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DIVISION II
WASHINGTON STATE


COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Respondents,

v.

WASHINGTON STATE DEPARTMENT OF LICENSING,

Petitioner.

BRIEF OF RESPONDENTS

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ARGUMENT

1. Introduction.

Michael Hellickson is an innovator and a leader in his field (residential short sales). Innovators become targets for competitors and regulators, who often do not understand or lag behind a rapidly-changing environment. The real estate market has been extremely volatile over the past few years. Until recently, real estate professionals could estimate market value fairly closely and predict market trends fairly accurately. Today, it is nearly impossible to predict how much a home will sell for or how long it will take to sell it.

Short sales present additional and unique challenges for all concerned. Homeowners usually are distressed emotionally, as well as financially. They often “check-out” mentally and try to avoid dealing with their unpleasant circumstances. They often are difficult to reach and do not return calls or messages – even to consider offers. And, because the homeowners usually have no economic interest in the outcome, they have no incentive to make repairs recommended by the buyers’ inspector or required by the buyers’ lender. Lienholders also are difficult to deal with. They often do not respond timely to offers and communications and seem to take forever to approve short sales. In addition, the lienholders’

guidelines and personnel change frequently. The homeowners may be getting close to an approval of a short sale, then have the file assigned to a new person with the lienholder or have new guidelines adopted, which may result in having to start the process over!

The Department of Licensing ["DOL"] has not kept pace with the rapidly-changing real estate market. None of DOL's personnel who participated in the decision to summarily suspend Hellicksons' licenses have any background, experience or training on short sales. In fact, the lead investigator assigned to this case has never even held a real estate license or practiced real estate brokerage.

2. Granting DOL's petition to "stay the stay" would be inequitable at this point.

The Ex Parte Order summarily suspending the Hellicksons' licenses was issued on September 2, 2010. Several of the complaints upon which the Statement of Charges is based were filed one-and-a-half years before the Ex Parte Order was entered. The investigations of the complaints were completed more than four months before the Ex Parte Order was entered. The Superior Court stayed the Order and DOL reinstated the Hellicksons' licenses on October 8, 2010. The hearing on the merits of the charges was concluded on March 15, 2011, and the ALJ's

Initial Order is expected any day now.¹

In summarily suspending Hellicksons' licenses, the Director concluded that there was "an immediate danger to the public health, safety or welfare," where the Director's Ex Parte Order was entered without notice or an opportunity for a hearing and based on:

- a. unsubstantiated hearsay and speculation;
- b. records seized illegally by DOL;
- c. no showing that any consumer was actually harmed by Hellicksons' alleged acts;
- d. complaints made one-and-a-half years earlier;
- e. investigations completed four months earlier;
- f. an erroneous standard of proof; and
- g. no showing that less restrictive agency action would have been inadequate to protect the public.

Now, six months after Hellicksons' licenses were reinstated, DOL seeks to suspend the Hellicksons' licenses again, even though a decision on the merits of the charges is expected shortly. It is completely illogical and inequitable for DOL to take one-and-a-half years to investigate the complaints and four months thereafter to file a Statement of Charges, then

¹ RCW 34.05.461(8)(a) provides that "initial or final orders shall be served in writing

contend that “an immediate danger to the public health, safety, or welfare [exists] requiring immediate agency action.” RCW 34.05.479(1). The suspension of the Hellicksons’ licenses has devastated their reputations, business and livelihood. This court should deny DOL’s petition on the basis of fundamental fairness to Hellicksons alone. The case should be decided after a full evidentiary hearing on the merits of the charges, rather than the hearsay and speculation that formed the basis for the Ex Parte Order.

3. The superior court had inherent jurisdiction to protect Hellicksons’ constitutional rights.

Judge Grant’s Orders were based on constitutional flaws in the Ex Parte Order and the Real Estate Licensing Law itself. Judge Grant expressed particular concern about two issues: (a) the standard of proof applied by DOL was unclear, and (b) there are no definite time limits in the APA for emergency adjudicative proceedings. Judge Grant was concerned that DOL had denied Hellicksons due process of law, in that DOL had applied “different standards of proof at different stages of the administrative process. 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

within ninety days after conclusion of the hearing,” such that the ALJ’s Initial Order must be served by June 13, 2011, at the latest.

decision to be made.” Order Reversing ALJ Order Denying Stay, p. 3 (Appendix A to Brief of Petitioner). As noted by Judge Grant, “[t]he constitutional rights of the parties are paramount to our system of justice and equity.” Order Reversing ALJ Order Denying Stay – Revised, p. 3 (Appendix A to Brief of Petitioner). Judge Grant went on to clarify that:

“4. The parties are entitled to know under which burden of proof they are to proceed;

“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.”

Order Reversing ALJ Order Denying Stay – Revised, p. 3-4 (Appendix A to Brief of Petitioner).²

Thus, contrary to DOL’s contention, Judge Grant *did* make findings in support of her Orders and did not abuse her discretion.

There are no specific time limits for review of emergency adjudicative proceedings. The Administrative Procedure Act provides only

² The Department implies that improper ex parte contact occurred between Hellicksons’ counsel and Judge Grant. To the contrary, Hellicksons’ attorney provided to Judge Grant in electronic format a proposed form of the Order clarifying her previous ruling with

that “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.” (Emphasis added.) RCW 34.05.479(5). The Ex Parte Order on Summary Action immediately suspending Hellicksons’ licenses and putting them out of business without a hearing, without an opportunity to confront the witnesses against them and without an opportunity to cross-examine witnesses, was served on September 2, 2010. A hearing on the merits of the charges was scheduled to *begin* on October 19, 2010. DOL indicated that it intended to call over 70 witnesses. The ALJ indicated that the hearing must be broken into pieces over several weeks, because he did not have a block of time sufficient to conduct the hearing. Once the hearing is concluded, the ALJ will enter an “initial order.” RCW 34.05.461. The Director then will review the initial order and agency record, and enter a “final order.” *There is no time limit for entry of the final order after entry of the initial order!* Either party may request reconsideration of a final order within 10 days after its entry and the opposing party may file a response to the petition for reconsideration within 10 day thereafter. WAC 308-08-416. *There is no time limit for the Director to rule on a petition for reconsideration of a final order!* So, how

notice to the Department. Judge Grant edited the order, but retained counsel’s electronic signature. Hellicksons’ attorney did *not* present the revised order ex parte.

long can this process drag on and still comply with the statutory mandate of “as quickly as feasible”? Martin Luther King, Jr. wrote, “Justice too long delayed is justice denied.” (Letter from Birmingham Jail, April 16, 1963).

It is the function and duty of the courts to invalidate laws that violate constitutional rights. *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803).

“[T]he doctrine of separation of powers is also complemented and modified by the theory of checks and balances. While it is the legislature’s duty to make public policy decisions and enact laws, when the legislature enacts a law violative of our state’s constitutional guaranties this court can *and must* invalidate the law. . . . As our nation’s history reflects, it is often left to the judicial branch to ensure acts of our legislature or the executive are not violative of the constitutional rights of the people. . . . Despite the deference afforded to the legislature, the rational basis standard is not without teeth – ‘the court’s role is to assure that even under this deferential standard of review the challenged legislation is constitutional.’” (Emphasis in original; citations and footnotes omitted.)

Andersen v. King County, 158 Wn.2d 1, 138 P.3d 963, 1015-16 (2006) (Fairhurst, J. (*dissenting*)).

Thus, the trial court not only had the inherent power to stay DOL’s action, but also the duty to protect Hellicksons’ constitutional right to due process of law.

Although not required to do so, Hellicksons had “Respondents’ Petition for Review of Order Denying Stay” served on the Office of Administrative Hearings on September 27, 2010, after DOL raised its objection. Declaration of Service (Appendix A). RCW 34.05.542 provides in its entirety as follows:

“Subject to other requirements of this chapter or of another statute:

- (1) A petition for judicial review of a rule may be filed at any time, except as limited by RCW 34.05.375.
- (2) 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.
- (3) 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, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.
- (4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States

mail, as evidenced by the postmark.

- (5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.
- (6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record.”

In this case, the “agency” referred to in RCW 34.05.542 is the Department of Licensing – not the Office of Administrative Hearings.

“(2) ‘Agency’ means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.

“(3) ‘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.”

RCW 34.05.010.

OAH has no power to enter an order imposing sanctions or withholding benefits. OAH conducts hearings and make recommendations to DOL. OAH’s findings are not binding on DOL unless and until incorporated into a “final order” issued by the Director of DOL. Although the Petition for Review incorrectly identified ALJ Schuh’s Order Denying Stay as the agency action being reviewed, it was actually the Ex Parte

Order issued by the Director that was reviewed by Judge Grant. Thus, service of the petition on the attorney general was all that was required.

4. The standard of review of the stay ordered by Judge Grant is “abuse of discretion.”

RAP 8.1(b) provides in part that “[s]tay of a decision in other civil cases [not involving a money judgment or affecting property] is a matter of discretion.” Thus, this court reviews the stay ordered by Judge Grant under the “abuse of discretion” standard. “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 484 P.2d 775 (1971).

5. Hellicksons were denied due process of law.

At the hearing before Judge Grant on November 5, 2010, DOL’s attorney made the incredible and outrageous comment that there is no standard of proof applicable to a summary suspension.

“MS. CAMPBELL: Actually, Your Honor, preponderance of the evidence doesn’t apply at the summary suspension phase. Both *Islam* and the *Boise Cascade* case make it clear that before summary suspension *what you need are specific allegations. You don’t need to meet a burden of proof or a standard of evidence.* And so there was no application of

either the preponderance or the clear and convincing standards to the evidence presented at the summary suspension phase.

“THE COURT: Okay. So when the Director made her ruling what did she predicate it on?”

“MS. CAMPBELL: Specific allegations of harm, eminent danger to the public. And that is within her discretion as an agency.” (Emphasis added.)

Verbatim Report of Proceedings (November 5, 2010), 15:4-16.

In other words, DOL summarily suspended Hellicksons’ licenses solely on the basis of *allegations* without any determination of merit. It is no wonder that Judge Grant was disturbed by DOL’s attitude of “shoot now, ask questions later.”

The suspension or revocation of a professional license is a drastic action involving fundamental constitutional rights. The due process clause of the Fourteenth Amendment to the United States Constitution precludes states from depriving any person of “life, liberty, or property, without due process of law.”

“Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

...

“[I]t is fundamental that, except in emergency situations (and this is not one), due process requires that, when a State seeks to terminate an interest such as that here involved (drivers license), it must afford ‘notice and opportunity for hearing appropriate to the nature of the case’ before the termination becomes effective.”

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the due process clauses of the fifth and fourteenth amendments to the United States Constitution. . . . ‘[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.’ *Joint Anti Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring). A professional license revocation proceeding has been determined to be ‘quasi criminal’ in nature and, accordingly, entitled to the protections of due process.”

Matter of Johnston, 99 Wn.2d 466, 474, 663 P.2d 457 (1983).

“Liberty denotes not only freedom from bodily restraint, but also the right of the individual to contract and to engage in any of the common occupations of life. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). In the employment context, the term ‘liberty’ encompasses two of the employee’s most basic interests, namely, his good name and his prospects for future employment. Thus, if the government dismisses an employee on charges that call into question his good name, honor or integrity, notice and an opportunity to be heard are essential. *Board of Regents v. Roth, supra* at 408 U.S. 569, 92 S.Ct. 2705, 33 L.Ed.2d 556, and cases cited. Similarly, the government cannot, by its actions, impose a stigma or other disability upon an employee which will foreclose his freedom to pursue other employment opportunities. *Board of Regents*

v. Roth, supra.”

State ex rel. Swartout v. Civil Service Commission of City of Spokane, 25 Wn.App. 174, 182-83, 605 P.2d 796 (1980).

“Inherent in the doctrine of due process is the concept that the hearing, to have meaning, must be afforded at some time *before* the final deprivation has taken place.

‘A necessary element in due process is that the opportunity to defend must be given at a time when it can be effective. Unless the defense can speak at a time when there is a chance to be heard fairly, the opportunity to speak is a hollow one.’

“*Poe v. Charlotte Memorial Hosp., Inc.*, 374 F.Supp. 1302 (W.D.N.C.1974) at 1311; *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512 (4th Cir. 1974). In *Groppi v. Leslie*, 404 U.S. 496, 502-03, 92 S.Ct. 582, 586-587, 30 L.Ed.2d 632 (1972), the court stated that

‘[R]easonable notice of a charge and an opportunity to be heard in defense *before* punishment is imposed are ‘basic in our system of jurisprudence.’ (citations omitted) ... In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (70 S.Ct. 652, 94 L.Ed. 865) (1950), the Court stated:

‘Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.’ 339 U.S., at 313 (70 S.Ct., at 656).”

Ritter v. Board of Com'rs of Adams County Public Hospital Dist. No. 1, 96 Wn.2d 503, 526, 637 P.2d 940 (1981)(J. Dore, dissenting).

“Where an individual possesses a constitutional property interest, due process requires that he be given notice and a meaningful opportunity to a hearing *before* he is deprived of that interest. We must balance three factors to determine the nature of the procedural protections required: (1) the gravity of the private interest affected; (2) the risk of erroneous deprivation under the current procedure and the probable value, if any, of additional procedural safeguards; and (3) the interest of the government, including the burdens of additional or substitute procedures.”

Jones v. State, 140 Wn.App. 476, 492-93, 166 P.3d 1219 (2007).

“[T]here is no question Dr. Nguyen’s private interest is significantly affected. The revocation of Dr. Nguyen’s license exposed him to loss of livelihood, diminished reputation, and professional dishonor, particularly where sexual misconduct is alleged. The private interest affected here is important, and Dr. Nguyen has a significant right in his medical license.”

Nguyen v. Dep’t of Health, 144 Wn.2d 516, 544, 29 P.3d 689 (2001). In *Nguyen v. Dep’t of Health*, *supra*, a medical doctor was charged with engaging in sexual misconduct with 25 of his patients and a summary suspension of his license was issued. After a hearing, the summary suspension was stayed pending a hearing on the merits of the case.

“[T]he purpose of the [real estate licensing law] is to protect the general public from negligent, unscrupulous, or dishonest real estate operators. *Nuttall v. Dowell*, 31 Wn. App. 98, 108, 639 P.2d 832 (1982).” *Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 401-02, 54 P.3d 1186 (2002). DOL argues that vigorous enforcement of the real estate

licensing law is essential to maintaining the standing of the real estate profession in the eyes of the public. However, it is equally important that state agencies promote confidence in the integrity of government in the eyes of the public by respecting the constitutional rights of individuals.

“Under the appearance of fairness doctrine, proceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing. *Swift v. Island Cy.*, 87 Wn.2d 348, 361, 552 P.2d 175 (1976). Although this doctrine originated in the land use area, *See Smith v. Skagit Cy.*, 75 Wn.2d 715, 453 P.2d 832 (1969), it has been extended to other types of quasi-judicial administrative proceedings, *See Chicago, M., ST. P. & Pac. R.R. v. State Human Rights Comm'n*, 87 Wn.2d 802, 557 P.2d 307 (1976).

Id. at 478.

Here, a “reasonably prudent and disinterested observer” would not conclude that Hellicksons “obtained a fair, impartial, and neutral hearing.” Indeed, DOL afforded Hellicksons no hearing at all. Instead, DOL charged, convicted, sentenced and executed Hellicksons with a single blow!

The Administrative Procedure Act implicitly recognizes the importance of live testimony by providing that (a) “[i]n reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer’s opportunity to *observe the witnesses*,” RCW

34.05.464(4), (b) “the presiding officer shall transmit a full and complete record of the proceedings, including such comments upon *demeanor of witnesses* as the presiding officer deems relevant,” RCW 34.05.461(2), and (c) “the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties’ opportunities to confront witnesses and rebut evidence.” RCW 34.05.461(4). (Emphasis added.)

Here, the Director did not observe the witnesses or their demeanor, because there were no witnesses, such that her “findings” are entitled to no deference.³ Fundamental fairness requires a formal hearing – especially where the credibility of the witnesses is at issue.

In addition, the “evidence” presented by DOL to obtain the Ex Parte Order is entirely hearsay (summary conclusions by DOL investigators)! Although hearsay may be admissible in an administrative hearing “if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs” (RCW 34.05.452(1)), DOL did not present a single, sworn statement by a consumer with personal knowledge of the facts! Not only has DOL denied Hellicksons a hearing before putting them

out of business, it also deprived them of the fundamental right of cross-examination and the right to confront the witnesses against them.

In this case, the Director did not even sign the Ex Parte Order personally. One would think that such drastic action impacting so many people would justify the Director's personal attention.

Authorities from other jurisdictions support Hellicksons' position. In *St. Michael's Acad., Inc. v. State, Dept. of Children & Families*, 965 So. 2d 169 (Fla. Dist. Ct. App. 2007), the court quashed an order of emergency suspension of the license of a child care facility.

"An emergency order suspending a license must be based upon particularized facts showing that the licensee's continued operation would pose an immediate serious danger to public health, safety or welfare. . . . Additionally, an emergency order suspending a license must present facts that: 'i) the complained of conduct was likely to continue; ii) the order was necessary to stop the emergency; and iii) the order was sufficiently tailored to be fair.' *Bio-Med Plus, Inc. v. Dep't of Health*, 915 So.2d 669, 672 (Fla. 1st DCA 2005). Immediacy of harm to the public need not be alleged if there are allegations of 'sufficiently egregious past harm which are of a nature likely to be repeated.' *Id.* at 673. However, '[g]eneral conclusory predictions of harm are not sufficient to support the issuance of an emergency suspension order.' *Daube v. Dep't of Health*, 897 So.2d 493, 495 (Fla. 1st DCA 2005).

...

"This Court is not persuaded by conclusory predictions of

³ The Director's "findings" simply incorporate the SOC by reference and are not even signed by the Director.

future harm based on factual allegations which do not demonstrate an immediate danger. The Court also notes that the time gap [of one to seven months] between a number of the incidents and the order undercuts the immediacy of the alleged danger.”

St. Michael's Acad., Inc. v. State, Dept. of Children & Families, 965 So. 2d 169, 172-73 (Fla. Dist. Ct. App. 2007) (applying a statute similar to Washington's APA).

In *Bio-Med Plus, Inc. v. Dep't of Health*, 915 So.2d 669, 672 (Fla. 1st DCA 2005), the court held that the emergency suspension order “does not contain a single, particularized allegation of a continuing public health or safety violation, or any allegations of harm or possible harm to any patient. The harm alleged in the Department's order is general and conclusory and relates to actions in excess of two years old.” *Id.* at 673.

In *Daube v. Department of Health*, 897 So.2d 493 (Fla.App. 1 Dist. 2005), the Department of Health issued an emergency order suspending a doctor's license for using an unapproved product instead of Botox® in wrinkle reduction procedures without the consent of his patients. In vacating the emergency order, the court held that:

“because the agency's emergency order was broader than that ‘necessary to protect the public interest under the emergency procedure’ . . . a more narrowly tailored emergency order is appropriate.

...

“[T]he complained of conduct is not likely to recur and issuance of the emergency order suspending petitioner's

license was not necessary to prevent future harm. General conclusory predictions of harm are not sufficient to support the issuance of an emergency suspension order. . . . Punishment for past behavior is properly the subject of an administrative complaint . . . wherein the licensee is afforded the opportunity to challenge the factual basis of the complaint through a [formal] hearing.”

Id. at 494.

From these authorities, the following guidelines can be deduced:

1. An emergency order suspending a license must be based upon particularized facts showing that the licensee’s continued operation would pose an immediate serious danger to public health, safety or welfare;
2. An emergency order suspending a license must present facts that:
 - a. the complained of conduct was likely to continue;
 - b. the order was necessary to stop the emergency; and
 - c. the order was sufficiently tailored to be fair;
3. General conclusory predictions of future harm are not sufficient to support the issuance of an emergency suspension order; and
4. An emergency order must be no broader than is necessary to protect the public.

Here, the Ex Parte Order closing down Hellicksons' business without a hearing fails to satisfy any of the above guidelines, such that the Ex Parte Order should be vacated and Hellicksons' licenses should be reinstated pending a formal hearing.

6. Exhaustion of administrative remedies is outweighed in this case by considerations of fairness and practicality.

The Administrative Procedure Act, Chapter 34.05 RCW ["APA"], contemplates that the ALJ makes findings of fact and conclusions of law and enters an initial order. The Director of DOL then adopts, modifies or rejects the initial order and enters a final order. Generally, a licensee may only seek judicial review of a final order entered by the Director. Admittedly, the Order Denying Stay is not a "final order," for purposes of the APA and Hellicksons did not exhaust administrative remedies. However, "[t]he court may relieve a [party] 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).

In *Orion Corp. v. State*, 103 Wn.2d 441, 456-57, 693 P.2d 1369 (1985), the court concluded that “considerations of fairness and practicality outweigh the policies underlying the doctrine,” such that exhaustion of administrative remedies was excused.

“It is a general rule that when an adequate administrative remedy is provided, it must be pursued before the courts will intervene. *Wright v. Woodard*, 83 Wn.2d 378, 381, 518 P.2d 718 (1974). If the administrative mechanisms available can alleviate the harmful consequences of the governmental activity at issue, a litigant must first pursue those remedies before resort to the court. . . . This is particularly true in land use cases where the matter in question involves an act of legislative discretion. . . .

“As the cases make clear there is a strong bias towards requiring exhaustion before resort to the courts. This court recently noted that the policies underlying the exhaustion doctrine 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 the exercise of agency expertise, (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by resort to the courts. *South Hollywood Hills Citizens Ass’n v. King Cy.*, 101 Wn.2d 68, 73-74, 677 P.2d 114 (1984).

“Although these policies strongly favor exhaustion, this court has recognized that the doctrine is not absolute.

‘Washington courts have recognized exceptions to the exhaustion requirement in circumstances in which these policies are outweighed by consideration of fairness or practicality. For example, if resort to the administrative procedures would be futile, exhaustion is not required.’ *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975).

“*South Hollywood Hills Citizens Ass’n*, 101 Wn.2d at 74, 677 P.2d 114.

“We believe that in this case, considerations of fairness and practicality outweigh the policies underlying the doctrine. We are convinced that on this record, resort to the administrative procedures would be futile and vain.”

Orion Corp. v. State, 103 Wn.2d 441, 456-57, 693 P.2d 1369 (1985).

Whether to require exhaustion of remedies is within the discretion of the court. In exercising its discretion, the court should consider the policies underlying the doctrine to determine whether such policies would be advanced or thwarted by requiring exhaustion. Applying the *South Hollywood Hills* factors to this case, the court should reach that same conclusion as *Orion* – i.e., that exhaustion of administrative remedies is outweighed by considerations of fairness and practicality and should be excused.

Judicial review at this point is limited to the record the Director had before her when she issued the Ex Parte Order. RCW 34.05.558. Although it is possible that the Director might reach a different conclusion *after* a formal hearing on the merits and all the evidence is before her, there is no reason whatsoever to expect that the Director might reverse herself *before* a hearing on the merits. In effect, the Director would be “reconsidering” her decision, rather than “reviewing” it. “[P]roceedings before a quasi-judicial tribunal are valid only if a reasonably prudent and

disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *Matter of Johnston*, 99 Wn.2d 466, 478, 663 P.2d 457 (1983). A reasonably prudent and disinterested observer hardly would conclude that Hellicksons could obtain a “fair, impartial, and neutral hearing” before the very person who issued the order being reviewed! Such review would be futile and should be excused.

a. Judicial review of the Order Denying Stay did not prematurely interrupt the administrative process.

In this case, judicial review of the Order Denying Stay did not delay or interrupt the administrative process at all. The hearing on the merits of the charges proceeded as scheduled and has been concluded.

b. Judicial review of the Order Denying Stay did not require the agency to develop a factual background or record.

The record on which the ALJ based his decision and of which Hellicksons sought review already existed. Hellicksons contend that the record before DOL and later before the ALJ was insufficient as a matter of law to justify a summary suspension of Hellicksons’ licenses.

DOL does not dispute the authenticity or completeness of the record filed herein with the Declaration of Douglas S. Tingvall. To the contrary, DOL itself identified the record filed with Tingvall’s declaration

as “evidence relied upon.” Department’s Response Brief at p. 7. Hellicksons asked DOL to certify the record, but DOL has declined, stating that the record must be certified by the Office of Administrative Hearings and that OAH has 30 days to do so after a request is served. DOL misreads the statute. It is the agency whose order is appealed (DOL) that must certify the record – not OAH.

c. The court, and not the agency, has greater expertise to resolve a purely legal issue.

One of the most important policies underlying the exhaustion doctrine is deference to the agency’s expertise. As stated in *Orion*, “[t]his is particularly true in land use cases where the matter in question involves an act of legislative *discretion*.” (Emphasis added.) 103 Wn.2d at 457. Here, whether Hellicksons were afforded due process of law and what is the correct standard of proof are purely legal issues requiring no agency expertise or discretion. In other words, the court deciding these issues would not undermine DOL’s expertise, authority or function.

RCW 34.05.461(5) provides that “[w]here it bears on the issues presented, the agency’s experience, technical competency, and specialized knowledge may be used in the evaluation of evidence.” However, where

the case turns on the interpretation of a statute, the usual deference afforded the agency's interpretation of the law does not apply.

“Interpretation of a statute is solely a question of law and within the conventional competence of the court. *State ex rel. Graham v. Northshore Sch. Dist.* 417, 99 Wn.2d 232, 242, 662 P.2d 38 (1983). Where the only question is the interpretation of a statute, resort to the administrative agency is unnecessary since it has no special competence over the controversy. *Northshore*, at 242, 662 P.2d 38. This conclusion reflects a well recognized exception to the doctrine of primary jurisdiction. *Northshore*, at 242, 662 P.2d 38 (citing *Great N. Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922)).

“At issue is interpretation of ‘primarily’ as used in RCW 9.46.113. Neither party advocates attributing to the term something other than its usual and ordinary meaning. Such explication is within the competence of this court and does not require deference to a specialized administrative body.”

American Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 5-6, 802 P.2d 784 (1991).

“‘The process of applying the law to the facts . . . is a question of law and is subject to *de novo* review.’ *Tapper v. Employment Sec. Dep’t*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993)]; see also *Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 329-30, 646 P.2d 113 (1982) (explaining that mixed questions of law and fact, also known as problems of application of law to facts, are subject to *de novo* review, meaning the court must determine the correct law independent of the agency’s decision

and then apply the law to established facts *de novo*). *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004).

Thus, DOL's interpretation of the Real Estate Licensing Law is reviewed *de novo* and is not entitled to deference.

d. The court, and not the agency, provides a more efficient process to correct the agency's mistake.

The ALJ already has ruled that (i) the summary suspensions were justified, (ii) the standard of proof applicable to disciplinary actions against real estate brokers is a simple preponderance of the evidence, and (iii) the ALJ has no authority to impose a higher standard of proof, as required under the Constitution. The standard of proof issue inevitably will be presented for judicial review, unless Hellicksons prevail on the merits at an administrative hearing. As discussed in more depth below, the ALJ applied the wrong standard of proof and would have repeated that mistake at the formal hearing had the court not corrected the mistake. DOL indicated it expected to call more than 40 witnesses and expected to take at least four days to present its case (in addition to Hellicksons' defense and DOL's rebuttal). If the ALJ applies an erroneous standard of proof at the hearing and if the court later reverses the ALJ's ruling on the standard of proof, then the court may have to remand the case for a new hearing, so

that the ALJ can judge the credibility of the witnesses under the correct standard of proof, rather than the court simply reviewing the record. This would result in a huge waste of resources for all parties and the court. In the interest of judicial economy, the court should decide the issue now.

e. Judicial review of the Order Denying Stay will not encourage individuals to ignore administrative procedures in the future.

Because emergency adjudicative proceedings rarely have been used by DOL, there are no published opinions in Washington involving real estate licensees. Judicial review of the Order Denying Stay will provide guidance to DOL and the Office of Administrative Hearings for other cases, which will serve to reduce, rather than increase, the need to resort to judicial review in the future.

f. Hellicksons will suffer irreparable harm, if they are required to exhaust administrative remedies.

Even if Hellicksons prevail on the merits at an administrative hearing, Hellicksons will suffer obvious and irreparable harm to their livelihood, business and reputation caused by the summary suspension, if they are required to exhaust administrative remedies. In this case, as in

Orion, “considerations of fairness and practicality outweigh the policies underlying the doctrine.”

7. DOL and the ALJ applied an erroneous standard of review and standard of proof.

The ALJ applied the wrong standard of review, RCW 34.05.550, which applies to judicial review of agency action *after a formal hearing* on the merits of the charges, rather than review of emergency adjudicative proceedings *before* a hearing on the merits.

The real estate licensing law does not prescribe a specific method for review of a summary license suspension, except that the Administrative Procedure Act requires that “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.” (Emphasis added.) RCW 34.05.479(5). By analogy, the Uniform Disciplinary Act for health professions requires a “show cause” hearing within fourteen days of the licensee’s request. “At the show cause hearing, the disciplining authority has the burden of demonstrating that more probable than not, the license holder poses an immediate threat to the public health and safety.” RCW 18.130.135(1).

However, the case law in Washington imposes a higher standard of proof for professional disciplinary actions due to the nature of the significant interest at stake. “Every doubt should be resolved in [the licensee’s] favor, and only upon a *clear preponderance* of the evidence that the acts charged have been done . . . should disciplinary action be taken.” (Emphasis added.) *In re Haglund*, 81 Wn.2d 118, 500 P.2d 84 (1972). The disciplinary authority has the “burden of establishing an act of misconduct by a *clear preponderance* of the evidence.” (Emphasis in original.) *In re Poole*, 156 Wn.2d 196, 209, 125 P.3d 954 (2006). “‘Clear preponderance’ is an intermediate standard of proof . . . requiring greater certainty than ‘simple preponderance’ but not to the extent required under ‘beyond [a] reasonable doubt.’” *In re Allotta*, 109 Wn.2d 787, 792, 748 P.2d 628 (1988).

“It is important to focus on the nature of the interest at stake in the sense that the more important the interest, the more process is required. The interest of the individual is the primary concern; however, important interests of the state likewise merit a higher burden. A traffic infraction results in a fine. If a mistake is made the consequence is only money (and not much of that) or an erroneous dismissal. In either case the result is of no great consequence. However, charges of aggravated first degree murder may result in the death penalty on the one hand or a killer on the loose on the other. We, as a civilized society, will risk a mistake in the former but tolerate no wrongful conviction in the latter. So too with Dr. Nguyen: His professional license, his reputation, his ability to earn a living for his family are very

important interests – much more important than money alone.

“By the same token society also has the important dual interests that (1) Dr. Nguyen’s standard of practice not fall below the acceptable minimum and (2) he not be erroneously deprived his license, as that would erroneously deprive the public access to and benefit from his services. Here *each* interest dictates a more exacting burden than mere preponderance.”

Nguyen v. Dep’t of Health, 144 Wn.2d 516, 525-26, 29 P.3d 689 (2001).

A more recent case holds that the standard of proof in a professional licensing disciplinary matter is “clear, cogent and convincing evidence.” The difference, if any, between “clear preponderance of the evidence” and “clear, cogent and convincing evidence” is unclear.

“The clear and convincing evidence standard applies to proceedings affecting a medical license. . . . Where the evidentiary standard is clear, cogent, and convincing, we must determine whether the substantial evidence in support of the findings of fact is ‘highly probable’ and whether the findings, in turn, support the conclusions of law.”

Alsager v. Washington State Bd. of Osteopathic Medicine and Surgery, No. 39301-8-II (Div. II, March 30, 2010).

Thus, DOL must show by *clear, cogent and convincing* evidence that the practices alleged in the SOC presented an *immediate danger to the public requiring immediate agency action*. “Summary suspension could not occur based on mere allegations rather than proof.” *Islam v. State*,

Dept. of Early Learning, No. 63362-7-I (Div. I, August 23, 2010)
(summary suspension reversed by ALJ).

Likewise, “[s]ince [real estate licensing law] is penal in nature and in derogation of the common law, it must be strictly construed.” *Grammer v. Skagit Valley Lumber Co.*, 162 Wash. 677, 299 P. 376 (1931); *Main v. Taggares*, 8 Wn. App. 6, 504 P.2d 309, 74 A.L.R.3d 630 (1972). “[F]undamental fairness requires that a penal statute be literally and strictly construed in favor of the accused.” *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986).

The following standard of review applies to this matter:

- a. DOL has the burden of proof,
- b. The standard of proof is “clear, cogent and convincing evidence,” and
- c. Any ambiguity or doubt must be resolved in Hellicksons’ favor.

At the hearing before the ALJ, the ALJ said he was bound by the statutory standard of proof (preponderance of the evidence) and did not have authority to hold that the Constitution requires a higher standard of proof (clear, cogent and convincing evidence or clear preponderance of the evidence). The ALJ erroneously concluded as follows:

“[Petitioners’] argument relied primarily on judicial decisions regarding the licenses of medical providers. Accordingly, I do not find those decisions persuasive.”

Order Denying Stay at 4.

In effect, by refusing to apply the higher standard of proof to real estate licensing, the ALJ implicitly has held that the public needs less protection in the health care field, where public *health and safety* are at stake, than in the real estate industry, where only *economic losses* are involved!

8. DOL’s petition is based entirely on hearsay and speculation.

Like the Director’s Ex Parte Order, DOL’s petition is based entirely on the declarations of DOL investigators. Hellicksons renew their objection to and move to strike the hearsay contained in the declarations of investigators William Dutra (Appendix E) and Robin Jones (Appendix F), and the double-hearsay (hearsay within hearsay) contained in the declaration of program manager, Karen Jarvis (Appendix G).

Contrary to DOL’s contention, hearsay is inadmissible in an administrative proceeding, unless “it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” RCW 34.05.452(2). Not all hearsay is admissible in an adjudicative proceeding. Under ER 802, “[h]earsay is not admissible

except as provided by these rules, by other court rules, or by statute. RCW 34.05.452(2) provides that “[i]f not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.” RCW 34.05.452(1) provides that “[e]vidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” Said differently, hearsay evidence is inadmissible, *unless* it is the kind of evidence on which reasonably prudent persons are *accustomed to rely in the conduct of their affairs*.

This rule is intended to allow the ALJ to consider certain kinds of evidence without requiring the author to authenticate or testify as to its content (*e.g.*, multiple listing service, business, county, bank, credit card, telephone and public records).

In *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 450-52, 191 P.3d 879 (2008), the supreme court held that EEOC reports containing “conclusions involving the exercise of judgment or discretion or the expression of opinion” did not fall within the public records exception to the hearsay rule and were inadmissible.

The public records hearsay “exception applies when a hearsay declarant who is a public official makes an out-of-

court statement while acting pursuant to her or his official duty. *Steel v. Johnson*, 9 Wn.2d 347, 357-58, 115 P.2d 145 (1941). If a hearsay declarant who is a public official reiterates or relies on the statement of a second hearsay declarant who is not a public official acting pursuant to official duty, the second declarant's statement generally is admissible only if it qualifies under a different hearsay exception. ER 805. Moreover, this court has held that 'a report or document prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion.' *Steel*, 9 Wn.2d at 358, 115 P.2d 145; *Monson*, 113 Wn.2d at 839, 784 P.2d 485."

"Applying this standard here, we hold that the trial court erred in admitting the [Department of Ecology] report. In the admitted version of the report, a vast majority of the formal 'conclusions' of the investigator were redacted, leaving only the 'facts.' However, the investigator's statement of 'facts' contained a residue of 'judgment' or 'opinion' because where individuals disagreed on the facts, the investigator necessarily chose whose version of a particular 'fact' to accept. The record here indicates that Fluor disputed a number of the 'facts' in the report. . . . While the report seems to accept as true the allegations of the pipe fitters, it discredits Fluor's version of the story. According to the Washington standard, this evidence is inadmissible as the product of the investigator's judgment and expression of opinion.

"Given the purpose for the hearsay rule, the only reasonable conclusion is that the report is inadmissible. The report differs markedly from other public records we have deemed admissible, such as driving records, *Monson*, 113 Wn.2d at 839, 784 P.2d 485, fingerprint records, *State v. Johnson*, 194 Wn. 438, 447, 78 P.2d 561 (1938); and weather bureau records, *Anderson v. Hilker*, 38 Wn. 632, 634, 80 P. 848 (1905). Unlike those purely factual recordings, the report is the product of an investigation, presumably involving interviews with the affected parties, and the investigator's

evaluation of the evidence as a whole. The hearsay prohibition serves to prevent the jury from hearing statements without giving the opposing party a chance to challenge the declarants' assertions. While the investigator may have done an admirable job, Fluor had no opportunity to challenge his factual conclusions. The trial court abused its discretion in admitting the report."

164 Wn.2d at 450-52; *See also, Bierlein v. Byrne*, 103 Wn.App. 865, 14 P.3d 823 (2000).

"Although the Uniform Business Records as Evidence Act allows regularly kept business records in evidence when proof that their custody, control and making shows prima facie that they are maintained in the regular course of business, the statute *ipso facto* does not render admissible such parts of the records as are otherwise excludable under well-established rules of evidence. If regularly maintained under a prearranged and established scheme, business records may be admitted to show the occurrence of events, conditions, conduct and status of things existing or occurring contemporaneously with the making of the records, but *they are not admissible as a narrative of occurrences antedating the making of the notations*. In short, although the Uniform Business Records as Evidence Act establishes a statutory exception to the common-law rule against hearsay evidence, it does not in all respects render admissible evidence contained in the records which should ordinarily be excluded." (Emphasis added.)

State v. Monson, 113 Wn.2d 833, 848, 784 P.2d 485 (1989) (quoting *State v. White*, 72 Wn.2d 524, 530-31, 433 P.2d 682 (1967)).

Reports prepared by DOL investigators are not "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." The reports were not prepared in the normal course of business, but were prepared by DOL solely for the purpose of

prosecuting disciplinary action against Hellicksons. Thus, the reports do not fall within any recognized exception to the hearsay rule or the narrow exception contained in RCW 34.05.452(1), and must be excluded from evidence.

9. DOL was not authorized to use emergency adjudicative proceedings in this case.

Emergency adjudicative proceedings are governed by RCW 34.05.479, which provides as follows:

- (1) Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving an *immediate danger to the public health, safety, or welfare requiring immediate agency action.*
- (2) *The agency may take only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.*
- (3) The agency shall enter an order, including a brief statement of findings of fact, conclusions of law, and policy reasons for the decision if it is an exercise of the agency's discretion, to justify the determination of an immediate danger and the agency's decision to take the specific action.
- (4) The agency shall give such notice as is practicable to persons who are required to comply with the order. The order is effective when entered.
- (5) After entering an order under this section, 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.

- (6) The agency record consists of any documents regarding ~~the~~ matter that were considered or prepared by the agency. The agency shall maintain these documents as its official record.
- (7) Unless otherwise required by a provision of law, the agency record need not constitute the exclusive basis for agency action in emergency adjudicative proceedings or for judicial review thereof.
- (8) This section shall not apply to agency action taken pursuant to a provision of law that expressly authorizes the agency to issue a cease and desist order. The agency may proceed, alternatively, under that independent authority.” (Emphasis added.)

DOL may use emergency adjudicative proceedings *only* in a situation involving an “immediate danger to the public health, safety, or welfare requiring immediate agency action.” RCW 34.05.479(1).

DOL had been investigating the subject complaints for over a year, so it is difficult to imagine how the alleged practices suddenly constitute an “immediate danger” to the public. Prior to September 2, 2010, the last communication between DOL and Hellicksons regarding the investigations were letters from DOL dated May 10, 2010, indicating as follows:

“The Real Estate Investigations Section of the Business and Professions Division has completed its inquiry of the above complaint. . . . It appears from our analysis that grounds may exist to pursue administrative action. . . . This file will be forward to the Legal Section for further consideration. The case file will be reviewed by that unit to determine if the evidence obtained warrants pursuing administrative

action on behalf of the State of Washington.”

In other words, for nearly four months after DOL completed its investigation, Hellicksons heard nothing whatsoever from DOL, until they were notified that their licenses had been suspended without any notice or opportunity for a hearing!

Even if allegations in SOC were true, the practices alleged do not constitute “immediate danger.” In *Nguyen v. Dep’t of Health*, 144 Wn.2d 516, 544, 29 P.3d 689 (2001), a medical doctor was charged with engaging in sexual misconduct with 25 of his patients and a summary suspension of his license was issued. After a hearing, the summary suspension was stayed pending a hearing on the merits of the case.

This is not a case involving theft of client trust funds, sexual misconduct (*Nguyen v. Dep’t of Health*, 144 Wn.2d 516, 544, 29 P.3d 689 (2001) and *Morgan v. PeaceHealth, Inc.*, 101 Wn.App. 750, 14 P.3d 773 (2000)), improper dispensing of prescription drugs (*Clausing v. State*, 90 Wn.App. 863, 955 P.2d 394 (1998) and *Olmstead v. Department of Health, Medical Section*, 61 Wn.App. 888, 812 P.2d 527 (1991)), or child abuse (*Islam v. State, Dept. of Early Learning*, No. 63362-7-I (Div. I, August 23, 2010) (infant injured at day care center)). If any consumers were harmed by Hellicksons’ conduct, their damages were purely

economic. There is no issue of public health or safety. Any harm to consumers can be remedied through civil lawsuits for damages. Interesting, there are no civil lawsuits pending against Hellicksons. If the Ex Parte Order stands and Hellicksons are later vindicated, irreparable harm will have been done – Hellicksons will have lost their business, their livelihood and their reputation. If, on the other hand, the Ex Parte Order is stayed and Hellicksons are found to have violated the licensing law, then disciplinary action can be imposed at that time appropriate to the violations found.

In *Clausing v. State*, 90 Wn.App. 863, 955 P.2d 394 (1998), the Department of Health moved the State Board of Osteopathic Medicine and Surgery to summarily suspend Dr. Clausing's medical license for improperly distributing legend drugs in excessive amounts, strength, frequency, and/or duration that often exceeded the dosages recommended by the Physician's Deskbook Reference by 1 1/2 to 3 times. Rather than suspending Dr. Clausing's license, the Board issued an Order of Summary *Restriction* on Dr. Clausing's practice. *Id.* at 868. Only after a formal hearing was Dr. Clausing's license revoked.

Here, none of the allegations in the SOC, even if taken as true, constitute an "immediate danger to the public health, safety, or welfare

requiring immediate agency action” justifying a summary suspension of Hellicksons’ licenses and putting them out of business. The following discussion of the specific charges against Hellicksons is limited to whether the allegations support a summary suspension.

a. Misrepresenting they would purchase a home, if not sold

DOL has failed to identify any homeowners, whose homes were eligible to be purchased by Hellicksons, where Hellicksons refused to purchase the homes. For example, the Streights decided to take their home off the market and negotiate a loan modification with their lender! Therefore, this practice cannot create an “immediate danger to the public health, safety, or welfare requiring immediate agency action.”

b. Encouraging homeowners to stop making payments

Hellicksons do not encourage homeowners to stop making payments, but do inform homeowners that most lenders will not to discuss loan modifications or short sales with homeowners, unless they are two to three behind in their payments. For example, the Streights initially were told by Wells Fargo Bank that they were not eligible for a loan modification or short sale, because they were current in their payments. Homeowners who continue to make their payments on homes whose value

is substantially less than the loan balances are throwing money into a bottomless pit. If homeowners wish to accomplish a short sale to avoid “throwing good money after bad,” they must first stop making their payments. This is an example of DOL not being in touch with what is going on in the marketplace. This practice hardly constitutes an “immediate danger to the public health, safety, or welfare requiring immediate agency action.”

c. Automatically reducing prices below what lienholders would approve

No one knows in advance what lienholders will approve – that is part of the problem with short sales! Lienholders will not commit to a discounted payoff, until the market has been tested at a higher price, and, in some cases, only after several offers have been generated. Hellicksons’ approach of having the homeowners pre-authorize scheduled price reductions is designed to anticipate the lienholders’ requirement to test the market at a higher price. However, because most homeowners in short sales have limited time before foreclosure, the price reductions must be fairly quick and substantial in order to generate offers. The only “immediate danger to the public” has been created by DOL’s summary

suspension of Hellicksons' licenses, leaving hundreds of homeowners without the expertise or time to avoid foreclosure.

d. Listing homes at prices not authorized by homeowners

DOL has not produced a single example of Hellicksons listing homes at prices not authorized by homeowners. Rather, the investigative files include vague allegations of a few homeowners claiming to have signed blank agreements, but without any evidence of having done so. These unsubstantiated allegations do not constitute an "immediate danger to the public health, safety, or welfare requiring immediate agency action."

e. Misrepresenting contents of listing agreements

A party to a contract is deemed to have read and understood what they signed. This fundamental rule of contracts is designed to avoid the precise "he said, she said" disputes raised here. Such unsubstantiated allegations do not constitute an "immediate danger to the public health, safety, or welfare requiring immediate agency action."

f. Failing to provide copies of agreements to homeowners

Hellicksons deny this allegation, as well. As discussed above, distressed homeowners typically "tune-out" of the process. It is not surprising that they do not retain or cannot find their copies of the

agreements they signed. There is no “immediate danger to the public health, safety, or welfare requiring immediate agency action.”

g. Failing to communicate with homeowners, potential buyers and lenders

As discussed above, communication with homeowners and lienholders is one of the biggest challenges in short sales. Lienholders are back-logged with files and sometimes take months to respond to an offer! Homeowners mentally “check-out” and do not return phone calls or messages. It can be a very frustrating process for all parties concerned. And, Hellicksons do not get paid unless and until the short sale is approved and closed. What incentive would Hellicksons have to thwart the process? Failure or delay in communicating is hardly an “immediate danger to the public health, safety, or welfare requiring immediate agency action.”

h. Requiring buyers to pre-qualify through preferred lenders

There is absolutely nothing wrong with Hellicksons advising their clients to require buyers to *pre-qualify* through one of Hellicksons’ preferred lenders. Neither Hellicksons nor the homeowners require buyers to *actually obtain* their financing from a preferred lender. However,

Hellicksons want to protect their clients against buyers who are not pre-qualified at all or who are pre-qualified by an incompetent or disreputable mortgage broker, only to have the buyers be unable to obtain financing after the lienholders have consented to the short sale! This is a perfectly legitimate requirement and clearly does not constitute an “immediate danger to the public health, safety, or welfare requiring immediate agency action.”

i. Telling owners to vacate their homes before required

Hellicksons adamantly deny this allegation. However, even if it were true, there is no “immediate danger to the public health, safety, or welfare requiring immediate agency action.” For example, David Randall, who claims that an unidentified person from Hellickson’s office told him to move-out following a foreclosure, worked with Tara Hellickson on a Fannie Mae relocation assistance package and voluntarily moved-out of the unit. Where is the emergency?

j. Advertising false information

The SOC was the first time DOL ever raised this issue with Hellicksons. DOL never asked Hellicksons to substantiate their claim of being “#1,” never asked Hellicksons whether they conduct real estate brokerage activities in Oregon or Hawaii, never determined whether a real

estate license is required in Oregon or Hawaii to negotiate short sales, and never confirmed whether Hellicksons' "team of experts," which include licensed mortgage brokers, can provide the services advertised. If DOL has evidence to prove that these claims are false, then DOL simply should have ordered Hellicksons to stop making the claims, rather than suspending their licenses without a hearing. There is no "immediate danger to the public health, safety, or welfare requiring immediate agency action."

10. DOL was required to take the least restrictive action to protect the public.

When judging conduct, one must keep in mind the purposes for which the conduct is being judged and the remedies appropriate for wrongful conduct. Criminal law punishes wrongdoer and protects society from dangerous persons. Contract law seeks to fulfill expectations of non-breaching parties arising out of voluntarily assumed duties. Tort law compensates victims for breaches of duties imposed by operation of law. MLS rules protect itself and its members from violations of operational and procedural rules.

"[T]he purpose of the [real estate licensing law] is to protect the general public from negligent, unscrupulous, or dishonest real estate

operators. *Nuttall v. Dowell*, 31 Wn. App. 98, 108, 639 P.2d 832 (1982).” *Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 401-02, 54 P.3d 1186 (2002). Notwithstanding the underlying goal of protecting the public, the emphasis of any regulatory scheme should be compliance, rather than punishment. “To the maximum extent feasible, within the limits of an agency's current budget and consistent with statutory requirements, an agency with regulatory enforcement authority shall promote voluntary compliance with state and federal law enforced by the agency and the agency’s rules through the provision of technical assistance, including technical assistance visits.” Executive Order 94-07 (June 6, 1994). Contrary to Governor Lowry’s Executive Order, DOL never even confronted Respondents with its objections to Respondents’ 30-day sale program or “#1 Agent” advertisements before suspending their licenses. DOL’s attitude was “shoot now, ask questions later.”

Under RCW 34.05.479(2), DOL may take “*only such action as is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies use of emergency adjudication.*” (Emphasis added.) RCW 18.235.030(7) authorizes DOL to “[t]ake emergency action ordering summary suspension of a license, *or restriction or limitation of the licensee's practice or business* pending proceedings by the disciplinary

authority.” DOL claims that summary suspension is the “least restrictive agency action.” However, even if immediate danger existed, DOL could have:

1. Issued an order as to Michael Hellickson only, instead of Tara and the entire firm, and/or
2. Limited the order to prohibiting the specific practices alleged in the SOC.

If DOL believed that Hellicksons committed practices that violate the real estate licensing law, then it simply should have issued a temporary order prohibiting Hellicksons from engaging in those specific practices pending a hearing, rather than putting them completely out of business!

The State must take the “least restrictive agency action” necessary to protect the public. Former Governor Lowry directed that “[a]gencies should attempt to use less intrusive methods of achieving desired outcomes.” Executive Order 94-07 (June 6, 1994). According to Karen Jarvis and Jerry McDonald, the State has never revoked the license of a real estate broker for anything less than mishandling of trust funds or criminal activity.

RCW 18.235.110 specifies a broad range of sanctions available to the State, as follows:

“(1) Upon finding unprofessional conduct, the disciplinary authority may issue an order providing for one or any combination of the following:

- (a) Revocation of the license for an interval of time;
- (b) Suspension of the license for a fixed or indefinite term;
- (c) Restriction or limitation of the practice;
- (d) Satisfactory completion of a specific program of remedial education or treatment;
- (e) Monitoring of the practice in a manner directed by the disciplinary authority;
- (f) Censure or reprimand;
- (g) Compliance with conditions of probation for a designated period of time;
- (h) Payment of a fine for each violation found by the disciplinary authority, not to exceed five thousand dollars per violation. The disciplinary authority must consider aggravating or mitigating circumstances in assessing any fine. Funds received must be deposited in the related program account;
- (i) Denial of an initial or renewal license application for an interval of time; or
- (j) Other corrective action.”

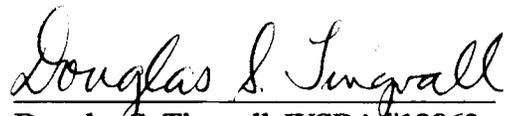
RCW 18.235.110(1).

Hellicksons have done nothing wrong and deny the allegations in the SOC. Hellicksons were helping homeowners in distress during

difficult times. It is the actions of DOL, and not Hellicksons, that have created the emergency. The Ex Parte Order resulted in sales not closing and homeowners losing their homes through foreclosures. The Ex Parte Order also damaged contractors working on homes being marketed and employees of Hellicksons.

Public confidence in the disciplinary process requires a “fair, impartial, and neutral hearing.” Hellicksons have been deprived of such a hearing.

Dated May 5, 2011.



Douglas S. Tingvall, WSBA #12863

Attorney for Respondents

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DECLARATION OF SERVICE

I certify that I emailed a copy of Brief of Respondents to Appellant's attorney, Toni M. Hood, at ToniH@ATG.WA.GOV, pursuant to agreement of counsel, on May 5, 2011.

Douglas S. Ingvall

RECEIVED
MAY 10 2011
CLERK OF SUPERIOR COURT
COUNTY OF KING
APPELLANT'S OFFICE
1000 4TH AVENUE
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SEATTLE, WA 98101


Appendix A

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SEP 29 2010

CUSHMAN LAW OFFICES

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 FIRM OF: MICHAEL HELICKSON, LICENSE #17267 TARA HELICKSON, LICENSE # 2063 HELICKSON.COM, INC LICENSE # 7905

Plaintiff/Petitioner

vs.

Defendant/Respondent

Cause #:

Declaration of Service of:

RESPONDENTS' PETITION FOR REVIEW OF ORDER DENYING STAY

Hearing Date:

Declaration:

The undersigned hereby declares: That s(he) is now and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On the date and time of Sep 27 2010 3:25PM at the address of 2430 BRISTOL CT SW OLYMPIA, within the County of THURSTON, State of WASHINGTON, the declarant duly served the above described documents upon OFFICE OF ADMINISTRATIVE HEARINGS by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with CARLA HARMENING AGENT.

No information was provided that indicates that the subjects served are members of the U.S. military.

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: September 28, 2010 at Olympia, WA

by [Signature] J. Lincoln

Service Fee Total: \$ 57.64



ABC Legal Services, Inc. 206 521-9000 Tracking #: 2523996

ORIGINAL PROOF OF SERVICE

2239.001 Cushman Law Offices 924 Capitol Way S Suite #201 Olympia, WA 98501 360 534-9183

EXHIBIT B