1978 WL 35148 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
October 4, 1978

***1** L. Steve Mayfield
Executive Director
S.C. State Housing Authority
2221 Devine Street
Suite 540
Columbia, South Carolina 29205

Dear Mr. Mayfield:
You have requested an opinion of this Office based on the following facts: The State Housing Authority will soon begin to implement its 1977 housing finance legislation. The specific program to be implemented will involve the purchase by the Authority of mortgages made by lending institutions (such mortgages having been made to the beneficiary class and with appropriate safeguards). The Authority's funds for such purchases will come from bond revenues. The question which has arisen is whether the Authority can restrict itself in purchasing mortgages to purchasing them from only those mortgage lenders domiciled in the state. We are informed that there is no practical possibility of difference between lending institutions except as related to their capacity to handle the volumes of business involved. We are further informed that at least the first bond issue will be in an amount which can be handled entirely by South Carolina institutions without straining their capacity.

The primary question presented is whether a policy of purchasing from South Carolina lenders only (as long as such a policy did not amount to favoring a domestic lender less able or qualified than a foreign one) amounts to an improper restraint on interstate commerce. A recent case in the U.S. Supreme Court has held that interstate commerce clause analysis in such cases is not even necessary, because the state in such cases acts not as a regulator of the market, but rather as a participant. The Court stated:
'Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.
Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809 (1976).

Thus, if enough qualified South Carolina lenders exist, the Authority may direct all of its mortgage purchase business to those lenders.

Another question involves the possible application of the federal equal protection clause to the aforementioned course of action. However, the federal courts and the Supreme Court have also rejected the motion that this procedure would violate the equal protection clause. In American Yearbook Co. v. Askew, 339 F.Sup. 719 (M.D.Fla. 1972) (three-judge court), aff'd. mem. 409 U.S. 904, an out-of-state school yearbook company challenged a Florida statute requiring that all public printing be done within the state. The court held that this involved the proprietary rather than the governmental aspects of the state's business and that in its exercise of the proprietary power the state is subject to no more limitation than a private individual or corporation would be in transacting the same business. The Supreme Court affirmed this conclusion. In the present case, while the ultimate objectives of the Authority's programs clearly involve an exercise of governmental power, the mechanical means by which funds are procured to accomplish those objectives are just as

clearly an exercise of proprietary power. Accordingly, it is the opinion of this Office that the equal protection clause does not apply to this situation.

***2** Since we are informed that under at least the first proposed bond issue, enough qualified South Carolina lenders exist to use all the funds to be made available, there is no need to consider questions concerning what, if any, limitations may be placed on foreign corporations from whom mortgages are purchased.

Sincerely yours,

Kenneth P. Woodington
Assistant Attorney General

1978 WL 35148 (S.C.A.G.)