

STATE OF NEW HAMPSHIRE

REAL ESTATE COMMISSION

Order on Petition for Declaratory Ruling

Petition of Ryan Kaplan

Ryan Kaplan (“Petitioner”) requests a declaratory ruling by the Real Estate Commission (the “Commission”) on whether he may hold an associate and a principal broker’s license simultaneously. The Petitioner makes this request so that he may be licensed as an associate broker at Tate and Foss Sotheby’s International Realty (“Sotheby’s”) where he would focus exclusively on sales, and simultaneously be licensed as a principal broker with Envision Property Management, LLC (“Envision”) where he would focus exclusively on property management. As explained in greater detail below, the Commission has determined that holding an associate and a principal broker’s license at the same time violates the statutes and rules that govern the Commission.

PROCEDURAL BACKGROUND

On June 1, 2021, pursuant to NH Admin. Rules Rea 201.08, the Petitioner submitted a petition for declaratory ruling asking whether it is permissible under the Commission’s applicable statutes and rules to have a principal broker’s license with one company and at the same time an associate broker’s license with another.¹ Specifically, the Petitioner asked the Commission, “Can I be the Principal Broker of my own Property Management Company while hanging my license as an Associate Broker with a sales agency?”

FACTS PRESENTED BY THE PETITIONER

¹ The Petitioner also sought temporary approval of the request from the Commission granting him dual licenses subject to the outcome of this Declaratory Ruling. The Commission denied the petitioner’s request for temporary approval.

The Petitioner worked for two years as a licensee with Arthur Thomas Properties in Dover, New Hampshire. He then transferred his license on December 14, 2020 to Sotheby's. Following the transfer, the Petitioner went from having a "primary portfolio of Property Management to one of Sales exclusively." After his transfer to Sotheby's, the Petitioner earned his NH Broker license. The Petitioner, now able to work in both sales and "property management," has received several requests from property owners asking him to manage their properties. The Petitioner's firm, Sotheby's, does not undertake property management work. Envision was founded by the Petitioner with the purpose of exclusively managing properties. The Petitioner's principal broker at Sotheby's is in support of him operating as an associate broker at Sotheby's and a principal broker at Envision. Presently, the Petitioner is a licensed associate broker as defined under RSA 331-A:2, I-c. The principal broker in charge of supervising the Petitioner is Tony Jalbert with Sotheby's.

DEFINITIONS

The Real Estate Practice Act defines "Broker" to be

any person acting for another on commission or for other compensation, for the promise of commission or other compensation, or any person any person licensed under this chapter acting on the licensee's own behalf who:

- (a)** Sells, exchanges, purchases, rents, or leases real estate.
- (b)** Offers to sell, exchange, purchase, rent or lease real estate.
- (c)** Negotiates, offers, attempts or agrees to negotiate the sale, exchange, purchase, rental or leasing of real estate.
- (d)** Lists, offers, attempts or agrees to list real estate for sale, lease or exchange.
- (e)** Buys, sells, offers to buy or sell, or otherwise deals in options on real estate or improvements on real estate.
- (f)** Collects, offers, attempts or agrees to collect rent for the use of real estate.
- (g)** Advertises or holds oneself out as being engaged in the business of buying, selling, exchanging, renting or leasing real estate.
- (h)** Assists or directs in the procuring of prospects, calculated to result in the sale, exchange, lease, or rental of real estate.
- (i)** Assists or directs in the negotiation of any transaction calculated or intended to result in the sale, exchange, leasing or rental of real estate.

(j) Engages in the business of charging an advance fee in connection with any contract whereby the person undertakes to promote the sale or lease of real estate, through its listing in a publication or data base issued for such purpose, through referral of information concerning such real estate to brokers, or both.

RSA 331-A:2, III. A principal broker is “the individual broker ... whom the [Commission] hold[s] responsible for the actions of licensees who are assigned to such individual broker.”

RSA-331 A:2, VIII (emphasis added). An associate broker is “any person who is licensed as a real estate broker, but who is employed by a principal broker . . . and in addition operates under the supervision of a principal broker to participate in any activity described in [RSA 331-A:2, III].” RSA 331-A:2, I(c) (emphasis added).

The Real Estate Practice Act does not define “property management”² and the Petitioner has not explained specifically what services he plans to provide at his proposed property management firm. In responding to the Petitioner’s request, the Commission assumes that the Petitioner intends to engage in one or more of the activities listed in RSA 331-A:2, III.

DISCUSSION

The Real Estate Practice Act is the bedrock upon which the entire profession of real estate brokers is built. *See* RSA 331-A:1. No statute or rule specifically states that licensees of the Commission may hold no more than one license at a time. However, as explained in greater detail below, a review of these statutes and rules leads to the clear conclusion that dual licensure would be inconsistent with both the text and the intent of these provisions of law. Moreover, even if the Petitioner could hold both an associate and a principal broker’s license, any brokerage services he provided as a principal broker would be in conflict with his duties as an associate broker. *See Dupont v. N.H. Real Estate Comm’n*, 157 N.H. 658, 661 (2008) (Standard of conduct

² The only use of the term “property management” in the statutes and rules governing the Commission is in reference to elective courses offered to licensees. *See* RSA 331-A:20, II(b); NH Admin. R. Rea 302.02, (a)(3)(h), (a)(6).

exists “regardless of whether or not it directly affects a particular real estate transaction.”) (quoting the trial court)). The Commission, therefore, concludes that its statutes and rules do not permit the duel licensing that Mr. Kaplan has proposed.

If licensed as a principal broker, Petitioner would be empowered to engage in the activities listed in RSA 331-A:2. However, RSA 331-A:2, I-c requires that an associate broker must operate under the supervision of a principal broker whenever they engage in an activity falling under RSA 331-A:2, III. Unlike in other professional licensing statutes, there is no carveout to this requirement. *See, e.g.*, RSA 329:1 (exempting those persons “to whom authority is given by any other statute” from the definition of the practice of medicine). Here, if the Petitioner sought to, for example, advertise, list, offer, or negotiate the renting and leasing of real estate for Envision he would be doing so without the supervision of his Sotheby’s principal broker. Thus, any broker activities he engaged in as a principal broker of Envision would be inconsistent with the requirement of his associate broker license. *See* RSA 331-A:2, I-c. Because the duel licensure arrangement proposed by the Petitioner would render the Petitioner unable to adhere to the requirements of his associate license while performing any principal broker duties, it is clear that the Real Estate Practice Act does not permit such a licensing arrangement. *See* RSA 21:1 (statutory construction may not be “repugnant to the context” of the statute).³

³ This is one instance where duel licensure would create a situation in which the Petitioner could not simultaneously honor the requirements of both his principal broker license and his associate broker license, it is far from the only one. As just one illustrative example, “[a]ll advertisements by a broker or salesperson shall include . . . the principal broker’s name when licensed under an individual principal broker license.” RSA 331-A:16, IV(a); *see also* NH Admin Rules Rea 404.05(b) (requiring prominent display of “that licensee’s principal broker” on all advertisements); RSA 331-A:2, III(g). In order for the Petitioner to advertise for Envision, or on behalf of Envision’s clients, while in compliance with his associate broker’s license he must also prominently list Sotheby’s on the advertisement, despite the fact that Sotheby’s would have no relationship with the Petitioner’s actions as principal broker of Envision.

Additionally, it would violate the Commission's procedural requirements to grant the Petitioner two licenses simultaneously. When an associate broker "changes his affiliation⁴ from one licensed principal broker to another or ceases to represent the principal broker," the principal broker must provide the Commission with notice of the change, along with the associate broker's license. RSA 331-A:17. IV. The Commission's Change of Broker Status form similarly requires that when a licensee seeks a new or different form of licensure, he is required to return to the Commission his existing license. The Petitioner's proposed arrangement involves him being affiliated with Sotheby's for some activities but unaffiliated with Sotheby's for all of his Envision activities. He might conceivably wear both hats multiple times in a single day. In order to comply with the procedural requirements, the Petitioner would need to surrender his license to the Commission repeatedly. Sotheby's would, similarly, be required to return the Petitioner's license to the Commission whenever he engaged in broker activities for Envision, only to reclaim it whenever the Petitioner again engaged in broker services for Sotheby's. This thoroughly unworkable result is additional strong evidence that the Petitioner's proposed form of dual licensure is not permitted under the Commission's statutes and rules.

It is of significant concern to the Commission that the Petitioner's proposed dual licensure would also directly conflict with the legislature's stated purpose for the Real Estate Practice Act. The purpose of the Real Estate Practice Act is to "promote public understanding and confidence in the business of real estate brokerage." RSA 331-A:1. Transparency is core to

⁴ The Commission's Salesperson, Associate and Managing Broker Affiliation form makes clear that an associate broker is affiliated with their principal broker by virtue of the principal broker's supervision of that associate. *See* Real Estate Commission, Salesperson, Associate and Managing Broker Affiliation Form, <https://www.oplc.nh.gov/sites/g/files/ehbemt441/files/inline-documents/sonh/affiliation-form.pdf> (last modified Jan. 23, 2020); *see also* RSA 541-A:1, XV (declaring forms are binding administrative rules under NH law).

this understanding and confidence. *See, e.g.*, RSA 331-A:25-d (requiring disclosure of dual agency); RSA 331-A:15, III (requiring prominent display of licenses). Although the Commission has no reason to doubt the Petitioner's intent to only perform property management services at Envision, there is no licensing or enforcement mechanism to ensure that he (and any hypothetical future dual licensee) limit his activities in such a way. Once granted there would be no restriction placed on a principal broker requiring them to solely engage in property management work. The Petitioner's proposed dual licensing arrangement would create a situation in which it would easily become unclear to the public whose interests the Petitioner was representing at any given time. This outcome would contravene the express purpose of the Real Estate Practice Act and should, therefore, not be allowed.

Finally, the Commission finds it appropriate to note that nothing in this decision prevents the Petitioner from engaging in property management services. His associate broker license permits him to engage in any of the activities listed in RSA 331-A:2, III. The Petitioner made his request for this Declaratory Ruling because his current employer is unwilling to permit him to perform property management services as their associate broker. To the extent anyone is restricting the Petitioner's ability to provide the services he wishes to provide, it is his employer and not this Commission.

CONCLUSION

The Real Estate Practice Act and the administrative rules governing the practice of real estate within the State clearly do not permit one individual to be licensed and to act as both an associate broker and a principal broker. Therefore, in response to the Petitioner's question as to whether he may be licensed as a principal broker at one firm and an associate broker at another firm, the Commission concludes that he may not.