") (the "Assistance Agreement"). On August 29, 1958, the Assistance Agreement was consolidated with a July 21, 1956 Assistance Agreement for Veterans' Terrace Extension (the "Consolidated Agreement").
2. On May 8, 2013, a public hearing was held by the Department of Economic and Community Development ("DECD") to determine whether the proposed disposition of King Court by EHHA satisfied the enumerated requirements under CGS § 8-64a.¹
3. On September 19, 2013, the Consolidated Agreement was amended to provide that King Court was no longer subject to the terms, conditions and provisions of the Consolidated

¹ Pursuant to CGS § 8-37r, the statutory authority of DECD under CGS § 8-64a was transferred to DOH on July 1, 2013.

Agreement, but would thereafter be subject to the terms, conditions and provisions of the Assistance Agreement (the "Amended Assistance Agreement").

4. On October 23, 2013, the Commissioner of Housing issued a Decision (the "October 23 Decision"), determining that EHHA had satisfied all of the conditions set forth in CGS § 8-64a and ordering that EHHA may proceed with the disposition of King Court, subject to its compliance with CGS § 8-76 and subject to certain conditions set forth therein.
5. On December 18, 2013, EHHA and Goodwin College King Court, LLC ("GCKC") entered into a Purchase and Sale Agreement, transferring ownership of King Court from EHHA to GCKC. The Purchase and Sale Agreement provided that the purchaser "shall maintain 80 units as affordable to household earning at or below 80% Area Median Income for a period of 40 years," and that "it will maintain 80 units subject to the State Family Moderate Rental program guidelines, governed by Sections 8-39 and 8-69 through 8-81 of the Connecticut General Statutes, and as directed in the DOH/CHFA Asset and Property Management Manual." (Purchase and Sale Agreement, Sections 5.1(d), 5.2(c)).
6. On July 30, 2014, GCKC signed a Declaration of Land Use Restrictive Covenants-Rental Housing (the "Declaration"), which was recorded on the land records, subjecting the eighty (80) units at King Court to the affordability restrictions of the SMRP program. Schedule A to the Declaration detailed the property considered to be part of King Court and encumbered by the Declaration.
7. On September 18, 2014, GCKC and the King Court Resident Association signed a Resident Participation Plan pursuant to CGS § 8-64c, which set forth, among other things, that "under the State Moderate Rental Program and deed restrictions filed as a result of the sale of the property Goodwin must, for forty years, maintain eighty (80) affordable housing units as defined by the State Moderate Rental Program." (Resident Participation Plan, Section 9(E)).
8. On January 21, 2015, EHHA, GCKC, and DOH signed an Assignment, Assumption and Modification of Assistance Agreement (the "Assignment Agreement"), assigning EHHA's rights and interests to the Amended Assistance Agreement to GCKC and releasing EHHA from the Amended Assistance Agreement. Schedule A to the Assignment Agreement detailed the property considered to be part of King Court and encumbered by the Assignment Agreement.
9. On December 23, 2016, GCKC wrote a letter to the Commissioner of Housing, requesting that the Schedule A definition of the property be modified "to delete reference to 30 of the King Court housing units to clarify that the moderate rental program requirements apply to 50 King Court units, which number represents the housing units at King Court that were available for occupancy at the time of the transfer."

10. On April 12, 2017, the Commissioner of Housing agreed to the modification of Schedule A of the Assignment Agreement (the "Restatement"), directing GCKC to record on the land records a Revised Declaration with a Revised Schedule A reflecting the change.
11. On April 18, 2017, GCKC signed a Corrected Declaration of Land Use Restrictive Covenants-Rental Housing (the "Corrected Declaration") with a Revised Schedule A reflecting the applicability of the Declaration to the fifty (50) units that were habitable at the time of the October 23 Decision. The Corrected Declaration was recorded on the land records.
12. For purposes of this Declaratory Ruling, all references hereinafter to the "Assistance Agreement" shall refer to the Assistance Agreement as modified by the Consolidated Agreement, the Amended Assistance Agreement, and the Assignment Agreement.

III. Analysis

A. CGS § 8-64a Is Not Applicable to DOH's April 12, 2017 Approval of an Amendment to the Declaration and the Subsequent Modification of the Declaration

CGS § 8-64a provides, in relevant part:

"No housing authority which receives or has received any state financial assistance may sell, lease, transfer or destroy, or contract to sell, lease, transfer or destroy, any housing project or portion thereof in any case where such project or portion thereof would no longer be available for the purpose of low or moderate income rental housing as a result of such sale, lease, transfer or destruction, except the Commissioner of Housing may grant written approval for the sale, lease, transfer or destruction of a housing project if the commissioner finds, after a public hearing, that (1) the sale, lease, transfer or destruction is in the best interest of the state and the municipality in which the project is located, (2) an adequate supply of low or moderate income rental housing exists in the municipality in which the project is located, (3) the housing authority has developed a plan for the sale, lease, transfer or destruction of such project in consultation with the residents of such project and representatives of the municipality in which such project is situated and has made adequate provision for said residents' and representatives' participation in such plan, and (4) any person who is displaced as a result of the sale, lease, transfer or destruction will be relocated to a comparable dwelling unit of public or subsidized housing in the same municipality or will receive a tenant-based rental subsidy and will receive relocation assistance under chapter 135. The commissioner shall consider the extent to which the housing units which are to be sold, leased, transferred or destroyed will be replaced in ways which may include, but need not be limited to, newly constructed housing, rehabilitation of housing which is abandoned or has been vacant for at least one year, or new federal, state or local tenant-based or project-based rental subsidies. The commissioner shall give the residents of the housing project or portion thereof which is to be sold, leased, transferred or destroyed written notice of said public hearing by first class mail not less than ninety days before the date of the hearing.

Said written approval shall contain a statement of facts supporting the findings of the commissioner . . . The commissioner shall not impose a one-for-one replacement requirement on King Court in East Hartford.

By its terms, CGS § 8-64a governs the disposition of property by a housing authority, defined by CGS § 8-39(b) as “a public corporation created by section 8-40, and the Connecticut Housing Authority when exercising the rights, powers, duties or privileges of, or subject to the immunities or limitations of, housing authorities pursuant to section 8-121.”

CGS § 8-64a imposes obligations only on housing authorities, and is applicable to the operation of a property only while the property is owned by the housing authority. The obligations imposed on the housing authority by the statute in effect lapse when a property approved for disposition under the statute is transferred to a non-housing authority owner, and the requirements of CGS § 8-64a cease to be applicable.

The Restatement took place well after ownership of King Court had been transferred from EHHA to GCKC. Because CGS § 8-64a only imposes obligations on housing authorities, the conditions set forth in the October 23 Decision pursuant to CGS § 8-64a required only EHHA to undertake the steps set forth in the Decision. Specifically, the October 23 Decision compelled EHHA to require the Selected Purchaser of King Court to, among other things, rehabilitate eighty (80) dwelling units and maintain such units as affordable under the terms of the SMRP.

At the time EHHA and GCKC entered into the Purchase and Sale Agreement requiring GCKC to maintain eighty (80) affordable units in accordance with the SMRP, EHHA’s obligations under the October 23 Decision were satisfied. Once the closing took place, the requirements of CGS § 8-64a were no longer applicable to the new owner of the property, since it was no longer owned by a housing authority. While the Restatement had the net effect of

removing thirty (30) King Court units from the SMRP, it did not have and could not at that time and given the ownership of the property, have had “the effect of modifying her October 23, 2013 Decision” thereby triggering the requirements of CGS § 8-64a. (Petitioners’ Supplemental Legal Argument, p. 4). While actions taken by GCKC may or may not have violated the Purchase and Sale Agreement or other subsequent agreements, as discussed in greater detail below, EHHA fulfilled its obligations pursuant to CGS § 8-64a and the October 23 Decision at the time the property was transferred to GCKC consistent with the terms of the Purchase and Sale Agreement. Therefore, it was not necessary or appropriate at the time of the Restatement, three years after the property was transferred to GCKC, to revisit the determinations set forth in the October 23 Decision or the obligations imposed on EHHA.

Because King Court was no longer owned by a housing authority at the time of the Restatement and the removal of the thirty (30) units from the SMRP was not proposed or undertaken by a housing authority, the requirements of CGS § 8-64a were not applicable.

B. The Terms of the Assistance Agreement and Declaration Apply to DOH’s Approval of the Restatement And the Subsequent Amendment of the Declaration

1. The Uniform Administrative Procedures Act Does Not Apply

Petitioners contend that, in addition to CGS § 8-64a, the Uniform Administrative Procedures Act (CGS § 4-166 *et seq.*) (the “UAPA”) applies to the Restatement of Schedule A to the Assistance Agreement approved by DOH in its April 12, 2017 letter. Specifically, Petitioners argue that the October 23 Decision constituted a “final decision” as defined by CGS § 4-166(5) and that the modification approved by DOH on April 12, 2017 constituted reconsideration of the October 23 Decision pursuant to CGS § 4-181a.

A reconsideration under the UAPA requires an agency to “render a decision modifying, affirming or reversing the final decision,” (CGS § 4-181a(a)(3)) or to “reverse or modify the

final decision.” (CGS § 4-181a(b)). As set forth above, the Restatement did not modify, reverse or affirm the October 23 Decision, which no longer governed the administration of the property as of the date of the transfer of the property to GCKC as contemplated by the Purchase and Sale Agreement. The Restatement modified Schedule A to the Assistance Agreement, which governs the applicability of the SMRP to King Court, but not the terms of the October 23 Decision. Since the Restatement did not constitute a decision modifying, affirming or reversing the October 23 Decision or its terms, the provisions of CGS § 4-181a governing reconsideration of a final agency decision are not applicable here.

2. The Purchase and Sale Agreement and Resident Participation Plan Are Not Applicable Here

Petitioners further assert that the Purchase and Sale Agreement entered into between EHHA and KCGC and the Resident Participation Plan, signed by the King Court Resident Association and GCKC, are applicable here. DOH was not a party to either the Purchase and Sale Agreement or the Resident Participation Plan, and is not subject to any obligations thereunder. They therefore are not relevant or applicable to the question of whether DOH’s approval of the Restatement was valid and appropriate. While there may be issues of whether the removal of units from the SMRP constituted a breach of obligations under the other agreements, DOH does not have jurisdiction over a dispute between parties concerning a contract to which DOH is not a party, and those issues are best left to be determined in the context of the litigation pending between the parties.

3. The Terms of the Assistance Agreement and the Declaration Apply to DOH’s Approval of the Restatement

The Restatement had the effect of modifying the Assistance Agreement and Declaration. A reading of GCKC’s December 23, 2016 request and DOH’s April 12, 2018 approval reflects

that both were inartfully phrased, using ill-chosen and misplaced language that might have led Petitioners to believe that the October 23 Decision was being revisited and modified. In order to determine what statutes, regulations or agreements in fact apply to an analysis of the Restatement, however, it is necessary to consider what action was, in substance, actually approved by DOH and ultimately undertaken. It is clear that the April 12, 2017 letter specifically authorized the modification of the Assistance Agreement and Declaration, which documents reflected that the King Court units were within the scope of the SMRP program.

Because the Assistance Agreement and Declaration govern King Court's inclusion in the SMRP and the Restatement authorized the modification of those documents, the terms of those documents govern the determination of whether the Restatement was valid and appropriate.

C. DOH's Approval of the Modification of the Assistance Agreement and Declaration Was Valid and Appropriate

The Restatement approved in the April 12, 2017 letter was within DOH's authority under the governing documents and any applicable statutes and regulations and was valid and appropriate. As set forth above, notwithstanding the fact that GCKC's December 23, 2016 request and DOH's April 12, 2018 approval were poorly phrased, the action approved by DOH and undertaken as a result of the Restatement was the modification of the Assistance Agreement and Declaration. At the time of the Restatement, DOH was responsible for the administration of the SMRP as it related to the King Court units. Under the SMRP, DOH was the appropriate entity to ask for changes in affordability under the SMRP or to request release from the SMRP.

The parties to the Assistance Agreement are GCKC and DOH. Amendment of the Assignment Agreement therefore may be effectuated with the mutual agreement of GCKC and DOH, the parties to the agreement. As a result, the agreement between GCKC and DOH to

modify Schedule A constituted an appropriate amendment to the Assistance Agreement under the terms of the agreement.

The Declaration provides that the restrictions set forth therein will be enforced by DOH and/or CHFA. It specifically states that DOH and GCKC “may execute and record any amendment or modification to this Declaration and such amendment or modification shall be binding on any third-parties granted rights under or otherwise through this Declaration.” (Declaration, Section 7(c)). The Declaration requires that amendments be effected as was done here. Although the language preceding this portion of the Declaration states that the owner will take all actions necessary to effect amendment of the Declaration necessary to comply with the SMRP program, it does not indicate that amendments may be made *only* for that purpose. The plain language of the full provision in fact demonstrates otherwise – that *any* amendment or modification may be made by DOH acting together with GCKC.

Notwithstanding the fact that the Restatement was effected properly in accordance with the terms of the Assistance Agreement, Declaration and the SMRP, Petitioners contend that DOH cannot issue a Declaratory Ruling in this case that would impair Petitioner’s purported vested contract rights under the Purchase and Sale Agreement and Resident Participation Plan.

The Restatement addressed the obligations of GCKC, the owner of the King Court units, under the SMRP. While the decision to, in essence, release thirty (30) King Court units from the SMRP may have an impact on GCKC’s compliance with other agreements to which DOH is not a party, the Restatement and resulting release of units reflects a wholly separate transaction in the context of the relationship of GCKC with DOH and the SMRP. Disputes relating to its obligations under other contracts and the interpretation of those contracts are appropriately considered in the context of the pending litigation between Petitioners and GCKC, and are

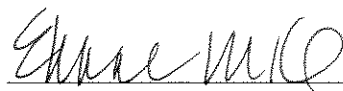
independent of whether DOH should have approved the modification of the Assistance Agreement and Declaration.

The case cited by Petitioners suggesting otherwise is inapposite. *See Kleen Energy Systems, LLC v. Commissioner of Energy and Environmental Protection*, 319 Conn. 367 (2015). *Kleen* does not, as Petitioners maintain, hold that an agency cannot issue a declaratory ruling that might have an implication or effect on an existing contract between other parties. Rather, the Court in *Kleen* considered whether an agency had jurisdiction to resolve a contract dispute between private parties to an agreement that had been developed and approved by the agency itself as a master agreement in a prior proceeding. The analysis focused on whether the agency could subsequently interpret the master agreement that it had developed where the statute that authorized it to create the agreement did not provide for the continued supervision or modification of its terms. The Court concluded that the agency could not alter its original decision approving the master agreement after the parties have agreed to its terms.

In contrast, a declaratory ruling here that DOH acted appropriately in approving the Restatement does not involve a contract the agency itself had previously created or approved. *Kleen* does not support the conclusion that an agency cannot issue a declaratory ruling that might have implications for the parties to a separate private contract with which the agency has had no involvement. Moreover, while in *Kleen* the agency specifically interpreted and opined on the meaning of contract terms, a declaratory ruling here does not require DOH to interpret the terms of the contract or resolve the dispute between the parties that are the subject of the pending litigation.

IV. Conclusion

In light of the foregoing determinations that CGS § 8-64a was not applicable to DOH's approval of the Restatement of Schedule A to the Assistance Agreement, and that the terms of the Assistance Agreement and Declaration applied, DOH's April 12, 2017 approval of the Restatement and the subsequent modification of the Declaration were valid and appropriate.



Evonne M. Klein
Commissioner