

FILED

APR 01 2015

BEFORE THE REAL ESTATE COMMISSION

STATE OF NEVADA

REAL ESTATE COMMISSION
BY *[Signature]*

JOSEPH R. DECKER, Administrator,
REAL ESTATE DIVISION, DEPARTMENT
OF BUSINESS & INDUSTRY,
STATE OF NEVADA,

Case No. REN 14-04-11-040

Petitioner,

vs.

SUSAN KAY LOWE,

Respondent.

JOSEPH R. DECKER, Administrator,
REAL ESTATE DIVISION, DEPARTMENT
OF BUSINESS & INDUSTRY,
STATE OF NEVADA,

Case No. REN 14-06-06-061

Petitioner,

vs.

MICHELLE PLEVEL,

Respondent.

Attorney General's Office
555 E. Washington, Suite 3900
Las Vegas, NV 89101

RESPONSE TO JOINT MOTION TO DISMISS

The REAL ESTATE DIVISION OF THE DEPARTMENT OF BUSINESS AND INDUSTRY OF THE STATE OF NEVADA (the "Division") hereby responds to the Joint Motion to Dismiss (the "Motion") filed by Respondents SUSAN KAY LOWE and MICHELLE PLEVEL (the "Respondents").

POINTS AND AUTHORITIES

I. A MOTION TO DISMISS CANNOT RESOLVE FACTUAL ISSUES

Throughout Respondents' Motion are references to alleged facts in support of their defenses against the Division's Complaints. Motion, pp. 4, 9-16. For example, Respondents allege the expenditure of "substantial sums rehabilitating the property, as well as [the] incurring [of] costs associated" therewith, and allege that is what "probably happened here" to cause the increase in re-sale prices. Motion, pp. 15-16. Those (and other) factual allegations

1 have neither been presented nor proven. "The dispositive resolution of questions of fact is not
2 part of a motion to dismiss on the pleadings." Breliant v. Preferred Equities Corp., 112 Nev.
3 663, 668, 918 P.2d 314, 317 (1996).

4 Moreover, on a motion to dismiss for a failure to state a claim for relief, the allegations
5 in the Division's Complaints must be accepted as true by the Nevada Real Estate Commission
6 (the "Commission"). See Brown v. Kellar, 97 Nev. 582, 583, 636 P.2d 874 (1981). The
7 Complaints set forth numerous allegations of Respondents' preferentialism of *specified* buyers
8 over *specified* sellers and the sellers' lenders with respect to *specified* properties, and
9 *specified* actions allegedly undertaken to monetize that preferentialism to benefit those
10 buyers, and the Respondents themselves, at the expense of *other parties* to the real estate
11 transactions. The Division's Complaints also include reference to the particular sections of the
12 statutes and regulations involved - NRS 645.252(2), NRS 645.633(1)(h), NAC 645.600(1), and
13 NAC 645.605(6).

14 In Crucil v. Carson City, 95 Nev. 583, 585, 600 P.2d 216 (1979), the Nevada Supreme
15 Court held that "the pleading of conclusions, either of law or fact, is sufficient so long as the
16 pleading gives fair notice of the nature and basis of the claim." Respondents' Motion does not
17 establish a failure by the Division to state facts upon which a violation of NRS and NAC
18 chapter 645 may be found.

19 **II. THE APPLICABLE LAW IS NOT VOID FOR VAGUENESS**

20 Respondents also claim that certain statutes and Commission regulations are
21 unconstitutionally vague, leaving them "completely in the dark." Motion, pp. 10-11, 16-20.
22 Specifically, they contend they cannot understand the meaning of "reasonable skill and care;"
23 "absolute fidelity," and "dealing fairly" with respect to possible violations. Motion, p. 18.
24 Although these terms may be general in nature, they are not void for vagueness.

25 The due process clause does *not* require impossible standards of specificity. Sheriff of
26 Washoe County v. Martin, 99 Nev. 336, 339, 662 P.2d 634, 637 (1983). Rather, the Nevada
27 Supreme Court held that the criterion under which to examine an assertion of vagueness is:

28 ...

1 whether the statute "either forbids or requires the doing of any act
2 in terms so vague that men of common intelligence must
3 necessarily guess at its meaning and differ as to its application...."
4 Equally important in a facial challenge for vagueness is whether the
5 statute impinges upon First Amendment freedoms. If not, a statute
6 may be stricken as unconstitutionally vague only if it is found to be
7 so "in all of its applications." Further, our standard of review is less
8 strict under a challenge for vagueness where the statute is directed
9 at economic regulations.

7 State v. Glusman, 98 Nev. 412, 420-21, 651 P.2d 639, 644-45 (1982) (citations omitted).
8 Here, Respondents do not claim any impingement upon First Amendment freedoms. Rather,
9 their Motion challenges statutes and regulations directed at economic regulations.

10 In fact, the terms at issue here are part of NRS and NAC chapter 645. They are within
11 the statutory scheme explicitly regulating the professional conduct of real estate licenses. In
12 In re Discipline of Lerner, 124 Nev. 1232, 1245, 197 P.3d 1067, 1077 (2008), the Nevada
13 Supreme Court disciplined a state licensee and denied a facial vagueness challenge to a rule
14 of *professional conduct* when the allegedly vague term's meaning "is readily perceptible in
15 light of authority construing the term." Likewise, the terms at issue here are readily
16 perceptible in light of authority construing them. Under the Court's "less strict" standard of
17 review, the disputed terms in NRS and NAC chapter 645 are not unconstitutionally vague.

18 **III. THE COMPLAINTS ARE NOT BARRED BY ISSUE PRECLUSION**

19 Respondents argue that the Complaints against them are barred by the doctrine of
20 collateral estoppel. Motion, pp. 7-9. The Division acknowledges that that argument has some
21 initial merit as the Division is the Petitioner in all these actions before the Commission.
22 However, the complaint against O'Brien involved the *same exact transactions and sellers and*
23 *buyers* as those in the complaints against Lococo and Lewis. Here, the sellers and
24 transactions set forth in these Complaints are *not* the same as those in the complaints against
25 O'Brien, Lococo and Lewis.

26 Respondents are asking this Commission to bind itself to its Lococo decision without
27 comparing and contrasting the different *factual* allegations between the complaints. In Bailey
28 v. State, 95 Nev. 378, 385, 594 P.2d 734, 738 (1979), the Nevada Supreme Court stated "that

1 the facts and circumstances of each case are to be considered on an individual basis, taking
2 into account the nature of the task and the difficulties encountered." See also Interstate Tel.
3 Coop., Inc. v. Public Utilities Comm'n, 518 N.W.2d 749, 751-52 (S.D. 1994) (res judicata did
4 *not* prevent subsequent lawsuit between *same* parties involved in prior lawsuit in light of fact
5 that subsequent suit involved "*different parcels of land*, at later point in time" because although
6 the court was "considering similar issues, they do not arise from the same set of facts")
7 (emphasis added). Res judicata and collateral estoppel are inapplicable in such
8 circumstances.¹

9 Respondents' preclusion plea fails even if it is more accurately construed as one
10 invoking the doctrine of *stare decisis*. In Motor Cargo v. Public Serv. Comm'n, 108 Nev. 335,
11 337, 830 P.2d 1328, 1330 (1992), the Court stated that even if an agency "failed to follow
12 some of its prior decisions, the [agency] has not thereby abused its discretion. In Nevada,
13 administrative agencies are not bound by *stare decisis*."

14 In State, Dep't of Taxation v. Chrysler Group LLC, 129 Nev. ___, 300 P.3d 713, 716 n.3
15 (Adv. Op. 29, May 2, 2013), the respondent argued "that it is entitled to a refund because an
16 administrative law judgment granted one upon similar facts in the past and, because the
17 statutes have not since been amended, there is no legal basis for a different decision." The
18 Nevada Supreme Court, relying on Motor Cargo, rejected that argument because Nevada
19 administrative agencies are not bound by *stare decisis*. *Id.* The Division is not barred from
20 pursuing its Complaints against Respondents, and the Commission is not barred from hearing
21 the Complaints on their merits.

22 Finally, Respondents' references to NRS 34.160, 34.320 and 233B.135(3) are
23 misplaced.² See Motion, p. 9. While NRS 233B.135 sets forth the standard of review for a
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25
26 ¹ Likewise, Respondents' final argument that a failure to grant their Motion would be arbitrary and capricious
27 (Motion, pp. 20-21) is inexact if the Commission finds *factual* differences of consequence among the five
28 complaints.

² It is difficult to understand Respondents' claim that they are entitled to "immediate writ proceedings in the
District Court" as the Commission's proceedings on the Motion and/or Complaints provide Respondents with "a
plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170.

1 petition for judicial review, it is not a jurisdictional constraint. This Commission has jurisdiction
2 to hear this Motion, and if the Motion is unsuccessful, to hear the Complaints.

3 **IV. CONCLUSION**

4 Respondents' Motion fairly identifies disagreements with the Division over whether
5 Respondents' alleged conduct constitutes statutory and/or regulatory violations. A hearing
6 before this Commission is the appropriate avenue for the resolution of those disagreements.

7 DATED this 30th day of March, 2015.

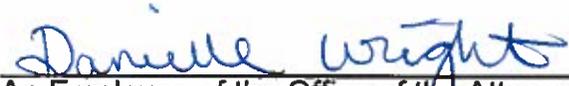
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1 CERTIFICATE OF SERVICE

2 I do hereby certify that I am an employee of the Office of the Attorney General and that
3 on the 30th day of March, 2015, I served a true and accurate copy of the RESPONSE TO
4 JOINT MOTION TO DISMISS by mailing via United States mail, first class, postage prepaid,
5 to:

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12 An Employee of the Office of the Attorney General

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