



CHEROKEE NATION
OFFICE OF THE ATTORNEY GENERAL

A. Diane Hammons
Attorney General

P.O. Box 948
Tahlequah, OK 74465-0948
918-453-5000

OPINION OF THE CHEROKEE NATION ATTORNEY GENERAL

Question Submitted by: David Southerland, Executive Director
Housing Authority of the Cherokee Nation

Opinion Number: 2007-CNAG-2

Date Decided: August 2, 2007

To: David Southerland, Executive Director
Housing Authority of the Cherokee Nation

From: A. Diane Hammons, Attorney General
Cherokee Nation

Date: August 2, 2007

This office has received your request for an Attorney General's Opinion asking, in effect¹, the following questions:

1. May the Housing Authority of the Cherokee Nation ("HACN") purchase a home from an elected official or family member of an elected official of the Cherokee Nation for the benefit of an applicant under the assumable mortgage program, where the property will be transferred to the applicant after a three year period of time? Or, may the applicant purchase the home directly from a Cherokee Nation elected official or family member of an elected official, with the HACN applying a mortgage assistance grant?
2. Under the HACN's rental assistance program, where the applicant chooses the rental unit owned by a third party and the HACN makes assistance payments directly to the third party landlord, may the HACN make such payments where the third party landlord is a Cherokee Nation elected official or the family member of an elected official?
3. What, if any, prohibition is there upon housing assistance being provided by HACN to Cherokee Nation elected officials and/or their families?

¹ We have combined your questions numbered 1 and 2 into our number 1 for ease of answer.

4. What, if any, prohibition is there upon housing assistance being provided by HACN to HACN Commissioners and/or their families?

Analysis of First Question Presented

1. *May the Housing Authority of the Cherokee Nation (“HACN”) purchase a home from an elected official or family member of an elected official of the Cherokee Nation for the benefit of an applicant under the assumable mortgage program, where the property will be transferred to the applicant after a three year period of time? Or, may the applicant purchase the home directly from a Cherokee Nation elected official or family member of an elected official, with the HACN applying a mortgage assistance grant?*

In both instances described above, the “benefit” to the elected official is the sale of the home. The “applicant” under the above described scenario is not the elected official, but a third party purchaser.

The federal regulations of the Department of Housing and Urban Development (HUD) relating to Native American Housing Assistance and Self Determination Act (NAHASDA) funded activities such as the one described above, states, in part:

No person who participates in the decision-making process or who gains inside information with regard to NAHASDA assisted activities may obtain a personal or financial interest or benefit from such activities . . . Such persons include anyone with an interest in any contract . . . either for themselves or others with whom they have business or immediate family ties.

24 CFR §1000.30(b). All elected officials of the Cherokee Nation, participate in the “decision-making process” of the HACN, and have “inside information with regard to NAHASDA assisted activities.” That participation includes preparation and passage of the annual NAHASDA budget, with its breakdown of funding for various programs. The Tribal Council members and the Principal Chief may adjust budgets for certain NAHASDA activities engaged in by the Tribe, perhaps subtracting from one program and adding to another, deciding broad programmatic issues, etc.

There are exceptions to the above HUD rule. One such exception is found at 24 CFR §1000.30(c), which states:

The conflict of interest provision does not apply in instances where a person who might otherwise be included under the conflict provision is low-income and is selected for assistance in accordance with the recipient’s written policies for eligibility, admission and occupancy of families for housing assistance with IHBG funds, provided that there is no conflict of interest under applicable tribal or state law. The recipient must make a public disclosure of the nature of assistance to be provided and the specific basis for the selection of the person. The recipient shall

provide the appropriate Area ONAP with a copy of the disclosure before the assistance is provided to the person.

In the scenario described above, the “person who might otherwise be included under the conflict provision” is the elected official, and not the applicant for mortgage assistance. The elected official does not, assumedly, meet the definition of “low-income” and qualify for HACN programs. Thus, §1000.30(c) does not apply.

Another exception is found at 24 CFR §1000.32, and elaborated on in 24 CFR §1000.34. Those provisions allow HUD to make exceptions to the conflict of interest provisions “on a case-by-case basis when it determines that such an exception would further the primary objective of NAHASDA and the effective and efficient implementation of the recipient’s program.” In making such a determination “HUD must consider whether undue hardship will result, either to the recipient or to the person affected, when weighed against the public interest served by avoiding the prohibited conflict.” In the mortgage assistance questions presented above, there has been no mention of a HUD exception granted, and thus it will be assumed that there is none existent nor anticipated.

The Cherokee Nation is the recipient of the Indian Housing Block Grant (IHBG) funds authorized under NAHASDA, and HACN acts as a sub-recipient/sub-grantee of those IHBG funds. The HACN administers the Nation's mortgage assistance and rental assistance programs, as well as maintains and operates NAHASDA rental and homeownership units. The HACN expends roughly 2/3 of the funds and the Nation 1/3 of the approximately \$30 million available each year. The executive branch of the Nation submits the annual budget for these funds, and the Tribal Council approves (or rejects) the budget. Negotiations and modifications to budget programs may take place during this process. HACN’s Board of Commissioners are appointed by the Principal Chief and confirmed by the Tribal Council

Elected officials are bound by the Cherokee Nation’s ethics code. Pertinent portions are found below:

28 § 4. Code of Ethical Standards

Every official and employee of the Cherokee Nation should endeavor to:

(A) Put loyalty to the highest moral principles and to the Cherokee Nation above loyalty to other persons, parties or governmental entities.

(F) Never accept, for himself or herself or for family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of tribal duties.

(H). Engage in no business with the tribe, either directly or indirectly, which is inconsistent with the conscientious performance of tribal duties and further **make every effort in his or her private work to avoid conflicts of interest; unless participation in the conduct of the business, personal and tribal, is deemed to be of no substantial effect on his or her integrity and any other interests are deemed insignificant.**

(I). Never use any information gained confidentially in the performance of tribal duties as a means of making private profits to the detriment of the Cherokee Nation.

(J). Never use his or her position in any way to coerce or give the appearance of coercing anyone to provide a financial benefit to himself or herself or another person.

(emphasis added). Using the above standards, clearly an elected official could not use knowledge gained by his or her position to personally profit (including profit for one of his or her family members) from the HACN, or any other entity. That action would violate F, H, I, and J, above. From the scenario described above, it cannot be assumed that the elected official had any participation in the selection process of the home listed for sale.

In fact, under the scenario described above, the elected official could have little or no involvement in the third party applicant's decision to purchase a home from him - for example, if the home were listed for sale and the applicant found it through a real estate agent. The elected official might not even know that the applicant/purchaser would be utilizing a HACN program to assist in purchase of the home. However, at some point HACN would know, and it is because of that knowledge that the potential for conflict becomes more problematic. Would HACN then stringently apply all of its regulations regarding the program to the elected official's home listed for sale, with the ever present knowledge that it is the elected official who determines HACN's annual budget? And, would it be fair to place such a burden on HACN staff? Would the elected official be influenced in either direction to accept or reject a purchase offer when he discovered that the potential purchaser was being assisted by HACN? Then, would that decision affect his later abilities to neutrally participate in the annual budget process for HACN?

Perhaps the potential for these problems is the rationale behind the strict wording of §1000.30(b): *No person who participates in the decision-making process or who gains inside information with regard to NAHASDA assisted activities may obtain a personal or financial interest or benefit from such activities.* No knowledge, intent, or motive is required in the prohibition; thus, the entirely innocent, uninvolved elected official as home seller would still fall under the prohibition, unless the exception of §1000.30(c) applies, or HUD grants an exception under §§1000.32, 34. Under the questions presented, the exception would not apply, and no variance has been granted by HUD; thus the elected official would be prohibited from gaining the "benefit" of the sale of the home where the purchaser is utilizing the HACN mortgage assistance program.

Answer to First Question Presented

The Housing Authority of the Cherokee Nation ("HACN") may not purchase a home from an elected official or family member of an elected official of the Cherokee Nation for the benefit of an applicant under the assumable mortgage program, where the property will be transferred to the applicant after a three year period of time unless the specific exceptions allowing such a transaction in 24 CFR §1000.32 and §1000.34 are present. Neither may the HACN apply a mortgage assistance grant where the applicant purchases the home directly from a Cherokee Nation elected official or family member of an elected official unless such exceptions exist.

Analysis of Second Question Presented

2. *Under the HACN's rental assistance program, where the applicant chooses the rental unit owned by a third party and the HACN makes assistance payments directly to the third party landlord, may the HACN make such payments where the third party landlord is a Cherokee Nation elected official or the family member of an elected official?*

Answer: In 2003, an informal memorandum from the undersigned, then Director of the Justice Department, agreed with a memorandum written by Todd Hembree, attorney for the Tribal Council, dated September 11, 2003, wherein we found that there was no tribal legal impediment to a Councilmember's family receiving rental payments under the rental assistance program, where the tenants selected the units, and the Councilmember's family did nothing to solicit the rental assistance funds. In that informal memo, I opined that "the scenario described does not violate Cherokee Nation law." I did not do an analysis of the federal regulations, nor was such requested. With the new question posed in May, 2007, I have been provided certain HACN policies which were modified in 2006, and have analyzed the federal regulations. While the transaction referred to above may not "violate Cherokee Nation law,"² it does violate current HACN policies, and would violate the federal regulation cited above, for the same reasons.

Under the sub-section "Unit" in the HACN policy manual, at p. 5 of 11, it is stated:

The following units are not eligible for the Rental Assistance Program:

1. A unit receiving project-based Section 8 assistance;
2. Any unit where the family would receive duplicative rental subsidies; Nursing homes or other institutions that provide care;
3. Units owned by HACN staff or immediate family members; or
4. ***Units owned by members of any governing body or their immediate family members, unless approved by the Oklahoma Attorney General,***

(emphasis added). "Governing body" is not defined in HACN policies. However, other provisions of the policy, when referring to HACN Commissioners, specifically refer to *them* as Commissioners or the Board of Commissioners. Therefore, "governing body" must refer to someone else. "Governing body" is referred to in HUD federal laws and regulations as the decision maker(s) for a unit of government. See, e.g., 25 U.S.C.A. §1452(f), 24 C.F.R. §511.2. Thus, "governing body" does not refer to HACN Commissioners, but the governing unit of the Cherokee Nation.

The "governing body" of the Cherokee Nation is the Cherokee Nation Tribal Council and the Principal Chief. It is clear that the term "any governing body" in sub-section 4, above, includes the Tribal Council of the Cherokee Nation. Therefore, under HACN's own policies, this

² Unless, of course, there is an ethical violation under Title 28. See, the discussion as to the first question, above. Under the scenario described to us in 2003, and in the question posed here, there is no ethical violation on the part of the elected official.

transaction is prohibited, unless approval has been granted by the Oklahoma Attorney General. In the question presented, there has been no reference to such approval, and it is assumed that none has been granted. Thus, the transaction is prohibited under the HACN rule, above.

Further, the HACN rule must be read in coordination with the federal regulations as an additional restriction. Thus, the HACN rule should come into play only *after* one of the two HUD exceptions has been met. In other words, the restriction of 24 CFR §1000.30(b) still applies. The transaction would thus only be allowable if one of the federal exceptions is met, *and* the additional requirement articulated by HACN was also met (Oklahoma AG approval). Then, and only then, would the transaction be allowable.

Answer to Second Question Presented

The Housing Authority of the Cherokee Nation (“HACN”) may not make rental assistance payments to a third party landlord where that landlord is a Cherokee Nation elected official or the family member of an elected official for the benefit of an applicant under the rental assistance program, unless the specific exceptions allowing such a transaction in 24 CFR §1000.32 and §1000.34 are present. Under its own policies, the Housing Authority of the Cherokee Nation (“HACN”) may not make such payments, absent approval from the state’s Attorney General..

Analysis of Third Question Presented

3. What, if any, prohibition is there upon housing assistance being provided by HACN to Cherokee Nation elected officials and/or their families?

Cherokee Nation elected officials and/or their families may only receive housing assistance provided by HACN if they are “low income” **and** meet the other guidelines established by HACN, **and** all of the exceptions and requirements are met that are outlined in §1000.30(c), above. One of those requirements is that no tribal conflict of interest provision prohibits the transaction. Some of those specific Cherokee Nation conflict provisions are outlined in the analysis of the first question, above. Clearly the elected official could not receive any assistance if he or she used his position to obtain that assistance. Further, the official is required by law to avoid any circumstances where such would even bear the appearance of that impropriety.

The other exception, mentioned above, and found at 24 CFR §§1000.32, 34 allows HUD to make exceptions to the conflict of interest provisions “on a case-by-case basis when it determines that such an exception would further the primary objective of NAHASDA and the effective and efficient implementation of the recipient’s program.” In making such a determination “HUD must consider whether undue hardship will result, either to the recipient or to the person affected, when weight against the public interest served by avoiding the prohibited conflict.” Thus, even if there is a conflict, HUD could allow the transaction under those circumstances described in the regulations, after full disclosure.

Answer to Third Question Presented

Housing assistance may only be provided by HACN to Cherokee Nation elected officials and/or their families if the allowed exceptions under the federal regulations (24 C.F.R. §1000.30(c) and 24 CFR §§1000.32, 34) are present.

Analysis of Fourth Question Presented

4. What, if any, prohibition is there upon housing assistance being provided by HACN to HACN Commissioners and/or their families?

Under federal and tribal law, HACN Commissioners and/of their families may receive housing assistance provided by HACN only under the same circumstances described above for the Nation's elected officials and/or their family members. Thus, if the Commissioners or their family members are "low income" **and** meet the other guidelines established by HACN, **and** all of the exceptions and requirements are met that are outlined in §1000.30(c) or HUD grants an exception under 24 CFR §§1000.32, 34, above, then such assistance may be provided. There are, apparently, no specific HACN policy provisions that would prohibit the transaction.

There is, however, a prohibition under Oklahoma law, 63 O.S. §1059, which should be considered. It states that:

- A. During his tenure and for one (1) year thereafter, no commissioner, officer, or employee of the local housing authority shall voluntarily acquire any interest, direct or indirect, in any project or in any property included or planned to be included in any project, or in any contract or proposed contract relating to any housing project. . .
- B. Nothing in this section shall be construed to apply to the housing authority commissioner who is a tenant.

Before, the addition of subsection "B", above, §1059 had been construed to prohibit a Commissioner, who was otherwise qualified, from receiving "low-rent or mutual-help housing." See, Okl.A.G.Opin. 71-276, wherein the Oklahoma Attorney General opined:

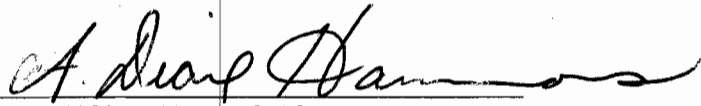
That appointment as a member of the Oklahoma Ponca Tribal Housing Authority would render such officer ineligible to live in or participate in mutual-help or low rent housing facilities. Although, it would appear that an interest acquired prior to such appointment acts only to preclude an officer's participation in that particular project.

The statute was amended after the above Opinion was issued, thus allowing housing commissioners to remain tenants. Any "interest, direct or indirect, in any project," other than tenancy, is still prohibited under Oklahoma law, however.

Answer to Fourth Question Presented

Housing assistance may only be provided by HACN to its Commissioners and/or their family members if the allowed exceptions under the federal regulations (24 C.F.R. §1000.30(c) and 24 CFR §§1000.32, 34) are present, and in the case of Commissioners themselves (not their family members) Oklahoma law prohibits such assistance unless the Commissioner is a tenant.

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A handwritten signature in cursive script, reading "A. Diane Hammons", written over a horizontal line.

A. DIANE HAMMONS

Attorney General of the Cherokee Nation