

REAL ESTATE COMMISSION MEETING

Heber M. Wells Building
Room 250
9:00 a.m.
August 19, 2020
Zoom

MINUTES

DIVISION STAFF PRESENT:

Jonathan Stewart, Division Director
Kadee Wright, Chief Investigator
Joy Natale, Analyst
Justin Barney, Hearing Officer
Mark Fagergren, Licensing Director
Stephen Gillies, Assistant Attorney General
Maelynn Valentine, Board Secretary
Mary Martinez, Education Coordinator
Shane McFarland, Investigator
Sarah Nicholson, Investigator
Chris Martindale, Investigator
Mark Schaerrer, Investigator

COMMISSION MEMBERS PRESENT:

Richard Southwick, Chair
Lori Chapman, Vice Chair
Marie McClelland, Commissioner
Randall Smith, Commissioner
James Bringhurst, Commissioner

PUBLIC MEMBERS PRESENT:

Dan Naylor
Rob Aubrey
David Helm

The August 19, 2020 meeting of the Utah Real Estate Commission began at 9:00 a.m. with Chair Southwick conducting.

PLANNING AND ADMINISTRATIVE MATTERS

Meeting Without Anchor Location-Jonathon Stewart

Approval of Minutes – A motion was made and seconded to approve the minutes of the July 15, 2020, meeting and the minutes of the August 12, 2020, meeting of the Commission as written. Vote: Vice Chair Southwick, yes; Commissioner McClelland, yes; Commissioner Chapman, yes. The motion was approved.

DIVISION REPORTS

DIRECTOR'S REPORT – Jonathan Stewart

Director Stewart reported on the current state of the Division. There has been no change as far as the Heber Wells building being open to the public.

The Division has not resumed fingerprinting at this time. The Division has made the decision not to require fingerprinting for the time being and is unsure when it will resume. There is a concern that if the Division resumes fingerprinting that it may have to be stopped if there is spike in Covid-19 cases. The process is already complicated, as the Division will need to track applicants that have already been fingerprinted between January and mid-March.

Director Stewart thanked the Commission members for being available for the emergency Commission meeting held on July 12, 2020. A press release has been issued regarding the stipulation for Bruce L. Armstrong that was approved by the Commission. Press releases are not typically issued on cases for the Division, but this case was a serious enough violation that the Division felt that alerting the press was needed.

Director Stewart addresses the Commission with a proposal. In Discussion with Liz Harris, the Assistant Attorney General and Sarah Nicholson, an investigator with the Division have both mentioned that in the course of investigating the Bruce L. Armstrong case that they noticed an issue with the trust account rules. The proposal to the Commission is to form three committees, as there are three different sections of administrative code 403; there is 403a, 403b and 403c. There are the general provisions regarding trust accounts and there are provisions related to sales and property management.

Director Stewart believes there will be some overlap, but it would be beneficial to the Division and industry to look at the administrative rules. First look should be on the general provisions and what should apply to all brokers/brokerages as far a trust accounts. Members of the committee should include people who are involved in property management and sales

to have input into the rules. Once it has been established as to what should apply to all brokers and brokerages, then the other two committees will focus on property management trust accounts rules and sales rules.

Director Stewart states that it would be beneficial to include Paul Smith, a member of the Utah Apartment Association, at least one broker from a property management company, a practitioner in sales, potentially Kreg Wagner from UAR, a member or two from the Commission and a representative from the Division.

Chair Southwick agrees that forming the committees makes perfect sense given the significant issues seen this year centered on trust accounts. He does believe that a commercial broker should be included on the committee.

Sarah Nicholson gives a brief summary of the current issue regarding trust accounts for property management. The biggest concern is accounting for and keeping the money separate. In this case, there was the use of multiple accounts to track people's money. Currently there is no rule that states that a principal broker cannot hold more than \$500 of his own funds in the trust account. She would like to see that the trust account rules be the same, whether its real estate or property management. This will prevent property management from holding large sums of money for earned commissions in the trust account, which could easily be confused with client money.

Commissioner Bringhurst and Chair Southwick volunteer to serve on the committee. Sarah Nicholson from the Division would like to serve on the committee as well. Director Stewart will reach out to industry members to see if they would like to participate on the committee.

ENFORCEMENT REPORT – Kadee Wright

Ms. Wright reported that in the month of July the Division received 19 complaints; closed eight cases; leaving 475 open cases. There are six cases pending with the AG's office.

Stipulations for Review Presented by Joy Natale
David C. Helm

EDUCATION AND LICENSING REPORT – Mark Fagergren

Mr. Fagergren reported that there was a net increase of 202 real estate licensees for the month. Last month Mr. Fagergren mentioned the reduction of 1000 inactive licensees. This month 1100 licensees have returned. This may be more or less a statistical anomaly. In the months February, March

and April, there were approximately 4,000 inactive individuals and in June 2,900. This month the number is back to 4,000, which appears to be the more accurate number.

Mr. Fagergren addresses the Commission regarding outlines for the mandatory courses, stating that now would be the time to consider any modifications or revisions. All of the mandatory courses except for the mandatory residential are newer and therefore did not require modification. Mr. Fagergren stated that Chair Southwick has asked the Commission to consider whether there were some areas that needed to be included in the mandatory residential course that may not be currently covered. Mr. Fagergren was planning to indicate that in the instructor workshop that even though the modifications might be minimal, that instructors should revamp the examples they are using and suggests not teaching the identical material from year to year.

Vice-Chair Chapman asks if there has been any input from the educators related to amending or changing the outline. Mr. Fagergren states there have been no suggestions from educators to him at this time. Commissioner Smith asks the educators that are present for the meeting if they automatically update examples as they come along. Dan Naylor explains that with his courses that he teaches that they try to keep them up to date, so there should be current examples. Rob Aubrey states that he creates examples that he gets from social media or that he sees in his own organization. He does not use the same examples all the time and tries to mix it up from time to time.

Chair Southwick asks if there is anything addressing safety, best practices both from an agent and anything related to Covid-19 as precautions for agents, buyers and sellers? Mr. Fagergren informs Chair Southwick that there is nothing in the outline at this time for Covid-19 as it was not around when the mandatory course outline was created. He also states there is nothing specifically addressed for personal protection when showing homes. Mr. Fagergren does inform the Commission that there is a class agents can take on safety that are approved by the Division, but are not a part of the mandatory course.

Mr. Fagergren addresses the Commission with a new item that he would like to discuss for their consideration. Currently Broker candidates are required to get 60 experience points to qualify for their license. For example, for a residential sales person and for each side of the transaction they are involved in, they would get 2½ experience points. Once they have completed 24 transactions they would have the 60 experience points needed to qualify,

where they acted as either the listing agent or the buyer's agent and were listed on the REPC. Mr. Fagergren has seen instances where an individual has turned in an application and their name is only listed on 1/2 of the transaction. They have buyer or seller agency, but their name is not on the REPC or vice versa. The Division will typically give partial credit at 1 1/4 points. When the Division receives an application for an individual who has submitted transactions and they were never involved in agency, then the licensing team has expressed to the applicant that does not comply with current rule 401a for experience points. Mr. Fagergren asks the Commission if he is correct in that assessment that the Division is reluctant to approve the broker application that has not had a compliant transaction listed.

Mr. Fagergren explains that the rule states that there must be a written agency agreement to receive experience points. In instances that involve building brokerages, they often times will include the name of the agent on the purchase contract and on their employment agreement, which is not an agency agreement. Commissioner Bringham states that in order for them to be compliant, a builder would need to include a representation agreement as a part of their contract in order for the agent seeking a broker's license to qualify for that half of the transaction. Mr. Fagergren states that if a builder wanted to have a blanket agreement, then the Division would be okay with that also.

Chair Southwick asks if there have been instances where this could possibly be a technical gap or if applicants have not been involved in the transaction, but still listed on the contract. Mr. Fagergren answers that he does not believe there is any fraudulent activity being identified, but has seen altered documents in the past.

The issue that the Division is struggling with has to do with there being no agency representation. If the applicants name is somewhere in the REPC, not in paragraph five, then the Division would count that as experience points, but they would not be credited for having an agency agreement. Agency cannot be created in the purchase agreement. Agency is to be created prior to entering into a purchase agreement.

Commissioner Smith asks if a builder has not specified in their contract that there is a cooperating agent, after the fact, which shows there is a cooperating agent. Would that get the applicant their experience points? MR. Fagergren answers that the Division would not accept the "after the fact" scenario. The Division would need confirmation, that at the time, the applicant was assigned to be either the buyer's representative or seller.

Mr. Fagergren explains that a complication that occurs with builders is that they have a separate LLC with the same name as the brokerage, although agents view themselves working for the owner. There needs to be a written agreement between the builder company and the brokerage company authorizing them to act as an agent to sell their homes. Chair Southwick agrees that there does need to be written agency agreement. Joy Natale addresses the Commission and explains from enforcement prospective that there needs to be consistency between licensing and enforcement with the Division.

Mr. Fagergren reported that there was a six-week period of time where Pearson Vue was not testing individuals due to Covid-19 and there was a longer period where they were not performing fingerprinting. The Division granted 311 conditional licenses, which gave those individuals until September 30, 2020 to be fingerprinted. The Division has entered into an agreement with Pearson Vue that the conditional licensed individuals could schedule to be fingerprinted at Pearson Vue for \$12.00. If those individuals are not fingerprinted by the deadline, then their licenses will be denied. There are over 1400 slots available for fingerprinting and reminder notices have been sent.

Dan Naylor asks if individuals that are testing at Pearson Vue locations, if they are being fingerprinted? Mr. Fagergren answers and informs him that they have resumed fingerprinting as of July 15, 2020.

Director Stewart addresses the Commission regarding the discussion on broker applications. Earlier this year he spoke to the Wasatch Front MLS and one of the issues they raised with him was broker applications and why the Division requests every single file for the points that an applicant submits. Several years ago, the Commission did away with the random sampling of experience points for broker applicants. Director Stewart and Mr. Fagergren have been in discussion that random sampling was an effective way of determining if an applicant was in compliance without having to request so many files from applicants. Commissioner Bringhurst agrees and believes that random sampling makes sense. Chair Southwick, Vice-Chair Chapman, Commissioner McClelland and Commissioner Smith all agree to allow random sampling.

BOARD AND INDUSTRY RULE UPDATE – Justin Barney

Mr. Barney reported on the current proposed rule amendment. It has been submitted for review to the Office of Administrative Rules. They had some corrections and additions and was returned to the Division and resubmitted.

Public comment will go through October 15, 2020.

A brief summary of what is included on the current rule amendment is:

1. Mandatory CE course for licensees renewing after having been inactive
2. Change that would allow the name "escrow account" as an alternative name for a trust account
3. Eliminating mandatory denial for an applicant with a record of a felony plea in abeyance
4. Turnover of unclaimed funds from a trust account being made consistent with state laws
5. Increased broker funds allowed in a trust account to be increased from \$500 to \$1000

Mr. Barney gave an update on the virtual live amendment. A rough draft was prepared and submitted to members of the Division. No feedback has been received on the rough draft.

Mr. Barney reported on the committee that has been working on the redesign of the FHA/VA loan addendum form. A proposed form has been submitted. Mr. Barney thanked Kreg Wagner for his involvement. Some changes may occur, but is available for review. Chair Southwick comments that the form is a good clarification of distinguishing whether the loan is FHA or VA. Kreg Wagner had a comment regarding paragraph three of the updated form and it states, "We need to see what exact language is required for the amendatory language to meet FHA/VA loan standards. I think we can make this language much more concise, but it depends on what language is required."

Commissioner Smith believes that the language is a little confusing, as it seems the FHA addendum automatically makes the financing and appraisal deadline null and void. Chair Southwick would like to hold off on until next month when Dan is available for clarification before approving the form. Vice-Chair Chapman suggests that there to be clarification on who pays for the terminate inspection on a VA loan on the addendum.

A motion was made and seconded to close the meeting for the sole purpose of discussing the character, professional competence or physical or mental health of an individual. Vote: Chair Southwick, yes; Vice Chair Chapman, yes; Commissioner Smith, yes; Commissioner Bringhurst, yes; Commissioner McClelland, yes. The motion was approved.

CLOSED TO PUBLIC

Executive session from 10:20 a.m. to 10:35 a.m.

OPEN TO PUBLIC

A motion was made and seconded to approve the stipulation for David C. Helm. Vote: Chair Southwick, yes; Vice Chair Chapman, yes; Commissioner Smith, yes; Commissioner Bringhurst, yes; Commissioner McClelland, yes. The motion was approved with concurrence from the Division.

Director Stewart stated that once the FHA/VA addendum is finalized, that the committee look at other state approved forms. Other than the RECP, state approved forms have not been updated for some time. He believes it would be a good idea to prioritize which forms are used the most and consider whether they should be updated. Chair Southwick suggests sending a list of state approved forms to the Commissioners so they can distinguish them from UAR forms.

A motion was made and seconded to adjourn the meeting, Vote: Chair Southwick, yes; Vice Chair Chapman, yes; Commissioner Smith, yes; Commissioner Bringhurst, yes; Commissioner McClelland, yes. The motion was approved. The meeting adjourned at 10:54 a.m.