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Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3660
FACSIMILE: 803-253-6283

June 16, 1993

John T. Watkins, Director
S. C. Residential Builders Commission
2221 Devine Street, Suite 530
Columbia, SC 29205

Dear Mr. Watkins:

As you are aware, your letter of May 18, 1993 to Attorney General Medlock was referred to me for response. In your letter to the Attorney General, you referenced Senate Bill S.610, a piece of legislation recently passed by the General Assembly.

You also enclosed with that letter a list of interpretations which the Commission has given to certain provisions of S.610. You ask that this Office advise you as to whether the Commission's interpretations of the statutory provisions would be lawful.

At the outset, it is useful to acknowledge two pertinent principles of law. First, in the construction of a statute, one must give effect to the manifest intent of the legislature. State v. Salmon, 279 S.C. 344, 306 S.E.2d 620 (1983).

Secondly, the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. Jasper County Tax Assessor v. Westvaco Corp., ____ S.C. _____, 409 S.E.2d 333 (1991). With those principles in mind, we discuss below the relevant statutory provisions along with the Commission's interpretations of those provisions.

Section 40-59-75(B) of S.610 provides that: "When the cost of an undertaking performed by a residential specialty contractor for an individual property owner exceeds five thousand dollars, the residential specialty contractor must obtain an executed bond with a surety in an amount approved by the Commission." (emphasis

Donald Lotter

supplied). Your letter indicates that, in interpreting this provision, the Commission proposes to construe the term "undertaking" to mean any instance "when a contractor enters into a contract with an individual when the aggregate amount exceeds five thousand dollars."

An "undertaking" has been defined as a "promise, engagement or stipulation". Black's Law Dictionary, Sixth Edition, 1990. The use of the term "undertaking" evidences a legislative intent that a bond be required whenever the cost of the work promised, engaged or stipulated to be performed by a residential specialty contractor for an individual homeowner exceeds five thousand dollars. Thus, a residential specialty contractor who promises or engages to perform, for example, roofing and painting for an individual homeowner could not avoid the bonding requirement by simply pricing the cost of each service at less than five thousand dollars, if the total cost of the work promised exceeds five thousand dollars.[1] Consequently, a bond would be required if the roofing cost was $2,600.00 and the painting cost was $2,700.00. The Commission's interpretation would appear to be consistent with the intent of the legislature.

With respect to the dollar amount of the bond required of a residential specialty contractor, the Commission proposes that: (a) a residential specialty contractor registered in one to two classifications is required to obtain a five thousand dollar bond; (b) a residential specialty contractor registered in three to five classifications is required to obtain a fifteen thousand dollar bond; and, (c) a residential specialty contractor registered in more than five classifications must take an examination to acquire a residential builders license unless the residential specialty contractor "can show justification why he should not be licensed as a residential builder."

The escalating bonding requirements set forth in (a) and (b) above reflect the Commission's apparent judgement that registration in multiple classifications by a residential specialty contractor indicates that the monetary cost of undertakings to be performed by that contractor are likely to be greater than the monetary cost of undertakings to be performed by a contractor who registers in only one classification. The increased monetary cost of the undertaking carries with it an increased risk of monetary loss to the

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[1] Questions regarding the exact services, and the costs thereof, included in a residential specialty contractor's promise or engagement would be issues of fact to be resolved by the Commission in the course of its administrative process.

individual homeowner. Consequently, the Commission has determined that the bonding requirement to be met by those contractors who register in multiple classifications should be greater so as to offer adequate protection to the homeowner.

The pertinent language of Section 40-59-75(B) expressly provides that a residential specialty contractor "must obtain an executed bond with a surety in an amount approved by the Commission" (emphasis supplied). By investing in the Commission the authority to "approve" the amount of the bond, the legislature clearly indicated its intent that the Commission have the discretion to pass judgement upon or to set the dollar amount of the bonds to be obtained by contractors. See: 3A Words and Phrases, "Approve". Therefore, the Commission's determination that it has the discretion and authority to set escalating bonding requirements would seem to have some support in the language of the statute. Accordingly, we would accord respectful consideration to the Commission's interpretation and see no compelling reason to disagree with it. Jasper County Tax Assessor v. Westvaco, supra.

On the other hand, there would seem to be an absence of any support in the statute for the Commission's proposed interpretation which would require a contractor who simply registers in more than five classifications to take an examination for the purpose of obtaining a residential builders license. No language in the statute appears to either expressly or impliedly permit such an interpretation. Indeed, in Section 40-59-77(A), the legislature provided that "all residential specialty contractor registrations issued by the Commission must be for one or more of the classifications adopted pursuant to this chapter." This language appears to indicate that the legislature contemplated that a contractor could register for an unlimited number of classifications and that doing so would not, in and of itself, change the contractor's status from residential specialty contractor to residential builder. As a result, although the Commission's interpretation is entitled to deference, there appears, in this instance, to be cogent reasons for differing with that interpretation. Gilstrap, et al. v. S. C. Budget and Control Board, _____ S.C. ____, 423 S.E.2d 101 (1992).

Next, your letter advises that the Commission proposes to interpret the provisions of Section 40-59-10 to provide that a residential specialty contractor who registers in five or more classifications and supervises two or more subcontractors on an undertaking for an individual with a cost exceeding five thousand dollars must be considered a residential builder and, thus, must become licensed as a residential builder. The relevant provisions of Section 40-59-10 existed prior to the passage of S.610 and were

not affected by that new legislation.[2] The Commission's interpretation represents an attempt to delineate the circumstances under which a residential specialty contractor becomes a residential builder.

A review of the statutes indicates that the functions which may be performed by a residential builder and a residential specialty contractor are quite similar. The most significant differences between the two are that Section 40-59-10 permits a residential builder to supervise the work performed on a residence while Section 40-59-75(B) appears to contemplate that a residential specialty contractor will, himself, perform the work. In addition, a residential builder may construct an entire residence while a residential specialty contractor may perform only such work on a part of the residence as is consistent with the particular classifications in which he is registered.

These differences in the statutorily permitted functions of a licensed builder and a residential specialty contractor are supportive of the Commission's view that the ability to construct a residence and the ability to supervise work on a residence distinguish a licensed builder from a residential specialty contractor. It follows from that reasoning that a residential specialty contractor moves into the realm of a residential builder when the contractor becomes able to construct a residence and to supervise the performance of work on a residence.

Based upon its collective knowledge of custom and practice in the residential construction industry, the Commission has made the judgement that a residential specialty contractor becomes able to construct a residence and supervise the performance of work on the residence when the contractor registers in more than five classifications and supervises more than two subcontractors in the performance of work on a residence. At such time, according to the Commission's interpretation of the statutes, the residential specialty contractor should be required to become licensed as a residential builder. Given the Commission's specialized knowledge

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[2] Section 40-59-10 provides, in pertinent part, that: "....a residential builder is one who constructs a residential building or structure for sale or who, for a fixed price, commission, fee or wage, undertakes or offers to undertake the construction or superintending of the construction of any building or structure which is not over three floors in height and which does not have more than sixteen units in the apartment complex, or the repair, improvement, or reimprovement thereof, to be used by another as a residence when the cost of the undertaking exceeds five thousand dollars."

of industry practice and custom, along with the distinctions made by the legislature in the functions of a residential builder and residential specialty contractor, we find no compelling reason to take issue with the Commission's interpretation.

Finally, Section 40-59-77(B) of S.610 provides that: "Residential specialty contractors must be qualified and experienced in the particular branches or fields of the contracting vocation in which they intend to, and do, engage." Your letter advises that the Commission has interpreted this provision to mean that a contractor seeking registration in a classification may be required to provide a written account of his work history; however, the contractor may not be required to take and pass an examination "unless deemed necessary by the Commission". (emphasis supplied).

Once again, the Commission's interpretation is entitled to due deference. Nevertheless, it is difficult to ignore the fact that the language of Section 40-59-77(B) quoted above is the same as was found in the Section 40-59-77(B) which existed prior to the passage of S.610. Importantly, the Commission did not interpret the language of the old 40-59-77(B) to allow it to administer an examination to applicants for registration. Simply stated, the Commission has not previously required an applicant for registration to take and pass an examination. Consequently, deferring to the Commission's new interpretation of the language would not seem appropriate when the new interpretation conflicts with the Commission's history of administering the statute. Gilstrap, et al v. S. C. Budget and Control Board, supra.

Furthermore, in amending Section 40-59-77(B), the legislature deleted the category of a "certified residential specialty contractor" and the authority of the Commission to administer an examination to that category of licensees. Presumably, the legislature was aware of the examination provision of the old 40-59-77(B) and could have included such a provision in S.610 if it believed that the Commission should have the authority to require a residential specialty contractor to pass an examination. The fact that the legislature did not include such a provision in S.610 is indicative of the legislature's intent that the Commission not have that authority. Bell v. S. C. State Highway Department, 204 S.C. 462, 30 S.E.2d 65 (1944).

To summarize, we would advise you that we see no compelling reason to disagree with the Commission's interpretations of S.610 to the effect that:

(a) An "undertaking" is any instance where a residential specialty contractor enters into a contract with an individual when the aggregate amount exceeds five thousand dollars.

(b) A residential specialty contractor registered in one to two classifications is required to obtain a five thousand dollar bond.

(c) A residential specialty contractor registered in three to five classifications is required to obtain a fifteen thousand dollar bond.

(d) A residential specialty contractor who registers in more than five classifications and supervises two or more subcontractors is considered a residential builder.

(e) An applicant for registration as a residential specialty contractor may be required to provide a written account of his work history.

We see compelling reasons to take issue with the Commission's interpretations of S.610 to the effect that:

(a) A residential specialty contractor who simply registers in five or more classifications may be required to become licensed as a residential builder unless he can show justification why he should not be so required.

(b) When deemed necessary by the Commission, an applicant for registration as a residential specialty contractor may be required to take and pass an examination.

We emphasize here that this Office, unlike a court, is not authorized to annul or overrule the Commission's interpretations of statutory provisions. The purpose of this opinion is to simply call attention to those interpretations which, in our judgement, would be of doubtful legal validity because of a lack of support in the language of the statutes and in the case law.

I trust that the foregoing information adequately responds to your inquiry. Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

Wilbur E. Johnson
Assistant Attorney General

WEJ/fc

REVIEWED AND APPROVED BY:

Donald J. Zelenka
Chief Deputy Attorney General

Robert D. Cook
Executive Assistant for
Opinions