

# The State of South Carolina

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## Office of the Attorney General

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October 15, 1992

Mr. 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 August 19, 1992 to Attorney General Medlock was referred to me for review and response. Enclosed with your letter was a letter written by Earl E. McLeod, Jr., Executive Director of the Home Builders Association of Greater Columbia, to James Brannock, of the Home Builders Association of South Carolina.

In your letter, you asked for this Office's opinion on several issues which are germane to the Commission's operating procedures and which were raised by Mr. McLeod. Those issues may be stated as follows:

1. Is the Commission's jurisdiction over complaints filed against its licensees prescribed or limited, in any way, by the provisions of 1976 South Carolina Code, Ann., Section 15-3-640?
2. May the Commission hear charges against a licensee which arose out of an inspection of a residence when the charges were not among those listed in the complaint filed by the owner of the residence?
3. Should or must a Commission inspector give notice to a licensee of the inspector's intention to inspect a residence which is the subject of a complaint filed against the licensee?
4. May a Commission inspector suggest that a licensee perform certain repairs on a residence to correct defects detected during an inspection of the residence?

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5. May the Commission declare a licensee guilty of incompetence or gross negligence in the practice of home building if the licensee does not perform repairs on a residence as required by the Commission?

6. Should the Commission wait until after an administrative hearing to apprise the owner of a residence of any defects, and suggested repairs thereof, noted during an inspection of the residence.

Taken in the order set forth above, we would respond to the issues raised as follows:

1. In pertinent part, Section 15-3-640, Code, prescribes that: "No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after the substantial completion of such an improvement." (emphasis supplied).

By its express provisions, Section 15-3-640 limits only the prosecution of civil actions for the recovery of damages. The statute makes no reference to, and does not in any way, limit administrative proceedings conducted by the Commission.

By the provisions of Section 40-59-90, Code, the Commission may take action against a licensee who, in the Commission's opinion, has been guilty of gross negligence, incompetence or misconduct in the practice of home building. While the Commission may certainly take into account the age of the residence in determining a licensee's guilt, its jurisdiction to make such a determination is not specifically limited by the period of time in which the residence, or any defect therein, has been in existence.

2. Generally, an administrative body has such authority and power as is conferred upon it by the legislature through express statutory provision. However, in the absence of express statutory limitation, an administrative body "possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the powers admittedly possessed by it." Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 380 (1948).

In the matter at hand, Section 40-59-90, Code, expressly authorizes the Commission to pass upon the validity of charges made against a licensee. In order that it may do so, the Commission

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employs inspectors to inspect the residence of the person making the charges.

Often, the inspection reveals that some of the charges are trivial or unfounded. Almost as often, the inspection reveals the existence of additional defects which had not been detected by the homeowner. In the latter case, the inspector adds the newly found defects to the charges made by the homeowner and all of the charges, unless corrected by the licensee, are scheduled for hearing by the Commission.

The application of the principle enunciated in Beard-Laney, supra, would appear to yield the conclusion that the Commission does not exceed its authority by passing upon charges not complained about by a homeowner, but which arise out of an inspection. In order to effectively exercise its authority to pass upon the competence of its licensees, and to carry out its responsibility to protect the welfare of the public, the Commission may hear all charges which result from a complaint, and subsequent inspection, so long as a licensee is given the requisite thirty days notice of the hearing. Any conclusion to the contrary would appear to hamper the Commission's ability to discharge its quasi-judicial duties in an orderly and efficient manner.

Moreover, it is generally held that once its jurisdiction is invoked, a "board is free to make full inquiry under its broad investigatory powers, and neither such inquiry nor the violations alleged by the board in its complaint is precisely restricted to the particularization of the charge filed with the board." 2 Am.Jur.2d., Administrative Law, Section 357. The rationale underlying this principle is readily apparent. In the matter at hand, the average homeowner is not expected to have expertise in the various building codes which must be followed by Commission licensees. Consequently, the homeowner may be ignorant of or overlook a defect which may be obvious to a knowledgeable inspector. In such case, the Commission may take note of the defect and is not restricted to "the particularization of the charge" filed by the homeowner.

3. The Commission is required by Section 40-59-90, Code, to provide a licensee with at least thirty days notice of a hearing on charges filed against a licensee. There is no provision in the Commission's statutes or regulations regarding specific notice of an inspection. As a result, whether and in what manner such notice is provided properly would be the subject of the Commission's administrative policies and procedures, and would not present a legal issue addressable by this Office.

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4. The Commission's statutes and regulations do not prohibit an inspector from suggesting or recommending that a licensee repair defects detected during an inspection. Of course, the licensee may not be required to make such repairs and may choose to contest his responsibility for any defects found during an inspection at a hearing before the Commission.

5. Clearly, a licensee cannot be declared guilty of gross negligence or incompetence in the practice of home building until after a hearing on the charges. Thus, a licensee cannot be deemed guilty of gross negligence or incompetence if he fails or refuses, prior to a hearing, to make repairs suggested or recommended by an inspector.

The Commission has not been granted the authority to order a licensee to make repairs on a residence, either before or after a hearing. However, the Commission is not prohibited from granting a licensee the opportunity to correct defects found in a residence before the Commission makes a final determination of whether the licensee is guilty of gross negligence or incompetence.

6. Neither the Commission's governing statutes or the requirements of due process of law prohibit the Commission from providing pre-hearing notification to a homeowner of any defects, and suggested repairs thereof, noted during an inspection of the homeowner's residence. Again, the question of whether the Commission should provide such notice is a matter to be addressed by the agency in its administrative policies and procedures.

I trust that you will find the foregoing information to be responsive to your concerns. Please contact me if I can be of further assistance.

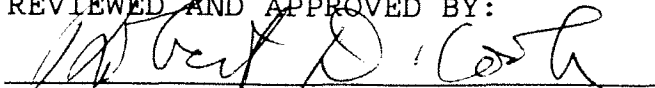
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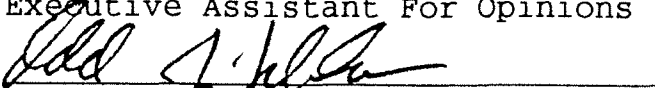
Wilbur E. Johnson  
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WEJ/fc

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