

become "unrestricted" funds and belong to the state department of education.

In view of the above it is my opinion that interest earned on investment of the "Reserve" fund is state money and subject to the limitation of Const 1963, art 9, § 20.

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### REAL ESTATE BROKERS AND SALESMEN

A person selling condominiums for another or as an owner as a principal vocation must hold a real estate license.

Opinion No. 4757

October 19, 1973.

Beverly J. Clark, Director  
Department of Licensing and Regulation  
1033 South Washington Avenue  
Lansing, Michigan 48926

Your predecessor has requested my opinion regarding the following questions:

"1. Must a person, firm, partnership association, copartnership or corporation who performs any act, for which a real estate broker's license is required by Sections 2 and 3 of 306 PA 1919, as amended, be licensed as a real estate broker when such act is performed with respect to an 'apartment' in a 'condominium project' as defined in 229 PA 1963, as amended?"

"2. Must a person who performs any act for which a real estate salesman's license is required by Sections 2 and 3 of 306 PA 1919, as amended, be licensed as a real estate salesman when such act is performed with respect to an 'apartment' in a 'condominium project' as defined in 229 PA 1963, as amended?"

"3. Must the deposits or other moneys accepted by a real estate broker or real estate salesman in condominium 'apartments' or 'condominium' transaction be accepted, deposited, retained, and accounted for in compliance with Sections 13(j) (1) (2) (3) (4) and (5) of 306 PA 1919, as amended?"

The terms "apartment" and "condominium" are defined in 1963 PA 229, as amended; MCLA 559.1 *et seq*; MSA 26.50(1) *et seq*, hereinafter referred to as the Horizontal Real Property Act, in section 2 thereof as follows:

"(a) 'Apartment' means an enclosed room or rooms constituting a single unit and the space enclosed thereby which occupies all or part of a floor or floors in a building of 1 or more floors or stories regardless of whether it be destined for residence, for office, for the operation of any industry or business, or for any other type of independent use, provided it has a direct exit to a thoroughfare or to a

given common space leading to a thoroughfare. When a unit is a single family residence and occupies all the vertical space in the structure it may include the structure and such external space contained within the given description and may also include fee simple title to all the land underneath the given description provided that a permanent easement is granted to the condominium for repair and maintenance of the exterior of the structure and the external improvements.

“\* \* \*

“(c) ‘Condominium’ means the ownership of apartments and the space enclosed by the description thereof as contained in the master deed in a multiple unit structure, together with ownership of an interest in common elements.” MCLA 559.2; MSA 26.50(2)

The terms “real estate broker” and “real estate salesman” are defined in 1919 PA 306; MCLA 451.201 *et seq*; MSA 19.791 *et seq*, hereinafter referred to as the real estate license law, in section 2 thereof as follows:

“A real estate broker within the meaning of this act is any person, firm, partnership association, copartnership or corporation, who with intent to collect or receive a fee, compensation or valuable consideration, sells or offers for sale, buys or offers to buy, appraises or offers to appraise, lists or offers or attempts to list, or negotiates the purchase or sale or exchange or mortgage of real estate, or negotiates for the construction of buildings thereon, or who leases or offers to lease or rents or offers for rent any real estate or the improvements thereon for others, as a whole or partial vocation, or who sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the good will of an existing business for others, or who as owner or otherwise, engages in the sale of real estate as a principal vocation. A real estate salesman within the meaning of this act is any person who for compensation or valuable consideration is employed either directly or indirectly by a licensed real estate broker to sell or offer to sell, or buy or offer to buy, to appraise or offer to appraise, to list, or offer or attempt to list or to negotiate the purchase or sale or exchange or mortgage of real estate, or to negotiate for the construction of buildings thereon, or to lease or offer to lease, rent or offer for rent any real estate, or who sells or offers for sale, buys or offers to buy, leases or offers to lease, or negotiates the purchase or sale or exchange of a business, business opportunity, or the good will of an existing business for others, as a whole or partial vocation. . . .” MCLA 451.202; MSA 19.792

An examination of the Horizontal Real Property Act discloses a lack of statutory direction as to what persons or entities are entitled to sell condominium apartments after the permit to sell is issued. Since both the Horizontal Real Property Act, *supra*, and the real estate license law, *supra*, involve the sale of an interest in real property, it is necessary to read them in harmony if possible. Our Supreme Court in *Valentine v Redford Township Supervisor*, 371 Mich 138, 144, 123 NW2d 227 (1963), quoted the following with approval:

“ . . . If by any reasonable construction 2 statutes can be reconciled and a purpose found to be served by each, both must stand, *Garfield Township v. A. B. Klise Lumber Co.*, 219 Mich 31; *Edwards v. Auditor General*, 161 Mich 639; *People v. Harrison*, 194 Mich 363. The duty of the courts is to reconcile statutes if possible and to enforce them, *Board of Control of the Michigan State Prison v. Auditor General*, 197 Mich 377. The courts will regard all statutes on the same general subject as part of 1 system and later statutes should be construed as supplementary to those preceding them. *Wayne County v. Auditor General*, 250 Mich 227. See, also, *Rathburn v. State of Michigan*, 284 Mich 521.’ *People v. Buckley*, 302 Mich 12, 22.

“This court has held that only, when 2 acts are so incompatible that both cannot stand, does a later act repeal a former.’ *In re Estate of Reynolds*, 274 Mich 354, 360.”

The Horizontal Real Property Act contains no lanaguage repealing any of the provisions of the real estate license law or exempting the sale of condominiums from the purview of the real estate license law.

Thus, reading the two acts together, it is clear that the statutes are consistent with each other and the licensure requirements of the real estate license law are applicable to those persons selling condominium apartments for others or an owner selling condominium apartments as a principal vocation.

In OAG, 1971-1972, No 4,669, p 46 (May 14, 1971), the attorney general discussed in depth the problem of those persons who must be licensed as real estate brokers. The opinion concluded, as set out in the headnotes to the opinion, the following:

“A profit corporation, partnership or individual whose principal business activity is buying and selling real estate, but which does not engage in the sale of real estate for others, is required to be licensed as a real estate broker.

“A profit corporation, partnership, individual or other legal entity engaged in the buying and selling of real estate for its account on a continuing basis, but which has another vocation, is required to be licensed as a broker, unless the real estate work of such entity is not its main occupation or where it spends a major portion of its time.

“A profit corporation, partnership or individual engaged in the sale of its own property and subject to the broker licensing requirements is not required to have a license if it makes those sales through a duly licensed broker.”

Thus, when a developer of condominium apartments offers them for sale to the public, and such activity is a principal vocation of the developer, he must be licensed as a real estate broker or make the sales to the public through a duly licensed broker.

Your first two questions are answered in the affirmative.

Turning our attention to your third question regarding the handling of purchasers’ earnest money deposits, we find that section 13(j) (1)-(5) of the real estate license law provides for suspension or revocation of licensure for the failure to comply with the following provisions:

"(1) All deposits or other moneys accepted by every person, copartnership, corporation or association holding a real estate broker's license under the provisions of this act must be retained by such real estate broker pending consummation or termination of the transaction involved, and shall be accounted for in the full amount thereof at the time of the consummation or termination.

"(2) Every real estate salesman promptly on receipt by him of a deposit or other moneys on any transaction shall pay over the deposit or other moneys to the real estate broker.

"(3) Under no circumstances shall a broker permit any advance payment of funds belonging to others to be deposited in the broker's business or personal account or be commingled with any funds he may have on deposit belonging to him.

"(4) Every real estate broker shall immediately deposit such moneys, of whatever kind or nature, belonging to others in a separate custodial or trust fund account maintained by the real estate broker with some bank or recognized depository until the transaction involved is consummated or terminated, at which time the real estate broker shall account for the full amount received.

"(5) Every real estate broker shall keep records of all funds deposited therein, which records shall indicate clearly the date and from whom he received money, the dates deposited, the dates of withdrawals, and other pertinent information concerning the transaction, and shall show clearly for whose account the money is deposited and to whom the money belongs. All such records shall be subject to inspection by the commissioner or his deputies and by employees of the commission. Such separate custodial or trust fund account shall designate the real estate broker as trustee, and such account must provide for withdrawal of funds without previous notice." MCLA 451.213; MSA 19.803

The Horizontal Real Property Act does not set forth any statutory requirements regarding the handling of purchasers' deposits. However, the Department of Commerce,<sup>1</sup> pursuant to its rule making authority, promulgated the following rules:

"Rule 1302. (1) 'Co-owner' includes a land contract vendee who is entitled by the terms of his contract to the use and possession of the apartment.

"(2) 'Escrow agent' means a commercial escrow depository licensed to do business in this state and regulated either by an agency of this state or the federal government such as a state or national bank, a federal or state savings and loan association, title insurance company or a trust company.

"(3) 'Escrow agreement' means an agreement:

<sup>1</sup>The powers of the Corporation and Securities Commission over condominiums as set forth in the Horizontal Real Property Act, *supra*, were transferred to the Department of Commerce by 1965 PA 380, section 237; MCLA 16.337; MSA 3.29(237).

“(a) Signed by a developer and an escrow agent setting forth terms of the escrow of subscriber’s funds and the conditions on which the funds shall be paid over to the subscriber or to the developer.

“(b) Incorporated by reference into the reservation and subscription or other agreement between the subscriber and developer.

“(c) Permitting the escrow agent to require proof of the basis for any forfeiture and which may set forth a course of action to be taken by the escrow agent in case conflicting claims are made upon it.” 1971 AACS (#67) R 451.1302

“Rule 1322. (1) A reservation and subscription agreement shall provide that all funds paid by the subscriber shall be deposited in an escrow account in accordance with an escrow agreement approved by the administrator and that the subscriber may withdraw from the agreement without cause and without penalty at any time before issuance of the permit to sell and notice thereof. . . .” 1971 AACS (#67) R 451.1322

“Rule 1361. A developer who proposes to use subscribers’ funds as part of his financing of a project shall submit his plan of financing to the administrator for review. Before the developer may use purchasers’ deposits as part of his financing of the project, he shall deposit with the escrow agent irrevocable letters of credit or guarantee bonds in the full amount of the purchasers’ funds he desires to withdraw. The escrow agent shall release the purchasers’ funds to the developer only up to the amount of the letters of credit or guarantee bonds. Letters of credit and guarantee bonds shall be in a form satisfactory to the administrator. The administrator shall be satisfied that the bank issuing a letter of credit and the escrow agent receiving it will be able to meet their commitments. Those arrangements shall be fully set forth in the escrow agreement and in the reservation and subscription agreement.” 1971 AACS (#67) R 451.1361

“Rule 1372. (1) A conditional permit to sell is a permit to sell containing such further conditions to be satisfied by the developer as the administrator may require. If the condominium buildings have not been constructed when the plan is submitted, the structures shall be designated in the plan as ‘proposed’. A conditional permit to sell, except as specifically provided therein, is effective as a permit to sell and allows the developer to convey completed apartments and enter into binding contracts of sale. The administrator may issue a conditional permit to sell before actual completion of all apartments or the entire project. Such a permit may be issued only after completion of all aspects of the application for approval of the master deed and conditional permit to sell, including approval and recording of the master deed and bylaws of the condominium and the condominium subdivision plan.

“(2) Funds paid for the purchase of an apartment and held in escrow may ordinarily be released to the developer only upon conveyance of such an apartment to the purchaser. In case the developer, pursuant to a conditional permit to sell conveys any apartment before issuance of a final permit to sell, the administrator may

require the developer to retain in or deposit with an escrow agent sufficient funds or other security as determined by the administrator to insure the completion of those common elements necessary for use and enjoyment of the project.

“(3) A final permit to sell will only be issued after completion of the project and the submission, approval and recording of the master deed with changes, if any, and the condominium subdivision plan certified ‘as built’ by the architect, engineer or surveyor.” 1971 AACS (#67) R 451.1372

A reading of the above cited rules and section 13(j) (1)-(5) of the real estate license law, *supra*, indicates that there is no conflict between them regarding the handling of earnest money deposits.

The different procedures for handling earnest money deposits under the real estate license law, *supra*, and the administrative rules promulgated under the Horizontal Real Property Act, *supra*, concerning the handling of purchasers’ moneys may be readily reconciled.

The purpose of a broker’s custodial trust or escrow account is to protect purchasers’ moneys while the transitory phase of the transaction is pending. The escrow account of a condominium developer provides protection to purchasers’ moneys while the interest contracted for is being completed. Therefore, if a person brokering sales of condominium apartments places earnest money deposits in his trust account until the offer is accepted by the condominium developer and then the broker disburses the funds to the developer’s escrow account, so advising his client, the requirements and policy behind both statutes is effectuated.

Therefore, it is my opinion that the trust account provisions are applicable to sales of “condominium apartments” by licensed real estate brokers and salesmen and that the administrative rules of the Department of Commerce are valid and consistent with the real estate license law.

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*Attorney General.*

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