

MINUTES
Texas Real Estate Commission
April 19, 2004
Texas Real Estate Commission
Room 235, 1101 Camino La Costa
Austin, Texas

Chairman John Walton called the regularly scheduled meeting of the Texas Real Estate Commission to order at 9:00 a.m., Monday, April 19, 2004. In addition to Chairman Walton, members present were James Austin, Larry Jokl, Louise Hull, Paul Jordan, Mary Frances Burleson, Elizabeth Leal and William Flores. Mr. Cantu was absent.

Staff present were: Wayne Thorburn, Administrator; Sabrina Hassumani, Assistant Administrator; Loretta DeHay, General Counsel; Brad Bowman, Staff Attorney; Alan Waters, Director of Staff Services; Tom Watson, Director of Information Services.

Chairman Walton led the attendees in the pledge of allegiance.

Chairman Walton called for agenda item two, recognition of the new Chairman and introduction of new Commissioners. Mr. Thorburn announced the appointment of John Walton as chairman and introduced the new members: Elizabeth Leal of El Paso, a broker member with Century 21 deWetter Hovious; Mary Frances Burleson of Aubrey, a broker member and President of Ebby Halliday Realtors®; and William H. Flores of Sugar Land, a public member and Senior Vice President and CFO of Gryphon Exploration Company. Mr. Thorburn introduced a new staff member, the Director of Information Services, Tom Watson.

The Chairman moved to agenda item three, election of vice-chairperson and secretary. Mr. Jokl, seconded by Mr. Austin, nominated Louise Hull as vice-chairperson. The nomination was adopted by unanimous vote. Mr. Jokl, moved to elect James Austin, as secretary. The nomination was adopted by unanimous vote.

Mr. Walton moved to agenda item four, minutes of February 9, 2004 Commission meeting. Mr. Austin, seconded by Ms. Hull, moved to approve the minutes as mailed. The motion was adopted by unanimous vote.

The Chairman moved to agenda item five, staff reports; committee reports. Assistant Administrator Sabrina Hassumani reported that there has been a steady increase in the number of licensees in the past 33 months.

Mr. Bowman presented the reports for the Enforcement Division and introduced a new employee, Latrice Miller. There was discussion concerning the changes in the E1 report.

Mr. Watson presented the reports for Information Services.

Mr. Thorburn presented the reports on Timeshare and Residential Services. He also explained that staff would be doing an audit the next week. A member of the audience, Mary Jane Beisert, asked if there was software available which allowed someone to check the status

of a claim with a residential service company. Mr. Thorburn stated that the agency did not have such software.

Mr. Waters reported on the Real Estate Recovery Trust Account and the State Auditor's audit report. There was discussion concerning the S1 report.

Chairman Walton moved to agenda item six, general comments from visitors. There were no comments presented.

Mr. Walton moved to agenda item seven, executive session to discuss pending litigation pursuant to Texas Government Code §551.071; and, if necessary, to receive legal advice from general counsel on posted agenda items under Texas Government Code, §551.071. The executive session began at 9:20 a.m. The executive session ended and the open meeting resumed at 10:18 a.m.

The Chairman moved to agenda item eight, discussion and possible action to authorize payments from the recovery funds or other action on items considered in executive session. Ms. DeHay presented the following claim to be paid without contest:

RF 04-003, SLS Properties v. Ida Ramirez Baker, in the amount of \$50,000. Ms. Hull, seconded by Mr. Austin, moved to approve payment. The motion was adopted by unanimous vote.

Chairman Walton moved to agenda item nine, discussion and possible action to adopt amendments to: (a) 22 TAC §535.51 concerning requirements for licensure, (b) 22 TAC §535.65 concerning changes in ownership or operation of school; presentation of courses, advertising, and records, (c) 22 TAC §535.101 concerning fees, and (d) 22 TAC §§535.212, 535.218, and 535.223 concerning real estate inspectors. Ms. DeHay presented the item for discussion and possible action to adopt.

Ms. DeHay explained that the amendments to §535.51 changes the fee provisions in two real estate broker application forms and one salesperson application form. It changes fees to add an additional \$2 fee for salesperson original applications, and an additional \$5 for individual broker original applications and broker late renewal applications in conjunction with Government Code Chapter 2054, Subchapter I, Section 2054.252, which requires TREC to participate in an electronic system using the Internet for licensing applications and renewals. Changes were made to the original submission to add a revised Moral Character Determination form to the amendments. This form was updated to replace references to the old statutory cite with references to the Texas Occupations Code. Mr. Austin, seconded by Mr. Jordan, moved to adopt the amendments as presented. The motion was adopted by unanimous vote.

Ms. DeHay explained that the amendments to §535.65 adopt changes which permit accredited real estate schools to request MCE credit for instructors of real estate core courses by filing a completed MCE Form 11-3, Instructor Credit Request and adopts an amendment to §535.65(j) to permit a school to provide a roster of students who take alternate delivery method or correspondence courses 10 days after the end of the month in which the course was taken. Mr. Austin, seconded by Mr. Jordan, moved to adopt the amendments as presented. The motion was adopted by unanimous vote.

Ms. DeHay explained that the amendments to §535.101 adopts changes to subsections 535.101(b)(1)-(3) in conjunction with Government Code Chapter 2054, Subchapter I, Section 2054.252, which requires TREC to participate in an electronic system using the Internet for licensing applications and renewals. Mr. Flores, seconded by Mr. Austin, moved to adopt the amendments as presented. The motion was adopted by unanimous vote.

Ms. DeHay explained that the amendments to §535.212 increase from 60 to 320 the number of additional classroom hours that the commission may require of professional inspector applicants for substitution of additional education in lieu of the number of inspections and previous licensure requirements. The amendments apply to professional inspector license applications submitted on or after January 1, 2005.

There was discussion concerning comments received on these amendments. Fred Buck, Chairman-Texas Real Estate Inspector Committee, spoke concerning the education requirements and whether educators would have the courses available by the deadline for the alternative education courses. There was discussion concerning on-site training for inspectors. Comments were offered by Sabrina Hassumani, TREC Assistant Administrator and Rita Santamaria, Champion School of Real Estate.

After discussion, Mr. Jokl, seconded by Ms. Hull, proposed an amendment to §535.212(a)(6) to add subparagraph (D) which would state: "A classroom course may include up to 10% of classroom time on site for appropriate field work relevant to the course topic. Such field work may not be included as part of correspondence or alternative delivery courses." The amendment was approved by unanimous vote.

The amendments to §535.218 permit currently licensed inspectors to use a course approved as an alternate education course to satisfy continuing education requirements as long as the licensee attended the entire course.

The amendments to §535.223 exempt an inspector licensee who conducts a code compliance inspection of a new home for a builder from using the standard inspection report form if the builder required use of the builder's form and the inspector includes a specific

disclosure in the alternate form. Mr. Jokl, seconded by Ms. Hull, moved to adopt the amendments to §535.212, as amended, and §§535.218 and 535.223 as presented.

The Chairman called for a vote on the motion as amended. The motion was adopted by unanimous vote.

Chairman Walton moved to agenda item ten, discussion and possible action to propose amendments to or take other action on (a) 22 TAC §535.2 concerning broker responsibility and (b) 22 TAC §535.217 and 535.223 concerning real estate inspectors.

Ms. Dehay presented a recommendation on a rule amendment that TREC had received from the Texas Association of Realtors (TAR) regarding 22 TAC §535.2 concerning broker responsibility. The rule amendment TAR recommended provides as follows:

(d) In negotiating for his or her principal a broker, at a minimum must:

(1) accept and present to the principal offers and counter-offers to buy, sell, or lease the principal's property or property the principal seeks to buy or lease;

(2) assist the principal in developing, communicating, and presenting offers, counter-offers, and notices that relate to the offers and counter-offers; and

(3) answer the principal's questions relating to offers, counter-offers, and notices.

(e) Under §1101.652(b)(22) of the Act a broker may not negotiate or attempt to negotiate the sale or lease of property with a principal with knowledge that the principal is a party to an outstanding written contract that grants exclusive agency to another broker. Under §1101.652(b)(27) of the Act, a broker may not aid, abet, or conspire with another to circumvent the Act. A broker who represents a principal under a listing contract that grants an exclusive agency to the broker may not instruct or authorize another broker who represents another party in the transaction to negotiate directly with the principal.

(f) When a broker delivers an offer or counter-offer to another broker, the broker is not negotiating or attempting to negotiate with a principal he or she does not represent by delivering a copy of the offer or counter-offer to the principal he or she does not represent so long as the broker representing the principal consents to the delivery and the broker who makes the delivery does not discuss or attempt to discuss the terms or conditions of the offer or counter-offer with the principal he or she does not represent.

Mr. Jordan spoke concerning the meetings that he facilitated for TREC and restated the current law concerning a broker's responsibility.

Ron Walker, general counsel for TAR, spoke concerning the recommended rule text and the reasons TAR felt a rule amendment was needed.

Don Walden, attorney for Aaron Farmer owner of Texas Discount Realty, spoke about his client's concerns about the rule text being recommended by TAR. He also commented on other suggestions that had been made during the last year while this issue had been under consideration.

At Commissioner Joki's request Mr. Farmer joined Mr. Walden to answer questions. Commissioner Hull and Commissioner Flores asked questions of Mr. Walden and Mr. Farmer. Comments were offered by Shad Bogeny, Gary Bishop, Debbie Hinkle, Sandy Haverlah and Mary Jane Beisert.

After discussion, Mr. Flores, seconded by Mr. Jordan, moved to have the general counsel draft proposed revisions to the rules that would require a written minimum disclosure statement for use by fee-for-service brokers or minimum service brokers representing either party in a real estate transaction. Staff will present the draft at the June 7, 2004 meeting. After remarks from former Commissioner Henry Santamaria and Mr. Walker of TAR, the motion was adopted by unanimous vote.

Mr. Flores, seconded by Mr. Jordan, moved to request an Attorney General's opinion to determine its authority to adopt amendments to 22 TAC §535.2 as follows:

(a) A broker is responsible for the authorized acts of the broker's salespersons, but the broker is not required to supervise the salespersons directly.

(b) A real estate broker acting as an agent owes the very highest fiduciary obligation to the agent's principal and is obliged to convey to the principal all information of which the agent has knowledge and which may affect the principal's decision. A broker is obligated under a listing contract to negotiate the best possible transaction for the principal, the person the broker has agreed to represent.

(c) A broker is responsible for the proper handling of escrow monies placed with the broker, although the broker may authorize other persons to sign checks for the broker.

(d) In negotiating for his or her principal a broker may not refuse to provide the following services when such services are appropriate in the transaction:

(1) accept and present to the principal offers and counter-offers to buy, sell, or lease the principal's property or property the principal seeks to buy or lease;

(2) assist the principal in developing, communicating, and presenting offers, counter-offers, and notices that relate to the offers and counter-offers; and

(3) answer the principal's questions relating to offers, counter-offers, and notices.

(e) Under §1101.652(b)(22) of the Act a broker may not negotiate or attempt to negotiate the sale or lease of property with a principal with knowledge that the principal is a party to an outstanding written contract that grants exclusive agency to another broker. Under §1101.652(b)(27) of the Act, a broker may not aid, abet, or conspire with another to circumvent the Act. A broker who represents a principal under a listing contract that grants an exclusive agency to the broker may not instruct or authorize another broker who represents another party in the transaction to negotiate directly with the principal.

(f) When a broker delivers an offer or counter-offer to another broker, the broker is not negotiating or attempting to negotiate with a principal he or she does not represent by delivering a copy of the offer or counter-offer to the principal he or she does not represent so long as the broker representing the principal consents to the delivery and the broker who makes the delivery does not discuss or attempt to discuss the terms or conditions of the offer or counter-offer with the principal he or she does not represent.

The motion was adopted by unanimous vote.

Mr. Flores, seconded by Mr. Jordan, moved to ask the Attorney General if he found that TREC does not have the statutory authority to revise 22 TAC §535.2 to add (d)-(f) as stated in the previous motion, would TREC, in the alternative, have the statutory authority to revise 22 TAC §535.2 by adding subsection (d) as follows (subsection (f) only from above):

(d) When a broker delivers an offer or counter-offer to another broker, the broker is not negotiating or attempting to negotiate with a principal he or she does not represent by delivering a copy of the offer or counter-offer to the principal he or she does not represent so long as the broker representing the principal consents to the delivery and the broker who makes the delivery does not discuss or attempt to discuss the terms or conditions of the offer or counter-offer with the principal he or she does not represent.

The motion was adopted by unanimous vote.

Mr. Flores, seconded by Mr. Jordan, moved to direct staff to include in the strategic plan a directive to request that the legislature mitigate the ambiguity in Occupations Code section 1101.653(b)(22) that prohibits a licensee from negotiating or attempting to negotiate with a party to a real estate transaction with knowledge that the person is a party to an outstanding

written contract that grants exclusive agency to another broker in connection with the transaction. The motion was adopted by unanimous vote.

Mr. Walton announced a break from 12:22 to 12:39.

Chairman Walton moved to agenda item 10(b). Ms. DeHay presented the agenda item for discussion and possible action to propose amendments to 22 TAC §535.217 and 535.223 concerning real estate inspectors. §535.217 requires an inspector to disclose to all parties to the transaction and obtain the written consent of the client that the inspector intends to receive a fee or other valuable consideration from a person other than the inspector's client. It also requires the licensee to disclose to and obtain the written consent of the client that the inspector is paying a fee to a service provider or a participant in the transaction. The proposed rule would adopt by reference a Fee or Other Valuable Consideration Disclosure Form (REI 7B-0) for required use. The revision to §535.223 would allow an inspector to allocate additional space on page 2 of the standard property inspection report form (REI 7A-0) for comments that do not fit on page one. Comments were offered by Mike Cope, Brinks Home Security and Fred Buck, Chairman-Texas Real Estate Inspector Committee, concerning §535.217. Mr. Jokl, seconded by Ms. Leal, moved to propose the amendments to §§535.217 and 535.223 as presented. The motion was adopted by unanimous vote.

The Chairman moved to agenda item eleven, discussion and possible action to: (a) schedule rule reviews for 2004 and (b) propose review of Chapter 535, concerning Provisions of the Real Estate License Act (§§535.92-535.403). After discussion, Mr. Austin, seconded by Ms. Burleson, moved to approve the rule reviews as presented. The motion was adopted by unanimous vote.

Mr. Walton moved to agenda item twelve, discussion and possible action to approve the Memorandum of Understanding between the Texas Real Estate Commission and the Texas Real Estate Center regarding required mandatory continuing education courses. Mr. Thorburn presented the item for discussion and possible action. Malcolm Richards, Real Estate Center, Texas A&M University, was available for questions. Ms. Hull, seconded by Ms. Leal, moved to approve the Memorandum of Understanding as presented. The motion was adopted by unanimous vote.

Chairman Walton moved to agenda item thirteen, discussion of, and possible action to revise, draft rules concerning mandatory continuing education requirements. Ms. DeHay presented the draft rules for discussion. The draft rules will be posted on the web site for comment and no further action was needed at this time. The Chairman announced a break from 1:20 p.m.-1:40 p.m.

The Chairman moved to agenda item fourteen, discussion and possible action to approve Strategic Plan for 2005-2009. Mr. Thorburn presented the short-term suggestions for discussion

and possible action. Mr. Flores, seconded by Ms. Leal, moved to approve the short-term suggestions from the Strategic Plan for 2005-2009 contained in the meeting material. The motion was adopted by unanimous vote.

Mr. Thorburn presented the long-term suggestions for discussion and possible action by category. After discussion, Mr. Jokl, seconded by Mr. Austin, moved to approve the inclusion of sections one and two, Human Resources and TREC Facilities. The motion was adopted by unanimous vote. Ms. Leal, seconded by Mr. Austin, moved to approve the inclusion of section three, Education. The motion was adopted by unanimous vote.

Mr. Thorburn moved to section four, Licensing. Mr. Austin, seconded by Ms. Leal, moved to approve the inclusion of section four as follows:

Explore the viability of establishing a separate category of referral salespersons and brokers who would meet all education and fee requirements applicable to an active licensee but could not engage in brokerage activities other than to receive a referral fee from another licensee.

Consider two-year renewal for inspectors similar to the renewal structure currently in place for brokers and salespersons. Inspector licensees must renew on an annual basis under current rules. To provide for administrative consistency, a two-year renewal system would be beneficial to the agency. Authority to provide for a 2-year renewal was granted by the 78th Legislature, however the procedure has not yet been implemented.

Create business license for professional inspector corporations and limited liability companies. This would give the Commission authority over inspection companies and make the inspector statutes consistent with those for real estate brokers.

Revise employment history column headings on applications and late renewal applications to obtain more pertinent information. Requiring the address and phone number of former employers would make it much easier for TREC staff to contact former employers to verify employment.

The motion was adopted by unanimous vote.

Mr. Thorburn moved to section five, Consumer Protection. Ms. Leal, seconded by Mr. Flores, moved to approve the inclusion of section five as follows.

Research agency relationship in reference to Virtual Office Websites (VOWs). Concerns were raised that consumers do not understand they have entered into an exclusive agency relationship by simply "clicking" through several pages to get to listings.

Develop and distribute consumer information on agency programs to individuals and organizations. To engage in such consumer protection activities, it will be necessary to increase TREC's appropriation authority.

Explore the composition of 9-member Commission. During external focus group meetings it was noted that TREC's 9-member Commission is comprised of a majority of individuals who represent the real estate industry. It was suggested that in order to deliver fully on its "consumer protection" mission, the Commission should have significantly more representation from public members.

Revise the Information About Brokerage form to emphasize the regulatory authority at the bottom of the form.

Explore current agency law.

Update the Texas Timeshare Act. In 2002, the agency worked closely with representatives of the timeshare industry to develop a comprehensive modernization of the Texas Timeshare Act. Despite widespread support, the proposed bill did not obtain a final vote in the 2003 legislative session. This update of the Act should be introduced again in the next legislative session as a needed revision to take into account changes in the timeshare industry and ensure adequate consumer protection.

Obtain approval to reimburse advisory committee members for travel. Two advisory committees created by the Commission's enabling legislation consist of members who volunteer their time to assist the Commission in critical areas. The Texas Real Estate Broker-Lawyer Committee develops standard contract forms and addenda which are promulgated by the Commission for mandatory use by real estate licensees. The elimination in funding of travel expenses for the six broker members has significantly reduced the number of meetings held by the committee, impacting the committee's ability to revise forms in a timely fashion.

The Texas Real Estate Inspector Committee, nine professional inspectors appointed by the Commission, is charged by statute to recommend to the Commission rules governing real estate inspectors. It is the Commission's primary resource for inspector expertise. The committee must review and revise the inspection standards of practice on an on-going basis. The elimination of funding for the committee's travel has sharply reduced the number of committee meetings.

The motion was adopted by unanimous vote.

Mr. Thorburn presented section six, Enforcement. Mr. Flores, seconded by Mr. Jokl, moved to approve the inclusion of section six as submitted without deletions. The motion was adopted by unanimous vote.

Mr. Thorburn presented section seven, Technology. Mr. Flores, seconded by Ms. Leal, moved to approve the inclusion of section seven as submitted without deletions. The motion was adopted by unanimous vote.

Mr. Thorburn presented section eight, Appraisers. Ms. Leal, seconded by Ms. Hull, moved to approve the inclusion of section eight as submitted without deletions. The motion was adopted by unanimous vote.

Mr. Walton moved to agenda item fifteen, consideration of complaint information. Mr. Bowman requested authorization to initiate investigations on Stephen Dale Lawson for failing to complete his Mandatory Continuing Education (MCE) hours and pay the \$200 fee needed to renew a license within the time required by 22 TAC §535.92(f). Ms. Leal, seconded by Ms. Hull, moved to authorize the investigation as requested. The motion was granted by unanimous vote.

Chairman Walton turned the gavel over to Commissioner Jordan for agenda item 16, Motion for Modification or Rehearing in the Matter of Joseph Tome Slim, Hearing No. 03-258-032966. Mr. Slim, who was unable to attend due to health problems, was represented by his attorney,

Jules P. Slim. The Enforcement Division was represented by Sharon Harris, staff attorney. Mr. Slim presented his motion for modification or rehearing. Ms. Harris presented the Enforcement Division's response. Mr. Slim responded to the Enforcement Division's statements. Mr. Slim stated that his motion included a request for probation although the title of the request did not reference a request for probation. A vote was taken on the motion for rehearing. The motion was denied by unanimous vote. A vote was taken on the motion for modification. The motion was denied by unanimous vote. After discussion, a vote was taken on whether Mr. Slim's motions also included a motion for probation. Ms. Burleson, Mr. Walton, Mr Austin, Mr. Jokl and Mr. Flores voted in favor of acknowledging that the motion included a request for probation; Ms. Hull and Ms. Leal voted against it. After discussion, Mr. Walton, seconded by Ms. Burleson, moved to amend the motion for probation for a term of 2 years and during that time an additional 6 hours of mandatory continuing education would be required. The motion to amend was approved by majority vote. Finally, a vote was taken on the amended motion for probation. Ms. Burleson, Mr. Walton, Mr. Austin and Ms. Hull voted for the motion. Ms. Leal and Mr. Flores voted against the motion.

Chairman Walton moved to agenda item eighteen, scheduling future meetings and adjournment. The next meetings were scheduled for June 7, August 9, and October 18, 2004 in Austin. The Chairman adjourned the meeting at 3:15 p.m.

APPROVED this the 7th day of June, A.D. 2004.

John Walton
Chairman

ATTEST: _____
Wayne Thorburn
Administrator