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AGRICULTURE, DEPARTMENT OF: Designation of Michigan Crop Improvement Association as an official seed certifying agency

WORDS AND PHRASES: "State agency"

Although, pursuant to statute, the Michigan Crop Improvement Association is designated by the director of the Department of Agriculture as an official seed certifying agency, it is not a state agency inasmuch as:

1. it was neither created nor vested with delegated powers by the legislature;
2. it is incorporated under a general corporation law;
3. its funds are obtained from membership dues which are not fixed by statutory enactment; and
4. its governing board is not selected by a government official or agency.

Opinion No. 5011

June 18, 1976.

B. Dale Ball, Director
Department of Agriculture
Lewis Cass Building
Lansing, Michigan 48902

I am in receipt of your letter regarding the entity created by 1959 PA 221; MCLA 286.71 *et seq*; MSA 12.195(1) *et seq* and the rules promulgated thereunder. Your letter states:

"The MCIA has some concerns relative to its vulnerability to errors and omissions suits and the association's legal position with respect to the law governing suits against state agencies, thus:

1. Would the MCIA, in fact, be considered as a state agency if sued for errors or omissions arising from the seed certification process; or
2. If not, would it be appropriate for the Department to intervene in such a suit?"

1959 PA 221, *supra*, is entitled:

"An Act to define certified and certain classes of seed; to authorize the director of agriculture to promulgate rules and regulations governing the certification of seed as to certain genetic and other standards; to authorize the designation by the director of official seed certification agencies; and to provide penalties for the violation of this act."

By 1959 PA 221, § 2, the director of agriculture is designated the legal seed certifying officer of the State of Michigan. Most relevant to this discussion is 1959 PA 221, § 3, which provides:

"The director shall, after consultation with the dean of agriculture of Michigan state university and the director of the Michigan agricultural experiment station, and after due notice and public hearing, designate official seed certifying agencies which he finds qualified to assist and advise him in carrying out this act and to advise as to variety, type, strain or other genetic characteristics and to recommend standards

for agricultural or vegetable seeds or plant propagating materials to be certified and the labeling of such seeds. The director shall authorize the designated official seed certifying agencies to charge a fee commensurate with the cost of the seed certification function."

Pursuant to 1959 PA 221, § 3, the Michigan Crop Improvement Association (MCIA) was designated as an official seed certifying agency in 1970-71 AACCS, R 285.623(1). However, it may be noted that MCIA is merely a source of advice for the benefit of the Director of the Department of Agriculture, who is not obligated to follow its recommendations.

To evaluate whether the MCIA is, in fact, a state agency, an analysis of its creation, structure, and purpose must be made. As stated in *Advisory Opinion re Constitutionality of PA 1966, No. 346*, 380 Mich 554, 571, 158 NW 2d 416, 423 (1968):

"We must, . . . look behind the name to the thing named. We must examine its character, its relations, and its functions to determine, indeed, whether it is an agency or instrumentality of State government. . . ."

In determining the Michigan State Apple Commission to be a state agency, my predecessor utilized the following test in II OAG 1955-1956, No. 2942, p 737, 738 (December 7, 1956):

"The Michigan State Apple Commission is *created by the legislature* and controlled by it with delegated powers. Its funds which it uses for purposes of the act, including pay for its members, come from an assessment levied upon the production of apples at a rate per bushel established by the act. The duties and purposes are set forth and are generally declared to be ' . . . in the exercise of the police power of the state to protect public health, to promote the welfare of the state and to stabilize and protect and promote the apple industry of the state.'

"The *Commission consists of seven members appointed by the Governor*, with the advice and consent of the Senate for definite terms of office, plus two ex officio members whose capacity is advisory only without any vote. Its jurisdiction is coextensive with the state boundaries. No profit is contemplated and funds derived from the taxation are to be expended to carry out the purposes of the act, including the statutory salary of members of the Commission. Such a body, created by the legislature, meets the requirements of a state agency whose members are state officers performing a governmental function in the interest of public health and welfare as declared by the law." (emphasis added)

An analysis of the character of the MCIA shows such association *not* to be a state agency. The MCIA was neither created nor vested with delegated powers by the legislature. The MCIA revised 1970 Constitution and By-laws (Art I) denotes that the association is incorporated under the General Corporation Law, 1921 PA 84, a forerunner of the present General Corporation Law. The funds for said association are obtained from membership dues (Art IV), not at rates established by a statutory enactment. Also, the governing board of the MCIA is not selected by government official or agency

(Art V). In view of these characteristics, you are hereby advised that the MCIA is not to be considered a state agency.

Turning to your second question, intervention in lawsuits by the state, through the Department of the Attorney General, is permissible where necessary to protect a right or interest of the state, or of the people of the state. 1919 PA 232, MCLA 14.101; MSA 3.211 states in part:

"The attorney general of the state is hereby authorized and empowered to intervene in any action heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state . . ."

You have informed me that the MCIA is interested in the intervention question because they must make a decision on the necessity of obtaining errors and omissions insurance. Kindly be advised that the decision on whether to intervene rests with the Attorney General. Thus, a decision by MCIA on errors and omissions insurance should not assume intervention on the part of the state.

FRANK J. KELLEY,
Attorney General.

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STATE CONSTRUCTION CODE: Schools and School Districts

SCHOOLS AND SCHOOL DISTRICTS: State Construction Code

BARRIER FREE DESIGN: Schools and School Districts

The barrier free design rules contained in the State Construction Code do apply to the construction of public and nonpublic school buildings through the provisions of 1966 PA 1.

Opinion No. 4914-A

June 21, 1976.

Honorable Jelt Sietsema
State Representative
The Capitol
Lansing, Michigan

You have requested my opinion on a question which may be stated as follows:

Do the barrier free design requirements of the State Construction Code apply to the construction of public and nonpublic school buildings?

1966 PA 1, as last amended by 1975 PA 177; MCLA 125.1351 *et seq*; MSA 3.447(121) *et seq*, provides, in its title, as follows:

"An Act to provide for the accessibility and the utilization by the physically limited persons of public facilities and facilities used by the public; to create a barrier free design board and to prescribe its powers and duties; to prescribe the powers and duties of certain other state and