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MEMORANDUM

*** Privileged and Confidential ***

TO: Greg Lemon, Director
Nebraska Real Estate Commission

FROM: O'Neill Heinrich Damkroger Bergmeyer & Shultz, P.C., L.L.O. *CH*
Attorneys for the Commission

DATE: October 19, 2016

RE: NEB. REV. STAT. § 81-885.24(14); Proposed Policy or Regulation

Question Presented

Whether the Nebraska Real Estate Commission (the "Commission") can, by interpretation, regulation or policy, prohibit licensees from contracting represented buyers or tenants, based upon the prohibition contained in NEB. REV. STAT. § 81-885.24(14), which prohibits a licensee from directly contacting an owner or lessor if the licensee knows that such owner has an existing written listing contract in connection with such property.

Brief Answer

No. First, a court would likely determine that NEB. REV. STAT. § 81-885.24(14) is unambiguous, so no deference would be given to the Commission's interpretation. Second, an interpretation or regulation that would add exclusive buyer or tenant agency contracts would be contrary to the plain language of NEB. REV. STAT. § 81-885.24(14). Lastly, the proposed interpretation that includes buyer and tenant contracts is not supported by the Committee Records of Floor Debates of the legislative history.

Statute

NEB. REV. STAT. § 81-885.24(14) provides that the Commission may impose disciplinary actions for the unfair trade practice of:

(14) Negotiating a sale, exchange, listing, or lease of real estate directly with an **owner or lessor** if he or she knows that such owner has a written outstanding listing contract in connection with such property granting an exclusive agency or an exclusive right to sell to another broker or negotiating directly with an owner to withdraw from or break such a listing contract for the purpose of substituting, in lieu thereof, a new listing contract.

NEB. REV. STAT. § 81-885.24(14) (emphasis added). The Commission's interpretation of this statute reads:

Neb. Rev. Stat. 81-885.24(14) sets out two prohibitions. Taking the second one first, it prohibits licensees from negotiating directly with an **owner** to withdraw from or break an exclusive agency or exclusive right to sell listing contract for the purpose of substituting, in lieu thereof, a new listing contract.

The first part of (14) also prohibits certain activity which, as it relates to "listings", is modified somewhat by (15). Under (15), a licensee can discuss with an **owner** whose property is exclusively listed with another broker the terms upon which the broker would accept a future listing upon the expiration of the present listing, if the owner initiates the discussion. The Commission has not distinguished between expiration, termination or cancellation previously.

Except for the proviso in (15), licensees cannot, in the first part of Neb. Rev. Stat. Section 81-885.24(14), negotiate a sale, exchange, listing, or lease of real estate directly with an **owner or lessor** if the licensee knows that such **owner** has a written outstanding listing contract in connection with the property, which contract grants an exclusive agency or exclusive right to sell to another broker.

Interpretation of 81-885.24(14) and (15) (emphasis added).

Analysis

"An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer." *Creighton St. Joseph Reg'l Hosp. v. Nebraska Tax Equalization & Review Comm'n*, 260 Neb 905, 914 (2000). The Commission has been granted authority by and through the Nebraska Real Estate

License Act to "adopt and promulgate rules and regulations relating to the administration of but not inconsistent with the act." See NEB. REV. STAT. § 81-885.07

"Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent." *Upper Big Blue Nat'l Res. Dist. v. State Dep't of Natural Res.*, 276 Neb. 612, 618 (2008). However, when an agency's regulation or interpretation contravenes the plain language of its governing statutes, the "rule of deferring to an agency's interpretation does not apply." *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379, 395 (2012). "Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used [in the statute] is clear, or its meaning can be ascertained by the use of intrinsic aids alone." *Ameritas Life Ins. V. Balka*, 257 Neb 878, 888 (1999).

In our opinion, interpreting NEB. REV. STAT. § 81-885.24(14) to prohibit communications with represented buyers and tenants would be inconsistent with the existing statute because the existing statute expressly prohibits communications only with represented **owners** and **lessors**, but-not with represented buyers or tenants. The proposed policy or regulation would likely contravene the plain language of NEB. REV. STAT. § 81-885.24(14). The existing statutory language appears to be clear and unambiguous. A statute is only "ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in *pari materia* with any related statutes." *Johnson v. Kenney*, 265 Neb. 47, 50 (2002). Here, the plain meaning of NEB. REV. STAT. § 81-885.24(14) prohibits communications only with represented **owners** and **lessors**, not with **buyers** or **tenants**. Accordingly, it is unlikely that a court would defer to a Commission policy or regulation that includes buyers or tenants.

"An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute." *Upper Big Blue Nat'l Res. Dist.*, at 617-18 (2008). Stated another way, "an administrative agency cannot interpret its rules and regulations in such a manner so that self-interpreted rules and regulations contravene the statute which the agency is obliged to administer." *County of Dodge v. Dep't of Health*, 218 Neb. 346, 354 (1984). If the Commission

adopted an interpretation of NEB. REV. STAT. § 81-885.24(14) that included buyers and tenants, it would likely be an impermissible modification, alteration or enlargement of the statute's scope. Again, the existing statute does not expressly prohibit these types of communications with represented buyers or tenants.

Lastly, in certain instances, the legislative history can show the "[l]egislature's acquiescence in an agency's interpretation of its governing statutes." See *Project Extra Mile v. Neb. Liquor Control Comm'n*, 283 Neb. 379, 395 (2012). Conversely, legislative history may also show "an agency's attempt to achieve through regulations what the Legislature declined to enact through proposed statutory amendments." *Id.* NEB. REV. STAT. § 81-885.24(14) was enacted in 1973 through LB 68, and amended by LB 354 in 1975, LB 361 in 1978, and LB 109 in 1985. The legislative history and discussions contained in the Floor Debate records are silent as to whether the statute applies to buyer or tenant agency contracts. Likewise, there was no discussion in the committee records on this issue. Based upon the legislative history, the Legislature did not acquiesce to the Commission's proposed interpretation.

Conclusion

In our opinion, NEB. REV. STAT. § 81/885.24(14) does not allow for an interpretation policy or regulation which prohibits licensees from communicating with represented buyers or tenants. A Court will likely find that the statute is unambiguous and that any interpretation to include buyers and tenants would be inconsistent and/or erroneous. Also, a Court would likely determine that any such interpretation would improperly contravene, modify and enlarge the plain language of the statute. Finally, a Court would likely determine that the Legislature has not acquiesced to an interpretation that includes prohibited communications represented buyers and tenants. If you would like to discuss any of these issues in more detail, feel free to contact us. Thank you for the opportunity to assist you and the Commission with this matter.