

VOLUME NO. 40

OPINION NO. 54

PROPERTY, REAL - Licensing of brokers and salespersons;
PROPERTY, REAL - Timeshare arrangements;
MONTANA CODE ANNOTATED - Sections 37-51-102, 37-51-202,
70-23-102.

HELD: The Montana statutes concerning the licensing of real estate brokers and salesmen apply to property transactions involving rental leasing, condominiums, the providing of lists of real property by rental agencies for a fee, and those timesharing arrangements where the purchaser becomes an owner of the timeshare unit.

7 June 1984

F. Lon Mitchell
Board of Realty Regulation
Department of Commerce
1424 Ninth Avenue
Helena MT 59620

Dear Mr. Mitchell:

You have requested my opinion on the following question:

Whether the Montana statutes concerning the licensing of real estate brokers and salesmen apply to property transactions involving rental leasing, condominiums, the providing of

lists of real property by rental agencies for a fee, and timesharing arrangements.

The Board of Realty Regulation licenses real estate brokers and salesmen under the authority granted it in section 37-51-202, MCA. The relevant definitions found in section 37-51-102, MCA, are:

(2) "Broker" includes an individual who for another or for a fee, commission, or other valuable consideration or who with the intent or expectation of receiving the same negotiates or attempts to negotiate the listing, sale, purchase, rental, exchange, or lease of real estate or of the improvements thereon or collects rents or attempts to collect rents or advertises or holds himself out as engaged in any of the foregoing activities. The term "broker" also includes an individual employed by or on behalf of the owner or lessor of real estate to conduct the sale, leasing, subleasing, or other disposition thereof at a salary or for a fee, commission, or any other consideration. The term "broker" also includes an individual who engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract by which he undertakes primarily to promote the sale, lease, or other disposition of real estate in this state through its listing in a publication issued primarily for this purpose or for referral of information concerning real estate to brokers, or both, and any person who aids, attempts, or offers to aid, for a fee, any person in locating or obtaining any real estate for purchase or lease.

....

(8) "Real estate" includes leaseholds as well as any other interest or estate in land, whether corporeal, incorporeal, freehold, or nonfreehold and whether the real estate is situated in this state or elsewhere.

(9) "Salesman" includes an individual who for a salary, commission, or compensation of any

kind is associated, either directly, indirectly, regularly, or occasionally, with a real estate broker to sell, purchase, or negotiate for the sale, purchase, exchange, or renting of real estate.

The scope of coverage of Title 37, chapter 51, MCA, is broad, as evidenced by the inclusion of the phrase "any interest in land" in the definition of "real estate," and by specific mention of a broad range of activities that include the listing, sale, purchase, rental, exchange, lease, collection of rent, and advertising of real estate in the definition of "broker." These definitions clearly apply to individuals engaged in the business of rental leasing or providing lists of real property.

The licensing provisions of Title 37, chapter 51, MCA, would also pertain to any of the specified broker activities involving condominiums. A "condominium," as defined in Montana's Unit Condominium Act, involves ownership of a part of the land, buildings, and improvements, described as a "unit." § 70-23-102(5), (13), and (15), MCA. Consequently, a "condominium" represents an interest in real estate for purposes of Title 37, chapter 51, MCA.

Your question as it applies to timesharing arrangements is a more difficult one to answer, since the concept of timesharing may take one of several forms, not all of which resemble traditional interests in land. Some background is in order.

Generally, the purchaser of a timeshare interest obtains an exclusive and repetitive right to occupy housing at a resort for a specified period of time. Where the purchaser actually owns the timeshare unit for his annual period of time, i.e., where he receives a transferable title to the unit (often referred to as a timeshare ownership), the interest in the property is clearly encompassed by the phrase "any interest in land," contained in Montana's real estate licensing statutes. § 37-51-102(8), MCA.

Where, however, the ownership interest is retained by the developer, and the purchaser receives merely a right to use a unit in the timeshare development, the interest more closely resembles a membership license or

contractual right. This arrangement is often referred to as a vacation license or vacation lease, the former being a right to occupy an undesigned unit at a certain resort during a specified time each year for a specified number of years, and the latter being a right to occupy a specific accommodation for a specified time over a specified number of years. Reiser, Real Estate Time-Sharing, Am. Jur. 2d, New Topic Service; Gunnar, Regulation of Resort Time-Sharing, 57 Or. L. Rev. 31, 33-34 (1977). The states vary according to whether they regulate vacation licenses and vacation leases by way of their real estate laws, their subdivision laws, or their securities laws. Gunnar, supra, at 40.

Most states, including Montana, do not have specific statutes dealing with timesharing as a property concept. Although there is a growing body of case law on the subject of timesharing, the concept has not, to my knowledge, been tested in the Montana courts. The application of common law property concepts has served to legitimize timesharing ownership interests in some states. See Note, Timesharing: A Unique Property Concept Creates the Need for Comprehensive Legislation, 25 St. Louis U.L.J. 629, 634 (1981), discussing Home Association v. Big Canoe Corp., No. C-65248 (Ga. Super. Ct. Oct. 24, 1980); Bauer, Representing a Purchaser of a Time Share, 11 Colo. Law. 1543, 1544 (1982). Where fee ownership timesharing is not involved, the law is even more unsettled. In Colorado, nonfee timesharing arrangements are unregulated. Martin, Timesharing in Colorado, 11 Colo. Law. 2804, 2806 (1982). In California, a court has determined that under a right-to-use timeshare arrangement, the sale of membership interests in an adventure club entitling members to the use of an undesignated resort condominium unit for one week or more each year constituted a sale or lease of an interest in subdivided lands, and, as such, was within the jurisdiction of the state Department of Real Estate. Cal-Am Corporation v. Department of Real Estate, 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (Cal. Ct. App., 2d Dist. 1980). The conclusion reached by the California court is the opposite of that arrived at by the Nevada Supreme Court in State of Nevada v. Carriage House Associates, 585 P.2d 1337 (Nev. 1978). California subdivision law, however, specifically covers membership rights in condominiums and makes those interests subject to the regulations of the state's Department of Real Estate.

Cal. Ann. Bus. & Prof. Code § 11004.5(g)(1) (West 1984).
Montana does not have a similar statute.

The Montana Legislature and the courts have not yet had an opportunity to address the legitimacy of timesharing as a method of transferring property, let alone to determine whether an interest in real property is involved in the variety of timesharing arrangements. While uniform laws have been proposed to deal with timesharing, none has been adopted in Montana. Eastman, Time Share Ownership, 57 N.D.L. Rev. 151, 152 (1981). Moreover, it is uncertain whether any timesharing arrangements are in current use in Montana, other than the fee ownership timesharing arrangement, which, as I have noted, comes under the jurisdiction of the existing real estate licensing statute. Consequently, it would be inappropriate for me to issue an opinion on that part of your request which deals with the nonfee, right-to-use timeshare interest. This subject is more properly one for the Legislature.

THEREFORE, IT IS MY OPINION:

The Montana statutes concerning the licensing of real estate brokers and salesmen apply to property transactions involving rental leasing, condominiums, the providing of lists of real property by rental agencies for a fee, and those timesharing arrangements where the purchaser becomes an owner of the timeshare unit.

Very truly yours,

MIKE GREELY
Attorney General