

STATE OF ALASKA
DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT
DIVISION OF OCCUPATIONAL LICENSING
REAL ESTATE COMMISSION

MINUTES OF MEETING
TELECONFERENCE
DECEMBER 21, 2004

Authority of AS 08.01.070(2), and in compliance By authority of AS 08.01.070(2), and in compliance with the provisions of AS 44.62, Article 6, a scheduled meeting of the Real Estate Commission was held September 30, 2004, at the Atwood Building, Room 1500, Anchorage, Alaska.

Tuesday, December 21, 2004

Call to Order

Chairperson Barbara Ramsey called the meeting to order at 1:05 p.m.

Roll Call

Members Present:

Barbara Ramsey, Associate Broker, 3rd Judicial District
Glenn Clary, Public Member, via teleconference
Larry J. Bauer, Broker, 1st Judicial District, via teleconference
Susan Rainey, Associate Broker, 4th Judicial District, via teleconference
Bradley Fluetsch, Public Member, via teleconference
David B. Somers, Broker at Large, via teleconference
Rita Wilson, Broker at Large, via teleconference

Staff Present:

Sharon Walsh, Executive Administrator
Nancy Harris, Licensing Examiner
Barbara Gabier, Program Coordinator, via teleconference
Gayle Horetski, Assistant Attorney General, via teleconference
David Brower, Assistant Attorney General, via teleconference
Margo Mandel, Investigator

Public Members present:

Ann W. Resch, Attorney, Brown, Waller & Gibbs, representing Mr. Despain, via teleconference

Thomas Despain Licensing Matter

Gayle Horetski, Assistant Attorney General, gives a quick summary regarding the Thomas Despain licensing issue. She was contacted by Barbara Gabier about this matter involving Mr. Despain and that is how it led to this teleconference today. She also thanked the Chair for working with us. She became aware that the Real Estate Commission, at their past meeting had voted to suspend the license of Broker Thomas Despain over concern of alleged inadequate supervision of his office in the state of Alaska. The reason for this meeting although there are certain offenses where a licensee may have his or her license suspended or revoked or otherwise disciplined under the statute AS 08.01.090, the Administrative Procedure Act applies to actions of this board. The APA itself appears in AS 44.62 it is in the Alaska Statutes but not in your booklets. Even if someone has allegedly done something for which suspension or revocation is an appropriate penalty, ultimately, under the APA unless there is a public safety emergency that would justify a summary suspension, and that is clear and immediate danger to the public, under AS 08.01.075(c). Unless that is occurring, the way in which a licensee is disciplined is that an investigation is conducted, an accusation is filed and the matter is referred to the Hearing Officer, David Stebing. Then a proposed decision is issued following a full hearing on the merits, right to counsel, right to cross-examine the witness, etc. Then the Commission receives the proposed decision and discusses it, amends or adopts as appropriate. The sufficient procedural safeguards were not taken, apparently from the record and they were not afforded Mr. Despain. The Department of Law and the Division would strongly urge the Real Estate Commission to rescind its recent action taken at the preceding board meeting. Thereby, retro-actively reinstating Mr. Despain's brokers license. Also, to the extent that through operation of law, any salesperson's licenses that were at all effected by that action that the Board would also retroactively rescind this action to those licensees as well. Ms. Horetski explained that the point of doing this on the record and making it clearly retro-active is to avoid a break in service. Also, for anybody having to say that their license was suspended as a result of this conduct because the due process was not afforded in advance to these licensees. Ms. Horetski said she would be glad to talk with any board members now on the record or at any other time about the procedures for summary suspension and she also would talk about cease and desist orders and things of that nature. Under the APA

a person has the right to be given notice, a right to be heard, and a right to a hearing.

Rita Wilson asked if we rescind our entire decision what can we legally do to pursue our concerns.

Ms. Horetski explained that standard procedure is for the allegation to be referred to the investigation unit, investigative unit of the division, that conducts a factual investigation into the allegations and also analysis what standards apply to the conduct. Even if the conduct is as alleged, if that conduct does not itself violate any regulation or statute then obviously no offense has been committed. If after the full investigation and discussion with the supervisor, the investigator concludes that there is a factual basis for the violation and in-fact all elements of the offense can be established, each step in the allegation can be established, then the step is to bring in the allegation. Then the next step of course is once an accusation is filed the licensee, the accused person, has a right to respond and then we have to have a hearing.

Bradley Fluetsch commented, let's keep this here lady brief. Gayle, I'm sorry but you are not really helping with the conversation.

Barbara Ramsey said that the steps that Ms. Hortetski explained to the Board were important for them to understand for these items as well as anything else we may do. Ms Ramsey believes that Ms. Horetski's observation were right in the information that we have that we have not seen any of these steps. Ms. Ramsey said she would like those steps clarified in writing so that everyone will have them.

Gayle Horetski said she will provide the Board members with a copy of the Administrative Procedure Act.

Larry Bauer said that what he envisions this relationship that was involving a third party and then it would go through an investigator with a complaint. This was not the case. This is were the Commission is reviewing a licensee license. There was no third party. A letter was sent describing the requirements under statute that they have an on site broker or associate broker manage the company. Mr. Despain's response back to us was that he does it through telephone and email, therefore he admitted that he did not have a on site broker and that he did not intend to have on site broker. Now with that, I believe that due process was done because he admitted and he choose not to do it. Based on that and the Real Estate statutes we acted accordingly to protect the public. Protecting the public in the statutes says you have to have a licensed person on staff. Someone could take off with the

funds, someone could make bad decisions or representations or miss answer real estate laws. This is the reason that we acted. I felt the process was completed with his responses.

Ms. Horetski says she thinks that the Board with its earnestness and zealously to protect the public's interest are mixing the rules of board members with the rules of the other people on the division staff. You are the jury, you are not the investigator. The investigation is conducted by the Division. If a licensee in the state is alleged to have committed a wrongdoing wouldn't you want your case tried in front of a fair and impartial jury who hears only the evidence on record. Would you want to be tried by the guy who investigated the case and has already decided that you are guilty?

Larry Bauer said he would like to be tried by his peers. An investigator is not a peer.

Ms. Horetski says no, the trial is the hearing presided over by Mr. Stebing, he is like the judge and the proposed decision goes to you, which is the jury. This was written into the legislature, enabling statutes by the legislature, if you take a look at the statute in your book, 8.01.087 the department has the investigative authority, the charging authority, and the board itself has the disciplinary authority and that is under 08.01.075. The legislature deliberately separated out the investigation and prosecution function and assigned it to the Division. The Commission is the jury. The exchange of letter is not a fair hearing.

Larry Bauer commented, so if you are saying that they are the investigator then what are they investigating? Do we then go to the investigator as a Commission and say go and investigate this guy because he doesn't have a broker in his office. Come back and tell us what he has already written us and has no intent on doing that.

Gayle Horetski says that under the Administrative Procedures Act state law requires the filing of an aquistion. AS 44.62.400.

Larry Bauer stated that if this is violating the law and we have to go through this investigation is there some other action that the Commission can take to temporary suspend or where we are sure that the public is not being violated for them not following the law.

Gayle Horetski wanted to make clear that if there is a violation of the law here she believes that the Commission needs to be extremely 100 percent positive and be able to prove that before taking summary action against the person. Under 8.01.087 which are the powers assigned to the Department.

The board's powers 08.01.075(c) the board may summarily suspend a license from the practice of the profession before a final hearing is held or during a appeal if the board finds that the licensee poses a clear and immediate danger to the public health and safety. A person is entitled to a hearing before the board to appeal their summary suspension within seven days after the order of suspension is issued. A person may appeal an adverse decision of the board on an appeal of a summary suspension to a court of competent jurisdiction. This is the due process afforded state law in a summary suspension; even then the guy gets a hearing. A person may appeal from an adverse decision of the board. You have to be ready and prove your case. AS 08.01.087(b)(1), the Commissioner, if he or she believes that there is a violation, the person has engaged in or is about to engage in an act or practice in violation of a provision of this chapter or a regulation adopted under it, or a provision of AS 43.70 or a provision of this title or regulation adopted under this title dealing with an occupation or board listed in AS 08.01.10, the commissioner may, if the commissioner considers it in the public interest, and after notification of a proposed order or action by telephone, telegraph or facsimile to all board members, if a board regulates the act or practice involved, unless a majority of the members of the board object within 10 days. But again, the person gets a hearing and in this case it is within fifteen days. It is temporary until the fifteen days and by that time you have a hearing. So again due process is in the statute if the Commission even acts on an emergency basis the person immediately gets a hearing. That is called a cease and desist order. Again, I am hearing terms like "on site" clear violation and I am not sure that these terms are adequately defined. I'm not sure that there are any supervision regulations that has been violated here, and I don't think we should be talking about the merits of this case right now because the board is the jury. If and when some type of official action reaches the board then the board can vote on it. When it is a cease and desist order, how that works is that the Commissioner proposes to do it and they have to notify the board members, in AS 08.01.087(b) unless the majority of the board objects within ten days then the order is issued. The board's role in a cease and desist order is veto authority to the commissioner if they think it is an improper cease and desist order. The board's role on the summary suspension is the power to for vote but must prove there is a clear and immediate danger to the public's health and safety, and that is an extremely high standard and that burden is on the board and not the licensee.

**A motion was made by Mr. Clary to adjourn the meeting.
Motion failed due to lack of a second.**

Dave Brower says that the Real Estate Commission is subject to the Administrative Procedures Act and not subject to their own whim. The

commission spoke about the letter they wrote and the letter Mr. Despain wrote back, but at some point if you thought there was a clear and immediate danger you needed to get involved with the investigative unit. The Real Estate Commission and other boards have plenty of time to contact the Attorney General's office for these types of things. In this case whether or not it is rescinded he thinks it's ineffective.

Barbara Ramsey commented to the board members that she would like to take up Gayle's motion to rescind it and make it retroactive. In the interim time we need to have a better understanding of what we as a Commission can do and the procedure so that we can be effective, the Commission can be efficient and have some teeth. Ms. Ramsey does not the Commission has the information now and if Mr. Brower is correct in what we did anyway is not effective then at this point in time it is pointless. We will have much clearer guidelines for the next meeting.

Bradley Fleuscth asked if we had an investigation and if we did follow this path would we be directing Barbara to file a complaint investigate this person and then bring that to the Commission at the next meeting.

Margo Mandel, the investigator assigned to the Real Estate Commission, explained that either Barbara or Sharon can refer cases for investigation to her and give her all the documentation that has been gathered. She will then conduct an investigation but she will not report what she finds to the Commission on a regular basis. All their investigations are confidential and would go through the investigative process. That is the reason when there is a board meeting and she presents her reports and investigations and all the Commission will see is case numbers. The Commission does not see names or details on cases because of the procedure that Gayle was describing. The Commission is actually acting as the jury, so that is the whole purpose behind that. She said she when she conducts an investigation she would not report the progress of that investigation to the Commission, although the Commission would be notified of the outcome.

Barbara Ramsey clarifies the investigative process in that the investigator will not be giving the Commission an update as the investigation goes along. The chair can initiate the investigation with the investigator, the investigator will take it, proceed through normal the process and at the end of that process will present to the board with a recommendation or findings.

On a motion made by Mr. Somers, seconded by Ms. Rainey, and passed unanimously, it was

RESOVLED for the Real Estate Commission to rescind its recent former action; thereby, retroactively reinstating the Alaska Brokers license for Mr. Despain and to the extent any other salesperson licenses that were arguably suspended by operation of law as a result of the former action; also retroactively reinstating those salespersons licenses as well and to have this case referred to the investigative unit for further review for potential violations of real estate law.

5 members in favor; 2 members opposed. Motion passes.

Bradley Fleutsch wanted to point out for the record that both public members voted against the motion.

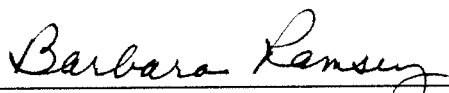
On a motion made by Ms. Rainey, seconded by Mr. Somers, and passed unanimously, it was

RESOVLED to adjourn the meeting.

Meeting adjourned at 1:42 p.m.

Prepared and submitted by Division Staff.

Approved:



Barbara Ramsey, Chairperson
Real Estate Commission

Date: 3/24/05