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HENRY McMASTER
ATTORNEY GENERAL

April 28, 2006

The Honorable Luke A. Rankin
Senator, District No. 33
P.O. Box 142
Columbia, South Carolina 29202

Dear Senator Rankin:

By letter, you requested an opinion of this Office concerning "the legality of a developer of a residential community providing a nominal token gift to homebuyers upon their referral of new homebuyers who end up purchasing from that developer." In your letter, you informed us:

The role of the homebuyers who receive this token gift does not, in any way, extend beyond and is strictly limited to the initial referral to the developer of the name and contact information. The new prospective buyers will have contact with and access to a licensed real estate agent who will assist them with the home buying process and the referring party will not be involved in any way after the initial referral. Please refer to the following resources which reference, in general terms, the situation about which we are inquiring: 1) S.C. Code Ann. §40-57-20; 2) 1971-1972 Op. Atty. Gen. No. 334, p. 167.

Based on our Court of Appeals' interpretation of the licensure requirements provided in sections 40-57-10, et seq. of the South Carolina Code, by receiving the "nominal token gifts" you describe in you letter, the homebuyers are presumably acting as unlicensed real estate brokers.

Law/Analysis

Section 40-57-20 of the South Carolina Code (2001) provides: "It is 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." Furthermore, section 40-57-30(3) of the South Carolina Code (2001) defines a "broker" as

an individual who for a fee, salary, commission, or other valuable consideration or who with the intent or expectation of receiving compensation:

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- (a) negotiates or attempts to negotiate the listing, sale, purchase, exchange, lease, or other disposition of real estate or the improvements thereon;
- (b) auctions or offers to auction real estate;
- (c) solicits a referral in order to conduct activities set forth in this section;
- (d) offers advisory services as a real estate consultant or counselor;
- (e) offers to act as an agent representing a principal in a real estate transaction;
- (f) advertises or otherwise holds himself out to the public as being engaged in any of the foregoing activities.

In Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997) our Court of Appeals addressed whether a Roberts, who was not a licensed real estate broker but served as a broker in sale of a business, which included real estate, could recover fees he alleged were due to him. The Court analyzed whether Roberts was in fact real estate broker. Id. In this analysis, the Court stated:

It is generally recognized that a “broker ‘negotiates’ within the meaning of the licensing statutes just as much when he brings the parties together in such a frame of mind that they can by themselves evolve a plan of procedure as when he carries on the discussion and personally induces an agreement to accept a specific provision.”

Id. at 487, 486 S.E.2d at 775 (quoting 12 Am. Jur. 2d Brokers § 12 (1964)). The Court then added: “Applying this same reasoning, our supreme court has recognized that a broker earns his or her fee as the procuring cause of the sale even if the actual agreement is made by the owner.” Id. (citing Goldsmith v. Coxe, 80 S.C. 341, 346-47, 61 S.E. 555, 557 (1908) (“[T]he rule of reason, which seems to be supported by practically all the authorities on the subject, is that the broker is entitled to his commissions, if during the continuance of his agency, he is the efficient or procuring cause of the sale, though the actual agreement for the sale is made by the owner without the aid of the broker; and the broker will be regarded the procuring cause if his intervention is the foundation upon which the negotiation resulting in the sale is begun.”)). Thus, the Court concluded:

Roberts “negotiated” the sale of the business because he instigated the negotiations between the parties which resulted in the sale.

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Therefore, the mere fact that Gaskins and Hollis negotiated the lease of the real property directly does not remove the transaction from the real estate broker licensing requirements. If Roberts was required to have a real estate broker's license to earn a commission on the sale of the personal property of the business because the business also included real property then the fact of the direct negotiation of the agreement to lease the real property by the parties did not obviate the necessity of a license.

The situation you described in your letter indicates to receive the "token gift," the homebuyer must refer a prospective buyer to the developer and the prospective buyer must purchase a home from the developer. Based on the Court of Appeals' analysis in Roberts, the homebuyer receiving the gift is negotiating within the meaning of section 40-57-30(3) because he or she is bringing the prospective buyer and the developer together and is in effect "procuring the cause of the sale" even though the homebuyer is not actively participating in the actual agreement between the prospective buyer and the developer. As you indicated in your letter, the homebuyer receives "nominal token gifts" for providing the referral. We are unsure as to what is meant by "nominal token gifts," but because this Office does not undertake to investigate or determine the facts in issuing an opinion, we presume for purposes of section 40-57-30(3) the homebuyer performs these services "for a fee, salary, commission, or other valuable consideration." Op. S.C. Atty. Gen., November 28, 2005; S.C. Code Ann. § 40-57-30(3). Accordingly, we believe the homebuyer satisfies the definition of broker under 40-57-30(3). Thus, employing the Robert's analysis, if the homebuyer is not licensed as a real estate broker, he or she could be found in violation of section 40-57-20 of the South Carolina Code.

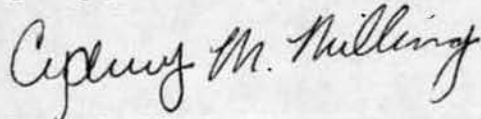
However, we must note, the Court of Appeals' decision analyzed the actions of a professional business broker who most likely is involved on a regular basis in the sales of businesses, which may include property. In the situation described in your letter, we apply the principles espoused by the Court of Appeals to individuals who are homebuyers, but not necessarily familiar with real estate transactions or licensure statutes and who, for the most part, probably will not qualify to received token gifts on an on-going basis. Therefore, we caution that a court may look at this set of circumstances differently than those involving a professional business broker.

In your letter, you referred to an opinion of this Office issued in 1972. Op. S.C. Atty. Gen., June 27, 1972. In that opinion, we addressed whether the payment of a finder's fee to an unlicensed person is unlawful under the statute now codified as section 40-57-20 of the South Carolina Code. Id. As cited in our opinion, the statutory definition of "broker" at that time included "any person who engages in the business of charging an advance fee or contracting for collection of a fee in connection with any contract whereby he undertakes primarily to promote the sale of real estate . . . or for referral of information concerning such real estate to brokers . . ." Id. Accordingly, we determined the statutory definition of "broker" "includes a 'finder' within the category of one who charges a fee for referral of information concerning real estate to brokers . . ." Id.

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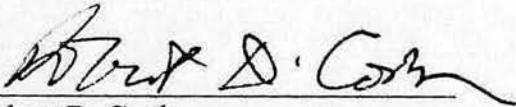
Under the circumstances presented in your letter, the homebuyer receiving a token gift could be considered a finder in that he or she is receiving a "fee" for referring information to a broker. However, the current statutory definition of "broker" does not include one who charges a fee for referral of information. S.C. Code Ann. § 40-57-30(3). Nevertheless, having determined the referring homebuyer, as described in your letter, meets the statutory definition of a broker by bringing the prospective buyer and developer together in exchange for valuable consideration, we arrive at the same conclusion reached in our 1972 opinion.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General