

**NEBRASKA REAL ESTATE COMMISSION**

October 27, 2011

**Staybridge Suites**

**Staybridge Room**

**Lincoln, NE**

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**Opening**

Chairperson Gale convened a meeting of the Nebraska Real Estate Commission at 9:05 a.m. on October 27, 2011, in the Staybridge Room of the Staybridge Suites, located at 2701 Fletcher Avenue in Lincoln, Nebraska. All of the members of the Real Estate Commission were present, with the exception of Commissioner Dover, who was absent and excused. Also present were Director Greg Lemon, Deputy Director for Education and Licensing Teresa Hoffman, Deputy Director for Enforcement Terry Mayrose, and Administrative Assistant Monica Rut.

**Notice of Meeting (Adopt Agenda)**

Director Lemon presented a public notice and proofs of publication thereof relating to this meeting, all of which are attached to and made a part of these minutes. Chairperson Gale reported that all Commissioners had been notified of the meeting simultaneously, by mail and e-mail, and that a proposed tentative agenda accompanied the notification.

Chairperson Gale pointed out to those in attendance that a public copy of the materials being used during the meeting were available to the public on the counsel table in the meeting room; that a copy of the Open Meetings Act was posted on the easel located in the northwest corner of the meeting room by the west entrance; and that the procedures followed were in accordance with the Open Meetings Act. Chairperson Gale asked that guests sign the guest list.

Director Lemon noted that no agenda items had been added since the tentative agenda was mailed to the Commissioners.

After review of the final agenda, a motion was made by Ptak and seconded by Leisey to adopt the final agenda as presented. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

**Minutes of September 15-16, 2011**

The minutes of the Commission meeting held on September 15-16, 2011, were considered.

After review, a motion was made by Rouch and seconded by Leisey to approve the minutes as presented. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

**Public Comment**

Chairperson Gale asked the members of the audience if anyone wished to come forward to provide public comment on Commission related business.

Kristen Anderson with the Nebraska Realtors Association indicated that with the two year renewal cycle, they had been receiving inquiries from licensees asking if there would be any consideration of refunds or prorated fees should they only desire to have a license for one year instead of two.

Commissioner Leisey indicated that he had also received the same inquiries but the law was written to pay for a two year license. Director Lemon indicated that the general office policy is that there would be no refunds except for extraordinary circumstances such as death since refunds are expensive to process. Chairperson Gale indicated that refunds would make revenue flow less predictable and did not feel the Commission should be refunding license fees. Commissioner Avery indicated that in other professions they have two year license fees which are non-refundable. Commissioner Leisey felt that concerns regarding refunds or the two year license fees should have been addressed prior to making the law but did not feel it was appropriate now. Chairperson Gale indicated that a subcommittee could be formed to review refunds or prorating of fees.

It was the consensus of the Commission not to form a subcommittee and to continue with the current Commission policy.

### **Receipts and Expenditures Report for September**

Director Lemon presented the Receipts and Expenditures Report for September. A copy of said report is attached to and made a part of these minutes. Director Lemon noted that an explanation page was included on the report.

The cash fund balance as of September 30, 2011, was \$249,566.32, which compared to a cash fund balance of \$354,871.72 on September 30, 2010.

After discussion, a motion was made by Leisey and seconded by Avery to file the September Receipts and Expenditures Report for audit. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

### **Renewal Report**

Director Lemon presented the Renewal Report. A copy of said report is attached to and made a part of these minutes.

No action was necessary on this report.

### **Specialized Registrations**

There were no specialized registrations to be presented at the meeting.

### **Nonresident Licenses and Resident Licenses Issued to Persons Holding Licenses in Other Jurisdictions Report**

Deputy Director Hoffman presented for ratification the Nonresident Licenses and Resident Licenses Issued to Persons Holding Licenses in Other Jurisdictions Report, a copy of which is attached to and made a part of these minutes.

After review, a motion was made by Ptak and seconded by Leisey to ratify issuance of the licenses as set forth in the report. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

## **Examination Report - September**

Deputy Director Hoffman presented for ratification the September Examination Report, a copy of which is attached to and made a part of these minutes.

After review, a motion was made by Leisey and seconded by Rouch to ratify the September Examination Report for the purpose of issuing licenses. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

## **Real Estate Education Matters**

### **Pre-License Education Instructor Approval**

Deputy Director Hoffman presented for ratification the Pre-License Education Instructor Approval Report, a copy of which is attached to and made a part of these minutes.

### **Continuing Education Activity Approval**

Deputy Director Hoffman presented for ratification the Continuing Education Activity Approval Report, a copy of which is attached to and made a part of these minutes.

After review, a motion was made by Leisey and seconded by Avery to ratify the two reports. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

## **Pending Sworn Complaints and Investigative Matters**

Deputy Director Mayrose presented a summary report of the pending complaints, which included a list of licensees presently under disciplinary action or on appeal. A copy of said report is attached to and made a part of these minutes.

No action was necessary on this report.

The following sworn complaints and investigative matters were presented to the Commission:

### **Item A Complaint 2010-044**

Deputy Director Mayrose presented the alleged violations and investigative report to the Commission and, when necessary, answered questions on this matter.

After being advised of the results of the investigation and discussion, a motion was made by Leisey and seconded by Avery that this complaint be held in abeyance and a new complaint be filed against the Respondent for alleged violations of Neb. Rev. Stat. 76-2417(1)(b)(c); 76-2422(2); and 81-885.24 (29). Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

### **Item B Complaint 2010-054**

Deputy Director Mayrose presented the alleged violations and investigative report to the Commission and, when necessary, answered questions on this matter.

After being advised of the results of the investigation and discussion, a motion was made by Ptak and seconded by Leisey that this complaint be held in abeyance and a new complaint be filed against the Respondent on Neb. Rev. Stat. 76-2418 (1)(b)(c), 76-2419, 76-2421, 76-2422(4), 76-2425, 81-885.24(16), 81-885.24(29), and Title 299 Chapter 5 Section 003.25. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused

**Item C** Complaint 2011-001 – Ruth E. Richter vs. Tori Lynn Wallitsch

Deputy Director Mayrose presented the alleged violations and investigative report to the Commission and, when necessary, answered questions on this matter.

After being advised of the results of the investigation and discussion, a motion was made by Leisey and seconded by Avery that the complaint be dismissed without prejudice. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

**Item D** Complaint 2011-002

Prior to discussion of this matter, Commissioner Avery recused himself, thereby nullifying any potential conflict of interest.

Deputy Director Mayrose presented the alleged violations and investigative report to the Commission and, when necessary, answered questions on this matter.

After being advised of the results of the investigation and discussion, a motion was made by Leisey and seconded by Stange that the complaint be set for hearing per Staff recommendation. Motion carried with Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused, with Avery not participating or voting, having recused himself, thereby nullifying any potential conflict of interest.

**Item E** Complaint 2011-006

Prior to discussion of this matter, Commissioner Avery recused himself, thereby nullifying any potential conflict of interest.

Deputy Director Mayrose presented the alleged violations and investigative report to the Commission and, when necessary, answered questions on this matter.

After being advised of the results of the investigation and discussion, a motion was made by Leisey and seconded by Ptak that the complaint be set for hearing per Staff recommendation. Motion carried with Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused, with Avery not participating or voting, having recused himself, thereby nullifying any potential conflict of interest.

**Item F** Complaint 2010-061 – Gregory John and Michelle Suzette Specak vs. Steven Lee Taylor

Deputy Director Mayrose presented Complaint 2010-061 for reconsideration.

Deputy Director Mayrose presented the alleged violations and investigative report to the Commission and, when necessary, answered questions on this matter.

After being advised of the results of the investigation and discussion, a motion was made by Avery and seconded by Leisey that the complaint be dismissed without prejudice. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

**Item G** Complaint 2010-049 – Wallace Wiebesieck vs. Bruce Delmar Connell

Deputy Director Mayrose requested Complaint 2010-049 be dismissed. Deputy Director Mayrose explained that Complaint 2010-049 was presented to the Commission as an investigative matter. The Commission had voted to file a new complaint on its own motion and to hold Complaint 2010-049 in abeyance until the new complaint had been adjudicated. Complaint 2011-024 was the new complaint.

A motion was made by Leisey and seconded by Avery to dismiss Complaint 2010-049, since the Commission accepted a Stipulation and Consent Order for Complaint 2011-024 at this meeting. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

**Presentation of Stipulation and Consent Orders**

**Complaint 2011-024,  
Commission vs. Bruce Delmar Connell**

Deputy Director Mayrose presented a Stipulation and Consent Order in the matter of Complaint 2011-024, Commission vs. Bruce Delmar Connell. A copy of said Order is attached to and made a part of these minutes.

After discussion, a motion was made by Leisey and seconded by Rouch to enter into the Order as presented. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

**Complaint 2011-012, Commission vs. Michael Douglas Garrison and Gary Thomas  
Thompson and Complaint 2011-020, Commission vs. Michael Douglas Garrison**

Deputy Director Mayrose presented a Stipulation and Consent Order in the matter of Complaint 2011-012 and 2011-012, Commission vs. Michael Douglas Garrison and Gary Thomas Thompson and Complaint 2011-020, Commission vs. Michael Douglas Garrison. A copy of said Order is attached to and made a part of these minutes.

After discussion, a motion was made by Leisey and seconded by Stange to enter into the Order as presented against Michael Douglas Garrison only. Motion carried with Avery, Leisey, Ptak, Rouch, Stange and Gale voting aye, with Dover not participating or voting, being absent and excused.

## **Hearings**

There were no hearings scheduled to be held at the meeting.

## **Informal Special Appearances**

There were no special appearances scheduled to be held at the meeting.

## **2012 Legislation**

Director Lemon explained that the Commission staff did not currently have any proposed legislation but was placed on the agenda for conversation purposes.

Commissioner Leisey indicated that he would like the law to be changed so that if a seller has a home listed with another licensee, the seller can initiate a new listing contract with another licensee prior to the expiration of the current listing agreements expiration date. He indicated that by changing the law it would allow the licensees the opportunity to get the marketing in place so there is no down time where the property is off the market between listings for the seller. It would also be easier for the licensee so they do not have to track down the seller on the day of expiration of the listing contract. He noted that this change would not be skirting the law but is a practical perspective of the law being utilized.

Commissioner Avery concurred. He felt that the proposed law change is in the best interest of the consumer since the seller is not always available.

Chairperson Gale felt there were some fundamental issues which would need to be addressed when changing a policy. He was concerned that by another licensee signing a new listing agreement while there is one in place, it may hinder the current licensee from performing the duties and the seller may not be served as well. He felt that the licensee which is trying to get the new listing contract may indicate to the seller the proposed advantages to change licensees and a seller could hold out for a better deal which would get confusing.

Commissioner Stange indicated that ethics would play a substantial roll in this process. He indicated that if a seller reaches out to another licensee six months in advance it could be problematic. He indicated that should this proposed law change pass, he felt a time frame should be considered.

Commissioner Avery indicated that it would be impractical to have a new listing dated six months in advance. He indicated that most sellers begin looking for a new representative at the end of the listing contract. He also noted that a licensee would not contact the seller, it would be the seller making a decision and contacting the licensee or initiating the conversation, which would not be a case of the licensee under minding another licensee.

Commissioner Leisey indicated that no licensee has the right to talk to a seller currently under contract, or to encourage the seller to break a listing which would go against the code of ethics. He indicated that a thirty-day time frame for signing a new listing agreement would be acceptable. He indicated that if a seller is unhappy with the current listing contract that there is no damage to the seller. He indicated that this type of activity is permitted under the code of ethics of the Nebraska Realtors Association.

Commissioner Rouch indicated that either of these scenarios would work but indicated that sometimes an offer comes in toward the last day of the listing contract. She indicated that should this happen it could still be dealt with if there was a pending contract.

Commissioner Ptak indicated that if a seller signed a one year agreement and in six months was unhappy with the licensee, the seller has the right to fire the licensee and terminate the agreement. He indicated that the last thirty days of a contract usually promotes flurry on the licensee's behalf. He noted that if a seller initiates the discussion with a licensee that would be acceptable, but wondered where the Commission draws the line.

A motion was made by Leisey and seconded by Avery to have language drafted for Commission review to amend current law and allow a seller to enter into an agreement with another licensee prior to the expiration of the current agreement with a post dated date after the expiration of the current agreement.

Chairperson Gale felt the proposed law change was premature and not been reviewed by the industry or other interested parties, and was not in favor of the proposed legislation. He also felt that such a change might be more appropriate coming from the industry rather than the Commission.

Commissioner Leisey amended his motion to include that the Nebraska Realtors Association would also review the proposed law change and would require them to be in favor of such change as well. The amendment was accepted by the second.

Chairperson Gale did not feel the amendment was necessary since the proposed law change would need to be drafted first prior to the Nebraska Realtors Associations approval.

Motion carried with Avery, Leisey, Rouch and Stange voting aye, with Ptak and Gale voting nay, and with Dover not participating or voting, being absent and excused.

### **2010-2011 Objectives – Quarterly Report**

Director Lemon presented an exhibit regarding the proposed 2010-2011 objectives of the Commission. A copy of said exhibit is attached to and made a part of these minutes.

Director Lemon reviewed each of the current Commission Objectives and explained the progress made on each of them.

No action was necessary with regard to this matter.

### **Interpretation of Neb. Rev. Stat. 81-885.21, Advance Payment and Disbursement of Fees**

Director Lemon presented an exhibit of the current interpretation of Neb. Rev. Stat. 81-885.21 regarding the advance payment and Disbursement of fees. A copy of said exhibit is attached to and made a part of these Minutes. Mr. Steve Wiley was in attendance to speak to this matter.

Director Lemon explained the contents of the exhibits. He indicated that the guidelines as stated in the exhibit have been reviewed by legal counsel and would provide the Commission staff the appropriate interpretation and guidelines to answer licensee's questions. He paraphrased by indicating that the guidelines would allow funds to be deposited into a broker trust account and transferred to an operating account upon receipt of client agreement to compensate third party services dollar for dollar, with advance agreement in writing by all parties, but not be

compensation or payment to the broker.

Steve Wiley indicated that in order to comply with the laws, he had made the inquiry to the Commission for the interpretations and guidelines. He indicated that due to the economy the costs incurred by a broker have changed and increased greatly. He indicated that the current guidelines are a cost risk to a broker and would like a reconsideration of the guidelines in order for him to do the best job for his clients. He also reviewed the statutes with the Commission and inquired as to the intent of those statutes.

Commissioner Leisey indicated that money for marketing or advertising would occur prior to the time of the listing agreement.

Mr. Wiley indicated that if he were able to collect advance fees he would be able to offer more competitive fees and charge a lower commission. Chairperson Gale asked if the fees would be disclosed at the time of listing. Mr. Wiley indicated that there would be some mechanism of proof of how the advance fees were being spent. He noted that while it was suggested in the guidelines to put the fees into a broker trust account, it would propose an overhead expense to him as a broker since his trust account is currently inactive.

Chairperson Gale asked if the advance fees from the seller would be detailed in the listing agreement, connected with the compensation agreement or completely separate.

Mr. Wiley indicated that the listing agreement and the compensation agreement would be related. He indicated that a receipt of money would be provided to the seller and detailed as to how the money had been or would be utilized. He noted that attorneys and architects get retainer fees and felt that real estate broker should be allowed the same rather than just allowing advance compensation for third parties. He explained that should he provide a service to the seller such as putting together a video tour, he would like to be compensated for the time invested.

Commissioner Stange indicated that if the advance fees for the video tour were not paid to a third party vendor but for broker profit and you would be reimbursing yourself, it would be hard to distinguish if it was a fair cost. Mr. Wiley indicated that as long as the fees charged were not excessive he felt it should be acceptable.

Commissioner Leisey indicated that auctioneers get an advance fee for the advertising when they are selling real estate and asked how this would be different.

Director Lemon indicated that the scenario provided by Mr. Wiley was not the same as the proposed guideline which states that only advance fee disbursements on such fees collected for third party payments were acceptable. He also noted that the guidelines should be broad to provide meaningful and workable standards for the entire industry.

Commissioner Ptak indicated that lawyer retainers are received to bill against or for third party expenses, and while he understands Mr. Wiley's proposal it could lend the opportunity for abuse. He indicated that when paying third party expenses with advance fees there is a way to track the expenditures but it could be a profit center for licensees to abuse and market their own services. He indicated that when attorneys bill against the retainer for services such as copies, they should not be padding the copy fees for example, or that would also be abuse. He felt that disclosure is key and it would be difficult to monitor the accountability of the payments and did not feel that advance broker payments would be in the best interest of the public even if the seller agreed to the payment in writing as this could potentially take advantage of the seller.



Chairperson Gale indicated that he was not aware of all payments going through the trust account such as those indicated on a HUD statement. Commissioner Leisey indicated that there were many funds that do not go through a trust account when dealing with HUD.

Chairperson Gale felt that the Commission would want the ability to audit the advance fees or if it would be acceptable to keep it separate such as currently done with the HUD statements. Commissioner Ptak indicated that while the referenced statutes talk about commissions or fees being paid to the broker and that the public be informed of such fees, he understands that the landscape of real estate transactions have changed and with the current economy it is difficult, he does not want to go down a path that could harm the public.

Commissioner Leisey indicated that by law commissions are negotiable. He was not a fan of the advance fees going through a trust account and it should be stated in the listing agreement.

Director Lemon indicated that the proposed guidelines were not intended to apply to earnest money, only the advanced fees.

Commissioner Leisey indicated that the advance fees do not need to go through the trust account since the auditors currently review the purchase agreements which would include such advance fees.

Commissioner Avery indicated that he was interested in the concept and felt the Commission should look at a change in the interpretation which would allow for different marketing opportunities for licensees, as long as the fees are put through a trust account for the auditors review since they only look at a small sample of the purchase agreements and not all of them. He indicated that if a licensee should utilize such business concepts, a broker trust account for depositing advance fees should be used since the protection of the public is important.

Commissioner Stange felt that such advance fees should not be put into a trust account since this would be more work for the office administrators who oversee such accounts. He felt it was not necessary as long as the fees were clear on listing agreement, all parties agreed on the costs and the fees could be accounted for in a separate ledger for the auditors to review.

Mr. Wiley indicated that while public protection is paramount, he felt the regulations and enforcement of advance fees need to change as long as the broker has a good audit trail. He also indicated that some third party services are not satisfactory and if the broker would be able to provide a better service and receive compensation for these services in advance that would be in the public interest.

Chairperson Gale indicated that if a seller signed a listing agreement with a broker who has limited funds, it could benefit the seller to pay the advance fees for broker services such as for marketing services. He indicated that should advance fees be collected and deposited into a trust account as a flat sum and the fees could be charged against it. Also in the listing agreement it would have a maximum amount so the broker would not exceed the agreed amounts.

Mr. Wiley indicated that he had crafted a sample listing agreement that would allow for the seller to have the option of the advanced services. Chairperson Gale asked Mr. Wiley's option on where the money would be deposited and how it would be accounted for. Mr. Wiley indicated that it would be deposited into the broker's general operating account which could provide an audit trail the same as a trust account.

Chairperson Gale indicated that if the advance fees were deposited into an operating account instead of a trust account the seller could have a difficult time getting their money back for unused fees or another scenario would be if the broker should die that money would become part of the estate. Commissioner Ptak concurred with Chairperson Gale and added that while it may not always go to the estate depending on the type of business entity it would be difficult to assume that for all licensees. He indicated that the fees should only go into the operating account once the broker obligations had been met and that the operating account should only receive fees when the broker had earned the money. He felt that the guidelines should be reviewed and would like to have a study conducted on how the proposed changes could be administered and while Mr. Wiley had valid questions, he was not in favor of making a new policy until further research was conducted.

Mr. Wiley indicated that the prepaid expenses would be capped and identified in the listing agreement and would be paid to the broker pending delivery of services such as distinguished between an attorney fee and real estate fees. He also noted that the proposed expenses would be more difficult to collect after the fact and would be easier to collect up front.

Chairperson Gale asked Mr. Wiley to submit the drafted listing agreement to Director Lemon who would take it under advisement.

Commissioner Avery indicated that he appreciated Mr. Wiley's comments which were specific to his needs, it was not as broad as the Commission's decision required.

It was the consensus of the Commission to frame a more detailed interpretation by Director Lemon to be reviewed by various sources and to present such findings at the next available meeting.

## **Information Matters**

### **Trust Account Examination Evaluation Report - Third Quarter 2011**

Director Lemon presented the Trust Account Examination Evaluation Report - Third Quarter 2011. A copy of said report is attached to and made a part of these minutes.

Director Lemon reviewed some of the comments received and how the situations were handled.

No action was necessary on this report.

### **ARELLO Annual Conference – Baltimore, Maryland - September 28 - October 1, 2011 – Report of Attendees**

Director Lemon noted that Commissioners Avery and Dover and Deputy Director Hoffman attended the ARELLO Annual Conference.

Commissioner Avery and Deputy Director Hoffman discussed their experiences at the ARELLO Meeting, Commissioner Dover, being excused, was not available to report.

No action was necessary on this report.

## **Errors and Omissions Loss Report – Third Quarter 2011**

Director Lemon presented the Errors and Omissions Loss Report – Third Quarter 2011. A copy of said exhibit is attached to and made a part of these minutes.

Director Lemon explained that he felt the low incidence of claims and losses on the report was a good reflection on Nebraska licensees.

There was discussion regarding the report and it was the consensus of the Commission that further clarification of the columns be provided for the next quarterly report.

No action was necessary with regard to this matter.

### **Future Meeting Dates**

December 6-7, 2011 – Staybridge Suites, Lincoln  
January 19-20, 2012 - Staybridge Suites, Lincoln  
February 16-17, 2012 - Staybridge Suites, Lincoln  
March 15-16, 2012 - Staybridge Suites, Lincoln  
April 19-20, 2012 - Staybridge Suites, Lincoln  
May 17-18, 2012 - Staybridge Suites, Lincoln  
June 21-22, 2012 - Staybridge Suites, Lincoln

### **Recesses and Adjournment**

At 10:24 a.m., Chairperson Gale declared a brief recess, and reconvened the meeting at 10:35 a.m.

At 12:20 p.m., there being no further business to come before the Commission, a motion was made by Ptak and seconded by Rouch that the meeting adjourn. Motion carried with Avery, Griess, Leisey, Ptak, Rouch and Gale voting aye, with Dover not participating or voting, being absent and excused.

I, Greg Lemon, Director of the Nebraska Real Estate Commission, do hereby certify that the foregoing minutes of the October 27, 2011, meeting of the Nebraska Real Estate Commission were available for inspection on November 4, 2011, in compliance with Section 84-1413(5) R.R.S. 1943, of Nebraska.

Respectfully submitted,

  
Greg Lemon  
Director

### **Guests Signing the Guest List**

Kristen Anderson, Nebraska REALTORS® Association, Lincoln  
Tammy Brookhouser, Nebraska REALTORS® Association, Lincoln  
Steve Wiley, Smarter Choice Real Estate, Lincoln

