

1997

# Mineral Mountain Ranchos Market Wise Investors Inc. Cress Ferriera and June Ferriera v. The Division of Real Estate of the Department of Commerce of the State of Utah : Brief of Petitioners

Utah Court of Appeals

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## Recommended Citation

Petition for Rehearing, *Mineral Mountain Ranchos v. Department of Commerce of the State of Utah*, No. 970735 (Utah Court of Appeals, 1997).

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**UTAH COURT OF APPEALS  
BRIEF**

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DOCKET NO. 970735-CA

**IN THE UTAH COURT OF APPEALS**

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Mineral Mountain Ranchos,	)	
Market Wise Investors, Inc.	)	
Cress Ferriera and June Ferriera	)	
Respondent/Petitioner	)	Case No. 970735-CA
	)	
vs.	)	
	)	
The Division of Real Estate of	)	
The Department of Commerce of	)	
The State of Utah,	)	
Plaintiff/Respondent	)	

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**BRIEF OF PETITIONERS  
TO APPEAL FROM FINAL AND OTHER  
CEASE AND DESIST ORDERS ISSUED BY  
THE DIVISION OF REAL ESTATE AND THE DEPARTMENT OF COMMERCE,  
THE HONORABLE JUDGE J. STEVEN EKLUND, PRESIDING**

---

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**FILED**

**MAR 17 1998**

**COURT OF APPEALS**

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### **JURISDICTIONAL STATEMENT**

The agency started this case by formal adjudicative proceeding under the Uniform Land Sales Practices Act. They heard it under Title 63, Chapter 46b, and reviewed it under §63-46b-12 and R151-46b-12. The agency action is ready for review and this court has jurisdiction under §63-46b-16(1).

### **STATEMENT OF THE ISSUES**

The issues in this case arise out of a cease and desist order based on alleged requirement to register a subdivision. Numerous procedural roadblocks have prevented the registration. Subdivider's objections to the propriety of the roadblocks have been raised at each level of administrative procedure. The area of dispute has been narrowed but the problem remains.

**A.** Issue: Whether the order is valid if it is not supported by the statutes cited.

Standard of Review: In Savage Indus.v Utah State Tax, 811 P.2d 664 (Utah 1991), the agency's interpretation of the statutes was reversed by the supreme court on a correction of error standard of review. The same standard should apply in this case relative to the Division's contention that the Land Sales Practices Act applies to Mineral Mountain Ranchos Subdivision. This issue is preserved in the record (R.364).

**B:** Issue: Whether or not the Agency has authority to reconstruct the exemption language of §57-11-4(1)(f) in such a way as to increase the subdivider's burden

under the statute.      Standard of Review: In Bonneville v. State Tax Commission, 858 P.2d 1045 (Ct. App. 1983), the court says "Because we find no explicit or implied grant of discretion in section 59-12-104(15), we will review the Commission's interpretation under a correction of error standard." In the present case, there being no grant of discretion in regard to §57-11-4(1)(f), this court can review this issue under a correction of error standard (Ferrieras' Exhibits 9 & 10, R. 337-338).

C:      Issue: Whether the agency can rely on a change of wording in the statute to override prior approvals obtained under Title 17 . This issue is preserved in Ferrieras' Exhibits 9 & 10.

Standard of Review: This issue can be reviewed by the correction-of-error standard as in Chevron v State Tax Commission, 847 P.2d 418 (Ct. App. 1983) where the court states in its standard of review that, "We do not defer to an agency's statutory interpretation unless the legislature has explicitly, or implicitly, granted the agency discretion to interpret the statutory language at issue." (Emphasis added.) This issue is preserved in Ferrieras' Exhibits 9 & 10.

D:      Issue: Whether it is lawful for an Administrative Law Judge and The Executive Director of the Department of Commerce to issue final orders based on illusionary definition of a statutory term. A question of correctness exists as well as a question of the right to interpret statutes in absence of a legislative grant of discretion.

Standard of Review: A similar question was addressed in Mor-Flo v Board of Review, 817 P.2d 328 (Ct. App. 1991) when the Commission assumed an expertise in boiler construction which it did not possess. The Mor-Flo case was decided on a correction of error standard with no deference to the agency. The same standard should be applied in this case. This issue is preserved in a general challenge of Division and the Department of Commerce.

E. Issue: Whether the cease and desist order could be made permanent without a hearing if the Ferrieras were stopped from contesting the order by failure of the Division to state a cause of action or by the Division stating a false cause of action. In First Federal v Schamanek, 684 P.2d 1257 (Utah 1984), the court could grant relief under 64-46b-16(a) on grounds that the order on which the agency action is based is unconstitutional as applied because the act of contesting it would be self incriminating.

Standard of Review: A correction-of-error standard of review could be used as it was in Stewart v Utah Public Service, 885 P.2d 759 (Utah 1994), where the court found UCA 54-4-4.1(2) unconstitutional. Issue is preserved at R. 366.

F: Issue: Whether it was lawful for the Division to start Adjudicative procedure against the Ferrieras while falsely claiming authority for the process under §57-11-13 and concealing the fact that they were proceeding under shelter of a different statute. Issue preserved at R. 506.

Standard of Review: This court may grant relief under §63-46b-16(4) using a correction of error standard of review as in Velarde v Board of Review, 831 P.2d 123 (Ct. App. 1983) where the court concluded that "in denying Mrs. Velarde her death benefits action and providing her no alternative remedy, without avoiding a clear social or economic evil, Utah Code Ann. 35-2-13(b)(3) violates article I, section 11 of the Utah Code and is invalid". This issue is preserved (R. 366 -376) (R. 498) (R. 504 - 511).

G: Issue: Whether the Division is enabled by statutes to shelve subdivider's application to register without giving required notices.

Standard of Review: This issue can be reviewed under §63-46b-16(4)(e) by a correction of error standard as in Krantz v Department of Commerce 856 P.2d 369 (Ct. App. 1983). In the present case, the Division of Real Estate failed to give the notices required under § 57-11-9(1). Issue preserved (R. 593)

H: Issue: Whether the Division had the right to withhold registration from the Ferrieras unless the Ferrieras would offer rescission rights to every person who bought a lot from them within a five year period prior to their cease and desist order.

Standard of Review: This issue can be reviewed under §63-46b-16(4)(h)(i) by a reasonableness and rationality standard as in Thorup Bros. v Auditing Division, 860 P.2d 324 (Utah 1983) Issue preserved (R. 19).

I: Issue: Whether the Division acted lawfully when it stopped the sale of 50 acres all to one party because the Ferrieras would not offer rescission rights to all others who purchased from them in the five years prior in view of their actions under §63-46b-20 and its compliance subsection (2)(a).

Standard of Review: This issue may be reviewed under §63-46b-16(4)(d) by a correction of error standard as in Bevans v Industrial Comm., 790 P.2d 573 (Ct. App. 1990) where the agency was not statutorily enabled to reduce Beven's workers compensation benefits. This issue is preserved (R. 22).

### **STATEMENT OF THE CASE**

This case is caused by an assumption made by the Utah Division of Real Estate that the Ferrieras were selling unregistered subdivided lands in Mineral Mountain Ranchos Subdivision. The Ferrieras admit to selling the lots but deny that the sales were subject to the Uniform Land Sales Practices Act.

Division of Real Estate brought this case against the Ferrieras by simultaneous service of Notice of Adjudicative Proceeding (R. 1) and cease and desist order (R. 3) claiming authority of §57-11-13 and requiring the Ferrieras to stop selling lands in Mineral Mountain Ranchos and the state of Utah until such lands were registered with them. The Ferrieras submitted application to register in accordance with §57-11-5, 6, and 7 (R. 192); Division did not respond in accordance with §57-11-9; Judge scheduled exemption

hearing at the Ferrieras' request (R. 13). The Ferrieras requested information about the case and were denied (R. 14); The Ferrieras filed Motion to Exclude Present Escrow and were denied (R. 19); A telephonic exemption hearing was held on February 24, 1997, (R. 353 - 483). Findings, conclusions and order were issued that subdivision is not exempt (R. 484-494); Petition for Agency Review was filed (R. 495- 541). Request was made to copy records and denied (R. 605-615) Order on Review (R. 623-634) says subdivision is not exempt.

#### **RELEVANT FACTS WITH CITATIONS**

The feasibility of Mineral Mountain Ranchos Subdivision, hereinafter called MMR, was studied by Bullock Bros. Engineering Inc. in April of 1983 (Ferrieras' Exhibit 1, R. 302-306) and prepared in accordance with the Division of Health Requirements (R. 302). The feasibility study shows that Cress Ferreira is the developer representative (R. 304) and that it was prepared in accordance with "requirements to Establish Feasibility of Proposed Housing Subdivisions" as published by the Utah State Division of Health dated January, 1971 (R. 305). The study includes a preliminary plat, showing contours, proposed street and lot layouts and at R. 305 it says, "2. Individual homes in the subdivision will receive water from private individual wells (R. 305)"; and at the time MMR was approved, Ferreira had drilled one well on his property near the East 1/4 quarter corner of Section 22, T29S. R8W SLB&M.(R. 307). The study shows that water



from that well was tested by Southern Utah State College in February 1983 (R. 308-10) (R. 113). On July 8, 1983 the approved map with official signatures was properly recorded (R.191). Beaver county has a mobile home ordinance (R. 339) to "protect the health, safety, and welfare of the present and future residents" (R. 339 Chapter 1). MMR specifically allows mobile homes (R. 214 d) Over the years, four mobile homes have been moved into MMR under building permits issued by Beaver County and the Southwest Utah Division of Health. (R. 343) (R. 344) (R. 349) (R. 350)(R. 404-412).

#### **A. Validity**

The Division issued the order and started the formal adjudicative proceedings "pursuant to investigation ..." (R. 3).

This order is not supported by the Land Sales Practices Act which is being claimed as authority (R. 3).

The validity issue was brought up in court at (R. 357).

The Division tried to establish that the Ferrieras' failure to prove the exemption issue would constitute an automatic validation of the cease and desist order (R. 362) (R363. 22-24).

The Ferrieras preserved that issue in saying they are "... in no way prepared to concede that it (if) the thing is not exempt that that order to cease and desist was validly issued." (R. 364).

Ferreira relied on his knowledge of the Land Sales Practices Act and a face to face conversation with the Division of Real Estate when he decided to bypass the registration process in 1986 ( R. 7-8).

According to Utah Code Ann. §57-11-21, the Utah Uniform Land Sales Practices Act “shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it”. The Utah act was patterned after the Model Land Sales Practices Act (see addendum page marked 669). Ferreira relied on the intent and purpose of the Land Sales Practices (R. 378).

The objective of the Utah version and the Model Act is "the prevention of fraud" Wallis v. Thomas 632 P.2d 39 (Utah 1981).

The Model Land Sales Practices Act was meant for subdivisions of more than 25 lots (Addendum page marked 674) Model Land Sales Practices Act (1.(6)); MMR has 22 lots (Division’s Exhibit 12).

Targets of the Land Sales Practices Act are known as promotional subdivisions (see comment following Model (1.(6) at page marked 675 of the addendum). Subdivisions selling less than 25 separate lots per year are excluded (Model (3.(2), addendum page marked 677).

#### **B. The 1983 Exemption Language**

The items discussed face to face with the Division in 1986 (R. 9) were the condition of the title, the approval of the plat, and the absence of a promotional plan. Ferriera phoned the division immediately after being served and was switched to David Jones who turned the conversation away from these topics by questioning Ferriera about the precise location he had visited in Salt Lake City ten years before. Mr. Jones said he was working there at the time. After that, Mr. Jones argued the applicability of the statutory exemptions of the Land Sales Practices Act as they were before 1983, after 1983, and at present time. In conclusion, he told Ferriera the Division intended to call for rescission rights to all persons who bought lots from the Ferriera's during the 5 year period immediately preceding the cease and desist order.

### **C. The 1993 v 1983 Exemption Language**

The present wording of the exemption at §57-11-4(1)(f) is different from what it was in 1983 when MMR was approved under Title 17. The difference in the language is not decisive but it weighs heavily on the interpretation of the present exemption language of the Land Sales Practices Act. The difference between the two versions of §57-11-4(1)(f) is essential to the Ferrieras' case.

Apparently the version cited by the Division as §57-11-1, et seq. (1993) is the product of 1991 legislative session. The wording seems to transfer a *satisfactory assurance of completion* from the police power of the county ordinances to the subdivider

(Ferrieras' Exhibits 9,10, 13, and 14). However, the transfer is arguable because the assurance referred in the present exemption language is probably related to the granting of a temporary permit under §57-11-5(2) and §57-11-7(1)(e)(iii). The alleged promise of completion (R. 431-432) is non-existent.

#### **D. The 1993 Exemption Language**

This is the same issue sometimes referred to in this case as the 1993 exemption. The 1991 legislature changed 57-11-4(1)(f) of the Land Sales Practices Act to make the exemption dependent on the subdivider's furnishing of satisfactory assurance of completion of the improvements". That change is evident in Ch. 165 Laws of Utah 1991. In that chapter it is not at all clear whether the new *satisfactory assurance of completion* clause refers to a preexisting promise to complete or the one required in the public offering statement at §57-11-7(1)(e)(iii). Ferriera is sure it is the latter because it does not make much sense the other way. However, that question needs to be answered by this court not the Division of Real Estate because, clearly, it is a matter of law not agency expertise.

Both of §57-11-4 and §57-11-7 were modified in the same time frame in consecutive paragraphs of Laws of Utah, 1991 ch.165. Namely, §1 and §2. It would be too self-serving to allow the Division to use the *satisfactory assurance of completion of*

*the improvements* phrase to demonstrate a non existent promise to complete by the subdivider.

The Division spawned its own unique interpretation of 1991, ch. 165, §1. The facts about the 1993 exemption issue are plain. The Ferrieras say MMR is exempt from registration at §57-11-4(1)(f). The Division and the Administrative Law Judge say the subdivision is not exempt because the Ferrieras have not provided "assurance of completion of the improvements as to culinary water" The order on review says "the Ferrieras agreed to supply culinary water to the lots in 1983" but did not do it and do not intend to do it. The Ferrieras say the subdivision has culinary water and the exemption language is not based on a requirement that the subdivider has to complete anything that is not described in the POS.

In essence, the absence of a promise to complete made by the subdivider in a public offering statement, automatically exempts the subdivision if it's located in a county which has the **facilities** described in §57-11-4(1)(f)(i) and §57-11-4(1)(f)(ii) regardless of the improvements providing it will have telephone and electricity when it is complete.

#### **E. Constitutionality**

The cease order was based on exemption issue "which are not exempt" (R. 3).

The Division started formal adjudicative proceeding on the same they issued the cease and desist order (R. 1). Section §57-11-13 does not authorize the Division to start adjudicative proceedings.

The emergency order is not in compliance with §63-46b-20(2)(b) because they did not state any reason for starting using emergency proceedings in the order (R. 1-3)

Division acknowledged the validity issue by inviting the Ferrieras to "contest this cease and desist order" (R. 1).

The court confirmed the existence of the validity issue by using it to deny Ferriera's motion to exclude a preexisting escrow (R. 357).

The Division tried to validate the cease and desist order by insisting that if the subdivision were found not exempt, the order would be valid automatically (R. 363).

Ferriera objected to automatic validation (R. 364).

Ferriera requested information about what provoked the problem (R. 14).

The Division resorted to a formal adjudicative proceeding so they could rely on it to withhold information regarding the investigation pursuant to the order (R. 17) (R. 606-615).

Ferreira could not argue the validity of the order at the exemption hearing because he did not know why it was issued in the first place (R. 363)

The court tried to force Ferriera to testify on the validity of the order anyway which brought 12 pages of argument (R. 363-375)

The argument was concluded by the court's allowing the Ferrieras to reserve the validity issue (R.376).

The Administrative Law Judge and the Executive Director of the Department of Commerce have issued final orders upholding the cease and desist orders..

#### **F. Due Process**

The Division issued emergency order under §63-46b-20 and claimed authority under §57-11-13 (R. 563)

The order is defective because it doesn't give any reason for emergency action even though the statement of any reason is required at §63-46b-20(2)(b).

They concealed that it was an emergency order until Ferreira reasoned it out and faced them with it (R. 507).

Eventually, the Division admitted they had used the emergency procedures of §63-46b-20 (R. 564).

They asked their superior agency to disregard the due process issue (R. 561)

They are still trying to deny due process to the Ferrieras by claiming the Ferrieras waived their rights (R. 562).

The Administrative Law Judge offered them a post judgment hearing but he admitted he is prejudiced by saying "This court remains convinced that the September 30, 1996 Order was issued in full compliance with procedural requirements mandated by §57-11-13 (R. 107)

#### **G. The Registration Issue**

The Division received a fully executed and paid up application to Register the subdivision from the Ferriera's on October 25, 1996 (R. 605).

Utah Code Ann. § 57-11-9(1)(a) through §57-11-9(1)(c) provides:

- 1) (a) Upon receipt of the application for registration in proper form, the division shall issue a notice of filing to the applicant within five business days of the date of receipt of application.
- (b) Within 30 days from the date of the notice of filing, or, if no notice of filing is issued within the time required, within 35 days from the date of receipt of the application, the division shall register the subdivided lands or reject the registration.
- (c) If the division has not entered the rejection within 30 days from the date of notice of filing, the land is considered registered unless the applicant has consented in writing to a delay.

None of the above described notices have been received by the Ferrieras.

The Division has neither granted nor denied the application (R. 487) (R. 593).

#### **H. Recision Rights**

The Division's letter dated December 2, 1996 makes retroactive recision rights and other things a prerequisite for registration (R. 40).



Retroactive rescission rights are not a statutory requirement under 57-11-8(1). There is no statutory grant of discretion to the agency in this regard.

The Division does not understand the difference between sales contracts and real estate purchase contracts and the importance of that difference to the Land Sales Practices Act (R. 53-54) (R. 73-74)

#### **I. The Right to Close Escrow**

The Ferrieras filed Motion to Exclude Present Escrow from the Cease and Desist Order on January 23, 1997 (R. 19-41) including exhibits and attachments intended to demonstrate to the court that the Ferrieras had faithfully and conscientiously fulfilled all statutory requirements for registration of the subdivision.

The value of the escrow was \$38,500 (R. 24) The title to be transferred was for three water rights and all utilities including a 25 gallon per minute well (R. 24, 1.1). Seller was to insure the title and convey it under the usual warranty deed subject only to a note and first deed of trust. The buyer was to have a seven day right of rescission under the standard Utah REPC (R. 24).

Section §63-46b-20(2)(a) reads as follows:

(a) limit its order to require only the **action necessary to prevent or avoid the danger** to the public health, safety, or welfare (Emphasis added).

The court denied the motion based on fuzzy logic (R. 357)

### **ARGUMENT FOR THE EXEMPTION ISSUE**

The Land Sales Practices Act, being relied upon by the Utah Division of Real Estate does not support the Division's action against the Ferrieras. It is patterned after the Uniform Law Commissioners' Model Land Sales Practices Act (see addendum but page numbers therein are not related to page numbers in the index of the record) The Land Sales Practices Act was known as the Utah Uniform Land and Timeshare Sales Practices Act until 1987. After that it became known as the Utah Uniform Land Sales Practices Act. Both versions of the Act are based on the 1966 Uniform Land Sales Practices Act which has been adopted in substance by most of the United States. Utah was the tenth state to adopt it. Clearly, the Model Act is focused on the manner in which lands are sold not the manner in which they are subdivided. Apparently, the Division was not aware of origin and purpose of the Land Sales Practices Act. If they were, they should not have cited it against the Ferrieras because Mineral Mountain Ranchos is not a promotional subdivision.

The Land Sales Practices Act is essential to the protection of the unskilled and inexperienced residential property buyer who might otherwise be taken in by the false promises and suede shoe sales tactics sometimes used by unscrupulous real estate promoters. The Division's duty under The Land Sales Practices Act is to enforce the production of an elaborate detailed disclosures regarding the character of the land and the resources of the sellers which disclosure is referred to as a public offering statement

(§57-11-17) or a POS (R41). Under §57-11-12 the Division is empowered to investigate the correctness of the POS but nothing in the Land Sales Practices Act authorizes the Division to evaluate the fitness or the completeness of any subdivision improvement. That duty is reserved unto the County officials under Title 17 as referenced at §57-11-6(1)(l)(i).

The exemption language of the Land Sales Practices Act is designed to minimize administrative costs by excluding the vast majority of subdivisions from its jurisdiction (see prefatory note in addendum). Contrary to the Division's thoughts of record expressed in various phrases such as "entitled to an exemption" "not deserve an exemption" and in the record (R. 465), the exemptions are not there to provide an escape hatch for sleazy developers. Mineral Mountain Ranchos, hereinafter MMR, is purposely exempt from The Land Sales Practices Act by, title, definition, and statutes as well as by the intent and purpose of the Model Act because the legislature wants to minimize administrative costs.

### **DETAILS OF THE EXEMPTION ARGUMENT**

#### **A. Validity Argument**

Respondent ordered the Ferrieras to stop selling **subdivided lands** in Mineral Mountain Ranchos until such lands are properly registered under provisions of §57-11-1, et seq (R4). The findings upon which the September 30, 1996 order is based state that the Ferrieras are “engaging in acts constituting violations of the Land Sales Practices Act”.

The only three ways of violating this chapter are listed at §57-11-17(1)(a), (b), and (c) as follows:

(a) refers to §57-11-5 which has four subsections all pertaining to “subdivided lands;”

(b) refers to untrue statements of material facts in disposing of “subdivided lands;”

(c) refers to omitting a material fact in disposing of “subdivided lands.”

The definition of “subdivided lands” given at §57-11-2 (9) is “ten or more units offered as part of a common promotional plan”. In the absence of a promotional plan the lands mentioned are not subdivided lands regardless of the number of lots involved. None of the land referred to in the order is identifiable as “subdivided lands” within the meaning of the Land Sales Practices Act because there is no promotional plan. The Ferrieras admit to selling lots in MMR but they deny selling “subdivided lands”. Unless the Division had already proved that the lands being sold by the Ferrieras are subdivided lands within the meaning of the Land Sales Practices Act, they had no "reason to believe **"that the above-named Respondents have been, and are, engaging in acts constituting violation of the Utah Land Sales Practices Act"**" (R. 3). Therefore, they had no authority to issue a cease and order in this case.

In their letter dated December 2, 1996 (R41. 4). The Division states that “The Public Offering Statement (POS) you submitted is acceptable and may be used for this

offering”. That approved document says that MMR was not to be sold under a “promotion plan” so none was undertaken (R. 35) That document was approved by the Division of Real Estate itself (R. 41).

The definition of “promotion” given in the New Lexicon Webster’s Encyclopedic Dictionary, 1989, is “a striving to secure greater sales by intensive advertising”.

The Administrative Law Judge found only three lots sold on November 17, 1995 (R.102). However there were seven sold on that date because two of the buyers wanted 10 acre sites (two five acre lots each ) and one wanted a fifteen acre site (three five acre lots).

Nevertheless, the court should wonder how the Division could believe that three lot sales in the entire year of 1995 could be the result of an intensive plan of advertising.

The Ferrieras conclusion is that the Division well knew MMR is not a promotional subdivision and they only wanted to see how much trouble they could make for the Ferrieras by tying up their real estate.

In order to cancel any possible inferences of a common promotional plan in MMR, we reconciled the sales or record in this proceeding to the following tabulation:

MMR is 22 lots of 5 Acres each (Division’s Exhibit 12). The record shows that during the five years preceding the September 30, 1996 cease and desist order, the Ferrieras sold

1) One lot to Robert and Sharon Andrew on July 1, 1996 (Division’s Exhibit 18);

- 2) Two lots to Douglas Parker November 24, 1995 Division's Exhibit 19;
- 3) Three lots to Jon Fry on November 24, 1995 Division's Exhibit 20);
- 4) Two lots to Steven Scandell on November 30, 1995 Division's Exhibit 21;
- 5) Two lots to David Fry on November 24, 1995 Division's Exhibit 22,
- 6) Two lots to Phil Ivey on May 21, 1995 Division's Exhibit 25
- 7) One lot to Gayle Cooney on May 24, 1994 Division's Exhibit 24
- 8) One lot to Ross Low on June 20, 1994 Division's Exhibit 26;

During those five years there was one transaction in 1996, five transactions in 1995 and two transactions in 1994. In all, fourteen lots were sold during those five years but only 8 transactions because most of the buyers preferred ten acres home sites and bought two lots each. Two lots had been sold before that five year period and at the time of the cease and desist order two other lots were in escrow leaving four lots unsold at the time of the order. From time of its approval in 1983 until the date of the order in 1996 there were eleven dispositions as defined at §57-11-2(1). This can not be seen as the result of any common promotional plan by any stretch of the imagination. The tabulation averages out to about one sale every 15 months. Moreover, every last sale was made to local people or a friend or relative of a local person. No sale was ever made from advertising. By definition, the Utah Land Sales Practices Act does not apply to any of the

lands mentioned in this case, because there is no evidence that the Ferrieras had any common plan of promotion.

The Division also ordered the Ferrieras to stop offering or selling the four 40 acre parcels adjacent to MMR. However, these parcels are not part of a common promotional plan of advertising and sale. They are not subdivided lands within the meaning of the Land Sales Practices Act (R. 4).

The Division ordered the Ferrieras to stop offering or selling land in this State but the Ferrieras have not offered or sold any land in the State of Utah under a common promotional plan of advertising and sale. The order does not apply to anything the Ferrieras have ever done with real estate.

No single paragraph describes the Land Sales Practices Act better than the eleventh paragraph written by Chief Justice Maugham in Wallis v Thomas 632 P.2d 39 which says:

“In construing this Act, the focus should be on its objective, i.e., the regulation of subdivided lands was designed for the prevention of fraud and sharp practices in a type of real estate transaction peculiarly open to such abuses.”

The few lots involved in the entire subdivision, only 22 in all, the few sales made in MMR, and the absence of any promotional plan, exclude this tract of land from the kind of subdivision that is “peculiarly open to such abuses.”

Section §57-11-21 of the Utah Land Sales Practices Act provides:

"This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it."

As noted by Chief Justice Maugham in the Wallis v Thomas case, the Utah Uniform Land Sales Practices Act effective August 1, 1973, with certain modifications, follows the Model Act. The Ferrieras realize that Utah did not include the following section in its codification of the Act. The purpose in citing it here is to address the comments following the section in the same way as Chief Justice Maughan did in Wallis v Thomas when he cited the comment following section (3)(1) of the Model Act (addendum page marked 677). The Ferrieras make the citation at this point to demonstrate the intent and purpose of the act not to invoke it as controlling authority.

Subsection 3(2) of the Model Act (addendum 677) provides an exemption if "fewer than [25] separate parcels , units, or interests in subdivided lands are offered by a person in a period of [12] months;"

The Comment that follows the exemption reads as follows:

This exemption will exclude all locally oriented offerings and will allow the seller to take advantage of the exemption even though the subdivision may be large enough to qualify , by restricting the amount of land offered for disposition. In order to qualify under this exemption, the owner must not only refrain from *selling*, but must refrain from *offering* the requisite number of lots for sale.



It is reasonably obvious that the Utah Legislators, in revising the Land Sales Practices Act at Laws of Utah, 1983, ch. 255, §2, purposely incorporated the "fewer than [25] separate parcel" exemption into the definition language by substituting the phrase "including land" for the phrase "and also includes any land" in the first sentence of §57-11-2(9) as shown below. In this way, they were able to eliminate section 3(2) of the Model, maintain the full substance of The Act, and fulfill the purpose of uniformity expressed at §57-11-21. 1983, ch. 255, §2, Laws of Utah which reads::

(6) "Subdivision" and "subdivided lands" means ~~[any]~~ land which is divided or is proposed to be divided for the purpose of disposition into ten or more units ~~[and also includes any]~~ including land, whether contiguous or not ~~if~~ ten or more units are offered as a part of a common promotional plan of advertising and sale. ~~[Where any]~~ If a subdivision is offered by a ~~[single]~~ developer~~;~~ or ~~[a]~~ group of developers ~~[acting in concert]~~, and ~~[that]~~ the land is contiguous or is known, designated, or advertised as a common tract or by a common name, that land ~~[shall be]~~ is presumed, without regard to the number of units covered by each individual offering, to be part of a common promotional plan:

It also can be seen from the foregoing that the purpose of the authority being claimed by the Division (§57-11-1, et seq) is to supervise the **manner in which lands are sold not the manner in which they are subdivided.**

The Utah Uniform Land Sales Practices Act does not apply to MMR because there is no plan of promotion.

It should be noted that the Wallis v Thomas case took place in 1981 and the decision therein was based on the definition of subdivided land as it stood in 1981 not as it is now in 1998. As that definition stands now and has stood for the last 15 years, MMR is not included in the Land Sales Practices Act because it does not now have and never has had a common plan of promotion.

#### **B. The 1983 Exemption Argument**

MMR is clearly exempt at §57-11-(4)(1)(f) as it stood in 1983 because this exemption simply provides that subdivided lands that are subject to county ordinances which assure an orderly development of the improvements are exempt from the provisions of the Land Sales Practices Act. The Division does not want to understand that their only authority under the act is to enforce and monitor the production and distribution of a detailed disclosure statement. Their duty is not to evaluate subdivisions. Conformance to building standards is the responsibility of the county. Evaluation is the buyer's privilege.

The Division agreed (R. 391) that all conditions of the 1993 exemption language exist in Mineral Mountain Ranchos except that it doesn't have culinary water R-104. The common basis of all their conclusions and final orders is that the exemption requires the **subdivider** to provide satisfactory assurance of completion of the culinary water (R. 431). The 1983 exemption language does not include the word subdivider nor does it in any way imply that the subdivider shall furnish satisfactory assurance of completion of

anything. The 1983 exemption language used the same words as the 1993 exemption does but the earlier version did not imply that subdivider is required to furnish satisfactory assurance of completion as demonstrated in Ferrieras' Exhibits 9 and 10. The Ferrieras' understanding of the 1983 language is simply that the state will not require a POS if the County Ordinances assure completion of the off-site improvements. MMR was designed in favor of Mobile Homes (R. 214, d.), Beaver County has a Mobile Home Ordinance (Ferrieras' Exhibit 11, R. 339-342), and MMR is properly approved under Title 17 (Division's Exhibit 12).

The Division agreed that all conditions of the 1993 exemption are fully met in MMR except as to culinary water (R. 391). Their only reservation is that they want the subdivider provide assurance of completion. However, the 1983 version neither mentions the subdivider nor places any such responsibility on him. The exemption of MMR under the 1983 statutes could not be questioned without reference to the 1991 statutes which of course had not yet been conceived.

### **C. The 1983 v 1993 Exemption Argument**

To establish that "no operative difference" (R. 105) exists between the two versions of §57-11-4(1)(f) the division had to assume an expertise in the definition of culinary water and a statutory right to determine that the subdivider is responsible for assurance of its existence in the affected land. They do not have the expertise on water

and they do not have a statutory grant of discretion to determine that the subdivider is responsible for the assurance.

The Ferrieras assert that the county ordinances adequately assure that no home will be occupied unless the owner of the home provides himself with culinary water service. The Division is trying to say the subdivider has to provide the culinary water service in order to fit the terms of the exemption language. The county was satisfied that culinary water was generally available throughout the subdivision when they approved it and they were confident that no one could live in the subdivision without either drilling his own well or hooking up to a neighbors well. All they wanted to know was that each lot owner would be provided with a water right which would authorize him to apply for a permit from the state engineer to drill his own well if he so desired. The ordinances make it clear that, without a source of culinary water, no building permit will be issued. The difference between the 1983 version and the 1993 versions of the exemption is an illusion that appears only if the present version is misread with an incorrect definition of culinary water in mind. Culinary water is not culinary water service. The present exemption language is the product of 1991 legislature. In actuality, the wording only appears to transfer a *satisfactory assurance of completion* from the police power of the county ordinances onto the subdivider (Ferrieras' exhibits 9, 10, ). The Division is relying on a false definition of culinary water to establish a necessity for the *satisfactory assurance of*

*completion* which they are trying to impose on the Ferrieras. If they are allowed to establish that culinary water and culinary water service mean the same thing , they think they can prove to us that there is no operative difference between the two versions of the exemption and thereby prove that the subdivider has always had an obligation to furnish *satisfactory assurance of completion* even in 1983, under which language, MMR obviously is exempt.

In the final analysis, there being no factual evidence to show the existence of a **promise to complete** (R. 412), the *satisfactory assurance of completion* phrase is meaningless. Even though the difference is based on an incorrect definition of culinary water, Ferriera needs to reserve a right to rely on the 1983 version of the exemption if he is required to preserve the argument that the subdivision was exempt at the time it was approved under Title 17 in 1983.

#### **D. The 1993 Exemption Argument**

The agency has created an illusory interpretation of the exemption language but the legislature did not grant the division any right of discretion in the interpretation of that statute. In Chevron v State Tax Commission, 847 P.2d 418, the court states in its standard of review that "We do not defer to an agency's statutory interpretation unless the legislature has **explicitly, or implicitly**, granted the agency discretion to interpret the statutory language at issue." emphasis added.

In our case, the agencies illusionary interpretation was created by the following conclusions of the administrative law judge and the Executive Director of the Department of Commerce..

(R. 487) "failed to provide satisfactory assurance of completion of the improvements for culinary water"

(R. 489) "the subdivider would be required to provide assurance of completion of those improvements"

(R. 489) "the improvements ... must consist ... of a well on each lot ... or a delivery system.

(R. 490) "assurance of completion of the improvements as to culinary water"

(R. 631) "Subdivider agreed to supply culinary water to the lots"

The code exemption calls for culinary water all right but all of the forgoing refer to an **illusion of culinary water**. Culinary water is a natural attribute of the land not an illusion. The Administrative Law Judge has reached other conclusions that are neither logical nor supported by statute. For example, he said that the subdivider's efforts in regards to providing culinary water "cannot be **reasonably construed** (R. 105) to constitute completion of the improvements as that phrase is used in §57-11-4(1)(f)." He went even further when he said "clearly the improvements in question must necessarily consist of **either the construction of a well on each lot to actually provide culinary**

water for that lot or the completion of a delivery system whereby water from an adjoining lot is available to the lot in question (R. 105) (R. 431) (R. 409). The Judge is describing culinary water services but that is not what the code calls for.

The Division is arguing that culinary water service means the same thing as culinary water means in the exemption language (R. 396, 397). Nevertheless §57-11-4(1)(f)(iii) specifically calls for “culinary water” by reference to §57-11-4(1)(f)(ii); not culinary water service. Wherever the code means culinary water service, it refers to it by that specific phrase as in §57-11-4(3)(a)(i), §57-11-4(3)(a)(ii), §57-11-4(3)(b)(i), and §57-11-6(1)(o)(i). The two phrases are not synonymous. Culinary water is household water that may be drawn from a river, stream, lake, or well, by bucket on a rope, a windmill, a gas powered pump, an electric powered pump, or in special instances, hauled out from town on a tank truck. Culinary water is a natural attribute of the land that is available to the inhabitants of the land for household use as long as it is accessed in a way that is approved by ordinances of the county, the local health department, and the state engineer.

Culinary water service, on the other hand, means water piped to each dwelling from a common source in some way similar to what the judge is describing above. That kind of water supply must be evaluated by the Health Department (R. 413) or some agency other than the Division of Real Estate.

The difference between the terms is exemplified in Paulson v Hooper

Water Imp. Dist., 656 P.2d 459, (Utah 1982) as follows:

"After trial, the trial court found that, even though the defendant had installed main culinary water lines adjacent to the area in question, **the installation and "availability" of water is not the same as furnishing culinary water services** to the plaintiffs' land. Thus, the court entered a finding that the defendant "was not, at the date of the filing of the petition, furnishing culinary water service to the territory sought to be withdrawn. (Emphasis added.)

The §57-11-4(1)(f) exemption being relied on by the Ferrieras is based on the availability (R. 401) of culinary water not *culinary water service*. There is no explicit grant of discretion in this section of the code, under which the Division of Real Estate can assume the expertise needed to determine that the code means *culinary water service* when it clearly says culinary water. The Division is not constituted to decide that the culinary water called for in §57-11-(4)(1)(f) means that water must be piped to or available from a private well on each lot at the time of sale in order to declare the subdivision exempt. Obviously, the division is still building on its own illusion by saying, "the improvements in question must necessarily consist of either the construction of a well on each lot to actually provide culinary water for that lot or of the completion (R. 431) of a delivery system whereby water from an adjoining lot is available to the lot in question



R. 105). Under any light, the judge is clearly mistaken because the exemption language at §57-11-4(1)(f) calls for assurance of completion not completion. The existence of underground water was all the assurance the county needed for approval of the subdivision. If anything else had been required by the Beaver County Commissioners, they would have called for a performance bond; that they did not do (R. 432).

Moreover, an assurance of completion is not justifiable without a promise to complete and none was requested or given (R. 431-432). If the subdivider is the one who is supposed to provide the assurance that promise would have had to come from the subdivider in order for it to be binding upon him.

The court says that "that assurance would come from the subdivider" (R. 105) and the Department rubber stamped it by saying "subdivider obtained approval of the Mineral Mountain Ranchos by the planning commission based upon representations that culinary water would be provided by the Ferrieras at each lot in the subdivision" (R. 628). They issued their order of noncompliance on an alleged existence of the subdividers promise to complete a culinary water improvement that they perceive to be either a well on each lot in the subdivision or a piped water delivery system.

The facts are:

September 22, 1981, the Division of Water Rights recommends .45 acre Ft. (Ferrieras' Exhibit. 5, R. 331) per family.

April, 1983, Bullock Brothers Feasibility Study says, "Individual homes in this subdivision will receive water from private individual wells" (Ferrieras' Exhibit 1, R. 305).

April, 1983, Bullock Brothers Feasibility Study says "Private individual wells will serve this subdivision" (Ferrieras' Exhibit 1, R. 305).

April, 1983), Bullock Brothers Feasibility Study says, "Individual water wells are anticipated as sources of supply for each lot and a statement from the Utah State Engineer is attached which discusses feasibility of obtaining ground water" (Ferrieras' Exhibit 1, R. 305).

April 20, 1983, Preliminary plat map is approved by County Commission contingent on a **letter from the Health Department** (Division's Exhibit 1).

April 20, 1983, County Commission motion carried to rezone from MU 10 to A-5 (Division's Exhibit 1).

May 10, 1983, Southwest Utah District Health Department acknowledged the subdivider's proposal "**that individual wells be drilled by each individual purchasing property**" emphasis added (Ferrieras' Exhibit 4, R. 327).

May 10, 1983, **that individual wells be drilled by each individual purchasing property** emphasis added. Feasibility statement acknowledged the subdivider's proposal "**that individual wells be drilled by each individual purchasing property**" (emphasis added) and said that such water supply is feasible (Ferrieras' Exhibit 4, R. 328)

June 10, 1983, notice of public hearing on petition to rezone.  
(Ferrieras' Exhibit 2, R. 325).

June 13, 1983, public hearing on petition to rezone held without protest  
(Division's Exhibit 4, R. 114).

June 13, 1983, the zoning ordinance adopted (Ferrieras' Exhibit 3, R. 326).

June 15, 1983, Planning Commission required .73 Acre Ft for each 5 acres in  
stead of the proposed .45 and Ferriera cut down the number of lots to 25 so he would  
have enough water for the whole subdivision (Ferrieras' Exhibit 6, R. 332).

July 6, 1983, revised map of MMR presented and accepted by the planning  
commission (Division's Exhibit 3).

July 7, 1983, revised map of MMR presented and accepted by the County  
Commissioners (Division's Exhibit 5).

July 8, 1983, approved map of the subdivision is recorded (Division's Exhibit 12).

The foregoing being all the evidence of contacts between the Beaver County  
Officials and the Ferrieras prior to and including final approval and recording of the plat  
map, and there being substantial and credible evidence comprised therein that Beaver  
County as well as the Health Department knew and accepted Ferriera's plans for culinary  
water wherein each purchaser would drill his own well (R.403), and there being no  
evidence at all of a promise by subdivider to drill any wells or complete anything

whatever, then it should be concluded that the Division of Real Estate and the Department of Commerce conjured up or deliberately prevaricated respectively that Ferriera got the subdivision approved by Beaver County on the basis of a promise to complete the Division's illusion of culinary water.

Moreover, the Southwest Utah Division of Health Feasibility Statement on date of May 10, 1983, says, **that individual wells be drilled by each individual purchasing property**". It does not say that individual wells will be drilled on **each lot** as conjured up in the Division's illusion of culinary water.

Furthermore, the foregoing facts are clear and concise in the matter of the zoning that was changed to A-5 to accommodate the subdivision. It should be obvious to the Division that their illusion of culinary water is not compatible with agricultural zoning where most people own 10 acres or more. Those are farms not lots. The incompatibility of culinary water service in A-5 zoning as well as the impracticality of drilling wells prior to sales has been demonstrated adequately to the Division by the Ferrieras (R. 588-589).

### **SUMMARY OF ARGUMENT FOR DUE PROCESS**

The division thinks the Ferrieras acts "constitute a threat to the public welfare" The Land Sales Practices Act authorizes the agency to issue a cease and desist order if the subdivider doesn't register lands that are not exempt and it gives the agency a right to sue the subdivider in district court if he doesn't obey the order but the Land Sales Practices

Act does not provide the agency with a discretionary right to secretly determine whether or not an act is a threat to the public welfare. The Utah version of the Land Sales Practices Act does not even authorize the agency to decide whether or not an order should be an emergency order as opposed to an informal cease and desist order. The Act is perfectly clear on this matter. An emergency order may be issued only under §57-11-10(2)(c). Contrary to what the agency avers, the overt act of selling unregistered lots that are thought to be exempt can not be reasonably construed to constitute a threat to the public welfare even if the agency did have a discretionary right in that regard.

### **DETAIL OF ARGUMENT FOR DUE PROCESS**

#### **E. Constitutionality Argument**

The Division claimed authority under §57-11-13 but that section does not support emergency orders. The validity issue is before this court because the agency failed to find support for their order in Ferreira's testimony on the exemption issue. On the other hand, if Ferreira had contested the validity of the orders instead of the exemption issue the Division would have construed his request for hearing the cease and desist into an admission of nonexempt status. Ferreira couldn't contest the Cease and Desist order directly because he does not know what facts they relied on when they issued the order. The Division is still withholding all information leading up to the issuance of the order. They knew and took advantage of the fact that Ferreira could not challenge the validity of

phantom allegations. The Ferrieras think that anyone holding a position of authority in the Division of Real Estate ought to know enough about The Land Sales Practices Act to have realized from the start that MMR is not subject to that act even without an investigation. There being no authority in the act to issue an emergency cease and desist order for failure to register an allegedly nonexempt subdivision, the Ferrieras thought the Division might be harboring some other kind of grievance by mistake. The Ferrieras were entitled to an opportunity to dispel such grievance if one existed. The Ferrieras are asking for reverse of the cease and order under §63-46b-16(4)(a) because the Division's use of §57-11-1 et seq. is unconstitutional on its face or as applied.

There is no doubt that the Division did in fact start emergency proceedings under §63-46b-20 as charged by the Ferrieras (R. 508) and admitted by Division. (R. 563)

Emergency proceedings are not authorized under §57-11-13 which is the only section they cited as authority for issuing the order. The only justification for invoking §63-46b-20 is the existence of an “immediate and significant danger to the public health, safety, or welfare” as spelled out at §63-46b-20(1)(a). MMR is not an immediate and significant danger requiring immediate action by the agency. However, that condition must be present in order to justify such an order according to §63-46b-20(1)(a). Without such justification, it is clear that “the agency acted beyond the jurisdiction conferred by any statutes”. The Ferrieras are entitled to relief under §63-46b-16(4)(b).

Section §57-11-13 plainly says that if the Director thinks something is wrong, he can issue an order, hear the other side, and then make the order permanent if he finds there is a violation. Nothing in this section or any other section of the Land Sales Practices Act gives the agency any authority to issue an emergency cease and desist order against an unregistered subdivision. The Division may resort to Title 63 in cases of fraudulent behavior, (§57-11-14), enforcement of renewal reports, (§57-11-10), in any of its administrative proceedings (§57-11-3.5), or, as in (§57-11-13) (1)(d), **“if the person served requests a hearing.”** (Emphasis added.). The Ferrieras have not requested a hearing on the cease and desist order because they do not know why the emergency order was issued. If §57-11-13 et seq. can be construed to be a proper authority for the procedure the Division used herein, then that section is indeed “unconstitutional on its face or as applied.” The Ferrieras are therefore entitled to relief under §63-46b-16(4)(a) which does not require deference to the agency.

For example, §57-11-21 Reads as follows:

This act shall be **so construed** as to effectuate its general purpose to make uniform the law of those states which enact it." (Emphasis added.)

The Model Land Sales Practices Act cited in Wallis v Thomas by Chief Justice Maughan is included in the addendum at addendum page 693 and reads in part as follows:

## **§ 12. [Cease and Desist Orders]**

(a) If the agency determines **after notice and hearing** (emphasis added) that a person has:

(1) violated any provision of this Act:

(2) directly or through an agent or employee knowingly engaged in any false, deceptive, or misleading advertising, promotional, or sales methods to offer or dispose of an interest in subdivided lands;

(3) made any substantial change in the plan of disposition and development of the subdivided lands subsequent to the order of registration without obtaining prior written approval from the agency;

(4) disposes of any lands which have not been registered with the agency; or

(5) violated any lawful order or rule of the agency;

it may issue an order requiring the person to cease and desist from the unlawful practice and to take such affirmative action as in the judgment of the agency will carry out the purposes of this Act. (Emphasis added.)

**COMMENT**

Copied from section 478.161, Florida Statutes.

(b) if the agency makes a finding of fact in writing that the public interest will be irreparably harmed by delay in issuing an order, it may issue a temporary cease and desist order. Prior to issuing the temporary cease and desist order, the agency whenever possible by telephone or otherwise shall give notice of the proposal to issue a temporary cease and desist order to the person. Every temporary cease and desist order shall include in its terms a provision that upon request a hearing will be held [promptly] [within \_\_\_\_\_] to determine whether or not it becomes permanent.

This language of the Model Act (not the comment) was imported verbatim into the Utah Uniform Land Sales And Time Share Act in 1977 and remained intact until replaced by its present version in 1991.

It is the present version that has caused this judicial review not the former one. The agency should have phoned the Ferrieras before they issued the order. Petitioners' phone



number has been in the Beaver county phone book for many years and the number automatically forwards to their home/office in California. Either our present version of the 57-11-13 is defective or section 57-11-21 which promises uniformity is false. One or the other is sorely in need of revision.

#### **F. Due Process Argument**

The Division is determined to challenge the Ferrieras right to due process. The Division has not followed the rules in this case since they started it on September 30, 1996. The cease and desist order is defective in several ways:

a) It is premised on alleged violations of §56-11-1 et seq. which act does not apply to the Ferrieras by intent and purpose;

b) An emergency order is not authorized under § 57-11-13 under which they claimed;

c) An emergency order is not valid except in specific circumstances related to immediate and significant danger and in any event the danger has to be spelled out in the order according to (§63-46b-20(1)(a) and (2)(b)). None of this was done (R. 1-3) but they admit to using an emergency order (R. 564);

d) Ferriera is denied access to all information leading up to the issuance of the cease and desist order (R. 606-615).

e) When the Ferrieras requested review, the Division asked their superior agency to disregard the due process issue (R. 561).

f) They are still trying to stop the Ferrieras from getting due process under the law by trying to convince everyone that they waived their right to due process (R. 561) by not requesting Judge Eklund to hear the due process issue after he issued his final order.

The Ferrieras can not believe they waived their rights to due process by not letting Judge Eklund hear it inasmuch as he said he was already convinced that the Division had followed correct procedures (R. 107).

The Ferrieras' income has been stopped for 16 months on account of the unauthorized cease and desist order and the adjudicative proceedings started by the Division of Real Estate.

The Ferrieras are entitled to relief under §63-46b-16(4).

#### **G. The Registration Argument**

There is no doubt that the Ferrieras filed complete application to register the subdivision within a few days after they became aware that the Division considered MMR not to be exempt because of a change in the exemption language. There can be no doubt that that the Division still has the Ferrieras' completed application in their possession together with the Ferrieras' registration money. There can be no doubt that the Division has neither denied nor registered Ferriera's application.

Obviously, the division never intended to register the subdivision because they knew it was not subject to the Land Sales Practices in the first place and they knew it was exempt at §57-11-4(1)(f). The purpose of the cease and desist order was to delve into the Ferriera's personal affairs. Ferrieras bring this to issue because they believe they are entitled to relief under §63-46b-16(4)(e) simply because the agency “failed to follow prescribed procedure.”

#### **H. Retroactive Recision Rights Argument**

There can be no doubt that the Division’s letter to the Ferrieras Dated December 2, 1996 advised the Ferrieras of the Division’s intention to delay registration of the subdivision as long as possible if not forever (R. 40). Everything they mentioned had already been provided to them in the application and the POS which they approved in that same letter.

They brought the retroactive recision rights up again because they knew that was the one thing Ferriera would not do (R. 7-8). Ferriera is absolutely sure that no present lot owner wants to “rescind” his deal. If anyone should become dissatisfied in the future they have a right to recovery through a civil procedure under 57-11-17(2).

For the Division to require a blanket offer of recision rights as a condition of registration is unreasonable and unfair inasmuch as it would appear to everyone receiving such an offer that possibly Ferreira had done something wrong. Title 57 does not

authorize the Division of Real Estate to make any such judgment or to place such a burden on anyone.

### **I. The Right to Close Escrow Argument**

Under an emergency cease and desist order the agency is required to limit its actions to those required to avoid any immediate and significant danger. This would have been good and sufficient reason for granting the Ferrieras motion to exclude the present escrow from the cease and desist order. However, the Division deliberately and wrongfully concealed the facts of the emergency procedure from the Ferrieras. The Division did not reference §63-46b-20 in its cease and desist order and it did not demonstrate any requirement for immediate action. The Division successfully concealed these facts until August 8, 1997 (R. 564) six months after Ferriera's motion to exclude the present escrow R. 19) Their deception was deliberate and premeditated.

The administrative law judge denied the motion to exclude the present escrow on vague grounds (R. 357). If the Ferrieras had been able to present that motion in light of §63-46b-20(2)(a), it might have had a better chance for survival.

By falsely claiming authority for emergency action under §57-11-13 (R. 3 ) the Division cost the Ferrieras a bare minimum of \$38,500. Therefore the substantial prejudice requirement of §63-46b-16(4) is clearly met.

### **CONCLUSIONS AND STATEMENT OF THE RELIEF SOUGHT**

Mineral Mountain ranchos is not a promotional subdivision because it does not have a common plan of promotion. It is exempt because there is no promise to complete anything beyond what is already in place. The division violated due process when it issued an emergency cease and desist order without grounds.

The essence of this case is due process. The Division served an emergency cease and desist order against the petitioners without a hearing and without stating the reasons for the agency's utilization of emergency adjudicative proceedings

The Division stated the reason for the order was failure to register a subdivision but when Petitioners did register the subdivision, immediately after the order, the Division would not complete the registration on grounds that subdivider must first furnish blanket five year retroactive rescission rights to everyone even though all those sales were made by conveyance of insured title, not by land sales contracts, and none of the buyers are dissatisfied with their purchases.

The Division deliberately and repeatedly withheld information about events leading up to the issuance of the order which might have allowed the Ferreira to contest it or correct any alleged problem. Division would not permit the close of a valuable preexisting escrow even though the emergency order required them to limit their restrictive actions.

The administrative law judge tried to beat Ferreira down on the due process issue by challenging him to argue the law with him word by word even while Ferreira was in

the act of demonstrating to the Division that the lands are exempt by definition and by statutory language. When petitioner objected to argument about due process until after the exemption hearing, the judge privately ruled against him and issued a final order without ever hearing the due process argument. The judge tried to justify his arbitrary action by stating in the order that he would hear objections to it if raised within 30 days but at the same time he declared that he was already convinced that no due process violations existed.

When the matter came before the Department of Commerce for agency review, that department found that petitioners waived their right to due process by not opting for a hearing under the Administrative Law Judge knowing full well that he had already ruled with prejudice on the due process issue.

The Division's most recent attempt to frustrate the Ferrieras' right to due process is the Division's motion to silence this judicial review on false logic and sections of the code cited out of context.

Petitioners complaint against the Division's abuse of due process is fueled by the Divisions lack of knowledge about real estate transactions relative to the Land Sales Practices Act. The Division does not understand that the act is designed to regulate promotional subdivisions exclusively. The Division is not qualified to recognize promotional subdivisions. Division does not understand that their duty under the act is to

enforce full disclosure not to regulate the development of the subdivisions. The division does not know that the purpose of the exemptions is to lessen the financial burden of administration. Division does not realize the difference between land sales contracts and transfer by conveyance of title. The Division does not know the importance of the type of sales documentation relative to rescission rights. Division does not understand the positive effect of clear title at time of sale versus blanket incumbrances. The Division does not understand its limitations in interpreting the law as opposed to their authority in the use of implied expertise.

### **REQUEST FOR RELIEF**

#### **Specific Relief**

Respondent respectfully requests this court to reverse the Division of Real Estate's cease and desist orders and require them to do the following:

- 1) Issue a letter of exemption to Respondents;
- 2) Retract their cease and desist orders;
- 3) Return Respondents Registration documents;
- 4) Return Respondents Registration fee;
- 5) Pay monthly interest on all of Respondents real property and water rights in Beaver County Utah from September 28, 1996 until the properties are sold or until September 28, 2016 whichever occurs sooner.

The property will be deemed sold for the above purpose whenever all of the following are completed to respondents satisfaction:

a) The culinary water right is changed from .73 acre ft. per lot to .45 acre ft. per dwelling for all of Respondent's land in Beaver because this is what it should have been in the first place and respondent thinks the discrepancy must be what caused the present conflict.

b) The Zoning of Respondent's land needs to be changed back to A-5. Beaver County destroyed the A-5 zoning with a new General Plan.

### **In Lieu of Costs**

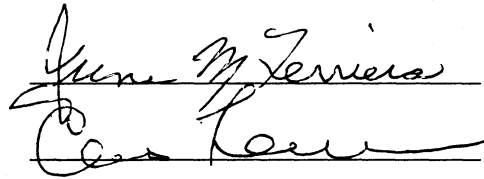
Petitioners are not lawyers and they do not have the \$15,000 plus required by most lawyers as retainer for this case. Petitioners had to abandon all their ordinary efforts to produce income in order that they themselves could take on the task of preserving the past and future income from the sales of land in Mineral Mountain Ranchos. Therefore, they request restitution for their lost time in the sum of \$150,000.

### **Punitive Damages**

Petitioners complain that the Utah Division of Real Estate is not presently qualified to administer the Utah Uniform Land Sales Practices Act. Throughout this year and a half of forced litigation, Petitioners have tried to reason with the Division on the matters of due process and administration with not one sign of possible success.



Therefore, Petitioners respectfully request punitive damages against the Division of Real Estate in the amount of \$300,000 or whatever other sum this court feels will impress the Division of their need for self study on the origin, history, and ramifications of the Utah Uniform Land Sales Practices Act and their administrative duties relative thereto. In the years to come, the state will save much more than the punitive amount mentioned, if the Division is precluded from improper litigation against innocent owners of non promotional subdivisions.

  
James M. Ferris

#### CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Joint Petition for Writ of Review by depositing the same in the U. S. Mail, postage prepaid, on the 16 day of March, 1998 addressed to the following:

Blaine R Ferguson  
Assistant Attorney General  
Consumer Rights Division  
160 East 300 South, 5th Floor  
Salt Lake City, Utah 84114-0872

Dated this 16 day of March, 1998.

By: 

# UNIFORM LAW COMMISSIONERS' MODEL LAND SALES PRACTICES ACT

## *Table of Jurisdictions Wherein Act Has Been Adopted*

Jurisdiction	Laws	Effective Date	Statutory Citation
Alaska .....	1968, c. 179		AS 34.55.004 to 34.55.046.
Connecticut .....	1969, P.A. 697	1-1-1970	C.G.S.A. §§ 20-329a to 20-329m.
Florida .....	1967, c. 67-229	8-1-1967	West's F.S.A. §§ 498.001 to 498.063.
Hawaii .....	1967, c. 223		HRS §§ 484-1 to 484-22.
Idaho .....	1972, c. 276		I.C. §§ 55-1801 to 55-1823.
Kansas .....	1967, c. 311	7-1-1967	K.S.A. 58-3301 to 58-3323.
Minnesota .....	1973, c. 413	7-1-1973	M.S.A. §§ 83.20 to 83.42.
Montana .....	1969, c. 97		MCA 76-4-1201 to 76-4-1251.
South Carolina ...	1968, c. 3052		Code 1976, §§ 27-29-10 to 27-29-210.
Utah .....	1973, c. 158	8-1-1973	U.C.A.1953, 57-11-1 to 57-11-21.

### Historical Note

The Uniform Land Sales Practices Act was approved by the National Conference of Commissioners on Uniform State Laws, and the American Bar Association, in 1966. It was changed to a Model Act in 1969.

In 1968, federal legislation concerning interstate land sales was enacted as the "In-

terstate Land Sales Full Disclosure Act", 15 U.S.C.A. §§ 1701 to 1720. The exemptions provisions of the federal act, specifying the situations when the federal act does not apply, may be found in 15 U.S.C.A. § 1702.

### PREFATORY NOTE

The promotional sale of land has been popularly designated as the "Ten-Dollar-Down-Ten-Dollar-A-Month" lot sales plan. Land located in Arizona, California, Colorado, Florida, New Mexico, North Carolina, and the Caribbean Islands, to mention a few, has been sold actively in this manner. It is sold not only in the places where the land is located, but extensively in the major metropolitan areas of the United States and even in major cities elsewhere in the world.

In the past ten years there have been several national scandals involving fraudulent promotions, and although the majority of those involved in this billion dollar a year industry are operating honestly, the scandals have been so dramatic that state legislative activity has increased substantially, and the United States Congress is presently considering regulatory legislation.

At the present time approximately 50% of the states have legislation dealing with the promotional sale of real estate. However, the existing state laws on this subject vary greatly in the degree of regulation, and there is a substantial lack of uniformity in the application of these laws. Effective enforcement has been hampered by inability to apply the laws beyond the boundaries of the individual states and by failure to include

in the laws techniques available to affect transactions having contact with several states.

The preparation of the Uniform Land Sales Practices Act began in February of 1965. The drafting process included numerous drafting conferences with representation from all areas of the United States, and the Act, as adopted, reflects the comments, suggestions, and experiences of representatives of the land sales industry, related industries, administrators, and the purchasing public. The drafters of the Act have utilized effective portions of existing state laws.

The Uniform Land Sales Practices Act is designed to promote uniformity in the regulation of the land sales industry. Perhaps more importantly, the Act is designed to place individual purchasers of large scale promotional land offerings on an equal bargaining basis with the promoter-seller. It achieves this purpose by providing for the examination of the promotional offering to determine (1) that it affords full and fair disclosure to prospective buyers, (2) that the seller can convey unencumbered legal title to the purchaser, and (3) that there are sufficient safeguards to assure that the seller will complete the promised offsite improvements on the land.

The Act requires a subdivider satisfying the jurisdictional requirements of the Act to register his land prior to offering it for sale. This registration requirement applies to land located within the state, and also to land located outside of the state if sales activity takes place within the state.

Those transactions which are not considered to fall within the regulatory scope of the Act are expressly excluded.

The application for registration of subdivided lands discloses pertinent information that will allow the agency to determine if the subdivider can convey the land offered for sale. Further, this information contained in the application provides the basis from which the agency can determine that there are reasonable assurances that the proposed improvements promised by the promoter-seller will be completed as represented. The Act contains a provision for the examination of the general promotional plan to determine if it will afford full and fair disclosure to prospective purchasers. If the subdivider has been involved in fraudulent promotions in the past, the land will not be registered, and, therefore, cannot be sold to the public. After the agency is satisfied that the various requirements are met, the land is then registered and may be offered for sale to the public. As a safeguard against unfair administrative delays, the law provides for automatic registration if the agency has failed to act within 90 days after receiving the initial application.

The principal enforcement tools of the agency are the power to issue cease and desist orders, to initiate and intervene in legal actions involving the subdivided lands for the purpose of protecting the rights of subdivision purchasers, and to suspend or revoke the registration of the land, thereby prohibiting further sale.

The Act contains criminal provisions and provides for interstate rendition of those persons accused of violating the law. Important to the various states that will consider the enactment of this law, are the provisions for reciprocity between the states and for interstate investigative cooperation.

## LAND SALES PRACTICES ACT

The public offering statement required by the Uniform Act is designed to afford full and fair disclosure to the purchasing public, and the law requires that the subdivider give each prospective purchaser a public offering statement as approved by the agency prior to the consummation of the transaction. A civil remedy is given to persons who have been injured through the defalcations of subdividers, in addition to those remedies that are afforded at common law.

### General Statutory Notes

**Alaska.** Adds section as follows:

**"Sec. 34.55.006. Fraudulent and prohibited practices.** It is unlawful for a person, in connection with the offer, sale or purchase of subdivided land directly or indirectly, to knowingly

"(1) employ a device, scheme or artifice to defraud;

"(2) make an untrue statement of a material fact or omit a statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

"(3) engage in an act, practice, or course of business which operates or would operate as a fraud or deceit upon a person."

**Connecticut.** The Connecticut act is a substantial adoption of the major provisions of the Model Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Florida.** L.1979, c. 347, renumbered, amended, readopted or repealed the provisions of the Model Land Sales Practices Act, effective July 1, 1979. The new act so reconstituted appears as West's F.S.A. §§ 498.001 to 498.063.

The Florida Land Sales Practices Act was generally amended by L.1981, c. 177.

The Florida Land Sales Practices Act was amended by L.1982, c. 400. Note that L.1982, c. 400, § 3 provides that each section within chapter 498, Florida Statutes, which is added or amended by that act, is repealed on October 1, 1988, and shall be reviewed by the Legislature pursuant to s. 11.61, Florida Statutes.

The newly constituted act remains a substantial adoption of the major provisions of the Model Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Georgia.** Adopted an act called "Georgia Land Sales Act of 1982" (O.C.G.A. §§ 44-3-1 to 44-3-19) which is not a substantial adoption of the Model Act, but contains some provisions similar to those in the Model Land Sales Practices Act.

**Hawaii.** The Hawaii act is a substantial adoption of the major provisions of the Model Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Idaho.** The Idaho act, which is entitled "Sale or Disposition of Land Located Outside the State", is a substantial adoption of the major provisions of the Model Act, but contains numerous variations, omissions, and additional matter which cannot be clearly indicated by statutory notes.

**Kansas.** Adds section as follows:

**"58.3320. Registration and report fees.**

"(a) For the registration of subdivided lands there shall be paid to the commissioner a registration fee of ten dollars (\$10), plus one-tenth of one percent of the maximum aggregate offering price of the registered subdivided lands to be offered in this state up to one hundred thousand dollars (\$100,000), plus one-twentieth of one percent of the amount in excess of one hundred thousand dollars (\$100,000) and not exceeding four hundred thousand dollars (\$400,000), plus one-fortieth of one percent of the amount in excess of four hundred thousand dollars (\$400,000); but in no case shall such fee be greater than five hundred dollars (\$500) for each registration: *Provided, however,* That the commissioner may prescribe a maximum amount of subdivided lands to be registered at any one time. If registration is denied or withdrawn prior to the offering of subdivided lands in this state, the commissioner shall refund all of the fee in excess of one hundred dollars (\$100).

“(b) The land and books and records of every person selling or offering for sale subdivided lands subject to the provisions of this act shall be subject to examination by the commissioner, or such other person as the commissioner may designate, and the examinee shall pay a fee for each examiner employed to make such examination of not to exceed twenty-five dollars (\$25) for each day or fraction thereof, plus the actual expenses, including the cost of transportation of said examiner, while he or she is absent from his or her office for the purpose of making said examination.

“The commissioner may require any registrant under this act to file a semiannual report containing such reasonable information as he or she may believe necessary regarding the financial condition of such registrant and the subdivided lands sold in this state by such person. Each report shall be accompanied by a filing fee of five dollars (\$5).”

**Minnesota.** The Minnesota act is a substantial adoption of the major provisions of the Model Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

**Montana.** The Montana act is a substantial adoption of the major provisions of the Model Act, but it contains numerous variations, omissions, and additional matter which cannot be clearly indicated by statutory notes. It should be noted that the Montana provisions corresponding to the Model Act (MCA 76-4-1201 to 76-4-1251) relate only to instate sales of out-of-state subdivisions. Montana has a separate set of provisions (MCA 76-4-1101 to 76-4-1117) which relate to out-of-state sales of in-state subdivisions, but which do not correspond to the Model Act.

**New Jersey.** The New Jersey Land Sales Full Disclosure Act (N.J.S.A. 45:15-16.3 to 45:15-16.26) is not a substantial adoption of the Model Act although it contains some similar provisions and has the same general purpose.

**South Carolina.** Adds section as follows:

“§ 27-29-200. Fees; land, books and records subject to examination by Commissioner; annual renewal reports.

“(a) For the registration of subdivided lands there shall be paid to the Commissioner a registration fee of ten dollars, plus one tenth of one percent of the maximum aggregate offering price of the registered subdivided lands to be offered in this State up to one hundred thousand dollars, plus one twentieth of one percent of the amount in excess of one hundred thousand dollars and not exceeding four hundred thousand dollars, plus one fortieth of one percent of the amount in excess of four hundred thousand dollars; but in no case shall such fee be greater than five hundred dollars for each registration. Provided, however, that the Commissioner may prescribe a maximum amount of subdivided lands to be registered at any one time. If registration is denied or withdrawn prior to the offering of subdivided lands in this State, the Commissioner shall refund all of the fee in excess of one hundred dollars.

“(b) The land and books and records of every person selling or offering for sale subdivided lands subject to the provisions of this chapter shall be subject to examination by the Commissioner, or such other person as he may designate, and the examinee shall pay a fee for each examiner employed to make such examination of not to exceed twenty-five dollars for each day or fraction thereof, plus the actual expenses, including the cost of transportation of the examiner, while he is absent from his office for the purpose of making the examination.

“(c) The Commissioner may require any registrant under this chapter to file an annual renewal report containing such reasonable information as he may believe necessary regarding the financial condition of such registrant and the subdivided lands sold in this State by such person. Each renewal report shall be accompanied by a renewal filing fee of one hundred dollars.

“(d) In order to carry out the provisions of this chapter the Commissioner shall retain such fees and other funds which may come into his possession to defray expenses in the administration of this chapter.”

**Utah.** The Utah Act, known as the Utah Uniform Land and Timeshare Sales Practices Act, is a substantial adoption of the major provisions of the Model Act, but contains numerous variations, omissions and additional matter which cannot be clearly indicated by statutory notes.

# MODEL LAND SALES PRACTICES ACT

## Section

1. Definitions.
2. Administrative Agency.
3. Exemptions.
4. Prohibitions on Dispositions of Interests in Subdivisions.
5. Application for Registration.
6. Public Offering Statement.
7. Inquiry and Examination.
8. Notice of Filing and Registration.
9. Annual Report.
10. General Powers and Duties.
11. Investigations and Proceedings.
12. Cease and Desist Orders.
13. Revocation.
14. Judicial Review.
15. Penalties.
16. Civil Remedy.
17. Jurisdiction.
18. Interstate Rendition.
19. Service of Process.
20. Uniformity of Interpretation.
21. Short Title.
22. Severability.
23. Repeal.
24. Effective Date.

## § 1. [Definitions]

When used in this Act, unless the context otherwise requires:

- (1) “disposition” includes sale, lease, assignment, award by lottery, or any other transaction concerning a subdivision, if undertaken for gain or profit;

### COMMENT

Experience has shown the specific terms, sale, lease, assignment, etc., are not broad enough to cover many of the transactions used by land promoters.

The term “disposition” is the broadest possible term and is intended to include transactions in which no incidents of legal title are transferred.

- (2) “offer” includes every inducement, solicitation, or attempt to encourage a person to acquire an interest in land, if undertaken for gain or profit;

### COMMENT

Modeled after section 401(h), Uniform Securities Act.

(3) "person" means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity;

#### COMMENT

Modeled after the Uniform Statutory Uniform Deceptive Trade Practices Construction Act, section 26, and the Act.

(4) "purchaser" means a person who acquires or attempts to acquire or succeeds to an interest in land;

#### COMMENT

"Purchaser" is defined in this manner to include persons who are not successful in their attempts to acquire land because of invalid title or other reasons, and also to include those persons who succeed to an interest in land by gift, inheritance, or otherwise, in order to eliminate the necessity of privacy with the subdivider as a prerequisite to asserting rights granted under this Act.

(5) "subdivider" means any owner of subdivided land who offers it for disposition or the principal agent of an inactive owner;

#### COMMENT

Modeled after section 337, Article 9-A, New York Real Property Law. This definition does not include a trust company that holds bare legal title in trust for the use and benefit of another or other inactive owner if sales are made through a promoter.

In those states in which "subdivided" lands are commonly sold by use of a subdivision trust, under which bare legal title to the land is held by a corporate trustee, additional language

may be desirable in defining "subdivider" in subsection (5). Such language should be directed to excluding from that definition a trustee holding bare legal title to subdivided land, and to including within that definition the beneficial owner under the trust.

It is not believed that any additional language is needed where a bank or other corporation or individual holds the bare legal title in trust.

(6) "subdivision" and "subdivided lands" mean any land which is divided or is proposed to be divided for the purpose of disposition into [25] or more lots, parcels, units, or interests and also includes any land whether contiguous or not if [25] or more lots, parcels, units, or interests are offered as a part of a common promotional plan of advertising and sale.

## COMMENT

Copied in part from section 11.000 California Real Estate Law, and in part from section 478.021(5) Florida Statutes. It should be noted that this definition does not require the land to be presently subdivided, nor does it require the land to be contiguous. A subdivider who offers land located in several different areas or states will be subject to this Act if the land is disposed of pursuant to a common promotional plan. Although each case must be examined independently, normally a common promotional plan is one which utilizes common advertising and sales methods to the extent that the offering begins to take on the character of a fungible.

Even though the number 25 is bracketed, it is recommended that this Act

apply only to subdivisions of 25 or more lots, parcels or units. The typical promotional subdivision, to be financially successful, normally has a minimum of 25 parcels. It would be unduly costly and burdensome to require smaller subdividers to comply with the registration procedure set out in this Act, and could overburden the agency with an unnecessary amount of administrative work. Further, the subdivisions of 25 or fewer lots are usually offered within a local area, thereby giving prospective purchasers an adequate opportunity to examine the land and to be familiar with the character and reputation of the subdivider.

## Action in Adopting Jurisdictions

## Variations from Official Text:

**Alaska.** Subd. (6) reads: "‘subdivision’ and ‘subdivided land’ mean land which is divided or is proposed to be divided for the purpose of disposition into two or more lots, units or interests and also includes any land whether contiguous or not if two or more lots, parcels, units or interests are offered as a part of a common promotional plan of advertising and sale; if the land is contiguous or is known, designated or advertised as a common unit or by a common name,

the land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for disposition as part of a common promotional plan;".

**Kansas.** In subd. (2), substitutes "any" for "every".

In subd. (6), inserts the phrase "situated within or without the state of Kansas" preceding "which is divided" and substitutes "(50)" for "[25]" in both instances.

## Library References

Trade Regulation 861.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

## Notes of Decisions

**Offer 2**  
**Subdivided lands 1**

Act. Wallis v. Thomas, Utah 1981, 632 P.2d 39.

## 2. Offer

## 1. Subdivided lands

Uniform Land Sales Practices Act clearly indicates that land need not be presently subdivided but only be proposed to be subdivided for purpose of disposition to constitute "subdivided lands" within meaning of

Postsale conduct designed to induce the continuation of payments does not constitute an "offer" for purposes of the Uniform Land Sales Practices Act. State v. First Nat. Bank of Anchorage, Alaska 1982, 660 P.2d 406.



## § 2. [Administrative Agency]

This Act shall be administered by [insert appropriate administrative agency and any related provisions on selection and remuneration of personnel, budget, annual reports, fees, and other administrative provisions which are appropriate to the particular state] which hereinafter is called the agency.

### COMMENT

Each state may place the administration of this Act under the agency it deems most appropriate. Normally, the state real estate commission is the designated agency, but several states with laws of this kind have taken other approaches. For example, New York places the responsibility on the Secretary of State, Ohio in the Securities Commission, Florida in the Installment Land Sales Board, Michigan in the Corporation Securities Commission, Maine in the Department of Banks and Banking, and New Mexico with the Attorney General.

Incorporated within this section should be provisions for financing the agency. Whether the agency should be financed from fees collected or through a general appropriation or

some other method, should be determined by each state.

The cost of administering this law will vary in each state, and will depend primarily on whether the state is classified as a situs state, an investor state, or a combination of both. Florida, which has a separate regulatory agency of regulating promotional land sales, registers approximately 200 subdividers and approximately 3,000 salesmen. The agency employs 12 to 14 personnel including the executive director, attorneys, investigators and clerical personnel. The agency has operated on an annual budget of \$115,000 to \$135,000. The annual budget of the Florida agency is funded exclusively from fees collected.

### Library References

Trade Regulation 861.  
C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

### Notes of Decisions

#### 1. Rules and regulations

Notice that the Department of Commerce proposed to adopt regulations in Title III of the Administrative Code to implement the Uniform Land Sales Practices Act with respect to general provisions, filing procedures, unfair acts and practices, advertising and promotion plans, protection of purchasers, and severability was adequate. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

Regulations which had been adopted to implement the Uniform Land Sales Practices Act prior to the time it was amended to apply to in-state land sales as well as out-of-state land sales were required to be repromulgated after the adoption of amendments to the Act making it applicable to in-state land sales; failure to repromulgate the regulations did not deprive developer of due process. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

### § 3. [Exemptions]

(a) Unless the method of disposition is adopted for the purpose of evasion of this Act, the provisions of this Act do not apply to offers or dispositions of an interest in land:

(1) by a purchaser of subdivided lands for his own account in a single or isolated transaction;

#### COMMENT

This subsection is modeled after section 402(b)(1) Uniform Securities Act, and it is designed to make it unnecessary for an individual lot purchaser to

comply with this Act upon resale even though the lands have been previously registered.

(2) if fewer than [25] separate lots, parcels, units, or interests in subdivided lands are offered by a person in a period of [12] months;

#### COMMENT

This exemption will exclude all locally oriented offerings and will allow the seller to take advantage of the exemption even though the subdivision may be large enough to qualify, by restricting the amount of land offered for

disposition. In order to qualify under this exemption, the owner must not only refrain from *selling*, but must refrain from *offering* the requisite number of lots for sale.

(3) on which there is a residential, commercial, or industrial building, or as to which there is a legal obligation on the part of the seller to construct such a building within [2] years from date of disposition;

(4) to persons who are engaged in the business of construction of buildings for resale, or to persons who acquire an interest in subdivided lands for the purpose of engaging and do engage in the business of construction of buildings for resale;

#### COMMENT

The exemptions of subsections (3) and (4) are designed to limit the application of the Act to land upon which the seller has no obligation to build

structural improvements and will eliminate those persons engaged exclusively in the homebuilding business.

(5) pursuant to court order;

(6) by any government or government agency;

(7) as cemetery lots or interests.

(b) Unless the method of disposition is adopted for the purpose of evasion of this Act, the provisions of this Act do not apply to:

(1) offers or dispositions of evidences of indebtedness secured by a mortgage or deed of trust of real estate;

(2) offers or dispositions of securities or units of interest issued by a real estate investment trust regulated under any state or federal statute;

(3) a subdivision as to which the plan of disposition is to dispose to 10 or fewer persons; .

#### COMMENT

This exemption is designed to cover those persons who develop land for wholesale distribution. The subdivision may contain a large number of lots, but if it is offered for disposition to ten or fewer persons, the transaction is nevertheless exempt.

(4) a subdivision as to which the agency has granted an exemption as provided in section 10;

#### COMMENT

This subsection allows the agency to exempt an offering which is locally oriented and of a non-promotional nature. It is designed to afford flexibility in order that the regulatory emphasis remains principally on the promotional offering.

(5) offers or dispositions of securities currently registered with the [Commissioner of Securities] of this State; and

(6) offers or dispositions of any interest in oil, gas, or other minerals or any royalty interest therein if the offers or dispositions of such interests are regulated as securities by the United States or by the [Commissioner of Securities] of this State.

#### COMMENT

The exemptions stated in subsections (5) and (6) are designed to avoid duplication of regulation. If the promotional offering is already registered as a security and regulated by another agency, the Act will not apply.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

**Alaska.** In subd. (a) introductory clause, inserts "registration" preceding "provisions of this Act".

Subd. (a)(2) reads: "if fewer than 10 separate lots, parcels, units or interests in subdivided land located outside this state are offered by a subdivider in a period of 12 months, or if fewer than 50 separate lots,

parcels, units or interests in subdivided land located in this state are offered by a subdivider in a period of 12 months;"

In subd. (a), adds a paragraph (8) which reads: "if the land is located in this state and is registered or exempt from registration under the provisions of the federal Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.)."

**Kansas.** In subd. (a)(1), inserts "or her" following "his".

Omits subd. (b)(5) and (6).

In subd. (a)(2), substitutes "fifty (50)" for "[25]".

**South Carolina.** Omits subd. (b)(5) and (6).

### Library References

Trade Regulation 861.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

### Notes of Decisions

**Generally** 1  
**Standard of care** 2

tion was inapplicable in transaction between subdivider and purchaser. *Wallis v. Thomas*, Utah 1981, 632 P.2d 39.

#### 1. Generally

Section of Uniform Land Sales Practices Act which provides that Act does not apply to offers or dispositions of interest in land by purchaser of subdivided lands for his own account in a single or isolated transaction was designed to make it unnecessary for individual lot purchasers to comply with act upon resale even though lands had been previously registered; thus, such subsec-

#### 2. Standard of care

In view of fact that the Land Sales Practices Act exempts from the Act's coverage those subdividers offering fewer than 50 lots within the state during a 12-month period, it would be both illogical and unjust to hold such small tract subdividers to a higher standard of care than that applicable to their large-scale competitors. *Stepanov v. Gavrilovich*, Alaska 1979, 594 P.2d 30.

## § 4. [Prohibitions on Dispositions of Interests in Subdivisions]

Unless the subdivided lands or the transaction is exempt by section 3:

(1) no person may offer or dispose of any interest in subdivided lands located in this State nor offer or dispose in this State of any interest in subdivided lands located without this State prior to the time the subdivided lands are registered in accordance with this Act;

### COMMENT

Modeled after section 201(2) Uniform Securities Act.

(2) no person may dispose of any interest in subdivided lands unless a current public offering statement is delivered to the purchaser and the purchaser is afforded a reasonable opportunity to examine the public offering statement prior to the disposition.

### COMMENT

Copied from section 337-b(4) Article 9A, New York Real Property Law and section 11018.1 California Real Estate Law. This section requires the pur-

chaser to be afforded a reasonable opportunity to examine the public offering statement before consummation of the transaction.

## Action in Adopting Jurisdictions

## Variations from Official Text:

**Alaska.** Subd. (1) reads: "no person may offer or dispose of in this state an interest in subdivided land before the time the subdivided land is registered in accordance with this chapter."

**Kansas.** Subd. (1) reads: "No person may in this state offer or dispose of any interest in subdivided lands located within

or without this state prior to the time the subdivided lands required under the act to be registered are duly registered in accordance with this act;".

**South Carolina.** Subd. (1) reads: "No person may in this State offer or dispose of any interest in subdivided lands prior to the time the subdivided lands are registered in accordance with this chapter."

## Library References

Trade Regulation 861.  
C.J.S. Trade-Marks, Trade-Names and  
Unfair Competition § 237.

## Notes of Decisions

## 1. Generally

Where none of three orange groves from which sales of lots were made to Canadian citizens was registered under Florida statutes applying to sale of interests in subdivi-

vided land, lot sellers were liable to purchasers for such illegal sales, subject to any applicable statute of limitations which could stand in bar of individual class member's claim. *Ferland v. Orange Groves of Florida, Inc.*, D.C.Fla.1974, 377 F.Supp. 690.

## § 5. [Application for Registration]

(a) The application for registration of subdivided lands shall be filed as prescribed by the agency's rules and shall contain the following documents and information:

(1) an irrevocable appointment of the agency to receive service of any lawful process in any non-criminal proceeding arising under this Act against the applicant or his personal representative;

## COMMENT

Copied from section 414(g) Uniform Securities Act, except that the irrevocable consent is given at all times rather than when the subdivider is operating through an agent. (See section 19, *infra*, for method of service.)

(2) a legal description of the subdivided lands offered for registration, together with a map showing the division proposed or made, the dimensions of the lots, parcels, units, or interests and the relation of the subdivided lands to existing streets, roads, and other off-site improvements;

(3) the states or jurisdictions in which an application for registration or similar document has been filed and any adverse order, judgment, or decree entered in connection with the subdivided lands by the regulatory authorities in each jurisdiction or by any court;

(4) the applicant's name and address, and the form, date, and jurisdiction of organization; and the address of each of its offices in this State;

(5) the name, address, and principal occupation for the past five years of every director and officer of the applicant or person occupying a similar status or performing similar functions; the extent and nature of his interest in the applicant or the subdivided lands as of a specified date within 30 days of the filing of the application;

(6) a statement, in a form acceptable to the agency, of the condition of the title to the subdivided lands including encumbrances as of a specified date within 30 days of the date of application by a title opinion of a licensed attorney, not a salaried employee, officer, or director of the applicant or owner, or by other evidence of title acceptable to the agency;

(7) copies of the instruments which will be delivered to a purchaser to evidence his interest in the subdivided lands and of the contracts and other agreements which a purchaser will be required to agree to or sign;

(8) copies of the instruments by which the interest in the subdivided lands was acquired and a statement of any lien or encumbrance upon the title and copies of the instruments creating the lien or encumbrance, if any, with data as to recording;

(9) if there is a lien or encumbrance affecting more than one lot, parcel, unit, or interest a statement of the consequences for a purchaser of failure to discharge the lien or encumbrance and the steps, if any, taken to protect the purchaser in case of this eventuality;

(10) copies of instruments creating easements, restrictions, or other encumbrances, affecting the subdivided lands;

(11) a statement of the zoning and other governmental regulations affecting the use of the subdivided lands and also of any existing tax and existing or proposed special taxes or assessments which affect the subdivided lands;

(12) a statement of the existing provisions for access, sewage disposal, water, and other public utilities in the subdivision; a statement of the improvements to be installed; the schedule for their completion; and a statement as to the provisions for improvement maintenance;

#### COMMENT

The information in this subsection will be helpful to the agency in determining whether the advertising and the public offering statement give sufficient information about the existence of standard improvements such as access and utilities and whether or not a public agency has undertaken the responsibility for maintaining the improvements. Also, the section re-

quires a schedule for completion, if the promised improvements are not in existence. This schedule will enable the agency to follow the progress of the subdivider with respect to his obligations for completion of improvements.

(13) a narrative description of the promotional plan for the disposition of the subdivided lands together with copies of all advertising material which has been prepared for public distribution by any means of communication;

#### COMMENT

This information will enable the agency to determine the areas in which the subdivider will offer its property and the manner in which the property will be offered.

(14) the proposed public offering statement;

(15) any other information, including any current financial statement, which the agency by its rules requires for the protection of purchasers.

#### COMMENT

Section 5(a) lists the principal information to be submitted to the agency in order that it may determine whether the subdivider can convey legal title, has the resources to complete promised improvements, and whether the advertising material relating to the subdivision offers full and fair disclosure. This section principally constitutes a compilation of various requirements required by the jurisdictions presently regulating land promotions. If the enacting state currently regulates subdivision offerings, a grandfather provision should be adopted to avoid interrupting the operation of a going business.

(b) If the subdivider registers additional subdivided lands to be offered for disposition, he may consolidate the subsequent registration with any earlier registration offering subdivided lands for disposition under the same promotional plan.

(c) The subdivider shall immediately report any material changes in the information contained in an application for registration.

#### COMMENT

Section 478.161(1)(c) Florida Statutes; section 11012, California Real Property Law.

**Action in Adopting Jurisdictions****Variations from Official Text:**

**Kansas.** Makes minor language changes relating to gender without affecting substance and substitutes "commissioner" for

"agency", wherever appearing, except in subd. (a)(1) where "Kansas securities commissioner" is substituted for "agency".

**Library References**

Trade Regulation ☞863.

C.J.S. Trade-Marks, Trade-Names and

Unfair Competition § 237.

**Notes of Decisions****1. Construction with other laws**

Exemption from registration provisions of the Federal Interstate Land Sales Full Disclosure Act provides exemption from

registration requirements of Uniform Land Sales Practices Act, but does not immunize sellers from liability under the ULSPA for fraud. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

**§ 6. [Public Offering Statement]**

(a) A public offering statement shall disclose fully and accurately the physical characteristics of the subdivided lands offered and shall make known to prospective purchasers all unusual and material circumstances or features affecting the subdivided lands. The proposed public offering statement submitted to the agency shall be in a form prescribed by its rules and shall include the following:

- (1) the name and principal address of the subdivider;
- (2) a general description of the subdivided lands stating the total number of lots, parcels, units, or interests in the offering;

**COMMENT**

An integral part of many promotions is an emphasis on the resale potential of the lands offered for sale. This section of the public offering statement is designed to show the buyer

whether the subdivider (the buyer's chief competitor when he wishes to resell) has an adequate supply of lots to meet future demand.

(3) the significant terms of any encumbrances, easements, liens, and restrictions, including zoning and other regulations affecting the subdivided lands and each unit or lot, and a statement of all existing taxes and existing or proposed special taxes or assessments which affect the subdivided lands;

(4) a statement of the use for which the property is offered;

(5) information concerning improvements, including streets, water supply, levees, drainage control systems, irrigation systems, sewage disposal facilities, and customary utilities, and the estimated cost, date



of completion, and responsibility for construction and maintenance of existing and proposed improvements which are referred to in connection with the offering or disposition of any interest in subdivided lands;

(6) additional information required by the agency to assure full and fair disclosure to prospective purchasers.

#### COMMENT

Section 6(a) is copied from Section 338.1, Article 9-A, New York Real Property Law and Chapter 188-6, Rules and Regulations of Florida Installment Land Sales Board. At the present time about one-half of the states engaged in the regulation of subdivision sales provide for some form of public report, prospectus, offering statement, or property report. In this section this document is designated a public offering statement. A great deal of attention has been focused upon this matter and it has been a subject of discussion at various conferences throughout the United States. While the purpose of the public report has been generally agreed to be the providing of pertinent and material information concerning the subdivision to the prospective purchaser, there exists a wide variance of opinion as to the information that should be con-

tained in the statement. New York has established a public offering prospectus which is analogous to a securities prospectus. Florida, on the other hand, has a property report which is designed to furnish the prospective purchaser with information which a prudent and cautious buyer would normally evaluate prior to purchase.

It is felt that the public offering statement should be thorough, but should be simple and concise. It should not contain such minutiae of detail as to lose the interest of the reader, but should be sufficiently detailed and simple to reasonably assure that the prospective purchaser will understand the material aspects of the offering and the conditions of the property at the time the offering is made, and information concerning improvements to the subdivision.

(b) The public offering statement shall not be used for any promotional purposes before registration of the subdivided lands and afterwards only if it is used in its entirety. No person may advertise or represent that the agency approves or recommends the subdivided lands or disposition thereof. No portion of the public offering statement may be underscored, italicized, or printed in larger or heavier or different color type than the remainder of the statement unless the agency requires it.

(c) The agency may require the subdivider to alter or amend the proposed public offering statement in order to assure full and fair disclosure to prospective purchasers, and no change in the substance of the promotional plan or plan of disposition or development of the subdivision may be made after registration without notifying the agency and without making appropriate amendment of the public offering statement. A public offering statement is not current unless all amendments are incorporated.

## COMMENT

The public offering statement required by this section is originally prepared by the subdivider and edited by the agency. This differs from the public report now used by some states which is prepared initially by the ad-

ministrative agency. The requirement for amending the public offering statement is copied from Section 337-b(7), Article 9-A, New York Real Property Law.

## Action in Adopting Jurisdictions

## Variations from Official Text:

**Kansas.** Substitutes "commissioner" for "agency", wherever appearing.

## Library References

Trade Regulation ☞863.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

## Notes of Decisions

Change in offering 2  
Construction with other laws 1  
Instructions 3

## 1. Construction with other laws

Purchasers' action under statute making it " \* \* unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement \* \* \*" was not preempted by Uniform Land Sales Practices Law. *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, Fla.App.1981, 403 So.2d 1367.

## 2. Change in offering

Term "offering" as used in section of Uniform Land Sales Practices Law providing that after order of registration has been issued no material change of the offering shall be made by subdivider without notification and written approval must refer to something that was in existence before order of registration was issued and which it is within power of subdivider to change, alter, or modify but which legislature considered should not be changed, altered, or modified without prior approval of Division of Land Sales and Condominiums of the Department of Business Regulation. *Jaffe v. State*, Fla.App. 5 Dist.1983, 438 So.2d 72, petition for review dismissed 436 So.2d 99.

Proposed advertising material, proposed public offering statement, and proposed

contracts and other agreements which purchaser is required to execute under Uniform Land Sales Practices Law were included within the term "offering" as used in section of statute providing that after order of registration has been issued no material change of the offering shall be made by subdivider without notification and written approval. *Jaffe v. State*, Fla.App. 5 Dist. 1983, 438 So.2d 72, petition for review dismissed 436 So.2d 99.

In prosecution under section of Uniform Land Sales Practices Law providing that after order of registration has been issued no material change of the offering shall be made by subdivider without notification and written approval, even if allegations of charging document had accurately tracked statute, proof at trial that defendant had executed and delivered quitclaim, rather than warranty, deeds as promised in agreement for deed would not have sustained such allegations. *Jaffe v. State*, Fla.App. 5 Dist.1983, 438 So.2d 72, petition for review dismissed 436 So.2d 99.

Term "offering" in section of Uniform Land Sales Practices Law providing that after order of registration has been issued no material change of the offering shall be made by subdivider without notification and written approval does not mean or include order of registration, and thus counts charging unlawful land sales practices based on material alteration, change, or modification of order of registration were defective in failing to allege material

**Note 2**

change, alteration, or modification of "the offering." *Jaffe v. State*, Fla.App. 5 Dist. 1983, 438 So.2d 72, petition for review dismissed 436 So.2d 99.

**3. Instructions**

Even if term "offering" in section of Uniform Land Sales Practices Law providing that after order of registration has been issued no material change of the offering shall be made by subdivider without notification and written approval included order of registration, it was reversible error for trial court to instruct jury that issuance of

quitclaim deeds to contract purchasers in lieu of warranty deeds as provided in agreements for deed was, as a matter of law, material change, alteration, or modification of order of registration; whether any alleged change, alteration, or modification of offering was material in given instance depended on substance of change, alteration, or modification and subject matter and context and, as in fraud and similar cases, was question of fact for jury. *Jaffe v. State*, Fla.App. 5 Dist.1983, 438 So.2d 72, petition for review dismissed 436 So.2d 99.

**§ 7. [Inquiry and Examination]**

Upon receipt of an application for registration in proper form, the agency shall forthwith initiate an examination to determine that:

(1) the subdivider can convey or cause to be conveyed the interest in subdivided lands offered for disposition if the purchaser complies with the terms of the offer, and when appropriate, that release clauses, conveyances in trust, or other safeguards have been provided;

(2) there is reasonable assurance that all proposed improvements will be completed as represented;

(3) the advertising material and the general promotional plan are not false or misleading and comply with the standards prescribed by the agency in its rules and afford full and fair disclosure;

(4) the subdivider has not, or if a corporation, its officers, directors, and principals have not, been convicted of a crime involving land dispositions or any aspect of the land sales business in this State, the United States, or any other state or foreign country within the past [10] years and has not been subject to any injunction or administrative order entered within the past [10] years restraining a false or misleading promotional plan involving land dispositions;

(5) the public offering statement requirements of this Act have been satisfied.

**COMMENT**

States regulating the land sales industry generally fall into three categories—(1) those which merely prosecute subdividers for fraudulent statements, (2) those which require affirmative action in achieving full and fair disclosure from subdividers in their advertising and promotional materials, and (3) those which examine the offering itself

in advance to determine that it is fair, just and equitable before registration. This Act combines to some degree each of the foregoing theories. There are criminal provisions for fraud and non-compliance. Full and fair disclosure is achieved by requiring the public offering statement and through the option of supervising advertising. This Act

does not direct the agency to make a determination as to whether the offering is fair, just and equitable, on the theory that this decision is better made by the well-informed purchaser rather than an administrator. The Act does, however, go further than full and fair disclosure since it requires proof and assurances that the subdivider has the

ability to convey title to the lands offered, and if he promises improvements, that he is in a position to guarantee completion. The agency must also determine that the subdivider, or if a corporation, its principals, have not been involved in fraudulent promotions within the last ten years.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

**Kansas.** Substitutes "commissioner" for "agency", wherever appearing.

In subd. (3), inserts "or regulations" following "rules".

In subd. (4), omits "entered".

#### Library References

Trade Regulation Ⓒ863.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

## § 8. [Notice of Filing and Registration]

(a) Upon receipt of the application for registration in proper form, the agency shall issue a notice of filing to the applicant. Within [90] days from the date of the notice of filing, the agency shall enter an order registering the subdivided lands or rejecting the registration. If no order of rejection is entered within [90] days from the date of notice of filing, the land shall be deemed registered unless the applicant has consented in writing to a delay.

#### COMMENT

Modeled after Section 478.141(3) Florida Statutes. This section prevents the administrative agency from arbitrarily delaying the application for registration. This section affords an additional remedy to an applicant and is not a substitute for existing common law or statutory prerogative writs.

(b) If the agency affirmatively determines, upon inquiry and examination, that the requirements of section 7 have been met, it shall enter an order registering the subdivided lands and shall designate the form of the public offering statement.

(c) If the agency determines upon inquiry and examination that any of the requirements of section 7 has not been met, it shall notify the applicant that the application for registration must be corrected in the particulars specified within [10] days. If the requirements are not met within the time allowed the agency shall enter an order rejecting the registration, which shall include the findings of fact upon which the

order is based. The order rejecting the registration shall not become effective for [20] days, during which time the applicant may petition for reconsideration and is entitled to a hearing.

### COMMENT

Modeled in part after Section 9(g) 1961 Model State Administrative Procedures Act. The preorder notice enables the applicant to amend the application prior to the time an adverse order is rendered. If the appropriate corrective measures cannot be taken within the ten day period, the agency may grant an additional time upon re-

ceipt of a waiver of the ninety day deadline required by Section 8(a). The post order petition for reconsideration is designed to give the applicant further opportunity to present his position to the administrative agency prior to seeking judicial review of the agency's order.

### Action in Adopting Jurisdictions

#### Variations from Official Text:

**Kansas.** Substitutes "commissioner" for "agency", wherever appearing, and makes some minor language changes without affecting substance.

**South Carolina.** In subd. (c), substitutes "fifteen" for "[10]" days.

### Library References

Trade Regulation ¶863.  
C.J.S. Trade-Marks, Trade-Names and  
Unfair Competition § 237.

## § 9. [Annual Report]

(a) Within [30] days after each annual anniversary date of an order registering subdivided lands, the subdivider shall file a report in the form prescribed by the rules of the agency. The report shall reflect any material changes in information contained in the original application for registration.

(b) The agency may permit the filing of annual reports within [30] days after the anniversary date of the consolidated registration in lieu of the anniversary date of the original registration.

### COMMENT

See section 5(b). Many subdividers will register additional subdivided lands to be offered under the same promotional plan during the course of the year. Upon each subsequent filing all of the information relating to the

subdivided lands should be made current. Normally a consolidated registration would obviate the necessity of an annual report until one year after the order registering and consolidating the additional subdivided lands.

**Action in Adopting Jurisdictions**

**Variations from Official Text:**

**Kansas.** In subd. (a), substitutes "commissioner" for "rules of the agency".

In subd. (b), substitutes "The commissioner at his or her option" for "The agency".

**South Carolina.** In subd. (a), inserts "renewal" following "file a" and provides that

the report may, at the option of the commissioner, be consolidated with the required annual renewal report.

In subd. (b), inserts "at his option" preceding "may permit".

**Library References**

Trade Regulation 863.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

**§ 10. [General Powers and Duties]**

(a) The agency shall prescribe reasonable rules which may be adopted, amended, or repealed [in compliance with the administrative procedure act] [after a public hearing with notice thereof published once in a newspaper or newspapers with statewide circulation not less than 5 days nor more than 15 days prior to the hearing and mailed to all subdividers not less than 5 days nor more than 15 days prior to the public hearing]. The rules shall include but need not be limited to:

(1) provisions for advertising standards to assure full and fair disclosure;

(2) provisions for escrow or trust agreements or other means reasonably to assure that all improvements referred to in the application for registration and advertising will be completed and that purchasers will receive the interest in land contracted for;

(3) provisions for operating procedures; and

(4) other rules necessary and proper to accomplish the purpose of this Act.

**COMMENT**

Modeled after Section 478.041(5), Florida Statutes.

(b) The agency by rule or order, after reasonable notice and hearing, may require the filing of advertising material relating to subdivided lands prior to its distribution.

**COMMENT**

This Act does not require the filing of all advertising materials prior to their distribution, but if the agency finds such filing is desirable either for

all subdividers or particular subdividers, it is specifically authorized to do so by rule or order after notice and hearing.

(c) If it appears that a person has engaged or is about to engage in an act or practice constituting a violation of a provision of this Act or a rule or order hereunder, the agency, with or without prior administrative proceedings, may bring an action in the [insert the name of the appropriate court] to enjoin the acts or practices and to enforce compliance with this Act or any rule or order hereunder. Upon proper showing, injunctive relief or temporary restraining orders shall be granted, and a receiver or conservator may be appointed. The agency is not required to post a bond in any court proceedings.

**COMMENT**

This section is modeled after section 408 of the Uniform Securities Act.

(d) The agency may intervene in a suit involving subdivided lands. In any suit by or against a subdivider involving subdivided lands, the subdivider promptly shall furnish the agency notice of the suit and copies of all pleadings.

**COMMENT**

Modeled after section 478.132(7), Florida Statutes.

(e) The agency may:

- (1) accept registrations filed in other states or with the federal government;
- (2) contract with similar agencies in this State or other jurisdictions to perform investigative functions;
- (3) accept grants in aid from any source.

(f) The agency shall cooperate with similar agencies in other jurisdictions to establish uniform filing procedures and forms, uniform public offering statements, advertising standards, rules, and common administrative practices.

**COMMENT**

These important subsections enable the agency to establish reciprocal agreements with similar agencies in other jurisdictions and within the state for the purpose of uniformity. Without uniformity of regulation with respect to matters such as advertising standards, subdividers promoting land

nation-wide might frequently be frustrated by inconsistent rules. Through reciprocal agreements the agency will

also greatly facilitate its ability to enforce the Act and reduce the cost of the administration and investigation.

(g) The agency may exempt a subdivision of [\_\_\_\_\_] or fewer lots, parcels, units, or interests from the provisions of this Act if it determines that the plan of promotion and disposition is primarily directed to persons in the local community in which the subdivision is situated.

### COMMENT

See section 3(b)(4). This section is designed to allow the agency to exclude from its jurisdiction those subdivisions which are local in nature and in

which prospective purchasers are familiar with the land and the nature of the offering.

### Action in Adopting Jurisdictions

**Blanks to be filled in, subd. (g):**

**Alaska.** See variation note, *infra*.

**Kansas.** See variation note, *infra*.

**South Carolina.** "one hundred".

**Kansas.** Substitutes "commissioner" for "agency", wherever appearing.

In subd. (a), substitutes "shall" for "may" preceding "be adopted" and uses all material contained in both sets of brackets.

**Variations from Official Text:**

**Alaska.** In subd. (a), substitutes "shall be" for "may be" and uses "Administrative Procedure Act (A.S. 44.62)".

Omits subd. (g).

Omits subd. (g).

**South Carolina.** In subd. (a), omits "adopted, amended, or repealed" and inserts bracketed material relating to public hearing and notice.

### Library References

Trade Regulation ☞863.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

### Notes of Decisions

**Appointment of monitors 2**  
**Jurisdiction 1**

board's order. *Florik v. Florida Land Sales Bd.*, Fla.App.1967, 206 So.2d 41.

#### 1. Jurisdiction of court

District Court of Appeal lacked jurisdiction of proceeding on petition for review of Florida land sales board's order suspending private land corporation as registrant under board and appointing monitors to oversee land corporation's operations where proceeding, in effect, sought equitable relief available to stockholder in court of equity on issue whether officers had acted illegally in agreeing and pleading guilty, in effect, to

#### 2. Appointment of monitors

Florida land sales board lacked authority to appoint monitors to oversee operation of land company and to expend sums ranging up to \$150,000 for their expenses and salaries to be taxed against corporation. *Gulf Am. Corp. v. Florida Land Sales Bd.*, App., 206 So.2d 457 (1968).

Florida land sales board lacked authority to select monitors to oversee operation of private corporation for purpose of seeing that it complied with board's orders. *Florik v. Florida Land Sales Bd.*, Fla.App.1967, 206 So.2d 41.



**§ 11. [Investigations and Proceedings]**

(a) The agency may:

(1) make necessary public or private investigations within or outside of this State to determine whether any person has violated or is about to violate this Act or any rule or order hereunder or to aid in the enforcement of this Act or in the prescribing of rules and forms hereunder;

(2) require or permit any person to file a statement in writing, under oath or otherwise as the agency determines, as to all the facts and circumstances concerning the matter to be investigated.

**COMMENT**

Copied from section 407, Uniform Securities Act, except that the agency is not expressly permitted to publish information concerning violations of the Act.

(b) For the purpose of any investigation or proceeding under this Act, the agency or any officer designated by rule may administer oaths or affirmations, and upon its own motion or upon request of any party may subpoena witnesses, compel their attendance, take evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts, or any other matter reasonably calculated to lead to the discovery of material evidence.

**COMMENT**

Copied in part from section 407(b), Uniform Securities Act, and in part from Rule 26b, Federal Rules of Civil Procedure.

(c) Upon failure to obey a subpoena or to answer questions propounded by the investigating officer and upon reasonable notice to all persons affected thereby, the agency may apply to [insert name of appropriate court] for an order compelling compliance.

**COMMENT**

Modeled after Rule 37a and 37b, Federal Rules of Civil Procedure.

[ (d) Except as otherwise provided in this Act, all proceedings under this Act shall be in accordance with the Administrative Procedure Act.]

## COMMENT

To be deleted if the agency already has established special rules of procedure or if the state has no administrative procedures act.

## Action in Adopting Jurisdictions

## Variations from Official Text:

**Alaska.** In subd. (b), substitutes "the department or an officer designated by the department" for "the agency or any officer designated by rule".

**Kansas.** Substitutes "commissioner" for "agency", wherever appearing.

In subd. (a)(1), inserts "or regulation" following "any rule" and "and regulations" following "of rules".

In subd. (b), substitutes "the commissioner" for "rule" and "his or her own" for "its own".

Omits subd. (d).

**South Carolina.** In subd. (b), substitutes "shall" for "may" preceding "subpoena".

Omits subd. (d).

## Library References

Trade Regulation ☞863.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

## § 12. [Cease and Desist Orders]

(a) If the agency determines after notice and hearing that a person has:

- (1) violated any provision of this Act;
- (2) directly or through an agent or employee knowingly engaged in any false, deceptive, or misleading advertising, promotional, or sales methods to offer or dispose of an interest in subdivided lands;
- (3) made any substantial change in the plan of disposition and development of the subdivided lands subsequent to the order of registration without obtaining prior written approval from the agency;
- (4) disposed of any subdivided lands which have not been registered with the agency; or
- (5) violated any lawful order or rule of the agency;

it may issue an order requiring the person to cease and desist from the unlawful practice and to take such affirmative action as in the judgment of the agency will carry out the purposes of this Act.

## COMMENT

Copied from section 478.161, Florida Statutes.

(b) If the agency makes a finding of fact in writing that the public interest will be irreparably harmed by delay in issuing an order, it may

issue a temporary cease and desist order. Prior to issuing the temporary cease and desist order, the agency whenever possible by telephone or otherwise shall give notice of the proposal to issue a temporary cease and desist order to the person. Every temporary cease and desist order shall include in its terms a provision that upon request a hearing will be held [promptly] [within \_\_\_\_\_ days] to determine whether or not it becomes permanent.

### COMMENT

Modeled upon proposed amended draft of Rule 65b, Federal Rules of Civil Procedure.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

**Alaska.** In subd. (b), inserts "10 days".

**Kansas.** Substitutes "commissioner" for "agency" wherever appearing.

In subd. (b), substitutes "the commissioner may" for "it may", and inserts "promptly" in last sentence.

**South Carolina.** In subd. (b), inserts "promptly".

#### Library References

Trade Regulation ~~8~~863.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

## § 13. [Revocation]

(a) A registration may be revoked after notice and hearing upon a written finding of fact that the subdivider has:

- (1) failed to comply with the terms of a cease and desist order;
- (2) been convicted in any court subsequent to the filing of the application for registration of a crime involving fraud, deception, false pretenses, misrepresentation, false advertising, or dishonest dealing in real estate transactions;
- (3) disposed of, concealed, or diverted any funds or assets of any person so as to defeat the rights of subdivision purchasers;
- (4) failed faithfully to perform any stipulation or agreement made with the agency as an inducement to grant any registration, to reinstate any registration, or to approve any promotional plan or public offering statement; or
- (5) made intentional misrepresentations or concealed material facts in an application for registration. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

(b) If the agency finds after notice and hearing that the subdivider has been guilty of a violation for which revocation could be ordered, it may issue a cease and desist order instead.

### COMMENT

Modeled after section 478.161, Florida Statutes, with the addition of the language relating to findings of fact to insure that findings of fact are not

merely ultimate findings but are sufficiently explicit to afford an aggrieved party relief upon judicial review.

### Action in Adopting Jurisdictions

#### Variations from Official Text:

**Kansas.** Substitutes "commissioner" for "agency", wherever appearing.

In subd. (b), substitutes "the commissioner may" for "it may".

### Library References

Trade Regulation ⇐863.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition § 237.

## § 14. [Judicial Review]

[(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by an order pertaining to registration, a cease and desist order, an order of revocation, or any other final decision of the agency is entitled to judicial review under this Act. This section does not limit utilization or the scope of judicial review available under other means of review, redress, relief, or trial *de novo* provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition in the [insert the name of appropriate court] within [30] days after [mailing notice of] the final decision of the agency or, if a rehearing is requested, within [30] days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within [30] days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost.

The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.]

[Proceedings for judicial review shall be in accordance with the Administrative Procedure Act.]

#### COMMENT

Copied from section 15, 1961 Model State Administrative Procedure Act. If the state has an administrative procedure act, the sentence in the last set of brackets should be used in lieu of subsections (a) through (g).

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

**Alaska.** Omits this section.

**Kansas.** Substitutes "commissioner" for "agency", wherever appearing, and omits reference to Administrative Procedure Act.

In subd. (g), introductory text, substitutes "commissioner's findings" for "administrative findings".

**South Carolina.** Omits reference to the Administrative Procedure Act.

#### Library References

Trade Regulation ⇐863.  
C.J.S. Trade-Marks, Trade-Names and  
Unfair Competition § 237.

## § 15. [Penalties]

Any person who willfully violates any provision of this Act or of a rule adopted under it or any person who willfully, in an application for registration, makes any untrue statement of a material fact or omits to state a material fact is guilty of a [misdemeanor] [felony] and may be fined not less than [\$1,000] [\$5,000] or double the amount of gain from the transaction, whichever is the larger but not more than [\$50,000]; or he may be imprisoned for not more than [6 months] [2 years]; or both.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

##### **Alaska.** Section reads:

"(a) A person who wilfully violates § 6 [§ 34.55.006 of the Alaska Act, set forth in General Statutory Notes of the Model Act] or § 8 [§ 4 of the Model Act] of this chapter is, upon conviction, punishable by a fine of not more than \$50,000, or by imprisonment for not less than one year nor more than five years, or by both fine and imprisonment.

"(b) Any violation of this chapter other than as provided in (a) of this section or of a regulation adopted under this chapter is a

misdemeanor and is punishable by a fine of not less than \$1,000 or double the amount of gain from the transaction, whichever is larger but not more than \$50,000, or by imprisonment for not more than six months, or by both fine and imprisonment."

**Kansas.** Designates violation as felony, provides for \$1,000 as the minimum fine and for 3 years as the maximum imprisonment.

**South Carolina.** Designates a violation as a misdemeanor, provides for \$1,000 as the minimum fine and for 3 years as the maximum imprisonment.

#### Library References

Trade Regulation ⇐863.  
C.J.S. Trade-Marks, Trade-Names and  
Unfair Competition § 237.

## § 16. [Civil Remedy]

(a) Any person who disposes of subdivided lands in violation of section 4, or who in disposing of subdivided lands makes an untrue statement of a material fact, or who in disposing of subdivided lands omits a material fact required to be stated in a registration statement or public offering statement or necessary to make the statements made not misleading, is liable as provided in this section to the purchaser unless in the case of an

untruth or omission it is proved that the purchaser knew of the untruth or omission or that the person offering or disposing of subdivided lands did not know and in the exercise of reasonable care could not have known of the untruth or omission, or that the purchaser did not rely on the untruth or omission.

#### COMMENT

Modeled in part upon section 410(a), 2672, dated June 9, 1966 now pending Uniform Securities Act, and section 10 before the U.S. Senate. of the Committee Print Senate Bill

(b) In addition to any other remedies, the purchaser, under subsection (a), of this section may recover the consideration paid for the lot, parcel, unit, or interest in subdivided lands together with interest at the rate of 6% per year from the date of payment, property taxes paid, costs, and reasonable attorneys' fees, less the amount of any income received from the subdivided lands, upon tender of appropriate instruments of reconveyance. If the purchaser no longer owns the lot, parcel, unit, or interest in subdivided lands, he may recover the amount that would be recoverable upon a tender of a reconveyance, less the value of the land when disposed of and less interest at the rate of 6% per year on that amount from the date of disposition.

#### COMMENT

Modeled upon section 410(a), Uniform Securities Act. In some states a statutory attorney fee is unconstitutional. In those states the provision for attorneys' fees should be deleted.

(c) Every person who directly or indirectly controls a subdivider liable under subsection (a), every general partner, officer, or director of a subdivider, every person occupying a similar status or performing a similar function, every employee of the subdivider who materially aids in the disposition, and every agent who materially aids in the disposition is also liable jointly and severally with and to the same extent as the subdivider, unless the person otherwise liable sustains the burden of proof that he did not know and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist. There is a right to contribution as in cases of contract among persons so liable.

#### COMMENT

Modeled upon section 10(a)(4), Senate Bill 2672, *supra*.

(d) Every person whose occupation gives authority to a statement which with his consent has been used in an application for registration or public offering statement, if he is not otherwise associated with the subdivision and development plan in a material way, is liable only for false statements and omissions in his statement and only if he fails to prove that he did not know and in the exercise of the reasonable care of a man in his occupation could not have known of the existence of the facts by reason of which the liability is alleged to exist.

(e) A tender of reconveyance may be made at any time before the entry of judgment.

#### COMMENT

Modeled upon section 410(c), Uniform Securities Act.

(f) A person may not recover under this section in actions commenced more than 4 years after his first payment of money to the subdivider in the contested transaction.

#### COMMENT

This limitation of action should be placed with the state's general law relating to limitations.

(g) Any stipulation or provision purporting to bind any person acquiring subdivided lands to waive compliance with this Act or any rule or order under it is void.

#### COMMENT

Modeled upon section 410(g), Uniform Securities Act.

#### Action in Adopting Jurisdictions

##### Variations from Official Text:

**Alaska.** Subd. (a) reads: "(a) A person who disposes of subdivided land in violation of § 6 [§ 34.55.006 of the Alaska Act, set forth in General Statutory Notes of the Model Act] or § 8 [§ 4 of the Model Act] of this chapter is liable as provided in this section to the purchaser unless in the case of an untruth or omission it is proved that the purchaser knew of the untruth or omission or that the person offering or disposing

of subdivided land did not know and in the exercise of reasonable care could not have known of the untruth or omission."

**Kansas.** In subd. (b), the percentage rate at 15% in both instances.

Makes minor language changes relating to gender without affecting substance.

In subd. (g), inserts "or regulation" following "rule".



## Library References

Trade Regulation §864.  
C.J.S. Trade-Marks, Trade-Names and  
Unfair Competition § 237.

## Notes of Decisions

**Attorney's fees** 11  
**Construction with other laws** 1  
**Jury trial** 9  
**Knowledge of purchaser as to untruth or omission** 5  
**Misrepresentation or omission of material facts** 4  
**Parties** 8  
**Reliance** 6  
**Standard of care** 3  
**Statute of limitations** 7  
**Theory of case** 10  
**Transactions within act** 2

## 1. Construction with other laws

Exemption from registration provisions of the Federal Interstate Land Sales Full Disclosure Act provides exemption from registration requirements of Uniform Land Sales Practices Act, but does not immunize sellers from liability under the ULSPA for fraud. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

## 2. Transactions within act

Actions of seller of land in lulling buyers into sense of security after the sales took place were not "transactions concerning land" for purposes of the Uniform Land Sales Practices Act and liability for fraud could not be imposed on that basis; the language "transactions" should be construed under the doctrine of ejusdem generis as limited to transactions involving the transfer of an interest in land. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

## 3. Standard of care

It would be illogical and unjust for the Supreme Court to devise a rule requiring subdividers operating before the Land Sales Practices Act became effective to be held to a more exacting standard of care than that imposed by the Act. *Stepanov v. Gavrilovich, Alaska* 1979, 594 P.2d 30.

## 4. Misrepresentation or omission of material facts

Seller who knew, prior to developing subdivision, of facts relating to flood hazard

and who misrepresented those facts or omitted to mention those facts was properly ordered to provide restitution to those persons who purchased their lots after effective date of amendments to the Uniform Land Sales Practices Act making it applicable to sales of instate land. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

Liability of a subdivider for damages incurred by a purchaser of his lots because of the presence of permafrost depends on the failure of the subdivider to disclose permafrost conditions that are known or could have been known through the exercise of reasonable care, that is, the use of appropriate testing methods and review of available geologic data. *Stepanov v. Gavrilovich, Alaska* 1979, 594 P.2d 30.

## 5. Knowledge of purchaser as to untruth or omission

Defense provided in statute governing civil remedies for violation of Uniform Land Sales Practices Act requires actual knowledge on part of purchaser as to untruth or omission on part of vendor; thus, failure of purchasers to investigate proffered real estate and discover its actual condition was no defense to vendor's violation of statute in conveying real estate to purchasers. *Wallis v. Thomas, Utah* 1981, 632 P.2d 39.

Even if vendor had defense that purchaser must exercise reasonable care to determine truthfulness of any material representation in order to avail themselves of section of Uniform Land Sales Practices Act governing civil remedies for violations, where vendor disposed of property in violation of section of statute governing registration, public offerings, statement and receipts required for offer of interest in subdivided land, vendor was liable to purchaser. *Id.*

## 6. Reliance

Reliance is an essential element of cause of action under Uniform Land Sales Practices Law for subdivider's untrue statement of material facts made in disposing of the in-

terest in subdivided lands or in registration statement or public offering statement. *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, Fla.App.1981, 403 So.2d 1367.

#### 7. Statute of limitations

Where none of three orange groves from which sales of lots were made to Canadian citizens was registered under Florida statutes applying to sale of interests in subdivided land, lot sellers were liable to purchasers for such illegal sales, subject to any applicable statute of limitations which could stand in bar of individual class member's claim. *Ferland v. Orange Groves of Florida, Inc.*, D.C.Fla.1974, 377 F.Supp. 690.

#### 8. Parties

State must proceed under Uniform Land Sales Practices Act in a representative capacity but certification as a class action is not a prerequisite to an award of restitutionary relief. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

State has the authority to bring suit in the public interest on the basis of common-law fraud to obtain restitution for defrauded land purchasers. *State v. First Nat.*

*Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

#### 9. Jury trial

Where State sought only injunctive and restitutionary relief under the Uniform Land Sales Practices Act, developer was not entitled to trial by jury. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

#### 10. Theory of case

Land seller's right to fair trial was jeopardized when trial court adopted a new theory of the case, common-law fraud, at the conclusion of the evidence in the case, which had been tried on the theory of violation of the Uniform Land Sales Practices Act. *State v. First Nat. Bank of Anchorage, Alaska* 1982, 660 P.2d 406.

#### 11. Attorney's fees

Under section of Uniform Land Sales Practices Act governing civil remedies for violation of statute purchaser may recover reasonable attorney fees not only for initial action but also for attorney fees incurred upon appeal. *Wallis v. Thomas, Utah* 1981, 632 P.2d 39.

## § 17. [Jurisdiction]

Dispositions of subdivided lands are subject to this Act, and the [insert name of appropriate courts] of this State have jurisdiction in claims or causes of action arising under this Act, if:

(1) the subdivided lands offered for disposition are located in this State; or

(2) the subdivider's principal office is located in this State; or

(3) any offer or disposition of subdivided lands is made in this State, whether or not the offeror or offeree is then present in this State, if the offer originates within this State or is directed by the offeror to a person or place in this State and received by the person or at the place to which it is directed.

### COMMENT

Modeled upon section 414(a), (b) and (c) of the Uniform Securities Act.

**Action in Adopting Jurisdictions**

**Variations from Official Text:**

**Alaska.** Section reads: "A disposition of subdivided land is subject to this chapter, and the superior court of this state has jurisdiction in claims or causes of action arising under this chapter if

"(1) the subdivider's principal office is located in this state;

"(2) an offer or disposition of subdivided land is made in this state, whether or not

the offeror or offeree is then present in this state, if the offer originates in this state or is directed by the offeror to a person or place in this state and received by the person or at the place to which it is directed; or

"(3) the subdivided land is located in this state."

**Kansas.** Omits par. (1).

**South Carolina.** Omits par. (1).

**Library References**

Consumer Protection ⚡36.  
Courts ⚡4.  
C.J.S. Courts §§ 6, 7, 37 et seq.

C.J.S. Trade-Marks, Trade-Names and Unfair Competition §§ 237, 238.

**Notes of Decisions**

**Retroactive effect 1  
Rules and regulations 2**

**1. Retroactive effect**

Amendment to Uniform Land Sales Practices Act making it applicable to in state's sales is not to be given retroactive application. *State v. First Nat. Bank of Anchorage*, Alaska 1982, 660 P.2d 406.

**2. Rules and regulations**

Regulations which had been adopted to implement the Uniform Land Sales Practic-

es Act prior to the time it was amended to apply to in-state land sales as well as out-of-state land sales were required to be repromulgated after the adoption of amendments to the Act making it applicable to in-state land sales; failure to repromulgate the regulations did not deprive developer of due process. *State v. First Nat. Bank of Anchorage*, Alaska 1982, 660 P.2d 406.

**§ 18. [Interstate Rendition]**

In the proceedings for extradition of a person charged with a crime under this Act, it need not be shown that the person whose surrender is demanded has fled from justice or at the time of the commission of the crime was in the demanding or other state.

**Library References**

Extradition ⚡34.  
C.J.S. Extradition § 13 et seq.

**§ 19. [Service of Process]**

(a) In addition to the methods of service provided for in the [Rules of Civil Practice] service may be made by delivering a copy of the process to the office of the agency, but it is not effective unless the plaintiff (which may be the agency in a proceeding instituted by it)

(1) forthwith sends a copy of the process and of the pleading by [certified] [registered] mail to the defendant or respondent at his last known address, and

(2) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(b) If any person, including any nonresident of this State, engages in conduct prohibited by this Act or any rule or order hereunder, and has not filed a consent to service of process and personal jurisdiction over him cannot otherwise be obtained in this State, that conduct authorizes the agency to receive service of process in any noncriminal proceeding against him or his successor which grows out of the conduct and which is brought under this Act or any rule or order hereunder, with the same force and validity as if served on him personally. Notice shall be given as provided in subsection (a).

### COMMENT

This section should be deleted if the general statutes of the state provide a method for service of process that would be applicable to this Act. If not, this section should be included in the chapter of the state statutes relating

to service of process. Modeled upon section 414 of the Uniform Securities Act and section 5(2) of the Uniform Reciprocal Enforcement of Support Act.

### Action in Adopting Jurisdictions

#### Variations from Official Text:

**Alaska.** In subd. (a)(1), inserts "certified".

**Kansas.** Substitutes "commissioner" for "agency", wherever appearing and makes minor language changes relating to gender without affecting substance.

In subd. (a)(1), inserts "certified, or registered".

In subd. (b), inserts "or regulation" following "any rule" in both instances.

**South Carolina.** In subd. (a)(1), inserts "certified or registered".

### Library References

Consumer Protection ⚖️36.  
Process ⚖️49.

C.J.S. Trade-Marks, Trade-Names and  
Unfair Competition §§ 237, 238.  
C.J.S. Process § 25 et seq.

## § 20. [Uniformity of Interpretation]

This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

### Library References

Statutes ⚖️226.  
C.J.S. Statutes § 371 et seq.

**§ 21. [Short Title]**

This Act may be cited as the Uniform Land Sales Practices Act.

**§ 22. [Severability]**

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are severable.

**Library References**

Statutes ⇐64(2).  
C.J.S. Statutes § 96 et seq.

**§ 23. [Repeal]**

The following Acts and parts of Acts are repealed:

- (1)
- (2)
- (3)

**Library References**

Statutes ⇐152.  
C.J.S. Statutes § 282.

**§ 24. [Effective Date]**

This Act shall take effect [not less than 90 days after enactment].

**Library References**

Statutes ⇐255. C.J.S. Statutes §§ 405, 407.



# State of Utah

DEPARTMENT OF COMMERCE  
Division of Real Estate

Michael O. Leavitt  
Governor  
Douglas C. Borba  
Executive Director  
Ted Boyer  
Division Director

Heber M. Wells Building  
160 East 300 South/ Box 146711  
Salt Lake City, Utah 84114-6711  
Phone (801) 530-6747  
Fax (801) 530-6749  
Internet <http://www.commerce.state.ut.us/web/commerce/divreal.htm>

September 30, 1996

MINERAL MOUNTAIN RANCHOS  
MARKET WISE INVESTORS INC  
CRESS AND JUNE FERRIERA  
615 NORTH LOWER SACRAMENTO RD  
LODI CA 95242

Re: Notice of Formal Adjudicative Proceeding  
Case Number RE96-09-05

To Whom It May Concern:

Attached is an Administrative Cease and Desist Order issued pursuant to Utah Code Annotated Section 57-11-13 (1993) prohibiting you from selling subdivided land in this State until such time as you register the land as required by the Utah Land Sales Practices Act.

If you wish to contest this Cease and Desist Order, you have the right to a hearing before an administrative law judge at which time you will have the opportunity to present evidence, argue, respond conduct a cross-examination and submit rebuttal evidence as to whether you should be prohibited from selling subdivided land within this State without registering the land.

The hearing will be conducted as a formal adjudicative proceeding. The presiding officer at the hearing will be J. Steven Eklund, Administrative Law Judge, Department of Commerce. If you have any questions on hearing procedures, he may be contacted at Box 146701, Salt Lake City, Utah 84114-6701. His telephone number is (801) 530-6648.

If you wish to request a hearing, you must do so in writing within ten days of your receipt of the Cease and Desist Order. Pending the hearing, the Cease and Desist Order remains in effect. If, at the hearing, a finding is made that there has been a violation, the Cease and Desist Order will be made permanent. If you fail to cease the act or practice, the Director of the Division of Real Estate may file suit against you in District Court to enjoin and restrain you from the act or practice.

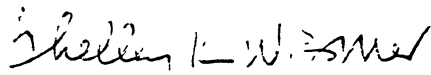
If you do not contest the Cease and Desist Order by requesting a hearing, the Cease and Desist Order will remain in effect.



You may represent yourself or you are entitled to be represented by legal counsel at all times while this action is pending. If you will be represented by legal counsel, your counsel should file an Entry of appearance with the Division no later than the date of your request for a hearing.

Sincerely,

DIVISION OF REAL ESTATE

A handwritten signature in cursive script, reading "Shelley K. Wismer".

Shelley K. Wismer  
STAFF LEGAL COUNSEL

96-09-05.na

BEFORE THE REAL ESTATE DIVISION OF THE STATE OF UTAH

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DIVISION OF REAL ESTATE OF  
THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH, BY  
AND THROUGH ITS DIRECTOR,  
TED BOYER,

Plaintiff,

vs.

MINERAL MOUNTAIN RANCHOS,  
MARKET WISE INVESTORS, INC.,  
CRESS FERRIERA, and JUNE FERRIERA,

Respondents.

ORDER TO CEASE

AND DESIST

CASE NO. RE96-09-05

---

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to investigation by the Utah Division of Real Estate of the Department of Commerce of the State of Utah and upon receipt of information therefrom, the Director of the Utah Division of Real Estate has reason to believe that the above-named Respondents have been, and are, engaging in acts constituting violation of the Utah Land Sales Practices Act, Utah Code Annotated Section 57-11-1, et seq. (1993), to wit: Selling lots in the Mineral Mountain Ranchos Subdivision in Beaver County, Utah which are not registered with the Division of Real Estate under the provisions of the Utah Land Sales Practices Act and which are not exempt from registration.

The Director concludes that such acts constitute a threat to the public welfare. It also appearing that it would be in the public interest to stop such acts, the following Order is issued pursuant to the provision of Utah Code Annotated Section 57-11-13 (1993) :



ORDER

IT IS HEREBY ORDERED that the above-named Respondents and any officers, agents, servants, employees and those persons in active concert or participation with Respondents who receive actual notice of this Order by personal service or otherwise; now,

CEASE AND DESIST from the acts of offering or selling subdivided lands in this State until such time as such interests are properly registered with the Division of Real Estate of the Department of Commerce of the State of Utah under the provisions of Utah Code Annotated Section 57-11-1, et seq. The acts prohibited include, but are not limited to, selling or offering for sale lots in the Mineral Mountain Ranchos Subdivision or any adjacent acreage.

Dated this 30<sup>th</sup> day of September, 1996.

UTAH DIVISION OF REAL ESTATE

  
TED BOYER, DIRECTOR

MAILING CERTIFICATE

I hereby certify that I have this day served the foregoing document upon Mineral Mountain Ranchos, Market Wise Investors, Inc. and Cress Ferriera by mailing a copy thereof, properly addressed, with postage prepaid, to Cress Ferriera, 615 North Lower Sacramento Rd., Lodi, CA 95242.

Dated this 30<sup>th</sup> day of September, 1996.

  
Signature

**BEFORE THE DIVISION OF REAL ESTATE  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

---

In the Matter of	:	<b>FINDINGS OF FACT</b>
<b>Mineral Mountain Ranchos,</b>	:	<b>CONCLUSIONS OF LAW</b>
<b>Market Wise Investors Inc.,</b>	:	<b>AND RECOMMENDED ORDER</b>
<b>Cress Ferriera and June Ferriera</b>	:	Case No. RE96-09-05

---

**Appearances:**

Blaine R. Ferguson for the Division of Real Estate

Cress Ferriera for Respondents

**By the Administrative Law Judge:**

A February 24, 1997 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce. Thereafter, evidence was offered and received.

The Administrative Law Judge, being fully advised in the premises, now enters his Findings of Facts, Conclusions of Law and submits the following Recommended Order to the Division for its review and action:

**FINDINGS OF FACT**

1. Respondent Cress Ferriera is the president of Market Wise Investors, Inc., a California corporation. Respondent June Ferriera is the secretary of that corporation. The Mineral Mountain Ranchos subdivision, consisting of 22 lots, is located in Beaver County, Utah.

2. The Beaver County Planning Commission reviewed the preliminary plat of the subdivision on April 20, 1983. The June 15, 1983 Beaver County Planning Commission minutes reflect Mr. Ferriera met with the Board on that date to obtain approval of the subdivision. Mr. Ferriera thus proposed to give .45 acre feet of water with each lot and further proposed that any subsequent purchaser of a lot would sign an agreement to thus acquire a total of .73 acre feet of water prior to building on the lot.

3. The Board recommended that Mr. Ferriera--as the subdivider--be required to furnish .73 acre feet of water for each lot and the size of the subdivision be reduced if there was insufficient water to supply that amount of water to each lot. The Planning Commission minutes further reflect Mr. Ferriera elected to resubmit a plat with 20 five acre parcels for subsequent review and approval by the Board.

4. The Beaver County Planning Commission reviewed the revised plat on July 6, 1983, which reflects 20 five acre parcels. The Commission accepted that plat as thus presented. The Beaver County Commission approved the proposed subdivision on July 7, 1983. Existing Beaver County ordinances regulating the platting and recording of subdivisions required that the subdivision plan reflect approval by the Planning Commission of "the quantity and feasibility of providing culinary water to the subdivision".

5. Chapters 2 and 3 of the just-referenced ordinances establish the requirements applicable to preliminary and final plats. Chapter 4-5(a) provides all subdivisions "shall have a supply of culinary water available to each lot in the subdivision." Subsection (b) also provides the quantity and method of distribution "shall be approved by the Commission." Subsection (c) further provides all buyers in the subdivision "shall be advised of specific points of connection or availability of water and the earliest time at which connection may be made or at what time water may be made available".

6. Respondents had submitted an April 1983 feasibility study to Beaver County regarding the Mineral Mountain Ranchos subdivision. The study recites that individual water wells "are anticipated as sources of supply for each lot". The study also references a statement from the Utah State Engineer "which discusses feasibility of obtaining ground water". The study also recites Respondent Cress Ferriera "plans to deed 0.45 acre-foot to each lot at the time they are purchased" as to "allow the drilling of a well with sufficient water rights for domestic purposes".

7. The feasibility study includes a March 7, 1983 letter from Gerald W. Stoker, area engineer for the State of Utah, Natural Resources and Energy Water Rights Division. The letter reflects Respondent Cress Ferriera has drilled one well on his property as to the proposed subdivision, but the Division of Water Rights "has not made a determination on the quality of the water developed". The letter further states it was anticipated "there would be

additional sites within the four section area mentioned that would have the potential for potable water but that opinion is speculative".

8. Respondent drilled a well on two lots in the subdivision during 1982 and 1983. Respondent drilled two more wells on different lots in the subdivision during 1993. Based on the substantial and credible evidence presented, the four existing wells have an aggregate pumping capacity sufficient to provide water to all lots in the subdivision. However, Respondents have not provided every lot with actual access to water available through existing wells on adjoining lots.

9. The Division and Respondents agree and acknowledge that lots in the Mineral Mountain Ranchos subdivision are not, and never have been, registered with the Division pursuant to the Utah Land Sales Practices Act. On or about November 17, 1995, Market Wise Investors Inc. conveyed--by warranty deed--three lots in the Mineral Mountain Ranchos subdivision to Douglas W. Parker, John C. Fry and Dale A. Fry, and Steven J. Scandell, respectively.

10. Based on the substantial and credible evidence presented, no prospective purchaser of a lot in the subdivision would necessarily be able to share a well with an adjoining lot owner. However, access to water in that manner would avoid the expenses of drilling a separate well on each lot. The above-described warranty deeds recite that no "warranty is expressed or implied as to water quality or quantity". The deeds further recite that the owner of any lot agrees "that any use of water from the existing well is entirely at their own risk".

11. The warranty deeds also provide Respondent Market Wise Investors, Inc. has reserved "the right to install and maintain additional pumping facilities in the well for their own exclusive use providing said pumping facilities do not curtail the availability of culinary water to owners of the aforementioned lots". Moreover, the just-described easement is given in lieu of "any and all obligations that might exist now or in the future" upon Respondents or their successors and assigns "in regards to providing water to any of the aforementioned lots".

12. The Division issued a September 30, 1996 Cease and Desist Order, whereby Respondents Mineral Mountain Ranchos, Market Wise Investors, Inc., Cress Ferriera and

June Ferriera were ordered to cease and desist from offering or selling lots in the Mineral Mountain Ranchos subdivision, any adjacent acreage or any other subdivided lands in Utah until such time as those lands are properly registered with the Division. The September 30, 1996 Order further recites the lots in question are not exempt from registration and that the Order was entered because the sale of unregistered lots constitutes a threat to the public welfare.

13. Respondent Cress Ferriera contacted this Court by telephone on October 11, 1996 and thus timely preserved Respondents' right to subsequently request a hearing to formally contest the September 30, 1996 Order. Respondents submitted an application to register the lands in question, which was received by the Division on October 28, 1996. The Division has neither granted nor denied that application. Notwithstanding the submission of that application, Respondents have notified the Division that Respondents believe the subdivision is exempt from registration.

### **CONCLUSIONS OF LAW**

Respondents assert the Mineral Mountain Ranchos subdivision is exempt from registration under the Utah Uniform Land Sales Practices Act. Specifically, Respondents contend §57-11-4(1)(f) of that Act creates an exemption from registration which is applicable in this proceeding.

The Division asserts no statutory exemption applies as to obviate the need for registration of the subdivision in question. Specifically, the Division urges Respondents have failed to provide satisfactory assurance of completion of the improvements for culinary water as to the lands under review. Accordingly, the Division contends none of those lands in question may be sold without being duly registered under the Act.

U.C.A. §57-11-5 provides:

Unless the subdivided lands or the transaction is exempt under §57-11-4, the following apply:

(1) No person may offer or dispose of any interest in subdivided lands located in this state prior to the time the subdivided lands are registered in accordance with this chapter . . . .

§57-11-4(1) provides the Utah Uniform Land Sales Practices Act does not apply to offers or dispositions of an interest in land:

.....  
(f) *if at the time of the offer or disposition the subdivider furnishes satisfactory assurance of completion of the improvements described in Subsections (ii) and (iii) and the interest lies within the boundaries of a first, second or third class city or county which:*

(i) *has a planning and zoning board utilizing or employing at least one professional planner;*

(ii) *enacts ordinances which require approval of planning, zoning, and plats, including the approval of plans for streets, culinary water, sanitary sewer, and flood control; and*

(iii) *in which the interest in land will have the improvements described in Subsection (ii) plus telephone and electricity . . .*

The Division and Respondent have stipulated that the Mineral Mountain Ranchos subdivision is located within the boundaries of Beaver County, that the county had a planning and zoning board utilizing or employing at least one professional planner, that the county had enacted ordinances requiring approval of planning, zoning and plats--which also included the approval of plans for culinary water--and that no dispute exists in this proceeding with respect to any improvements beyond those required as to culinary water.

The above-quoted statute was enacted in 1991 and necessarily governs as of the time an offer or disposition is made by a subdivider with respect to the lands in question. Respondent urges the prior version of §57-11-4(1)(f), effective when Beaver County approved the subdivision in 1983, is relevant and that statute--unlike the 1991 version--did not expressly require the subdivider to provide satisfactory assurance of completion of the improvements in question.

The prior version of §57-11-4(1) provided that registration requirements of the Utah Uniform Land Sales Practices Act did not apply to offers or dispositions of an interest in land:

(f) Which at the time of the offer or disposition lies within the boundaries of a first, second or third class city or a county, which city or county has a planning and zoning board utilizing or employing at least one professional planner, and which interest in land is subject to ordinances which require approval of planning and zoning and plats, including the approval of plans for streets, culinary water, sanitary sewer, and flood control, *and which requires satisfactory assurance of completion of all of those improvements, and which interest in land will have all of those improvements plus telephone and electricity . . .* (All emphasis herein added).

Concededly, the 1981 statute did not expressly impose a duty on the subdivider to provide satisfactory assurance of completion of all necessary improvements. Nevertheless, that statute clearly provides that the ordinances in question must require satisfactory assurance of completion of improvements. By necessary and reasonable implication, such assurance would be forthcoming from the subdivider.

Despite the foregoing, this Court finds and concludes there is no operative difference between the above-quoted versions of §57-11-4(1)(f). Specifically, the Court readily concludes both statutes required initial approval of plans for culinary water and that the subdivider would be required to provide satisfactory assurance of completion of those improvements at the time of any subsequent offer or disposition of an interest in the land in question. Clearly, the Beaver County Commission did not require Respondents to actually provide direct access to water on every lot prior to the approval of the subdivision in 1983. Moreover, the Commission merely required that a sufficient quantity of water be subsequently available to each lot owner and the Commission was necessarily satisfied that such a quantity existed when the subdivision was approved approximately fourteen years ago.

The critical issue is what constitutes "completion of the improvements" as to culinary water with respect to the subdivision under review. The mere fact that Respondents could convey some interest in water rights to a prospective lot purchaser or that any prospective purchaser could enter an agreement with the owner of an adjacent lot to share a well and thus realize actual access to culinary water on the land in question cannot be reasonably construed to constitute the completion of improvements, as that phrase is used in §57-11-4(1)(f).

Respondents may well have satisfied the Beaver County Commission as to the potential availability of water for the lands in question to thus prompt approval of the platted subdivision. However, §57-11-4(1)(f) requires a subsequent assurance by the subdivider of the completion of improvements as to culinary water when an offer or disposition of the interest in the land is made. Clearly, the improvements in question must necessarily consist of either the construction of a well on each lot to actually provide culinary water for that lot or the completion of a delivery system whereby water from an adjoining lot is available to the lot in question. Since Respondents concede water is not *actually* available *on* each lot in

the subdivision at the present time, the Court finds and concludes Respondents have not provided assurance of the completions of improvements as to culinary water to thus qualify for an exemption from registration under §57-11-4(1)(f).

The Division also urges Respondents must apply for an exemption under §57-11-4(3). That statute provides as follows:

(a) Notwithstanding the exemptions in Subsections (1) and (2), any person making an offer or disposition of an interest in land which is located in Utah shall apply to the Division for an exemption before the offer or disposition is made if:

(i) the person is representing, in connection with the offer or disposition, the availability of culinary water service to or on the subdivided land; and

(ii) the culinary water service is provided by a water corporation as defined in §54-2-1.

Respondents have generally represented to prospective purchasers that water is available in the subdivision. However, there is a lack of substantial and credible evidence that Respondents have represented that culinary water service is available to each lot in the subdivision. Significantly, no evidence was presented in this proceeding that any culinary water service is provided by any water corporation as defined in §54-2-1. Thus, §57-11-4(3)(a)(ii) does not apply and Respondents are not statutorily bound to file any request with the Division for an exemption under §57-11-4(3).

A procedural issue should also be addressed. During the February 24, 1997 hearing, Respondents asserted the September 30, 1996 Order was invalid as having been prematurely issued without the opportunity for a hearing or the submission of any information by Respondents to the Division as to possibly resolve any concerns prior to the issuance of the Order. The Court duly notes §57-11-13, which provides:

(1)(a) If the director has reason to believe that any person has been or is engaging in conduct violating this chapter . . . he shall issue and serve upon the person a cease and desist order and may also order the person to take such affirmative actions as the director determines will carry out the purposes of this chapter.

(b) The person served may request an adjudicative proceeding within ten days after receiving the order.

(c) The cease and desist order remains in effect pending the hearing.

(d) The division shall follow the procedures and requirements of Title 63,



Chapter 46b, Administrative Procedures Act, if the person served requests a hearing.

Significantly, §57-11-13(2) further provides:

(a) After the hearing the director may issue an order making the cease and desist order permanent if the director finds there has been a violation of this chapter.

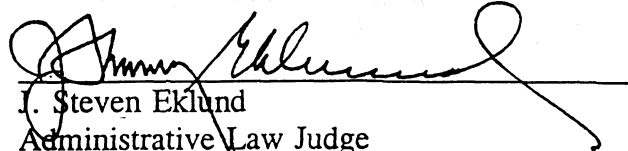
The just-quoted statute clearly authorizes the director to issue a cease and desist order prior to conducting any hearing on the issues which prompt the issuance of that order. As a corollary, the statute duly provides any person to whom a cease and desist order is directed may request a hearing to challenge the validity of that order. Given Respondents' belief that the lands in question are exempt from registration under the Act, they requested that a hearing be conducted in this proceeding. The hearing was timely conducted and Respondents were thus afforded all due process required by statute in that regard.

During the February 24, 1997 hearing, Respondents requested the opportunity to subsequently challenge the validity of the September 30, 1996 Order on the basis that the Order had been improperly issued without a prior hearing. The Court thus granted Respondents leave to raise that issue following the issuance of any order as to whether the lands under review are exempt from registration under the Act. This Court remains convinced that the September 30, 1996 Order was issued in full compliance with the procedural requirements mandated by §57-11-13. Nevertheless, the Court will address any request filed by Respondents to challenge the validity of that Order if Respondents file a written objection in that regard no later than thirty (30) days from the date the Recommended Order set forth below may be adopted by the Division.

#### **RECOMMENDED ORDER**

WHEREFORE, IT IS ORDERED the September 30, 1996 Order shall become permanent, effective the date this Recommended Order is adopted by the Division. Specifically, the Mineral Mountain Ranchos subdivision is not exempt from registration under Utah law. Accordingly, no offer of an interest in those lands or any disposition of an interest in those lands may be made until such time as the lands are duly registered with the Division.

I hereby certify the foregoing Findings of Fact, Conclusions of Law and Recommended Order were submitted to Ted Boyer, Director of the Division of Real Estate, on the 3<sup>rd</sup> day of June, 1997 for his review and action.

  
J. Steven Eklund  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed the foregoing Order and Findings of Fact, Conclusions of Law, and Recommended Order to:

Cress Ferriera  
615 N Lower Sacramento Rd.  
Lodi, CA 95242

and hand-delivered a copy to:

Blaine R. Ferguson  
Assistant Attorney General  
Consumer Rights Division  
160 East 300 South, 5th Floor  
Salt Lake City, Utah 84111.

Dated this 4th day of June, 1997.

Allyn Stutsman

**BEFORE THE DIVISION OF REAL ESTATE  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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In the Matter of	:	
Mineral Mountain Ranchos,	:	<b>ORDER</b>
Market Wise Investors Inc.,	:	Case No. RE96-09-05
Cress Ferriera and June Ferriera	:	

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The foregoing Findings of Fact, Conclusions of Law and Recommended Order are hereby adopted.

Dated this 4<sup>th</sup> day of June, 1997.

  
\_\_\_\_\_  
Ted Boyer, Director  
Division of Real Estate

Agency review of this order may be obtained by filing a request for agency review with the Executive Director, Department of Commerce within thirty (30) days after the date of this order. The laws and rules governing agency review are found in §63-46b-12 of the Utah Code and §R151-46b-12 of the Utah Administrative Code.

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**BEFORE THE**  
**DEPARTMENT OF COMMERCE**  
**OF THE STATE OF UTAH**

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IN THE MATTER OF THE REQUEST  
FOR AGENCY REVIEW OF  
**MINERAL MOUNTAIN RANCHOS,**  
**MARKET WISE INVESTORS, INC.,**  
**CRESS FERRIERA and**  
**JUNE FERRIERA**

:  
:  
:  
:

**ORDER ON REVIEW**

Case No. RE96-09-05

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**INTRODUCTION**

This matter comes before the Executive Director on the request of the Petitioners, Mineral Mountain Ranchos, Market Wise Investors, Inc., Cress Ferriera and June Ferriera (hereafter collectively referred to as "Petitioner"), for agency review of the Order heretofore entered by the Division of Real Estate (hereafter "Division").

**STATUTES OR RULES PERMITTING OR REQUIRING REVIEW**

Agency review of the Division's decision is conducted pursuant to Section 63-46b-12, Utah Code Annotated, and Rule R151-46b-12 of the Utah Administrative Code.

**ISSUES REVIEWED**

1. Whether Mineral Mountain Ranchos is exempt from registration under the *Uniform Land Sales Practices Act* (also referred to hereafter as "Act").

## FINDINGS OF FACT

1. On September 30, 1997 the Division issued an Order to Cease and Desist requiring Petitioner to cease and desist from the offer and sale of subdivided land in the State of Utah until properly registered with the Division pursuant to the *Uniform Land Sales Practices Act*. This order was signed for by Petitioner on October 4, 1996.
2. The Order to Cease and Desist was attached to a Notice of Formal Adjudicative Proceeding informing Petitioner of the right to contest the cease and desist order and request a hearing to be conducted as a formal adjudicative proceeding.
3. Petitioner filed a timely request for agency review arguing that Mineral Mountain Ranchos is exempt from the Act and that the Division's cease and desist procedure was violative of due process.

## CONCLUSIONS OF LAW

1. The cease and desist order which was entered against Petitioner in this matter on September 30, 1996 was entered under the provisions of UTAH CODE ANN. §57-11-13 which provides, *inter alia*:
  - (1) (a) If the director has reason to believe that any person has been or is engaging in conduct violating this chapter, or has violated any lawful order or rule of the division, he shall issue and serve upon the person a cease and desist order and may also order the person to take such affirmative actions the director determines will carry out the purposes of this chapter.
  - (b) The person served may request an adjudicative proceeding within ten days after receiving the order.
  - (c) The cease and desist order remains in effect pending the hearing.
  - (d) The division shall follow the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, if the person served requests a hearing.
2. The cease and desist order prohibited Petitioner from “. . . offering or selling subdivided lands in this State until such time as such interests are properly registered with the

Division . . . .”

3. The Executive Director is of the opinion that Petitioner’s arguments concerning the legitimacy of the Order to Cease and Desist are actually non-issues since the order would be of no force or effect if the subject property is exempt from registration under the Act by operation of law or, in the alternative, the property is determined to be entitled to exemption or becomes registered under the *Uniform Land Sales Practices Act*.

4. The applicable law governing the disposition of any interests in subdivided property in the State of Utah is the *Uniform Land Sales Practices Act* which provides in UTAH CODE ANN. §57-11-5, in part:

Unless the subdivided lands or the transaction is exempt under Section 57-11-4, all of the following apply:

(1) No person may offer or dispose of any interest in subdivided lands located in this state nor offer or dispose in this state of any interest in subdivided lands located outside of this state prior to the time the subdivided lands are registered in accordance with this chapter.

5. The threshold issue in this case is whether the subject property falls within the purview of the *Uniform Land Sales Practices Act*. UTAH CODE ANN. §57-11-4(1) provides that:

[u]nless the method of disposition is adopted for the purpose of evasion of this chapter or the federal act, this chapter does not apply to offers or dispositions of an interest in land:

. . .

(f) if at the time of the offer or disposition the subdivider furnishes satisfactory assurance of completion of the improvements described in Subsections (ii) and (iii) and the interest lies within the boundaries of a first, second, or third class city or a county which:

(i) has a planning and zoning board utilizing or employing at least one professional planner;

(ii) enacts ordinances that require approval of planning, zoning, and plats, including the approval of plans for streets, culinary water, sanitary sewer, and flood control; and

(iii) in which the interest in land will have the improvements described in Subsection (ii) plus telephone and electricity;

6. Property which is not automatically exempt as being outside of the auspices of the *Uniform Land Sales Practices Act* may seek exemption of a commercial subdivision under the provisions of §57-11-4(3):

(a) Notwithstanding the exemptions in Subsections (1) and (2), any person making an offer or disposition of an interest in land which is located in Utah shall apply to the division for an exemption before the offer or disposition is made if:

(i) the person is representing, in connection with the offer or disposition, the availability of culinary water service to or on the subdivided land; and

(ii) the culinary water service is provided by a water corporation as defined in Section 54-2-1.

(b) A subdivider seeking to qualify under this exemption shall file with the division an application for exemption together with a filing fee of \$50 and an application containing:

(i) information required by the division to show that the offer or disposition is exempt under the provisions of this section;

(ii) a statement as to what entity will be providing culinary water service and the nature of that entity; and

(iii) a copy of the entity's certificate of convenience and necessity issued by the Public Service Commission, or evidence that the entity providing water service is exempt from the jurisdiction of the Public Service Commission.

7. The first question is whether Mineral Mountain Ranchos falls outside of the provisions of the *Uniform Land Sales Practices Act*. If the Act does not apply to Petitioner then the Division was in error in attempting to force Petitioner to seek registration, and the decision in favor of the Division would have to be reversed and the order requiring registration would have to be dismissed and held for naught. However, the Executive Director does not reach the conclusion that Mineral Mountain Ranchos is entitled to exemption as being excluded from the Act..

8. The only real dispute in this matter between Petitioner and the Division revolves around the issue of culinary water at Mineral Mountain Ranchos and the furnishing of the same to the lots in the subdivision. The applicable exclusionary test set forth under the Act in UTAH CODE ANN. §57-11-4(1)(f) is that if, at the time of offer or disposition of the subdivided land, the



city or county in which the subdivision is located requires approval of plans for culinary water and the subdivider furnishes satisfactory assurance of completion of such culinary water improvements then the subdivision is excluded from the Act.

9. Petitioner argues that the 1981 version of the *Uniform Land Sales Practices Act* rather than the current enactment should apply to Mineral Mountain Ranchos since it was subdivided under the prior enactment of the law. The Executive Director has examined the current law and finds no language indicating that existing subdivisions were intended to be grandfathered under it and Petitioner offers no compelling argument to the point that the legislature intended to exclude from the Act unsold lots in existing subdivisions.

10. The subdivision ordinance in effect in Beaver County in 1983 when Mineral Mountain Ranchos was approved required that the proposed subdivision plan show the “[a]pproval of the planning commission approving the quantity and feasibility of **providing culinary water to the subdivision**” [§2-1-3(g)]. The ordinance further provided in §4-1-5 that:

- a. All subdivisions shall have a supply of **culinary water available** to each lot in the subdivision. . . .
- b. Quantity and method of distribution shall be approved by the Commission.
- c. All buyers in the subdivision shall be advised of specific points of connection or availability of water and the earliest time at which connection may be made or at what time water may be made available. . . . (Emphasis added).

11. The June 15 1983 minutes of the Beaver County Planning Commission reflect that Petitioner met with them seeking approval of Mineral Mountain Ranchos and proposed giving .45 acre feet of water with each lot. The commission rejected Petitioner’s proposal and required Petitioner “ . . . **to furnish** the .73 acrea (*sic*) ft. of water. It was recommended (*sic*) that if [Petitioner] did not have the Water **to supply** the whole Subdivision he should cut the Subdivision down in the amount of Parcels so he could **furnish** the water.” (Emphasis added). The planning commission voted to accept the subdivision “. . . with twenty, five acrea (*sic*) parcels with .73 acrea (*sic*) feet of water with each lot.” (Emphasis added).

12. The Mineral Mountain Ranchos plat shows that the plat was filed on July 8, 1983.

The plat contains the approval of the planning commission dated July 6, 1983. The record offers substantial evidence to support a finding that Petitioner obtained approval of the Mineral Mountain Ranchos by the planning commission based upon representations that culinary water would be provided by Petitioner at each lot in the subdivision although Petitioner would argue to the contrary. The Court of Appeals in *Albertsons v. Dept. Of Employment Sec.*, 854 P.2d 570 (Utah App. 1993) states the standard for resolving conflicting evidence on a record review:

We defer to the Board's assessment of conflicting evidence. We are in no position to second guess the detailed findings of the ALJ which were adopted by the Board. It is not our role to judge the relative credibility of witnesses. "In undertaking such a review, this court will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review." (Citation omitted). "It is the province of the Board, not appellate courts, to resolve conflicting evidence, and **where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.** (Emphasis added).

13. The record reflects that on June 13, 1996 Petitioner filed for record with the Beaver County Recorder an amendment to the subdivisions covenants and restrictions providing that Petitioner "... assumes no responsibility for quantity and quality of well water." This would be in direct contravention of the agreement made by Petitioner to obtain planning commission approval of the subdivision in which culinary water was to be furnished to the lots, and would further be violative of the county ordinance. Such an action belies Petitioner's stated reliance upon having been approved under the Beaver County ordinances. If the intent of such ordinances can so easily be vitiated by subdividers, such action establishes and reinforces the need for registration under the Act and oversight by the Division of compliance for the protection of the public.

14. Petitioner is mistaken in a number of his assertions regarding agency review. Agency review is a record review governed by the same standards and rules as those applicable to judicial appellate review. UTAH ADMIN R151-46b-12(7) establishes the standards of agency review as corresponding to those established by UTAH CODE ANN. §63-46b-16(4) which provide,

among other things, that “[t]he appellate court shall grant relief only if, on the basis of the agency’s record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following: . . . ” after which follows a specific shopping list of reasons why relief might be granted to the party appealing the adverse action. Among the grounds potentially applicable in this case are: that the agency acted beyond its statutory jurisdiction; that the agency erroneously interpreted or applied the law; that the decision is based upon findings not supported by any substantial evidence in the whole record.

15. Although the Executive Director is required by UTAH CODE ANN. §63-46b-16(4)(g) to review the “whole record” and the facts both supporting and detracting from the findings to determine whether the action of the Division is “supported by substantial evidence”, the burden and responsibility remains upon the party challenging the facts to marshal all of the supporting facts in favor of the decision and show that despite such facts the decision is not supported by substantial evidence. *First Nat’l Bank v. County Bd. of Equalization*, 799 P.2d 1163 (Utah 1990). The failure to so marshal the evidence permits the appellate court to accept the findings of fact made by the inferior tribunal as conclusive. *Crapo v. Industrial Comm’n et al.*, 922 P.2d 39 (Utah App. 1996).

16. The onerous burden undertaken by an appellant seeking to dispute the facts as found by the inferior tribunal is spelled out in *Oneida/SLIC v. Oneida Cold Storage & Whse., Inc.*, 872 P.2d 1051 (Utah App. 1994):

Utah appellate courts do not take trial courts’ factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court’s findings of fact, appellate counsel must play the devil’s advocate. “[Attorneys] must extricate [themselves] from the client’s shoes and fully assume the adversary’s position. In order to properly discharge the [marshaling] duty. . . , the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which **supports** the very findings the appellant resists.” (citations omitted). One appellants have established every pillar supporting their adversary’s position. they then “must ferret out a fatal flaw in the evidence” and show why those pillars fail to support the trial

court's findings. (citation omitted). They must show the trial court's findings are 'so lacking in support as to be "against the clear weight of the evidence," thus making them "clearly erroneous." (citations omitted).

17. Petitioner is likewise inadequately familiar with the law and rules governing agency review in asserting UTAH ADMIN. R151-46b-5(3) for the proposition that case law is not controlling authority over decisions made by the Executive Director. The statement made by the rule is that the *Utah Rules of Civil Procedure* and the case law discussing and interpreting such rules ("thereunder") are not controlling. The reason for this is that agency review is controlled by the *Utah Administrative Procedures Act* rather than the *Utah Rules of Civil Procedure* and the UCRP rules and interpretive case law are persuasive or advisory only.

18. Petitioner is correct in stating that UTAH CODE ANN. §63-46b-16(4) sets out the grounds upon which relief may be granted rather than being a standard of review. "[S]ection 64-46b-16(4) deals with judicial relief, not judicial review. It is clear from this language that this section does not affect the degree of deference an appellate court grants to an agency's decision." *Morton Int'l, Inc. v. Utah State Tax Comm'n*, 814 P.2d 581 (Utah 1991). The *Morton* case is also perhaps the best case explaining the three standards of review:

a. Findings of fact made by an agency are entitled to the greatest deference and will not be disturbed if supported by any substantial evidence;

b. An intermediate standard of review exists concerning the application of facts to the legal rules governing a case by an agency and grants some deference to the agency's experience and expertise in such determination with the test being that of reasonableness; and

c. A correction-of-error standard applies to an agency's interpretation of law or issues characterized as concerning general law, and the appellate court grants no deference whatsoever to the agency on such issues.

19. Although Petitioner seeks to argue with the findings of fact made by the Administrative Law Judge, Petitioner is not entitled to do so for failure to marshal the evidence. However there does not appear to be any dispute as to the ultimate fact: that Petitioner has at no

time been registered with the Division pursuant to the *Uniform Land Sales Practices Act*. The issue before the Executive Director is therefore narrowed to either the second or third standard of review in which either intermediate deference or no deference is to be granted to the decision rendered by the Division. The Executive Director is of the opinion that the determination in this review rests solely upon interpretation of the applicable law since the law either applies or does not apply to Petitioner and, if it applies, Petitioner is either exempt or not exempt from the *Uniform Land Sales Practices Act*.

20. Petitioner attempts to argue in his briefs that the term “culinary water” does not equate to “potable water”, a position which is not sustained by a search of Utah case law and references to water found elsewhere in the Utah Code Annotated of 1953. In such sources four types of water merit mention: culinary, domestic, irrigation and industrial. In the few instances where “potable” appears it is used in conjunction with “culinary” as a synonym. Therefore the Executive Director is of the opinion that “culinary water” as used in the applicable statutes and the Beaver County Subdivision Ordinance refers to water suitable for drinking.

21. Mineral Mountain Ranchos was approved as a subdivision in 1983 under the representation that Petitioner would “furnish” .73 acre feet of culinary water to each lot in the subdivision. The *Uniform Land Sales Practices Act* applies to subdivisions unless the subdivider provides satisfactory assurance of completion of culinary water improvements at the time the lots are offered or transferred. In this case Petitioner agreed to supply culinary water to the lots in 1983 but had not yet done so in 1996 and, according to the amended covenants, has no intention of so doing despite the assurances given to the planning commission in 1983 which resulted in the approval of the subdivision. The Executive Director is of the opinion and finds that Mineral Mountain Ranchos falls within the *Uniform Land Sales Practices Act* and is required to either be registered or be determined by the Division to be exempt from the registration requirements.

22. The exemption provisions of *Uniform Land Sales Practices Act*, UTAH CODE ANN. §57-11-4(3)(a), allows a subdivider to apply to the Division for an exemption before offering or disposing of property if a culinary water service provided by water system for public

service is represented as being available at the property. There is nothing whatsoever in the record to indicate any claim by Petitioner that culinary water offered by a water corporation is being represented as available to potential lot purchasers at Mineral Mountain Ranchos. The Executive Director is therefore of the opinion and finds Petitioner is not entitled to exemption from registration under the applicable provisions of the Act.

23. Since the subdivision known as Mineral Mountain Ranchos falls within the *Uniform Land Sales Practices Act* but is not exempt, Petitioner must therefore register the subdivision pursuant to UTAH CODE ANN. §57-11-5 prior to making an offer or disposition of any interest in the property comprising the subdivision.

24. Petitioner alleged at the hearing below an inability at that time to proceed forward upon Petitioner's claim of having been denied due process under the cease and desist procedures followed by the Division pursuant to UTAH CODE ANN. §57-11-13. At the time of the hearing below, Petitioner was afforded an additional thirty days within which to develop and present his arguments on this issue to the Administrative Law Judge. Petitioner failed to do so and by such failure waived his objections did not preserve a right to have the issue considered on appeal.

## ORDER


The Executive Director of the Department of Commerce is of the opinion and finds:

1. The subdivision known as Mineral Mountain Ranchos falls foursquare within the provisions of UTAH CODE ANN. §57-11-1 *et seq.*;
2. The subdivision known as Mineral Mountain Ranchos is not entitled to an exemption pursuant to UTAH CODE ANN. §57-11-4(3)(a); and
3. Petitioner is prohibited by the provisions of UTAH CODE ANN. §57-11-5 from offering or disposing of any interest in the subdivision known as Mineral Mountain Ranchos until such time as registration is granted by the Division or a temporary permit is issued to Petitioner by the Division.

And the Executive Director so finding, it is, therefore

**ORDERED** that the determination of the Division of Real Estate that the subdivision known as Mineral Mountain Ranchos must be registered is hereby affirmed and the order prohibiting Mineral Mountain Ranchos, Market Wise Investors, Inc., Cress Ferriera and June Ferriera from offering or disposing of any interest in the subdivision known as Mineral Mountain Ranchos is likewise affirmed in its entirety until such time as the subdivision is properly registered with the Division or a temporary permit is issued by the Division of Real Estate.

**SO ORDERED** this the 1<sup>st</sup> day of December, 1997.

  
\_\_\_\_\_  
DOUGLAS C. BORBA, Executive Director  
Utah Department of Commerce

### **NOTICE OF RIGHT TO APPEAL**

Judicial review of this Order may be obtained by filing a Petition for Review with the Court of Appeals within 30 days after the issuance of this Order on Review. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-16, Utah Code Annotated.

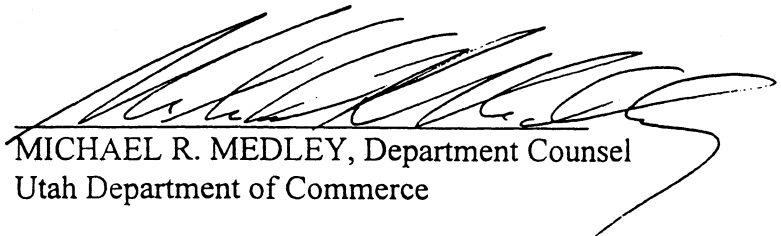
## CERTIFICATE OF MAILING

I certify that on the 15<sup>th</sup> day of December, 1997, the undersigned mailed a true and correct copy of the foregoing Order on Review by certified mail, properly addressed, postage prepaid, to:

Mineral Mountain Ranchos  
Market Wise Investors, Inc.  
Cress Ferriera  
June Ferriera  
615 N. Lower Sacramento Road  
Lodi CA 95242

and caused a copy to be hand-delivered to:

J. Craig Jackson, Director  
Division of Occupational and Professional Licensing  
160 East 300 South  
Salt Lake City, Utah 84111



MICHAEL R. MEDLEY, Department Counsel  
Utah Department of Commerce