

NO. 41492-9

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner,

v.

MICHAEL HELLICKSON, TARA HELLICKSON, and  
HELLICKSON.COM, INC.,

Respondents.

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**BRIEF OF PETITIONER**

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NO. 41492-9

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**PETITIONER'S BRIEF**

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**APPENDIX**

**DESCRIPTION**

- A. Superior Court Order Granting Petitioners' Motion for Reconsideration, entered Nov. 5, 2010; Order Reversing ALJ Order Denying Stay-Revised, entered Oct. 12, 2010; Order Reversing ALJ Order Denying Stay, entered Oct. 8, 2010.
- B. ALJ Order Denying Stay, signed Sept. 21, 2010; DOL Director's Ex Parte Order of Summary Action, signed September 2, 2010; Order Denying Petition For Review of Order Denying Stay of Summary Suspension Due to Mootness, signed October 13, 2010.

## I. INTRODUCTION

The Hellicksons' real estate licenses were summarily suspended, pending a hearing on the merits, following a lengthy investigation by the Washington State Department of Licensing that identified a pattern and practice of misrepresentation and deception posing an immediate danger to the public's health, safety, and welfare. The Office of Administrative Hearings (OAH) denied Hellicksons' request to stay that suspension. Without exhausting administrative remedies or properly serving OAH, the Hellicksons sought superior court review of the OAH order denying stay. The superior court, without benefit of the administrative record, reversed the OAH order and stayed the suspension. In so doing, the superior court failed to require the Hellicksons to exhaust their administrative remedies and failed to make the findings statutorily required to stay administrative orders, like the suspension, based on public health, safety, or welfare.

The Department has been granted expedited discretionary review of two orders entered by Pierce County Superior Court: Order Reversing ALJ Order Denying Stay—Revised, filed October 12, 2010 (Order Reversing ALJ), and Order Granting Petitioner's Motion for Reconsideration, filed November 5, 2010 (Order on Reconsideration).<sup>1</sup> In

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<sup>1</sup> The court's order of November 5, 2010, supplemented the order of October 12, 2010, which revised an earlier order entered on October 8. These orders are attached as Appendix A. The Department did not specify as grounds for review the court's decision

these orders, the court reversed the Order Denying Stay, the interlocutory administrative order entered by the OAH. CP at 199–201, 229–230. OAH issued this order on September 21, 2010, after conducting a motion hearing to determine whether the Director’s Order Suspending Licenses should be stayed until a full hearing could be completed and a final order on the merits could be issued. CP at 26–30.

The superior court also stayed the earlier interlocutory order, the Ex Parte Order of Summary Action (Order Suspending Licenses) issued by the Director of Licensing on September 2, 2010 (CP at 94–97) whereby the Director invoked her emergency powers to summarily suspend the real estate broker licenses of Michael and Tara Hellickson, and the real estate firm license of Hellickson.com, Inc. (collectively, “the Hellicksons”). This order initiated the adjudicative proceeding being conducted pursuant to RCW 34.05, the Administrative Procedure Act (APA).

Because the Pierce County Superior Court reversed these administrative orders<sup>2</sup> without OAH having been properly served, without benefit of the administrative record, without exhaustion of administrative remedies, and without making the findings statutorily required to reverse

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decision requiring the Department to prove the allegations in this case by clear and convincing evidence; instead, the Department seeks complete reversal of the superior court’s orders for the reasons set forth in this brief.

<sup>2</sup> These orders are attached as Appendix B, along with the Director’s 10/1310 order on the Hellicksons’ petition for administrative review.

such orders, this Court should reverse and direct that court to vacate its orders and dismiss the petition.

## **II. ASSIGNMENTS OF ERROR**

Assignment of Error No. 1. The superior court erred by granting review of the Order Denying Stay issued by OAH because the Hellicksons did not properly invoke the court's appellate jurisdiction when it failed to serve OAH with a copy of the petition for review, as required by RCW 34.05.542.

Assignment of Error No. 2. The superior court erred by relieving the Hellicksons of the obligation to exhaust the administrative remedies available to them without the showing regarding such remedies required by RCW 34.05.534(3).

Assignment of Error No. 3. The superior court erred by staying the Director's Order Suspending Licenses, an agency order based on public health, safety, or welfare grounds, without making specific findings required by RCW 34.05.550(3).

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Hellicksons petitioned for review of an agency order in an adjudicative proceeding governed by the APA. By failing to serve OAH, the agency that issued the order, with a copy of their petition for review, did the Hellicksons fail to properly invoke the superior court's

appellate jurisdiction such that the court should have dismissed their petition? Assignment of Error No. 1.

2. Because the Hellicksons did not serve a copy of their petition for review on OAH, the agency record was not before the superior court when it granted full relief to the Hellicksons. Did the superior court commit reversible error in granting relief to the Hellicksons without having considered the agency record? Assignment of Error No. 1.

3. Did the superior court commit reversible error by relieving the Hellicksons of the obligation to exhaust any or all of their administrative remedies without the showing regarding such remedies required by RCW 34.05.534(3)? Assignment of Error No. 2.

4. Did the superior court commit reversible error when, without making specific findings required by RCW 34.05.550(3), the court stayed an agency order that is based on public health, safety, or welfare grounds? Assignment of Error No. 3.

#### **IV. STATEMENT OF THE CASE**

Over a period of approximately two years, the Department received 27 complaints about the Hellicksons concerning their conduct in handling short sales of residential property.<sup>3</sup> After completing the

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<sup>3</sup> “A short sale is a real estate transaction in which the sales price is insufficient to pay the debt(s) and obligations encumbering the property along with the costs of sale, AND the seller is unable to pay the difference. Every short sale is dependent upon the

investigations of these complaints and analyzing the results, it became apparent the complainants were describing a similar pattern and practice of misrepresentation and deception being carried out by the Hellicksons. Verbatim Report of Proceedings (VRP) (Oct. 5, 2010) at 14.

On September 2, 2010, the Director of Licensing issued the Order Suspending Licenses (CP at 94–97) and the Department, through its assistant director of the business and professions division, issued a Statement of Charges on Summary Action (CP at 35–39). Informing these actions were an Ex Parte Motion for Order of Summary Action (CP at 40–41), Declaration of William Dutra (CP at 92–93), Declaration of Robin Jones (CP at 48–91), and Declaration of Karen Jarvis (CP at 42–47).

The Department charged the Hellicksons with nine patterns and practices of unprofessional conduct in violation of specific provisions in RCW 18.85, RCW 18.86.030, and RCW 18.235. These patterns and practices are that the Hellicksons:

(1) Misrepresented they would purchase a home listed with them if it did not sell within thirty to ninety days.

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seller's lender(s) consenting to the transaction and agreeing to release the lender's security interest in exchange for less than what is owed. In some cases however, the lender's approval of a short sale does not necessarily mean the lender relieves the seller of liability for repayment of the entire debt." Short Sale Seller Advisory, Department of Licensing and Department of Financial Institutions, December 10, 2010. <http://www.dol.wa.gov/business/realestate/docs/shortsales-consumers.pdf>.

(2) Encouraged homeowners to stop making payments on their home loans.

(3) Listed homes at artificially reduced prices, inaccurately reflecting what offers owners were willing to accept, thereby creating false advertisements and false expectations among both buyers and sellers regarding the true sale price. In addition, the Hellicksons automatically reduced the list prices, such that the prices regularly fell below what the lenders were willing to accept to release their liens.

(4) Listed homes at prices that were lower than those authorized by the homeowners.

(5) Engaged in a practice of having clients/homeowners sign blank addenda which the Hellicksons later completed without the clients' authorization.

(6) Failed to provide to their clients copies of the executed listing agreements at the time of their execution and misrepresented the expiration date of the listing.

(7) Failed to promptly and properly communicate with clients, potential buyers and lenders.

(8) Requested buyers, without the seller's consent, to obtain pre-approval from specified lenders.

(9) Told homeowners that they had to vacate their home before they were legally required to do so.

CP at 35–38.

In addition, the Department charged the Hellicksons with false advertising. The Hellicksons advertise themselves as the “#1 agent in Washington, Oregon, and Hawaii” and the “top Washington, Oregon and Hawaii real estate agents” but the Hellicksons are not licensed real estate agents in Oregon and Hawaii. CP at 38.

In support of its motion to summarily suspend the Hellicksons’ licenses, the Department provided declarations under penalty of perjury that summarized the investigations and explained how the activities uncovered by the investigations posed a risk of imminent harm to the public. Based on these declarations, the Director found that the Hellicksons’ conduct posed an immediate danger to the public’s health, safety, and welfare, and that summary suspension was the least restrictive action necessary to prevent or avoid that immediate danger. Order Suspending Licenses, CP at 96. Therefore, the Director summarily suspended the Hellicksons’ licenses, prohibiting them from conducting any business or activities as Managing Real Estate Broker, Real Estate Broker, or Real Estate Firm, or advertising that they offer real estate brokerage services pending further disciplinary proceedings. CP at 96.

One day later on September 3, 2010, the Hellicksons filed in Thurston County Superior Court a Complaint against the Department and Motion for Temporary Restraining Order. The court denied their motion. CP at 111. There is no written order reflecting the court's oral order denying the motion for restraining order. Before a written order could be entered and without first seeking leave of court, the Hellicksons dismissed their complaint. CP at 111-112.

On September 9, 2010, in a separate case brought earlier by the Hellicksons against the Department, King County Superior Court, No. 09-2-41204-9SEA, in which the Department's motion to dismiss the complaint was pending, the Hellicksons moved for a temporary restraining order restraining the summary suspension of their licenses. That court refused to hear the motion and granted the Department's motion to dismiss. CP at 112.

Meanwhile, two days earlier on September 7, 2010, the Hellicksons responded to the summary administrative action and requested a prompt hearing. CP at .27. A prehearing conference with OAH was immediately scheduled for September 10, 2010. CP at 29. At that conference, the parties agreed to bifurcate the proceedings so that they could promptly address whether the summary suspension should be stayed during the pendency of the proceeding, and later hear the full case on the

merits. The parties agreed to a hearing on September 16, 2010, to address the Hellicksons' motion to stay the summary suspension, and to commence the full merits hearing on October 19, 2010. CP at 29.

Both parties filed briefing, and the ALJ heard argument on the propriety of the summary suspension on September 16, 2010. On September 21, 2010, the ALJ issued the Order Denying Stay. CP at 26–30.

The following day, September 22, 2010, the Hellicksons filed a Petition for Review of Order Denying Stay (Petition for Judicial Review) in Pierce County Superior Court. CP at 1–25. The Hellicksons identified the agency action for which they sought review as: “Administrative Law Judge Terry A. Schuh entered the attached Order Denying Stay.” CP at 2. That order was appended to the Petition. CP at 26–30. The Hellicksons served copies of the petition on the assistant attorney general who represented the Department’s real estate program in charging the Hellicksons with misconduct. But even though the Hellicksons clearly sought review of the OAH order, the Hellicksons did not serve OAH with the Petition for Review.<sup>4</sup>

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<sup>4</sup> The Hellicksons also failed to serve the Director of Licensing.

The Hellicksons also moved the superior court to shorten time. The motion was heard and granted on September 22, 2010. CP at 105–106.

The hearing on the Petition for Judicial Review was conducted on October 5 and 7, 2010. The Hellicksons still had not served OAH with their petition for review, and thus OAH had not filed with the court the agency record of the proceeding. On October 8, 2010, the court entered an Order Reversing ALJ Order Denying Stay, using the form of the order proposed by the Hellicksons, but interlineating it with handwritten terms. CP at 199–201.<sup>5</sup> The court faxed the order to the parties. Upon receipt, the Hellicksons' attorney sent an email to Judicial Assistant Tonya Moore.<sup>6</sup> The email stated:

Tonya,  
I just received the faxed order. Based on the fact that Judge Grant signed the order Petitioners proposed, I assume that Judge Grant intended that *all* check boxes apply, but she did not check *any* boxes. The form of the order contemplates that Judge Grant would check whichever boxes she agreed with. It is especially important in the (last) order section of the order. Would you please ask Judge Grant to check whichever boxes she agrees with? I am attaching a clean copy of the order in Word format for your convenience, to which I have inserted the handwritten language added by Judge Grant, but made no other changes.

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<sup>5</sup> Attached in Appendix A.

<sup>6</sup> This email is not preserved in the clerk's papers because it was not in the superior court file.

Doug

On the morning of October 12, Tonya Moore emailed the parties' lawyers, stating "Judge Grant is revising her previous order and I will have [it] to you by mid-afternoon. Thank you."<sup>7</sup> Later that afternoon, the superior court entered the Order Reversing ALJ. CP at 221–223. It bears the signature of the Hellicksons' lawyer, but the circumstances under which the Hellicksons' lawyer presented this order are unclear, since it was done without notice to the Department's attorney of record and the attorney was not in court when the order was presented.

The following day, the Director issued an order on the Hellicksons' Petition for Administrative Review noting that the Petition became moot because the Department reinstated the Hellicksons licenses pursuant to the court's October 12 order. CP at 217–220.

On October 14, the Hellicksons moved the superior court for reconsideration of its October 12 Order Reversing ALJ.<sup>8</sup> CP at 202–208. Still the Hellicksons had not served OAH and had not caused a copy of the OAH record to be filed. The court held a hearing on the motion for reconsideration on November 5, 2010, and entered its Order on

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<sup>7</sup> Similarly, this email is not preserved in the clerk's papers because it was not in the superior court file.

<sup>8</sup> Neither the original nor the revised superior court contained any ruling on the evidentiary burden of proof required of the Department; therefore, the Hellicksons argued in their motion for reconsideration for an order requiring the Director to apply the clear and convincing evidence standard.

Reconsideration, granting the Hellicksons complete relief.<sup>9</sup> CP at 229–230.

The Department filed a notice of appeal, which the Commissioner converted to a notice of discretionary review. The Department did not move to modify the Commissioner’s ruling, but moved for discretionary review. The Commissioner granted expedited review.

## V. ARGUMENT

### A. **The superior court erred by granting review of the OAH order because the Hellicksons did not invoke the court’s appellate jurisdiction.**

To invoke the appellate jurisdiction of the court under the APA, a person must comply with RCW 34.05.542(2)<sup>10</sup> which provides:

A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general and all parties of record within thirty days after service of the final order.

The person filing a petition for judicial review has the burden to prove compliance with this requirement. *Diehl v. W. Wash. Growth Mgmt.*

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<sup>9</sup> After entry of the superior court orders staying summary suspension of their licenses, the Hellicksons withdrew their request for a prompt hearing with OAH and obtained a continuance of the administrative hearing to February 14, 2011.

<sup>10</sup> Were the Court to conclude that this section applies only to final orders, then RCW 34.05.542(3) would apply with the same result of failure to invoke jurisdiction of the superior court. That subsection provides: “A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action . . . .” RCW 34.05.010(3) provides: “‘Agency action’ means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.”

*Hearings Bd.*, 118 Wn. App. 212, 219, 75 P.3d 975 (2003), *rev'd on other grounds*, 153 Wn.2d 207, 103 P.3d 193 (2004). The jurisdiction of the superior court is invoked only through compliance with the statutory filing and service requirements: “The superior court and the parties are bound by the statutory mandate of the APA, and it is the statutory procedural requirements which must be met to invoke subject matter jurisdiction.” *Diehl v. W. Wash. Growth Mgmt. Hearing Bd.*, 153 Wn.2d 207, 217, 103 P.3d 193 (2004) (citations omitted).

Consequently, when a person does not comply with APA filing and service requirements, the person fails to invoke the jurisdiction of the superior court. The court must dismiss the action. *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 555–57, 958 P.2d 962 (1998); *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 619, 902 P.2d 1247 (1995); *Sprint Spectrum, LP v. State, Dep't of Revenue*, 156 Wn. App. 949, 235 P.3d 849 (2010).

The facts of *Sprint Spectrum, LP*, are analogous to those in this case. There, the Department of Revenue had assessed Sprint Spectrum, LP for various taxes, and the company appealed to the Board of Tax Appeals, which issued an order sustaining Revenue's assessment. Sprint Spectrum filed a petition for judicial review and served Revenue and the Office of the Attorney General, but did not serve the Board, the agency that issued

the Order sustaining the assessment. The superior court properly dismissed the petition, and the court of appeals affirmed.

Here, the Hellicksons did not serve OAH, the agency that issued the Order Denying Stay, with their petition for judicial review. This omission and its tie to the requirement of filing the agency record was brought to the court's attention in the Department's Response Brief, at 23–25. CP at 129–131.

OAH is an independent agency. It is not part of the Department of Licensing. See RCW 34.12.010 (“The office shall be independent of state administrative agencies and shall be responsible for impartial administration of administrative hearings . . . .”). Consequently, the Hellicksons were required by RCW 34.05.542(2) to serve OAH to invoke the appellate jurisdiction of the court under the APA.

Service on the Department was insufficient to satisfy this requirement. As the *Sprint Spectrum* decision holds, it does not matter that more than one agency is involved in the adjudication; service must be made on the agency that issued the Order under review. *Sprint Spectrum, LP*, 156 Wn. App. at 961.

This Court applies the error of law standard to evaluating the superior court's exercise of review notwithstanding the Hellicksons' failure to serve OAH with a copy of their petition for review of the OAH

Order Denying Stay. *See Harrington v. Spokane Cnty.*, 128 Wn. App. 202, 209, 114 P.3d 1233 (2005) (the decision under review turns on the interpretation of statutory procedural requirements, which dictates de novo review).

As a threshold matter, because the Hellicksons never properly invoked the court's jurisdiction due to their failure to serve OAH, the superior court's orders granting the Hellicksons relief are without force or effect and must be reversed. *Technical Employees Ass'n v. Public Emp't Relations Comm'n*, 105 Wn. App. 434, 442, 20 P.3d 472 (2001) (failure to serve a party divested the superior court of jurisdiction; the superior court erred by holding to the contrary and ruling on the merits of the petition for review).

**B. The superior court erred in allowing the Hellicksons to proceed without having the administrative record transmitted to the court.**

Service of the petition for judicial review of an order must be made on the agency that issues the order "to trigger production and transmittal of the administrative record to the reviewing court." *Sprint Spectrum, LP*, 156 Wn. App. at 963. Under RCW 34.05.566(1) the record on review comprises agency documents expressing the agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material

described in the APA as the agency record for the type of agency action at issue. Accordingly, under RCW 34.05.476(2), the agency record in an adjudicative proceeding comprises:

- (a) Notices of all proceedings;
- (b) Any prehearing order;
- (c) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
- (d) Evidence received or considered;
- (e) A statement of matters officially noticed;
- (f) Proffers of proof and objections and rulings thereon;
- (g) Proposed findings, requested orders, and exceptions;
- (h) The recording prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding;
- (i) Any final order, initial order, or order on reconsideration;
- (j) Staff memoranda or data submitted to the presiding officer, unless prepared and submitted by personal assistants and not inconsistent with RCW 34.05.455; and
- (k) Matters placed on the record after an ex parte communication.

Under RCW 34.05.570, a court conducting appellate review of agency action evaluates that action in light of the administrative record before the agency when the action was taken. It is imperative that the administrative record be transmitted to the court:

Admittedly, there are other ways to ensure that the record of an administrative agency is promptly submitted to a court for review. But the legislature has specified that service on the agency whose order is the subject of a petition is required to accomplish that objective under these circumstances. We will not substitute our judgment for that of the legislature on the proper method of ensuring timely transmittal of the administrative record to a court for judicial review.

*Sprint Spectrum* at 957. Because the Hellicksons did not procure, and the superior court did not require the agency record, the superior court did not properly perform its appellate function. This Court applies the error of law standard to the superior court's failure to require transmittal of the agency record. *Harrington v. Spokane Cnty.*, 128 Wn. App. at 209. Therefore, this Court should reverse the superior court and direct the court to vacate its orders and dismiss the petition.

**C. The superior court erred by relieving the Hellicksons of the obligation to exhaust their administrative remedies, without making findings required by RCW 34.05.534(3).**

The APA provides the exclusive means of judicial review of administrative actions. RCW 34.05.510. In conducting its review, the court sits in an appellate capacity, limited by the statutory confines of its appellate jurisdiction. *Union Bay*, 127 Wn.2d at 617.

A person may file a petition for judicial review only after exhausting all administrative remedies available within the agency whose action is being challenged, or available within any other agency authorized to exercise administrative review. RCW 34.05.534(3). However, the court may relieve a petitioner of the requirement to exhaust any or all administrative remedies upon a showing that:

- (a) The remedies would be patently inadequate;
- (b) The exhaustion of remedies would be futile; or

(c) The grave irreparable harm that would result from having to exhaust administrative remedies would clearly outweigh the public policy requiring exhaustion of administrative remedies.

RCW 34.05.534(3).

The superior court was apprised of this statute. CP 115–121, 226–227, 2–3. Nonetheless, the superior court made no findings or conclusions that the Hellicksons had shown existence of any of the three circumstances excusing exhaustion. There are no conclusions that administrative remedies were patently inadequate nor that exhaustion would be futile. Moreover, there are no conclusions of grave irreparable harm to the Hellicksons or that such harm, if it exists, clearly outweighs the public policy requiring exhaustion. Had the Hellicksons proven such grounds, the court order would have so indicated, particularly since the order was presented for entry by the Hellicksons.

Instead, the superior court was apparently persuaded by the Hellicksons' flawed argument urging the court that it had discretion to waive exhaustion by applying the one or more of the policies underlying the statutory exhaustion requirement. The court concluded, merely, that judicial review "is not likely to encourage individuals to ignore administrative procedures in the future in this case . . . ." Conclusion 6, Order Reversing ALJ. CP at 223.

This conclusion is not one of the statutory criteria of RCW 34.05.534. Instead it weakly addresses only one factor of several that inform the public policy *requiring* exhaustion. Those policies are to: (1) insure against premature interruption of the administrative process; (2) allow the agency to develop the necessary factual background on which to base a decision; (3) allow exercise of agency expertise in its area; (4) provide for a more efficient process; and (5) protect the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997) (citing *McKart v. United States*, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)).

The superior court's failure to consider and apply the criteria in RCW 34.05.534(3) is reviewed under the error of law standard. *Harrington v. Spokane Cnty.*, 128 Wn. App. at 209. But even if the abuse of discretion standard applies, a superior court abuses its discretion if its decision is based on untenable grounds, which necessarily includes committing an error of law. *Humphrey Indus., Ltd. v. Clay Street Associates, LLC*, 170 Wn.2d 495, 507, 242 P.3d 846 (2010) (the court's conclusion that defendant substantially complied with the Limited Liability Company Act is erroneous, and constitutes an error of law, thus

reversing an award of attorney fees, reviewed under the abuse of discretion standard, as based on untenable grounds); *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) (if the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion).

Here, the superior court failed to address RCW 34.05.534(3). The court's failure to conform its review consistent with the standards set out in the APA constitutes error of law and abuse of discretion.

A petition for judicial review filed by a litigant who has not pursued available administrative remedies prior to resorting to the court should be dismissed. *See Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009), and *Harrington v. Spokane Cnty.*, 128 Wn. App. at 211, which uphold superior court dismissals of Land Use Petition Act appeals for failure to exhaust administrative remedies.

When the superior court issued its Order Reversing ALJ, the Hellicksons' petition to the Director of Licensing for review of the OAH Order Denying Stay was pending. It was possible the Hellicksons could have obtained relief from the Director. She might have vacated, or perhaps more likely, modified her earlier Order Suspending Licenses, in a way that would protect the public from the course of conduct in which the Hellicksons engaged. For example, the Director might have decided to

allow the Hellicksons to conduct real estate brokerage services, while restricting their ability to deal in short sale transactions. We cannot know what steps the Director would have taken because the court short circuited the Director's ability to decide the matter.

In addition, even if the Director did not vacate or modify the Order Suspending Licenses, the superior court issued its Order Reversing ALJ on October 12, 2010, just one week before the merits hearing on the Statement of Charges was to begin. Instead of advancing public policy, the court's orders in this case clearly contravene public policy.

Because the superior court failed to articulate any statutory grounds for relieving the Hellicksons from exhausting their administrative remedies, this Court should reverse, and direct the superior court to vacate its orders and dismiss the petition.

**D. The superior court erred by staying the Director's order suspending licenses, an agency order based on public health, safety, or welfare grounds, without making specific findings required by RCW 34.05.550(3).**

When an agency takes an action based on public health, safety, or welfare grounds, as here, the court may not stay that action unless the court makes four specific findings.

If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court shall not grant such relief unless the court finds that:

- (a) The applicant is likely to prevail when the court finally disposes of the matter;
- (b) Without relief the applicant will suffer irreparable injury;
- (c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and
- (d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.

RCW 34.05.550(3). All elements must be met before a stay is granted.

Here, the superior court orders are completely devoid of any such findings.

The purpose of findings of fact is to ensure that the trial court has dealt fully and properly with all the issues in the case before deciding it and that the parties and the appellate court are fully informed as to the bases of the decision when it is made. Findings must be made on matters which establish the existence or nonexistence of determinative factual matters. The process used by the decision maker should be revealed by findings of fact and conclusions of law. Findings which consist of general conclusions drawn from an indefinite, uncertain, undeterminative narration of general conditions and events are inadequate. *See Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 36, 873 P.2d 498 (1994).

Moreover, when a court determines to grant a stay, the court should impose appropriate terms.

If the court determines that relief should be granted from the agency's action granting a stay or other temporary remedies, the court may remand the matter or may enter an order denying a stay or *granting a stay on appropriate terms*.

RCW 34.05.550(4) (emphasis added).

These statutory criteria were brought to the court's attention. Verbatim Report of Proceedings (VRP) (Oct. 5, 2011) at 22. The court made no findings under RCW 34.05.550(3) however, and did not impose terms to protect the public.

There are circumstances under which a reviewing court can abide a superior court's inadequate order:

When the superior court does not make written findings, we can look to the court's oral decision to clarify the theory on which the court decides the case. *Goodman v. Darden, Doman & Stafford Assocs.*, 100 Wash.2d 476, 481, 670 P.2d 648 (1983). And if findings of fact are incomplete, the appellate court may look to the superior court's oral decision to understand the court's reasoning. *Lakewood v. Pierce County*, 144 Wash.2d 118, 30 P.3d 446 (2001). But if the oral decision conflicts with the written decision, the written decision controls. *Ferree v. Doric Co.*, 62 Wash.2d 561, 567, 383 P.2d 900 (1963). An oral decision "is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Ferree*, 62 Wash.2d at 567, 383 P.2d 900.

*Grieco v. Wilson*, 144 Wn. App. 865, 184 P. 3d 668 (2008). Here, however, the court's oral remarks provide no indication that the court

considered the factors at issue. The court issued one written order favoring the Hellicksons, and four days later, apparently after ex parte communication(s) with the Hellicksons' lawyer, the court issued a revised order, also favoring the Hellicksons. But neither of these orders demonstrate that the court addressed the statutory basis for reversing the ALJ Order Denying Stay or for staying the Order Suspending Licenses.

Summary suspension of a license based on public health, safety, or welfare grounds, in which a hearing is provided after the license is suspended as here, is authorized by RCW 34.05.422(4), RCW 34.05.479, and RCW 18.235.030(7). A summary suspension does not per se violate due process. Both state and federal courts have upheld such actions as long as a prompt hearing is available.

Of course, the state is generally excused from providing a license holder with prior notice and a hearing if an emergency justifies summary action. See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 299-300, 101 S. Ct. 2352, 69 L. Ed. 2d (1981); *N. Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 319-20, 29 S. Ct. 101, 53 L. Ed. 195 (1908).

*Jones v. State Dep't of Health*, 170 Wn.2d 338, 351, 242 P.3d 825, 832 (2010).<sup>11</sup>

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<sup>11</sup> The Court reversed a summary judgment order favoring the Department of Health, however, because there was a genuine issue of material fact as to whether state inspectors had fabricated evidence of the "emergency" which led to the summary suspension of Jones' pharmacy license. Here, no evidence was fabricated. Indeed, after

Here, the Department promptly scheduled a hearing which, but for the superior court's improper order, would have commenced 11 days later on October 19, 2010. When an emergency order, such as the Order Suspending Licenses, is entered, "the agency shall proceed as quickly as feasible to complete any proceedings that would be required if the matter did not involve an immediate danger." RCW 34.05.479(5). In the ordinary course, initial or final orders are to be served in writing within ninety days after conclusion of the hearing or after submission of memos, briefs, or proposed findings, unless this period is waived or extended for good cause shown. RCW 34.05.461(8). There is no indication in the record, and the court made no findings, suggesting that the Department and OAH would not act as quickly as feasible, or that the agency proceedings would not be concluded in accordance with these provisions.

The superior court substituted its judgment for that of the Director and OAH without articulating any cogent reason for doing so. Under RCW 34.05.574, a court's function in reviewing matters within agency discretion, "is limited to assuring that the agency has exercised its discretion in accordance with law; the court does not itself undertake to exercise the discretion that the legislature has placed in the agency." An agency's determination of disciplinary sanctions is peculiarly a matter of

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the summary suspension became known to the public, the Department received even more complaints about the Hellicksons' misconduct. VRP Sept. 22, 2010 at 20.

administrative competence. *In re Brown v. State, Dep't of Health, Dental Disciplinary Bd.*, 94 Wn. App. 7, 16, 972 P.2d 101 (1998). As long as the agency is within its statutory authority, the choice of a particular sanction is a matter of discretion that the court will not disturb unless the agency has abused its discretion. *Shanlian v. Faulk*, 68 Wn. App. 320, 843 P.2d 535 (1992)

Neither the Director nor the ALJ abused their discretion. "Discretion" implies knowledge, prudence, and that discernment which enables a person to judge critically of what is correct and proper; it is judgment directed by circumspection. *Merritt School Dist. No. 50 v. Kimm*, 22 Wn.2d 887, 157 P.2d 989 (1945). The Director has statutory authority to exercise her discretion to determine whether the public health, safety or welfare is in immediate danger from a continuing course of conduct by real estate licenses engaged in unlawful acts that violate the standards of conduct expected of real estate licensees, and she has the statutory authority to take summary action to protect the public from such conduct. RCW 18.235.030(7); RCW 34.05.479.

The Director not only has discretion to act to protect the public, she has the obligation, through the licensure and regulation of real estate licensees, to assure the public of the adequacy of their professional competence and conduct. RCW 18.235.005. The purpose of the Real

Estate Brokers Act is to protect the public from negligent, unscrupulous, or dishonest real estate operators, and also to protect against fraud and misrepresentation. *Williamson v. Calibre Homes*, 106 Wn. App. 558, 23 P.3d 1118 (2001). Here, the Director found an immediate danger to the public based on 27 consumer complaints that together showed the Hellicksons engaged in unlawful patterns and practices. Allowing the Hellicksons to continue these practices during the pendency of the proceedings to discipline would place the public at risk of significant financial harm.

The superior court orders, lacking a cogently articulated rationale, countermand the director's statutory responsibility and authority to protect the public from the risk of immediate danger to the public health, safety, or welfare.

## **VI. CONCLUSION**

Based on the foregoing, the Department respectfully requests this

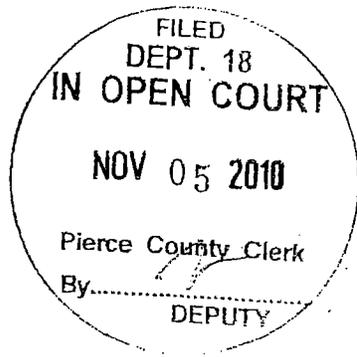
Court to reverse the orders under review and direct the superior court to vacate the orders and dismiss the Hellicksons' petition for judicial review.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of April, 2011.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in cursive script that reads "Diane L. Mcdaniel".

DIANE L. MCDANIEL  
Sr. Assistant Attorney General  
WSBA No. 19204  
1125 Washington St. SE  
Olympia, WA 98504-0110  
(360) 753-2702



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IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

MICHAEL HELLICKSON, TARA  
HELLICKSON, and HELLICKSON.COM,  
INC.,

No. 10-2-13257-6

*Petitioners,*

ORDER GRANTING PETITIONERS'  
MOTION FOR RECONSIDERATION.

v.

WASHINGTON STATE DEPARTMENT OF  
LICENSING,

*Respondent.*

This matter having come before the Court on Petitioners' Motion for Reconsideration of the Court's "Order Reversing ALJ Order Denying Stay – Revised" ["Revised Order"] entered on October 12, 2010, the Court having considered the following evidence:

- A. Petitioners' Motion for Reconsideration dated October 14, 2010;
- B. Declaration of Douglas S. Tingvall dated October 14, 2010;
- C. Department's Response to Petitioners' Motion for Reconsideration dated November 1, 2010; and
- D. The pleadings and file herein;

the Court deeming itself fully apprised in the premises;

//

ORDER GRANTING PETITIONERS' MOTION FOR  
RECONSIDERATION - 1

DOUGLAS S. TINGVALL  
8310 154<sup>th</sup> Ave SE  
Newcastle WA 98059-9222  
RE-LAW@comcast.net

1  
2 IT IS HEREBY ORDERED that the Revised Order is supplemented as follows:

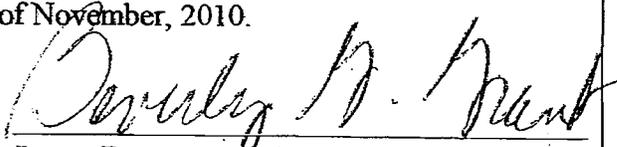
3 A. Due process requires that the standard of proof in a professional licensing  
4 disciplinary action be "clear and convincing evidence;"

5 B. Real estate brokers are professionals, who hold professional licenses; and

6 C. The real estate licensing law, specifically RCW 18.85.380 and .390, are  
7 unconstitutional to the extent they provide for a "preponderance of the evidence"  
8 in a disciplinary action;

9 D. At the adjudicative hearing on the merits in Department of Licensing Case No.  
10 2010-06-0027-00REA, the Department must prove the allegations in the  
11 Statement of Charges by "clear and convincing evidence."

12 DONE IN OPEN COURT this 5<sup>th</sup> day of November, 2010.

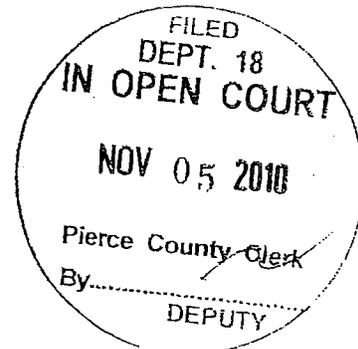
13   
14 JUDGE BEVERLY G. GRANT

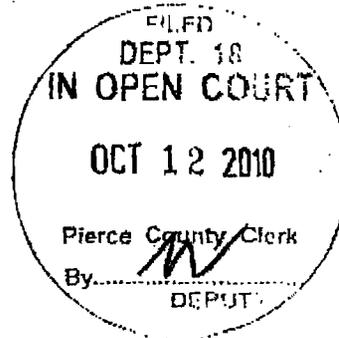
15 Presented by:

16 \_\_\_\_\_  
17 DOUGLAS S. TINGVALL, WSBA #12863  
Attorney for Petitioners

18 Approved as to form:  
19 ROBERT M. MCKENNA, Attorney General

20 \_\_\_\_\_  
21 JODY LEE CAMPBELL, WSBA #32233  
22 Attorneys for Department of Licensing  
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IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

MICHAEL HELLICKSON, TARA  
HELLICKSON, and HELLICKSON.COM,  
INC.,

No. 10-2-13257-6

*Petitioners,*

ORDER REVERSING ALJ ORDER  
DENYING STAY - *revised*

v.

WASHINGTON STATE DEPARTMENT OF  
LICENSING,

*Respondent.*

This matter having come before the Court on October 5, 2010 on Petitioners' petition for judicial review of the Order Denying Stay issued on September 21, 2010, by Administrative Law Judge Terry A. Schuh in Department of Licensing Case No. 2010-06-0027-00REA. Petitioners Michael Hellickson, Tara Hellickson and Hellickson.com, Inc. were represented by Douglas S. Tingvall, and Respondent Department of Licensing was represented by Jody Lee Campbell, Assistant Attorney General. The Court having considered the following evidence:

- A. Petition for Review of Order Denying Stay filed herein;
- B. Declaration of Douglas S. Tingvall dated September 22, 2010 (including exhibits);

- 1
- 2 C. Department's Response Brief dated September 30, 2010;
- 3 D. Declaration of Bruce L. Turcott dated September 27, 2010;
- 4 E. Declaration of Bruce Roberts dated September 29, 2010;
- 5 F. Department's Statement of Supplemental Authority October 1, 2010;
- 6 G. Reply in Support of Petition for Review of Order Denying Stay dated October 4,
- 7 2010;
- 8 H. Declaration of Michael Hellickson dated October 4, 2010;
- 9 I. Declaration of Tara Hellickson dated October 4, 2010;
- 10 J. Declaration of Joseph Scuderi dated October 4, 2010;
- 11 K. Declaration of Service (by M. Katy Kuchno) dated October 4, 2010; and
- 12 L. The case law including *Nguyen vs. Department of Health Medical Quality*
- 13 *Assurance Commission, 144 Wn. 2d 516, 29 P. 3d 689 (2001); Jones vs. State of*
- 14 *Washington, 140 Wa App 476, 166 P. 3d 1219 (2007); Islam vs. Department of*
- 15 *Early Learning, 238 P. 3d 72 (2010); pleadings and file herein;*

16 the Court deeming itself fully apprised in the premises, and finding and concluding as follows:

- 17 1. The constitutional rights of the parties are paramount to our system of
- 18 justice and equity;
- 19 2. The Petitioner was not issued an individual license, but a professional
- 20 license for a business real estate entity;
- 21 3. The public's interest should be balanced against the due process rights of
- 22 the professional licensor as to not deny due process of law for either party;
- 23 4. The parties are entitled to know under which burden of proof they are to
- 24 proceed;

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- 5. Due process cannot be implemented unless all parties clearly understand the rules of engagement *viz*; the type of burden of proof imposed whether it is preponderance of the evidence; clear preponderance of the evidence or clear and convincing evidence;
- 6. Judicial review of the Order Denying Stay is not likely to encourage individuals to ignore administrative procedures in the future in this case as parties will have a clear understanding as to due process time requirements and the type of burden of proof from which they may challenge various decisions.

IT IS HEREBY ORDERED as follows:

The Order Denying Stay is reversed and the Ex Parte Order of Summary Action is stayed pending a hearing on the merits.

DONE IN OPEN COURT this 12<sup>th</sup> day of October, 2010.

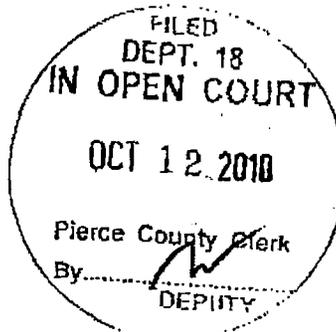
*Beverly G. Grant*  
 JUDGE BEVERLY G. GRANT

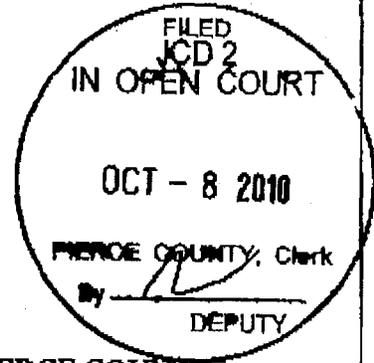
Presented by:

*Douglas S. Tingvall*  
 DOUGLAS S. TINGVALL, WSBA #12863  
 Attorney for Petitioners

Approved as to form:  
 ROBERT M. MCKENNA, Attorney General

JODY LEE CAMPBELL, WSBA #32233  
 Attorneys for Department of Licensing





IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

MICHAEL HELLICKSON, TARA HELLICKSON, and HELLICKSON.COM, INC.,

No. 10-2-13257-6

*Petitioners,*

ORDER REVERSING ALJ ORDER DENYING STAY

v.

WASHINGTON STATE DEPARTMENT OF LICENSING,

*Respondent.*

This matter having come before the Court on Petitioners' petition for judicial review of the Order Denying Stay issued on September 21, 2010, by Administrative Law Judge Terry A. Schuh in Department of Licensing Case No. 2010-06-0027-00REA, the Court having considered the following evidence:

- A. Petition for Review of Order Denying Stay filed herein;
- B. Declaration of Douglas S. Tingvall dated September 22, 2010 (including exhibits);
- C. Department's Response Brief dated September 30, 2010;
- D. Declaration of Bruce L. Turcott dated September 27, 2010;
- E. Declaration of Bruce Roberts dated September 29, 2010;

- 1
- 2 F. Department's Statement of Supplemental Authority October 1, 2010;
- 3 G. Reply in Support of Petition for Review of Order Denying Stay dated October 4,
- 4 2010;
- 5 H. Declaration of Michael Hellickson dated October 4, 2010;
- 6 I. Declaration of Tara Hellickson dated October 4, 2010;
- 7 J. Declaration of Joseph Scuderi dated October 4, 2010;
- 8 K. Declaration of Service (by M. Katy Kuchno) dated October 4, 2010; and
- 9 L. The pleadings and file herein;

10 the Court deeming itself fully apprised in the premises, and finding and concluding as follows:

- 11  Exhaustion of administrative remedies would be patently inadequate and futile in
- 12 this case;
- 13  The grave irreparable harm that would result to Petitioners from having to exhaust
- 14 administrative remedies would clearly outweigh the public policy requiring
- 15 exhaustion of administrative remedies;
- 16  Judicial review of the Order Denying Stay would not prematurely interrupt the
- 17 administrative process;
- 18  Judicial review of the Order Denying Stay does not require the agency to develop
- 19 a factual background or record in this case;
- 20  The court, and not the agency, has greater expertise to resolve a purely legal issue;
- 21  The court, and not the agency, provides a more efficient process to correct the
- 22 agency's mistake in this case;
- 23  Judicial review of the Order Denying Stay is not likely to encourage individuals to
- 24 ignore administrative procedures in the future in this case;

Petitioners will suffer irreparable harm, if they are required to exhaust administrative remedies in this case;

Petitioner have been denied due process of law *as there are different standards of proof at different stages of the admin - PEG*

Respondent failed to show an immediate danger to the public health, safety, or welfare requiring immediate agency action in this case;

Respondent was not authorized to use emergency adjudicative proceedings in this case; and

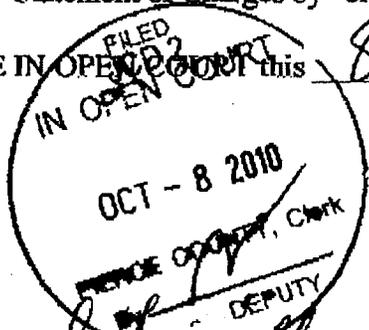
*The Petitioner has a professional license. PEG*  
 The Ex Parte Order is broader than is necessary to protect the public; *not an individual but business enterprise*

IT IS HEREBY ORDERED as follows:

The Order Denying Stay is reversed and the Ex Parte Order of Summary Action is stayed pending a hearing on the merits;

At the hearing on the merits, Respondent must prove the allegations in the Statement of Charges by "clear, cogent and convincing evidence."

DONE IN OPEN COURT this 8<sup>th</sup> day of October, 2010.



*Beverly G. Grant*  
JUDGE BEVERLY G. GRANT

Presented by:

*Douglas & Tinguall*  
DOUGLAS S. TINGVALL, WSBA #12863  
Attorney for Petitioners

Approved as to form:  
ROBERT M. MCKENNA, Attorney General

JODY LEE CAMPBELL, WSBA #32233  
Attorneys for Department of Licensing

*\*Stratire processes. There are no time lines in which an appeal can be made either from the Director's decision or when one can expect a final decision to be made.*

ORDER REVERSING ALJ ORDER DENYING STAY - 3

DOUGLAS S. TINGVALL  
8310 154<sup>th</sup> Ave SE  
Newcastle WA 98059-9222  
RE-LAW@comcast.net

**STATE OF WASHINGTON  
DEPARTMENT OF LICENSING  
BUSINESS AND PROFESSIONS DIVISION**

In the Matter of the License to Practice as  
a Managing Real Estate Broker/Real  
Estate Broker/Real Estate Firm of:

Michael Hellickson, License # 17267,

Tara Hellickson, License # 2063, and

Hellickson.com, Inc., License # 7905

Respondents.

No. 2010-06-0027-00REA

EX PARTE ORDER OF SUMMARY  
ACTION

This matter came before the Director of the Department of Licensing on September 2, 2010, on an Ex Parte Motion for Order of Summary Action brought by the Real Estate Disciplinary Program of the Department of Licensing by and through its attorney, Jody Lee Campbell, Assistant Attorney General. The Director, having reviewed the motion and the documents submitted in support of the motion, hereby enters the following:

**1. FINDINGS OF FACT**

1.1 Michael Hellickson, Respondent, holds a license to practice as a Managing Real Estate Broker (license # 17267), and he has held this license since April, 2004. His license expires March 8, 2012.

1.2 Tara Hellickson, Respondent, holds a license to practice as a Real Estate Broker (license # 2063), and she has held this license since 1996. Her license expires February 15, 2012.

1.3 Hellickson.com, Inc., Respondent, holds a license to practice as a Real Estate Firm (license # 7905), and it has held this license since March 8, 2004. Its license expires March 8, 2012.

1.4 The Program Manager issued a Statement of Charges on Summary Action alleging Respondents committed misconduct which violates RCW 18.85.230(1), (2), (3), (18) and (23), 18.85.361(2), (3) and (23), 18.86.030(1)(a), (b) and (d), 18.235.130(1), (3), (4) and (11).

1.5 The Director finds that an immediate danger to the public health, safety, and welfare require emergency action, in accordance with RCW 18.235.030(7), RCW 34.05.422(4), and RCW 34.05.479 pending further proceedings due to the nature of the allegations and in the Statement of Charges on Summary Action.

1.6 The alleged conduct, as set forth in the Statement of Charges on Summary Action and as supported by the documents attached to the Ex Parte Motion for Order of Summary Action, is directly related to Respondents' ability to practice as Managing Real Estate Broker, Real Estate Broker and Real Estate Firm in the state of Washington. The Director finds, based on the declarations and evidence submitted with the Ex Parte Motion for Order of Summary Action, that a summary restriction of Respondents' licenses to practice as Managing Real Estate Broker, Real Estate Broker and Real Estate Firm, hereby suspending Respondents' licenses, is the least restrictive action necessary to prevent or avoid immediate danger to the public health, safety, or welfare.

## 2. CONCLUSIONS OF LAW

2.1 The Director has jurisdiction over Respondents' licenses to practice as Managing Real Estate Broker, Real Estate Broker and Real Estate Firm.

2.2 The Director has authority to take emergency adjudicative action to address an immediate danger to the public health, safety, or welfare. RCW 18.235.030(7), RCW 34.05.422(4), RCW 34.05.479.

2.3 The above Findings of Fact establish that Respondent committed misconduct that violates RCW 18.85.230(1), (2), (3), (18), (23), 18.85.361(2), (3), (23), 18.86.030(1)(a), (b) and (d), 18.235.130(1), (3), (4) and (11).

2.4 The above Findings of Fact establish:

- (a) The existence of an immediate danger to the public health, safety, or welfare.
- (b) That the requested summary action adequately addresses the danger to the public health, safety, or welfare.
- (c) That the requested summary action is necessary to address the danger to the public health, safety, or welfare.

2.5 The requested summary action is the least restrictive agency action justified by the danger posed by Respondents' continued practice as Real Estate Brokers and a Real Estate Firm.

2.6 The above Findings of Fact establish conduct which warrants summary action to protect the public health, safety, or welfare.

### 3. ORDER

Based on the above Findings of Fact and Conclusions of Law, the Director enters the following Order:

3.1 IT IS ORDERED that the licenses of Respondents be SUMMARILY SUSPENDED pending further disciplinary proceedings.

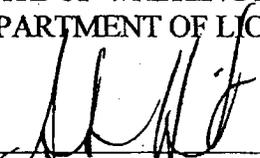
3.2 Respondents are PROHIBITED from conducting any business or activities as Managing Real Estate Broker, Real Estate Broker or Real Estate Firm or advertising that they offer real estate brokerage services, pending further disciplinary proceedings.

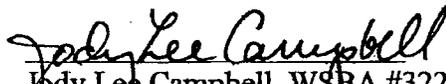
3.3 The Ex Parte Order of Summary Action shall remain in effect until it is modified or vacated by the Director or her delegated designee.

3.4 Procedures to contest this Ex Parte Order of Summary Action are set out in the Request for Hearing.

Dated this 2nd day of September, 2010.

STATE OF WASHINGTON  
DEPARTMENT OF LICENSING

  
\_\_\_\_\_  
ELIZABETH A. LUCE  
Director

  
Jody Lee Campbell, WSBA #32233  
Assistant Attorney General  
Attorney for Real Estate Disciplinary Program

PAC

**STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF LICENSING  
BUSINESS AND PROFESSIONALS DIVISION**

**RECEIVED**  
**SEP 22 2010**  
ATTORNEY GENERAL'S OFFICE  
LICENSING & ADMINISTRATIVE LAW DIVISION

**In the Matter of the License to Practice  
as a Managing Real Estate Broker/Real  
Estate Broker/Real Estate Firm of:**

**Docket No. 2010-DOL-0043  
DOL No. 2010-06-0027-00REA**

**Michael Hellickson, License # 17267  
Tara Hellickson, License # 2063, and  
Hellickson.com, Inc., License # 7905,**

**ORDER DENYING STAY**

**Respondents.**

**I. ISSUE**

1.1 Whether the Department of Licensing's (hereinafter, "the Department") summary suspension of the licenses of Michael Hellickson, Tara Hellickson, and Hellickson.com, Inc. (hereinafter, collectively, "the Respondents") should be stayed.

**II. ORDER SUMMARY**

2.1 Respondents' Motion to Stay the Department's summary suspension of their respective licenses is DENIED.

**III. HEARING**

3.1 **Administrative Law Judge:** Terry A. Schuh

3.2 **Respondents:** Michael Hellickson, License # 17267  
Tara Hellickson, License # 2063  
Hellickson.com, Inc., License #7905

3.2.1 **Respondents' Representatives:**  
Joseph W. Scuderi, Cushman Law Offices, attorneys at  
law  
Douglas S. Tingvall, attorney at law

3.3 **Agency:** Department of Licensing

3.3.1 **Department Representative:**  
Jody Lee Campbell, AAG

3.4 Hearing Date: September 16, 2010

#### IV. FINDINGS OF FACT

Note: These Findings of Fact rest only on the record in this stay hearing and operate only within the perspective of granting or denying a stay of the summary suspension. The findings at the hearing in chief may differ because both the procedural status and the record will be different.

I find the following facts more probable than not under the preponderance of the evidence standard:

##### Jurisdiction

4.1 Michael Hellickson holds a license to practice as a Managing Real Estate Broker, License #17267.

4.2 Tara Hellickson hold a license to practice as a Real Estate Broker, License #2063.

4.3 Hellickson.com, Inc. holds a license to practice as a Real Estate Firm. License # 70905.

4.4 The Ex Parte Order of Summary Action and supporting documents were served on the Respondents on September 2, 2010, by mail.

4.5 The Ex Parte Order of Summary Actions summarily suspended the licenses of the Respondents effective immediately and prohibited the Respondents from conducting business predicated on their respective licenses. The Department exercised this authority based upon its assertion that the Respondents' conduct constituted an immediate danger to public health, safety, or welfare.

4.6 On or about September 7, 2010, the Respondents timely requested a "prompt hearing".

##### Whether the Respondents are Likely to Prevail After a Hearing on the Merits

4.7 The Department has alleged the following conduct attributed to the Respondents:

(a) misrepresenting and advertising that they would purchase a home listed with them if it did not sell within 30 to 90 days;

(b) encouraging homeowners to stop making payments on their home loans;

(c) listing homes at artificially reduced prices inconsistent with what the owner would accept in order to generate multiple low-ball offers;

(d) listing homes at prices not authorized by the homeowners;

- (e) misrepresenting the contents of listing agreements;
- (f) failing to timely provide to the homeowners copies of executed listing agreements;
- (g) negligent and dilatory communications with homeowners, potential buyers, and lenders;
- (h) misrepresenting in counter-offers that the seller requested the buyer to pre-qualify through specifically designated lenders; and
- (i) telling owners they must vacate their homes before they were legally required to vacate.

4.8 The Department has asserted that the alleged Respondent conduct recited above collectively violated RCW 18.85.230(1), (2), (3), (18) and (23), RCW 18.85.130(1), (3), (4), and (11), RCW 18.86.030(1)(a), (b), and (d), and RCW 18.235.130(1), (3), (4), and (11), and provided the Department with the authority to summarily suspend the Respondents' licenses.

4.9 The Department also alleged that the Respondents engaged in false advertising in violation of RCW 18.85.230(2) and (23), RCW 18.85.361(2), (3), and (23), and RCW 18.235.130(3), (4), and (11).

4.10 The Department allegations flow primarily from the investigation of 27 complaints filed with the Department regarding the Respondents' conduct.

4.11 Some of those complainants also filed complaints with the Northwest Multiple Listing Service. At least four resulted in findings adverse to the Respondents, three of which resulted in fines of \$20,000.00 total.

4.12 The Respondents deny the allegations and assert that the context and circumstances have been misrepresented.

## V. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, I make the following Conclusions of Law:

### Jurisdiction

5.1 I have jurisdiction over this matter pursuant to Chapter 18.235 RCW, Chapter 18.85 RCW, Chapter 34.05 RCW, and Chapter 308-124 WAC.

### Basis for Stay

5.2 If a state agency summarily suspends a license, the licensee is entitled to a prompt hearing. RCW 34.05.422.

5.3 However, a suspension ordered by the Department may be stayed. RCW 18.235.110(3).

5.4 Here, the Respondents' request for a prompt hearing was initially addressed with a Pre-Hearing Conference on September 10, 2010. It was determined that a hearing on the merits would take approximately five days. Given that estimated duration and given the calendars of the parties, the attorneys, and the administrative law judge, a hearing on the merits was scheduled to start on October 19, 2010, and end on October 27, 2010. In an effort to further respond to the expediency of the Respondents' request, a hearing was scheduled for September 16, 2010, to consider staying the suspension pending the outcome from the hearing on the merits.

5.5 No statute or regulation specifically addresses the analytical basis for ruling on such a stay request. Accordingly, by analogy, I employ RCW 34.05.550, which addresses a judicial stay pending judicial review of an administrative decision.

5.6 If a stay is sought from "agency action based on public health, safety, or welfare grounds[,] the court shall not grant such relief unless the court finds that:

(a) The applicant is likely to prevail when the court finally disposes of the matter;

(b) Without relief the applicant will suffer irreparable injury;

(c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances."

RCW 34.05.550(3).

5.7 These prongs are conjunctive. The Respondents must establish all four in order in order for me to grant the stay.

Standard of Proof

5.8 The parties dispute what standard of proof the Department must satisfy. The Department argued that the proper standard is "by a preponderance of the evidence". The Respondents argued that the proper standard is "clear, cogent, and convincing evidence". Neither party referenced a statute, regulation, or appellate decision directly on point. The primary basis for the Respondents' argument is that the Respondents' licenses represent a property interest and a property interest can only be prejudiced by an agency if the agency satisfies the higher standard of proof. However, the Respondents' argument relied primarily on judicial decisions regarding the licenses of medical providers. Accordingly, I do not find those decisions persuasive. Most administrative law proceedings rely upon the "preponderance of the evidence" standard. Therefore, absent clear authority to the contrary, I hold that the preponderance standard applies herein.

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Whether the Respondents are Likely to Prevail after a Hearing on the Merits

5.9 RCW 34.05.550 does not define "likely". When a term is undefined by statute or regulation, it should be given its ordinary meaning. *State ex rel. Graham v. Northshore Sch. Dist. No. 417*, 99 Wn.2d 232, 244, 662 P.2d 38 (1983); *Delagrave v. Employment Sec. Dep't*, 127 Wn. App. 596, 612 (2005). It is appropriate to refer to a dictionary to derive the meaning of the undefined terms. *Delagrave* at 612; *Maplewood Estates, Inc. v. Dep't of Labor & Indus.*, 104 Wn. App. 299, 306 (2000). "Likely" means "probable". Black's Law Dictionary 925 (6<sup>th</sup> ed. 1990).

5.10 For the Respondents to prevail, the Department must fail to establish by a preponderance of the evidence that the Respondents committed the alleged acts. Therefore, for the Respondents to satisfy the first prong of the basis for granting a stay, I must determine that it is probable that the Department will fail in that regard. The Department may present the facts and circumstances flowing from 27 complaints involving multiple accusations of 9 different types of conduct, any of which arguably violate the statutes predicating discipline. Moreover, some of that conduct resulted in fines assessed by the Northwest Multiple Listing Service upon the Respondents. Undoubtedly, the Respondents are prepared to present testimony and other evidence to counter the Department's evidence. However, given the breadth of the Department's allegations, I am not persuaded that it is "probable" that the Department will be unable to establish at least some of its allegations.

5.11 Thus, I hold that the Respondents are not likely to prevail at the hearing. This of course does not mean that they will not prevail. Rather, it merely means that I cannot determine now that they will likely prevail.

5.12 Accordingly, the Respondents have failed to satisfy the first prong of the basis for granting a stay. Since the four prongs are conjunctive, I need not address the remaining three.

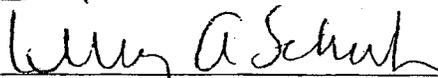
5.13 Therefore, I cannot and will not stay the summary suspension.

**VI. ORDER**

IT IS HEREBY ORDERED:

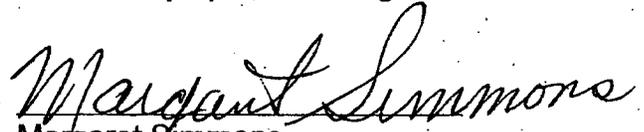
6.1 The Respondents's motion to stay the Department's summary suspension of their respective licenses is DENIED.

**Dated and Mailed** this 21<sup>st</sup> day of September 2010 at Olympia, Washington.

  
Terry A. Schuh, Administrative Law Judge  
Office of Administrative Hearings  
2420 Bristol Ct SW  
PO Box 9046  
Olympia, WA 98507-9046

Certificate of Service

I certify that I mailed true and exact copies of the Order Denying Motion to Stay to the following parties, postage prepaid this 21<sup>st</sup> day of September 2010 at Olympia, Washington.

  
Margaret Simmons  
Legal Secretary

Hellickson.com. Inc.  
c/o RSC Corporation, Registered Age  
1201 - 3<sup>rd</sup> Ave, #3400  
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Attorney at Law  
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Bonney Lake, WA 98391

Tara Hellickson  
PO Box 7917  
Bonney Lake, WA 98391

PROCEEDINGS BEFORE THE DIRECTOR OF  
THE DEPARTMENT OF LICENSING  
STATE OF WASHINGTON

In the Matter of the License to Practice as  
a Managing Real Estate Broker/Real  
Estate Broker/Real Estate Firm of:

Michael Hellickson, License # 17267

Tara Hellickson, License #2063, and

Hellickson.com, Inc. License # 7905

Respondents.

OAH No. 2010-DOL-0043  
No. 2010-06-0027-00 REA

ORDER DENYING PETITION FOR  
REVIEW OF ORDER DENYING  
STAY OF SUMMARY  
SUSPENSION DUE TO MOOTNESS

**I. DIRECTOR'S CONSIDERATION**

1.1 Review. This matter has come before the Director on Respondent's Petition for Review of Order Denying Stay, dated September 24, 2010. Respondents request the Director review the Order Denying Stay which was entered by Administrative Law Judge Terry A. Schuh on September 21, 2010. The Real Estate Program filed a Response to the Petition for Review on October 4, 2010.

The Director is also informed that the Superior Court of Pierce County, in Cause No. 10-2-13257-6, has issued an Order Reversing ALJ Order Denying Stay, initially issued on October 8, 2010, and issued in Revised form on October 12, 2010. Based on the October 8, 2010 order, the Department issued temporary licenses to the Respondents.

In issuing this Order, the Director considered the Order Denying Stay, the Petition for Review, the Program's Response, as well as the Statement of Charges on Summary Action, Ex Parte Motion for Order of Summary Action, Declaration of William Dutra, Declaration of Robin Jones, Declaration of Karen Jarvis, the Ex Parte Order of Summary Action issued on September 2, 2010, as well as the Order Reversing ALJ Order Denying Stay (October 8, 2010 Order, Pierce County Superior Court), and the Revised Order Reversing ALJ Order Denying Stay (October 12, 2010 Order of the Pierce County Superior Court).

ORDER DENYING PETITION FOR  
REVIEW AS MOOT- 1

1.2 The Director finds that the Order Denying Stay entered by Administrative Law Judge, Terry A. Schuh on September 21, 2010 was reversed by the Pierce County Superior Court, and the Department has issued licenses to the Respondents pending the outcome of the administrative hearing, thus the Petition for Review is moot.

1.3 Burden of Proof. The standard of proof in matters involving disciplinary actions under RCW 18.85.390 is a "by a preponderance of the evidence." While the Director has not received, nor read, the pleadings filed in the Pierce County Superior Court case, the Court's order states the "The parties are entitled to know under which burden of proof they are to proceed". RCW 18.85.390, the statute governing the discipline of real estate agents, reads in relevant part:

If the director decides, after an adjudicative hearing, that the evidence supports the accusation by a preponderance of evidence, the director may impose sanctions authorized under RCW 18.85.041.

Similarly, RCW 18.85.380 sets out some minimal procedures for the conduct of a disciplinary hearing. That statute reads:

The hearing officer shall cause a transcript of all adjudicative proceedings to be kept by a reporter and shall upon request after completion thereof, furnish a copy of the transcript to the licensed person or applicant accused in the proceedings at the expense of the licensee or applicant. The hearing officer shall certify the transcript of proceedings to be true and correct. If the director finds that the statement or accusation is not proved *by a fair preponderance of evidence*, the director shall notify the licensee or applicant and the person making the accusation and shall dismiss the case.

(Emphasis added). The legislature has set the standard, and the Director lacks the authority to impose a different burden of proof in cases heard under this statute. The legislature last amended RCW 18.85.380 and 390 in 2008, two years after the decision of the state Supreme Court in *Ongom v. Dep't of Health, Office of Professional Standards*, 159 Wn.2d 132, 148 P.3d 1029(2006), cert. denied, 550 U.S. 905 (2007). The Department must administer the law under the statutory authority provided to it. The standard of "a preponderance of the evidence" should be applied by the

Administrative Law Judge in this case, not the “clear, cogent and convincing” standard advocated by Respondents.

1.4 If the Director were to rule on the question of the standard to be applied to judge whether a summary suspension should be issued or upheld pending a prompt hearing, the Director finds that the *Islam* case standard is controlling. *Islam v. Dept. of Early Learning*, 238 P. 3d 72; (2010). The court in *Islam* addressed both the appropriateness of the summary suspension of a daycare license, and the fact that there was no pre-suspension hearing, only an opportunity for a post-suspension hearing. The wording in the statute at issue in the *Islam* case, RCW 43.215.300(2) is identical to RCW 18.85.390. While case law in Washington provides that a post-deprivation hearing can satisfy due process requirements (*See, e.g., Ritter v. Bd. of Commr's*, 96 Wn.2d 503, 637 P.2d 940 (1981) (suspension of hospital privileges for a surgeon); *Islam v. Dept. of Early Learning* (day care license summarily suspended, then served with SOC for revocation of license, pending hearing on revocation), the Director will abide by the Superior Court’s decision in this case to stay the summary suspension pending a hearing on the merits of the charges. As the court in *Islam* stated, when there is authority to take emergency action, as the Real Estate Program here did, and the situation requires immediate action, “the requirement of “proof” does not preclude the department from acting upon information that has not yet been tested in a hearing.” *Islam Slip Opinion, at 16.*

The ALJ’s Order Denying Stay recites that a hearing is scheduled for five days, commencing on October 19, and that the parties’ and the ALJ’s schedule did not allow the hearing to be scheduled sooner. It appears the hearing will be held in a relatively short time frame following the imposition of the summary suspension, and the department is not delaying providing a hearing. The Director assumes all parties will act in good faith to bring the matter to hearing in as expeditious manner as can be accomplished.

**II. ORDER**

Based upon the foregoing, and the Director having considered the documents and records detailed in par. 1.1 herein, and in the premises being fully advised, NOW, THEREFORE, **ORDERS:**

2.1 Because the Department has issued licenses to the Respondents pending the hearing, the Petition for Review of Order Denying Stay, made to this office, is moot, and is therefore DENIED. The parties shall proceed to hearing as scheduled, or as determined by the Administrative Law Judge. The Director will not entertain further interlocutory appeals of procedural or evidentiary rulings of the Administrative Law Judge.

2.2 Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

DATED this 13 day of October, 2010.

STATE OF WASHINGTON  
DEPARTMENT OF LICENSING

By:

Elizabeth A. Luce  
ELIZABETH A. LUCE  
Director

NO. 41492-9

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

WASHINGTON STATE  
DEPARTMENT OF LICENSING,

Petitioner,

v.

MICHAEL HELLICKSON, TARA  
HELLICKSON, and  
HELLICKSON.COM, INC.,

Respondents.

CERTIFICATE OF  
SERVICE



CLERK

RECEIVED  
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STATE OF WASHINGTON  
2011 APR -5 P 2:00  
BY RONALD R. CARPENTER

I, Dianne S. Erwin, certify that on April 5, 2011, I caused a copy of a true and correct copy of the **Verbatim Reports of Proceeding** of the hearings held in the Pierce County Superior court, by electronic mail and US Mail Postage Prepaid via Consolidated Mail Service to be served upon the following:

Douglas S. Tingvall  
8310 154th Ave. SE  
Newcastle, WA 98059-9222  
RE-LAW@comcast.net

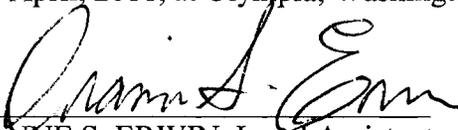
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**Original Filed With:**  
Clerk of the Court  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454  
COA2filings@courts.wa.gov

ORIGINAL

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5<sup>th</sup> day of April, 2011, at Olympia, Washington.

  
DIANNE S. ERWIN, Legal Assistant