

Statute

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ARIZONA CORPORATION COMMISSION

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SECURITIES DIVISION  
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April 6, 1994

James W. Zeeb, Esq.  
Hecker, Phillips & Zeeb, L.L.C.  
Rockwell Building  
405 West Franklin Street  
Tucson, AZ 85701

RE: WW Storage Association/ No-Action Request  
A.R.S. §§ 44-1801(22)

Dear Mr. Zeeb:

On the basis of the facts set forth in your letter of April 5, 1994, and in reliance upon your opinion as counsel, the Securities Division will not recommend enforcement action for violation of the Securities Act of Arizona should the transaction take place as set forth in your letter.

As this position is premised upon the facts set forth in your letter, it should not be relied on for any other set of facts or by any other person.

To the extent that the transactions do not take place as described in your letter of April 5, 1994, or a material change in circumstances causes these membership interests to be deemed to be "securities" for purposes of the Act, then the anti-fraud provisions of the Act would be applicable ab initio.

We have attached a photocopy of your letter. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

DEE RIDDELL HARRIS  
Director of Securities

DRH:JB

Attachment

N39261.LTR

LAW OFFICES  
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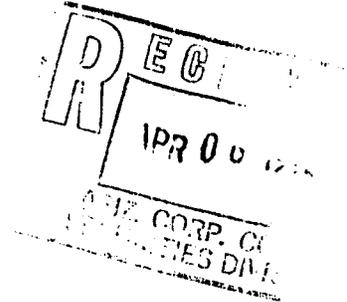
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April 5, 1994

OF COUNSEL  
ROGER S. LEVITAN

**VIA FAX (602) 542-3583 and FEDERAL EXPRESS**

Dee R. Harris  
Director, Securities Division  
ARIZONA CORPORATION COMMISSION  
1300 W. Washington St., 3rd Floor  
Phoenix, AZ 85007



Re: Membership in WW Storage Association

Dear Mr. Harris:

This letter is written on behalf of WW Storage Association, an Arizona non-profit corporation (the "Company"). We hereby respectfully request that the Arizona Corporation Commission issue a "no-action letter" or similar interpretative opinion determining that a membership interest in the Company is not a "security" within the meaning of A.R.S. § 44-1801.22.

1. Statement of Facts.

The Company has been recently formed for the purpose of acquiring an approximately 3.4 acre parcel of real property located in Pima County, Arizona (the "Subject Property"). The Subject Property is now primarily used for recreational vehicle storage, although other types of vehicles can and are periodically stored or parked on the Subject Property. Currently, approximately 80 of the persons leasing space at the Subject Property are members of Wagons West Travel Trailer Association (the "Association"), which has a total of 269 members and owns the real property adjacent to the Subject Property (the "Association Property"). Some space at the Subject Property is also currently leased to persons who are not members of the Association.

The Association was formed as an Arizona non-profit corporation in April 1982 under the name of Wagons West Mobile Home Park Residents Cooperative Association for the purpose of acquiring the Association Property as a mobile home park development. Members of the Association have the right to occupy mobile home spaces

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located on the Association Property for residential purposes only under proprietary leases. The Association operates the Association Property as a mobile home park and does not conduct any other business.

The Subject Property provides the only location for recreational vehicle storage in the vicinity, and the members of the Association who own recreational vehicles have a great interest in insuring that the Subject Property remains available for recreational vehicle storage. In addition, there is a strong desire on the part of many members of the Association to have control over the Subject Property so that they will have a voice in how the property will be used. Consequently, certain of the members of the Association have formed the Company for the purpose of acquiring the Subject Property and maintaining its principal use as a recreational vehicle storage area.

The purchase price for the Subject Property is \$205,000, and after acquiring the Subject Property, the Company will continue to lease space on the Subject Property for recreational vehicle storage. Members of the Company will be guaranteed the right to lease space on the Subject Property at prevailing lease rates, which will be established by the Company, although non-Company members would continue to lease space for so long as space is available. It is not contemplated that the Company will sell the Subject Property or change its use in the foreseeable future, and any such sale or change of use will only be possible upon an 80% vote of all of the members of the Company.

The Company anticipates raising a total of \$250,000, of which it is estimated that approximately \$205,000 would be utilized to acquire the Subject Property, \$12,000 would be utilized to pay attorneys fees and organizational costs, and \$33,000 would be utilized to establish a reserve for the Company. It is anticipated that up to 120 members of the Association will participate as members of the Company. Because some persons who desire to participate in the Company will be able to afford a larger contribution than others, each member's contribution will range from a minimum of \$1,250 to a maximum of \$5,000.

Day-to-day decision making for the Company will be made by a board of directors consisting of three to seven member managers who are elected by the members of the Company to serve two year terms on a staggered basis (each year the term of approximately one-half of the managers will expire). Although the Board of Directors generally has authority to manage the affairs of the Company, all significant decisions concerning the Subject Property and its operation will be made by a vote of the membership as a whole. For example, members must approve the expenditure of more than \$5,000 at a time (other than for payment of property taxes). Changes in the rental

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rates to be charged by the Company, and any decision to sell or alter the use of the Subject Property must also be submitted to a vote of all of the members.

Voting by the members of the Company will be weighted proportionately based upon their respective contributions (e.g., a member contributing \$5,000 will have four times the voting power of a member contributing \$1,250). Most matters will require a 60% vote of the members, although as noted above, any sale or change in use of the Subject Property will require at least 80% approval.

In the event that a member dies or for any reason is no longer a member of the Association, the Company is obligated to redeem such member's interest in the Company by the repayment of such member's initial contribution to the Company, provided it has sufficient funds. Moreover, any transfer of a member's interest in the Company will be restricted to members of the Association, and will in any event be subject to a right of first refusal on the part of the Company. In addition, members will not be able to pledge or hypothecate their interests in the Company.

The principal purpose behind forming the Company and acquiring the Subject Property is to preserve storage space for members' recreational vehicles and maintain control over the property adjoining the Association Property, rather than for any economic benefit to be gained from participating in the Company. Members will be executing a representation letter acknowledging, among other things, that they are not expecting any profit as a result of their participation in the Company.

Under Arizona's non-profit corporation statutes, the Company may not make any distributions to its members prior to dissolution of the Company. Additionally, the Association will own the Association Property free and clear in approximately 10 years. At that time, the Company's Bylaws will require the Company to offer to sell the Subject Property to the Association for the same price at which the Company is acquiring it (\$205,000), plus the cost of any capital improvements made to the Subject Property by the Company. Although it is not certain that the Association will eventually acquire the Subject Property, that very possibility further reduces any anticipation of profit or capital appreciation on the part of the members of the Company.

2. Analysis.

In the case at hand, the issue is whether interests in the Company constitute a security for purposes of Arizona law. A.R.S. § 44-1801.22 of the Act defines "security" as:

"Security" means any note, stock, treasury stock, bond, commodity investment contract, commodity option, debenture, evidence of indebtedness, certificate of interests or participation in any profit sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral right, real property investment contract or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guaranty of, or warrant or right to subscribe to or purchase, any of the foregoing.

Membership interests in a non-profit corporation are not enumerated as a specific class of security in A.R.S. § 44-1801.22. Consequently, our analysis depends upon whether such an interest constitutes an "investment contract" for purposes of Arizona law.

An investment contract "means a transaction or scheme whereby a person invests his money in a common enterprise and is lead to expect profits solely from the efforts of a promoter or third party." SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946). The Supreme Court expanded on its holding in Howey in United Housing Foundation, Inc. v. Forman, 421 U.S. 837, (1975) stating that the Howey test "embodies essential attributes that run through all of the Court's decisions defining a security." 421 U.S. at 852.

The definition of "security" in A.R.S. § 44-1801.22 is patterned after, and is virtually identical to the federal statutory definition found at 15 U.S.C. § 77b. First Citizens Federal Savings and Loan Association v. Worthen Bank and Trust Co., N.A., 919 F.2d 510 (9th Cir. 1990). In fact, Arizona courts are to utilize the Howey test to determine whether or not an investment contract exists. Daggett v. Jackie Fine Arts, 152 Ariz. 559 (Ct. App. Ariz. 1986).

In applying the Howey test, it is essential to look at the underlying economic realities of the transaction to determine whether (i) an individual is lead to invest money, (ii) in a common enterprise, (iii) with the expectation that he will earn a profit solely through the efforts of others. In the absence of any one of those factors, the interests involved do not constitute an investment contract under the Howey test.

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In the case at hand, the overriding purpose behind establishing the Company and acquiring the Subject Property is to ensure that members of the Company have a place to store their recreational vehicles, and have control over how the Subject Property will be used. In fact, members will be executing a representation letter acknowledging the aforementioned corporate purpose and specifically representing that they have no expectation of profit as a result of their participation in the Company. Also, as previously noted, under Arizona law the Company is prohibited from making any distributions to its members prior to dissolution of the Company.

With respect to any profits that might arise from sale of the Subject Property, not only are such profits purely speculative, no member can have any expectation that they will be participating in such profit if and when it arises since each member of the Company can be required to resell their interest back to the Company at a price equal to their initial contribution upon the occurrence of a variety of events, including termination of the member's membership in the Association. Also, the Company will be obligated to sell the Subject Property to the Association at cost once the Association has paid off its debt on the Association Property. Clearly, members of the Company will not be motivated by any expectation of profit or capital appreciation, and an interest in the Company more closely resembles a cooperative such as described in Forman than a typical real estate investment.

The SEC has addressed the issue of expectation of profits in a No Action letter entitled Home Mortgage Access Holding Corp. (public availability date 7-25-84), CCH ¶ 77,652 (SEC Dec. 1984). In Home Mortgage, members of a non-profit membership corporation made initial contributions designated as enrollment fees, and were also required to pay annual renewal fees. If a member terminated its membership in the corporation, it was entitled to a return of its aggregate capital contributions, without interest or gain. SEC staff indicated that such membership interests were not securities, which supports our view that interests in the Company are not securities. Here, membership interests in the Company are transferable only to other members of the Company, and even in that case, the Company has a right of first refusal to redeem the transferring member's interest in the Company at a price equal to the capital contribution made by such member. If a member's membership in the Company terminates, the Company is obligated to redeem that member's interest at a price equal to that member's capital contribution, assuming the Company has adequate funds.

In addition to the absence of any profit expectation, members of the Company will not be relying on the efforts of others. Although the Company will have a Board of Directors and officers, the Board members and officers, who must be members, will have extremely limited powers that will not extend beyond basic day-to-

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day matters. All important decisions require the approval of the members. Further, directors cannot serve for more than four consecutive years and each of the members will be eligible to serve as a director. Also, unlike the typical situation involving sale of the security, there is no promoter or permanent manager of the enterprise to whom the participants look for special expertise or managerial skills. Rather, the members of the Company will have comparable levels of experience and sophistication. Consequently, the members will not be relying upon the unique entrepreneurial or managerial ability of the Board of Directors or corporate officers, but rather will have ultimate control over the Company.

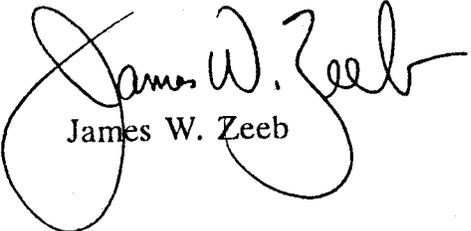
3. Conclusion.

For the reasons outlined above, we hereby request that you confirm to us that the interests in the Company do not constitute securities under A.R.S. § 44-1801.22, and therefore no enforcement action will be taken upon the admission of members into the Company upon the terms outlined above without registration in Arizona of such interests.

If for any reason you do not concur in any of the views set forth herein, we respectfully request the opportunity to discuss the matter with you before you issue any written response.

Very truly yours,

HECKER, PHILLIPS & ZEEB

  
James W. Zeeb

JWZ:tlj