

MINUTES

MONTANA SENATE 54th LEGISLATURE - REGULAR SESSION COMMITTEE ON BUSINESS & INDUSTRY

Call to Order: By CHAIRMAN JOHN HERTEL, on January 10, 1995, at 8:00 a.m.

ROLL CALL

Members Present:

Sen. John R. Hertel, Chairman (R)
Sen. Steve Benedict, Vice Chairman (R)
Sen. William S. Crismore (R)
Sen. C.A. Casey Emerson (R)
Sen. Ken Miller (R)
Sen. Mike Sprague (R)
Sen. Gary Forrester (D)
Sen. Terry Klampe (D)

Members Excused: Sen. Bill Wilson (D)

Members Absent: N/A

Staff Present: Bart Campbell, Legislative Council
Lynette Lavin, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 12.
Executive Action: N/A

HEARING ON SB 12

Opening Statement by Sponsor:

SEN. DARYL TOEWS, SD 48, Lustre, replaced SEN. JOHN HARP, SD 42, Kalispell, as Sponsor of SB 12. He said this bill was very simple and very much to the point, allowing the Board of Realty to impose a fine on licensees, both brokers and salespeople. He stated he had a tremendous aversion to having Boards fine people and anybody imposing fines at a state level. He explained the problem in the real estate industry is that the board was allowed to have only two alternatives -- either to revoke or to suspend (or temporarily suspend) a broker or a salesperson's license. He noted that this caused problems resulting in infractions; however, not bad enough for suspension. When a broker was suspended, it punished the consumer (selling their home), the salespeople under that broker (loss of the sale), etc. He maintained that one more option for the board would be to do

something minor, such as levying a fine in place of suspension of a license on the person committing a violation. Please look at the last page, page 5, Section 3 -- "a revocation of a salesperson's license must first be investigated from a sworn complaint in writing and that salesperson will be able to have a hearing."

Proponents' Testimony:

Marcia Allen, Board of Realty Regulation member, stated she has served on the Board for six and a half years and has been a licensed real estate broker for fourteen years. She read her written testimony. **EXHIBIT 1 Ms. Allen** maintained fining is definitely a disciplinary alternative and not a new process to determine violations.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SEN. TERRY KLAMPE asked if there is a realtor's association and asked **Ms. Allen** if she represented the board. **Ms. Allen** stated she does represent the Board of Realty. She further stated the Montana Association of Realtors will be represented, but they are not present at this time.

SEN. GARY FORRESTER on questioning **SEN. TOEWS**, stated it appears that a realtor right on the edge, can pay the fine, not get suspended, and may be cheaper for him to pay the fine; gets by with a bit of a shady practice, takes the fine and comes out much better. **SEN. TOEWS** answered that on the first offense, this is correct; however, if the realtor doesn't clean up his act, then the second time, the board would suspend the license.

SEN. FORRESTER asked **Ms. Allen** why the fine would be good. It is just slapping the realtors with a fine. **Ms. Allen** answered the Board would pursue a suspension if the board felt the violation was that severe, they would probably go for the suspension of the license and not just the fine. It just gives them the right to fine. **SEN. FORRESTER** then asked **Ms. Allen** if the board acts strictly on a complaint from a consumer, or does the board have investigative powers and **Ms. Allen** stated that they can initiate a complaint on their own. **SEN. FORRESTER** asked her how this was done and how often. **Ms. Allen** said this was done by a vote of the board and occurs just about every meeting, once a month.

SEN. STEVE BENEDICT stated he has a concern with this much power in the hands of a body that is not a judicial body; he was worried about due process. A \$5,000 fine for inadvertently doing some inaccurate advertising, such as the franchise name or logo type, making false promises of any character likely to influence, persuade, or induce, which could be a consultation between a

buyer and himself and the two don't get along, then that buyer can go to the Board of Realty Regulation and repeat a conversation from his point of view and **SEN. BENEDICT** thinks \$5,000 is too much of a fine. He asked **Ms. Allen** to comment on this. **Marcia Allen** stated there is a misconception and as far as a fine of \$5,000, that is not going to happen. The board will not even have the authority to issue a fine until after the entire due process. A complaint will come in, they will review it, check if it warrants going on to investigative section, there would be an investigation, they would review it again, and if they feel there is something there it then goes on for a notice of a hearing. Then, only at that time, after they have had complete due process, could the board issue a fine. **Ms. Allen** asked if that completely answered his question. **SEN. BENEDICT** stated it does and it doesn't, he still has some grave reservations.

SEN. MIKE SPRAGUE stated he has been a realtor for fifteen years and it seems a lot of complaints are generated from other realtors and rumblings between the ranks and asked **Ms. Allen** if that was correct. **Ms. Allen** stated the majority of complaints come from the public, although they get some from other realtors. **SEN. SPRAGUE** asked that when the complaint is initiated, fellow realtors are complaining that fellow realtors are not doing things properly such as lock boxes, signings, etc. and he feels it is a self discipline amongst the ranks to keep the standards high. **Ms. Allen** stated it would be nice if that was the way it was; however, she maintains that is not the case.

Informational Testimony:

John Shontz, representing the Montana Association of Realtors, which has over 2,000 members in Montana. He stated he was not here as a proponent or as an opponent, but as a "ponent". The association wants to share four thoughts with this committee. The fiscal note indicates it to be about \$2,500 for the fines, \$2,000 annually. In his conversations with board members, there is a more liberal intent on their part to use the fining mechanism and that should be ironed out. They share some very deep reservations about due process. At this time, with all licensees, the board had the power to remove a right which is the right to practice, but they are going beyond removal of a right, (and this is not the only board asking for administrative fining) to issuing a penalty through the administrative process. There is something very important about the administrative process in the true legal sense of the word. In Montana, the administrative boards use the inquisition process. They can bring the complaint, they have the power to investigate the complaint, they are the prosecutor and they are also the judge. So, in assessing a criminal penalty (as with all boards) everyone must be very careful that due process is in place, that the inquisitional process is conducive to the penalty process and it should be very carefully and fully explored. The association would suggest that the financial penalty should be in lieu of the suspension or

revocation rather than be in addition to. There is some question as to whether or not it should be a negotiating tool. If, in fact, the licensee is engaged in a practice that is inappropriate, illegal, unethical, then suspension should be considered. If it is a minor infraction, then perhaps the fine should be maximized at \$1,000 instead of \$5,000, because in fact, if the infraction is worthy of a \$5,000 fine, then perhaps suspension is the answer. **Mr. Shontz** would like to make one more point. He maintains there is a major piece of legislation coming that addresses this issue with every board. **SEN. JEFF WELDON** has requested that bill and this ought to be folded into that bill. It is their hope that this bill be kept until the other bill shows up and that all the bills will be merged into one standard bill for everybody and that is the administrations attempt.

Questions From Committee Members and Responses (continued):

SEN. SPRAGUE stated he did not see where the fine is necessarily a problem in that particular profession as there are over zealous salespersons making claims and there is a need when those persons should be reminded that what he or she is doing may effect a lot of lives and a lot of property. He asked **Ms. Allen** if the customer has any recourse in this process. **Ms. Allen** related the customer has no recourse and the idea is, when the customer sends the complaint to the board, they want the board to address the problem. **SEN. SPRAGUE** stated the individual salesperson may feel the fine would be well worth the risk if the commission on that sale is substantial -- \$5,000, \$50,000, or \$100,000 and the fine is \$1,000. **Ms. Allen** related that was not the intent, that individuals would not use the fining method to enable them to have a deceptive practice. If the board is given a severe complaint, they will not be willing to settle for just a fine, but would revoke the license. If the complaint is a minor infraction, the only course they have at this time is through the whole process -- the investigative process, the hearings, and that individual would be put out of business for a year and if they have licensees under them, those individuals would be immediately out of business as well. On occasion, the board makes a recommendation for a year suspension, all but one month suspended. In this situation, the board would like to issue a fine as well. The hope of the board is that the salesperson would correct the problem and not do it again. If the salesperson comes back before the board again, the odds of the board going through the same process would be slim.

SEN. KEN MILLER asked **Ms. Allen** how the board is set up. **Ms. Allen** stated they have five members; three licensees, two public members. **SEN. MILLER** inquired if the three licensees were brokers or agents and **Ms. Allen** stated the three licensees on the board are brokers, whereas the two public members, one an attorney and the other a retired legislator. **SEN. MILLER** asked if they are trying to regulate themselves, as three members are brokers imposing their own fines. **Ms. Allen** stated this shouldn't be viewed as regulating themselves, but more their

charge to protect the public. At present their choice is to suspend the license, or do nothing. Not only the public, but other licensees, are upset because some individuals are incurring violations over and over again. Some violations do not warrant the state's monies for an investigation of perhaps one year; for example, someone who is running an illegal ad in the newspaper. The boards only other choice is to do nothing about it.

SEN. CASEY EMERSON asked **SEN. TOEWS** why initially he was worried about the whole regulatory component and now it is what the broker does that affects other people, which is the real crux of the matter. If a salesperson does something wrong, revoke that license and it doesn't affect anyone else. There is a problem when a broker has his license revoked as it affects many other people. **SEN. EMERSON** questioned the feasibility of not having "brokers" and all salespersons termed "licensees". Only that person would be affected for any violation. Many years ago, before there was a board and brokers, there didn't seem to be any problem. Has this been brought up or mentioned as an alternative.

{Tape: 1; Side: B; Approx. Counter:; Comments: .}

SEN. TOEWS stated this had not been brought up as an alternative. The advantage of having salespeople under a broker is to guide them, help them to get a start, and to teach them responsibility. The brokers have a motivation to stay on top of everything knowing their licenses are at stake.

SEN. BENEDICT asked **SEN. TOEWS** if he is a licensed real estate broker and **SEN. TOEWS** stated "yes". **SEN. BENEDICT** then asked **SEN. TOEWS** if he has any qualms whatsoever about the \$5,000 fine, the due process and the inadvertent, a problem between a disgruntled buyer and a broker or salesperson. **SEN. TOEWS** answered "no" he doesn't. His problem originally was keeping government out of everything, but doesn't believe the amount of money talked about, even up to the \$5,000, would be a major problem and that person would probably deserve the fine.

SEN. WILLIAM CRISMORE is concerned about the other bill coming out achieving the same results. Will the legislators be confusing and defusing one and the other and questioned **Mr. Shontz**, who stated the Governor's Task Force is trying to standardize the administering process of all boards in the Department of Commerce. There will be activity in this area as the last time that particular bill was introduced it was over 100 pages long and it addressed all boards.

SEN. BENEDICT had one more question for **Ms. Allen**. Could personalities among competitors result in the fining being used as "a tool to beat up on your competitor"? **Ms. Allen** responded in the six and a half years of being on the board she has never seen that happen. She stated if an individual had a terrible dislike for another individual, normally that individual (board

member) would abstain or leave the room and be uninvolved in the due process. She has not seen it to be a problem and doesn't anticipate it to be one, given the makeup of the board.

SEN. BENEDICT asked **Ms. Allen** if her group would be amenable to have the agency that will be regulating boards in the future, set up an independent group that is outside the boards to hear these complaints and decide whether or not they have merit. He would like to see it removed one step further from the competitiveness of the profession itself to remove any possibility of getting into personalities. The independent board would take the final decision from the Board of Realty Regulations' hands when being heard by an independent authority. **Ms. Allen** stated the board hadn't considered this and is uncertain if there would be any opposition. When the Attorney General's office assigns a hearings examiner, their board is not involved and does not know the outcome until it comes back to them on paper form. **SEN. BENEDICT** asked if the board makes the final decision and **Ms. Allen** stated they do make the final decision. **SEN. BENEDICT** maintained somebody else should make the final decision. **Ms. Allen** stated that had never been addressed. She gave an example of a bill introduced the last session from the Belgrade area that has caused a lot of grief and they have received numbers of complaints; however, little can be done about the problem unless the board suspends the individuals licenses or revokes their licenses, essentially putting them out of business for that violation.

SEN. SPRAGUE asked **Ms. Allen** to clarify that statement about the Belgrade bill. The bill had not been requested by anyone inside the profession. It was brought up totally by an outsider of the profession.

SEN. SPRAGUE stated one of the reasons he is no longer a realtor is because the liability outweighed the benefits. The board and/or salespeople are constantly concerned about their profession and are pretty well self-disciplined. The biggest problem they have is being a bit over zealous because they tend to be aggressive people anyway. **SEN. SPRAGUE** sees this as a tool to discipline that individual early in his or her career so later on no major or minor mistakes will be made and asked **SEN. TOEWS** if this was the case, who stated that is correct and the broker is responsible for that salespersons actions.

SEN. FORRESTER has one final question for **SEN. TOEWS**. It appears that there is some conflict between **SEN. TOEWS** and **Mr. Shontz** on the fiscal note. The fiscal note states there will be an average of two per year, \$1,000 per incident and he is questioning why, if they are going to have two disciplinary actions that net \$1,000 fine each, do we need the bill and **SEN. TOEWS** stated there has been much concern by the committee. He would like to have this fiscal note researched before executive action takes place. He understood that some of the assumptions are from the Board of Realtors who have had to give the Governor's budget office these

assumptions. For two actions a year, **SEN. FORRESTER** cannot see the need for this bill.

Informational Testimony:


Informational testimony has already been given by **Mr. Shontz**.

Closing by Sponsor:

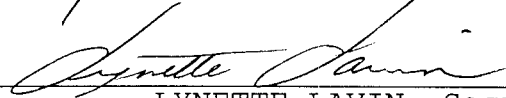
SEN. TOEWS stated initially he wondered if it was worth the effort to pursue this bill. He went to the realtors in his area, and he doesn't speak for the whole Realtor's Association because he doesn't think the whole association would be unanimously behind any particular thing. The realtors in his area believed there was a real need to do something small (not so massive) to protect the consumer. He maintains this is an honest attempt to protect the consumer. He states it is more than just regulating an industry. He considers it as a consumer protection bill and is willing to work with the committee and get an answer for **SEN. FORRESTER's** question. He is not for more regulation. If there is a major problem with the \$5,000, that can be changed, give the board a tool to use for the small infractions, while they are small, before they get away from us.

ADJOURNMENT

Adjournment: The meeting adjourned at 8:55 a.m.



SEN. JOHN HERTEL, Chairman



LYNETTE LAVIN, Secretary

JH/11

ROLL CALL

SENATE COMMITTEE Business & Industry DATE 1-10-95

[illegible]

Attach to each day's minutes

SENATE NO. 1DATE 1-10-95BILL NO. SB 12

WITH THE INTRODUCTION OF SENATE BILL 12, THE BOARD OF REALTY REGULATION IS PROPOSING THE ADDITION OF ADMINISTRATIVE FINING AUTHORITY TO THE POSSIBLE DISCIPLINARY SANCTIONS IMPOSED BY THE BOARD. THIS LEGISLATION HAS BEEN ACCEPTED BY THE GOVERNOR AS PART OF HIS EXECUTIVE LEGISLATION.

CURRENTLY, THE BOARD OF REALTY REGULATION IS LIMITED IN THE LICENSE DISCIPLINE IT MAY IMPOSE FOR VIOLATION OF THE REAL ESTATE LICENSING LAW. UNDER CURRENT LAW, IT MAY SUSPEND OR REVOKE A REAL ESTATE LICENSE. THE ADDITION OF ADMINISTRATIVE FINING AS A METHOD OF RESOLUTION TO CONTESTED CASES ASSISTS THE LICENSEE AND THE BOARD IN MORE ACCURATELY DISCIPLINING LICENSEES FOR TECHNICAL VIOLATIONS OF THE REAL ESTATE LICENSING ACT. IT ALLOWS GREATER FLEXIBILITY IN IMPLEMENTING DISCIPLINE AND RESULTS IN SWIFT RESOLUTION TO CONTESTED CASES. THE PURPOSE OF ANY DISCIPLINARY PROCESS IS PROTECTION OF THE PUBLIC. THE DETERRENT EFFECT OF AN ADMINISTRATIVE FINE HAS BEEN AND IS AN IMPORTANT TOOL IN ENFORCING COMPLIANCE WITH THE VARIOUS LICENSING ACTS REGULATING THE PROFESSIONS.

EACH YEAR THERE ARE A NUMBER OF COMPLAINTS BROUGHT BEFORE THE BOARD WHICH REQUIRE SOME SORT OF ACTION, BUT DO NOT WARRANT THE SEVERITY OF A SUSPENSION OR REVOCATION OF LICENSE. SOME EXAMPLES OF COMPLAINTS UTILIZING ADMINISTRATIVE FINING AS A RESOLUTION MIGHT BE A LICENSEE WHO ~~VIOLATES~~ ^{VIOLATES advertising Regulation} ~~PLACES A FINE~~ ^{THE} ~~AD~~ MAY AGREE TO A \$50 FINE RATHER THAN THE EXPENSE OF A CONTESTED CASE. A LICENSEE WHO HAS BEEN FOUND TO HAVE MISREPRESENTED THE ~~QUALITY~~ ^{THE} ~~OF A PROPERTY~~ THEY

LISTED WOULD BE ORDERED TO PAY A \$750 FINE RATHER THAN A SUSPENSION OF THEIR LICENSE FOR 30 DAYS. THE SITUATION MAY ARISE THAT A VIOLATION IS INDEED SEVER ENOUGH TO WARRANT A SUSPENSION OF A LICENSE, BUT MITIGATING CIRCUMSTANCES EXIST AND THE LICENSEE HAS TAKEN STEPS TO CORRECT THE PROBLEM AND RESOLVE THE CONFLICT. AFTER A HEARING THE BOARD MAY WISH TO SUSPEND THE RECOMMENDED LICENSE SUSPENSION AND INSTITUTE A FINE. THIS WOULD ALLOW THE BOARD TO RECOGNIZE THE LICENSEES ATTEMPTS TO CORRECT THE PROBLEM WHILE MAINTAINING A RECORD OF THE ACTION AND THE MORE SEVER DISCIPLINE IMPOSED.

THE \$5,000 FINING LIMIT IS CHARACTERISTIC OF THE LIMITS ESTABLISHED BY OTHER REAL ESTATE REGULATORY AUTHORITIES. MOST JURISDICTIONS HAVE SET \$5,000 TO \$10,000 AS A MAXIMUM FINE. AN ACT WARRANTING A FINE GREATER THAN \$5,000 SHOULD PROBABLY BE RESOLVED THROUGH OTHER DISCIPLINARY ACTION. TWENTY-NINE STATES AND THE DISTRICT OF COLUMBIA HAVE ADDED FINING AUTHORITY AS A MEANS OF DISCIPLINARY ACTION IN THE RESOLUTION OF REAL ESTATE LICENSING LAW VIOLATIONS. ADMINISTRATIVE FINING AUTHORITY HAS BEEN GRANTED BY THE MONTANA LEGISLATURE TO EIGHT PROFESSIONAL AND OCCUPATIONAL LICENSING BOARDS OVER THE YEARS. THOSE PROFESSIONS RANGE FROM MEDICAL EXAMINERS TO OUTFITTERS.

THE USE OF ADMINISTRATIVE FINING COULD ONLY OCCUR AS A RESULT OF AN ADMINISTRATIVE HEARING. SENATE BILL 12 WOULD NOT ELIMINATE THE ADMINISTRATIVE PROCEDURES ACT OR THE NECESSITY OF A HEARING BEFORE AN INDEPENDENT HEARING EXAMINER TO DETERMINE IF A VIOLATION

EXHIBIT 1DATE 1-10-95SB 12

OCCURRED. IT IS ONLY AFTER SUCH A FINDING THAT A FINE WOULD BE IMPOSED.

THE FISCAL IMPACT TO THE BOARD OF REALTY REGULATION, AS SHOWN IN THE ATTACHED FISCAL NOTE IS ZERO. THE BOARD ALREADY BARES THE COST OF A CONTESTED CASE AND THE RESOLUTION OF THAT CASE. THEY WOULD BE ADDING A DISCIPLINARY ALTERNATIVE, NOT A NEW PROCESS TO DETERMINE VIOLATIONS. THE ADMINISTRATIVE FINES GENERATED WOULD BE DEPOSITED IN THE STATE GENERAL FUND. THE BOARD CURRENTLY PAYS FOR THE CONTESTED CASE EXPENSES FROM THEIR LICENSING REVENUE AND WOULD CONTINUE TO DO SO ONCE ADMINISTRATIVE FINING AUTHORITY WAS IN PLACE.

I WOULD APPRECIATE YOUR SUPPORT OF SENATE BILL 12 AND I WILL BE HAPPY TO ANSWER ANY QUESTIONS YOU MAY HAVE.

OFFICE OF BUSINESS & INDUSTRY
EXHIBIT NO. 1
DATE 1-10-95
BILL NO. 12

TESTIMONY OF MARCIA ALLEN
MEMBER BOARD OF REALTY REGULATION —
(6½ years)
Licensed real estate broker (14 years)

At last sessions leg. passed a bill to make it unlawful to advertise property without a listing agreement. For this and other minor violations there should be an alternative other than suspension or revocation.

Any serious violation would warrant more

SENATOR HARP TOWNS

 $\langle \square \rangle$ [illegible]

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY