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AND  
CONSUMER ADVOCATE

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January 17, 1980

Declaratory Ruling No. 2.605-8001 Litchfield-by-the-Sea, Inc.

LITCHFIELD-BY-THE-SEA, INC. IS NOT ENGAGED IN THE BUSINESS OF MAKING CONSUMER CREDIT TRANSACTIONS WHEN IT FINANCES SALES OF CONDOMINIUMS IT CONSTRUCTS AND SELLS, SECURED BY FIRST MORTGAGES ON THOSE CONDOMINIUMS, AND IS SUBJECT TO §2.605.

You have petitioned for a ruling on the question whether Litchfield-by-the-Sea, Inc. (hereinafter "Litchfield") is subject to maximum charge and other restrictions on consumer credit transactions imposed by the Consumer Protection Code in connection with its financing of sales of condominiums it constructs and sells.

According to your petition, Litchfield is a wholly-owned subsidiary of a real estate development corporation engaged solely in the business of real estate development. Litchfield was created to hold and develop a tract of land known as Litchfield by the Sea, located on the ocean in Georgetown County at Litchfield Beach. Litchfield's current and future activities are and will be limited to real estate development. Litchfield is involved in financing only as it relates to the condominiums it constructs and sells. Financing is considered a sales tool and the ability of Litchfield to finance sales of its own condominiums, which it has done at rates lower than those of some other financing sources available, is especially helpful in periods of tight money when the lack of alternative financing would materially adversely affect its sales.

Litchfield uses a "contract of sale" in connection with its condominium sales which gives the buyer the option of requesting financing from the company. If Litchfield finances the sale after the buyer makes such a request, the agreement containing the terms of financing entered into between the buyer and Litchfield is secured by a first mortgage on the condominium. It is assumed for purposes of this ruling that a condominium is an interest in land under the laws of South Carolina. This is consistent with the South Carolina Horizontal Property Act, S.C. Code Ann. §§27-31-10 through 27-31-300 (1976), and is evidenced by the master deed creating Heron Marsh Villas Horizontal Property Regime, a copy of which you submitted with your petition.

In connection with the financing of its condominium sales, Litchfield uses the services of a mortgage company which is a wholly-owned subsidiary

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758-7546

NOTIFICATION  
758-8587

CONSUMER ADVOCACY  
758-5864

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of a national bank. As Litchfield's agent, the mortgage company evaluates the credit applications of prospective purchasers and services the mortgages after financing has been arranged. According to the servicing agreement, funds for financing the sales are provided entirely by Litchfield while the mortgage company earns a monthly fee for servicing the mortgage transaction.

Consumer Protection Code Section 2.104 [S.C. Code Ann. §37-2-104 (1976 as amended)] defines "consumer credit sale." Subsection (2) of that section provides in part:

Unless the sale is made subject to this title by agreement (§37-2-601), "consumer credit sale" does not include ...

(b) a sale of an interest in land if the debt is primarily secured by a first lien which is a purchase money security interest in land. (Emphasis added)

The underlined language is non-uniform; that is, there is no similar language in either the 1968 or 1974 official text of the Uniform Consumer Credit Code on which the Consumer Protection Code is based.

"Purchase money security interest in land" is defined in Subsection (21) of Consumer Protection Code Section 1.301 [S.C. Code Ann. §37-1-301 (Cum. Supp. 1979)] as "a security interest ... taken or retained by the seller of the land to secure all or part of its price." That definition is also a non-uniform provision added to the South Carolina version of the Uniform Consumer Credit Code as a result of the non-uniform language in definition sections for both "consumer credit sale" (see §2.104(2) quoted above) and "consumer loan." (The non-uniform language appears in Subsection (2) of the "consumer loan" definition [Consumer Protection Code §3.104, S.C. Code Ann. §37-3-104 (Cum. Supp. 1979)], which has been suspended until June 30, 1981. Section 6 of Act 7 of 1979.)

It is the opinion of this Department that the financed transactions described in your petition are credit sales which are not "consumer credit sales" for purposes of the Consumer Protection Code because they appear to be bona fide sales of an interest in land primarily secured by a first lien which is a purchase money security interest in land. That is, although the transactions would meet the definition of "consumer credit sale" in Subsection (1) of Consumer Protection Code Section 2.104 when the condominiums are sold to individuals for personal, family, or household purposes, they are excluded by Subsection (2) of that same section.

Section 2.605 of the Consumer Protection Code [S.C. Code Ann. §37-2-605 (1976)] provides that "With respect to a sale other than a consumer credit sale, the parties may contract for the payment by the buyer of any credit service charge." Thus, in the circumstances outlined in your petition, it is our further opinion that these credit sale transactions are not subject to a ceiling on finance (credit service) charges, leaving the parties free to contract for any mutually agreeable rate of finance charge.

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We reach the conclusion that the described transactions are financed sales rather than loans because Litchfield (1) is in the business of selling these condominiums, (2) is in the business of financing only to the extent it relates to these sales, and (3) finances these sales with its own funds. In other words, Litchfield is a seller who also happens to finance some of its own sales. So long as this is the case, it appears to us that such transactions are bona fide sales.

We are well aware of the South Carolina Supreme Court decisions in Brown v. Crandall, 218 S.C. 124, 61 S.E.2d 761 (1950) and Davenport v. Unicapital Corp., 267 S.C. 691, 230 S.E.2d 905 (1976). Both cases concerned the concept of "bona fide sales" under the time price doctrine and were based on facts involving transactions entered into prior to the adoption of the Consumer Protection Code. In our opinion, finding these financed condominium sale transactions to be bona fide credit sales governed by Consumer Protection Code Section 2.605 is in harmony with pre-Consumer Protection Code decisional law. Both cases cited distinguished transactions which are set up with "the intention or purpose of defeating the usury laws" from those that are not. It is significant to note that the General Assembly has eliminated the ceiling on interest rates on certain first mortgage loans (Act 7 of 1979), amended or passed numerous other laws relating to loans (e.g., S.C. Code §§34-1-110, 34-31-30, 34-31-90, Act 220 of 1979), provided ceilings on finance charges for both consumer credit sales and consumer loans, as well as enacted Consumer Protection Code Section 2.605 relating to non-consumer credit sales since the transactions involved in those cases were entered into. Thus the concept of "usurious" transactions may be changing as the General Assembly enacts and amends laws relating to loans and financed sales.

Whether a transaction is a bona fide sale must be decided on a case-by-case basis, and of course, the final determination of what constitutes a bona fide sale for purposes of the Consumer Protection Code must be made by the Supreme Court.

A complicating factor in this case is that some of the documents provided with your petition refer to Litchfield, the seller, as a "lender" while in the contract of sale it is designated the "seller." In our opinion this transaction is in substance a sale notwithstanding references to the seller as a "lender" in certain documents. If, on the other hand, a third-party loan to finance the purchase of a condominium were being made rather than a financed sale of the condominium, the transaction would be subject to the Consumer Protection Code if it met the definition of "consumer loan" in Section 3.104 [S.C. Code Ann. §37-3-104 (Cum. Supp. 1979)] and was not excluded by Subsection (11) of Section 1.202 [S.C. Code Ann. §37-1-202 (Cum. Supp. 1979)]. Administrative Interpretations Numbered 3.104-7908 and 3.201-7909, issued May 10, 1979.

In summary, it is the opinion of this Department that the transactions described in your petition are credit sales of an interest in land which

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are not consumer credit transactions subject to the Consumer Protection Code's limitations because they are primarily secured by a first lien which is a purchase money security interest in land. Further, finance charges may be at a rate agreed to by the parties under the authority of Consumer Protection Code Section 2.605.

Irvin D. Parker  
Administrator

By *Kathleen Goodpasture Smith*  
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