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May 24, 2016

The Honorable Yvette Herrell
New Mexico State Representative
New Mexico House of Representatives
P.O. Box 4338
Alamogordo, NM 88311

Re: Opinion Request – Necessity of a Real Estate Broker’s License to Auction Real Estate

Dear Representative Herrell:

You have requested our opinion regarding the applicability of the licensing requirements contained in the Real Estate Brokers and Salesmen Act, NMSA 1978, Section 61-29-1 to -29 (1959, as amended through 2013) (hereinafter “the Act”) to persons conducting auctions of real property in New Mexico. Specifically, you have asked: (1) whether a person hired by a real estate owner to conduct a sale by auction of that real estate must hold a valid broker’s license issued by the New Mexico Real Estate Commission (“Commission”); (2) whether a person hired by a licensed broker to conduct an auction sale of real estate must hold a valid broker’s license issued by the Commission, and; (3) the applicability of 16.61.32.8 NMAC to advertisements of real estate auctions. Based on our examination of the relevant New Mexico statutes, case law, regulations and opinions, as well as on the information available to us at this time, we first conclude that a person hired by the owner of real estate to auction that real estate must hold a broker’s license. Second, we conclude that a person hired by and working under the direction of a New Mexico-licensed real estate broker to auction real estate in New Mexico must hold a broker’s license. Finally, we conclude that the Commission’s regulation governing advertisements, 16.61.32.8 NMAC, applies to advertisements of real estate auctions to the same extent it applies to other real estate sales and services performed by licensed brokers.

Requirement of Licensure of Associate Brokers and Qualifying Brokers under the Act

The very first section of the Act provides that “[i]t is unlawful for a person to engage in the business or act in the capacity of real estate associate broker or qualifying broker within New Mexico without a license issued by the [C]ommission.” NMSA 1978, § 61-29-1. In order to

determine if a person is engaging in the business or acting in the capacity of an associate broker or qualified broker, we must look to the definition of those two terms provided in the Act. *See* Section 61-29-2(A)(3), (11). The Act provides that “associate broker” means:

[A] person who, for compensation or other valuable consideration, is associated with or engaged under contract by a qualifying broker to carry on the qualifying broker's business as a whole or partial vocation, and:

(a) lists, sells or offers to sell real estate; buys or offers to buy real estate; or negotiates the purchase, sale or exchange of real estate or options on real estate;

(b) is engaged in managing property for others;

(c) *leases, rents or auctions or offers to lease, rent or auction real estate;*

(d) advertises or makes any representation as being engaged in the business of buying, selling, exchanging, renting, leasing, auctioning or dealing with options on real estate for others as a whole or partial vocation; or

(e) engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract under which the qualifying broker undertakes primarily to promote the sale of real estate through its listing in a publication issued primarily for that purpose or for the purpose of referral of information concerning real estate to other qualifying brokers or associate brokers.

Section 61-29-2(A)(3) (emphasis added).

In corresponding fashion, the Act defines “qualifying broker” to mean:

[A] licensed real estate broker who has qualified a proprietorship, corporation, partnership or association to do business as a real estate brokerage in the state of New Mexico, who discharges the responsibilities specific to a qualifying broker as defined by the commission and who for compensation or other consideration from another:

(a) lists, sells or offers to sell real estate; buys or offers to buy real estate; or negotiates the purchase, sale or exchange of real estate or options on real estate;

(b) is engaged in managing property for others;

(c) *leases, rents or auctions or offers to lease, rent or auction real estate;*

(d) advertises or makes any representation as being engaged in the business of buying, selling, exchanging, renting, leasing, auctioning or dealing with options on real estate for others as a whole or partial vocation; or

(e) engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract under which the qualifying broker undertakes primarily to promote the sale of real estate through its listing in

a publication issued primarily for that purpose or for the purpose of referral of information concerning real estate to other qualifying brokers or associate brokers.

Section 61-29-2(A)(11) (emphasis added).

Both definitions enumerate specific real estate-related conduct or activities that, when performed for another and for compensation, bring a person within the definition of associate or qualified broker for purposes of the Act. Significantly, both definitions specifically identify auctions or the offer to auction real estate as conduct that brings one within these definitions. *See* Section 61-29-2(A)(3)(c), (A)(11)(c). In addition, both definitions reference the advertising of real estate auctions. *See* Section 61-29-2(A)(3)(d), (11)(d).

Accordingly, we interpret Sections 61-29-1 and -2 to express the legislature's intent that persons not otherwise exempt from the Act¹ who auction or offer for auction the real estate of another for compensation are acting as associate or qualifying brokers and must possess a broker's license issued by the Commission. We also conclude that the requirement for licensure under the Act applies regardless of whether the auctioneer is hired by the owner of the property to be auctioned, or by a licensed broker assisting the owner in the sale of the property.

While we find no New Mexico cases that directly address the question of the applicability of the Act to persons who auction or offer to auction the real estate of others for a fee, our conclusion is consistent with judicial interpretations of the Act and prior Attorney General Opinions. The Court of Appeals, interpreting an earlier version of the Act, has recognized generally that "[a] real estate broker's or salesperson's license is required for a variety of activities, including buying, selling, exchanging, renting, leasing, auctioning, or dealing with options in real estate." *Garcia v. New Mexico Real Estate Comm'n*, 1989-NMCA-034, ¶ 7, 108 N.M. 591. The rationale for such a requirement has been clearly stated by the New Mexico Supreme Court:

The Legislature intends to protect the public by requiring the New Mexico Real Estate Commission to evaluate the competence and moral character of persons in the real estate business through licensing and examination requirements. The Legislature ensures the furtherance of its purposes by prohibiting unlicensed persons acting as real estate brokers from maintaining an action to recover a commission.

Watts v. Andrews, 1982-NMSC-080, ¶ 11; 98 N.M. 404, 407 (internal citations omitted).

¹ The Act contains express exemptions, which, if applicable, operate to negate a requirement for licensure for certain real estate transactions, including auctions. *See, e.g.*, Section 61-29-2(C)(5) (attorneys acting in the performance of their duties as an attorney); Section 61-29-2(C)(6) (persons acting in their capacity as a receiver, bankruptcy trustee, or estate executor); Section 61-29-2(C)(7) (salaried government employees acting within the scope of their employment).

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Courts in other jurisdictions, ruling in the context of their states' real estate broker licensing statutes, have generally found the auctioning of real estate to require a broker's license, unless expressly exempted by statute. *See, e.g., Younkin v. Bureau of Prof'l & Occupational Affairs, State Real Estate Comm'n*, 774 A.2d 1281, 1284-85 (Pa. Commw. Ct. 2001) (noting the Pennsylvania statute's recognition of an overlap between the work of a broker and an auctioneer in the profession of selling real estate); *Adair v. Alabama Real Estate Comm'n*, 53 Ala. App. 621, 624, 303 So. 2d 119, 122 (Civ. App. 1974) (holding only licensed real estate brokers could auction real property).

Commission Rule Governing Advertisements Applies to Advertisements of Real Estate Auctions

The Commission has adopted a rule governing real estate advertising. *See* 16.61.32.8 NMAC. This rule requires that all real estate advertising "be a true and factual representation of the property and real estate services being advertised. . . ." 16.61.32.8(A) NMAC. The rule also requires qualified brokers and associate brokers advertising real property of others for sale to include in such advertisements the trade name and current brokerage office phone number. 16.61.32.8(B) and (C) NMAC. Given our conclusion stated above that, unless exempt from the Act, auctioning or offering for auction the real estate of another for compensation is a real estate service that requires a broker's license, it follows that advertisements regarding the sale of real estate by auction come under this rule.

In sum, it is our opinion that a person who auctions or offers for auction the real estate of another person for compensation is acting as associate or qualifying broker under the Act and must possess a broker's license issued by the Commission, regardless of whether the auctioneer is hired by the seller or by a licensed broker. It is also our opinion that because 16.61.32.8 NMAC applies to advertisements by associate brokers and qualifying brokers for the sale of real estate, it necessarily applies to advertisements by persons who auction the real property of others in New Mexico.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



Richard B. Word
Assistant Attorney General