

The State of South Carolina



Office of the Attorney General

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February 20, 1986

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Dear Mr. Levy:

By your letter of November 21, 1985, you have asked for the opinion of this Office as to whether a commissioner of the State Housing Authority may build or sell houses or lots which he owns or to supply building materials for houses to be permanently financed under the Authority's Single Family Program. You have subsequently advised that you are concerned about three scenarios in particular:

1. Situations in which a commissioner sells undeveloped property or lots which, several years later, are developed with financing from the State Housing Authority.
2. Situations in which a purchaser buys land from a commissioner with the hope of obtaining financing from the Housing Authority to develop the land at a later, undetermined date.
3. Situations in which a commissioner, as a developer of property, sells a house to a purchaser with the knowledge that Housing Authority funds will be the source of permanent financing for the mortgage.

This opinion is limited to the three situations just described.

The South Carolina State Housing Authority was created pursuant to Section 31-3-110, Code of Laws of South Carolina (1976). The commissioners, by Section 31-3-140, "have the same

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functions, rights, powers, duties, privileges, immunities and limitations as those provided for housing authorities created for cities, counties or groups of counties and the commissioners of such housing authorities." One such limitation imposed upon municipal commissioners and thus upon state commissioners is found in Section 31-3-360 of the Code:

No commissioner or employee of an authority shall acquire any interest, direct or indirect, in any project or in any property included or planned to be included in any project, nor shall he have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any project. If any member or employee of any authority owns or controls an interest, direct or indirect, in any property included in any project, which was acquired prior to his appointment or employment, he shall disclose such interest in writing to the authority and such disclosure shall be entered upon the minutes of the authority.

Considering the language of Section 31-3-360, supra, you have asked whether the term "project" contained therein would refer to only those structures erected by housing authorities commonly known as "housing projects," or whether the term may be applied to single family dwellings and lots therefor which may be constructed pursuant to Section 31-13-160 et seq. of the Code.

We are advised that financing most often being provided through bond issues of the Housing Authority is permanent financing to the purchaser of a single family dwelling. The purchaser would obtain the loan in an arms' length transaction with a financial institution, such as a mortgage bank, which has been selected by the Housing Authority to participate in a particular financial program. While the Authority has certain approval procedures in processing the individual loan applications, we are advised that the applicant's name and lending institution are only glanced at; credit approval and selection of the applicant for a loan under the Housing Authority programs actually occur within the lending institution. Following closure of the loan,

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the Housing Authority "buys" the closed loan from the lending institution, acting basically as a guarantor of the loan.

An instance could arise whereby a commissioner of the Housing Authority would, as a contractor or materialman, provide contracting services or building materials for a single family dwelling which would ultimately be financed by Housing Authority funds as described above. Similarly, a commissioner may own real estate and develop that property or sell it to a developer, who would construct single family dwellings thereon, which dwellings would then be financed as described above. Further, we are advised that blocks of funds are reserved from bond issues for use by developers in the construction of single family dwellings. Conceivably, a commissioner who is also a real estate developer could utilize some of these funds to construct homes for purchasers who would obtain financing themselves from Housing Authority funds. Whether any of these activities would be prohibited depends upon whether there is a "project" of the Housing Authority and further whether the commissioner has any interest.

The term "project" is defined by Section 31-3-20(10) to include

all lands, buildings and improvements
acquired, owned, leased, managed or operated
by a housing authority and all buildings and
improvements constructed, reconstructed or
repaired by a housing authority, designed to
provide housing accommodations or stores,
offices and community facilities appurtenant
thereto, whether or not acquired or constructed
at one time and the term may also be applied
to the planning of buildings and improvements,
the acquisition of property, the demolition
of existing structures, the clearing of
land, the construction, reconstruction and
repair of improvements and all other work in
connection therewith; ... [Emphasis added.]

While it is possible to speculate about a wide range of factual situations, some of which may conceivably affect an interest of a commissioner or the Housing Authority, the definition of "project" does not in a literal sense appear to address a dwelling built under the Single Family Program under at least the first two scenarios of your letter; the third situation is more troublesome.

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Applying the definition of "project" to the information provided to this Office on the single family dwelling program, it appears that this program would not fall within the definition in many instances. Prior to purchasing the closed loan, when Housing Authority money is used only for permanent financing, the Housing Authority would not have "acquired, owned, leased, managed or operated" these dwellings, nor would it have "constructed, reconstructed or repaired" the dwellings. Indeed, the Housing Authority's only interest would not come into existence until after any possible interest of a commissioner had ceased; that is, only after the fee has passed to the purchaser does the Housing Authority acquire any interest in the dwelling, and then only as a lien holder. The interest of the commissioner, as previous property owner, would no longer exist. On this basis, we see no problem with the first two scenarios about which you were concerned. In the first, when financing from the Housing Authority is obtained perhaps years after the consummation of the purchase, the commissioner's interest is far too remote to any which the Housing Authority may acquire. As to the second scenario, again, the commissioner's interest has ended while the Housing Authority's interest is not yet a reality.

The third scenario presents the greatest likelihood that a dwelling would become a "project" of the Housing Authority before the interest of a commissioner has terminated. While the literal interpretation of Section 31-3-20 (10) may not expressly include the holding of a mortgage, or construction by the commissioner (as opposed to the Housing Authority), the Housing Authority will assume some interest which could result in acquisition or ownership (as required by the definition of "project") in the future, as when a mortgage is foreclosed, for example. Similarly, if a commissioner-developer were to utilize a portion of the reserved block of funds to finance the construction of a single family dwelling, clearly the commissioner-developer (by his owning and/or developing the property) and the Housing Authority (by its holding the note or mortgage for construction or permanent financing) would have concurrent interests; again, the Housing Authority's interest could result ultimately in acquisition or ownership, and thus the construction or development would become a "project" of the Housing Authority. It is necessary that such concurrent interests exist in a "project" of the Housing Authority to bring such within the prohibition of Section 31-3-360; of the three scenarios about which you were concerned, the third is thus the most troublesome and likely to

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create a conflict of interest. We are advised that, at this time, there are no transactions of this nature occurring between commissioner-developers and the State Housing Authority. Nevertheless, because a court could conclude that a transaction of this nature would come within Section 31-3-360, the most prudent course for a commissioner to take would be avoidance of a transaction of this type.

In addition to the prohibition within Section 31-3-360, commissioners should be aware of the requirements of the Ethics Act, which prohibits a public official from using his official position for financial gain. While we do not intend to imply that the Ethics Act comes into consideration in the three scenarios in your inquiry, we point out the requirements to be followed in appropriate cases. Section 8-13-460 of the Code provides in relevant part:

Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions:

(a) Prepare a written statement describing the matter requiring action or decisions, and the nature of his potential conflict of interest with respect to such action or decision.

* * *

(c) ... If the public official is a member of the governing body of any agency, commission, [or] board, ... he shall furnish a copy to the presiding officer and to the members of that governing body, who shall cause such statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists, and shall cause such disqualification and the reasons therefor to be noted in the minutes.

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In the event that a matter involving a commissioner's financial interests should come before the Housing Authority, the above procedures should be followed.

We would point out that the basic housing authority statutes were adopted in 1933, during the Great Depression, when housing authorities were more in the landlord business than in the mortgage banking business. Such laws were enacted to, generally, provide low-rent housing and for purposes of slum clearance, rehabilitation of substandard housing, and redevelopment of blighted areas. See, generally, 40 Am.Jur.2d Housing Laws and Urban Redevelopment. While certain housing authority activities today still involve provision of low-rent housing in traditional "projects," many of the activities and resources of the State Housing Authority are involved in the financing of single family dwellings. As the emphasis of the Housing Authority has changed, however, the statutes concerning conflict of interest of commissioners have not been changed to reflect the shift of emphasis. In keeping with the public policy served by a commissioner keeping separate his private and public interests, it may be advisable to clarify, by statute, exactly the actions a commissioner may take with regard to the Single Family Program.

In conclusion and in response to the three scenarios discussed above, we would advise that:

1. Where a commissioner of the State Housing Authority sells land upon which, at a later date, a house is constructed and ultimately financed with Housing Authority funds, the interest of the commissioner ended too remotely vis a vis the interest of the Housing Authority, so that Section 31-3-360 is not applicable.
2. Likewise, where a commissioner sells property to a purchaser who hopes to obtain Housing Authority funding at an unknown future date, where approval for funding is by no means certain, the interests are too remote and Section 31-3-360 again is not applicable.
3. However, where there is certainty at the time the commissioner sells the land or develops it for sale that Housing Authority financing will be obtained for either construction or permanent financing, there is a greater likelihood that the dwelling is within the definition of a "project," and thus conflicts of interest may arise.

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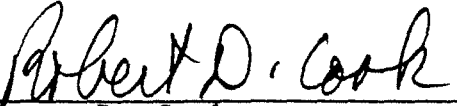
4. Finally, to avoid an appearance of a conflict, the provisions of the State Ethics Act should be followed when such would be appropriate.

Sincerely,

Patricia D. Petway
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Assistant Attorney General

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REVIEWED AND APPROVED BY:



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