

Opinion No. 80-14

April 21, 1980

OPINION OF: Jeff Bingaman, Attorney General

BY: Bruce R. Kohl, Assistant Attorney General

TO: Mr. Arthur L. Ortiz, Director, Financial Institutions Division, Lew Wallace Building, Santa Fe, New Mexico 87503

FINANCIAL INSTITUTIONS

The various provisions of the Residential Home Loan Act should be given effect as written.

QUESTIONS

1. May a "home loan", as defined by Section 3B of the Residential Home Loan Act, Chapter 64, Laws of 1980, be made under the provisions of and at the maximum interest rate allowed by the general usury statute, Section 56-8-11 NMSA 1978, as amended by Chapter 65, Laws of 1980, or must such a loan be made exclusively under the provisions of the Residential Home Loan Act?
2. May a lender charge the amounts authorized by Section 56-8-9D NMSA 1978 as "points" in interim construction financing, where the loan is made under the provisions of the Residential Home Loan Act, Chapter 64, Laws of 1980?
3. Is the exemption from interest limitations for corporations as debtors set forth in Section 56-8-9B NMSA 1978 applicable to a "home loan" made pursuant to the provisions of the Residential Home Loan Act, Chapter 64, Laws of 1980?

CONCLUSIONS

1. See Analysis.
2. Yes.
3. Yes.

ANALYSIS

Section 3B of the Residential Home Loan Act, Chapter 64, Laws of 1980 defines a "home loan" as meaning:

"(1) a loan made to a person, all or a substantial portion of the proceeds of which will be used to purchase, construct, improve, rehabilitate, sell a residence or refinance a loan on a residence and which loan will be secured in whole or in part by a security interest in the residence evidenced by a real estate mortgage;

(2) the principal amount secured by a real estate mortgage on a residence when that real estate mortgage was executed by the mortgagor in connection with his purchase of the property, and the obligation secured represents a part of the deferred purchase price; or

(3) the deferred balance due under a real estate contract made for the purchase or sale of a residence. . . ."

OPINION

Sections 4 and 5 of the Act specify the maximum rates of interest that can be charged by a lender when making a home loan, and the Act establishes in Section 6 a method by which the Director of the Financial Institutions Division is to determine this maximum authorized rate of interest for such loans. This rate can vary, and is based upon the weighted average yield of accepted {**135*} offers of the most recent Federal National Mortgage Association auction plus one percent on a per annum basis.

In your first question you have inquired whether a home loan, as defined above, can be made under the provisions of and at the maximum rates of interest allowed by the general usury statute, Section 56-8-11 NMSA 1978 as amended by Chapter 65, Laws of 1980, or whether such a loan must be made only under the provisions of the Residential Home Loan Act. It is our opinion that such a loan can only be made under the provisions of the Residential Home Loan Act, and with some exceptions discussed below, the provisions of the general usury statute do not apply to the making of a home loan.

Statutes should be given effect as written and where free from ambiguity, there is no room for construction. **State v. Elliott**, 89 N.M. 756, 557 P.2d 1105 (1977). It is clear from a reading of the Residential Home Loan Act that the Legislature intended that the provisions of the Act in Sections 4 and 5 limiting the allowable rate of interest should apply exclusively to the making of a home loan. Section 7A of the Act states that:

"[t]he interest limitations imposed on transactions subject to the provisions of the Residential Home Loan Act shall apply to the exclusion or in lieu of the general interest limitations set forth in Section 56-8-11 NMSA 1978. . . ."

Thus, in the making of a home loan, only those interest limitations contained in Sections 4 and 5 of the Act are applicable. This means that a lender could not make a home loan and charge the rate of interest authorized by Section 56-8-11, **supra**, if this rate were higher than the rate allowed under Sections 4 and 5 of the Residential Home Loan Act.

In question two you have asked whether a lender making an interim construction loan under the provisions of the Residential Home Loan Act may charge the amounts allowed by Section 56-8-9D NMSA 1978 as "points." The relevant portion of Section 56-8-9D provides:

"In addition to the maximum interest or discount which a lender is permitted to charge by law the lender may charge, take, reserve or receive a premium or points in an amount up to but not exceeding three percent of the face amount of the loan on interim construction loans. . . ."

To answer this question we must determine first whether interim construction lending is provided for under the Residential Home Loan Act. Section 3B of the Act defining "home loan" includes loans made to "construct" a residence. Since such interim construction lending is included in the definition of a home loan, it is therefore allowed under the Residential Home Loan Act and is governed by the provisions of the Act.

Section 7A of the Act further provides that:

". . . the provisions of the Residential Home Loan Act shall not supercede or repeal the exemptions from interest limitations and the other provisions set forth in Sections 56-8-9, 56-8-21, 58-8-1, 58-8-2 and 58-8-3 NMSA 1978 . . ."

Although not precisely stated, we believe that this provision indicates a legislative intent that the exemptions from interest limitations and other provisions of law established by Sections 56-8-9, 56-8-21, {**136*} and 58-8-1 through 58-8-3 should be applicable to any home loan made pursuant to the Residential Home Loan Act. Section 56-8-9D allows a lender to charge "points" in an amount not to exceed three percent of the face amount of the loan in addition to amounts allowed by law as interest when such loan is used for interim construction financing, and Section 7A of the Act apparently makes this provision applicable to a home loan made under the Act for construction of a residence. Thus, it is our opinion that a lender making a home loan for purposes of interim construction financing under the Residential Home Loan Act may charge "points" not to exceed three percent of the face amount of the loan in addition to any amounts allowed as interest under Sections 4 and 5 of the Act. This interpretation is consistent with the quoted language of Section 56-8-9D, which authorizes a lender to charge these amounts in addition to any interest allowed "by law," thus indicating that the exemption contained in Section 56-8-9D is not limited only to the interest provisions in the general usury statute.

As to question three, it is likewise our opinion based upon the quoted language from Section 7A of the Residential Home Loan Act, that the exemptions from interest limitations and other provisions of law applicable to corporations as debtors (Sections 56-8-9B and 56-8-21A), limited partnerships as debtors (Section 56-8-21B, **supra**), business or commercial loans of five hundred thousand dollars or more (Section 56-8-9C, **supra**), and National Housing Act loans (Section 58-8-1 to 58-8-3, **supra**) would apply to home loans made under the Residential Home Loan Act. Therefore, the

exemption from interest limitations for corporations as debtors established by Section 56-8-9B would apply to a home loan made under the Act, so that such a loan would be exempt from, the interest limitations of Sections 4 and 5.

ATTORNEY GENERAL

Jeff Bingaman, Attorney General