



Andy Beshear
Governor

Kerry B. Harvey, Secretary
Public Protection Cabinet

Robert Laurence Astorino
Executive Director

John L. Hardesty
General Counsel

Kentucky Real Estate Authority
Kentucky Real Estate Commission

Mayo-Underwood Building
500 Mero Street, 2NE09
Frankfort, Kentucky 40601
Phone: (502) 564-7760
krec.ky.gov

COMMISSIONERS
Lois Ann Disponett, Lawrenceburg
Raquel E. Carter, Lexington
James O. King, III, Louisville
Steve K. Cline, Bowling Green
James G. Simpson, Dry Ridge
Larry D. Disney, Winchester
Joy E. Amann, Ludlow

KENTUCKY REAL ESTATE COMMISSION
(KREC)

MEETING MINUTES

October 22, 2020

*** This meeting occurred via Zoom Teleconferencing, pursuant to KRS 61.826***

Commission Members Present

Commissioner Chair, Lois Ann Disponett
Commissioner Joy Amann
Commissioner Larry Disney
Commissioner James Simpson

Commissioner Steve Cline
Commissioner James King
Commissioner Raquel Carter

KREA Staff

Robert Laurence Astorino, Executive Director
John Hardesty, General Counsel
Hannah Carlin, Education Coordinator
Angie Reynolds, Administrative Specialist III
Brian Travis, Investigator
Angie Thomas, Staff Assistant

Guests Present

502-742-6001
Al Bevins
Brenda Goolin
Bree Snow
Brian Walters
Bryan Henderson
Bryan Russelburg
Christopher Bellas

Christel Long
Douglas Meyers
Jaclyn Graves
Jensey Burgess
Jim DeMaio
Johnathon French
Jonathon Gilvins
Josh White

Joyce MDB
Joyce Sterling
Lester Sanders
Marcie Estep
Margie Harper- HKAR
Nichole Knudtson
Pam Carroll
Paul Ogden

Rene Rogers
Rhonda Richards
Rose Mullins

Samuel Higdon
Sandy Newell
Todd Thornton

Virginia Lawson

Call to Order and Guest Welcome

The Kentucky Real Estate Commission meeting was called to order through video teleconference by Commission Chair, Lois Ann Disponett, at 9:10 a.m. on October 22, 2020. Roll call was taken and a quorum was present. Guests in attendance were welcomed and introductions of guests, staff, and commissioners were made.

Swear In New Commissioners At this time the new Commissioner James King was sworn in by Angie Thomas, KREA Staff Assistant and notary public.

Approval of Meeting Minutes

Commissioner Cline made a motion to approve the **September 17, 2020** Commission Meeting Minutes. Commissioner Simpson seconded the motion. With all in favor, the motion carried.

Education and Licensing Report

Ms. Carlin presented the Commission the following:

1. PSI Testing Statistics

September 2020 (First Time)

Type of Exam	Passed	% Passed	Failed	% Failed	Total Exams
License Reciprocity- Broker	2	66.67	1	33.33	3
License Reciprocity- Salesperson	3	60.00	2	40.00	5
Broker- National	3	60.00	2	40.00	5
Broker- State	3	42.86	4	57.14	7
Salesperson- National	126	77.78	36	22.22	162
Salesperson- State	105	63.25	61	36.75	166
TOTAL	242	69.54	106	30.46	348

September 2020 (Repeat)

Type of Exam	Passed	% Passed	Failed	% Failed	Total Exams
License Reciprocity-Broker	1	100.00	0	0.00	1
License Reciprocity-Salesperson	2	100.00	0	0.00	2
Broker- National	2	40.00	3	60.00	5
Broker- State	3	50.00	3	50.00	6
Salesperson- National	31	41.89	43	58.11	74
Salesperson- State	45	56.96	34	43.04	79
TOTAL	84	50.30	83	49.70	167

2020 (First Time)

Type of Exam	Passed	% Passed	Failed	% Failed	Total Exams
License Reciprocity-Broker	5	62.50	3	37.50	8
License Reciprocity-Salesperson	14	63.64	8	36.36	22
Broker- National	62	65.96	32	34.04	94
Broker- State	57	55.88	45	44.12	102
Salesperson- National	727	74.79	245	25.21	972
Salesperson- State	609	59.53	414	40.47	1,023
TOTAL	1,474	66.37	747	33.63	2,221

2020 (Repeat)

Type of Exam	Passed	% Passed	Failed	% Failed	Total Exams
License Reciprocity-Broker	3	75.00	1	25.00	4
License Reciprocity-Salesperson	5	83.33	1	16.67	6
Broker- National	26	44.07	33	55.93	59
Broker- State	35	57.38	26	42.62	61
Salesperson- National	169	37.06	287	62.94	456
Salesperson- State	267	54.27	225	45.73	492
TOTAL	505	46.85	573	53.15	1,078

2. Licensing Statistics

As of October 19, 2020

Type	Active	Inactive	TOTAL
Sales Associate	11,322	5,571	16,893
Broker	3,990	778	4,768
TOTAL	15,312	6,349	21,661

New Licenses Issued in 2020 (by month)

Month	Sales Associate	Broker	Total
January	102	16	118
February	87	21	108
March	97	19	116
April	49	11	60
May	15	4	19
June	35	1	36
July	142	8	150
August	125	4	129
September	131	9	140
October			
November			
December			
TOTAL	783	93	876

The October 2020 **Continuing Education Applications** were reviewed for compliance with 201 KAR 11:170 and recommended to the Commission for approval by Hannah Carlin.

Education Providers

- a. Kaplan Real Estate Education
- b. Ward Elliott Institute of Real Estate

Sales Associate Pre-license Courses

Cooke Real Estate School



Course Name- Course Number	Instructors	Pre-license Hours
Principles and Practice (21941)	Frank Cooke	96

Kaplan Real Estate Education

Course Name- Course Number	Instructors	Pre-license Hours
Kentucky Real Estate Principles (23148)	Tom Highland	96

Real Estate School

Course Name- Course Number	Instructors	Pre-license Hours
Principles and Practices of Real Estate (21928)	Vickie Grimes	96

Thornton's Real Estate Academy dba Great Way to Learn

Course Name- Course Number	Instructors	Pre-license Hours
Principles and Practices of Real Estate (21962)	Todd Thornton	96

Ward Elliott Institute of Real Estate

Course Name- Course Number	Instructors	Pre-license Hours
Principles and Practices (21963)	Ward Elliott	96

Continuing Education Courses

Kaplan Real Estate Education

Course Name- Course Number	Instructors	CE Hours
Avoiding Deceptive Practices On Demand Course V1.0 (23154)	Tom Highland	3 elective

Everyday Ethics in Real Estate V2.1 (23150)	Tom Highland	6 elective
Kentucky Core Course V1.0 (23146)	Tom Highland	6 law
Liars, Cheaters, and Thieves: Averting the Client Catastrophe On Demand V1.0 (23153)	Tom Highland	3 elective
Risk Management V5.0 (23149)	Tom Highland	6 law
Solving the Down Payment Dilemma Online Video Course V1.0 (23152)	Tom Highland	3 elective
The CIC Paper Chase Online Video Course V1.0 (23151)	Tom Highland	2 elective

The CE Shop

Course Name- Course Number	Instructors	CE Hours
Buyers by Generation (23142)	Jill Malloy, Michael McAllister	6 elective

WebCE Inc.

Course Name- Course Number	Instructors	CE Hours
Cybersecurity Best Practices for Real Estate Professionals (23155)	Susan Davis	3 elective

Continuing Education and Post-License Education Courses

Greater Louisville Association of Realtors

Course Name- Course Number	Instructors	CE Hours	PLE Hours
Pet or Not a Pet (23144)	Donna Miller, Doug Myers	3 law	3 fair housing

HomeServices Real Estate Academy



Course Name- Course Number	Instructors	CE Hours	PLE Hours
Contracts (21143)	Steven R. Tucker	3 law	3 contracts

Kaplan Real Estate Education

Course Name- Course Number	Instructors	CE Hours	PLE Hours
Fair Housing V5.0 (23147)	Tom Highland	3 law	3 fair housing
Real Estate Finance V1.0 (23145)	Tom Highland	3 elective	3 finance

Broker Electives/NAR Designation Courses

The CE Shop

Course Name- Course Number	Instructors	Broker Elective Hours	CE Hours
Marketing Strategy and Lead Generation (23143)	Jill Malloy, Michael McAllister	6	6 elective

Broker Curriculum Courses

Cooke Real Estate School

Course Name- Course Number	Instructors	Broker Curriculum Hours
Commercial Real Estate (21967)	Frank Cooke	48
Essentials of Finance (21918)	Frank Cooke	48
Essentials of Real Estate Investment (21934)	Frank Cooke	48
Property Management (21941)	Frank Cooke	48

Instructors



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- a. Ward Elliott
- b. Ted Highland
- c. Steven R. Tucker

Commissioner Amann made a motion to approve the list of applications. Commissioner Carter seconded the motion. Commissioner Disney abstained from the motion. Remaining all in favor, motion carried.

Ms. Carlin presented the **2020 renewal hardship requests** to the full Commission for review and consideration of waiving the \$200 fine with the following actions be taken by the Commission:

1. **License #221276** - This licensee was affected by the Commission's decision a few months ago regarding the discrepancy in our data base concerning inactive licensees and PLE deadlines. At the time, the system was failing to cancel inactive licensees that had not completed their PLE in a timely manner. The Commission voted to extend that deadline to those licensees until the end of the year, giving them enough time before they were to be canceled.

According to the submitted documentation, this licensee experienced a significant illness which led to her going inactive and financially unable to deal with the financial burden of the PLE classes. However, she has not provided a time frame in which she would complete her PLE. She was found to be permanently disabled in December 2016 by the Social Security Administration. She claims to have called KREC back in March 2020 and was told that she did not have to take any CE at that time. This was correct at the time, however in her accompanying letter it appears that she may have misunderstood that it meant she did not have to do any CE at all, which is not the case. At the time she came up as active and the error in the system had not been detected. She is asking the Commission to extend her deadline of Dec. 31, 2020. Licensee has not given an expected timeline of completion.

Commissioner Cline made the motion to deny. Commissioner Carter 2nd. Having all in favor, motion carried.

Ms. Carlin updated the Commission regarding the 'Train the Trainer' program. She and General

Counsel hosted a three hour 'Train the Trainer' Zoom session on October 15, 2020. She thanked everyone who attended. The 'Train the Trainer' presentation went over the regulatory changes and emphasized some areas of commonly misunderstood Real Estate law. She hopes that the instructors and trainers benefited from it. She hopes to continue the process moving forward. The current session of 'Train the Trainer' was recorded and will be provided on the website for viewing in the near future.

Executive Director Comments

Director Astorino wanted to commend General Counsel and Hannah for the 'Train the Trainer' educational presentation. He thought the content was very valuable.

There are other things going on at KREA that will impact the Commission. One of which is the draft for the reciprocity agreement from Tennessee. Currently, John Hardesty and Hannah Carlin are reviewing it. After that it will go to the Cabinet, for the Secretary's approval. By the next meeting he should be able to present a completed Tennessee reciprocity agreement. Which is something that licensees had asked for, and he feels that it is a promise kept.

There are a lot of new Commissioners that have come on board right now, who need to understand their fit of where they are - not just in the real estate board, but the fit of KREA with the department of Consumer Public Protection Cabinet (PPC). So another initiative that KREA had undertaken has been to prepare an orientation program for new Commission members, on not only the PPC, but also Commission specific, including Board related information and a copy of the regulations and statutes. KREC is currently under review awaiting approval. It should be available within the next 30 days.

He did attend Arello, he found it to be very interesting. He had never been before. It was an eye opener for him.

One of the things that he will be looking into this month is the idea of remote education and increasing our ability to effectively provide it. We do not know how long the pandemic will truly last, but the key to surviving and advancing in this environment will be the ability to conduct business via remote and/or social distancing. Anyone can be affected by the virus at any time. He asked to consider how the Boards can encourage those protocols and practices that enable us to continue a very active and successful real estate market. He doesn't want to tell people how to run their businesses, but he does want everyone to take it into consideration when conducting business.

Committee Reports

Education Committee

There was no Education Committee report for this meeting.

Applicant Review Committee

Commissioner Disney read the report of the Application Review Committee and the Committee's recommended action on each licensee:

1. J.W. to approve
2. J.G. to approve
3. J.D. to approve
4. J.F. to approve
5. D.B. to approve
6. S.H. to approve
7. B.W. to deny

Complaint Review Committee

Commissioner Cline read the report of the Complaint Review Committee, and the Committee's recommended action on each Complaint, to be further discussed in Executive Session. The Committee's recommendations are as follows:

Final Adjudications

- 18-C-024** - In a complaint filed on December 18, 2017, Complainant claims the Respondent, engaged in negotiating real estate leases in Kentucky without a licensed agent, and charged and collected commissions on the leases.

The Respondent was previously licensed in Kentucky but his license expired. However, because it appeared this was a commercial transaction for a business and the Respondent's company, and not the Respondent individually, was negotiating the deal, and because there was no documentation or allegation suggesting the Respondent did not have a licensed agent working with him, prior counsel requested a supplement from the Complainant. Complainant never provided a Sworn Supplement in response to the request. Therefore, the Committee recommended dismissal of the complaint.

- 19-C-010** - Complainant claimed that Respondent, a dual agent in the transaction, misrepresented the characteristics of property the Complainant purchased. The Complainant purchased two lots for development. Evidence suggests the septic tank, which was visible, was on Complainant's lot, but the leach lines, which were underground, ran onto an adjacent parcel.

The adjacent lot was purchased by another party for development. While in development the contractor determined the leach lines for Complainant's septic system were located on that adjacent lot.

There was evidence Complainant elected not to do a survey prior to purchase. The Respondent established he had no way of knowing where the septic lines were.

KRS 324.160(4)(b) prohibits a licensee from “making any substantial misrepresentation or failing to disclose known defects which substantially affect the value of the property.” The issue presented is whether Respondent violated this section.

There is no evidence Respondent knew that the leach field and leach lines crossed onto the adjacent lot at the time Complainant purchased the other two lots. Further, the Complainants had the opportunity to obtain a survey, or to request to review the existing survey, but choose not to do so.

The CRC Committee recommended to dismiss the complaint.

19-C-042 and 19-C-043 - The Complainant in both of the complaints purchased a home listed by the Respondent, on October 28, 2016. Complainant filed her original complaints on April 29, 2019 making various allegations of fraud against the Respondent and Complainant’s agent (Respondent 2), claiming the Respondent knew of defects to the property but failed to disclose them. The Complainant further claims she never received a Seller’s Disclosure form. In the companion case, Complainant alleges her own agent, Respondent 2, was negligent for not obtaining a copy of the Seller’s Disclosure form for her.

KREC legal staff sent Complainant a request to supplement her complaint. On the face of the original complaints, it appeared the complaints had been untimely filed and should be dismissed. In her supplement, Complainant provided one additional fact that, if true, would fall within the statute of limitations. She stated that on January 25, 2018, she discovered the HVAC system issues. Therefore, the failure to disclose known defects to the HVAC system would be the only actionable violation if it in fact occurred. All other defects to the home were discovered by January of 2017.

Because there was no evidence Respondents knew about the alleged HVAC issues, those claims likewise failed.

As a result, the CRC recommended to dismiss the complaint.

19-C-044 - The Complainants purchased property from the seller on November 13, 2018. The seller’s realtor is the Respondent. The Complainants claim the Respondent

covered up and misrepresented a number of problems with the property, including, primarily, a water leak in the basement.

They claim they texted Respondent that the basement was leaking, and he asked whether it was at the bottom of the stairs. Complainants claim this is evidence Respondent knew about the leaking beforehand since he asked about a specific location.

There was evidence Complainants visited the subject property approximately three to five times before purchasing it. Further, there was evidence Respondent's response to Complainant's text regarding whether it was leaking at the bottom of the stairs related to the fact that he knew there was a utility room under the stairs which contained the water heater and furnace, thus making it the most likely source of leaking in the basement. Respondent communicated Complainant's concerns to the seller, who informed Respondent the seller had never had a problem with water in the basement and that he had disclosed all known issues on the Seller's Disclosure form.

There is no evidence Respondent had prior knowledge of leaking issues in the basement of the home other than a drain pipe that could back up if not cleaned, which Respondent and the seller disclosed, or that he misrepresented or withheld such information. Text messages between Respondent and his client further support he had no knowledge of the issues. Further, the home inspector did not find evidence of leakage during his first inspection.

The CRC recommended to dismiss the complaint.

19-C-045 - The Complainant filed this complaint against Respondent in June 2019. The complaint alleged the prior owners of the property experienced and failed to disclose septic issues, including drainage issues that affected the neighbor's property. While the complaint is not explicit, it appeared that the Complainant alleges that the Respondent knew about and failed to disclose the problems.

In July 2019, the case KREC placed the case into abeyance because Complainant filed a parallel civil lawsuit related to the same issues. On October 3, 2020, the Legal Department received an email from the Complainant requesting to withdraw his complaint because he had settled the civil lawsuit and no longer wished to proceed with this case.

The CRC recommended to permit the Complainant to withdraw the complaint and dismiss the case against the Respondent.

19-C-057 - The CRC recommended an informal reprimand. The full Commission agreed with that recommendation but also authorized General Counsel to negotiate a settlement of discipline in the form of both an informal reprimand and six hours of CE – three in ethics and three in law.

Executive Session Legal Matters and Case Deliberations

At 9:38 a.m. Commissioner Cline made a motion to enter executive session, pursuant to KRS 61.810(1)(c) and (j), and KRS 61.815 to discuss proposed or pending litigation and deliberate on individual adjudications and to discuss 7 new applications (see above) and the 7 following case recommendations offered by Commissioner Cline:

- 18-C-024
- 19-C-010
- 19-C-042
- 19-C-043
- 19-C-044
- 19-C-045
- 19-C-057

Commissioner Simpson seconded the motion and the Commission entered into closed session discussion.

Reconvene Open Session and Committee Recommendations

Commissioner Disney motioned for the Commission to come out of executive session and Commissioner Simpson 2nd the motion. Commission Chair Disponett resumed the full Commission meeting at 10:34 a.m. and welcomed everyone back attending the teleconference Commission meeting.

Commissioner Disney made the motion to adopt the **Applicant Review Committee** recommendation report as discussed in the Executive Session. Commissioner Amann recused herself from the vote of J.G., J.D., and J.F. of the 7 application requests. Commissioner Cline 2nd the motion. Having all in favor, motion carried.

Commissioner Amann made the motion to adopt the **Complaint Review Committee** recommendations as discussed in the Executive Session. Commissioner Simpson 2nd the motion. Having all in favor, motion carried.

Legal Report

Docket Update

GC stated that the back log is continuing to be reduced. If anyone has any questions regarding updates on their complaints to please feel free to reach out to the legal team. We are moving as many complaints to the next step as fast as possible. He wanted to thank Brian Travis, the new

investigator. While GC had to work on other KREA projects, such as the ‘Train the Trainer’, Brian was able to step in, educate himself, and pick up the investigations that hadn’t been completed and finish them. He is currently working on other investigations and is moving through them. He thanked Brian for all his hard work, he was grateful to have him aboard.

Statewide Purchase Contract form

This has been a topic of a few meeting discussions. There are many for and against, all for their various reasons. He was asked by the Commission to look into the legality of and/or any implications of such a contract. KREC has also asked industry participants, such as; Licensees, Primary Brokers, and Attorneys for feedback. Anyone with experience in the industry to submit their thoughts to the Commission for consideration. We received 13 letters and all but one was in opposition to the contract and that letter was kind of neutral. GC read it as suggestions for things to do if they did decide to create a contract. He went through some of the concerns that were both raised from his own research and the concerns expressed in the letters. Those included Antitrust concerns, the difficulty tailoring a contract to serve all areas of the state due to their diverse needs, the potential impact on the freedom to contract, and how to deal with local laws and ordinances affecting what must be in a contract, among others.

It is clear from the feedback KREC received from licensees and the industry that there is widespread opposition to KREC mandating a statewide purchase contract form for use by all licensees.

At this time, GC opened it up for discussion among the Commissioners, Commissioner Cline stated that he felt that there needed to be additional fact checking on the letters. He stated that he sells lake front property every day and that there isn’t anything that they cannot do or undo with an addendum. He has done relocation for 33 years. There are two contracts for relocation, the original contract and the relocation contract, which supersedes the first contract. Everyone signs that contract. So some statements in the letters are not exactly true. He had not heard anything about Arello or any lawsuits, so he thinks that more fact checking needs to be involved. He said he wasn’t sure if the contract needed to be mandatory, but believed the Commission should provide one. He felt that it would be something not only beneficial to the licensees but the consumer as well. He felt that if you more prudent to educate someone on one contract versus fifty contracts. He feels that some of the claims in the letters were not factual, he bases this on his own everyday business experience.

Chairperson Disponett noted that she does a lot of business with Fannie Mae and is required by Fannie Mae to use their contract on the foreclosures. She has received several calls from around the state, but she has yet to speak to anyone that is in favor of a mandatory contract. She has spoken to a few people that were neutral.

Commissioner Simpson stated that he agreed with Commissioner Cline. He felt that he had made his feelings clear in previous meetings. Just recently he received a contract from another

association and it was a disaster. It bogged down the process and was a hindrance to him and his client. For a situation like Fannie Mae, where someone does not want to use the contract, do the same as what is required from the ‘Seller’s Disclosure Property Agreement’ – check the box for or notate that “seller doesn’t want to use our form they wanted to use a different form”. He sees the tide turning on this and doesn’t want to start a political campaign for people to write letters – but every high producing agent he has spoken to has been in favor of a mandatory contract. With that said, he definitely sees the value of creating a model contract. He would require that sellers use his contract or the state model form. This would definitely help curb what he has been experiencing.

Commissioner Disney stated that it has been his experience in working with state government to not go against the recommendation or advice of the agency attorney. This is the individual that would have to enforce the decisions of the Commission. Another major disadvantage that he sees is the time line of which it would take to get this accomplished, the least it may take 8 months up to a year or more to get a contract in place. He feels that the best way to develop a contract would be to work with the State and local associations. Going back to the statements of Commissioner Cline and Simpson, the Commission could post a model contract, with approval, on its website to be used by licensees as needed. He thinks that this maybe the better course to take until or if changes can be made through LRC in a more timely fashion.

Commissioner Amann added that builder contracts are another issue when doing new construction. That these things do come into play with the relocation contracts. That she agrees with Commissioner Disney, the state and local associations would be a great place to start by getting their input. Referring back to Commissioner Cline’s earlier statement about it not being ‘mandatory’ which seems to be a setback for her. There are some other items currently on the table that need to be cleaned up that will be going through that 8 to 10 month process as far as disclosures and advertising regulations. She advised focusing on those things first, and allow the state to look into a statewide contract that makes sense and revisit it.

Commissioner Carter agreed that having the contract available versus it being mandated is a determining factor for her. That as a Commission we should lead by showing what would be an example of an appropriate contract. She appreciated everyone that took the time to submit a letter. But it seems that the sentiment for not doing this is due to the time it would time take to do so. She is not making a determination one way or another. But if it is indeed the right thing to do for the public, time should not be a determinant.

Director Astorino stated that he felt GC did a great job with the legal opinion concerning this issue. He believed that the legal elements of this discussion would be enough that if he were a Commissioner he would also have some hesitancy. He feels that the biggest part of this is that it would be ‘mandated’. It is compulsory. These are things people do not become comfortable with no matter how good the outcome is. On the other hand to have something that is suggested or available for use at will is a different environment. He wants everyone on the call to understand that when they started this study the first thing that they did was to form a subcommittee with

himself, Commissioners Disney, Cline and Simpson. They reviewed about forty different states to see what their best practices were. Out of those states, only one, Utah, had a mandatory state sales contract. Kentucky has 120 counties and is in two different time zones. To think that one mandated contract will fill all the licensee needs is ambitious. Maybe we should go back and create something that is a format or a suggestion for best practices. The creation of something that would be supported verse a point of concern. That this process may be a better process to understand.

Commissioner Disney made the motion to work with local associations on a ‘model’ contract instead of a ‘mandatory’ contract, which would not have to be adopted into a regulation or statute. Something that would be accessible on the website for use as an example. Commissioner Amann 2nd the motion. Having all in favor, motion carried.

At this time Chairperson Disponett appointed Commissioners Disney, Cline and Amann to a Committee to work with staff and outside associations to help facilitate the creation of a ‘model’ contract.

New Committee Appointments

In addition, Chairperson Disponett appointed Commissioners Simpson and King the ARC Committee. She also appointed Commissioners Disney and Amann to the CRC Committee (Group A) and Commissioners Cline and Carter to the CRC Committee (Group B) to help expose the new Commissioners to the duties of the Commission.

Written Consent v. Listing Agreement Discussion

The Kentucky Real Estate Commission (“KREC”) recently received public comments regarding concerns about the change to KREC’s advertising regulation – 201 KAR 11:105 – that removed the requirement of a listing agreement for a licensee to advertise real estate for sale or lease, and replaced it with a requirement that the licensee must have “the written consent of the owner.” KREC is considering whether to amend the regulation again to require a listing agreement before a licensee can advertise real estate for sale or lease.

This issue arose, in part, due to concerns expressed by various local Realtor associations. In short, the associations are concerned that if KREC’s regulations do not require a listing agreement to advertise real estate, then licensees could enter into agreements, other than listing agreements, to advertise real estate wherein the real estate would not be listed on the association’s multiple listing service (“MLS”). Further, the associations argue they, the National Association of Realtors, and MLSs require listing agreements in order for Realtors to list properties on a MLS.

General Counsel addressed the legal ramifications of such a proposal, including Antitrust concerns, the need to avoid taking action that would benefit one group – such as local and state associations and MLSs – over non-realtor licensees, the need to consider the right to contract

freely, the fact that MLSs and associations should self-regulate, and KREC has no role in that process, and the benefits to allowing advertising a property with different types of agreements with the owners outside of only listing agreements.

In sum, the above analysis weighs in favor of not amending 201 KAR 11:105 Section 1.

At this time, GC opened it up for discussion among the Commissioners, Commissioner Simpson weighted in that this is not a realtor versus a non-realtor issue nor is it a MLS issue – it is a brokerage issue and many of us are real estate brokers. And as brokers we sell or lease real estate for a fee. The listing agreement defines the boundaries of the contract that generates that fee. Every agent in the state uses a listing contract. Not only does the listing contract designate the fee, but establishes the price of what the property is advertised for. It creates the boundaries of the sale. It does not limit any other agent from doing it, but there are multiple ways for listing a property, not just an exclusive authorization, to sell. A lot of different agency relationships are created by that listing contract. Quite frankly, it protects the consumer. A simple thing as ‘yes, you can advertise my property’ does not define what that broker is going to do or establish if the broker is going to hire another agent to help with the sell. Which is also good for the public, because now they can bring in their own agents. Chair Disponett and Commissioner Cline were on the Commission when this was put into place, and believes there to be some questions about that. He believes this to be a travesty and that if it is not added back as a ‘listing agreement’ in order to advertise property then it will hurt the whole industry.

Chairperson Disponett asked GC to explain in a little more detail the ‘anti-trust fair trade’ as mentioned in his brief. GC stated that you cannot take action as a state agency or as a board full of market participants that would benefit one group over another. It is his understanding that associations require their members to enter into listing agreements in order to list or advertise properties. The way that this issue was first presented to the Commission was in the context of MLSs and associations. The extent that you take action and it benefits or gives a competitive advantage to one group of licensees over another to the detriment of the other group of licensees can be considered anti-competitive because you are restraining the competition. There is no guarantee that the FTC will do anything, but it is a possibility. GC referenced the North Carolina Dental case that basically demonstrated that if a Board of market participants take action that is considered anti-competitive without State oversight then they waive State immunity and can be held liable for anti-trust violations.

Commissioner Amann asked if you needed to list a property in order to advertise a property? GC replied that not under the current regulation. But from what he has been told, associations and MLS require that there be a listing agreement. Commissioner Amann went on to ask if the brokerage license is there to advertise property or to sell property? GC replied that you have a license to engage in real estate brokerage services. Real estate brokerage services are defined as a single, multiple, or continuing act of dealing in time shares or options, selling or offering for sale, buying or offering to buy, negotiating the purchase, sale, or exchange of real estate, engaging in property management, leasing or offering to lease, renting or offering for rent, or referring or

offering to refer for the purpose of securing prospects, any real estate or the improvements thereon for others for a fee, compensation, or other valuable consideration. She went on to ask if that meant she just had the consent to advertise and without the purpose of listing or selling? GC replied that it depended on the agreement. This does not replace a listing agreement. A licensee is within their right to refuse to advertise a property without a listing agreement. Commissioner Amann's concern is that this is opening up a type of brokerage activity that is tilted more to advertising than buying, selling, leasing, referring or negotiating. GC stated that this is part of the Advertising regulation and it addresses what you have to have to advertise a property. Previously a listing agreement was required to advertise the property, this is allowing for written agreements different than or short of a listing agreement to advertise property. If you enter into a written consent with the client to advertise the property and then if you have perspective buyers approach then the licensee would go back to the client and enter into a listing agreement.

There was much discussion regarding the passing of this regulation among the Commission members. Ms. Carlin noted that everything that had been filed with LRC was approved by the Commissioners present at the time and signed off by the Executive Director of KREA at that time. Commissioner Cline disagreed.

Jim DeMaio, CEO of the Realtors Association of Southern Kentucky, was recognized to speak, and stated that he understood where GC was coming from, he just doesn't agree. Prior to Association management he was a practitioner and sold real estate for over 16 years. Advertising agreements that do not address actual legal representation, agency or compensation are worse than open listings. At least an open listing would have some of those parameters set in place. There are licensees approaching 'for sale by owners' or unrepresented sellers without any terms set forth. The licensees are required to have a consumer's guide to agency relationship signed by that seller by the end of the second contact with that seller. How are these consumers to know what they are signing without an agency form if all they need to do is send an email giving permission to advertise? This is something that most consumers do not understand. He feels this to be a detriment to consumer protection because nothing is being explained to the consumer. That it is not an MLS issue but a consumer protection issue.

Commissioner King stated that he thought that there would be some unintended consequences. Commissioner Carter agreed stating that there will be no definition for what the consumer can expect from the licensee. Advertising is one of the duties that a licensee offers but not why they have their license. We are licensed to represent in the real estate brokerage services. If we were just a marketing company, we would not need our real estate license. For a consumer, who knows you are a seller in the community, to not have any expectations of you to be representing them on their behalf is confusing. Who is responsible and who has any legal liability?

Commissioner Disney replied that this was an example of 'unintended problems'. He asked GC what it would take to correct this language now. GC replied he had only been asked to look at what the proposal was, which was to change it back to a listing agreement. He would have to look into it further.

At this time GC addressed comments from the comment section of the Zoom meeting.

Virginia Lawson commented that from her recollection this started as a discussion about how to legally advertise "coming soon" and how to advertise for a builder's subdivision without listing each and every lot. GC replied that neither of those would be allowed if it was changed back to a listing agreement. In order to have a listing agreement to advertise you cannot advertise "coming soon" because it has yet to be listed. It would constitute a violation. He has seen a number of complaints in the past where there was an adjudication based on the fact that "coming soon" was not allowed under the listing agreement language.

Jim DeMaio asked in the comment section that he wasn't sure if the consumer had a choice, how that could that be an anti-trust issue. GC replied that currently the consumer does have a choice as to what type of agreement they would want to enter into, if it goes back to a listing agreement they will not. But that is not where the anti-trust issue comes in – it comes in to play anytime you try to limit competition for those individuals who are not members of an association or do not have to list on the MLS.

Commissioner Simpson stated that before when you had to have a listing agreement to advertise which applied to every licensee in the state. So if he drove by a sign and the person was not a member of an association, he still knew he had a listing agreement, that the price was defined and that the property was for sale. It has nothing to do with MLSs, but created order in the market place and that person had actually hired a realtor to represent them. Nothing about this says that you have to have a listing agreement to be in MLS and that it hurts non-licensee because everyone has to have a listing contract. That it had nothing to do with the MLS or the Associations. And still does not.

GC noted that his point was well taken, but when it was first presented to them, it was 'look at how this will affect the MLSs' and 'don't we need to consider the MLSs'. Now other issues and implications are being raised but when this first came up that was the primary concern.

Chairperson Disponett asked GC to look into what can be done to make the change back or revise the regulation. GC said that he could and that maybe there would need to be a revision that would state what would need to be included in the written consent form. All Commissioners were in agreement.

GC asked all everyone on the call, any colleagues or industry members for feedback concerning this topic. Any thoughts on this, such as what would need to be included in that written consent to serve the consumer protection roll of the Commission. So that chaos does not result in the market. To send any comments, suggestions or concerns to the Commission within the next few weeks.

New Business

Approval of the ARELLO Investigator Conference

Commissioner Simpson made the motion to approve the payment for investigator Brian Travis to attend the ARELLO offered “Investigator Conference Course” Commissioner Amann 2nd the motion. Having all in favor, motion carried.

November, December, and 2021 KREC Meeting Dates

Commissioner Disney made a motion to skip the November meeting, be meet December 10th at 9:00 a.m. at that time the 2021 KREC Meeting Dates will be set. Commissioner King 2nd the motion. Having all in favor, the motion carried.

Commission Chair Disponett appointed Commission members Carter, Simpson and Disney to work with the Director and Ms. Carlin regarding diversity training to be added into the Education program.

Approval Per Diem

1. Commissioner Carter made a motion to approve the per diem for Commissioners Amann and Commissioner Disney for the attendance of the October 20, 2020 Application Review Committee meeting. Because it was teleconferenced, there were no travel expenses. Commissioner Simpson 2nd the motion. Having all in favor, the motion carried.
2. Commissioner Carter made a motion to approve the per diem for Commissioners Simpson and Commissioner Cline for the attendance of the October 21, 2020 Complaint Review Committee meeting. Because it was teleconferenced, there were no travel expenses. Commissioner King 2nd the motion. Having all in favor, the motion carried.
3. Commissioner Carter made a motion to approve the per diem for the October 22, 2020 KREC meeting. Because it was teleconferenced, there were no travel expenses. Commissioner Simpson 2nd the motion. Having all in favor, the motion carried.

Meeting Adjournment

Commission Chair Disponett made the recommendation that the next KREC Commission meeting be held via teleconference on December 10, 2020 at 9:00 a.m. Watch for a link for another Zoom meeting.

Commissioner Disney made a motion to adjourn the meeting. Commissioner Simpson seconded. Having all favor, the motion carried and the meeting adjourned at 11:51 a.m.