

Notice of Declaratory Statement

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

Florida Real Estate Commission

The Florida Real Estate Commission hereby gives notice that it has received a Petition for Declaratory Statement that was filed on May 8, 2006, by Southridge Partners I. The Petition seeks an opinion from the Commission concerning Section 475.011(2) Florida Statutes, as to whether the services that the general partner provides in selling the limited partnership's real property enjoys exemption from the Florida Real Estate License law.

A copy of the Petition may be obtained by contacting: Lori Crawford, Deputy Clerk, Division of Real Estate, 400 West Robinson Street, Suite N801, Orlando, Florida 32801.

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
FLORIDA REAL ESTATE COMMISSION

Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk

By: Brandon M. Nield

IN RE: PETITION FOR DECLARATORY STATEMENT OF
SOUTHRIDGE PARTNERS I, a NEW YORK LIMITED PARTNERSHIP

FINAL ORDER

DS 2006-021

The Florida Real Estate Commission (hereinafter Commission) considered the Petition for Declaratory Statement filed by Southridge Partners I, at a duly-noticed meeting of the Commission held on July 18, 2006 in Orlando, Florida. The Notice of Petition for Declaratory Statement was published on June 23, 2006, in Volume 32, Number 25, of the Florida Administrative Weekly. Petitioner was not present, but was represented by counsel.

The petition filed by Southridge Partners I, inquired whether the services that the general partner provides in selling the limited partnership's real property enjoys exemption from the Florida real estate licensing law pursuant to Section 475.011(2), Florida Statutes.

FINDINGS OF FACT

1. Petitioner is a New York limited partnership formed to acquire, own and operate multifamily apartment complexes.
2. Petitioner has sold its remaining apartment complex, which

is located in Florida. The proceeds from the sale have been placed in a segregated interest bearing account.

3. The General Partner does not hold a Florida real estate license.

4. The Petitioner's partnership agreement provides as follows:

- a) The Partnership has the authority to sell its real property.
- b) Only the General Partner has authority to act for the Partnership.
- c) The General Partners shall be solely responsible for the management of the Partnership's business and shall have all rights and powers conferred by law.
- d) The general partners have the right to enter into agreements to dispose of the Partnership's real estate.
- e) The general partner can sell the Partnership's real estate without the prior approval of the limited partners.
- f) A limited partner has no authority to act on behalf of the Partnership.
- g) In addition to other compensation, the General Partner shall be entitled to 3% of the sales price of the

Petitioner's real property, reduced by the amount of commissions paid to any unaffiliated real estate brokers.

5. Petitioner is selling its own property and is not providing real estate services for another.

CONCLUSIONS OF LAW

6. The Florida Real Estate Commission has authority to issue this Final Order pursuant to Section 120.565, Florida Statutes, and Chapter 28-105, Florida Administrative Code.

7. Petitioner has standing to obtain a declaratory statement.

8. Section 475.011(2), Florida Statutes, provides that an exemption from licensure is available to:

Any individual, corporation, partnership, trust, joint venture, or other entity which sells, exchanges, or leases its own real property; however, this exemption shall not be available if and to the extent that an agent, employee, or independent contractor paid a commission or other compensation strictly on a transactional basis is employed to make sales, exchanges, or leases to or with customers in the ordinary course of an owner's business of selling, exchanging, or leasing real property to the public.

9. An individual has the constitutional right to deal with his own property without the intervention of a licensed real estate broker or sales associate. The rationale for protecting members of the public from the potential for harm does not apply to employees of a corporate owner selling the


corporation's property because any misconduct of the employees would be "the responsibility of the employer under the doctrine of respondent superior." Florida Real Estate Commission v. McGregor, 336 So. 2d 1156, 1159-1160 (Fla. 1976).

10. It is the Commission's opinion that the sale of Petitioner's real property by the general partner: (i) is not a service of real estate that requires the general partner to hold a Florida real estate license under Section 475.01(1)(a), Florida Statutes, nor (ii) for which receipt of compensation based on a percentage of the sales price of the real property will constitute a violation of real estate license law in the state of Florida because Petitioner enjoys an exemption from licensure pursuant to Section 475.011(2), Florida Statutes.

11. This Final Order responds only to the specific facts and questions set forth by the Petitioner in the Petition for Declaratory Statement.

DONE and ORDERED this 11th day of August, 2006.

For Florida Real Estate Commission


By Dennis J. Yecke
Deputy Secretary for Professional Regulation

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided by Certified Mail to Nancy Pico Campiglia, Esquire, Akerman Senterfitt, 420 South Orange Avenue, Suite 1200, Orlando, Florida 32801 and Tom Barnhart, Assistant Attorney General, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050, on this 30th day of August, 2006.

Barbara Wachman

**PETITION FOR DECLARATORY STATEMENT
FROM THE FLORIDA REAL ESTATE COMMISSION**

FILED

Department of Business and Professional Regulation
DEPUTY CLERK

ATTENTION:

Florida Real Estate Commission
c/o Ms. Lori Crawford
Agency Clerk
400 West Robinson Street, Suite 801N
Orlando, Florida 32801
Filed by FAX (407-317-7260)

CLERK *Brandon M. Nichols*
DATE 5-9-2006

PETITIONER:

Southridge Partners I
A New York Limited Partnership
3990 Ruffin Road, Suite 100
San Diego, CA 92123

DS 2006-021

PETITIONER'S COUNSEL:

Nancy Pico Campiglia
Fla Bar No.: 164259
Akerman Senterfitt, Attorneys at Law
420 South Orange Avenue Suite 1200
Orlando, Florida 32801
407-423-4000
407-843-6610 (FAX)

QUESTION PRESENTED

WHETHER THE SERVICES THAT THE GENERAL PARTNER PROVIDES IN SELLING THE LIMITED PARTNERSHIP'S REAL PROPERTY ENJOYS EXEMPTION FROM THE FLORIDA REAL ESTATE LICENSE LAW PURSUANT TO SECTION 475.011(2), FLORIDA STATUTES.

I. INTRODUCTION

Southridge Partners I, a New York limited partnership (the "Petitioner"), files this PETITION FOR DECLARATORY STATEMENT FROM THE FLORIDA REAL ESTATE COMMISSION (the "Petition") pursuant to Section 120.565, Florida Statutes, which provides that any person substantially affected may seek a declaratory statement regarding an agency's

opinion as to the applicability of a statutory provision or rule as it applies to the petitioner's circumstances. A petition seeking a declaratory statement must state with particularity the petitioner's circumstances and specify the statutory provision or rule that the petitioner believes may apply to the circumstances. *See id.*

"The purpose of a declaratory statement is to allow a petitioner to select a proper course of action in advance." *Gopman v. Department of Education*, 1D04-0841 (Fla. 1st DCA 2005). Petitioner desires to be in compliance with Florida law and seeks confirmation from the regulatory agency that the general partner (the "General Partner") may receive compensation from the partnership for services that include the sale of the Petitioner's property, which the Petitioner performs in the ordinary course of its business without being the holder of a real estate license. Therefore, Petitioner respectfully requests that the Florida Real Estate Commission (the "FREC") issue a declaratory statement based on the circumstances as set forth below and the applicability of Chapter 475, Florida Statutes, to those circumstances.

The General Partner has closed on the transaction for the sale of the Petitioner's Florida Property. Pending the herein requested declaration, it has placed the agreed upon fees in a segregated interest bearing account.

II. JURISDICTION

Section 475.05, Florida Statutes, empowers the FREC to decide questions of practice arising in the proceedings before it that relate to Chapter 475, Part I, Florida Statutes. The FREC, therefore, has jurisdiction to issue this declaratory statement because the statutory provision that applies to Petitioner's circumstances is within Chapter 475, Part I, Florida Statutes.

III THE PETITIONER'S CIRCUMSTANCES

Petitioner is a New York limited partnership formed to acquire, own and operate multifamily apartment complexes. Petitioner has sold its remaining apartment complex, which is located in the State of Florida (the "Florida Property"). The General Partner is not the holder of a real estate license in the State of Florida. The Petitioner's partnership agreement provides as follows:

- a) The Partnership has the authority to sell its real property.
- b) Only the General Partner has authority to act for the Partnership.
- c) The General Partners shall be solely responsible for the management of the Partnership's business and shall have all rights and powers conferred by law.
- d) The general partners have the right to enter into agreements to dispose of the Partnership's real estate.
- e) The general partner can sell the Partnership's real estate without the prior approval of the limited partners.
- f) A limited partner has no authority to act on behalf of the Partnership.
- g) In addition to other compensation, the General Partner shall be entitled to 3% of the sales price of the Petitioner's real property, reduced by the amount of commissions paid to any unaffiliated real estate brokers.

IV. THE APPLICABLE STATUTORY PROVISIONS

Section 475.01(1), Florida Statutes, provides that a person performing the services of real estate, for another, for compensation must be the holder of a current and active real estate license. In addition, Section 475.011(2), Florida Statutes, provides that an exemption from licensure is available to:

Any individual, corporation, partnership, trust, joint venture, or other entity which sells, exchanges, or leases its own real property; however, this exemption shall not be available if and to the extent that an agent, employee, or independent contractor paid a commission or other compensation strictly on a transactional basis is employed to make sales, exchanges, or leases to or with customers in the

ordinary course of an owner's business of selling, exchanging, or leasing real property to the public.

V. ANALYSIS OF THE LAW AND APPLICATION TO THE FACTS

A. THE PETITIONER'S CIRCUMSTANCES FALL SQUARELY WITHIN THE EXEMPTION THAT SECTION 475.011(2) OF THE FLORIDA STATUTES PROVIDES, BECAUSE IN ACTING THROUGH ITS GENERAL PARTNER THE PETITIONER IS PERFORMING THE SERVICES OF REAL ESTATE FOR ITSELF, NOT FOR ANOTHER.

Section 475.01(1) of the Florida Statutes provides that a person performing the services of real estate for another for compensation must be the holder of a current and active real estate license. Here, the Petitioner is selling its own property and does not fall within the definition of a broker (since it is not providing real estate services for another). As a limited partnership, and in accordance with its partnership agreement, Petitioner acts only through its General Partner, ConAm Real Property Services Corporation. In overseeing the sale of the Property, therefore, the General Partner likewise is acting as a seller—as the Petitioner partnership selling its own property. Thus, the General Partner is no more a broker than Petitioner is, because the General Partner is not providing real estate services for another—rather, it is the means by which the seller (the partnership) sells its own property. In fact, in the State of Florida, conveyances to or by partnership must comply with the below mandates of Section 689.045, Florida Statutes:

(1) Any estate in real property may be acquired in the name of a limited partnership. Title so acquired must be conveyed or encumbered in the partnership name. Unless otherwise provided in the certificate of limited partnership, a conveyance or encumbrance of real property held in the partnership name, and any other instrument affecting title to real property in which the partnership has an interest, must be executed in the partnership name by one of the general partners.

(2) Every conveyance to a limited partnership in its name recorded before January 1, 1972, as required by law while the limited partnership was in existence is validated and is deemed to convey the title to the real property described in the conveyance to the partnership named as grantee.

(3) When title to real property is held in the name of a limited partnership or a general partnership, one of the general partners may execute and record, in the public records of the county in which such partnership's real property is located, an affidavit stating the names of the general partners then existing and the authority of any general partner to execute a conveyance, encumbrance, or other instrument affecting such partnership's real property. The affidavit shall be conclusive as to the facts therein stated as to purchasers without notice.

Moreover, Section 475.011(2) of the Florida Statutes expressly exempts from the licensure requirement

Any individual, corporation, partnership, trust, joint venture, or other entity which sells, exchanges, or leases its own real property; however, this exemption shall not be available if and to the extent that an agent, employee, or independent contractor paid a commission or other compensation strictly on a transactional basis is employed to make sales . . . with customers in the ordinary course of business of an owner's business of selling . . . real property to the public.

This exemption covers Petitioner, as a partnership that sells its own property (through its general partner). The exemption also covers the General Partner as a corporation selling property in which it has a partnership interest. It does not follow, therefore, that exclusion from this exemption would apply, because the General Partner is not an employee, agent, or independent contractor of Petitioner. The latter three roles each apply to a person who is not part of the employing entity employing him/her, contracting with him/her, or on whose behalf (s)he acts. In contrast, a general partner is part of a limited partnership, and indeed the General Partner in this case is solely responsible for managing the business of Petitioner, for entering into contracts, and for selling any project Petitioner owns. The General Partner is *not* acting as a broker on behalf of another. The General Partner is acting as the limited partnership itself, providing the only means by which the partnership can act, under its partnership agreement and under Florida law. Hence, as an internal means of compensation, Petitioner may legally pay a commission to its General Partner even though neither of them holds a Florida real estate license,

because the law says that the partnership may do so when performing the services itself (as it does here through its general partner) for itself.

One of the FREC's own rules reinforces this conclusion. Rule 61J2-10.028(2) of the Florida Administrative Code states that "[t]he sharing of a brokerage compensation by a licensee with a party to the real estate transaction with full disclosure to all interested parties is not considered a violation of Chapter 475." If a broker can pay a party to the transaction a fee when the party is not the holder of a license, it follows that a party performing services for itself can make an internal payment of a fee to itself and its principals without being the holder of a license from the Department.

Even more compelling, the Florida Supreme Court analyzed the previous version of Section 475.01, Florida Statutes, in *Florida Real Estate Commission v. McGregor*, 336 So.2d 1156, 1160 (Fla. 1976), and concluded that in adopting this framework for regulating real estate brokers and sales associates

the Legislature recognized that an individual has the constitutional right to deal with his own property without the intervention of a licensed real estate broker or salesman and that the exceptions with respect to partnerships and corporations were inserted in the statute to place those business organizations on some sort of parity with natural persons who own real estate.

The court in *McGregor* reasoned that the rationale for requiring a license for a real estate broker or sales associate (the protection of members of the public from the potential for harm caused by misrepresentations or misconduct by a broker or sales associate against whom the member of the public may not have any recourse) did not apply to employees of a corporate owner of property that they helped to sell, because the misconduct of such employees would be "the responsibility of the employer under the doctrine of respondeat superior." See *id.* at 1159, 1160 (concluding that to apply the license requirement when there was no rational basis for the requirement would

violate the Equal Protection Clause). This policy argument applies equally today in the context of conduct by a general partner through whom or which a limited partnership acts and who is the principal that can be held liable for the obligations of the partnership. Hence, the Petitioner asks that the FREC follow the high court's lead in *McGregor* and declare that the limited partnership may pay its general partner a fee or commission as provided in the partnership agreement, since the actions of the General Partner are those of the partnership performing the services of real estate for itself, and against whom any potential buyer would have recourse for any putative misconduct.

B. THE PURPOSE OF CHAPTER 475 IS NOT TO PREVENT PERSONS DEALING FOR THEMSELVES (AS PETITIONER IS) FROM REDUCING THEIR RISK AND COST OF INVESTMENT.

In the seminal case of *Central Florida Investments v. Kon*, the court held that a buyer had not acted as a broker in agreeing to accept an assignment of a portion (to be paid gradually out of the annual mortgage payments) of the commission that was due to the seller's broker, as a means of reducing the purchase price. See 579 So. 2d 750, 752 (Fla. 5th DCA 1991). There, the court reasoned that the buyer was simply acting for itself rather than for another, and that the purported assignment of part of the "commission" was only a price-reducing mechanism rather than consideration for any act or service requiring a license under chapter 475. See *id.* Thus, the court concluded that the seller had not violated Chapter 475 by engaging in unlicensed activity and opined that

The purpose of chapter 475 is to prevent persons, brokers or nonbrokers, from fraudulently or improperly dealing with property of others. It is not the purpose to prevent persons dealing for themselves [from] reduc[ing] the purchase price or [from] permit[ting] deferred payment of the purchase price even though they use the word "commission" in their arrangement.

See *id.* at 753.

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Under the instant circumstances, by tying portions of the General Partner's compensation to a percentage of the proceeds of the sale, Petitioner's partnership agreement devised a means to effectively defer the initial and potential on-going cash outlay of the other partners, thereby minimizing the risk of the investors. Here, the sole issue appears to be that the word "commission" was used when arranging in the agreement for determining and deferring a significant amount of the compensation that would be due the general partner, while seeking to minimize the risk and cash outlay by each of the limited partners and thus of Petitioner itself. As expounded the court in *Kott*, the purpose of Chapter 475 is *not* to prevent persons dealing for themselves, as is Petitioner, from reducing their risk and cost of investment, regardless of whether they label such deferred compensation a "commission."

Because the compensation at issue here is an internal payment made by the partnership to one of its own members, not a commission for brokerage services provided to another, to apply Chapter 475 under these circumstances would be to deny Petitioner (*i.e.*, the seller) the full benefit of its investment. The court in *Kott* rejected a transaction having an equivalent effect as one contemplated by Chapter 475. *See id.* at 752.

VI. REQUESTED DECLARATION

The instant transaction is not the type of transaction for which Chapter 475 requires a license because the Petitioner is acting for itself. Wherefore, the Petitioner respectfully requests that the FREC declare that:

THE SALE OF PETITIONER'S REAL PROPERTY BY THE GENERAL PARTNER: (i) IS NOT A SERVICE OF REAL ESTATE THAT REQUIRES THE GENERAL PARTNER TO HOLD A FLORIDA REAL ESTATE LICENSE UNDER SECTION 475.01(1)(A), FLORIDA STATUTES, NOR (ii) FOR WHICH RECEIPT OF COMPENSATION BASED ON A PERCENTAGE OF THE SALES PRICE OF THE REAL PROPERTY WILL CONSTITUTE A VIOLATION OF REAL ESTATE LICENSE LAW IN THE STATE OF FLORIDA BECAUSE PETITIONER ENJOYS AN EXEMPTION FROM LICENSURE PURSUANT TO SECTION 475.011(2), FLORIDA STATUTES.

Respectfully submitted,

AKERMAN SENTERFITT



Nancy Pico Campiglia

Fla Bar No.: 164259

Akerman Senterfitt, Attorneys at Law

420 South Orange Avenue Suite 1200

Orlando, Florida 32801

407-423-4000

407-843-6610 (FAX)

Respectfully submitted,

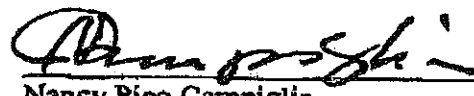
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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing petition was faxed on this 8th day of May 2006 to Lori Crawford, Agency Clerk, Florida Real Estate Commission, 400 West Robinson Street, Suite 801N, Orlando, Florida 32801 (Facsimile No.: (407) 317-7260).



Nancy Pico Campiglia