Statute

ARIZONA CORPORATION COMMISSION

SECURITIES DIVISION
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July 1, 1996

Fred A. Farsjo, Esq.
Gabroy, Rollman & Bosse, P.C.
2195 E. River Road, Suite 201
Tucson AZ 85718

RE: Far Horizons Mobile Home Park Residents Cooperative Association
A.R.S. § 44-1801(22)

Dear Mr. Farsjo:

On the basis of the facts set forth in your letter of June 4, 1996, and in reliance upon your opinion as counsel, the Securities Division will not recommend enforcement action for violation of the Securities Act of Arizona (the "Act") 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. As the interests do not constitute "securities" for purposes of the registration requirements of the Act, the anti-fraud provisions of the Act would not be applicable. To the extent that the transactions do not take place as described in your letter of June 4, 1996, or a material change in circumstances causes these cooperative shares to be deemed to be "securities" for purposes of the Act, then the anti-fraud provisions 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:GC
Attachment

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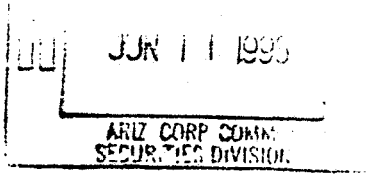
June 4, 1996



Arizona Corporation Commission
Securities Division
234 North Central Avenue
Phoenix, Arizona 85004

Re: No Action Letter for Far Horizons Mobile Home Park Residents Cooperative Association

Dear Sir or Madam:

The following is submitted for your consideration on behalf of our client named above for a no action letter from the Division with respect to a cooperative association facilitating secondary sales of shares of stock originally issued by the cooperative association ("Shares").

Far Horizons Mobile Home Park Residents Cooperative Association is a cooperative association which has been in existence for approximately twenty years (the "Co-op"). There has been no, nor will there be in the future, distribution of profits resulting solely from the efforts of a third party promotion to a tenant/shareholder since there will be no allocation or distribution of profits, or any profit at all to be distributed.

Ownership of Shares entitles a shareholder to a proprietary lease for his mobile home lot and to vote annually for a board of directors who will conduct the business of the Co-op. As a lessee, a purchaser of Shares will pay as monthly rent a proportionate share of the Co-op's cash requirement for the operation and maintenance of the mobile home park.

Restrictions on the transfer of shares provides that Shares can only be transferred in connection with the execution and delivery of a proprietary lease for a mobile home lot to the purchaser. Such transfers must be approved by the board of directors of the Co-op. The Co-op in no way will, nor have they in the past, attempt to market the Shares in a fashion so as to induce potential purchasers to expect realization of a profit. Their involvement in the transfer of Shares amounts to no more than the approving of potential pruchasers and the execution and delivery of a proprietary lease.

This request is based on the law regarding this subject matter as set forth in United Hous. Found., Inc. v. Forman, 421 U.S. 837; Securities and Exch. Comm'n v. W.J. Howey, Co., 328 U.S. 293 (1946); Grenader v. Spitz, 537 F.2d 612 (2d Cir. 1976); SEC Release No. 33-5347, 38 F.R. 1735 (Jan. 18, 1973) (hereinafter "Release"); No-Action Letter, AZ Corp. Comm'n, Sec. Div. 1-22-92, Blue Sky Rep., Vol. 1 at 5573; and Northbridge Park Coop. Offering, SEC, Division of Corporation Finance, Public Availability Date Jan. 7, 1980.

The material facts stated above are elaborated below in light of the law referred to above.

In United Hous. Found. Inc., supra, the United States Supreme Court considered whether shares of stock sold to prospective tenants in a low-income housing apartment cooperative as a prerequisite to their acquisition of an apartment were "securities" under the meaning of 15 U.S.C. § 77b(1) and concluded they were not:

> "The touchstone (of a security) is the presence of an investment in a common venture premised on a reasonable expectation of profit to be derived from the entrepreneurial or managerial efforts of others." By profits, the court meant either capital appreciation resulting from the development of the initial investment "or a participation in earnings resulting from the use of investor funds . . . . In such cases the investor is 'attracted solely by the prospects of a return on his investment.' Howey, supra, at 300. By contrast, when a purchaser is motivated by a desire to use or consume the item purchased--'to occupy the land or to develop it themselves'--as the Howey court put it, ibid--the securities laws do not apply . . . ."

Forman, 421 U.S. at 852-3.

The Court in Forman concluded that "[i]n short, the inducement to purchase was solely to acquire subsidized low cost living space; it was not to invest for profit . . . ." 421 U.S. at 852-3.

In Grenader v. Spitz, supra, the United States Court of Appeals for the Second Circuit considered whether the doctrine enunciated in Forman applied to a privately sponsored housing cooperative in contrast to the publicly subsidized housing cooperative considered in Forman. The court held that Forman controlled despite several distinctions between the ownership interests of the cooperative tenant/shareholders in the two cases.

Specifically, the court dismissed the contention that the fact that the tenant/shareholder had the right to dispose of his lease and his shares to a new and approved lessee-purchaser at whatever price the real estate market then permitted removed the facts from the Forman rule, the Forman rule having been made based on facts where the tenant/shareholders were required to offer their shares to the housing cooperative at the initial price.

The court explained its reasoning as follows:

> Appellees' major argument in distinguishing Forman is that the lessee in Co-op City whose tenancy is terminated voluntarily or otherwise, is required to offer his stock to the housing corporation at its initial selling price. Since he is the beneficiary of a public subsidy, the requirement that he make no profit is understandable. In contrast, the tenant of the private cooperative Building here admittedly has the right to dispose of his apartment and his shares to a new and approved lessee-purchaser at whatever price the real estate market then permits. Hence, there is an opportunity to make a profit and it is urged that this is a normal characteristic of a security or, more accurately, an investment contract within the securities acts. . . . we hold that the opinion of Mr. Justice Powell in Forman is definitive.
>
> As we have already indicated, the transaction here essentially involves the acquisition of a residence. Just as the purchaser of a private one family residence is not unaware that he may eventually sell his property at a profit or loss depending upon the vagaries of the real estate market, so the proprietary lessee of a privately owned cooperative cannot be unconscious of the fact that upon its disposal he will gain or lose depending upon the same market factors.

More pointedly, the Forman Court (421 U.S. at 852-53, 95 S. Ct. at 2060-61, 44 L. Ed. 2d at 632-33) adopted the definition of an investment contract set forth in SEC v. W.J. Howey Co., 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946). That opinion defines the term as follows:

> [A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect

> profits solely from the efforts of the promoter or third party.
>
> Id. at 298-99, 66 S. Ct. at 1103, 90 L. Ed. at 1249.
>
> We note initially that the Howey test first requires that the investor be "led to expect profits." There is nothing in the record before us to support the contention that the investor here was attracted by the prospect of realizing a profit on his investment. While the court below found that the tenants were attracted by the dual motives of obtaining housing and realizing a profit on their investments, the documentary evidence, which is all that was before the court, would indicate that the profit motive, if any, was purely incidental. The offering plan, which includes the subscription agreement, the proprietary lease and the by-laws is barren of any representation or intimation of anticipated profits.

It seems clear that under the Forman principle as relied upon in Grenader v. Spitz, the Shares of the Co-op should not be considered securities and thus not subject to Securities Act of 1933, or the Arizona Securities Act.

Further support for this proposition is found in the SEC Release cited above which states that real estate development units will be considered securities only when "offered or sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of the promoter." In our case the emphasis is on long-term tenancy in the mobile home park assured by ownership of the mobile home park by the tenants by way of the Co-op. Any perceived economic benefit by the tenant/shareholders is derived not from the managerial efforts of others but from the efforts of the tenant/shareholders themselves.

In Northbridge Park, supra, the SEC staff stated that it would not recommend any enforcement action in an offering of shares in Northbridge Park, a cooperative which intended to purchase an apartment building and offer shares to tenants and prospective tenants as a condition to obtaining a proprietary lease for an apartment. The facts in our case are a very close analogy to the Northbridge matter, and we are relying on the same law as well as the Northbridge precedent to support our opinion that the Shares are not "securities" under article 6 of the Arizona Securities Act.

For your additional information regarding the operations of the Co-op, we have enclosed a copy of the Co-op Bylaws and all

amendments made thereto. Also enclosed is a check payable to the State of Arizona in the amount of $200.00 for the filing fee.

We respectfully request advice that you or your staff will not recommend that the Securities Division of the Arizona corporation Commission take any action.

Sincerely,

GABROY, ROLLMAN & BOSSÉ, P.C.

Fred A. Farsjo

FAF:wp:012.136
Enclosures

cc: Far Horizons Cooperative Association