

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 05-17**

March 30, 2005

RE: May board chairman allow home purchasers to seek Kentucky Housing Corporation loans?

DECISION: Yes.

This opinion is issued in response to your March 9, 2005 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the March 30, 2005 meeting of the Commission and the following opinion is issued.

You state the relevant facts as follows. Your client has served as a member of the Board of Directors of the Kentucky Housing Corporation ("KHC") since mid-2004, and currently he serves as the Chairman of the Board. Your client also owns an interest in a private company that constructs and sells homes (the "home company") in several Kentucky cities. A related mortgage company (the "mortgage company") provides mortgages to certain buyers of homes built by the home company in which your client owns an interest. Neither your client nor the home company in which he owns an interest owns any interest in the mortgage company. The home company also sells homes, to purchasers that are financed through various mortgage brokers that routinely participate in KHC loan programs.

When your client accepted appointment to the Board of KHC, he voluntarily took the position that the home company's contracts with purchasers would not allow purchasers to participate in KHC loan programs. Further, in the event any previously approved matter involving the home company, or any of its related entities (including the mortgage company), comes before the Board, your client's position is to disclose his interest and abstain from participation in and voting on such matters.

In recent months, several purchasers of the home company's residences have complained that the mortgage company does not participate in KHC loan programs. In addition, the home company has received complaints from other mortgage brokers concerning the home company's unwillingness to allow purchases to be financed via KHC loan programs. In light of such complaints, your client has sought your involvement in addressing this issue. Your client wishes

to comply with all applicable ethical standards, but also does not want to deprive eligible homebuyers from participating in beneficial KHC loan programs.

You understand the KHC board members are not subject to the Executive Branch Code of Ethics and that ethical issues involving the members are outside the official jurisdiction of the Executive Branch Ethics Commission. However, you request from the Commission guidance on this matter that may be outside the Commission's official jurisdiction.

It is your opinion that the standard of conduct applicable to your client in this situation is found in KRS 198A.210, which relates specifically to KHC and provides:

**198A.210 Disclosure of conflict of interest of member, officer, or employee of the corporation.**

If any member, officer, or employee of the corporation shall be interested either directly or indirectly, or shall be an officer or employee of or have an ownership interest in any firm or corporation interested directly or indirectly in any contract with the corporation, including any loan to any sponsor, builder, or developer, such interest shall be disclosed to the corporation and shall be set forth in the minutes of the corporation, and the member, officer, or employee having such interest therein shall not participate on behalf of the corporation in the authorization of any such contract.

You state that if the home company were to allow purchasers of residences to finance homes by means of KHC loan programs, the "contracts" in question would be between and among KHC, the mortgage company (or other mortgage companies), and the individual home purchasers/borrowers. Since your client owns no interest in any of those entities, he would have no direct interest in the contracts. However, as a minority shareholder in the home company, he could be deemed to have an indirect interest in such contracts. Therefore, you believe the appropriate course of action for your client would be to disclose his interest in the home company and his potential indirect interest in its home sales that are financed through KHC loan programs and thereafter disqualify himself from any participation "on behalf of the corporation [KHC] in the authorization of any such contract."

In addition, you point out that KRS 11A.040(4)(d), provided below, exempts employees from the prohibition of contracting or having an agreement with their own state agency if the agreement is a purchase that is made from a state agency on the same terms that are available to other members of the general public. Similarly, you believe that this philosophy would allow the home company to participate in sales involving KHC loans.

KRS 11A.040

(4) A public servant shall not knowingly himself or through any business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, undertake, execute, hold, bid on, negotiate, or enjoy, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the agency by which he is employed or which he supervises, subject to the provisions of KRS 45A.340. This provision shall not apply to:

...

(d) Purchases from a state agency that are available on the same terms to the general public or that are made at public auction.

As you have noted, the Commission, in previously issued advisory opinions, concluded that members of state boards and commissions are not considered public servants subject to the Executive Branch Code of Ethics, unless the board or commission is specifically listed in the "officer" definition in KRS 11A.010(7). Because KHC is not a board or commission specifically listed, your client would not be subject to the Executive Branch Code of Ethics in KRS Chapter 11A.

However, the Commission also believes the actions of boards members of an executive branch agency should reflect high standards and be such that the public confidence is upheld in the integrity of the agency. In order not to damage such public confidence, board and commission members should also be independent and impartial in their decision-making capacities for their respective agencies.

Because the Commission feels strongly about this matter, in June of 2004 it proposed an initiative to board and commission members encouraging them to adopt a "model code of ethics" (a copy of which is enclosed) for the members of their respective boards and commissions. The model code encompasses three areas where potential conflicts could arise for board and commission members: 1) Acceptance of Gifts, 2) Disclosure of Conflicts of Interest, and 3) Contracts / Agreements, the latter two, detailed below, which would apply to your questions.

The model code provides for a member of a board to disclose to other members of the board any direct or indirect interest in any undertaking that puts his personal interest in conflict with that of the board. This disclosure should be

made in writing or should be recorded in the minutes of a formal meeting. A member who is required to publicly disclose a direct or indirect interest shall abstain from all decisions concerning his interest, if the decision would affect him as a member of a business, profession, occupation, or group in a manner different from other members of the business, profession, occupation, or group.

The model code also prohibits a board member, himself or through a business in which he owns or controls an interest of more than five percent (5%), or by any other person for his use or benefit or on his account, from undertaking, executing, holding, or enjoying, in whole or in part, any contract, agreement, lease, sale, or purchase made, entered into, awarded, or granted by the board, commission, authority, council, or committee of which he is a member. This prohibition does not apply to purchases that are available on the same terms to the general public or which are made at public auction.

The Commission encourages your client, as a board member who seeks to uphold ethical standards, to comply with the provisions noted above. Your client should disclose his indirect interest in the contracts or agreements with KHC, and abstain from all matters of the Board involving contracts or agreements between KHC and purchasers of the home company's residences. It does not appear that, by allowing purchasers of home company residences to seek KHC loan programs, he would be "enjoying" a part of the contract with KHC. Although the Commission believes that allowing the purchasers to seek such loans could indirectly benefit your client, he would not benefit any more than if he were not serving as a Board member.

Thus, provided your client complies with the guidance above, the Commission does not believe that purchasers of residences from the home company must be prohibited from applying for KHC loans in order for your client to uphold public confidence in the integrity of the Board. However, the Commission cautions that some may still view this as an appearance of a conflict even though an actual conflict would not exist.

Sincerely,

**EXECUTIVE BRANCH ETHICS COMMISSION**

---

**BY CHAIR:** James S. Willhite

Enclosure: Model Code of Ethics