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The State of South Carolina



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October 6, 1993

John A. Birgersen, Staff Counsel
South Carolina Real Estate Commission
Capitol Center, AT&T Building
1201 Main Street, Suite 1500
Columbia, South Carolina 29201

Dear John:

As you may be aware, I have been authorized to respond to your letter to me of August 10, 1993, pursuant to which you requested an Attorney General's opinion. From your letter of August 10, the memorandum of law which you enclosed with that letter and your letter to me of August 16, 1993, I have drawn the following pertinent facts: A condominium hotel is an establishment in which the hotel rooms are separately owned by many private individuals who have no involvement in the operation of the hotel. The company which operates the hotel leases rooms from the individual owners, then makes the rooms available for use by transient guests.

The property interests obtained by the company through the leases are renewable one-year leasehold interests in the rooms. The interest acquired by a guest who rents a room from the company is simply a license to occupy the room; possession is non-exclusive. The lease agreements by which the hotel company acquires its leasehold interests are identical, in substance, to contracts such as are generally used in the property management industry.

You referenced in your letter 1976 S. C. Code, Ann., Section 40-57-30 which, in relevant part, exempts from the licensing laws administered by the South Carolina Real Estate Commission (Commission) "any transaction involving the sale, rental or leasing of real estate by anyone who is the owner thereof or who owns any interest therein, if the legal ownership interest in the real estate being sold, rented, or leased is identical to the owner's

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legal interest....." You also referenced Section 40-57-40, which, in relevant part, provides that: "the provisions of this chapter are applicable only to those persons holding themselves out to the public as real estate brokers.....and property managers....."

With the aforementioned facts and statutes in mind, you asked for this Office's opinion on the following questions:

1. Does Section 40-57-30 require an owner of a non-fee interest in real property to convey his entire interest in the property in order to be exempt from the licensing laws administered by the Commission? More specifically, may a company, which owns a renewable, one-year leasehold interest in hotel rooms, claim the "owner" exemption allowed by Section 40-57-30 when the company sells only guest accommodations?

2. Does the Commission have the authority to evaluate the nature of a claimed ownership interest to determine whether an alleged owner is eligible for the exemption provided by Section 40-57-30?

3. Does Section 40-57-40 mean that any person holding himself out to the public as a real estate broker or property manager is subject to the licensing laws without regard to the person's status of an owner handling his own property?

The answer to your second inquiry would seem to be found in the provisions of Section 40-57-170. Section 40-57-170(A), in part, provides that "the commissioner may....investigate the actions of any real estate broker, counsellor, salesman, auctioneer, property manager, or any person who has unlawfully assumed to act in either capacity within this State...." Section 40-57-170(B)(1) states that "the Commissioner may make any public or private investigation which he considers necessary to determine whether any person has violated this chapter....." These provisions empower the Commissioner to undertake an inquiry which, in his view, may be appropriate to determine whether a person is in compliance with the provisions of Chapter 57. Clearly, the Commissioner possesses the authority to examine a claimed ownership interest so as to determine whether the person holding the interest is indeed eligible for the exemption from the licensing laws provided by Section 40-57-30.

With respect to your first question, Section 40-57-30 plainly states that in order for an owner of real estate, or one who owns any interest in real estate, to be exempt from the licensing provisions, that person must sell, rent or lease an ownership interest which is identical to the legal interest which he owns. According to facts set forth in your letter, the legal interest

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conveyed by the company to a guest is a license to occupy a room; the company does not convey its entire leasehold interest to the guest. Giving the language of the statute its plain and ordinary meaning, it is evident that the legal interest acquired by the guest is not identical to the legal interest held by the company. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Consequently, the transaction between the company and the guest would not be exempt from the licensing provisions of Chapter 57.

Your letter advises that the Commission also interprets Section 40-57-30 to hold that a transaction is exempt from the licensing provisions of Chapter 57 only if an identical legal interest is conveyed. The Commission's interpretation is notable in view of the principle which requires that the construction of a statute by the agency charged with its administration be accorded the most respectful consideration; such construction should not be overruled absent compelling reasons. Jasper County Tax Assessor v. Westvaco Corp., _____ S.C. _____, 409 S.E.2d 333 (1991). We see no compelling reason to disagree with the Commission's interpretation of Section 40-57-30.

Your final question references the interplay between the provisions of Section 40-57-30 and Section 40-57-40. Section 40-57-40 provides that the provisions of Chapter 57 "are applicable only to those persons holding themselves out to the public as real estate brokers,....real estate salesmen and property managers." Your inquiry concerns whether the exemption established in Section 40-57-30 would protect an owner selling his own property who holds himself out to the public in a manner such as is described in Section 40-57-40.

Consistent with the relevant principle of statutory construction, the provisions of Section 40-57-30 and 40-57-40 should be reconciled so that all parts of the two sections might be given, as far as possible, full force and effect. Purdy v. Strother, 184 S.C. 210, 192 S.E. 159 (1937). The application of that principle of construction to Sections 40-57-30 and 40-57-40 would yield the conclusion that an owner selling his own property is exempt from the provisions of Chapter 57 as long as he does not hold himself out to the public as a real estate broker, counsellor, auctioneer, real estate salesman or property manager.

This conclusion would appear to find some support in 12 Am.Jur.2d Brokers, Section 14, wherein it is stated 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

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statutes, or statutes defining the term "real estate broker" may expressly except owners of the property.... 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 owners of property.

Also worthy of note is language found in Virginia Real Estate Board v. Clay, 384 S.E.2d 622 (Va. App. 1989), a case which you referenced in your memorandum. In that case, the Court stated that "....a fundamental rule of statutory construction requires that courts view the entire body of legislation and the statutory scheme to determine the true intention of each part.... In construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment." Id., at p. 625.

As was indicated by the title of Act No. 833 of 1956, one of the purposes of the South Carolina real estate licensing law is to safeguard the public interest in real estate transactions. (See: Arthur v. Johnston, 185 S.C. 324, 194 S.E. 151, 1938, wherein it is stated: "A statute may be construed with reference to its title.") Consonant with that expression of legislative intent, we would conclude that an owner selling his own property may be subject to the provisions of Chapter 57 if he holds himself out to the public in a manner such as is described in Section 40-57-40.

In summary, we would opine you that:

(1) In order for an owner of real estate, or one who owns any interest in real estate, to be exempt from the licensing provisions of Chapter 57, that person must sell, rent or lease an ownership interest which is identical to the legal interest which he owns.

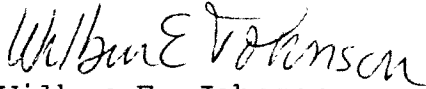
(2) The Commission is empowered to examine a claimed ownership interest to determine whether the person holding the interest is eligible for the exemption provided by Section 40-57-30.

(3) An owner selling his own property may be subject to the provisions of Chapter 57 if he holds himself out to the public as a real estate broker, counsellor, auctioneer, salesman or property manager.

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I trust that you will find the foregoing information to be responsive to your concerns. Please contact me if I can be of further assistance.

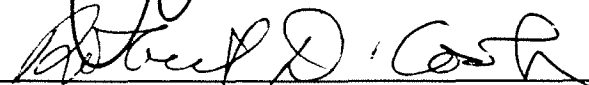
Very truly yours,


Wilbur E. Johnson
Assistant Attorney General

WEJ/fc

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