

You Can't Broker Your Way Out of This One

Real Estate Broker Licensing Requirements in Modern Housing Administrations

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Public housing authorities (“PHAs”) are in the business of property management. Among other things, PHA staff members negotiate tenant leases and manage the numerous day-to-day operational issues that arise in modern housing developments. Given that PHAs are created for the express purpose of providing and managing affordable housing opportunities, it is easy to understand why PHAs might assume they are entitled to engage in these activities simply by virtue of the public purposes they serve. In Pennsylvania, as in many states, it isn't quite that easy. In some instances a Pennsylvania real estate broker's license is required in order to manage rental property – even for PHAs.

Thankfully, there are exemptions to Pennsylvania's licensing requirements that often allow PHA staff to avoid obtaining broker licenses. However, in modern transactions where PHAs frequently engage in mixed-finance, low-income housing tax credit and other creative public/private partnerships, it is no longer safe to assume that broker licensing requirements simply do not apply. Penalties for non-compliance are stiff – a violator can receive a criminal penalty of up to \$500 or imprisonment for up to three months (or both) for a first offense, and for second or subsequent offenses fines of up to \$5,000 and imprisonment for up to two years (or both) are authorized. Additionally, Pennsylvania's State Real Estate Commission can levy a civil penalty of up to \$1,000 against those who violate the licensing requirements. So getting it wrong clearly can be costly, but when exactly are PHA staff required to be licensed?

Pennsylvania's Real Estate Licensing and Registration Act, 63 P.S. §§ 455.101 et seq. (the “Act”), provides that “[i]t shall be unlawful for any person, directly or indirectly, to [act] in the capacity of a broker . . . [or] rental listing referral agent . . . within this Commonwealth without first being licensed or registered as provided in this [A]ct, unless he is exempted from obtaining a license or registration certificate under the provisions of section 304.” 63 P.S. § 455.301. Under the Act a “broker” is defined as any individual or entity who, among other things, negotiates real estate leases or manages real estate “for another and for a fee, commission or other valuable consideration”. 63 P.S. § 455.201.

Additionally, the Act defines a “rental listing referral agent” as “[a]ny person who owns or manages a business which collects rental information for the purpose of referring prospective tenants to rental units or locations of such units [excluding] . . . any employee or official of any public housing authority created pursuant to State or Federal law.” The express carveout for PHAs in the latter definition is quite comforting, but the absence of such a reference in the very broad definition of “broker” should be cause for alarm.

That is where the exemptions from the Act under Section 455.304 come in. Section 455.304 provides that a broker license is not required for, among other things:

“(1) An owner of real estate with respect to property owned or leased by such owner. In the case of a partnership or corporation, this exclusion shall not extend to more than five of its partners or officers, respectively, nor to other partnership or corporation personnel or employees.”

or

“(10) Any person employed by an owner of real estate for the purpose of managing or maintaining multifamily residential property: [p]rovided, however, [t]hat such person is not authorized or empowered by such owner to enter into leases on behalf of the owner, to negotiate terms or conditions of occupancy with current or prospective tenants or to hold money belonging to tenants other than on behalf of the owner. So long as the owner retains the authority to make all such decisions, the employees may show apartments and provide information on rental amounts, building rules and regulations and leasing determinations.”

So what does this all mean for the typical PHA? The owner's exemption under Section 455.304(1) of the Act clearly allows a PHA to manage housing units in developments that are owned by that PHA without a broker's license. For many PHAs, that is the extent of their housing portfolio anyway and so those PHAs rightly may not worry about broker licensing issues. For other PHAs – particularly those engaged in mixed finance, low-income housing tax credit or similar transactions – the ownership structures in such deals often create situations in which the PHA is managing

a development that is owned by a legally-distinct limited partnership, limited liability company or other ownership entity. While a PHA could try to stay within the parameters of the multifamily housing exemption afforded under Section 455.304(10) of the Act, that exemption relies on much of the management function being retained by the property owner and for that reason it is often unworkable in practice. In that instance, PHA staff would be required to obtain the requisite broker's license on behalf of the PHA to ensure compliance with the Act. Lastly, if a PHA outsources property management functions covered under the Act to a third party, the PHA should require evidence of the third party's licensure in order to protect the PHA from potential legal, audit and public relations issues associated with using unlicensed service providers.

States are often looking for novel ways in which to raise funds and to appear more vigilant in their enforcement efforts, and the Commonwealth of Pennsylvania is no different. As PHAs and the housing industry evolve toward more

modern and complex housing partnerships and transactions – and as state coffers remain low – you can expect more attention to be given by regulatory authorities to real estate broker licensing issues and associated fines. It is safe to assume that the unlicensed and unwary will find it difficult to broker themselves out of situations in which violations of the Act are alleged.

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