**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE REAL ESTATE COMMISSION**

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| JOSE M. GUARDERAS, | ) | OAH No. 05-0563-REC |
| | ) | Commission No. 3054-05-008 |
| Applicant. | ) | |
| | ) | |

# Decision and Order

## I. Background

This is an administrative proceeding before the Alaska Real Estate Commission in which Jose Guarderas seeks to obtain an initial license as a real estate salesperson. By Statement of Issues, the commission denied Mr. Guarderas a license under AS 08.88.171(c) because he is under indictment for felony driving while intoxicated (DWI). Guarderas requested a hearing. An evidentiary hearing took place on August 31, 2005. The text of this document is the proposed decision to the commission; the commission's final disposition of the matter will be recorded at the end of the document. The administrative law judge recommends that the Real Estate Commission deny Mr. Guarderas's license application.

## II. Facts

Mr. Guarderas, division licensing examiner Nancy Harris, and division investigator Margo Mandel testified under oath and subject to cross-examination at the hearing. The division's exhibits A, B, D and E were admitted as evidence at the hearing. References are made in the fact findings to the audiocassette tapes comprising the record made at the hearing, which are not transcribed. The following findings are based on the record in this case. The material facts in this case are not disputed.

1. Jose Guarderas[1] applied for licensure as a real estate salesperson in Alaska through an application dated March 10, 2005. He identified his employing broker as Greg Gunnarson with Prudential Jack White Vista Real Estate. Question 1 of the Personal Screening Questions on the

[1] The applicant is also known as Jose Martin Guarderas-Bustamante. Cross-exam of Guarderas, Exhibit B, p. 3. Three different individuals in Alaska are reportedly known as Jose M. Guarderas.

application asks "Are you under indictment for, or have you ever been convicted of, a felony?" Mr. Guarderas answered "yes." His written explanation attached to the application stated "In reference to Yes on Question 1 . I was indicted of a felony DUI around 2003 but never convicted. . . . [sic]" (Direct and cross-exam of Guarderas, Direct exam of Harris, Direct and cross-exam of Mandel, Exhibit A)

2. At the time Mr. Guarderas submitted his application, he was under indictment for felony driving while under the influence of alcohol in violation of AS 28.35.030(n). The one-count indictment was still pending at the time of the hearing in this case. It alleges that Mr. Guarderas committed his third DWI within the ten-year statutory window of AS 28.35.030(n), rendering the third offense a class C felony. (Cross-exam of Guarderas, Direct exam of Mandel, Exhibit A, pp. 13, 49, Exhibit B, pp. 5-6, Exhibit E)

3. The division of occupational licensing conducted an investigation of Mr. Guarderas's license application based on his affirmative response to Question 1 in the application. The division determined that Mr. Guarderas has two prior DWI convictions in Alaska: Case No. 3AN-98-9013 CR in 1998 and Case No. 3AN-00-1162 CR in 2000. On December 15, 2002, Mr. Guarderas was again arrested for DWI. The division's investigation established that he was initially charged by information[2] and later indicted by a grand jury on January 13, 2004, in Case No. 3AN-S02-11587 CR. (Direct exam of Harris, Direct exam of Mandel, Exhibits A, B, E)

4. The Real Estate Commission initially considered Mr. Guarderas's application through a mail ballot. A decision on the application was tabled, however, until the commission's next regularly scheduled meeting in June 2005. The application was discussed and denied by the commission on June 14, 2005. A June 17, 2005, letter to Mr. Guarderas from Sharon Walsh, executive administrator of the Real Estate Commission, informed him that his application was denied based on AS 08.88.171(c). The letter, which constitutes a statement of issues under AS 44.62.370, advised Mr. Guarderas that the division's investigator determined he was "under indictment for a felony, Driving While Intoxicated." Mr. Guarderas timely appealed the decision. On August 22, 2005, the division amended the statement of issues in this case. (Direct exam of Harris, Direct exam of Mandel, Exhibit D)

[2] The information included allegations addressing three counts: Felony Driving Under the Influence (AS 28.35.030(n)), Driving While License Canceled, Suspended, or Revoked (AS 28.15.291(a)(1)), and Providing False Information to a Peace Officer (AS 11.56.800(a)(1)).

## III. Discussion

### *A. The legal requirements for licensure*

Mr. Guarderas has never held an Alaska real estate license. Therefore, under the Administrative Procedure Act he has the legal burden to establish by a preponderance of the evidence that he is qualified for a license.[3] In general, a preponderance of the evidence means something is more likely than not true. That is, there is a greater than 50 percent chance that it is true.[4]

AS 08.88.171(c) sets out several mandatory criteria for licensure as a real estate salesperson. One criterion is that the applicant "is not under indictment for forgery, theft, extortion, conspiracy to defraud creditors, or any other felony involving moral turpitude." The single issue in this case is a legal one: whether an individual indicted for felony DWI (violation of AS 28.35.030(n)) is under indictment for a "felony involving moral turpitude" as the term is used in AS 08.88.171(c).[5] Neither AS 08.88 nor its implementing regulations at 12 AAC 64 define "moral turpitude," and no Alaska case addresses whether felony DWI is a "felony involving moral turpitude" in any context. Professions other than real estate that are regulated under AS 08 are subject to the moral turpitude licensing criterion, but the term is likewise undefined.[6]

### *B. Whether felony driving while under the influence is a crime of moral turpitude*

In addressing this issue, the division argues that Mr. Guarderas's third DWI offense within a five-year period, a felony, is a crime "dangerous to life and limb," a *malum in se* crime (wrong in itself), and, therefore, a crime of moral turpitude. It cites the following language from the California case of People v. Forster:

> Having suffered at least three previous convictions for driving under the influence, a person who has violated [the felony DWI law] is presumably aware of the life-threatening nature of the activity and the grave risks involved. Continuing such activity despite the knowledge of such risks is indicative of a "conscious indifference or 'I don't care attitude' concerning the ultimate consequences" of the activity from which one can certainly infer a "depravity in the private and social duties which a man owes to his fellowmen, or to society in

---

[3] See AS 44.62.460(e)(2).

[4] See Dairy Queen of Fairbanks, Inc. v. Travelers Indemnity Co. of America, 748 P.2d 1169, 1170-72 (Alaska 1988).

[5] It is not assumed that Mr. Guarderas will be convicted of felony DWI. The portion of AS 08.88.171(c) at issue focuses on whether the individual is "under indictment" for enumerated felonies "or any other felony involving moral turpitude."

[6] E.g., AS 08.24.110 (collection agencies); AS 08.42.090 (morticians); AS 08.80.261 (pharmacists); AS 08.87.110 (real estate appraisers). See also AS 14.20.030 (teachers).

> general, contrary to the accepted and customary rule of right and duty between man and man."[7]

Mr. Guarderas admits the existence of his indictment for felony DWI but contends, with little supporting argument, that the crime is not one of moral turpitude and, therefore, no basis exists for denying him a real estate salesperson license.

1. General meaning of "moral turpitude"

The division correctly notes in its brief that "the phrase 'crime involving moral turpitude' depends somewhat on the setting in which the phrase appears."[8] Accordingly, the ultimate question in this case will be the meaning of that term within the very particular context of AS 08.88.171. Nonetheless, it will be useful to review the range of meanings that have been attached to the term in other contexts.

Although the context is different and the definition does not control AS 08.88, Alaska statutes do contain a definition of "felony involving moral turpitude" at AS 15.60.010(8). Under AS 15.05.030(a), "[a] person convicted of a crime that constitutes a felony involving moral turpitude under state or federal law may not vote in a state, federal or municipal election from the date of the conviction through the date of the unconditional discharge of the person." AS 15.60.010(8) provides the following definition applicable to all of Title 15:

> (8) "felony involving moral turpitude" includes those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault ….

The provision goes on to list dozens of crimes of many varieties, including both violent and nonviolent crimes, intentional and criminally reckless conduct, and crimes of involving both physical harm and other forms of misconduct such as dishonesty. DWI does not appear on the list, but notably, the list is non-exclusive. For the purpose of Mr. Guarderas's case, the definition at AS 15.60.010(8) is significant because it defines the term to include crimes that are immoral or "wrong in themselves" (*malum in se* crimes). *Malum in se* (wrong in itself) is used in the law to contrast to *malum prohibitum* (a wrong that is not inherently evil, but that has been made wrong by being prohibited by law).[9]

This equation of "moral turpitude" with *malum in se* is sometimes found in other legal authorities, though the correspondence may not be exact. Alaska courts have held that a crime

[7] 35 Cal. Rptr. 2d 705, 712 (Cal. App. 1994).
[8] 1 LaFave & Scott, Substantive Criminal Law § 1.6(c) (2003).
[9] Kinney v. State, 927 P2d 1289, 1292 (Alaska App. 1996).

is *malum in se* if it involves moral turpitude,[10] a holding that may suggest, but does not require, that the reverse would also be true. Clearly, however, if this case were governed by the statutory definition in Title 15, the felony for which Mr. Guarderas is under indictment would be deemed a crime of moral turpitude. It is beyond argument that repeatedly driving while intoxicated is wrong in itself, not wrong merely because it is against the law.

Nonetheless, it does not appear that in every context the phrase "moral turpitude" would necessarily encompass a drunk driving offense. In Alaska cases, the phrase "moral turpitude" has been used for crimes fraud, dishonesty, violence, and sexual assault.[11] The term is broadly defined by Black's Law Dictionary as "[c]onduct that is contrary to justice, honesty, or morality."[12] A legal encyclopedia describes it more specifically as follows:

> [I]n general, shameful wickedness – so extreme a departure from ordinary standards of honest, good morals, justice, or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which one person owes to another, or to society in general, contrary to the accepted and customary rule of right and duty between people.[13]

New Jersey's Supreme Court uses a definition similar to the immediately preceding block quote, focusing on "baseness, vileness, or depravity," though noting "the elasticity of the phrase and its necessarily adaptive character, reflective at all times of the common moral sense prevailing throughout the community."[14]

These more extreme definitions of moral turpitude lend some support to Guarderas's contention that the term need not encompass felony DWI. Indeed, most courts hold that a first DWI for an individual is not a crime of moral turpitude.[15]

Depending on the context, however, the graver DWI infractions have often been considered a crime of moral turpitude. A 1938 Oregon case held that a second conviction for

---

[10] See Kinney v. State of Alaska, 927 P.2d 1289, 1292 (Alaska App. 1996). See also Hentzner v. State of Alaska, 613 P.2d 821, 826 (Alaska 1980).

[11] E.g., Disciplinary Matter Involving Schuler, 818 P.2d 138, 140, 144 (Alaska 1991) (misdemeanor theft is conduct involving moral turpitude); Matter of Webb, 602 P.2d 408, 410 (Alaska 1979) (accessory after the fact of first degree murder is conduct involving moral turpitude); Kenai Peninsula Borough Board of Education v. Brown, 691 P.2d 1034 (Alaska 1984)(sexual immorality); Matter of Preston, 616 P.2d 1 (Alaska 1980)(felony distribution of cocaine).

[12] Black's Law Dictionary, p. 1026 (7th ed. 1999). See also Kinniry v. Professional Standards and Practices Commission, 678 A.2d 1230, 1234 (Pa. 1996)("conduct done knowingly contrary to justice, honesty or good morals").

[13] 50 Am. Jur. 2d Libel and Slander § 165, at 454 (1995).

[14] Matter of the License of Fanelli, 803 A.2d 1146, 1153 (N.J. 2002).

[15] See, e.g., Moore v. State of Texas, 143 S.W.3d 305, 314 (Ct. App. Tex. 2004).

driving a vehicle while intoxicated is a moral turpitude crime for purposes of attorney licensing.[16] A DWI conviction based on conduct that resulted in the death of a human being has been characterized as a crime of moral turpitude.[17] Notably, a felony DWI conviction occurring within seven years of three other DWI convictions has been held to be a crime of moral turpitude.[18] In addition, a DWI conviction has been held to be a crime involving moral turpitude for impeachment purposes in a criminal trial.[19]

Courts have recognized the long held view that moral turpitude is an adaptive term "to be at all times accommodated to the sense of the community."[20] Many courts outside Alaska have addressed the term to include an element of reckless conduct that is contrary to accepted rules of morality and the duties owed other persons.[21]

In short, the phrase "moral turpitude" is sufficiently flexible that the plain language of AS 08.88.171(c) leaves some ambiguity as to whether it encompasses felony DWI. Where the issue has been addressed in other contexts and in other jurisdictions, however, it has been most common for courts to regard the kind of repeat drunk driving involved in Alaska's felony DWI statute to be a crime of moral turpitude.

2. The specific language of AS 08.88.171

When the legislature referred to moral turpitude in the real estate salesperson licensing statute, it listed four examples. The list is non-exclusive, but it is important to note what it contains: the four examples are "forgery, theft, extortion, [and] conspiracy to defraud creditors." All four are crimes of dishonesty. It seems possible, therefore, that the legislature's primary concern in placing the restriction on licensure at issue in this case was to prevent licensing of those who might cheat their clients. No legislative history has been cited to the ALJ to shed any additional light on the purpose of this provision, however.

An applicant such as Guarderas, seeking to restrict the disqualifying crimes in the licensing statute to crimes involving dishonesty, could argue for application of the old legal

---

[16] In re Enright, 85 P.2d 359, 316 (Oregon 1938).
[17] Kinney v. State of Alaska, 927 P.2d 1289, 1292 (Alaska App. 1996).
[18] Lewis v. Mayle, 391 F.3d 989, 998 n.2 (9th Cir. 2004).
[19] Bunn v. State of Oklahoma, 561 P.2d 969, 971-72 (Okla. 1977)(driving under the influence of alcohol described: "such an activity is inherently dangerous to the public in general and such a crime shows a lack of personal integrity and a lack of concern for and respect of the person of others and their property")
[20] Du Vall v. Board of Medical Examiners of Arizona, 66 P.2d 1026, 1031 (Ariz. 1937)(citing cases in California, Oregon, and South Dakota).
[21] See Padilla v. Gonzales, 397 F.3d 1016, 1019-21 (7th Cir. 2005); Knapik v. Ashcroft, 384 F.3d 84, 87-90 (3rd Cir. 2004).

doctrine of *ejusdem generis*. This doctrine, whose name means "of the same kind," is an advisory principle in statutory construction that can be summarized as follows:

> Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.[22]

For example, if a statute allows a parks agency to sell "gravel, sand, earth or other material" from state parkland, a court will likely to interpret "other material" to encompass only material of the same general type, not every sort of item that might be found within a park.[23] Translated to this case, *ejusdem generis* would suggest that "any other felony involving moral turpitude" should be read to encompass only felonies similar to the four crimes of dishonesty listed just beforehand.

Mechanical reliance on this advisory principle would ignore other contextual clues, however. First, if the legislature had meant to restrict the interpretation of the licensing restriction to crimes of dishonesty, it could have done so with breathtaking simplicity: it could simply have referred to "any other felony involving dishonesty" instead of "any other felony involving moral turpitude." That it used the broader term suggests that, at a minimum, it sought to give the implementing commission discretion to interpret the restriction more broadly. Second, counterbalancing the canon cited above, there is a canon of statutory interpretation that one should "construe[s] a statutory term in accordance with its ordinary or natural meaning."[24] The ordinary meaning of "moral turpitude" certainly encompasses some crimes, such as premeditated murder, that are outside the realm of dishonesty and that it is difficult to imagine the legislature intending to exclude. The use of *ejusdem generis* in this context leads to an implausible, overly narrow construction, where even a serial axe murderer could be licensed as a real estate salesman. Third, it is notable that the legislature added the word "any" before the phrase "other felony involving moral turpitude." In Harrison v. PPG Industries, Inc.,[25] presented with a similar statute where Congress had chosen to say "any other" instead of other, the United States Supreme Court characterized the use of "any" as "expansive language," overcoming the principle of *ejusdem generis*. For these three reasons, the better approach in this context is to deem *ejusdem generis* not to be the controlling principle in interpreting this statute.

---

[22] 2A Singer, Statutes and Statutory Construction § 47:17 (rev. 2000). The principle is merely "an aid" to deciphering ambiguous laws, and in some applications has been criticized as "vapid legalism." Id. at § 47:18. It has, however, been used as a guide by the Alaska Supreme Court. Homer Elec. Ass'n v. Alaska Public Utilities Comm., 756 P.2d 874, 879 (Alaska 1988).

[23] See Sierra Club v. Kenney, 429 N.E.2d 1214 (Ill. 1981).

[24] FDIC v. Meyer, 114 S. Ct. 996, 1001 (1994).

[25] 446 U.S. 578, 588-89 (1980).

3. The commission's discretion

As the agency charged with applying AS 08.88.171, the Real Estate Commission has some discretion in interpreting a statutory term not defined by the legislature. In general, a reviewing tribunal will accord some deference to the judgment "to the interpretation given [a] statute by the officers or agency charged with its administration."[26] The commission brings to this task its particular knowledge of the real estate profession and of the sort of regulation that makes sense in that industry.

The commission may wish to consider the policy arguments for and against deeming felony DWI to be a disqualifying "felony involving moral turpitude" within the meaning of AS 08.88.171(c). On the one hand, for example, the commission might feel that the public needs primarily to be protected from dishonesty or potential violence by real estate practitioners, and that protection from poor driving is less compelling in the context of real estate sales. On the other hand, the commission might observe that clients are sometimes chauffeured by their salesperson, or that felony DWI is indicative of general irresponsibility that would be dangerous to clients, and might feel that it indeed ought to be a disqualifying matter. The commission has a choice to make in the interpretation of this statute, and it is legally free to choose either interpretation, guided by its special knowledge of the profession.

In the past, the commission has interpreted the moral turpitude criterion in AS 08.88.171(c) to extend beyond the narrow context of dishonest conduct. In Matter of Jackson, the commission denied a real estate salesperson license based in part on the fact that the applicant was convicted for felony crimes "involving moral turpitude."[27] The crimes of which the applicant was convicted related to assault on an Alaska State Trooper with the trooper's gun. To interpret the criterion also to encompass felony DWI would be consistent with the commission's prior reading of this statute, but would broaden it further to encompass an additional crime.

4. Recommended interpretation

In DWI cases under Alaska's criminal code (AS 11), courts have recognized the moral sense of the community and the duties owed by an individual to the community. The Alaska

[26] Pan Am. Petroleum Corp. v. Shell Oil Co., 455 P.2d 12, 22 (Alaska 1969) (Rabinowitz, J.); see also, e.g., Northern Timber Corp. v. State, 927 P.2d 1281, 1284 n.10 (Alaska 1996); Gulf Oil Corp. v. State, Dep't of Revenue, 755 P.2d 372, 378 n.19 (Alaska 1988); In re Warbelow's Air Ventures, Inc., No. 16-OTA-97 (Office of Tax Appeals, April 7, 1998), slip. op. at 4 n.3.

[27] Matter of Jackson, Case No. 3054-04-001 (March 14, 2005, Board Decision).

Court of Appeals cited the following provision from the Model Penal Code in Wright v. State of Alaska:

> [T]here is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly as no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct.[28]

It is common knowledge in society that an individual is prohibited from driving a vehicle when he or she is impaired due to the influence of alcohol.

Alaska courts also hold that individuals who drive while under the influence of alcohol engage in reckless conduct from which the public needs to be protected.[29] In Lupro v. State of Alaska, the court held that a person who drives under the influence of alcohol shows "a reckless disregard of consequences, a needless indifference to the rights and safety and even the lives of others."[30] In Coles v. State of Alaska, the court held that a felony DWI conviction in Alaska based on multiple prior DWI convictions justifies an individual's isolation from society through incarceration in order to protect the public.[31]

The crime Mr. Guarderas is charged with through the indictment is one of commission. He is indicted for felony DWI premised in part upon the existence of two prior DWI convictions. In the context of licensing him for a profession in which he will, at times, be responsible for the safety of his clients, such a repeated disregard for the lives of others should be regarded as moral turpitude. In the view of the administrative law judge, the best interpretation of the licensing requirements in AS 08.88.171(c) is that an individual under indictment for felony DWI is under indictment for a "felony involving moral turpitude," and is therefore ineligible for a real estate salesperson's license so long as the indictment is pending.

---

[28] 656 P.2d 1226, 1227-28 (Alaska App. 1983).

[29] See, e.g., Lupro v. State of Alaska, 603 P.2d 468, 475 (Alaska 1979)(an intoxicated driver is a reckless driver); Comeau v. State of Alaska, 758 P.2d 108, 112, 117 n. 13 (Alaska App. 1988)("[A] person who drives while actually impaired by alcohol is per se reckless.").

[30] 603 P.2d at 475.

[31] 64 P.3d 149, 152 (Alaska 2003).

## IV. Conclusion

Mr. Guarderas did not meet his burden to establish that he is entitled to a real estate salesperson license. His pending indictment for felony DWI prevents him from meeting the criteria for a license under AS 08.88.171(c). The administrative law judge recommends that the commission deny him licensure.

DATED this 3rd day of January, 2006.

*Signed*
David G. Stebing
Administrative Law Judge

# Adoption

The undersigned, on behalf of the Real Estate Commission and in accordance with AS 44.64.060(e)(1), adopts this Decision and Order as the final administrative determination in this matter. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. Civ. P. 602(a)(2) within 30 days of the date of this decision.

DATED this 26th day of January, 2006.

By: *Signed*
Signature
Barbara Ramsey
Name
Chair
Title

[This document has been modified to conform to the technical standards for publication.]