1984 WL 249841 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
March 12, 1984

***1** David E. Martin, Esquire
South Carolina Real Estate Commission
2221 Devine Street
Suite 530
Columbia, South Carolina 29250

Dear Mr. Martin:
You have asked our advice as to whether an individual owner of a time-sharing interest in a time-sharing project, who refers a friend or neighbor to the time-share developer for a fee of $100.00, contingent upon the referred person making such a purchase, must be licensed by the Real Estate Commission prior to such referral. With certain qualifications, requiring factual findings, we conclude that the situation you describe is probably exempt from licensure, pursuant to the express terms of § 27-32-10(7)(a) of the Code of Laws of South Carolina (1976 as amended).

Section 27-32-10 et seq. provides for the regulation of vacation time-sharing plans by the South Carolina Real Estate Commission. Section 27-32-20 makes it unlawful for any 'seller' of a vacation time-sharing plan to sell, lease, encumber or convey in any manner or to solicit or advertise such transactions unless the seller is licensed by the Real Estate Commission. The term 'seller' is defined in § 27-32-10(7) to mean:
any business entity, including but not limited to agents, dealers, distributors, franchisers, subsidiaries, assignees, resellers, brokers or any other representatives thereof who, for a fee, commission or other valuable consideration, negotiates or attempts to negotiate the listing, sale, auction, purchase, exchange or lease of any real estate or the improvements thereon or collects rents or attempts to collect rents, or who advertises or holds himself out as engaged in the foregoing activities.

The definition of 'seller', however, also contains the following proviso:
Provided, however, that the provisions of this chapter [Chapter 32] shall not be applicable to:
(a) the sale of real estate by anyone who is the owner thereof or who owns any interest therein, or to the attorney at law of such owner acting within the scope of his duties. Ownership of stock in a corporation is not ownership of an interest in real estate owned by the corporation and does not exempt such stockholder from the provisions of this chapter, unless the stockholder owns or controls at least ten percent of the stock of the corporation. (emphasis added).

As can be seen, § 27-32-10(7)(a) on its face exempts entirely from the statutory licensing requirements the sale of a time-sharing plan by one who is either an outright owner or who owns any interest therein. Thus, in the situation described in your letter, if the individual referring the acquaintance actually owns any property interest in the property to be sold, the licensing requirements described above would appear not to apply. Necessary then, in determining whether this exemption would apply is a determination of the rights and interests each referring person holds at the time such referral takes place. [1]

We are advised by those persons referenced in your request letter that the following interests, rights and duties are held by those who own time-sharing plans: an exclusive ownership of a particular unit for a designated period of time (usually certain weeks for a period of years); an undivided interest with other purchasers in the 'common elements' of the structure and grounds for

this same period of time; and a remainder over in fee simple as tenant in common with all other purchasers as to each of the units; we are advised that the remainder is vested, with the right to possession being deferred to a date certain in the future. We also understand that there exists a provision for termination of the time-sharing plan (if all unit week owners agree or if 'major damage' occurs to the property); upon termination of the plan, the property is then owned in common by the unit owners according to the same percentage share owned by the unit owner in the common elements.

***2** For purposes of the advice given herein, we assume for the moment that licensure by the Real Estate Commission is required, absent applicability of the ownership exemption contained in § 27-32-10(7)(a). [2] We also assume for purposes of our advice that the various property interests which we understand an owner of a time sharing plan to have are indeed owned by the person making the referral which you have described. If such assumptions are true, then we would advise that, by virtue of certain of these property interests, the person making the referral would probably be the owner of a property interest within the meaning of the statutory exemption from licensure provided for in § 27-32-10(7)(a). Accordingly, absent special factual circumstances explained more fully below, a license by the Real Estate Commission would probably not be required in the situation you describe. The basis for our conclusions will be set forth as follows.

The principal purpose of the licensing requirement in general is the protection of the public from unscrupulous and unqualified persons. Bonasera v. Roffe, (Ariz.), 442 P.2d 165 (1968). Thus, a court would likely conclude that, since the statute has a remedial purpose, it should be construed liberally in order to effectuate that purpose. See, South Carolina Department of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978); but see, N.C. Real Estate Licensing Bd. v. Woodward, (N.C.), 219 S.E.2d 271 (1975). Following this same line of reasoning, courts would likely construe strictly any exemptions from the licensing requirements, Zaid v. Island House Condominium Assn., 170 N.J.Super. 206, 406 A.2d 196 (1979), especially since the exemption in question is contained in a proviso which is generally strictly interpreted. Barringer v. Dinkler Hotels Co., 61 F.2d 82 (4th Cir. 1932).

Nevertheless, the language in the statute must be given its plain and ordinary meaning. Merchants Mut. Ins. Co. v. S. C. Second Injury Fund, 277 S.C. 604, 291 S.E.2d 667 (1982). The literal meaning of the words used must be applied. Southeastern Fire Ins. Co. v. S.C. Tax Comm., 253 S.C. 407, 171 S.E.2d 355 (1969). Where a statute uses words having a well-recognized meaning in law, the presumption is that the Legislature intended to use the words in that sense. Coakley v. Tidewater Const. Corp., 194 S.C. 284, 9 S.E.2d 724 (1940).

As stated, § 27-32-10(7)(a) exempts from the provisions of the Chapter (including licensure requirements) 'the sale of real estate by anyone who is the owner thereof or who owns any interest therein.' (emphasis added). Based simply upon this language, it would appear to us clear that one or more of the interests purportedly held by a unit owner would be sufficient to make him an 'owner' of real estate or one who 'owns any interest therein' within the meaning of the statutory exemption.

The word 'owner' is a broad term, usually understood to mean
the person in whom is vested the ownership, dominion or title to the property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal which he has a right to enjoy and do with as he pleases.

***3** Black's Law Dictionary, 'Owner' (5th ed.) The term 'interest' usually means a 'right, claim, title or legal share.' In the context of real property law, an 'interest' is generally viewed as being synonymous with an 'estate' or 'right'.

Certainly one who holds a vested remainder in fee is an 'owner' of real property within the generally accepted meaning of the word. Town of Brattleboro v. Smith (Vt.), 94 A.2d 407, 408 (1953). The South Carolina Supreme Court has concluded that remaindermen are 'owners' of property within the State constitutional provision which states that private property shall not be taken for public use without the consent of the 'owner'. Cureton v. Sea Board Railway Co., 59 S.C. 371, 37 S.E. 914 (1901). [3] Likewise, a tenant in common is considered an 'owner' of real property. See, 30A Words and Phrases, 'Owner', pp. 501-502.

Moreover, it is beyond dispute that one who holds a vested remainder as tenant in common possesses an 'interest' in the entire property in question. A vested remainder is a present interest in property, the remaindermen having the power to alienate and convey. 31 C.J.S., Estates, § 88(b) (1964). The term 'any interest' encompasses vested remainders. Cf. Young v. Young, 89 Va. 675, 17 S.E. 470 (1893). And our own Supreme Court likewise characterizes a vested remainder as an 'interest' in property. See, Walker v. Alverson, 87 S.C. 55, 68 S.E. 976 (1910); Faber v. Police, 10 S.C. 376 (1877). Further, it is widely recognized that a tenant in common owns an undivided interest in the whole property concerned. 20 Am.Jur.2d, Cotenancy and Joint Ownership, § 22. The right of one tenant in common is to an undivided share of the whole. Whitton v. Whitton, 38 N.H. 127. Each cotenant has a right to occupy and utilize every portion of the property at all times and in all circumstances. 20 Am.Jur.2d, supra at § 34. Moreover, in addition to a possessory interest in the whole, every tenant in common owns an interest in his cotenant's share until final settlement between them has been made; a leading treatise writer on real property has stated:

There is much authority for the doctrine that each tenant in common has an equitable lien upon the share of his cotenant until all equities are adjusted; or, in other words, while each tenant is vested with the title to his own undivided interest in the common estate, he holds a contingent interest in the entire estate until partition is made and accounts are settled.

Thompson on Real Property, Vol. 4, § 2004, p. 526. The Court in Paidle v. Hestad, (Ind.), 348 N.E.2d 678, 680 summarized the property interests of a tenant in common: 'Each tenant in common is seized per my et per tout, that is, each holds title to the whole estate until all equities relating to the tenancy are adjusted.' See also, Andrews v. Harris, (Ind.), 141 N.E.2d 761 (1957). Our Supreme Court has recognized this same rule:

***4** Tenants in common are seized per my and per tout, each being entitled, before severance, to an interest in every inch of the soil.

Martin v. Bowie, 37 S.C. 102, 15 S.E. 736, 742 (1892).

Thus, even if we focus solely upon that portion of a unit owner's holdings relating to the remainder over in fee as tenant in common, such interest alone would, we believe, fall within the literal meaning of the words used in the statutory exemption. [4] Because a unit owner holds a future interest in common with all other purchasers, he owns an interest in the whole; accordingly, when he makes a referral, even though that referral may involve a separate time-share unit, still there would be the 'sale of real estate by the owner thereof or who owns any interest therein . . .'.

It has been argued that in order to be entitled to the exemption contained in § 27-32-10(7)(a), the interest referred must be the very same property interest owned by the person making the referral; in other words, it is argued, for the exemption to apply, the unit owner must refer for sale the tenant in common's same proportionate share as he himself owns. But the statute does not say that, in clear and unambiguous terms at least. Indeed, it would have been a simple matter for the statute to have been drafted in the manner suggested. Cf., Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). Instead, the statutory exemption appears capable of two variant interpretations. One such reading is the one suggested above, requiring that the interest referred be the very same property interest owned by the person making the referral. The other interpretation would rest upon a literal reading of the statutory exemption; so long as the person making the referral owned 'any interest' in the real estate, the exemption would apply.

However, we need not attempt to resolve this apparent ambiguity. Even if the exemption is construed to require the person making the referral to own the same property interest which he is referring for sale, we understand the situation you have described to meet this requirement. As shown above, and based upon the information provided to us, the referral would be made by one who actually owns an interest in the very property he is referring. [5]

Our conclusion that the situation you have described falls explicitly within the statutory exemption contained in § 27-32-10(7)(a) is also in accord with the general law in this area. For, it is recognized that:

Ordinarily, and in the absence of a statute providing otherwise, a person dealing with his own property would not be deemed to be acting as a real estate broker or agent, and some licensing statutes, or statutes defining the term 'real estate broker' may expressly except owners of the property. (emphasis added).

12 Am.Jur.2d, Brokers, § 14. As emphasized, § 27-32-10(7)(a) expressly creates such an exemption. Therefore, again assuming that the property interests described above are actually held by the person in question, we believe a court would probably conclude that such a person would possess the requisite property interest within the literal terms of the exemption contained in § 27-32-10(7)(a). [6]

***5** You should however be advised of one possible caveat to this conclusion. There exists some authority as follows:
Under some circumstances, however, one dealing with property in which he has an interest may be deemed to be acting as a real estate broker in the transaction, regardless of the exception of owner of property. (emphasis added).

12 Am.Jur.2d, Brokers, § 14. We have examined the various cases where this caveat has been applied. In virtually every one of them, the court has looked to the facts to see whether the person making the sale is 'acting solely as the owner', Rothgeb v. Safeco Ins. Co. of America, (Ark.), 534 S.W.2d 759, 760 (1976) or is instead acting as agent for' a realtor or realty company. Kaufman v. Pacific Indemnity Co., 5 Cal.2d 761, 56 P.2d 504, 506 (1956). Courts will not allow an exemption such as contained in § 27-32-10(7)(a) to be used as a subterfuge to circumvent the licensing requirement. See, Goody v. Md. Cas. Co., 53 Idaho 523, 25 P.2d 1045 (1933). If a person is representing to a prospective purchaser that he is acting on behalf of a third person, rather than solely for himself individually, the courts will not require the prospective purchaser to ascertain at his peril in which capacity he is really acting; the statute requiring licensure will be broadly construed to protect the purchaser. Mapes v. Foster, 38 Wyo. 244, 266 P. 109 (1928). See also, Hatupin v. Smith, (Wash.), 150 P.2d 675 (1944); Twite v. Western Surety Co., (Mont.), 577 P.2d 1219 (1978); Flugel v. Meek, (Ohio), 128 N.E.2d 828 (1954); Buras v. Fid. Deposit Co. of Md., 197 La. 378, 1 So.2d 552 (1941).

This body of case law appears to be in accord with a broad construction of the definition of 'seller' in § 27-32-10(7). And it would allow this definition to be read together with the exemption contained in the proviso in such a way that the exemption would not eviscerate the definition itself. Such a reading would appear reasonable. Of course, the applicability of this exception to the exemption would depend upon the particular facts and circumstances. The literal language of the proviso itself could not be simply ignored.

In conclusion then, we would advise that, based upon the information presented to us, we believe a court would probably conclude that the person making the referral would possess the requisite property interest within the literal terms of the exemption contained in § 27-32-10(7)(a). However, we would further advise that the Real Estate Commission, the agency vested with the primary statutory authority for enforcing the Vacation Time sharing Act, must make the ultimate decision as to whether a license is required in a particular instance, its decision subject to judicial review. And, as part of that statutory authority, the Commission may decide, based upon all the facts presented to it, whether the persons in question actually own the property interests which have been described to us; further, the Commission may consider, again based upon the facts presented, whether the persons in question are truly acting individually as the owner of their property interests, or instead are really acting as 'sellers' of Vacation Time Sharing Plans.

***6** These are properly factual questions for the Commission, not this office. This office can only advise as to its interpretation of the Vacation Time Sharing Act as written. We cannot rewrite the statute or add phrases or take from away. Hartford Accident and Indem. Co. v. Lindsay, supra. That may be done only by the General Assembly. And we cannot apply the Act, as interpreted, to a particular situation. That may be done only by the South Carolina Real Estate Commission.
Sincerely,

Robert D. Cook

Executive Assistant for Opinions

Footnotes

1 An actual determination of the rights and interests held by a unit owner is beyond the scope of this opinion. Necessarily, such a determination involves questions of fact which this office has neither the authority nor the resources to resolve. Op. Atty. Gen., December 9, 1983. Thus, we must simply assume for purposes of this opinion that the interests enumerated above are actually held by the unit owner.

2 This point is certainly not clear, however, as no South Carolina case of which we are aware has addressed the question whether the mere bringing together of buyer and seller constitutes 'negotiation' within the definition of 'seller' contained in § 27-32-10(7). The authorities in other jurisdictions are, based upon that state's particular statutory requirements, split as to this question. Cases such as White v. Miriam Realty Co., (Mo. App.), 547 S.W.2d 184 (1977); Moody v. Hurricane Creek Lumber Co., 290 Or. 729, 625 P.2d 1306 (1981) and Tyrone v. Kelley, 106 Cal. Reptr. 761, 507 P.2d 65 (1973) suggest that such referrals do not represent 'negotiation', while decisions such as Massie v. Dudley, 173 Va. 42, 3 S.E.2d 176 (1939) and Gower v. Strout Realty, Inc., 56 N.C.App. 603, 289 S.E.2d 880 (1982) conclude otherwise. See also, 24 A.L.R.3d 1160, 1172 et seq.; see also, Op. Atty. Gen., Op. No. 3334 (June 27, 1972).

3 Section 28-3-40 also defines 'owner' to include vested remainders for purposes of the condemnation of land by the State.

4 Arguably, the interest held by the unit owner in the common elements would also be sufficient to invoke the exception; the principal difference between that interest and the vested remainder is that, with respect to the latter, the unit owner holds an interest in common with all other purchasers with respect to the entire property.

It would also appear arguable that the provision for termination would bestow ownership of an 'interest' in the property sufficient to invoke the exception. As we understand it, upon termination of the plan, the entire property is then owned in common by the unit owners according to the same percentage share owned by the unit owner in the common elements; thus this interest could also be viewed as falling within the express terms of the statute. We need not rest our conclusions upon any findings concerning these interests, however, as the remainder over appears to us sufficient in itself to invoke the exception.

5 We have been informed by documentation submitted to us that an owner's percentage share in the common elements and as tenant in common in the remainder over diminishes in quantity as each phase of the plan is completed and more units are sold. If this is true, it is arguable that even if the property interest referred must be the same interest actually owned, the substance of this requirement is met by the diminution of the interest which apparently occurs.

6 The fact that the individual interests in a remainder over as tenant in common with all other purchasers may be viewed as minute does not matter. Interests in real property are not based upon the magnitude in size of the interest involved. And § 27-32-10(7)(a) clearly says 'any' interest therein; the only exception in terms of quantity of interest is contained in the proviso itself. A person must own at least ten percent of stock in a corporation to qualify for the exemption as to that particular type of property. The fact that the General Assembly specifically included one exception to the exemption provision amounts to an affirmation of applicability of the provision to all other cases not excepted. Vernon v. Harleysville Mut. Cas. Co., 244 S.C. 152, 135 S.E.2d 841 (1964). Any other distinction based upon quantity might well conflict with the express statutory language.

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