

VOLUME NO. 37

OPINION NO. 2

BOARD OF HOUSING - State Contracts, officers and employees interested in; PUBLIC CONTRACTS - Board of Housing, conflict of interest, officers and employees interested in; CONFLICT OF INTEREST - Public contracts, officers and employees; CONTRACTS - State contracts, conflict of interest, what constitutes interest in; CONSTITUTION OF MONTANA - Article XIII, section 4; REVISED CODES OF MONTANA, 1947 - Section 59-501.

- HELD: 1. The Board of Housing members who are respectively the president and majority stockholder in a bank and an officer and minority stockholder in a bank would come within the prohibitions of section 59-501, R.C.M. 1947, if the Board of Housing contracts or acts officially with the institutions with which they are associated.
2. The actions taken by these members of the Board of Housing do not, as of the date of this opinion, constitute any violation of section 59-501, R.C.M. 1947.

23 February 1977

William A. Groff, Chairman
Montana Board of Housing
Department of Community Affairs
Capitol Station
Helena, Montana 59601

Dear Mr. Groff:

You have requested my opinion on the following questions:

1. Does the status of three members of the Board of Housing create the "necessary interest in the contract" which may be entered into between banks and the board, as to make such contract a violation of section 59-501, R.C.M. 1947?
2. Have the actions of these members of the Board of Housing to the present time constituted a violation of section 59-501, R.C.M. 1947?

Your letter reveals that the three board members in question occupy the following positions, respectively, in lending institutions:

- a. President and majority stockholder of a bank;
- b. Officer and minority stockholder of a bank;
- c. Chief executive officer of a mutual savings and loan association.

The institutions with which these board members are affiliated are in the position to become "approved lending institutions" by the board (Rule 22-3.18(6)-S1870, MAC). If approval is given by the board, the institutions may then participate in the home mortgage loan program to low-income families administered by the board under the Housing Act of 1975, section 35-501 et seq., R.C.M. 1947.

The 1972 Constitution of Montana mandated (Art. XIII, § 4) the Legislature to provide for a code of ethics prohibiting "conflict between public duty and private interest" for all state and local officers and employees. Section 59-501, R.C.M. 1947, was a partial response to that directive, and provides:

Members of the legislature, state, county, city, town, or township officers or any deputy or employee thereof, must not be interested in any contract made by them in their official capacity, or by any body agency, or board of which they are members or employees. In this section:

- (1) The term "be interested" does not include holding a minority interest in a corporation.
- (2) The term "contract" does not include:
 - a. contracts awarded to the lowest responsible bidder based on competitive bidding procedures, or
 - b. merchandise sold to the highest bidder at public actions, or
 - c. investments or deposits in financial institutions which are in the business of loaning or receiving money, or
 - d. contracts for professional services.

This provision in substantially the same form has been in the laws of Montana since 1895, and, exclusive of subsections (1) and (2), was taken almost verbatim from section

1090 of the California Government Code. The exclusions in subsection (2) from the term "contract" are not applicable here. Subsection (1) is self explanatory, and excludes a person whose only connection is that of a minority stockholder. It is helpful, therefore, to consider the construction given the remainder of this statute by the California courts.

The interest prohibition statute has been broadly interpreted in California. In the leading case of Stigall v. City of Taft, 375 P.2d 289 (Cal. 1962), the court found that the statute had been violated even where the public official resigned his post prior to the actual execution of a contract with a corporation in which he owned a majority interest. In commenting upon the breadth and intent of the statute the court said (375 P.2d at 291):

The instant statutes are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the city. Conceding that no fraud or dishonesty is apparent in the instant case, the object of the enactments is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct. (Emphasis added.)

The California court quoted the United States Supreme Court's opinion in U.S. v. Mississippi Valley Co., 364 U.S. 520, 549-50, concerning the Court's ruling upon a federal conflict of interest statute:

✓ The statute is thus directly not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.

Finally, the California Court concluded that the statute seeks to prohibit a person's purporting to "deal at arm's length with himself, and any construction which condones such activity is to be avoided." (Emphasis added, 375 P.2d at 292.) Subsequent cases have similarly construed the statute (People v. Sobel, 115 Cal.Rptr. 532 (1974); People v. Watson, 92 Cal.Rptr. 860 (1971)).

As indicated by the language from the U.S. Supreme Court quoted above, other courts have likewise broadly construed conflict of interest statutes. In People v. Savaino, 335 N.E.2d 553 (Ill. 1975), for example, the court held that the general rule that penal statutes are to be strictly construed in favor of the accused had no application in face of the legislative intent behind the conflict of interest statutes:

This interpretation is consonant with the legislative intent to preclude a public officer from misuse of the powers of this office for his own profit, to prevent influenced decisions, and to effectuate the advancement and protection of the public good, which, in a final analysis, constitutes the basic underlying purpose of the statute.

In Savaino the court found a violation of the Illinois conflict of interest statute even though the alleged public contract was never consummated.

The Montana case involving section 59-501, R.C.M. 1947, Grady v. City of Livingston, 115 Mont. 47 (1943), does not help in the resolution of the present issues. In Grady, taxpayers sued to recover from certain corporations the monies paid by the city for goods and services over a period of years. Various members of the city council were employees or officials of these corporations, and the Court took no issue with the assertion that the sales in question did in fact violate the statute. The crucial factor for the majority was that the city had used or consumed all the purchased goods, and since the contracts were voidable, rather than void, (section 59-503, R.C.M. 1947) there could be no recovery from the corporation without return of the goods. The conclusion that contracts entered in violation of section 59-501 are not void, but merely voidable, is a major departure from California law.

Based upon the discussion above, the following points become evident:

1. Statutes prohibiting conflicts in interest in public contracts are broadly construed.
2. Conflict of interest statutes are intended to remove any official interest except remote or minimal interests.
3. The object of the statute is to remove any possibility of conflict of interest. Any interest which prevents or could tend to prevent impartial and faithful public service is prohibited.
4. There need be no showing of actual fraudulent or dishonest intent on the part of the public official involved.
5. A contract entered in violation of the statute is not void, but merely voidable.
6. If public officials violate the prohibitions of section 59-501, they are subject to criminal sanction under section 94-7-401, R.C.M. 1947.

As to the board members in question, the member who is president and majority stockholder in a bank is clearly covered by section 59-501. The board member who is an officer and minority stockholder is also covered by the statute. Although subsection (1) exempts minority stockholders, the greater interest evidence by additionally being an officer should bring the member within section 59-501. It has been held that a stronger case of interest exists when the public official involved is both an officer and a stockholder. See, State v. Robinson, 2 N.W.2d 183 (N.D. 1942), and 140 A.L.R. 344 and cases cited therein. The case of the board member who is the "executive officer" of a mutual savings and loan association is not as clear as the two above, because the degree of interest he has in the association is unclear. His situation should be assessed by himself and the board in light of the thrust of the conflict of interest statute to remove and prohibit the possibility of a conflict. The language of the Illinois court in People v. Adduci, 108 N.E.2d 1 (1952), is helpful:

✓ The interest against which the prohibition is leveled is such an interest as prevents or tends to prevent the public official from giving to the public that impartial and faithful service which he is in duty bound to render and which the public has every right to demand and receive.

I am mindful of the statutory requirement that members of the Board of Housing must be "informed and experienced in housing, economics of finance." Being "informed and experienced," however, falls far short of having a private interest in a public contract as prohibited by section 59-501, R.C.M. 1947. This dichotomy is emphasized by the fact that, while board members must be "informed and experienced" in the subject matter with which they deal, they are prohibited by criminal sanction (section 94-7-401, R.C.M. 1947) from having the conflict of interest prohibited by section 59-501.

Your second question is, in effect, whether the actions taken to date by the board constitute a violation of section 59-501. A review of the board's actions show that they have been general in nature and have been the basic steps necessary to implement the Housing Act of 1975. The board has not dealt individually with any institution associated with the three board members in question. Rather, the board has undertaken such actions as adopting form documents and regulations and authorizing the preparation and sale of bonds. These are not such actions as constitute the interest in a contract prohibited by section 59-501.

THEREFORE, IT IS MY OPINION:

1. The Board of Housing members who are respectively the president and majority stockholder in a bank and an officer and minority stockholder in a bank would come within the prohibitions of section 59-501, R.C.M. 1947, if the Board of Housing contracts or acts officially with the institutions with which they are associated. The board must evaluate the situation of the members who is the chief executive officer of a mutual savings and loan association in light of the material set forth in this opinion.

2. The actions taken by these members of the Board of Housing do not, as of the date of this opinion, constitute any violation of section 59-501, R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General