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REAL ESTATE COMMISSION
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BEFORE THE REAL ESTATE COMMISSION

STATE OF NEVADA

JOSEPH R. DECKER, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA, Petitioner, vs. SUSAN KAY LOWE, Respondent.	**Case No. REN 14-04-11-040**
JOSEPH R. DECKER, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA, Petitioner, vs. MICHELLE PLEVEL, Respondent.	**Case No. REN 14-06-06-061**

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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

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

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

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

II. THE APPLICABLE LAW IS NOT VOID FOR VAGUENESS

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

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

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

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

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

III. THE COMPLAINTS ARE NOT BARRED BY ISSUE PRECLUSION

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

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

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

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

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

Finally, Respondents' references to NRS 34.160, 34.320 and 233B.135(3) are misplaced.[2] See Motion, p. 9. While NRS 233B.135 sets forth the standard of review for a

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[1] Likewise, Respondents' final argument that a failure to grant their Motion would be arbitrary and capricious (Motion, pp. 20-21) is inexact if the Commission finds *factual* differences of consequence among the five 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.

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

IV. CONCLUSION

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

DATED this 30th day of March, 2015.

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CERTIFICATE OF SERVICE

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

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