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Letter Opinion No. 62-94-L  
R-391

August 22, 1962

REQUESTED BY: Mr. G. A. Bushnell, Director  
State Insurance Department

OPINION BY: Robert W. Pickwell  
The Attorney General

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**ARIZONA ATTORNEY GENERAL**

STATEMENT OF  
FACT:

An insurance corporation, the balance (as opposed to imbalance) of the proportions of admitted investments of which will not be affected adversely (A.R.S. § 20-556(4)), seeks to invest its funds in, or claim as an admitted investment, as "such other real property as shall be requisite for its convenient accomodation in the transaction of its business . . ." (*id.*, subsection 1), a leasehold interest (actually a tenancy at will with provision of refund) in lands and buildings, upon two sites, claimed to be appropriate as shelters from atomic attack, for the insurer's records and emergency rations for employees. The Director of Insurance has denied the application for admission of such as an investment as not being in "real property as shall be requisite for its convenient accomodation."

Judicial review has not been sought by insurer-applicant pursuant to A.R.S. § 20-161, et seq, but it seeks the Director's agreement to abide by opinion of the Attorney General, if such an opinion is in derogation of the adverse report filed under A.R.S. § 20-158.

QUESTIONS:

1. Assuming the tenancy at will is "real property", was denial of approval, by the Director, upon the foregoing facts, defensible on appeal to the Superior Court?

2. Is a tenancy at will "real property" within A.R.S. § 20-556(1)?

CONCLUSIONS:

1. See body of opinion.
2. Negative.

We have, at some risk of being prolix and redundant, interpolated your letter request of August 3, 1962, as a request for review of the judicial decisions bearing upon the exercise of discretion vested in the Director of Insurance upon the question

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of what constitutes "other real property requisite for its (insurer-applicant's) convenient accommodation" under subsection 1, A.R.S. 20-556.

Couch on Insurance 2d cites one case upon this general question. This case is Guardian Life Ins. Co. of America v. Bohlinger, (1954) 284 App.Div.110, 130 N.Y.S. 2d 705. The case is remarkable, principally, in the clarity of its dissenting opinion. It has been credited as the moving cause for the amendment of the Laws of the State of New York, pertaining to insurance, to liberalize the provisions for judicial review.

John F. X. Finn, Insurance Against Overreaching of Sovereignty, 25 Fordham Law Review 411.

The investment considered in the cited case was an office building in an outlying town, and was, upon a non-definitive plan of questioned completeness, conceived as an appropriate facility to decentralize maintenance of insurance company records to ally effects of atomic attack. The question as to completeness, and definitiveness, as regards the plan, was pointed out by the majority opinion. Thus, it was described as an afterthought, or an expedient, to bring the investment within the particular provision of the New York statute, which is counterpart of the Arizona statute under which your request falls, and is, so far as we can tell, in precisely the language used in Arizona Revised Statutes. The majority opinion held that the contemplated investment was not "requisite", as follows:

"Guardian also contends that the Superintendent exceeded his authority in failing to adhere to the statutory standard of "convenient accommodation" in considering its application. A reading of the report of the hearing deputy, however, indicates that he polarized his consideration of the problem, as well as his findings, to the legislative criteria. His ultimate findings indicate an awareness of the basic statutory standard. For example, he found:

'4. The Petitioner has not demonstrated that its present quarters are inadequate for the convenient transaction of its business or that economies in the best interests of policyholders will flow from such acquisition.

'5. The proposed building project is purely an interim measure to serve until the Petitioner finds what it may consider a more adequate and proper location for the erection of a new Home Office building.

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'6. \* \* \*

'7. As of the date of the hearing on the petition, the plans for actual use by various departments of the Petitioner had not yet been crystallized.

'8. Petitioner is still endeavoring to find a proper location for a new Home Office building.

'9. The property was acquired in violation of the Insurance Law Section 81-7(b), cf. Insurance Law, Section 89.'

"It is clear, from the evidence and the hearing deputy's report and findings, that there is no basis in fact for Guardian's complaint that the Superintendent is attempting to 'supplant management or \*\*\* to formulate those business decisions which properly are the sole responsibility of management.'"

The minority opinion, remarking upon the lack of cogency demonstrated by the majority, has this to say:

"Thus in annulling a decision of the Public Service Commission, our Court of Appeals in *People ex rel. Delaware & Hudson Co. v. Stevens*, 197 N.Y. 1, 10, 90 N.E. 60, 63, said:

'We do not think the legislation alluded to was designed to make the commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation as to the wisdom of a transaction, but that it was designed to make the commissioners the guardians of the public by enabling them to prevent the issue of stock and bonds for other than the statutory purposes; these purposes we have already enumerated in quoting the statute.'

"In our opinion we should hold that the Superintendent's duties are supervisory only, to enforce the statutes, to review the acts of management and see that they conform to the statutes; but not to supplant management or attempt to formulate business decisions which properly are the sole responsibility of management."

The contention of the minority in the cited case was buttressed

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upon the holding of the same court in People ex rel Metropolitan Life Ins. Co. v. Hotchkiss, 136 App.Div. 150, 120 N.Y.Supp. 649. This case considered the question of whether or not a tuberculosis hospital for the insurance company's employees was, as a real estate investment, "requisite for (the company's) convenient accommodation in the transaction of its business." We conceive the holding of the case, particularly in the quoted portions, as important to an appraisal of the considerations thought valid in the exercise of the Director's discretion. Those considerations set forth under subparagraphs "4" through "8" seem to offer some light upon that area within which the Director's quasi judicial judgment must fall.

In the case presented by your request, several facts, of suggested validity per the quotation above, to guide the discretion of the administrator, are omitted. The general tenor of your request infers that certain facts deemed significantly critical (id., subparagraphs "4", "5") against applicant-insurer, in the case cited, do not seem to be present. For example, here, the insurer seems to be in inadequate quarters. For further example, here, insurer contemplates a term of 43 years.

In favor of the Director's determination here, however, a parallel to the cited case should be drawn concerning the aura of expediency with which, though engendered differently, the instant case seems to be complicated.

It is notable that the cited case was affirmed twice, and went to the highest court of the State of New York. It has been followed in the following cases:

Roxy Wines v. N. Y. State Liquor Authority, 159 N.Y. S.2d 930;

Gross v. N. Y. City Alcoholic Beverage Control, 191 N.Y.S.2d 94.

These, and the Fordham Law Review citation, supra, are all on the question of the reviewability of the administrative action.

The Hotchkiss case, relied upon in the dissent, contains the following:

"The application having been denied solely for want of power, we refer to the petition for the facts which indicate that this real estate is requisite for the company's convenient accommodation in the transaction of its business. It is a stock corporation, with assets of upwards of \$236,000,000 and gross income for the year 1908 of upwards of \$76,000,000. At the time of the application 20 of

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its employes were absent from work on account of tuberculosis, and were receiving assistance from the company, and upon investigation 48 cases of tuberculosis were found among the employes. We quote from the petition:

'Tuberculosis is far the most insidious as well as the most destructive disease which obtains among the company's employes and policy holders. In the company's home office it employs about 2,800 people, and it has a field force of over 11,000 persons. Cases of tuberculosis are found with great frequency among the company's employes, particularly in the home office, and frequently its existence is not discovered by the management until a number of other employes have been exposed to the contagion . . .'

"The original petition foreshadowed that vacancies in the hospital from time to time, at the election of the company, may be filled from selected cases among its policy holders; but that position has not been urged upon us, and the briefs of counsel upon either side have practically eliminated that question. We therefore treat the case as relating solely to the tuberculosis hospital, and upon the facts stated we conclude that the relator has power under section 20 of the insurance law to acquire and hold real estate for that purpose.

"The determination under review is therefore annulled, and the matter remitted to the Superintendent of Insurance for his consideration upon the merits."

(Id., at page 652)

We hope that, as thus epitomized, the related cases contain certain landmarks by which the Director's discretion may be oriented, or vindicated.

This suggestion is offered in a spirit of cooperation, which has existed between our offices.

Answering Question No. 2, unquestionably, the result of the Director's determination, above considered, can be vindicated upon the basis that "a term at will" even under a written lease for years, does not come within the provisions of A.R.S. § 20-556 (1). This cannot be questioned, so we feel, because a term at will, even under a lease, is not "real property" as envisaged by that section of the statute.

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The alternative treatment, suggested by your request for an opinion, is that the lease is a "term for years", a "tenement" or "hereditament" (A.R.S. § 1-215), and it is therefore "real property" within A.R.S. § 20-556(1). To this proposition there is cited Corpus Juris Secundum, Vol. 73, p. 161. We are in accord with this interpretation. There are, doubtless, "hereditaments" which are not "real property". When speaking of lands, however, in a statute defining "real property", it is necessary to apply certain rules of statutory construction which have become axiomatic. Our statute provides;

"A.R.S. § <sup>1-215</sup> 215. Definitions.

\* \* \*

25. "Real property" is coextensive with lands, tenements and hereditaments."

The doctrine of ejusdem generis requires that the subsequent terms be construed as modifications, only, of the first genus described. The words, lands, or real property, which include tenements or hereditaments, or is coextensive therewith, relate to tenements or hereditaments that are interests in lands. The inheritable interests in lands are fixed, primarily, by ancient laws pertaining to feudal tenure. The use of the word hereditaments infers interests inheritable under the laws of the feudal tenures. In short, there is inferred an interest in land, which, by itself, is subject to inheritance. A term of years, on the other hand, is not, in and of itself, inheritable. It may be made inheritable when it contains a "covenant" to that effect. But the inheritable interest is a result of a "contract", and not of "tenure".

This consideration is aside from the fact that the interest here created, terminable at the will of lessor by sale or conveyance, is not appropriately described as a contract right -- it is not a right -- it is only a temporary interest relying upon the forbearance of the lessor.

Hancock v. Maurer, 229 Pac. 511, 103 Okla. 196;

Rexroat v. Ford, 201. Ill.App. 342.

We take issue, therefore, with the definitions of "tenements" and "hereditaments", suggested by your letter of reference. Tenements, in this area of the law, means the improvements upon land.

Polson v. Parsons, 23 Okla. 778;

State v. Snellgrove, 71 S.W. 266.

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"Hereditaments" means those rights in land, which, by their own nature, are inheritable.

Callahan v. Martin, 43 P.2d 788, 101 A.L.R. 871.

Corpus Juris Secundum, Vol. 73, page 161, is cited as support for the general proposition that "real property" and "lands, tenements and hereditaments" include a "lease for years". This position is untenable. Lands, tenements and hereditaments find their place in the law by reference to feudal tenure. The significance then, in the days of feudal tenure, and now, is that "real property", as opposed to "personal property", is that real property is an appurtenant or interest in land. A leasehold interest has always been deemed "personal" property and is considered such by our statutes. In each of the subsections of A.R.S. § 20-556, it is notable that the words "real property" are used. Our Supreme Court has indicated that the construction of statutes should be such as to perpetuate the "thread of meaning" which is manifested by the general terms of the statute, in their commonly-accepted meaning.

Alvord v. Tax Commission, 213 P.2d 363, 69 Ariz. 287;

White v. Moore, 46 Ariz. 48, 46 P.2d 1077.

A "tenancy at will" is considered by our statutes as is an "estate for years", as being something less than an "inheritable estate". A.R.S. § 33-201.

The question posed by your request for an opinion is answered, therefore, in the negative; that is, a tenancy at will is not "real property" within the provisions of A.R.S. § 20-556.

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*By M. L. H. Haggerty*  
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RWP:RSM:lf

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