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COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF THE APPLICATION OF
MADISON COUNTY INDUSTRIAL DEVELOPMENT
AGENCY, et al.

Appellants,

No. 14

-against-

STATE OF NEW YORK AUTHORITIES BUDGET
OFFICE, et al.

Respondents.

20 Eagle Street
Albany, New York
February 12, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 14, matter of Madison
3 County Industrial Development Agency v. the State of New
4 York Authorities Budget Office.

5 (Pause)

6 CHIEF JUDGE DIFIORE: Counsel?

7 MR. MALCOMB: Thank you. May it please the
8 court. My name is Charles Malcomb. I'm counsel for the
9 appellants, Madison County IDA and the Madison Grant
10 Facilitation Corporation.

11 I would like to request two minutes for rebuttal.

12 CHIEF JUDGE DIFIORE: Of course.

13 MR. MALCOMB: Thank you. General Municipal Law
14 858(17) provides the express power to IDAs to do all things
15 necessary or convenient to carry out its purposes and
16 exercise the other express powers given in that section of
17 the statute.

18 Despite what that ABO argues, this is not carte
19 blanche to do whatever the IDA wants to do. And it does
20 not swallow the other sixteen enumerated powers. Rather -
21 - -

22 JUDGE WILSON: I'm having a little trouble
23 understanding why that issue is here in the following
24 sense. I read what the ABO did or said as: there's some
25 uncertainty about - - - based on the Attorney General's



1 opinion, about whether you can do this or not. And given
2 the uncertainty, and given another issue they identified,
3 we want you to report separately. Why isn't that within
4 their discretion, and - - - and why is it that the
5 underlying issue that you think, I guess - - - the
6 underlying issue of whether you can or can't form a
7 subsidiary is really here?

8 MR. MALCOMB: Okay. Well, the - - - the ABO had
9 a policy - - - it's at record, page 70, which basically
10 said that subsidiaries can file consolidated reports. This
11 is obviously more cost-effective for the IDA to be able to
12 file a consolidated report.

13 JUDGE WILSON: That's not specifically
14 subsidiaries of IDA; that's specifically subsidiaries of
15 all types of public authorities?

16 MR. MALCOMB: Correct, subsidiaries in general.

17 JUDGE WILSON: Okay.

18 MR. MALCOMB: Right.

19 JUDGE WILSON: Yeah.

20 MR. MALCOMB: So if you have a subsidiary, and
21 you meet the criteria that are spelled out the ABO's
22 policy, you're able to file consolidated reports. The ABO,
23 in this case, denied the IDA and the GFC's request to file
24 consolidated reports on the basis that the AG's opinion
25 saying that we don't have the legal right to form a



1 subsidiary. That was based upon an error of law. Based on
2 the ABO's policy, the GFC and the IDA had the right to file
3 - - -

4 JUDGE WILSON: But that's my question.

5 MR. MALCOMB: - - - consolidated reports.

6 JUDGE WILSON: That's my question, though. Is it
7 an error of law for the ABO to say there's now some doubt
8 about the ability to form a subsidiary and therefore we
9 want to proceed cautiously? Is that a question of law?

10 MR. MALCOMB: When an administrative agency
11 doesn't follow their own policies, that's improper, that's
12 arbitrary, and their arbitrary decision was based on an
13 error of law. The sole reason in the record that was
14 provided as to why the IDA and the GFC did not have the
15 ability to file consolidated reports was on the basis that
16 the IDA didn't have the power in the first place.

17 And we submit that that's not correct, based on
18 the plain meaning of 858(17). So if you look at the
19 argument is well, all of these horrible things could
20 happen, you're - - - you're outside of the sixteen other
21 enumerated powers when you're doing this, I would submit
22 that this is a limited power. It's got to be limited by
23 "necessary or convenient to the exercise of another express
24 power" consistent with the IDA's purposes.

25 So here the record was undisputed that the IDA



1 and the GFC met all three of those requirements. It was
2 admittedly convenient. The ABO's never argued otherwise.
3 The Third Department conceded that it was convenient. It
4 was to carry out an economic development purpose to, you
5 know, confer a grant on private business, disperse job
6 creation in the C and D recycling sphere. And it was for
7 the exercise of another express power, the power to accept
8 and use grants. So - - -

9 JUDGE STEIN: So it's your position that - - -
10 one of the things I'm having some trouble here with is - -
11 - is I'm trying to figure out the distinction between an
12 affiliate and a subsidiary and what rules apply to each.
13 But if we agree with you that IDAs have the authority to
14 form subsidiaries, are you saying that - - - that the ABO
15 then would have no authority - - - this is sort of a
16 follow-up on Judge Wilson's question - - - to require that
17 subsidiary to separately report?

18 MR. MALCOMB: The ABO could provide for reporting
19 through the PARIS system, as it deems appropriate, provided
20 it's consistent with the statutory language of the Public
21 Authorities Law.

22 The ABO went and issued policy guidance under
23 that provision saying that a subsidiary, meeting specific
24 criteria controlled by the parent entity, can file
25 consolidated reporting. Now, if the ABO wanted to revisit



1 that and choose different requirements, or not allow
2 subsidiaries to file consolidated reporting with their
3 parents, that certainly would be another question as to
4 whether or not they were acting within the - - - their
5 authority.

6 JUDGE STEIN: What if it's an affiliate? What if
7 it's called an affiliate under the Public Authorities Law,
8 not a subsidiary? In that case, can the ABO require
9 separate reporting?

10 MR. MALCOMB: They do.

11 JUDGE STEIN: They do.

12 MR. MALCOMB: They require separate reporting for
13 affiliates. Now - - -

14 JUDGE STEIN: Okay. So - - -

15 MR. MALCOMB: - - - the strange thing, and where
16 I think the ABO gets confused on all this is an affiliate -
17 - - a subsidiary is a type of affiliate. And affiliate is
18 broader; it encompasses the parent and the subsidiary
19 within that definition. If you look for the Not-For-Profit
20 Corporation Law - - -

21 JUDGE STEIN: That's why I'm confused as to your
22 position that the ABO couldn't require - - - under its
23 authority to require an affiliate to file separately, why
24 couldn't it require Madison Grant to - - - to file
25 separately?



1 MR. MALCOMB: We haven't specifically taken the
2 provision what they can and can't do with respect to
3 reporting. We've taken the position: here's what they
4 did.

5 JUDGE STEIN: Okay.

6 MR. MALCOMB: They said in their policy that you
7 can have consolidated filing with - - - with parents and
8 subsidiaries. They, in their policy, at record 70, set out
9 the specific criteria as to how you meet that definition.
10 We've met it; they don't dispute that. And they denied us
11 our ability to file consolidated reports, which we think
12 was error.

13 But to the point of the affiliates versus the
14 subsidiaries, the ABO, you know, in the record, at 106, in
15 the affidavit that they submitted below, said, well, yeah,
16 it's common for IDAs to have affiliates and to use these
17 for their purposes. Well, where's that power in (1)
18 through (16) of 858?

19 And the answer is it's in (17), the same for
20 subsidiaries. There's - - - they have not articulated why
21 the creation and use of an affiliate is somehow so beyond
22 the scope of 858(17). And so we would submit that, if you
23 take a look at Public Authorities Law, Section 2, which
24 talks about what the definition of a "local authority" is -
25 - -



1 JUDGE RIVERA: Can I ask, since - - - putting
2 aside for a moment this particular argument you made about
3 there's no power, other than in (17), for affiliates as
4 well as subsidiary, what - - - why is it more convenient to
5 have the subsidiary than the affiliate?

6 MR. MALCOMB: Well, I would say that an affiliate
7 and a subsidiary are - - - are related, and a subsidiary is
8 a type of affiliate. I would think an affiliate could be
9 convenient. But a subsidiary is as well. And it may be
10 more so in the fact that the parent can control the
11 subsidiary in a different manner. So you know, you - - -

12 JUDGE FAHEY: Wasn't there a public policy basis,
13 though, for the ABO's initial receipt of the power to do
14 this, to audit, basically, the activities of these
15 subsidiaries or affiliates, and that was that the local
16 IDAs, the state had determined were, in many instances, not
17 reaching their contractual goals, in other words, like a
18 number of hires, things like that, their employment goals,
19 their economic development goals. So they set up a process
20 to require that there be an auditing and that you can't
21 evade the auditing and evade whether or not you meet your
22 local requirements by trying to draw on a distinction here
23 between subsidiaries and affiliates. Isn't that really
24 what's at the core here of their policy?

25 MR. MALCOMB: You see, in the brief to this



1 court, the ABO talked a whole lot about transparency and
2 the purposes for the reporting. But they - - -

3 JUDGE FAHEY: I'm not even so much concerned
4 about transparency, in other words, the great wider world
5 knowing about everything that's going on. I'm talking
6 about whether or not we gave a contract to somebody and
7 they - - - and they gave them reduced tax breaks and they
8 said they'd hire forty-two people and they hired three.
9 And we want to audit that to make sure that they did that,
10 and we don't - - - and we don't want to say that you can
11 set up a subsidiary that would prevent us from doing that
12 kind of work. Isn't that what's really underlying this?

13 MR. MALCOMB: So I think we're confusing the
14 auditing the IDAs, in general, with the - - -

15 JUDGE FAHEY: No, I understand; I'm not talking
16 about auditing their costs or anything like that.

17 MR. MALCOMB: Okay.

18 JUDGE FAHEY: I'm talking about the success of
19 the contract itself.

20 MR. MALCOMB: What we're arguing for here,
21 consolidated reporting, that does - - - nothing different
22 is submitted to PARIS.

23 JUDGE FAHEY: So the ABO could meet its goals
24 then, is what you're saying - - -

25 MR. MALCOMB: Absolutely.



1 JUDGE FAHEY: - - - under the consolidated review
2 approach?

3 MR. MALCOMB: Absolutely. And as a matter of
4 fact, below we argued that there is no difference. We
5 pointed out here's what the system is, here's what the ABOs
6 said they were initially concerned about that, you know,
7 there might be some things that wouldn't be caught up in a
8 consolidated report. We refuted that. They abandoned that
9 argument at every level. And they've tried, at the last
10 minute here, to say, well, we're losing something by having
11 consolidated reporting, but they conceded that at the Third
12 Department below in their briefs.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. MALCOMB: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MR. GOLDFARB: Good afternoon. May it please the
17 court. Rob Goldfarb appearing for the respondents.

18 The Authorities Budget Office rationally required
19 the IDA and the local development corporation to file
20 separate disclosure reports.

21 And Judge Wilson - - -

22 JUDGE STEIN: How about the issue about whether
23 they can - - - whether they operated under an error of law
24 and whether they can - - - the IDAs can form subsidiaries?

25 MR. GOLDFARB: At - - -



1 JUDGE STEIN: Would you start with explaining - -
2 - first of all telling us if you agree that - - - that an
3 IDA can form an affiliate but not a subsidiary, and if so,
4 where the former power comes from and what's the
5 difference?

6 MR. GOLDFARB: Yes, Your Honor. Our position,
7 and as laid out in our brief, is that the legislature did
8 not grant the IDA authority, express or implied, to create
9 a subsidiary.

10 JUDGE STEIN: But where did they - - - but do
11 they have the authority to - - - to create an affiliate?

12 MR. GOLDFARB: The IDA's enabling statute,
13 General Municipal 858, doesn't authorize an IDA to create
14 an affiliate either. The authority to create this local
15 development corporation is not conferred by the IDA
16 enabling statute. It derives from Not-For-Profit
17 Corporation Law 1411 which allows any individual over
18 eighteen to create one of these local development
19 corporations.

20 This local development corporation was caused to
21 come into existence by the IDA, but it was incorporated by
22 an individual over eighteen. ABO has not taken the
23 position that this entity was not validly created, just
24 that it is a separate local authority required to file
25 separate reports under the Act.



1 And Judge Wilson, it would be enough that there
2 is uncertainty about whether this entity can create
3 subsidiaries to make this a rational determination. For
4 the reasons we state in our brief - - -

5 JUDGE WILSON: Does - - -

6 MR. GOLDFARB: - - - we don't think there is
7 uncertainty - - -

8 JUDGE WILSON: Does the ABO have the power to
9 determine whether an IDA can create a subsidiary?

10 MR. GOLDFARB: The ABO only - - -

11 JUDGE WILSON: If I'm an IDA, can I apply to the
12 ABO for a determination that I can or cannot create a
13 subsidiary?

14 MR. GOLDFARB: No, Your Honor. But as opposing
15 counsel points out, ABO does have a policy of permitting
16 consolidated reports for parents and subsidiaries that act
17 as divisions of the parent. When ABO told this authority
18 that it was the - - - the local development corporation was
19 an affiliate under Public Authorities Law, Section 2(2),
20 they responded saying, well, can they be treated as a
21 subsidiary. At that point issue was joined on that
22 question. ABO quite reasonably sought an opinion from the
23 Attorney General and reasonably relied on that opinion.
24 And I think that's enough to make this a rational
25 determination.



1 JUDGE GARCIA: Can I ask a follow-up on that one
2 point? Let's assume your opinion is wrong, that they do
3 have the authority, just for the purposes of this
4 discussion, they do have the authority to create a
5 subsidiary, would that necessarily mean that there's no
6 rational basis for their action?

7 MR. GOLDFARB: No, Your Honor, for the reasons
8 I've stated. It's enough that there is - - - well, to
9 accept that there is no authority, no, because Public
10 Authorities Law, Section 2(2) specifically denominates this
11 local development corporation to be a, quote/unquote,
12 "affiliate" of the IDA, not a subsidiary. Section 2(2)
13 defines a local authority to include five separate types of
14 entities. They're broken out. Section 2(2)(c) - - -

15 JUDGE GARCIA: Those are a lot of sections, but
16 if you could - - - and I'm getting a little confused by
17 them. But if you are wrong on the subsidiary point and
18 they do have the authority to create a subsidiary, does
19 that necessarily make their decision, the ABO's decision in
20 this case, irrational or - - - or based on an error of law?

21 MR. GOLDFARB: No, Your Honor, it doesn't because
22 - - -

23 JUDGE GARCIA: And why, without sections, is that
24 true?

25 MR. GOLDFARB: Well, I think it's important that



1 the - - - the Public Authorities Law specifically defines,
 2 denominates this local development corporation to be a
 3 subsidiary. If you look at the - - - to be an affiliate -
 4 - - I'm sorry, Your Honor. If you look at the definition
 5 of a local authority, there is no mention of subsidiaries
 6 in there. If you look at the definition of a state
 7 authority, it defines it to include subsidiaries of such
 8 public authority. The definition of a local authority says
 9 an IDA is a local authority and an affiliate of an IDA is a
 10 local authority. Both are required to file separate
 11 reports.

12 I'd also add that the determination is consistent
 13 with the LDC certificate of incorporation which, by its
 14 terms, contemplates separate reports. It says - - - it's
 15 at page 112 of the record. It says the entity is subject
 16 to the Public Authorities Accountability Act, will be
 17 required to undergo independent audits and submit its
 18 annual budget to ABO. And another - - -

19 JUDGE GARCIA: Now, if the Agency - - - if the
 20 ABO said to them clear - - - and let's assume again - - - I
 21 don't - - - you know, not specifically here, but let's say
 22 they did, they say to the - - - they say to this - - - this
 23 company, we're doing this and we're making you file
 24 separately because we have this opinion that says you can't
 25 drop a subsidiary, and therefore our view is you have to



1 file separately.

2 And now let's say your advice that they can drop
3 the subsidiary was wrong. So wouldn't we have to send it
4 back? If they're saying to the party you can't do this
5 because of the legal advice we got from the AG, wouldn't -
6 - - even if they can do it under these other provisions,
7 would the proper remedy be for us to send it back to the
8 ABO to say do you want to do this, even assuming that they
9 can do the subsidiary?

10 MR. GOLDFARB: No, Your Honor, because that's not
11 the only reason that they gave. And they gave other
12 rational bases for requiring separate reports. If you look
13 at the letters that constitute the determination in this
14 matter, it's also rational to require separate reports here
15 because these local development corporations actually have
16 to report different content than an IDA. That's
17 specifically the recipients and the amounts and the
18 purposes of the local development corporation's grants.

19 JUDGE GARCIA: And that's in the record, these
20 other reasons as to why they were doing that?

21 MR. GOLDFARB: It's not only in the record; it's
22 in the determinations at issue. That would be at pages - -
23 -

24 JUDGE STEIN: They may have provided these other
25 reasons, right, but if - - - if their own practice - - - if



1 their own guidance says that subsidiaries are entitled to
2 file consolidated reports, and we find that they were
3 entitled to form a subsidiary, then do those other bases,
4 do those other rationales matter?

5 MR. GOLDFARB: I think those other rationales
6 matter a great deal here because - - -

7 JUDGE STEIN: Well, how can they matter if - - -
8 if their - - - if their own policy is to allow subsidiaries
9 to file separately?

10 MR. GOLDFARB: Because their policy is to allow
11 subsidiaries to file with parents where the legislature has
12 granted explicit authority to create a subsidiary in - - -

13 JUDGE STEIN: Is that what it says?

14 MR. GOLDFARB: - - - in the enabling statute.

15 JUDGE STEIN: Is that exactly what it says in
16 their - - - in their - - -

17 MR. GOLDFARB: That - - - that is what it says
18 now, and that's what it meant at the time, Your Honor. It
19 simply has to mean that the entity has legislative
20 authority to create a subsidiary.

21 JUDGE STEIN: If we say they do. That's my
22 point. If we say they have implicit authority, okay, or
23 however - - - if we say they have implicit authority, then
24 don't those other rationales - - -

25 MR. GOLDFARB: No, I still think the other bases



1 for the determination here would provide a rational basis.
2 But let me explain to you why the AG has the correct
3 opinion here. An entity only has the powers expressly
4 conferred or those required by necessary implication. The
5 IDA's enabling statute does not expressly confer authority
6 to create a subsidiary. And we have a great deal of other
7 evidence in other enabling statutes - - - they're in my
8 brief - - - that where the legislature intends to confer
9 this, it does so expressly.

10 JUDGE STEIN: Isn't that where they give the
11 subsidiary special powers or rights and - - - and so they -
12 - - in order to describe what they're allowed to do, which
13 they otherwise wouldn't be allowed to do, then they have to
14 expressly, you know, say that there's a right to form them,
15 because they're not your typical subsidiary, which as I
16 understand, doesn't have all the rights, for example, of an
17 IDA, necessarily.

18 MR. GOLDFARB: Well, you're correct, Your Honor,
19 that the legislature does also enact provisions describing
20 what the subsidiary can do, limiting its powers, describing
21 what its attributes would be and - - -

22 JUDGE STEIN: What about Public Authorities Law
23 2827-a, which provides that: "No state authority shall
24 hereafter have the power to organize any subsidiary
25 corporation unless the legislature has enacted" blah, blah,



1 blah. Doesn't that imply that up until then the state did
2 have the power to do that and also implies, since it
3 doesn't mention local authorities, that the local
4 authorities have that power as well?

5 MR. GOLDFARB: No, Your Honor.

6 JUDGE STEIN: Why not?

7 MR. GOLDFARB: First of all, a legislative - - -
8 legislatively-created entity's powers have to come from its
9 enabling statute. This court has never inferred powers for
10 a creature of statute.

11 JUDGE STEIN: But the legislature gave it the
12 power to do anything necessary or convenient to perform its
13 - - - its other expressly enumerated powers.

14 MR. GOLDFARB: In all of the enabling statutes
15 that I discuss in my brief, Your Honor, where the
16 legislature has given an entity explicit authority to
17 create various subsidiaries, they also include the
18 "necessary or convenient" clause.

19 JUDGE RIVERA: Counsel, let me ask you, so what
20 understanding should we import to the word "convenience" in
21 this provision?

22 MR. GOLDFARB: The "necessary or convenient"
23 clause, by its terms, only authorizes necessary or
24 convenient acts that are incidental to the exercise of an
25 express power. That's what it says. And here that's the



1 power of the IDA itself to accept grants. Creating a new
2 entity to accept the grant is not merely incidental to that
3 power because the IDA's no longer accepting the grant.

4 This court has never viewed a "necessary or
5 convenient" clause as permitting a legislatively-created
6 entity to do anything that it alone deems convenient, and
7 for good reason, because this would permit the entity to do
8 anything it wants and would just swallow up the rule that a
9 creature of statute lacks powers - - -

10 JUDGE RIVERA: Why can't it be convenient to
11 protect themselves from liability? I mean, that's
12 basically what they've done, right, or tried to do.

13 MR. GOLDFARB: Well, the - - - the desire to - -
14 - of the IDA to insulate itself from all liability from
15 accepting grants does not render it essential for it to
16 create a subsidiary. The IDA can - - -

17 JUDGE STEIN: It doesn't have to be essential; it
18 has to be convenient.

19 JUDGE RIVERA: Convenient, right?

20 MR. GOLDFARB: Well, Your Honor, in expressly
21 authorizing an IDA to accept grants of public money,
22 there's no indication that the legislature intended - - -

23 JUDGE FAHEY: Well, isn't your argument, though -
24 - -

25 MR. GOLDFARB: - - - an IDA could - - -



1 JUDGE FAHEY: Counsel?

2 MR. GOLDFARB: - - - insulate itself.

3 JUDGE FAHEY: Isn't your argument really that if
4 the "necessary or convenient" clause is as broad as - - -
5 as counsel argues, then there is no reason for express
6 clauses because the express clauses and express grants of
7 authority would be unnecessary; everything would be
8 subsumed into either a necessary or a convenient power that
9 would be granted by the mere application of that phrase.

10 MR. GOLDFARB: Yes, Your Honor, you've
11 articulated it better than myself. And I think this
12 court's decision in the Abiele Construction (sic) case
13 really makes the point. It held that New York City
14 Construction Authority lacked power, under a "necessary or
15 convenient" clause, to make, in that case, a quasi-judicial
16 determination under a contract.

17 JUDGE FAHEY: And the core of that basically is
18 that the "necessary and convenient" phrase must be read
19 with the express powers that are granted not in substitute
20 for the express powers that are granted.

21 MR. GOLDFARB: That has always been the rule, and
22 that is the express language of the "necessary and
23 convenient" clause we're dealing here - - - dealing with
24 here. It talks about "necessary or convenient" to carry
25 out the purposes and exercise the powers expressly given in



1 this title. And the power in this title is in subdivision
2 (11), which is for the IDA to accept grants and use them
3 for its corporate purposes and creating a new entity to
4 accept the grant is - - - is not incidental to that power.

5 Before I - - - one more point before I sit down.
6 I just wanted to point out how, at its base, it's the IDA's
7 position here that's really unreasonable and contradictory.
8 The IDA wants separate liability, but at the same time,
9 it's objecting to separate reporting. But if the - - - if
10 another entity is going to incur the liability, it's all
11 the more reasonable for that entity to file separate
12 reports disclosing its activities and - - - and showing
13 that it has the ability to meet those obligations. So it's
14 this insistence on separate liability.

15 JUDGE STEIN: If we find that they have the power
16 to create a subsidiary, does that deprive the ABO of
17 requiring them to file separately?

18 MR. GOLDFARB: No, Your Honor. For the reasons
19 I've stated, there are other rational bases for these. The
20 fact that the LDC is required to report different content
21 that would not be captured on the IDA's report - - -

22 JUDGE STEIN: So what difference does it make to
23 you then whether they have the subsidiary or not?

24 MR. GOLDFARB: I'm sorry, Your Honor?

25 JUDGE STEIN: What difference does it make to you



1 if they have the subsidiary or not if the point of all this
2 is to have them file separate reporting?

3 MR. GOLDFARB: Well, they asked for this entity
4 to be treated as a subsidiary. Therefore, we considered
5 that question, we sought an opinion from the Attorney
6 General, but for all the reasons I've stated, they do not
7 have that authority, and that's another rational basis for
8 this determination.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. GOLDFARB: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MR. MALCOMB: Thank you. I'd like to go to Judge
13 Fahey's question about the express power to create a
14 subsidiary and how that swallows the rule. If you look at
15 the language of the other public authorities that have that
16 express language, it's much broader.

17 JUDGE FAHEY: You mean the "necessary and
18 convenient" - - -

19 MR. MALCOMB: No.

20 JUDGE FAHEY: - - - language?

21 MR. MALCOMB: No, the subsidiary specific express
22 power. It's much broader than the - - - than what the
23 "necessary or convenient" clause would allow with respect
24 to creation of subsidiaries.

25 So those statutes have similar language all



1 reading something along the lines of you can create a
2 subsidiary for, quote, "all purposes". So if it's
3 consistent with the purpose generally, powers, duties,
4 functions, or activities. In order for an IDA to do it and
5 to fit under 858(17), it has to be necessary or convenient,
6 okay, to the exercise of another specific express power in
7 858, consistent with the IDA's purposes.

8 So it's more limited than what - - - and the fact
9 that these other authorities have separate and different
10 authority to create a subsidiary doesn't somehow remove the
11 power of an IDA. The language is clear. You don't go to
12 other statutes and go to the other interpretive tools if
13 the language is clear. And I would submit that "necessary
14 or convenient" is certainly clear.

15 I would also point out that it would be - - -

16 JUDGE RIVERA: So where is the line going to be
17 drawn for the rule? What would not be convenient?

18 MR. MALCOMB: Well, it would have to be necessary
19 or convenient to the exercise of an express power, and
20 consistent with an IDA's purposes. So you have to tie it
21 back to another express power. It would have to be
22 convenient to that. So wherever the line is - - -

23 JUDGE RIVERA: Well, he says that if you're
24 trying to hook this to (11) for the grant - - -

25 MR. MALCOMB: Right.



1 JUDGE RIVERA: - - - that it's supposed to be
2 about the purposes of that corporation itself, not another
3 entity. Why isn't he right about that?

4 MR. MALCOMB: I'm not sure I follow - - -

5 JUDGE RIVERA: Okay.

6 MR. MALCOMB: - - - the question.

7 JUDGE RIVERA: Well, (11) talks about accepting a
8 - - - a gift or grant, et cetera, and so forth?

9 MR. MALCOMB: Correct.

10 JUDGE RIVERA: For any of its corporate purposes.
11 I understood his argument to be that means it's only for
12 the IDA; it's not for another entity that you create for
13 purposes of insulating yourself.

14 MR. MALCOMB: But when you're act - - - when
15 you're using a subsidiary under the "necessary or
16 convenient" clause, you are accepting a grant consistent
17 with the IDA's corporate purposes of economic development.
18 And the fact that you want to appropriately structure a
19 transaction consistent with - - -

20 JUDGE RIVERA: The corporate purpose being?

21 MR. MALCOMB: The corporate purpose being an IDA
22 statutory purpose under 858 with respect to economic
23 development. So there's nothing about the creation of - -
24 - of a subsidiary for - - - to facilitate the grant. But
25 it's not just the grant funding, like, for example - - -



1 JUDGE RIVERA: Again, how does that not end up
2 being you can do anything?

3 MR. MALCOMB: Because it has to be tied to an
4 express power, it has to be necessary or convenient, and it
5 has to be consistent with an IDA's purposes. That's not
6 everything. And wherever the line is, creating an entity
7 for the purpose of properly structuring a transaction is
8 nowhere near it. And I would suggest that this court
9 already did set a line in the Abiele case - - -

10 JUDGE RIVERA: What about some of the other - - -
11 the mega point that he makes that the - - - the legislature
12 did not intend, through the "necessary and convenient"
13 clause, to allow an IDA to insulate itself when it comes to
14 a state grant, all right, the state's money?

15 MR. MALCOMB: Well, the state - - -

16 JUDGE RIVERA: Or government money.

17 MR. MALCOMB: The state wanted us to do this.
18 The state was - - - asked us to take - - -

19 JUDGE RIVERA: Yes, you, not the - - -

20 MR. MALCOMB: - - - the grant. The IDA - - -

21 JUDGE RIVERA: - - - subsidiary, right?

22 MR. MALCOMB: Well - - - well, there's an IDA - - -
23 -

24 JUDGE RIVERA: When you sought out the grant did
25 you say to the government, oh, and we're going to create



1 the subsidiary?

2 MR. MALCOMB: Yes. As a matter of fact, and
3 initially we wanted to do it as an LLC. They said we're
4 not going to do it to an LLC; do it as an LDC, so we
5 created the LDC. We wouldn't be accepting that grant if we
6 couldn't create a subsidiary and the state's - - -

7 JUDGE RIVERA: Then why didn't you end up - - -

8 MR. MALCOMB: - - - purpose would be frustrated.

9 JUDGE RIVERA: Then why didn't you end up
10 accepting the grant?

11 MR. MALCOMB: Because the state and the - - - the
12 business that were pursuing that grant ended up - - - it
13 ended up not coming to fruition.

14 JUDGE RIVERA: I see. Okay.

15 MR. MALCOMB: But back to your question on where
16 the line is, this court set the line in Abiele. It has to
17 be necessary or convenient to the exercise of another
18 express power. And you can't do anything outside of the
19 legislated - - - the legislatively-granted sphere.

20 So for example, in that case, where you had an
21 administrative agency taking on a quasi-judicial role,
22 which is way out of the realm of what they're allowed to
23 do, under any stretch of the imagination, that's the line.
24 And here, properly structuring a transaction is well within
25 the IDA's authority.



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CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. MALCOMB: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals Matter of the Application of Madison County IDA, et al. v. State of New York Authorities Budget Office, et al., No. 14, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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