ALAN WILSON
ATTORNEY GENERAL

February 23, 2023

The Honorable J. Gregory Hembree
Member
South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Hembree:

We received your request for an opinion concerning real estate licensure of online travel agencies ("OTAs"). Specifically, you ask us to address the following two issues regarding OTAs:

A. OTAs perform activities equivalent to those described in the SC Real Estate License Law which the South Carolina Code of Laws contemplates being conducted by parties who must obtain South Carolina real estate licensure; and
B. Rules of statutory construction and public policy concerns mandate that the SC Real Estate License Law be construed to require OTAs to be licensed in South Carolina and comply with the SC Real Estate License Law.

Law/Analysis

Chapter 57 of title 40 of the South Carolina Code governs the licensing of real estate professionals. Section 40-57-20 of the South Carolina Code (Supp. 2022) makes it unlawful "for an individual to act as a real estate broker, real estate salesman, or real estate property manager or to advertise as such without a valid license issued by the department." Section 40-57-30(3) of the South Carolina Code (Supp. 2022) defines "broker" as

> an associated licensee who has met the experience and education requirements and has passed the examination for a broker license and who, for a fee, salary, commission, referral fee, or other valuable consideration, or who, with the intent or expectation of receiving compensation:

> (a) negotiates or attempts to negotiate the listing, sale, purchase, exchange, lease, or other disposition of real estate or the improvements to the real estate;
>
> (b) auctions or offers to auction real estate in accordance with Section 40-6-250;
>
> (c) for a fee or valuable consideration solicits a referral;
>
> (d) offers services as a real estate consultant, counselor, or transaction manager;
>
> (e) offers to act as a subagent of a real estate brokerage firm representing a client in a real estate transaction; or
>
> (f) advertises or otherwise represents to the public as being engaged in any of the foregoing activities.

Section 40-57-30(20) defines "property manager" as follows:

> an associated licensee who meets educational requirements and passes the examination for a property manager license, and who will for a fee, salary, commission, other valuable consideration or with the intent or expectation of receiving compensation:
>
> > (a) negotiates or attempts to negotiate the rental or leasing of real estate or improvements to the real estate;
> >
> > (b) lists or offers to list and provide a service in connection with the leasing or rental of real estate or improvements to the real estate; or
> >
> > (c) advertises or otherwise represents to the public as being engaged in an activity in subitems (a) and (b).

A "licensee" for purposes of chapter 57 is defined as "an individual currently licensed under this chapter." S.C. Code Ann. § 40-57-30(14) (Supp. 2022). It is our understanding that the OTAs you refer to in your letter, such as VRBO, Homeaway, and Airbnb are corporations. Our courts have yet to address whether the term "individual" as used in chapter 57 includes corporations. As such we employ the rules of statutory interpretation to determine whether corporations are considered individuals for purposes of requiring licensing under chapter 57.

As our Supreme Court explained in State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622-23 (2011):

> "The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). As such, a court must abide by the plain meaning of the words of a statute. Id. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. at 85, 533 S.E.2d at 581. "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" Id. (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed.1992)).

Black's Law Dictionary defines "individual" as "1. Existing as an indivisible entity. 2. Of, relating to, or involving a single person or thing, as opposed to a group." INDIVIDUAL, Black's Law Dictionary (11th ed. 2019). Moreover, while this term is not defined in chapter 57, the South Carolina tax code states "individual" "means a human being." S.C. Code Ann. § 12-2-20(2) (2014). Additionally, in a prior opinion, we described the word as referring to natural persons. Op. Att'y Gen., 1977 WL 24597 (S.C.A.G. Aug. 12, 1977) (citing Lake Shore Auto Parts v. Korzen, 54 Ill. 2d 237, 296 N. E. 2d 342, cert. denied 94 S. Ct. 539, 414 U. S. 1039, 38 L. Ed. 2d 329). As such, the plain meaning of the term "individual" indicates the licensing requirement applies natural persons rather than corporations. This interpretation is further supported by the fact that the licensing requirements are geared to natural person as they require them to submit to criminal background checks and satisfy certain educational and examination requirements. See S.C. Code Ann. § 40-57-115 (2022); § 40-57-320 (2022). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (quoting Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). Accordingly, we believe the term "individual" for purposes of chapter 57 does not include corporations.

However, chapter 57 does contemplate the conduct of real estate related activity by corporations. A "real estate brokerage firm" is defined to include companies that "engage in the business of real estate brokerage," which includes "the aspect of the real estate business that involves activities relative to property management or a real estate sale, exchange, purchase, lease." S.C. Code Ann. § 40-57-30(24) & (23) (Supp. 2022). Real estate brokerage firms act under the direction of a licensed broker-in-charge or property manager-in-charge and other associated licensees. The law as it currently stands does not require a real estate brokerage firm to hold a license separate from

its associated licensees. Nevertheless, section 40-57-350 of the South Carolina Code (Supp. 2022) places certain duties on real estate brokerage firms regarding their clients.

Attached to your opinion request, you included a letter from Haynsworth Sinkler Boyd, P.A. ("HSB") in support of your opinion request. In the letter, HSB acknowledged "[c]urrently, Real Estate License Law's statutory threshold requires licensees to be "individuals . . . ." However, HSB argues OTAs are performing activities, specifically real estate brokerage and property management activities, which would require licensure if performed by individuals. Referring to the definition of a broker, as cited above, HSB states:

> Per (a), while OTA hosts personally list and lease their respective properties, OTAs nonetheless facilitate such listings and leasing by designing, creating, and maintaining the platform on which the hosts interact with renters. Such platforms also coordinate reservations and facilitate and oversee the payments from the renters and then to the hosts. Per (d), given that the online tools of OTAs (like Airbnb) not only effects the transactions between the host and renter, but also provides services in that regard by virtue of the provision and management of the tools described below, OTAs could reasonably be qualified "transaction manager[s]." Finally, per (f), the web postings and social media marketing of OTAs directly correspond to "advertising" aimed towards rental customers. Therefore, Airbnb fits some of the definitional requirements of a broker under the SC Real Estate License Law.

HSB also analyzes OTAs as property managers under section 40-57-30(20) as follows:

> Per (a) and as aforementioned, while OTA hosts personally list and lease their respective properties, the OTAs act as facilitators of such listings and leasing by creating, maintaining, and offering the platform on which hosts interact with renters. Per subsection (c) and as aforementioned, the web postings and social media marketing of OTAs directly correspond to "advertising" aimed towards rental consumers. With respect to subsection (b), while hosts directly list their homes on an OTAs' website, OTAs nonetheless could be seen as "offering" properties for leasing by allowing such properties to be displayed on their website; further, the platforms on which OTAs operate even act as the intermediary between hosts and renters for purposes of exchanging rental funds. Moreover, the creation, provision, and maintenance of certain highly interactive online tools afforded by OTAs to hosts provides definitive evidence of the "services' component required by subsection (b).

At least some of the activities HSB described in its letter could be viewed as activities performed by a real estate broker or property manager. However, in addition to the fact that the statutes apply to individuals rather than corporations, whether an OTA satisfies the definition of either a broker or a property manager involves a determination of fact. As we stated in prior opinions, "because

this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions." Op. Att'y Gen., 2006 WL 1207271 (S.C.A.G. Apr. 4, 2006) (quotations omitted).[1]

Next, you argue the rules of statutory construction and public policy concerns mandate OTAs be licensed and comply with the SC Real Estate License Law. You and HSB present compelling reasons why OTAs should be required to be licensed under South Carolina law. As you point out, the role of the Real Estate Commission is to "regulate the real estate industry so as to protect the public interest when involved in real estate transactions." S.C. Code Ann. § 40-57-10 (Supp. 2022). You argue OTAs are engaging in real estate transactions and therefore, should fall under the regulation and oversight of the Real Estate Commission. For example, you state renters can book directly with the OTA without involvement of the property owner, OTAs provide data analysis to assist owners with pricing, and OTAs process the transactions. Moreover, you provided examples of ramifications of OTAs operating without a license. You note the lack of licensing for OTAs creates an opportunity for property owners to evade business licensing requirements and taxation. While we agree with your concerns, this is a policy matter which much be addressed by the General Assembly. Op. Att'y Gen., 1993 WL 439024 (S.C.A.G. Sept. 17, 1993) ("Neither this office nor a court can substitute its judgment for that of the General Assembly.").

Conclusion

Section 40-57-20 of the South Carolina Code requires individuals acting as real estate brokers, real estate salespersons, and real estate property managers to be licensed by the South Carolina Real Estate Commission. Chapter 57 does not specifically address whether corporations, such as the OTAs mentioned in your letter, are considered individuals for purposes of the chapter. However, given the plain and ordinary meaning of the term and reading it in conjunction with other provisions under chapter 57, we believe that while individuals acting as real estate brokers, salespersons, and property managers are subject to the licensing requirements, as the law stands today, corporations are not.

Nonetheless, we share your concern that OTAs, while not required to be licensed, may be engaging in activities if performed by an individual may subject them to the licensing requirements in

[1] Additionally, it is important to note that section 47-57-240 of the South Carolina Code (Supp. 2022) specifically exempts "the sale, lease, or rental of real estate by an unlicensed owner of real estate who owns any interest in the real estate if the interest being sold, leased, or rented is identical to the owner's legal interest . . . ." We presume OTAs and their clients would argue they are exempt from licensure because the client is an unlicensed owner. HSB argues the role of the OTA goes far beyond serving as a platform which homeowners can use to list their properties to one that involves the conduct of real estate activities. We are concerned about the role OTAs play, especially if the OTA is processing the transaction. But, as we stated previously, that role should be examined by a court that can hear all the evidence in support and against this assertion.

Chapter 57. However, we encourage the General Assembly to address this issue through legislation.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General