



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

May 3, 2013

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Charles McConnell
Chairman, Board of Commissioners
Virginia Housing Development Authority
601 South Belvidere Street
Richmond, Virginia 23220

Dear Mr. McConnell:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether the State and Local Government Conflict of Interests Act (“COIA”)¹ prohibits officers and employees of the Virginia Housing Development Authority (“VHDA”) from participating as owners in the federal Housing Choice Voucher program (“HCV”) administered by VHDA. You further inquire whether, if not prohibited from participating, those employees and officers must make any disclosures or abstain from participating in HCV transactions.

Response

It is my opinion that officers and employees of VHDA are prohibited by COIA from participating as owners in the federal HCV program administered by VHDA. Furthermore, I note that the current regulations governing the program expressly bar officers and certain employees of VHDA from participating in the program as owners.

Background

You state that the HCV program provides rental subsidies for low and moderate income persons and families. VHDA receives federal funds for the HCV program from the United States Department of Housing and Urban Development (“HUD”) pursuant to annual contracts between VHDA and HUD. Both HUD and VHDA have adopted regulations governing the administration of the program.²

You further state that the monthly rental assistance payments are paid by VHDA to the owners of the rental properties on behalf of the low-income persons or families participating in the HCV program. The monthly payments to owners are determined by a formula that calculates the amount the participating

¹ VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2011 & Supp. 2012).

² See 24 C.F.R § 982, *et seq.*; 13 VA. ADMIN. CODE §10-70-10, *et seq.*

family will pay for rent with VHDA paying the remainder to the owner pursuant to a contract between VHDA and the owner.

You request that it is assumed, for the purposes of this Opinion, that the amount of rental payments made to any participating VHDA officers and employees would exceed \$10,000 annually, and that the value of their ownership interest in the dwelling units leased under the HCV program would exceed \$10,000.

Applicable Law and Discussion

Your inquiry focuses on any prohibition that COIA may impose on officers and employees of VHDA, but I first note that the regulations governing the program prohibit officers and at least some employees of the authority from participating in the program as owners. Specifically, the relevant regulations provide that

[p]ersons holding the following offices and positions may not participate as owners in the program during their tenure and for one year thereafter because their relationship with the authority or the program would constitute a prohibited interest under the ACC and HAP contracts: (i) **present or former members or officers of the authority or the administrative agent**, (ii) **employees of the authority or the administrative agent who formulate policy or influence decisions with respect to the program**, and (iii) public officials or members of a governing body or state or local legislators who exercise functions or responsibilities with respect to the program. In addition, current members of or delegates to the Congress of the United States of America or resident commissioners are not eligible to participate in the programs as owners.³

This language essentially tracks the language of 24 C.F.R. § 982.161, which provides that certain people are not eligible to participate as owners in the program due to a conflict of interests. Accordingly, by regulation, all officers and former officers within one year of their respective tenures at VHDA are barred from participating in the program as owners. Similarly, certain employees of VHDA who are involved in formulating policy or influencing decisions regarding the program may not participate in the program as owners.

Turning to your specific inquiry, COIA prohibits officers and employees of state government agencies from having personal interests in contracts, other than their employment contracts, with the government agency by which they are employed.⁴ The payments pursuant to the HCV program you describe would constitute “contracts” as defined in COIA.⁵

Nonetheless, grants or other payments under any program wherein uniform rates for, or the amounts paid to, all qualified applicants are established solely by the administering governmental agency are exempt from the prohibition in COIA.⁶ Thus, whether such payments are exempt from COIA turns on whether the payments to owners are made pursuant to a uniform schedule.

The payments you describe are partially set by a formula in accordance with VHDA guidelines and apply equally to all HCV program participants. A prior COIA opinion of this office concluded that the

³ 13 VA. ADMIN. CODE § 10-70-30 (emphasis added).

⁴ See VA. CODE ANN. § 2.2-3106(A) (2011).

⁵ See § 2.2-3101 (2011); see also 1999 Op. Va. Att’y Gen. 10.

⁶ See § 2.2-3110(A)(8) (2011).

formula represented a “uniform rate,” and therefore, fell within the COIA exemption. However, the formula described in your letter does not actually set the payments because one element of the formula, the rental price of the property at issue, is utilized in the formula but is not actually set by the formula.

Specifically, based on your letter, payments to owners under the program are determined by subtracting the lessee’s share (which is determined by a formula tied to the lessee’s income) from the lesser of a payment standard established by VHDA for the rental unit or the gross rent, which is defined as the rent payable to the owner plus utilities paid by the lessee. Thus, the amount paid to an owner depends on the gross rent paid by the lessee or the payment standard that VHDA sets for the particular dwelling unit.

The regulations governing the program indicate that there can be differences in the payment standards set by VHDA or the gross rent charged by an owner. For example, the rent for a property “must normally not exceed the fair market rent established by HUD for the area. . . ,”⁷ suggesting there are circumstances when the rent may exceed the HUD established rate. Furthermore, the regulations setting forth the duties of an administrative agent for the program specify that it is the administrative agent's responsibility to “[r]eview the leases proposed by owners; determine rent reasonableness; and inspect the rental housing units.”⁸ Given the inherent subjectivity in determining whether rent is reasonable, it appears that there is some discretion as to what rents are acceptable.

The federal regulations governing the program also recognize that the rents charged may vary from the payment standard set by HUD. The relevant regulation provides that “the subsidy is based on a local ‘payment standard’ that reflects the cost to lease a unit in the local housing market. **If the rent is less than the payment standard**, the family generally pays 30 percent of adjusted monthly income for rent. **If the rent is more than the payment standard**, the family pays a larger share of the rent.”⁹

Because the regulations allow an owner to charge less than the payment standard set by HUD, the amount that owners of similar properties will receive from the program can vary, and thus, cannot be considered “uniform.” To the extent that this is the case, payments under the program do not fall within the exemption found in § 2.2-3110(A)(8).

Given the facts specified in your request, the only other COIA exemption that might be applicable is found in § 2.2-3110(A)(1), which provides an exemption for contracts related to

[t]he sale, lease or exchange of real property between an officer or employee and a governmental agency, provided the officer or employee does not participate in any way as such officer or employee in such sale, lease or exchange, and this fact is set forth as a matter of public record by the governing body of the governmental agency or by the administrative head thereof

⁷ 13 VA. ADMIN. CODE §10-70-10.

⁸ 13 VA. ADMIN. CODE §10-70-50(9) (emphasis added). There are two subsections numbered 9 in 13 VA. ADMIN. CODE § 10-70-50. The second, detailing the duties of the administrative agent, is quoted here. *See also* 24 C.F.R. § 982.305(a)(4).

⁹ 24 C.F.R. § 982.1(a)(4)(ii) (emphasis added). *See also* 24 C.F.R § 982.4 (defining “reasonable rent” a “rent to owner that is **not more than** rent charged: (1) For comparable units in the private unassisted market; and (2) For comparable unassisted units in the premises”) (emphasis added).

To fall within this exemption, the contract between VHDA and the owner who is also an officer or employee of VHDA would have to constitute a “sale, lease or exchange of real property between an officer or employee and a governmental agency” Here, the contract between VHDA and the officer or employee would not constitute the sale or exchange of real property because the officer or employee would continue to own the property.

Furthermore, while the program does require a lease between the tenant and the owner, the contract between the owner and VHDA is not a lease of real property, but rather is a separate agreement that does not create a leasehold. The federal regulations that govern the HVC program define a lease as a “written agreement between an owner and a tenant for the leasing of a dwelling unit to the tenant.”¹⁰ The definition continues, noting the purpose of a lease and distinguishing it from the contract between a property owner and an authorized housing agency. Specifically, the definition concludes by noting that a “lease establishes the conditions for occupancy of the dwelling unit by a family with housing assistance payments under a HAP contract between the owner and the [authorized housing agency].”¹¹

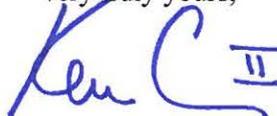
Because the contract between a property owner and VHDA under the HVC program is not the “sale, lease or exchange of real property between an officer or employee and a governmental agency,” the exemption found in § 2.2-3110(A)(1) does not apply. Given that no COIA exemption applies, the general prohibition that “[n]o officer or employee of any governmental agency of state government . . . shall have a personal interest in a contract with the governmental agency of which he is an officer or employee, other than his own contract of employment . . .” applies.¹² Accordingly, I conclude that, even absent the prohibition found in the state and federal regulations governing the HVC program, COIA prevents officers and employees of VHDA from being an owner in the HVC program under the factual assumptions contained in your request.

Conclusion

Accordingly, it is my opinion that officers and employees of VHDA are prohibited by COIA from participating as owners in the federal HCV program administered by VHDA. Furthermore, I note that, even absent COIA’s restrictions, the current regulations governing the program expressly bar officers and at least certain employees of VHDA from participating in the program as owners.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

¹⁰ 24 C.F.R. § 982.4.

¹¹ *Id.*

¹² VA. CODE ANN. § 2.2-3106(A).