

## **REAL ESTATE COMMISSION MEETING**

Heber M. Wells Building

Room 210

8:00 a.m.

April 20, 2011

### **MINUTES**

#### DIVISION STAFF PRESENT:

Deanna Sabey, Division Director  
Dee Johnson, Enforcement Director  
Mark Fagergren, Licensing/Education Director  
Xanna Hardman, Assistant Attorney General  
Renda Christensen, Board Secretary  
Tiffeni Wall, Real Estate Education Coordinator  
Travis Cardwell, Investigator  
Jim Bolton, Investigator  
Van Kagie, Investigator  
Jill Childs, Real Estate Licensing  
Kathy Archultea, Real Estate Licensing

#### COMMISSION MEMBERS PRESENT:

Kay R. Ashton, Chair  
Stefanie Tugaw-Madsen, Vice Chair  
Gary R. Hancock, Commissioner  
H. Blaine Walker, Commissioner  
H. Thayne Houston, Commissioner

#### GUESTS:

Kevin Swenson	Curtis Bullock
Tammy Lund	Elizabeth Watts
Irene Kennedy	Linda Leavitt

The April 20, 2011 meeting of the Utah Real Estate Commission began at 9:00 a.m. with Chair Ashton conducting.

Representative Gage Froerer has to reschedule his visit until the May meeting, May, 18, 2011.

### **PLANNING AND ADMINISTRATIVE MATTERS**

#### Approval of Minutes

The minutes from March 16, 2011 had one correction, on page 3; the effective date of HB-91 will begin on May 10, 2011. With this correction, a motion was made to approve the minutes as amended. Vote: Chair Ashton, yes; Vice Chair Tugaw-Madsen, yes; Commissioner Hancock, yes; Commissioner Walker, yes; Commissioner Houston, yes. Motion carries.

## **DIVISION REPORTS**

### DIRECTOR'S REPORT – Deanna Sabey

Director Sabey called the Commission's attention to the new format of the Division's newsletter. There is a new flip format for viewing the newsletter which is similar to reading a newspaper. There is a new column called "Legal Corner," and for the last newsletter of 2010 Ms. Jonsson prepared a topical index for the year which includes individual topics and where they can be found in previous newsletters. She will be continuing this process at the end of each year forward.

HB-91 passed and will become effective on May 10, 2011. There have been several licensees so excited about the new changes and they have been trying to convince Ms. Christensen that they are exempt from any disclosures. Each person has had to be reminded that the new non-disclosures of Class C misdemeanors will not be in effect until May 10, 2011. Until that date, disclosure is still required.

The FTC MARS (Mortgage Assistance Relief Services) rule has posted a compliance guide for business. This is important because it clarifies that the rule applies to real estate agents in providing mortgage assistance relief services to their clients. It covers agents who are promoting their services as a way to help consumers avoid foreclosures. However, the rule does not cover real estate agents who do not promote their services this way, and will only provide services to help people in buying or selling homes.

The MARS rule has specific disclosures that are required and are above and beyond what real estate agents who might be operating in this arena are used to. For example, there have to be disclosures in ads, communication with prospective customers, and disclosures must be made when they give consumers an offer of mortgage relief from the lender or servicer.

The Division is not enforcing the MARS rule. We do not enforce federal law; however, we do have state law that covers foreclosure rescue services. Our state law does not require disclosures; it just states that those individuals who are providing foreclosure rescue services must avoid certain prohibited conduct. Examples of prohibited conduct would be falsely representing an affiliation with government, or instructing consumers agency that they should not communicate with their lenders or lawyers.

Mr. Bullock mentioned the UAR has come out with disclosure documents for their members so they can comply with this MARS rule. They have also heard from the NAR that it might not require consumer-specific disclosure. There have been many phone calls over several weeks on the confusion with these MARS disclosure forms. UAR is hoping they can delete several of these forms to help relieve confusion.

### ENFORCEMENT REPORT – Dee Johnson

Mr. Johnson introduced a new mortgage investigator to the Commission. Travis Cardwell has joined the Division recently, and has been in the mortgage industry for many years. Mr. Everett has been the only mortgage investigator for a couple of months, and will be excited to have someone to share the cases with.

In March the Division received 73 complaints; screened 23 complaints; opened 17 cases; closed 25 cases; leaving a total of real estate cases at 157.

Stipulations for review:

Robert Seitz  
Travis B. Wallace  
David M. Welcker  
B. J. Mora  
Troy H. Silvester

Each of the respondents was offered the opportunity to appear today, but has declined.

EDUCATION AND LICENSING REPORT – Mark Fagergren

Mr. Fagergren said the statistics for March show there was a loss of 166 active agents, but there was a gain of 124 inactive agents. There was only a net loss of 42 licensees. The economy is still tough on our licensees. Typically, this time of year it has been a booming time.

The Division's 2011 Caravan will begin next week. There have been some changes in the registration system that will now show the breakdown of real estate, mortgage, and appraisers attending. We will also be charging a \$10.00 no-show fee and will now be able to plan the attendance at each meeting. Chair Ashton said he believes part of the reason enrollment might be down is because NMLS won't allow mortgage licensees to receive continuing education.

Mr. Fagergren said the Division has its approved list of topics for core courses and elective topics for CE. There has been more interest in social networking courses. The Division's standard has always been, does this fall into the category of sales promotion? Are they talking about marketing techniques related to real estate? We don't think the Commission wants us to approve a course that just teaches how to use those networks. We understand that the Commission would allow the approval of such courses that show how real estate agents can take advantage of those technologies to protect the public and promote the business.

Commissioner Walker is concerned about the social networks being used for advertising, and it may be violating some of our state statutes or rules. ARELLO has been looking at social media and how it is being advertised or to promote agents or properties on a national and international basis.

Another area where interest has been shown is in the staging of homes. Some

educators are trying to get enough people interested in having a class approved on this topic. Legitimate rationale for home staging courses are a little more difficult to ascertain. The Commission said there might be some reasons to approve staging courses based upon marketing, but they felt it was a real stretch. Marketing classes that improve the techniques of the agents are great, and they encourage agents to enroll in them. Commissioner Walker and Commissioner Houston said this course might fall into professional education, but it doesn't fall under a topic that is still allowed for continuing education.

## COMMISSION AND INDUSTRY ISSUES

### Discussion of Proposed Rules – Deanna Sabey

Ms. Jonsson is on vacation this week, so Director Sabey will be giving the report on rules.

Director Sabey said the Division has gone through all the rules and regulations to determine if we could possibly reduce the regulatory burdens that are placed on our licensees and businesses. This process is at the encouragement of the Governor in his State of the State address for all agencies to review their rules. Director Sabey said she will have a list at the next meeting with the recommendations the Division feels could be areas of regulation reduction or change.

There was a rule published for comment on March 15, 2011 with three provisions. One of the provisions, R162-2f-205 amended that an entity may not register under a name that closely resembles the name of another registered entity, or that the Division may determine is misleading to the public. This amendment received one comment which was favorable.

The second amendment, R162-2f-403 deals with changes in trust accounts, so it would prohibit a principal broker from paying a commission out of the real estate trust account. Before any commission payment, the transaction must be closed or terminated, the broker must make a record of each disbursement from the trust account, and then deposit the withdrawn funds in the broker's operating account.

The third amendment regarding the square footage issue received five comments as part of this rule filing. All five of the comments have significant concerns with the rule, which will be addressed. The rule filing becomes effective on April 21, 2011 unless we decide to make some kind of change in language.

Commissioner Houston commented on the amendment regarding the trust account. One scenario would be on a lease option where there would be a delayed closing, and sometimes a portion of the commission is paid out. Sometimes trust monies are authorized by buyer and seller to be disbursed. So with this rule, is that not possible? Director Sabey said that according to this rule, that can't happen without first closing or terminating the transaction, making a record of each disbursement, and depositing the withdrawn funds into the broker's operating account. The piece that was added to this was the depositing into the broker's operating account.

Commissioner Walker said one way to keep things easier is to say if it's income, it goes to the operating account. Until it comes out of the trust account it is not income. Once you have earned that money, whether it be as a direct result of the builder paying early prior to the closing, or whether you obtain a closing, it's income to the company.

Director Sabey discussed R162-403-6(d). "A principal broker may not pay a commission from the trust account without first: closing or otherwise terminating the transaction; making a record of each disbursement; and depositing the withdrawn funds into the principal broker's operating account."

There was one comment in support of the name of an entity closely resembling the name of another registered entity, or if the Division determines it might otherwise be confusing or misleading to the public. Director Sabey explained that there is a misconception that the Department of Corporations protects intellectual property, so a trademark name, or an individual, and that is not their function. It is also not the function of the Division of Real Estate. We are trying to protect consumers and business from any confusion that is created because of a similar name, and would deny a name on that basis. In such a case, the name would be denied. It is the responsibility of the Division to protect the public.

Director Sabey brought up the topic of the square footage rule. Commissioner Walker said some brokers had concerns regarding this issue. He made a motion to take a brief break to see if they will show up. Vote: Chair Ashton, yes; Vice Chair Tugaw-Madsen, yes; Commissioner Walker, yes; Commissioner Hancock, yes; Commissioner Houston, yes. Motion carries. A brief recess was taken from 10:16 a.m. until 10:28 a.m.

The scheduled hearing for Sonia Zisumbo has been rescheduled for next month.

Commissioner Walker gave a report on his recent attendance at the ARELLO district conference on April 17, 2011. Commissioner Walker is the District Vice President in District 4 which includes Utah, Wyoming, Montana, Idaho, Oregon, and Hawaii. Utah remains on the cutting-edge, and Wyoming mentioned how great our website was. They go to our website quite often, and now Wyoming is trying to make some changes. One recommendation made by California to the Executive Director of the Oregon division was that ARELLO consider being a resource for people to go where they can check on fraud. ARELLO is determining whether or not they want to establish a Fraud Bank that would report convictions of fraud.

ARELLO has talked several times about being a clearing house for several types of licensing issues. Anyone can go on their website and see if a person has a license in a particular state. ARELLO's resource library is a good source of information.

Broker Price Opinions were also discussed, and how appraisers try to link it to

mortgage fraud. The American Resort Development Association has their own perspective on how timeshare should be dealt with, and Commissioner Walker brought information back for Director Sabey regarding timeshare resale ads. Alberta, Canada, has developed a system for social networking.

On specific issues, Idaho and Wyoming are becoming more protective of their states and more restrictive. ARELLO advocates greater reciprocity, license recognition and cooperation among the states. There is a concern in all the states with out-of-state brokers coming in and listing properties without being licensed in the state; no reciprocal agreement with an in-state broker; and then advertising the real estate. This mainly deals with commercial brokers, not residential brokers. Commissioner Walker believes Utah should take a tougher stand on this issue.

Commissioner Walker encourages everyone to go on the ARELLO website and search out a lot of information. He passed on reports from Montana, Oregon, and Nevada to Director Sabey. He encouraged everyone who can to attend the ARELLO meetings. Mr. Fagergren has gone in the past to learn and to meet others in the industry. Canada conforms to many of the rules and regulations that we do. ARELLO's next meeting is in October and will be held in Baltimore.

Chair Ashton turned the time over to Director Sabey to continue the issue of square footage. Chair Ashton wanted to thank all those who sent in public comments to the proposed rules. These comments help in decision making to make sure there are no unintended consequences.

There are five comments from the public addressing the square footage issue, which for the record is rule R162-2f-401(a). Four of these comments received were from commercial agents. Two comments were received with concerns about our current procedures having so many disclosures dealing with square footage, and the obligation of the consumer if they have questions on their own. Three comments were from commercial agents and are concerned with the overall language, and that the rule is unreasonable and will subject agents to additional liability if they were disclosing square footage.

Commissioner Houston is concerned that now there might be another place where an agent can get tripped up or to have an action brought against them by the Division for not complying with the rule. Mr. Bullock said that it will not necessarily add extra forms. The UAR has added an additional space on their forms for the client and seller disclosure forms to list the source of the square footage. Also, in the listing agreement, they have added a space with the exact same disclosure is made, so it causes the listing agent and the seller to talk about the source of square footage. The current forms are already updated so there will not be any additional burden.

Commissioner Walker represented the concerns of the commercial brokers. For clarification purposes, he asked Mr. Bullock if we actually had seen any commercial

lawsuits taken in Utah. Mr. Bullock said across the country there have been, but not in Utah. The concerns have all been from residential. On the issue of disclosure, the Division doesn't deal with just a few agents; it deals with all of the agents. The REPC is a state-approved form that is used by all agents. Unfortunately, people will use any reason for a scapegoat, so you need to be careful to list where you got the information. We are not asking for additional disclosures, we are requiring a disclosure.

Commissioner Walker said the concern from the commercial brokers is that there are many places to get information regarding square footage. The rule says to disclose the source on which licensee relies for square footage data. Commercial brokers deal a lot with attorneys, surveyors, and outside professionals on almost every step of the transaction. If the rule states that this applies to residential dwellings from one to four units, the problem would be solved for the commercial side, and it would also be handled from the residential side. Commissioner Walker would like to see this item on the agenda for next month for further discussion.

A motion was made to modify the verbiage of the proposed rule to read: in order to offer a property for sale (strike "or lease") in a residential real estate sale of one to four units (a) disclose the source, etc., and strike, "or lessors or lease." Commissioner Houston said he is still having issues with why we need to regulate this issue, and why it can't be handled through education and practice through our associations or individual licensees handling that issue. He needs more information as to why we think this is necessary to mandate and put that extra burden in. Vote: Chair Ashton, yes; Vice Chair Tugaw-Madsen, yes; Commissioner Hancock, yes; Commissioner Walker, yes; Commissioner Houston, no, to the general concept.

Director Sabey said the Commission would have to vote on the final language, because we are now separating residential, and one provision that provides to all properties, and then define residential properties in our definitional section of the rules. We will also have to take the changes that we made to our other rule for the trust account, and do this all at once. We should have this language ready for the Commission's review at the next meeting, and if it is approved, it will go back out for public comment.

A motion was made to separate the three issues into different notices so they can be dealt with individually. Vote: Chair Ashton, yes; Vice Chair Tugaw-Madsen, yes; Commissioner Hancock, yes; Commissioner Walker, yes; Commissioner Houston, yes. Motion carries.

#### **CLOSED TO PUBLIC**

A motion was made to enter Executive Session for the sole purpose of discussing the character, professional competence, or physical and mental health of an individual. Vote: Chair Ashton, yes; Vice Chair Tugaw-Madsen, yes; Commissioner Walker, yes; Commissioner Hancock, yes; Commissioner Houston, yes. Motion

carries. An Executive Session was held from 11:17 a.m. to 11:30 a.m.

**OPEN TO PUBLIC**

The Commission and the Director have approved the following Stipulations:

Robert Seitz - Approved

Travis B. Wallace - Approved

David M. Welcker - Approved

B. J. Mora - Approved

Troy H. Silvester - Approved

A motion was made to adjourn the meeting. Vote: Chair Ashton, yes; Vice Chair Tugaw-Madsen, yes; Commissioner Walker, yes; Commissioner Hancock, yes; Commissioner Houston, yes. Motion carries. The meeting was adjourned at 11:31 a.m.