

**Before the  
New Hampshire Real Estate Commission  
Concord, New Hampshire 03301**

**In The Matter Of:**

**Docket No.: 2014-036**

**New Hampshire Real Estate Commission v. Bryan D. Wheeler & Thomas E. Van Horn**

**Re: Complaint of Thomas Dyer & Barbara Grealish Dyer**

License Nos.: 059564 & 054949

(Adjudicatory/Disciplinary Proceeding)

**FINAL DECISION AND ORDER**

Before the New Hampshire Real Estate Commission ("Commission") is an adjudicatory/disciplinary proceeding In the Matter of Bryan D. Wheeler ("Respondent Wheeler" or "Mr. Wheeler") and Thomas E. Van Horn ("Respondent Van Horn" or "Mr. Van Horn") in Docket Number 2014-036.

**Background Information:**

Thomas Dyer and Barbara Grealish Dyer purchased a single family home located at 36 Prescott Street in Nashua, NH from sellers Brian and Janine Page on August 16, 2013. Respondent Wheeler was the listing agent for the sellers and Respondent Van Horn was the buyer agent for the buyers. On May 24, 2014, Thomas Dyer and Barbara Grealish Dyer filed a complaint with the Commission against Respondent Wheeler and Respondent Van Horn, alleging that both Respondents as real estate agents had actual knowledge and failed to inform them that a construction project for the Broad Street Parkway and the Baldwin Street Bridge, a couple hundred feet from their home, would begin shortly after they purchased the home, causing shaking to their foundation, traffic issues, noise pollution, an unsafe environment for their children to be raised, a decrease in value of their home, and has caused their family great undue stress and inconvenience. Subsequent to an investigation, on June 8, 2015, the Commission issued a Notice of Hearing for a hearing scheduled for August 18, 2015. On Tuesday, August 18, 2015, at 10:15 a.m., the

Commission commenced the adjudicatory/ disciplinary hearing in the above captioned matter.

Commission members present<sup>1</sup> were:

Daniel S. Jones, Commissioner, Presiding Officer  
William E. Barry, Commissioner  
Calley M. Milne, Commissioner  
Paul A. Lipnick, Commissioner

The prosecution was conducted by Kinsman Corthell, the Commission's Investigator. Mr. Wheeler was represented by Attorney Ralph Suozzo, and Mr. Van Horn was represented by Attorney Peter G. Callaghan.

The following exhibits were introduced into evidence and accepted into the record:

- Complainant Investigator Corthell's Exhibits:

Exhibit #1 – Documents from Complaint File 2014-036, pages 1-597.

- Respondent Wheeler's exhibits introduced:

Exhibit A – Wheeler/Page Exclusive Listing Agreement

Exhibit B – Van Horn/Dyer Exclusive Right to Represent Buyer Agreement

Exhibit C – Appraisal by Dale Gerry

Exhibit D – Affidavit of Brian Page

Exhibit E – Affidavit of Janine Page

Exhibit F – Seller's Property Disclosure

- Respondent Van Horn's exhibits introduced:

Exhibit A – Buyer Agency Agreement

Exhibit B – MLS Listing

Exhibit C – Property Disclosure

Exhibit D – Purchase and Sale Agreement

Exhibit E – VA Escape Clause

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<sup>1</sup> These same Commission members also deliberated and voted on this Final Decision and Order.

Exhibit F – Appraisal

Exhibit G – Verani Sales Research and Market Summary

Exhibit H – Verani Sales Brochure

The following witnesses were present and testified at the hearing:

- Thomas K. Dyer, Buyer of 36 Prescott Street, Nashua, NH.
- Bryan D. Wheeler, Listing Agent for sellers of 36 Prescott Street, Nashua, NH.
- Thomas E. Van Horn, Buyer Agent for Thomas Dyer and Barbara Grealish Dyer.
- Michael D. Day – Listing Agent for 60 Fairmount Street, Nashua, NH.
- Michael R. Gallo, Selling Agent for 60 Fairmount Street, Nashua, NH.
- Mark R. Kleiner, Buyer Agent for 3 ½ Beacon Court, Nashua, NH.
- Clifford A. Critch, Listing Agent for 3 ½ Beacon Court, Nashua, NH.
- Margaret J. Walther, Listing Agent for 42 Fairmount Street, Nashua, NH.
- Virginia E. Kazlouskas (formerly Virginia Gregory), Buyer Agent for 42 Fairmount Street, Nashua, NH.

**Findings of Fact:**

In light of the testimony and exhibits, the Commission finds the following facts:

1. Respondent Wheeler was first granted a real estate salesperson's license by the Commission on July 29, 2004, and a real estate broker license on October 20, 2008. At the time of the allegations, Respondent Wheeler was licensed as a real estate broker, license # 059564. Respondent Wheeler is currently licensed with a license period of October 20, 2014 – October 20, 2016. Respondent Van Horn was first granted a real estate salesperson's license by the Commission on February 21, 2002. At the time of the allegations, Respondent Van Horn was licensed as a real estate salesperson, license #054949. Respondent Van Horn is currently licensed with a license period of February 21, 2014 – February 21, 2016.

2. Complainants Thomas Dyer and Barbara Grealish Dyer purchased a single family residence property located at 36 Prescott Street, Nashua, NH on August 16, 2013.

3. Respondent Wheeler of Berkshire Hathaway Home Services of Nashua, NH was the listing agent for the sellers Janine and Brian Page of 36 Prescott Street, Nashua, NH, and Respondent Van Horn of Coldwell Banker Residential Brokerage of Amherst, NH was the buyer agent for Complainants Thomas Dyer and Barbara Grealish Dyer.

4. The Dyers were provided a Property Disclosure Form for 36 Prescott Street, which the Dyers initialed and signed on June 23, 2013. This property disclosure includes the following statement: (Ex. 1, pages 288-290)

NOTICE TO PURCHASER(S): PRIOR TO SETTLEMENT YOU SHOULD EXERCISE WHATEVER DUE DILIGENCE YOU DEEM NECESSARY WITH RESPECT TO ADJACENT PARCELS IN ACCORDANCE WITH THE TERMS AND CONDITIONS AS MAY BE CONTAINED IN PURCHASE AND SALES AGREEMENT AND DEPOSIT RECEIPT, YOU SHOULD EXERCISE WHATEVER DUE DILIGENCE YOU DEEM NECESSARY WITH RESPECT TO INFORMATION ON ANY SEXUAL OFFENDERS REGISTERED UNDER NH RSA CHAPTER 651-B. SUCH INFORMATION MAY BE OBTAINED BY CONTACTING THE LOCAL POLICE DEPARTMENT.

5. The Dyers initialed and signed an Exclusive Right to Represent Buyer Agreement form ("Buyer Agency Agreement") on June 28, 2013, which was in effect from June 22, 2013 – September 22, 2013, with Coldwell Banker Residential Brokerage ("Coldwell Banker") with Mr. Van Horn as their buyer agent. This Agreement includes the services that Coldwell Banker will provide and the scope of Coldwell Banker's representation to the Dyers, which includes a buyer acknowledgement that Coldwell Banker is being retained solely as a real estate broker and not as an attorney, tax advisor, lender, appraiser, surveyor, structural engineer or other professional services provider. (Exhibit 1, pages 231-233)

6. The Dyers were not familiar with the city of Nashua because they moved to Nashua from Dorchester, MA, and had no knowledge of the Broad Street Parkway Project or the Baldwin Street Bridge and that the construction for this project would be about 250 feet behind their house. Mr. Dyer stated that before placing an offer on the home, he went to the local police department to find out about crime in the area and checked out the school, but placed his trust in the Respondents as real estate agents to inform him of any exterior factors that may affect the property.

7. The Dyers viewed the property at 36 Prescott Street three times prior to closing on the property. Mr. Dyer stated that they met the sellers of the property prior to presenting an offer when they had to return to the property to retrieve a stuffed animal left behind and the sellers never made any disclosures to the Dyers about the Broad Street Parkway project.

8. Statements from the sellers indicated that they lived at 36 Prescott Street in Nashua since 2005 and a few years later they learned about the Broad Street Parkway project, but they had no details of the project other than it had been discussed for 20 years and no one knew if it would materialize, or if it did, how it might affect their home on Prescott Street. (Wheeler Exhibits D & E)

9. Mr. Dyer first learned about the Broad Street Parkway project about a month after he purchased the home when he began talking to neighbors, and initially saw the beginning of the project in October 2013. On Thanksgiving Weekend 2013 he sent an e-mail to Respondents Van Horn and Wheeler regarding his displeasure about the project, but Mr. Dyer did not receive a response from the Respondents.

10. Mr. Dyer indicated that the Broad Street Parkway project had been in place since the 1960s, approval and bonding occurred in 2008, and demolition elsewhere in the city started in 2011. The City of Nashua's website publishes information regarding the status of the parkway project. Mr. Dyer stated that Respondent Van Horn has lived in Southern NH for 25 years and his managing broker David Hennessey at Coldwell Banker Residential Brokerage, is the Executive Chair of the Nashua Planning & Zoning Commission, and Respondent Wheeler is a lifelong resident of Nashua and his real estate office is located .08 miles from Mr. Dyer's house, and finds it hard to believe that the Respondents didn't know about the Broad Street Parkway project. He feels they should have known and should have informed him of the project. Mr. Dyer attended a meeting at the school where his step-daughter went to school in November 2013, and he asked the Mayor whether the local residents were made aware of the Broad Street Parkway project, and she stated that there had been a wealth of information available on the internet and in the newspaper that the project was going to start and that in 2011 they broke ground in the Old Mill area.

11. The house behind Mr. Dyer's property that abuts his property was seized by the City of Nashua by eminent domain due to the project prior to the Dyer's moving into 36 Prescott Street, and has been the construction company's headquarters since October 2013. Mr. Dyer testified that the house to the east of his house was also acquired by eminent domain, and was never disclosed to the Dyers prior to their purchase of 36 Prescott Street by either of the Respondents.

12. Mr. Dyer stated at the hearing that he travels a lot and his wife was left alone with the kids experiencing the house shaking, noise from construction starting at 6:45 a.m., which had a huge negative affect on their relationship, because she was left alone with a mess, and this was a major factor in their divorce in December 2014.

13. The initial appraisal completed for lender for 36 Prospect Street prior to the closing was \$298,000 and in the summer of 2014, Mr. Dyer had the house re-appraised and the second appraisal was \$250,000, showing the value of the property depreciated by \$48,000 in less than one year. Mr. Dyer testified that the main factor of this depreciation was the Broad Street Parkway project. Mr. Dyer stated that he asked Appraiser Dale Gerry, who performed the initial appraisal if he knew about the Broad Street Parkway project at the time that he did the appraisal and Mr. Geary stated that he did know about it, but did not feel that it would affect the property and did not mention anything in the appraisal report about the properties taken by eminent domain. Mr. Dyer stated that he can't sell the property because he is \$48,000 in the hole, and that he would have never bought the property if he knew about the project. (Exhibit 1, pages 15-41 and 199-224).

14. Respondent Wheeler was working for Berkshire Hathaway Home Services located at 175 Amherst St, Nashua, NH when he was the listing agent for 36 Prescott Street in Nashua. Mr. Wheeler testified that he is a lifelong resident of Nashua. Respondent Wheeler stated that during the process of listing 36 Prescott Street for the sellers Brian and Janine Page, the Pages never brought up the Broad Street Parkway project or the Baldwin Street Bridge project. Mr. Wheeler testified that he knew of the Broad Street Parkway project when he listed the property for the sellers, but knew very little about the project and knew nothing about the Baldwin Street Bridge project or about the properties within the area that were taken by eminent domain. Mr. Wheeler stated that he

doesn't read the Nashua Telegraph and doesn't watch the local news and never saw anything online or in the Nashua Telegraph about the project, just heard about it verbally sometime within a couple of years before listing 36 Prescott Street and did not know that the project would affect this area, and only knew that the project was supposed to improve the flow of traffic. Mr. Wheeler stated that he held an open house at 36 Prescott Street and some of the agents that attended the open house made comments on how beautiful the house was, but there were no conversations or comments made regarding the Broad Street Parkway project or the Baldwin Street project. Respondent Wheeler first learned about the construction behind Mr. Dyer's house from Mr. Dyer when he e-mailed him during Thanksgiving Weekend 2013 and stated that because of the project there has been a decrease in value of his house and that he would be taking action against him. Respondent Wheeler stated that he tries to give the buyer or consumer as much information as he can so that the consumer or buyer can do their own due diligence, and as a buyer agent he would disclose to a buyer anything he knew would affect the property. If he was listing a property within the area of the project today, he would have a discussion with the seller about the project prior to listing the property.

15. Respondent Van Horn was the buyer agent for the Dyers and was working for Coldwell Banker Residential Brokerage and the office was located in Amherst, NH and he resides in Amherst. Mr. Van Horn has lived in Southern NH since 1998 and has lived in NH for about 30 years. Respondent Van Horn testified that he first became aware of the Broad Street Parkway project in late October or early November 2013 when the project first began, and had he known about the project and the vicinity of the project, he would have disclosed this information to the Dyers, because it would have been his duty to disclose. Mr. Van Horn stated that in 2013 there were about 40 agents within his office, and 10-12 of the agents focused on the Nashua area, and prior to and during the Dyer transaction, there were no discussions with the agents within the office about the Broad Street Parkway project or the Baldwin Street Bridge project. Mr. Van Horn testified that as a buyer agent, if he saw something that caused a red flag, such as stakes in the woods behind a property, he would first contact the listing agent to see if they had any knowledge of the stakes and

let the buyer know what the listing agent knows or doesn't know and then direct the buyer to go to the town hall and obtain additional information. Mr. Van Horn explained that he would not go to the town hall to obtain the information because it is not within the scope of his duties, and he could be liable if the information he obtained was incorrect. Mr. Van Horn stated that Tom Dyer asked him who owned the fence in the back yard of 36 Prescott Street and he found out who owned the fence for him.

16. Michael Day, the co-owner of Holiday Realty located in Hudson, NH was the listing agent for 60 Fairmount Street, Nashua, NH which sold in July of 2013. Mr. Day was first licensed as a NH salesperson in 2001, and received his NH real broker's license in 2003, and opened his real estate office in 2005. Mr. Day stated that 60 Fairmount Street was a HUD owned property, it was a foreclosure. They would receive listings from HUD and the listing is placed on MLS and agents and their clients go to the property and submit their bids online and he doesn't see the agents or buyers or any of the contracts. HUD provides their own disclosure and property information and did not disclose the Broad Street Parkway project for the 60 Fairmount Street property. Mr. Day stated that he became aware of the Broad Street Parkway Project around 2010-2011 through his wife who reads the Nashua Telegraph, but at the time he listed the property at 60 Fairmount Street he did not have any knowledge of specific details about when the project would begin and the exact location of the project. Mr. Day stated that if a buyer asked for information regarding the surrounding area of a property, he would point them to the appropriate resources to get the information, but he would not investigate for the buyer because he could be liable for providing inaccurate information, but as a buyer's agent if you have actual knowledge of factors that could affect the property you have a duty to disclose the information to the buyer.

17. Michael Gallo of Gallo Realty Group was licensed as a NH real estate salesperson in 2004 and as a real estate broker in 2006. Mr. Gallo's office is located in Bedford and he does a couple of transactions a year in Nashua. Mr. Gallo purchased 60 Fairmount Street in July of 2013, and sold the property six months after. Between the time he purchased the property and sold the property he did not have any knowledge of the Broad Street Parkway project, and disclosure or discussion of the project did not come up when he purchased the property or sold the property.

Prior to purchasing 60 Fairmount Street, Mr. Gallo drove through the neighborhood and thought the neighborhood looked okay and did not do any research of the area surrounding the property.

18. Mark Kleiner, a NH real estate salesperson, started with DCU Realty, LLC in January 2013, and has resided in Hudson, NH most of his life. Mr. Kleiner testified that he didn't have any knowledge of the Broad Street Parkway project until a couple of months prior to the hearing when Investigator Corthell contacted him. Mr. Kleiner was involved with the sale of 3 ½ Beacon Court, Nashua, NH as the buyer agent in August of 2013, and the Broad Street Parkway project did not come up in discussion throughout the transaction. Mr. Kleiner testified at the hearing that if he was representing a buyer as a buyer's agent and the buyer had concerns about the property or surrounding property, he would direct the buyer to the City Hall or other resources because he may say one thing and if his information was inaccurate he could be liable for his misinformation.

19. Clifford Critch is the managing broker of ERA Key Realty Services, Inc. in Ayer, Massachusetts. Mr. Critch explained that he was appearing at the hearing as the managing broker not the listing agent for a transaction at 3 1/2 Beacon Court, Nashua, NH which sold in August of 2013, and that Mary Coen was the listing agent for this transaction but has since left the company. Mr. Critch, as managing broker, was the keeper of the records. Mr. Critch stated that he had no knowledge about the Broad Street Parkway project until Investigator Corthell contacted him a couple of weeks prior to the hearing, and he stated that Ms. Coen didn't discuss the project and didn't know anything about the project at the time of the transaction. Ms. Coen lives in Nashua, but has only lived there for a short period of time.

20. Margaret Walther from Berkshire Hathaway Home Services was issued a NH real estate salesperson's license in 1987 and a real estate broker license in 1989. Ms. Walther was the managing broker of the Londonderry office for 8 years and is an REO broker. Ms. Walther was the listing agent for 42 Fairmount Street, Nashua, NH, which sold in August of 2013. Ms. Walther stated that she did not have any definitive information about the Broad Street Parkway at the time of this transaction, and would not have known or thought that the project would be something that would have affected the property. Ms. Walther stated 42 Fairmount Street was around a half mile from 36

Prospect Street. Ms. Walther stated that she relies very heavily on the sellers to disclose the necessary information about the property and possible things that may be happening around the property. When you have an absentee seller who has no information about the property, they will go to great lengths to make sure the buyer understands that they have no information. Ms. Walther stated that unless she has information first hand that is a material fact, she does not go looking for information, but if she discovered a material fact she would disclose it to the buyers of a property. Berkshire Hathaway Home Services has a disclosure form for consumers, which identifies several things that may be important to a buyer, and provides the buyer with the appropriate resources to obtain information on any property concerns or areas surrounding the property. Ms. Walther stated that she has known Bryan Wheeler for about 8 years and worked with him on a team for about 5 years, and does not feel he was dishonest or unethical to the Dyers as the listing agent of 36 Prescott Street, Nashua, NH.

21. Virginia Kazlouskas (formerly Virginia Gregory) stated that she has worked for Harmony Real Estate, Inc. a family owned real estate office since 1997, and has been licensed as a NH real estate salesperson since 2005. The real estate office is located in Hudson, NH, but used to be located out of Nashua. She worked in the Nashua real estate office for about 20 years. Ms. Kazlouskas stated that she lived in Nashua, NH for most of her life. She moved away in 1999 for 10 years and then returned to Nashua. Ms. Kazlouskas was the buyer agent for a transaction at 42 Fairmount Street which sold in August of 2013, and at that time she didn't really have any knowledge about the Broad Street Parkway project and the project was not discussed during this transaction. Ms. Kazlouskas stated that she heard about the project around 20 years ago maybe through her parents, but there had been no discussions about the project among agents within the real estate office.

**Relevant Law:**

**RSA 331-A:1 Purpose.** It is the policy of this state to regulate the practice of real estate brokers and salespersons in order to ensure that they meet and maintain minimum standards which promote public understanding and confidence in the business of real estate brokerage.

**RSA 331-A:25-b Seller Agent; Duties.**

II. The duties of a licensee acting on behalf of a seller or landlord to a buyer or tenant include:

(c) Disclosing to a prospective buyer or tenant any material physical, regulatory, mechanical, or on-site environmental condition affecting the subject property of which the licensee has actual knowledge. Such disclosure shall occur at any time prior to the time the buyer or tenant makes a written offer to purchase or lease the subject property. This subparagraph shall not create an affirmative obligation on the part of the license to investigate material defects.

**RSA 331-A:25-c Buyer Agent; Duties.**

I. A licensee engaged by a buyer or tenant shall:

(e) Disclose to a prospective buyer or tenant any material physical, regulatory, mechanical, or on-site environmental condition affecting the subject property of which the licensee has actual knowledge. Such disclosure shall occur at any time prior to the time the buyer or tenant makes a written offer to purchase or lease the subject property. This subparagraph shall not create an affirmative obligation on the part of the licensee to investigate material defects.

**RSA 331-A:26 Prohibited Conduct.**

V. Knowingly committing, or being a party to any material fraud, misrepresentation, concealment, conspiracy, collusion, trick, scheme or device, whereby any other person relies upon the word, representation or conduct of the licensee.

XXXVI. Demonstrating untrustworthiness or incompetency to act as a broker or salesperson.

**Rulings of Law:**

Based on the foregoing findings of fact, the Commission hereby issues the following rulings of law:

1. Thomas Dyer and Barbara Grealish Dyer purchased a single family home located at 36 Prescott Street in Nashua, NH from the sellers Brian and Janine Page on August 16, 2013. Respondent Wheeler was the listing agent for the sellers and Respondent Van Horn was the buyer agent for the Dyers. The Dyers filed a complaint with the Commission against Respondent Wheeler and Respondent Van Horn, alleging that both Respondents as real estate agents had actual knowledge and failed to inform them that a construction project for the Broad Street Parkway and the Baldwin Street Bridge, a couple hundred feet from their home, would begin shortly after they purchased the home. Mr. Dyer indicated that the Broad Street Parkway project had been in place since the 1960's, approval and bonding occurred in 2008, and demolition elsewhere in the city started in 2011. Mr. Dyer stated that Respondent Van Horn has lived in Southern NH for 25 years and Respondent Wheeler is a lifelong resident of Nashua, NH and his real estate office is located .08 miles from Mr. Dyer's house, and finds it hard to believe that the Respondents didn't know about the Broad Street Parkway project. Mr. Dyer feels that the Respondents should have known and

should have informed him of the project. Had the Dyers been informed of the project they would have never bought the home.

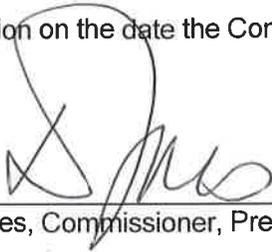
2. During the process of listing the property, the sellers never discussed with Mr. Wheeler the Broad Street Parkway project, because the sellers didn't know the details of the project and whether it would ever materialize. Respondent Wheeler testified that he knew of the Broad Street Parkway project, but did not have any knowledge of the details of the project and that the project could affect the property at 36 Prescott Street and had no knowledge of the Baldwin Street Bridge project or the properties near 36 Prescott Street that were seized by eminent domain. There was no evidence presented to prove any wrongdoing by Respondent Wheeler. Therefore, the Commission rules that Respondent Wheeler did not violate NH RSA 331-A:25-b, II, (c); RSA 331-A:26, V; or RSA 331-A:26, XXXVI. (Notice of Hearing, paragraphs 5A, 5C, and 5D).

3. Respondent Van Horn testified that he first became aware of the Broad Street Parkway project in late October or early November 2013, and had he known about the project and the vicinity of the project, he would have disclosed this information to the Dyers, because it would have been his duty as their buyer agent to disclose. There was no evidence presented to indicate any wrongdoing by Respondent Van Horn. Therefore, the Commission rules that Respondent Van Horn did not violate NH RSA 331-A:25-c, I, (e); RSA 331-A:26, V; or RSA 331-A:26, XXXVI. (Notice of Hearing, paragraphs 5B, 5C, and 5D).

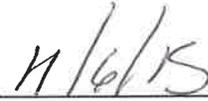
IT IS **ORDERED** that this Final Decision and Order shall be maintained by the Commission as a public document.

IT IS **FURTHER ORDERED** that if this decision is not appealed within 30 days of the effective date, it shall become final. See RSA 331-A:28, III ("The action of the commission in revoking, suspending, or denying a license or accreditation, or levying a fine, shall be subject to appeal to the superior court at the instance of the licensee or an accredited individual, institution, or organization, within 30 days after the filing of the commission's decision...").

IT IS FURTHER **ORDERED** that this Final Decision and Order shall take effect as an Order of the Commission on the date the Commission signs it.



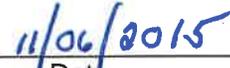
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Daniel S. Jones, Commissioner, Presiding Officer



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William E. Barry, Commissioner



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Calley M. Milne, Commissioner



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Paul A. Lipnick, Commissioner



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\*\ John G. Cronin, Commission member, recused.