

Opinion No. 58-90

May 1, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Joel B. Burr, Jr., Assistant Attorney General

TO: Mr. John Block, Jr., State Corporation Commission, Santa Fe, New Mexico

QUESTION

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May a corporation, organized to provide housing on a co-operative basis for sale and to be regulated by the Federal Housing Commissioner as to sales, charges, capital structure, and methods of operation, in the manner and for the purposes provided in Sec. 213 of Title II of the National Housing Act and the Administrative Rules and Regulations thereunder, incorporate under the New Mexico Nonprofit Corporation Act, compiled as Sections 51-14-20 to 51-14-40, N.M.S.A., 1953 Comp., 1957 Pocket Supplement?

CONCLUSION

No.

OPINION

ANALYSIS

This question arises out of an attempted filing with the State Corporation Commission of Articles of Incorporation by Skyview Estates, No. 10, of Albuquerque, New Mexico, under and by virtue of the New Mexico Nonprofit Corporation Act, compiled as Sections 51-14-20 to 51-14-40 of the New Mexico Statutes Annotated, 1953 Compilation, 1957 Pocket Supplement.

Skyview Estates, No. 10, was organized by its incorporators to provide housing on a cooperative basis for sale. It has elected to organize under Section 213 of Title II of the National Housing Act and the Administrative Rules and Regulations promulgated thereunder, and to be regulated by the Federal Housing Commissioner as to sales, charges, capital structure, and methods of operation, in order to secure the financing of the construction of its housing to be obtained with the assistance of mortgage insurance under the National Housing Act, as amended.

Pursuant to Section 241.25 of the Administrative Rules and Regulations under Section 213 of the National Housing Act, as amended (see Title 24, Chapter 11, Subchapter D, Part 241, Code of Federal Regulations, 1949) and a directive entitled CH-50 from the

Assistant Commissioner of the Federal Housing Administration to directors of all Federal Housing Administration field offices, Skyview Estates, No. 10, has in its proposed Articles of Incorporation given itself the power "To make patronage refunds to members, occupants of living units, or others as provided in the By-laws and/or Occupancy Agreements."

The patronage refunds contemplated by the above provision would arise from the "assessment" by the corporation of "monthly carrying charges" from individual shareholders who wished to occupy their individual units prior to completion of the entire project. It is suggested by the Federal Housing Administration that this monthly charge not be more than rents charged for comparable dwelling units in the area, or in an amount equal to the actual monthly cost of operation of the project to the mortgagor corporation, whichever is greater. In granting permission to occupy prior to completion, the shareholder is advised that the monies so collected will be considered corporate income to be used for appropriate corporation purposes, and any amount remaining at the time of release will be disbursed to all members equally as a patronage refund.

The above plan is based on the principle that income from occupancy of Sales Type projects prior to completion and commencement of amortization accrue to the benefit of the mortgagor corporation as a whole, and not for the sole benefit and credit of the individual shareholders from whom such interim payments are received. In view of this, any surplus remaining at the time the blanket mortgage is released is distributed to all shareholders in the corporation equally, and distribution thereof is not limited to those individual members from whom such interim payments were received.

The question then arises as to whether this proposed plan of patronage refunds conflicts with Section 51-14-20, Subsection (b) N.M.S.A., 1953 Comp., 1957 Pocket Supp. This section defines a nonprofit corporation as follows:

"(b) NONPROFIT CORPORATION. 'Nonprofit corporation' means a corporation formed for a purpose not involving pecuniary gain to its shareholders or members, **paying no dividends or other pecuniary remuneration, directly or indirectly, to its shareholders or members as such, and having no capital stock.**" (Emphasis ours).

Inasmuch as our Nonprofit Corporation Act is relatively new, having been enacted in 1957, our courts have not been called upon to interpret the above quoted section. However, we cannot escape the conclusion that shareholders of the type of corporation which is the subject of this opinion stand in a position to receive pecuniary remuneration as a result of their membership in such a corporation. The language of the statute is broad in scope and in our opinion covers the situation in question.

We, therefore, conclude that Article IV, Section (E) of the proposed Articles of Incorporation of Skyview Estates, No. 10, which provides for patronage refunds to shareholders of said corporation violates the definition section of the New Mexico Nonprofit Corporation Act, and that, therefore, the Corporation Commission is without authority to accept the articles in question for filing.