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Appraisal Subcommittee

Federal Financial Institutions Examination Council

November 14, 2005

Camille Nohe, Assistant Attorney General
State of Kansas
Office of the Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597

Dear Ms. Nohe:

This letter responds to your June 28, 2005 letter stating the Kansas Real Estate Appraisal Board's ("KREAB" or "Board") and your position regarding Appraisal Subcommittee ("ASC") staff attendance to observe KREAB's non-public sessions.

In that letter, you concluded that KREAB was entitled to remove ASC staff from "quasi-judicial deliberations" under an exception from the Kansas Open Meetings Act, K.S.A. 75-4317 *et seq.* You, however, stated that ASC staff could observe KREAB's "executive sessions." You also concluded, without stating any rationale, that the presence of ASC staff during quasi-judicial deliberations is not in any way related or necessary to the ASC's monitoring responsibilities regarding Kansas' compliance with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended ("Title XI").

Since 1991, a few State appraiser regulatory agencies ("State agencies") have been reticent about allowing ASC staff to observe non-public portions of their meetings. Without exception, those State agencies ultimately allowed ASC staff to observe those non-public sessions when State representatives understood the scope of the ASC's responsibilities under Title XI, and the fact that any information learned in those meetings would remain confidential. To assure State agencies regarding the confidentiality of information, when requested, the ASC has signed documents acknowledging that all information learned in those sessions would remain confidential. In fact, the ASC would withhold that information from public disclosure under the Privacy Act of 1974, 5 U.S.C. 552a, and the exemptions from disclosure in the Freedom of Information Act, 5 U.S.C. and 552(b).

For the reasons discussed below and in our May 16, 2005 field review letter, we strongly disagree with your position and urge you to advise KREAB to reconsider its position. In our view, § 1118(a) of Title XI, 12 U.S.C. 3347(a), which requires the ASC to monitor State agencies "for the purpose of determining whether a State agency's policies, practices, and procedures are consistent with Title XI[,]" clearly authorizes the ASC to view *any and all* aspects of KREAB's Title XI-related activities, including the activity at issue. Every function involved in a State appraiser regulatory program ("Program") related to its compliance with Title XI, no matter the implementation or process, is open to our monitoring authority under Title XI. Without that ability, the ASC would find it difficult to determine, among other things, whether a State agency has made "decisions concerning . . . supervision of appraiser practices [that] are not made in a manner that carries out the purposes of [Title XI]." Section 1118(b)(3) of Title XI, 12 U.S.C. 3347(b)(3).

It is the ASC, not KREAB, that decides the scope of the ASC's monitoring responsibilities. In that regard, the ASC decided many years ago to exercise its monitoring responsibilities through a field review process. Over time, this process has become routine and repetitive, with all States knowing the ASC's compliance expectations (through its correspondence and Policy Statements) and how the ASC conducts its on-site field reviews.

The ASC deliberately created this monitoring system and its components with a view towards reasonably balancing the needs of the States and the ASC's needs to fulfill its statutory responsibilities under Title XI. At all times, the ASC has attempted to grant States comity because States, like the Federal Government, are sovereign entities. At the same time, the ASC has operated its field review program in recognition of the fact that, when a conflict exists between its statutory duties and the desires of a State agency, the ASC's needs must take precedence.

This result, however, does not mean that the ASC's authority is unlimited. The U.S. Supreme Court, in the seminal case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), laid out an analytical framework for reviewing a Federal agency's construction of the statute it administers. In doing so, the Court established the boundaries regarding agency authority. Citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974), the Court noted that "the power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Then, the Court noted that the question is "whether the agency's [interpretation] is based on a permissible construction of the statute." *Id*. at 843. "If Congress has explicitly left a gap for the agency administering the statute to fill, there is in effect a delegation of authority to the agency to adopt a regulation or policy to elucidate the statute." *Id*. at 844. "So long as the interpretation comports with the statutory objectives and is not arbitrary or capricious, the administering agency's reasonable policy choices are entitled to deference." *Id*. at 844-845, 864-866.

Nothing in Title XI or its legislative history specifies how the ASC is to exercise its State agency monitoring authority. As discussed above, the ASC determined that it would exercise this authority through an on-site field review process tailored to accommodate as much as possible the needs and desires of all parties involved. Key elements of that supervisory process, among other things, are: (1) how a State agency determines to initiate a disciplinary action against an appraiser, *i.e.*, how it exercises its prosecutorial discretion; (2) whether the disciplinary process operates effectively and efficiently, (3) whether the State agency reaches disciplinary decisions fairly and consistently, free of conflicts of interest and self-dealing; and (4) whether State agency decision-makers in disciplinary actions duly consider their responsibilities under Title XI when making determinations throughout the case investigation and resolution process.

Without discounting the importance of any of these key factors, the last two are particularly significant when considering non-public sessions of State agencies. The third factor, which relates to fair and consistent decisions, is essential to ensuring the public's confidence and respect for the State agency and for the State's appraiser regulatory system as a whole. Without that confidence and respect, the State's system of effective appraiser supervisory oversight, as envisioned by Congress when it established Title XI, would likely fail.

Our experience in conducting field reviews over the years has taught us that, if unethical or preferential behavior occurs, it is often during those non-public sessions or discussions. For example, by attending State agency non-public sessions, we have learned of instances where State agency board or commission members have dismissed complaints out of hand against sitting or past members and politically connected appraisers. ASC staff attending those meetings assisted the decision-makers in recognizing their responsibility to treat all complaints impartially and equally. Indeed, after learning about a number of these instances, the ASC had to take action by adopting amendments to ASC Policy Statement 1 on August, 11, 2004. Those amendments established specific ethical standards for State agency board or commission members and any persons in policy or decision-making positions, including individuals who support those policy or decision-making activities. Our experience, therefore, is contrary to your assertion, via your citation of Kansas Attorney General Opinion No. 97-40, quoted at page four of your June 28th letter, that "[t]his is not an area in which one need fear the alleged 'private deals' and extraneous consideration to the matter at hand." [Citation omitted.]

The fourth factor relates to State agency decision-makers completely carrying out their Title XI duties when investigating allegations of appraiser misconduct and sanctioning wrongdoing appraisers. For example, by observing State agency non-public discussions and reviewing State disciplinary files, we learned that some State agency decision-makers were dismissing allegations of appraiser misconduct on an "absence of harm to the public" basis, even when those allegations involved violations of the Uniform Standards of Professional Appraisal Practice ("USPAP"). Title XI generally requires real estate appraisals to be performed in compliance with USPAP, and State agencies must enforce compliance with USPAP. As a result, the ASC, on October 11, 2000, adopted paragraph E. to ASC Policy Statement 10 that, among other things, includes language specifically addressing this issue.

The ability of the ASC to observe non-public portions of State agency meetings is a small but essential element in the ASC's State agency monitoring program. If the ASC were unable to observe State agency non-public meetings, the ASC might never have learned about the matters discussed above. At best, the ASC might have learned about them after they caused significant damage to the State's appraiser regulatory program. The ASC's ability to monitor State agency compliance with Title XI would have been thwarted, regulatory solutions to those problems might never have been crafted, the public confidence in the State's appraiser regulatory program could have declined, and users of appraisal services, such as federally regulated financial institutions, could have suffered financial losses.

Finally, your arguments are not pertinent for the following reasons. First, the ASC, as the Federal agency responsible under Federal law to monitor KREAB's compliance with Title XI, and the way the ASC implements its monitoring responsibilities are not subject to Kansas law.

Second, even if Kansas law attempted to include the Federal Government, *i.e.*, the ASC, within its reach, that attempt would fail because your interpretation of Kansas law directly conflicts with Federal law, *i.e.,* Title XI as reasonably interpreted and implemented by the ASC.

Third, the ASC, as the Federal agency responsible under Federal law to monitor KREAB's compliance with Title XI, is *not* a member of the "public." At the bottom of page four of your June 28th letter, you cite *Jordan v. !istrict of !olumbia*, 362 A.2d. 114 (!.C. Court of Appeals 1976). There, the court noted that admitting "any member of the public to . . . deliberations . . .

would effectively prevent the frank exchange of views in private among members of quasi-judicial agencies in reaching a decision . . . ." The very structure of State open meetings acts, such as K.S.A. 75-4317 *et seq.*, and the Federal Government in the Sunshine Act, 5. U.S.C. 552b, proves that the ASC is not a member of the public. All of these statutes are based on the premise that the interests of the public and the government are different, can be in conflict, and need to be balanced. This is best expressed in § 2 of Pub. L. 94-409, which accompanied the adoption of the Government in the Sunshine Act. That section states, in pertinent part, that the purpose of that Act is "to provide the public with such information [regarding the decision making process of the Federal Government] while protecting the rights of individuals and the ability of the Government to carry out its responsibilities."

Fourth, in our experience, ASC attendance at non-public meetings does not impede the free flow of discussion and exchange of ideas necessary to the fairness of the decision-making process. When attending non-public meetings, the ASC staff, as a rule, does not actively participate in the meeting's discussions; the staff merely observes them and is available to the decision-makers should they have questions. And, if only one person is the decision-maker, the staff certainly does not "insist on . . . being present while such a [decision-maker] mentally deliberates the requisite findings of fact, conclusions of law and any appropriate order, or insist that such a [person] deliberate out loud . . . ." as you asserted on page two of your June 28th letter. Of course, ASC staff would expect this decision-maker to answer questions about how he or she arrived at a decision if it related to the State's Title XI responsibilities. In this manner, ASC staff respects the frank exchange of views and free flow of discussion and is as unobtrusive as possible. Not only is this essential to fairness of the decision-making process, but it also is essential to the ASC's ability to gather information regarding whether the decision-makers are performing their responsibilities consistent with the purposes of Title XI. Indeed, as a rule, the decision-makers proceed as if ASC staff were not present.

Finally, you state on page three of your June 28th letter that the presence of ASC staff during non-public sessions would "create a breach of the attorney-client confidential relationship – something [KREAB] is unwilling to do." No breach would be created. As noted at the beginning of this letter, any information learned in those meetings would remain confidential under the Privacy Act of 1974 and the Freedom of Information Act. And, if a State agency wished to have further assurances of confidentiality, the ASC would sign documents acknowledging that all information learned in those sessions would remain confidential.

We expect that, in the future, ASC staff will be permitted to attend any and all KREAB meetings, including any non-public meetings or discussions that might occur among KREAB members, staff, or KREAB components. The ASC stands ready to provide KREAB with further assurances regarding the continuing confidentiality of any information learned during those meetings or discussions. Should ASC staff be prohibited from attending any such meeting, in view of such a knowing and flagrant violation of Title XI, we, as ASC staff, would be left with no choice but to recommend to the ASC the initiation of a non-recognition proceeding under § 1118 of Title XI, 12 U.S.C. 3347.

We strongly encourage you to consider seriously the possible far reaching consequences of a non-recognition finding. Such an order would severely affect the livelihoods of your licensed and certified appraisers and disrupt most real estate lending activity within your State. We hope you

will take the responsible course of advising KREAB to reconsider and withdraw its position regarding ASC attendance at non-public KREAB meetings.

Please contact us if you have further questions.

Sincerely,

Ben Henson
Executive Director

Marc L. Weinberg
General Counsel

cc: Phill Kline, Attorney General, Kansas Office of the Attorney General
James Pfeffer, Chairman of KREAB