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

IN RE: THE PETITION OF
KELLEY E. GERAGHTY
FOR DECLARATORY STATEMENT

Case No. FRE-DS-93-01

FILED
Department of Professional Regulation
FLORIDA REAL ESTATE COMMISSION
SIGNED [signature]
DATE 8/3/93

FINAL ORDER

On July 21, 1993 in Orlando, Florida, this matter came before the Florida Real Estate Commission pursuant to s.120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, for the purpose of considering the Petition for Declaratory Statement filed by Kelley E. Geraghty.

Having considered the Petition and being otherwise fully advised in the premises, the Commission makes the following findings and conclusions:

FINDINGS OF FACT

1. The Petitioner is an attorney representing Marco Resort, Inc. (hereinafter referred to as MRI). MRI is not registered as a real estate brokerage corporation under Chapter 475, Part I, Florida Statutes.

2. In a Petition for Declaratory Statement dated May 13, 1993, Petitioner asked whether MRI is required under Chapter 475, Part I, Florida Statutes, to have a licensed broker and/or salesperson supervise its rental operation at the Marco Bay Resort.

3. Specifically, the Marco Bay Resort is a condominium complex, with individual units privately owned. There are more than 140 such units.

4. The Marco Bay Resort is a public lodging establishment licensed as a resort condominium under Chapter 509, Florida Statutes, and operated as a resort condominium.

5. Of the individual units which are privately owned, approximately 140 unit owners have voluntarily entered into written agreements with MRI to rent their units out as hotel rooms for short periods of time.

6. Pursuant to the written agreement, the owner receives 50% of the net income (less certain service charges) and MRI receives 50% of the net income. MRI is referred to in the agreement as "agent."

7. MRI provides all services to maintain the operation of the resort, including reservation services, housekeeping services, and laundry service. MRI hires employees to perform these duties and to manage and operate the resort. These employees are compensated on a salaried basis. No officer or director of MRI is licensed as a real estate broker.

8. The Commission published notice of its receipt of the Petition in the June 1, 1993 issue of the Florida Administrative Weekly, Vol. 19, No. 23, Page 3240.

9. The Petition was discussed by the Commission at its meeting on July 21, 1993 in Orlando, Florida.

10. The Petitioner presented the case via telephone, explaining the facts, offering interpretations of the law and responding to questions.

11. Various members of the public who were present at the meeting also offered comments.

12. Chapter 509, Part I, Florida Statutes, provides for the licensing of establishments as public lodging establishments and public food service establishments.

Section 509.242, Florida Statutes, at Paragraph (1)(c), defines a "resort condominium" as "any unit or group of units in a condominium, cooperative or time-share plan which is rented more than three times in a calendar year for periods of less than 30 days or 1 calendar month, whichever is less, or which is advertised or held out to the public as a place regularly rented to transients."

As stated in the Petition, the Marco Bay Resort is licensed as a resort condominium.

13. MRI does not operate as a manager for the condominium association, which is Anglers Cove Condominium Association.

14. The Petitioner feels that s.475.011(2), Florida Statutes, could apply to MRI, thereby providing for an exception from licensure under Chapter 475, Part I, Florida Statutes.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter, pursuant to s.120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code.

2. The Petitioner has stated a concern as to whether MRI and its employees need to be registered and licensed under Chapter 475, Part I, Florida Statutes. If so, MRI requests

clarification on the appropriate methods for obtaining such registration and licensure and on the correct handling of and accounting procedures for the rental proceeds.

3. Section 475.01(1)(c), Florida Statutes, defines a "broker" as:

> "...a person who, for another and for compensation or valuable consideration...rents, or offers...any real property...or who advertises or holds out to the public...that he is engaged in the business of...leasing, or renting...real property...or who takes any part in the procuring of...lessors, or lessees of...the real property of another...or assists in the procuring of prospects or in the negotiation or closing of any transaction which does, or is calculated to, result in a...leasing thereof, and who receives, expects, or is promised any compensation or valuable consideration, directly or indirectly therefor...."

4. Section 475.01(1), Florida Statutes, defines "real property" or "real estate" as:

> "...any interest or estate in land."

5. In Chapter 718, Florida Statutes, a condominium is declared to be real property.

6. Section 475.011, Florida Statutes, states that this part does not apply to:

> "(2) 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.
>
> "(5) Any person employed for a salary as a manager of a condominium of cooperative apartment complex

> as a result of any activities or duties which he may have in relation to the renting of individual units within such condomium or cooperative apartment complex if rentals arranged by him are for periods no greater than 1 year.

7. Section 475.42(1)(a), Florida Statutes, provides that it is a violation to operate as a broker or salesperson without being the holder of a valid and current, active license.

8. The activity engaged in by MRI, whereby individual condominium units are rented or leased on behalf of the owner and for compensation, is a brokerage activity.

9. The exemption provided for in s.475.011, Florida Statutes (cited above), does not apply. Specifically, s.475.011 (2), Florida Statutes, does not apply if (a) the payment is in the form of a commission or transactional payment; and (b) it is not the owner's business to engage in the leasing of real property.

Because the payment to MRI is in the form of a commission (i.e., 50% of the net income) and since it was not shown that each of the c. 140 unit owners was in the business of leasing real property, this exemption does not apply.

10. The exemption provided for in s.475.011(5), Florida Statutes, applies to an individual employed by the association, for a salary. Since MRI is not an individual and is not paid a salary, this exemption does not apply.

11. There are no other exemptions to licensure under Chapter 475, Part I, Florida Statutes, which would apply to the instant factual situation. A review of Chapter 509, Florida Statutes, fails to reveal any exemption from licensure under

Chapter 475, Part I, Florida Statutes, due to licensure as a resort condominium. See s.509.242, Florida Statutes.

12. Therefore, the Florida Real Estate Commission finds that in order for MRI to engage in those activities cited in s.475.01(1)(c), Florida Statutes, as real estate brokerage activities, MRI must be registered as a real estate broker.

The Commission further finds that those persons working for MRI who engage in activities cited in 475.01(1)(c), Florida Statutes, as real estate brokerage activities, also must be licensed either as real estate brokers or salespersons.

13. There is competent and substantial evidence to support the Commission's Findings of Fact and Conclusions of Law.

WHEREFORE, it is the opinion of the Florida Real Estate Commission that to engage in those activities described in the Petition which fall within the definition of a broker, found at s.475.01(1)(c), Florida Statutes, MRI must be registered as a real estate broker.

This Declaratory Statement constitutes final agency action. A party who is adversely affected by this Order may seek judicial review pursuant to s.120.68, Florida Statutes. Proceedings for judicial review may be initiated by filing a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Clerk of the Department of Business and Professional Regulation, and by filing a copy of the Notice of Appeal, accompanied by the applicable filing fees, with the appropriate

District Court of Appeal. The Notice of Appeal must be filed within thirty (30) days of the date upon which this Declaratory Statement is filed with the Clerk of the Department of Business and Professional Regulation.

DONE AND ORDERED this 21st day of July 1993 in Orlando, Florida.

Darlene F. Keller
Darlene F. Keller, Director
Division of Real Estate

I HEREBY CERTIFY that a true copy of the foregoing was sent by U.S. Mail to Kelley E. Geraghty, Esq., Frost & Jacobs, 4001 Tamiami Trail North, Naples, FL 33940-8703; and by Hand Delivery to James R. Mitchell, Assistant Attorney General, Suite 107 South Tower, 400 West Robinson Street, Orlando, FL 32801, this 3rd day of August 1993.

Darlene F. Keller
Director

JM:pep