047

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case Number: 72,763
Fourth District No. 4-86-2663

SAMARA DEVELOPMENT CORPORATION,

Petitioner,

vs.

RICHARD MARLOW and MIDATLANTIC NATIONAL BANK AND TRUST COMPANY,

Respondents.

AUG 17 1988
CLERK, SUPREME COURT
By ____ Deputy Clerk

DISCRETIONARY REVIEW OF THE CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL

INITIAL BRIEF FOR PETITIONER

Sherr, Tiballi, Fayne & Schneider
Attorney for Petitioner
600 Corporate Drive
Suite 400
Post Office Box 9208
Fort Lauderdale, FL 33310
(305) 776-1680

By: Kathy Kaplan
Kathy Kaplan, Esquire
FLA BAR NO: 0507751
8/16/88

TABLE OF CONTENTS

Pase

TABLEOFCONTENTS. i

TABLE OF CITATIONS . . . . .ii, iii

PRELIMINARY STATEMENT . . . . .iv, v

STATEMENT OF THE CASE AND FACTS 1-5

SUMMARY OF THE ARGUMENT 6-8

ARGUMENT.. 9-28

I. ACCORDING TO HUD'S INTERPRETATION OF 15 U.S.C. §1702(a) (2) (1982), WHICH INTERPRETATION IS ENTITLED TO GREAT WEIGHT BY THIS COURT, A DEVELOPER IS EXEMPT FROM THE REQUIREMENTS OF ILSA IF THE CONTRACT PROVIDES FOR COMPLETION WITHIN TWO (2) YEARS AND THE BUYER IS AFFORDED THE REMEDY OF SPECIFIC PERFORMANCE IN THE EVENT OF THE DEVELOPER'S BREACH 9

11. IN LIGHT OF HUD'S INTERPRETATION OF THE EXEMPTION PROVISION CONTAINED IN 15 U.S.C. §1702(a)(2) (1982), THE SUPREME COURT OF FLORIDA SHOULD REVISIT BERZON AND THE CASES CITED BY THE FOURTH DISTRICT COURT OF APPEAL IN ITS OPINION IN THE INSTANT CASE BECAUSE THE HOLDINGS IN BERZON AND THE INSTANT CASE ARE NOT SOUND AND SHOULD BEREVERSED. 18

A. The Berzon decision and that of the Fourth District Court of Appeal in the instant case are in conflict with HUD's interpretation of 15 US.C. §1702(a)(2) and rely on dicta from cases in which HUD's interpretations were also not addressed. 19

B. Public policy dictates that the public must have the ability to rely on interpretations made by a federal administrative agency charged with enforcement of a federal statute. . . . 25

CONCLUSION. 29

CERTIFICATE OF SERVICE 30

TABLE OF CITATIONS

Cases Page

Appalachian, Inc. v. Olson, 468 So.2d 266 (Fla. 2d DCA 1985) 19

Beckwith v. Board of Public Instruction of Dade County, 247 So.2d 508, 510 (Fla. 3d DCA 1971) 17

Berzon vs. Oriole Homes Corporation, 497 So.2d 670 (Fla. 4th DCA 1986) 7,18

Chemical Mfrs. Ass'n v. National Resources Defense Council, **Inc.** 470 U.S. 116, 126, 105 Sup.Ct. 1102, 1107, 84 L.Ed. 2d 90,(1985) 11

Daniel v. Florida State Turnpike Authority, 213 So.2d 585, 587 (Fla. 1968) 10

Dorchester Development, Inc. vs. Burk, 439 So.2d 1032 (Fla. 3rd DCA 1983) 16,19

Fleetwood Enterprises, Inc. v. U.S. Dept. of Housing and Urban Development, 818 F.2d 1188, 1194 (5th Cir. 1987) 11

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-567, 100 S.Ct. 790, 796-97, 63 L.Ed. 2d 22, __ (1980) 11

King v. Seaman, 59 So.2d 859, 861 (Fla. 1962) 10

Marco Bay v. Vandewalle, 472 So.2d 472 (Fla. 2d DCA 1985) . . 23

Miller v. Youakim, 444 U.S. 125, 144, 909 S.Ct. 957, 968-69, 59 L.Ed.2d 194, __ (1979) 11

Mosher v. Southridge Associates, Inc., 522 F. Supp. 1226 (W.D. Penn. 1982) 21

Radio Telephone Communications, Inc. v. Southeastern Telegraph Company 170 So.2d 577, 582 (Fla. 1964) 10

Schatz v. Jockey Club, Phase 111, Ltd., 604 F.Supp. 537 (S.D. Fla. 1985) 23

Cases (Cont.) Page

United Neighbors Civic Ass'n of Jamaica, Inc. v. Pierce, 563 F.Supp. 200, 205 (E.D.N.Y. 1983) 11

Winter v. Hollingsworth Properties, Inc., 587 F.Supp. 1289 (S.D. Fla. 1984), rev'd, 777 F.2d 1444 (11th Cir. 1985). .11

Statutes

15 U.S.C. §1702(a)(2) 1,3,9,18,22

15 U.S.C. §1715 9,25

Other Authority

24 CFR §1710.5(b) 6,9

24 CFR 51710.17 10,25

44 Fed. Reg. 24,010 (1979) 10,12,13

49 Fed. Reg. 31, 375 (1984). 10,16,22

U.S. Dept. of Housing and Urban Development Buying Lots From Developers, 3,11 (1982) 9

Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 44 Fed. Reg. 24,010 (1979). 10,12,13

Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 49 Fed. Reg. 31,375 (1984) 10,16,22

HUD Advisory Opinion Letters 9,13,14,15,16

PRELIMINARY STATEMENT

In this Brief, R. shall refer to the record on appeal. A. shall refer to this Brief's Appendix. SAMARA, a Florida real estate developer, shall refer to the petitioner. MARLOW, a natural person who entered into a contract for the sale of a condominium unit with SAMARA, shall refer to the respondent. Midlantic National Bank and Trust Company is a respondent to this brief because it was a party to the instant lawsuit and the appeal. However, this party, the escrow holder, is not addressed in this Brief in that it stipulated in the trial court to be bound by any binding decision and further chose not to actively participate further in this lawsuit. ILSA or the ACT shall refer to the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 51701, et. seq, (1982). HUD shall refer to the Department of Housing and Urban Development, the agency to which Congress, at 15 U.S.C. 51715, (1982) specifically delegated the authority and responsibility for administrating ILSA. OILSR shall refer to the Office of Interstate Land Sales Regulation, an office of HUD. The 1979 HUD Guidelines shall refer to Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 44 Fed. Reg. 24,010 (1979), effective June 11, 1979. These Guidelines, in pertinent part, address HUD's regulations contained at 24 C.F.R. 51710. 5(b) (1987) which describe the breadth, scope and requirements of 15 U.S.C. §1702(a)(2) (1982). The 1984 HUD Guidelines shall refer to Guidelines for Exemptions Available

Under the Interstate Land Sales Full Disclosure Act, 49 Fed. Reg. 31,375 (1984) which, in pertinent part, also address 15 U.S.C. §1702(a)(2) (1982). Finally, Advisory Opinion(s) shall refer to opinion letters issued by HUD regarding 15 U.S.C. §1702(a)(2) (1982) pursuant to the authority contained within 24 C.F.R. §1710.17 (1987).

STATEMENT OF THE CASE AND FACTS

This cause comes before the Supreme Court of Florida upon a Notice to Invoke the discretionary jurisdiction of the Court following an appellate decision rendered by the Fourth District Court of Appeal which certified the following question as one of great public importance:

> IS A CONTRACT FOR THE SALE OF A CONDOMINIUM IN FLORIDA EXEMPT FROM THE PROVISIONS OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT, 15 USC §1701, WHERE IT PROVIDES FOR COMPLETION WITHIN TWO YEARS BUT RESTRICTS THE BUYER'S REMEDIES FOR BREACH OF THE CONTRACT BY THE SELLERS TO A RETURN OF THE DEPOSIT OR SPECIFIC PERFORMANCE, OR MUST THE CONTRACT ALSO AFFORD THE BUYER THE ALTERNATIVE REMEDY OF A SUIT FOR DAMAGES?

(A. 1-8).

Based upon the doctrine of stare decisis, the Fourth District Court of Appeal found that while SAMARA's position that it is exempt from ILSA in that its contract provides the remedy of specific performance in the event of a breach of its two (2) year construction obligation is contrary to the Fourth District Court of Appeal's ruling in a prior case. Nonetheless, the question was certified due to a recognition by the Fourth District Court of Appeal a conflict exists between the holding in its prior case regarding the interpretation of Section 1702(a)(2) of ILSA, a federal statute, and the interpretation contained in the 1979 through 1982 administrative guidelines and opinion letters issued by HUD, the federal agency empowered by Congress to administer ILSA. Because pursuant to Florida law,

the interpretations given by HUD are entitled to great weight and are not to be departed from unless clearly erroneous, and this issue was raised but not addressed in the opinion in the prior case, the Fourth District Court of Appeal certified the question.

MARLOW is the Plaintiff in a Complaint filed in the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case No. 85-4985 CA (L) H. (R. 1-15). MARLOW filed an Amended Complaint and a Second Amended Complaint wherein SAMARA and MIDLANTIC NATIONAL BANK AND TRUST COMPANY were named as Defendants together with SUN BANK/PALM BEACH COUNTY, N.A. (R. 16-32, 68-35). SUN BANK/PALM BEACH COUNTY, N.A. was later dropped as a Defendant pursuant to stipulation. (R. 195-196). SAMARA filed a counterclaim which was subsequently Amended. (R. 37-67 and 86).

SAMARA and MARLOW entered into a Condominium Purchase Agreement on or about November 22, 1983 for the Purchase and Sale of a Condominium Unit at La Mirada at Boca Pointe, a Condominium developed by SAMARA in Boca Raton, Palm Beach County, Florida. (R. 210-212). A copy of the Condominium Purchase Agreement is attached to MARLOW's Complaint, Amended Complaint, Second Amended Complaint and SAMARA's Counterclaim. (R. 1-15, 16-32, 37-67 and 68-85). MARLOW paid to SAMARA a deposit in the amount of TEN THOUSAND NINE HUNDRED FORTY ($10,940.00) DOLLARS for the purchase of the Condominium Unit. (R. 68-85, 210-212). MARLOW alleged in Count II that because SAMARA was in violation of ILSA, MARLOW was entitled to rescission of the contract as well as

other remedies for violating ILSA as contained within Section 1709 of the ACT. (R. 1-15, 16-32, 68-85, 87-89, 158, 243-248). SAMARA maintained it was exempt from the requirements of ILSA pursuant to Section 1702(a)(2) of the ACT. (R. 33, 37-67, 86, 156-157, 193-194).

The trial court originally determined in its Order on SAMARA's Motion to Dismiss Count II of the Second Amended Complaint that SAMARA did not qualify for an exemption from ILSA pursuant to 15 U.S.C. **§1702(a)(2).** (R. 97-98). SAMARA filed a Motion for Reconsideration with accompanying affidavits and authority, which Motion was denied. (R. 100-122, 125-151, 154-155). MARLOW filed a Motion for Judgment on the Pleadings. The trial court below stated in the Order on MARLOW's Motion for Judgment on the pleadings that it may have been incorrect in ruling on SAMARA's Motion to Dismiss (R. 197). Both SAMARA and MARLOW each filed a Motion for Summary Judgment as to Count II of MARLOW's Second Amended Complaint based solely upon the question of whether **SAMARA** was exempt.

The Order on Motions for Summary Judgment denied MARLOW's Motion for Summary Judgment on Count II of MARLOW's Second Amended Complaint and granted that SAMARA's Motion for Summary Judgment on Count II of MARLOW's Second Amended Complaint based upon a finding that SAMARA was exempt from ILSA pursuant to Section 1702(a)(2) of the ACT because its contract with MARLOW obligated **SAMARA** to complete construction within two (2) years and allowed MARLOW to seek the return of his deposit or specific

performance in the event of **SAMARA's** breach. (R. **222-225).** MARLOW filed a Motion for Rehearing which was denied. (R. **226-231).** **MARLOW** filed a timely Notice of Appeal which was subsequently amended (R. **240, 242).**

The issue on appeal was, once again, whether SAMARA was exempt from the requirements of the Interstate Land Sales Full Disclosure Act **(15** U.S.C. **§1701, _et seq_)** pursuant to 15 U.S.C. **§1702**(a)**(2).** On appeal, the Fourth District Court of Appeal found the instant case controlled by precedent announced in a prior case which held that in order to qualify for the 1702(a)(2) exemption, the Contract for Sale must obligate the Seller to complete construction within a period of two **(2)** years and allow the Purchaser to seek specific performance **_and_** damages in the event of a breach. Because the contract in the instant case allows the purchaser to seek specific performance but not damages, the Fourth District Court of Appeal found based upon the doctrine of stare decisis, that SAMARA was not exempt from the requirements of ILSA. (A. **1-6).**

SAMARA, claiming the exemption pursuant to Section **1702**(a)**(2),** relied on administrative guidelines and opinions issued from 1979 through **1982** by **HUD,** the agency empowered to enforce ILSA, which unequivocally state that a developer is exempt under that Section if the Contract obligates the developer to complete the unit within two **(2)** years of the contract and allows the Purchaser specific performance in the event of a breach. The administrative guidelines and opinions were raised

in the briefs in the prior case but were not addressed in the opinion of the prior case. Because SAMARA's contract provides the remedy of specific performance but disallows a claim for damages, and in light of the great weight to be afforded HUD's interpretations pursuant to Florida law, the Fourth District Court of Appeal followed the precedent established in its prior case but certified the instant question as one of great public importance.

The opinion by the Fourth District Court of Appeal in the instant case was rendered on June 15, 1988 and provided that the decision was not final until the time expired to file a Rehearing Motion and, if filed, disposed of. (A. 1). Subsequently, MARLOW filed a Motion for Rehearing or Clarification. Because a Motion for Rehearing tolls the finality of the Judgment Rendered but a Motion for Clarification does not, SAMARA filed its Notice to Invoke the discretionary jurisdiction of this Court on July 15, 1988 to protect against the consequences which would result if the Fourth District Court of Appeal deemed the Motion as one for clarification only. Pursuant to MARLOW's Motion for Rehearing on Clarification, the Order on Appeal was subsequently amended. (A. 7).

SUMMARY OF ARGUMENT

Section 1702(a)(2) of **ILSA** provides for an exemption from the requirements of **ILSA** for the sale of land under a contract obligating the Seller to erect a building thereon within a period of two (2) years. **HUD**, the federal agency charged by Congress with the administration of **ILSA**, and pursuant to the authority given it by Congress, promulgated a regulation regarding Section 1702(a)(2) which appears at **24** C.F.R. §1710, 5(b) (1988). Since 1979 HUD has also issued Guidelines regarding this exemption which developers and practitioners have relied on in order to take advantage of this exemption provision. HUD has interpreted the exemption provision of Section 1702(a)(2) to require a contract which contains a contractual obligation to complete the building within two (2) years and, in the event of a breach of this obligation, the remedy of specific performance to the purchaser. To be contractually obligated to build within two (2) years, and therefore exempt from **ILSA**, has never been interpreted by HUD to require the developer to also afford a purchaser the remedy of damages in the event of a breach.

Florida and Federal law provide that the rules and regulations of an administrative agency made under power conferred by statute have the force and effect of the statute, if they are within the scope and intent of authority conferred, and if they are reasonable and just and in accordance with applicable organic provisions and limitations. The courts are to

afford great deference to the interpretations of a federal statute by the agency charged with administration of the statute, and, if its interpretation is reasonable, it should be upheld even if the agency's interpretation is not the only reasonable one or even the one the court would have reached had it decided the question initially.

The regulations, advisory opinions and Guidelines issued by HUD over the course of nine (9) years clearly provide that HUD's interpretation of Section 1702(a)(2) is that a developer is exempt from the ACT when the developer is contractually obligated to complete within two (2) years and affords the Purchaser the remedy of specific performance in the event of a breach. These regulations, advisory opinions and Guidelines are within the scope and intent of the authority conferred on HUD by Congress, and they are reasonable and just and in accordance with applicable organic provisions and limitations and therefore should be controlling.

No Florida cases dealing with this exemption have ever addressed HUD's interpretation of this exemption in their decisions. Moreover, Florida law, as expressed in Berzon v. Oriole Homes Corp. 497 So.2d 670 (Fla. 4th DCA 1986), is in direct conflict with the interpretations given Section 1702(a)(2) by HUD. Berzon provides that a developer may not claim an exemption under the ACT when damages for violation of a two (2) year construction provision are limited to the return of the deposit or specific performance. According to Berzon, the remedy

of damages for breach of contract must also be afforded the purchaser in order to entitle the developer to an exemption. Although the briefs on appeal in Berzon raised the issue of HUD's interpretation of this exemption, the Fourth District Court of Appeal failed to address this issue in its opinion. Nonetheless, the court decided the instant case based upon the precedent established in Berzon.

In light of HUD's interpretation of the ILSA exemption provision at issue, and the weight to be accorded HUD's interpretations, SAMARA should be exempt from the Act in that its contract meets HUD's requirements for exemption. The SAMARA contract expressly provides for completion within two (2) years, and it affords the purchaser the remedy of specific performance in the event of a breach of the contractual obligation to complete within two (2) years. On this basis, SAMARA maintains that Berzon should be revisited and overruled, the Fourth District Court of Appeal should be reversed on its opinion in the instant case, and the opinion of the trial court in the instant case affirmed.

ARGUMENT

I. ACCORDING TO HUD'S INTERPRETATION OF 15 U.S.C. 51702(a)(2 (19 2), WHICH INTERPRETATION IS ENTITLED TO GREAT WEIGHT BY THIS COURT, A DEVELOPER IS EXEMPT FROM THE REQUIREMENTS OF ILSA IF THE CONTRACT PROVIDES FOR COMPLETION WITHIN TWO (2) YEARS AND THE BUYER IS AFFORDED THE REMEDY OF SPECIFIC PERFORMANCE IN THE EVENT OF THE DEVELOPER'S BREACH.

In 1968, Congress passed ILSA. The purpose of ILSA is to offer protection for consumers against fraudulent real estate sales operations. The ACT is administered by HUD. The ACT is a full disclosure law which requires Sellers to register their real estate developments with the Federal Government and to disclose to prospective buyers pertinent facts about the land offered for sale. Not all promotional land sales, however, are covered by the ACT. United States Department of Housing and Urban Development, Buying Lots from Developers 3, 11 (1982). (A. 72-84). The ACT provides several exemptions from its requirements. One of those exemptions, which appears in Section 1702(a)(2) of the ACT, is the subject of this appeal.

Congress, in Section 1715 of the Act delegated to HUD, and to its boards, the authority and responsibility to administer ILSA. Pursuant to that authority, HUD has promulgated regulations, guidelines and advisory opinions concerning the breadth, scope and requirements of Section 1702(a)(2) of the Act which have guided the industry since 1979. The HUD regulations describing Section 1702(a)(2) appear in the Code of Federal Regulations. 24 C.F.R. 1710.5(b) (1987). (A. 53). HUD's

advisory opinions were issued pursuant to the authority contained within the Code of Federal Regulations. 24 C.F.R. 51710.17 (1987). (A.54). Finally, HUD's Guidelines were issued in 1979 and 1984 and explain HUD's regulations. These Guidelines appear in the Federal Regulations. Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 44 Fed. Reg. 24, 010 (1979), 49 Fed. Reg. 31,375 (1984). (A. 9021, 35-48).

Section 1702(a)(2) of the ACT provides for an exemption from the requirements of ILSA in those instances when the sale of land is under a contract which obligates a seller to erect a building on the land within two (2) years. HUD in its Guidelines and Advisory Opinions has interpreted the exemption provisions contained in Section 1702(a)(2) to mean that as long as the contract for sale expressly obligates the Seller to complete a Purchaser's unit within two (2) years of the signing of the contract, and the contract does not limit the Purchaser's right to specific performance in the event of a breach, then the Seller is exempt from the requirements of ILSA.

This Court has recognized that interpretations of a statute by the agency empowered to enforce that statute are entitled to great weight and will not be departed from unless clearly erroneous. Daniel v. Florida State Turnpike Authority, 213 So.2d 585, 587 (Fla. 1968). See also King v. Seaman, 59 So.2d 859, 861 (Fla. 1952). The Supreme Court of Florida has always been reluctant to disagree with an administrative body in its interpretation of the statute which the body has a duty to

administer. Radio Telephone Communications, Inc. v. Southeastern Telegraph Company, 170 So.2d 577, 582 (Fla. 1964).

The United States Supreme Court has likewise held that a federal agency's interpretation of a federal statute is entitled to great deference and should likely be sustained. Chemical Mfrs. Ass'n. v. Natural Resources Defense Council, Inc., 470 U.S. 116, 126, 105 S. Ct. 1102, 1107, 84 L.Ed.2d 90, 98 (1985); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-67, 100 S.Ct. 790, 796-97, 63 L.Ed.2d 22, 31-32 (1980); Miller v. Youakim, 440 U.S. 125, 144, 99 S.Ct. 957, 968-69, 59 L.Ed.2d 194, 208 (1979). Moreover, when HUD has specifically been entrusted with the execution of a particular federal statute, as is true with ILSA, HUD's interpretations have been entitled to great deference. See Fleetwood Enterprises, Inc. v. United States Department of Housing & Urban Development, 818 F.2d 1188, 1194 (5th Cir.1987) (HUD's interpretation of National Manufactured Housing Construction and Safety Standards Act); United Neighbors Civic Ass'n. of Jamaica, Inc. v. Pierce, 563 F. Supp. 200, 205 (E.D.N.Y. 1983) (HUD's interpretation of National Environmental Policy Act of 1969).

The deference to be given to HUD's Guidelines pertaining to ILSA has been addressed by the Eleventh Circuit Court of Appeals. In Winter v. Hollingsworth Properties, Inc., 587 F. Supp. 1289 (S.D. Fla. 1984), rev'd, 777 F.2d 1444 (11th Cir. 1985), the federal district court was faced with the issue of HUD's interpretation of the ILSA provisions as they pertain to Florida

condominium units. In Guidelines promulgated by OILSR, HUD interpreted the ILSA provisions to be applicable to condominium units. Id. at 1291. The district court, however, refused to follow these Guidelines. **Id.** at 1294. The Eleventh Circuit, in reversing the district court and upholding the Guidelines, stated:

> The courts afford great deference to the interpretation of a federal statute by the agency charged with administration of the statutory scheme. EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 83, 101 S.Ct. 295, 307, 66 L.Ed.2d 268 (1980). The agency's interpretation need not be the only reasonable one or even the one that we would reach had we decided the question initially; if the agency's interpretation is reasonable, it will be upheld. American Paper Institute v. American Electric Power Service Corp., 461 U.S. 402, 422-23, 103 S.Ct. 1921, 1933, 76 L.Ed.2d 22 (1983).

777 F.2d at 1448.

HUD's interpretation of Section 1702(a)(2) of the ACT, contained within its regulations, Guidelines and advisory opinions, is not clearly erroneous or unreasonable. HUD's position is the result of a carefully reasoned analysis which is revealed in its 1979 and 1984 Guidelines, and in its advisory opinions.

In 1979 HUD issued Guidelines pertaining to determining the applicability of exemptions from the ACT. These Guidelines became effective June 11, 1979. Guidelines for Exemptions **Available Under the Interstate Land and Sales Full Disclosure Act**, 44 Fed. Reg. 24010 (1979). (A. 9-21). The first paragraph of these Guidelines sets forth in part:

> These guidelines are intended to provide information concerning the requirements for statutory and regulatory exemptions available to developers which are contained in the rules and regulations **(24** CFR **1710.10** through **1710.18)** issued pursuant to the Interstate Land Sales Full Disclosure Act. The guidelines contain agency positions, interpretations and descriptions of the individual element at eligibility criteria for each exemption. . . .

Part III, subsection (c) of these Guidelines addresses the exemption here at issue by stating, in pertinent part:

> If you (the Developer or Seller) are relying on this exemption and the residential, commercial, condominium or industrial building is not complete, the contract must specifically obligate you, the Seller to complete such a building within two (2) years, otherwise the sale is not exempt. The two-year period begins on the date the Purchaser signs the sales contract. The use of a contract that obligates the Buyer to build within two (2) years would not exempt the sale.
>
> Furthermore, any conditions which qualify the obligation to complete a building within two (2) years nullify the applicability of the exemption. Likewise. any Provision which restricts the Purchaser's remedy of specific Performance serves to nullify the construction obligation and disqualifies the transaction for the exemption. [Emphasis added].
>
> However, contract provisions which provide for delays of construction completion dates beyond the two-year period are acceptable if such delays are legally supportable in the jurisdiction where the building is being erected as an impossibility of performance for reasons beyond the control of the Developer. Provisions to allow time extensions for such things as acts of God or material shortages are generally permissible.

These are the same Guidelines that were at issue and upheld in Winter v. Hollingsworth Properties, Inc., which was discussed above.

A review of HUD's advisory opinions also show HUD's reasonable analysis leading to HUD's position that **only the**

remedy of specific performance is required to have a Section 1702(a)(2) exemption. For instance, on May 21, 1980, OILSR issued an exemption advisory opinion for Villas de Palmalta. (A. 22) This opinion provides in pertinent part:

> You have submitted a copy of the Promise of Assignment of Beneficial Interest which contains a provision obligating the developer to complete each unit and all common areas and recreational amenities within two (2) years of entering the agreement. **The** Promise of Assignment of Beneficial Interest contains no restrictions on the Purchaser's remedy of specific performance. [Emphasis added].
>
> Upon the basis of the representation that you have made and which are substantially as hereinbefore described, it is the opinion of the Office of Interstate Land Sales Registration that the offering of Villas de Palmalta in the manner hereinbefore described, is exempt.

On March 15, 1982, another advisory opinion was issued to Brian J. Sherr, Esq., on behalf of The Newport of Port Royale. (A. 33-34). This opinion states, in pertinent part:

> The Department has re-evaluated the previous definition of what constitutes a two-year obligation to construct a building as required by Section 1403(a)(2) of the Interstate Land Sales Full Disclosure Act. As a result, a contract such as the one submitted for The Newport would now meet the "two-year obligation to construct" requirement for exemption under Section 1403(a)(2) or the "improved lot" exemption.
>
> The Department's interpretation of what constitutes a two-year obligation to construct a building relies, generally, on principles of contract law in deciding whether or not the Seller has, in fact, an obligation to erect a building within two years. The contract must not allow non-performance by the Seller at the Seller's discretion. Likewise, *any* provision which restricts the Purchaser remedy for specific performance serves to nullify the construction obligation and disqualifies the transaction for exemption. Contracts which permit the Seller to breach virtually at will are viewed as non-contracts because the construction obligation is not an obligation in

reality; i.e., the contract is deprived of mutuality of obligation. Thus, a clause that provides only for a refund of the buyer's deposit if the Seller is unable to close for any reason is not acceptable for use under this exemption.

> Although the factual circumstances upon which non-performance is based may vary from transaction to transaction, non-performance must be based on grounds cognizable in contract law such as impossibility or frustration. [Emphasis added].

On April 23, 1982 another advisory opinion was issued, which pertained to The Palace Condominium. (A. 24). This opinion provides that because the contracts for sale at issue obligated the Developer to erect the condominium building on the subject property within two (2) years of the dates upon which each purchaser signed the contracts, subject to delays beyond the control of the developer, and each purchaser was granted a right of specific performance of the obligation to build the Condominium and such purchaser's unit, the developer was exempt from the requirements of ILSA. These same points are made in the advisory letters for The Porticos Condominium dated May 6, 1982, and for The Metro dated June 25, 1982. (A. 26-27, 31-32).

On June 2, 1982, OILSR issued another advisory opinion in which OILSR found the developer not exempt from the provisions of ILSA. (A. 28-29). The opinion provides, in pertinent part:

> The Amended Purchase and Sale Agreement are unacceptable for the "improved lot" exemption for the following reasons:
>
> 1. The purchaser's sole and exclusive remedy, should the developer default, is to receive all sums paid together with any interest earned. This provision limits the purchaser's right of specific performance.

> 2. Should a casualty occur to the condominium prior to closing, the Seller may, at his option, cancel the Agreement and direct the escrow agent to return all deposits, in which event the Agreement shall become void and no effect. This provision is unacceptable because it nullifies the contract rather than extending the construction time period for events that are beyond the Seller's control.
>
> Upon the basis of the representations that you have made and which are substantially described above, it is our opinion that the offering of Casa Marina Condominiums in the manner described, is not exempt under the provisions of the Interstate Land Sales Full Disclosure Act.

In 1984, HUD issued final exemption Guidelines which first appeared in the Federal Register. 49 Code Fed. Reg. 31,375 (1984). (A. 35-48). These Guidelines restate the position set out in the advisory letters stated above. In these Guidelines, HUD specifically addressed Dorchester Development Inc. v. Burk, 439 So.2d 1032 (Fla. 3rd DCA 1983), the first Florida case in which an Appellate Court stated in dicta that any limitation of remedies in a contract would destroy the developer's exemption under ILSA. While this case will be addressed in Part II of this Brief, it is now important to note that HUD's position on the Dorchester case is:

> In the case of Dorchester Development. Inc. v. Tema Burk, Schwartz & Nash, 439 So. 2d 1032 (1983), the Court held that there must be an unconditional commitment to complete the condominium units within two (2) years and that the remedies available to the purchaser must not be limited. Although the opinion's language was broad, it is HUD's position that the Court's concern regarding limitations on remedies was confined to the right of specific performance. [Emphasis supplied]

Guidelines for Exemptions Available Under the Interstate Land Sales Full Disclosure Act, 49 Fed. Reg. 31,375, 31,378 (1984).

Thus HUD has always clearly maintained that to qualify for an exemption pursuant to Section 1702(a)(2) of the ACT, the Seller must contractually obligate himself in the contract to complete the purchaser's unit within two (2) years from the date of the contract for purchase and sale and afford to the purchaser the remedy of specific performance in the event of the seller's breach.

HUD's interpretation of the exemption is supported by the language of the statute which simply requires a contractual obligation on the part of a seller to complete within two (2) years. HUD's interpretation is therefore neither unreasonable nor clearly erroneous. See Beckwith v. Board of Public Instruction of Dade County, 247 So.2d 508, 510 (Fla. 3d DCA 1971). HUD's interpretations should therefore, pursuant to Florida and Federal law, govern in deciding exemptions pursuant to Section 1702(a)(2) of the ACT.

The Contract in the instance case grants the purchaser the remedy of specific performance in the event of seller's breach. This fact was stipulated to by **SAMARA** and MARLOW in the trial court. (R. 222-225, 231). Therefore, in accordance with HUD's interpretation of the requirements for the Section 1702(a)(2) exemption, **SAMARA** is exempt from the requirements of ILSA.

II. IN LIGHT OF HUD'S INTERPRETATION OF THE EXEMPTION PROVISION CONTAINED IN 15 USC SECTION 1702(a)(2) (1982), THE SUPREME COURT OF FLORIDA SHOULD REVISIT BERZON AND THE CASES CITED BY THE FOURTH DISTRICT COURT OF APPEAL IN ITS OPINION IN THE INSTANT CASE IN ORDER TO ANSWER THE CERTIFIED QUESTION BECAUSE THE HOLDINGS IN BERZON AND THE INSTANT CASE ARE IN CONFLICT WITH HUD AND SHOULD BE REVERSED.

SAMARA's contract provides for specific performance or the return of the purchaser's deposit if **SAMARA** violates the two (2) year construction provision in its contract. The question certified by the Fourth District Court of Appeal in the instant case is a result of a finding by that appellate court that although the instant case is governed by the precedent set in Berzon v. Oriole Homes Corp., 497 So.2d 670 (Fla. 4th DCA 1986) that case failed to address the fact that HUD's interpretation of Section 1702(a)(2) of the ACT is in conflict with that decision. The Berzon court held that a developer could not claim an exemption pursuant to Section 1702(a)(2) when the remedies for violation of a two (2) year construction agreement were limited to return of the deposit or specific performance because the contract must also allow the Purchaser to sue for damages. As set forth in Part I of this Brief, HUD's position is that a developer would be exempt when the contract affords a Purchaser the remedy of specific performance in the event of a breach by the Seller of its two (2) year construction obligation. The holdings by the Fourth District Court of Appeal in Berzon and the instant case, and HUD's interpretation of Section 1702(a)(2), cannot be reconciled and one of these positions must fail. Because of the great weight to be afforded HUD's interpretations

of the statute as set forth in Part I of this Brief, and the fact that the Fourth District Court of Appeal in Berzon and the instant case did not address this issue in its opinions, **SAMARA** respectfully suggests Berzon and the instant case were decided improperly and should be reexamined and overruled.

A. The Berzon decision and that of the Fourth District Court of Appeal in the instant case are in conflict with HUD's interpretation of 15 U.S.C. 1702(a)(2) (1982) and merely rely on dicta from cases in which HUD's interpretations were also not addressed.

In Berzon, the issue was whether a developer was exempt from ILSA pursuant to Section 1702(a)(2) of the ACT. As in the instant case, the contract at issue required completion within two (2) years and afforded the purchaser the remedies of rescission or specific performance in the event of a breach by the developer. The Fourth District Court of Appeal, reversing the trial court, ruled that the developer was not exempt because the contract did not also allow the purchaser to sue for damages for breach of contract in the event of a breach. The decision was rendered without an opinion and cited two cases, Dorchester Development, Inc. v. Burk, 439 So.2d 1032 (Fla. 3d DCA 1983) and Appalachian, Inc. v. Olson, 468 So.2d 266 (Fla. 2d DCA 1985). In neither of these cases, however, did the courts decide the issue of whether a contract which obligated the developer to complete within two years and provided the remedy of specific performance in the event of a breach by seller would be exempt from ILSA pursuant to Section 1702(a). In addition, the opinions in each case did not address HUD's interpretation of Section

1702(a). The Olson court merely held that **ILSA** applied to the sale of condominiums, a point which is conceded. Moreover, the Dorchester court did not decide the exact issue present in Berzon; the Berzon court relied on dicta in Dorchester in its per curiam opinion.

The issue in Dorchester was whether the developer was exempt from **ILSA** pursuant to Section 1702(a)(2). Dorchester argued it was exempt because the contract at issue gave purchasers the right to extend the closing date or to rescind the contract if the condominium units were not completed within two (2) years. On appeal, the decision of the trial court finding no exemption was affirmed. The appellate court found that, unlike the contract at issue in the instant case, "nowhere in the contracts [was] there a requirement that Dorchester complete the building and this omission [was] fatal to Dorchester's position." **Id.** at 1034.

The court in Dorchester was also concerned that the remedies provided to the purchaser in event of a breach were not consistent with a contract obligating the seller to complete within two (2) years. Unlike the contract in the instant case, nowhere in the contract was the buyer afforded the remedy of specific performance. The sole remedies available to the purchaser in the event of a breach by seller was a return of the purchaser's deposit or an extension of the closing date. Therefore, the decision reached in Dorchester was, and is, consistent with HUD's interpretations of Section 1702(a)(2)

although the opinion does not specifically mention HUD's interpretations of Section 1702(a)(2) in deciding the case. The Dorchester court then distinguished Dorchester from Mosher v. Southridge Associates, Inc., 522 F. Supp. 1226 (W.D. Penn. 1982).

In Mosher, in which an exemption was upheld, the issue was whether the developer was exempt from ILSA pursuant to Section 1702(a)(2). The contract at issue specifically acknowledged, in accordance with ILSA, the developer's unconditional obligation to complete and deliver the Buyer's unit within two (2) years. The plaintiff argued that the promise was illusory because in the event the unit was not completed in two (2) years, the Buyer's remedy was limited to rescission. The court found that the contract did expressly obligate the developer to complete the unit within two (2) years and that the limitation on remedies was merely a damage provision which could not be read to render the obligation conditional. On this basis, the developer was found exempt from ILSA. Although the 1979 Guidelines issued by HUD were in effect at the time of this decision, they are contrary to this decision and were not addressed by the Mosher court in its opinion.

The Dorchester court distinguished Mosher from Dorchester by saying that in Mosher, unlike Dorchester, the language used in the contract unequivocally obligated the developer to complete within two (2) years. In a footnote, however, the court in Dorchester, recognizing that the contract in Mosher limited the purchaser's remedy of specific performance, stated that this

provision was obviously overlooked by the court in Mosher and had it been addressed, Mosher would likely have been decided differently. **Id.** at n.4. This is also consistent with HUD. In dicta, however, the court in Dorchester went on to say:

> Since the Act is to be construed to effect its remedial purpose of protecting the Land Sale consumer, . . . we can hardly conclude that a contract which has the effect of limiting the purchaser's remedies conforms to the requirements of the Act.

Id. at 1035.

In 1984, HUD issued final Guidelines on Section 1702(a)(2). These Guidelines, contained in 49 Fed. Reg. 31,375 (1984), specifically address the opinion in Dorchester and, in an attempt to harmonize the dicta in Dorchester with HUD's interpretation of Section 1702(a)(2), provide:

> Although the [Dorchester] language was broad, it is HUD's position that the Court's concern regarding limitations on remedies was confined to the right of specific performance.

On October 15, 1986, the Fourth District Court of Appeal filed its decision in Berzon without opinion. The decision reversed the trial court which had found the developer exempt from ILSA pursuant to Section 1702(a)(2). The appellate court cited Dorchester for the proposition that a developer may not claim an exemption under Section 1702(a)(2) when damages for failure to complete the condominium is limited to return of the deposit or specific performance. This is in error. The precise holding in Dorchester is that a contract which does not expressly obligate a developer to complete within two (2) years and limits

the remedies to the purchaser in the event of a breach to rescission or a change in the closing date is not exempt from Section 1702(a)(2). Dictum in Dorchester provides that any limitation on damages would be fatal to a seller seeking this exemption. Therefore, the most that can be said is that the decision in Berzon was based on dicta in Dorchester. Berzon fails to explain why Dorchester is controlling. This is especially disturbing because the dicta in Dorchester is inconsistent with HUD's opinion letters, and the 1979 and 1984 Guidelines, including HUD's interpretation of Dorchester in its 1984 Guidelines. Although HUD's interpretation of Section 1702(a)(2) was not addressed in the Dorchester opinion, HUD's interpretations were raised in Berzon according to the Answer Brief of Oriole Homes Corp. and the Fourth District Court of Appeal's opinion in the instant case. (A. 55-71, 1-6) However, the appellate court in Berzon issued its decision without opinion and therefore did not address this obvious conflict.

The decision by the Fourth District Court of Appeal in the instant case, in addition to the cases of Berzon and Dorchester, also cites the cases of Schatz v. Jockev Club, Phase 111, Ltd., 604 F. Supp. 537 (S.D. Fla. 1985) and Marco Bav v. Vandewalle, 472 So.2d 472 (Fla. 2d DCA 1985) for the proposition that the dicta in Dorchester, upon which the Berzon court relied in deciding Berzon, continues to be cited favorably by other Florida courts. SAMARA respectfully states that this fact does not determine the soundness of the dicta in Dorchester nor the

validity of its use to decide Berzon or the instant case. In Schatz, the Federal District Court for the Southern District of Florida found a developer was not exempt pursuant to Section 1702(a)(2) and it cited Dorchester with approval. 604 F. Supp. at **542.** However, in Schatz neither the remedy of specific performance nor damages was provided the purchaser in event of a breach. The court in Schatz therefore rejected the reasoning in Mosher and adopted the reasoning in Dorchester and found no exemption because the contract did not allow the purchaser to affirm the contract. However, Schatz is easily distinguishable in that it leaves open the issue of how the court would have ruled had the Purchaser been afforded the remedy of specific performance. Furthermore, Schatz does not address HUD's interpretations of Section 1702(a)(2) in its opinion.

In Marco Bay, the developer was found exempt because although the contract did not specifically allow the purchaser to sue for specific performance or damages in the event of a breach, the contract did not prohibit a suit for damages or specific performance. The opinion cites Dorchester with approval but again, the decision did not address HUD's interpretation of Section 1702(a)(2) nor did it decide the issue of what result would have been reached had the contract provided the purchaser with the remedies of return of the deposit or specific performance in the event of a breach.

The facts therefore show that Berzon and the instant case were decided by the Fourth District Court of Appeal based upon dicta in Dorchester. The dicta in Dorchester conflicts with HUD's interpretations of the exemption contained within Section 1702(a)(2). In addition, none of the cases cited by the Fourth District Court of Appeal in its decision in the instant case address this issue. Indeed, this is why the Fourth District Court of Appeal certified the question now before this court.

This Court has consistently stated that interpretations given by the administrative agency charged with its enforcement carry great weight and will not be departed from unless clearly erroneous, which is the subject of Part I in this Brief. When due weight is given to HUD's interpretations, the dicta in Dorchester is clearly erroneous and, consequently, likewise are the decisions in Berzon and the instant case erroneous. On this basis, SAMARA respectfully states that Berzon should be overruled and SAMARA found exempt from ILSA pursuant to Section 1702(a)(2) of the ACT.

B. Public policy dictates that the public must have the ability to rely on interpretations made by an administrative agency charged with enforcement of a statute.

The ramifications of upholding Berzon and answering the certified question to require that for a developer to be exempt there must be no limitation on a purchaser's right to damages go far beyond the effects on the developer in Berzon or SAMARA in the instant case. Pursuant to the authority contained within Section 1715 of the ACT and 24 C.F.R. 51710.17 (1987), HUD has

issued at least seven **(7)** advisory opinions (which are discussed in Part I of this Brief and are appended hereto as **A.** 22-34) and Guidelines in **1979** and **1984** which provide that as far as HUD is concerned, so long as the two (2) year completion requirement is not limited **by any** factor other than force maieure, and the purchaser is afforded the remedy of specific performance in the event of a breach, the contract is exempt from the requirements of **ILSA.** Both the Guidelines published in **1979** and **1984** provide in the summary portion that:

> The underlying purpose of the Guidelines is to assist developers in identifying eligibility for all self-determined exemptions and to provide guidance where the submission of material to HUD is required.

(A. 9, 35). Since at least **1979,** developers and their counsel have relied upon HUD's interpretations as stated in its opinion letters and Guidelines in preparing contracts and other project documentation. And, no doubt, confidence in relying on HUD's interpretations has its origin, at least in part, on case law discussed in Part **I** of this Brief which provides that the interpretations given by HUD should be controlling unless found to be clearly erroneous.

In addition, the affidavits attached to SAMARA's Motion for rehearing in the trial court, (R. 100-151, A. 85-90),[1] executed by respected real estate practitioners, show that for years developers and respected real estate practitioners have relied on HUD's interpretations in drafting contracts to be exempt for ILSA pursuant to HUD's interpretation of Section 1702(a)(2). According to these affidavits, contracts such as SAMARA's which obligate a seller to construct within two (2) years and provide for the remedy of specific performance in the event of the Seller's breach are exempt from ILSA pursuant to Section 1702(a)(2). To now hold that HUD's interpretations have no force or effect is not only contrary to Florida and Federal law, it would completely undermine the ability of the public to rely on a Federal agency's interpretations of the Federal statute it is empowered to administer. Developers who invested in Florida to develop its land, and the attorneys who aided them and relied on HUD for guidance, have now been penalized for relying on HUD. Aside from the obvious result to developers like SAMARA who

---

1. SAMARA intends, by its reference to R. 100-151, to refer to the affidavits of William Sklar, Professor of Condominium and Cluster Development Law at University of Miami; Jeffrey Kneen of the West Palm Law firm of Levy, Kneen, Boyes, Wiener, Goldstein & Kornfeld; and Mark Davis of the Miami law firm of Greenberg, Traurig which were attached to SAMARA's Motion for Reconsideration. The index to the record on this Appeal is unclear as to the exact location of these affidavits, but the affidavits appear to be located within the pages cited.

drafted their contracts to be exempt in accordance with HUD's interpretations, if this Court were not to uphold HUD's interpretation, there would be a justified hesitancy on the part of developers to do business in Florida when a federal statute is involved until case law on the subject in Florida was clearly decided.

CONCLUSION

For the foregoing reasons, SAMARA urges that the certified question be answered to require that a developer is exempt from 15 U.S.C. 1702(a)(2) (1982) when the contract provides for completion within two (2) years and affords the buyer the remedies of a return of the deposit or specific performance in the event of a breach by the seller of the two year construction obligation. SAMARA also therefore urges this Court to overrule Berzon and the Fourth District Court of Appeal in the instant case and affirm the decision of the trial court in the instant case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States Mail to Glenn M. Mednick, Esq., Attorney for Respondent MARLOW, GUTKIN, MILLER, SHAPIRO, SELESNER & SHOOBE, P.A., 1300 N. Federal Highway, Suite 108, Boca Raton, Florida 33432, and BRUCE GOODMAN, Esq., Attorney for Respondent, Midlantic National, RUDEN, BARNETT, MCCLOSKY, SCHUSTER & RUSSELL, P.A., P.O. Box 1900, Fort Lauderdale, Florida 33302, this 16th day of August, 1988.

SHERR, TIBALLI, FAYNE & SCHNEIDER
Attorneys for Appellee Samara Development

600 Corporate Drive, Suite 400
Post Office Box 9208
Fort Lauderdale, Florida 33310-9208
(305) 776-1680

By: ______________________
KATHY KAPLAN, Esq.
Fla. Bar No.: 0507751

wp\kak\marlow.brf\10
08/16/88:TD