

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

In the Matter of )

KAMERON DRAPER )

OAH No. 12-0186-REC  
Agency No. 2012-000303

**DECISION**

**I. Introduction**

Kameron Draper applied for an associate real estate broker's license. The Real Estate Commission (Commission) denied his application because he had a felony conviction for a DUI<sup>1</sup> within the seven year time period immediately preceding his application. Mr. Draper requested a hearing to challenge the denial of his application.

Prior to hearing, the Division of Corporations, Business and Professional Licensing (Division) moved for summary adjudication, which was denied. The basis for that denial, as discussed below, was that there was a factual issue regarding whether Mr. Draper's felony DUI affected his ability to practice as an associate real estate broker competently and safely. This matter then proceeded to an evidentiary hearing on October 9, 2012.

At hearing, Mr. Draper met his burden of proof, by a preponderance of the evidence, and established that his 2008 felony DUI conviction did not affect his ability to practice as an associate real estate broker competently and safely. The Commission should therefore exercise its discretion to approve his application for an associate real estate broker's license.

**II. Facts**

Mr. Draper has been a licensed real estate salesperson since November 2006.<sup>2</sup> Under broker supervision, he has actively practiced the real estate profession in the Anchorage area since that time.

In 2003, prior to his licensure, Mr. Draper was convicted of two separate misdemeanor DUI offenses. The 2003 offenses were committed very close in time to each other. In June 2008, he was again arrested for a DUI. He was charged with and convicted of a Class C felony, operating a motor vehicle while under the influence of alcohol in violation of Alaska Statute

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<sup>1</sup> Operating a motor vehicle while under the influence of alcohol in violation of Alaska Statute 28.35.030(n), a Class C felony.

<sup>2</sup> Draper Ex. 3.

28.35.030(n), in September 2008. Mr. Draper permanently lost his driver's license as a result of his third conviction.<sup>3</sup>

Mr. Draper has not had a drink since his June 2008 DUI arrest. After his 2008 felony DUI conviction, Mr. Draper completed a year-long alcohol treatment program at Clitheroe Center. He has engaged in both group and individual counseling. He was on probation for a three year period, during which he was subject to both alcohol and drug testing. He successfully completed his probation without having any probation violations. He does not drive and has not been arrested for driving without a driver's license. He does not have any criminal convictions involving dishonesty.<sup>4</sup>

The Division's investigator was not aware of any complaints filed against Mr. Draper with the Commission. Nor did her research disclose any criminal convictions for Mr. Draper other than his three DUIs.<sup>5</sup>

Mr. Draper applied to renew his real estate salesperson license in 2010. He disclosed his felony conviction on his application, and his license was renewed.<sup>6</sup> As of March 29, 2012, Mr. Draper's real estate salesperson license was current through January 31, 2012.<sup>7</sup>

Mr. Draper's real estate practice is primarily office based. He estimates that he represents 70 percent sellers and 30 percent buyers, and that he spends 90 percent of his time on the telephone and with paperwork. He occasionally will meet clients at a property. He does not drive the clients to the property. Nor does he drive himself; he arranges for another person to drive him, who is most often his wife.<sup>8</sup>

Mr. Draper applied for an associate real estate broker's license on January 30, 2012. The application disclosed his felony conviction.<sup>9</sup> The Commission has initially denied his application due to his felony conviction, stating that "seven years had not passed from the date of your felony conviction and therefore you are not eligible at this time to upgrade your license to an associate broker."<sup>10</sup> Mr. Draper has exercised his right to seek reevaluation of his application on the basis of a full evidentiary hearing.

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<sup>3</sup> Draper testimony; Division Ex. 3.

<sup>4</sup> Draper testimony.

<sup>5</sup> Jennifer Wirawan testimony.

<sup>6</sup> Draper Exs. 1, 2.

<sup>7</sup> Draper Ex. 3.

<sup>8</sup> Draper testimony.

<sup>9</sup> Division Ex. 1.

<sup>10</sup> Division's Exs. 4, 5.

### III. Discussion

The denial of Mr. Draper's application for an associate real estate broker's license presents two issues pertaining to the licensing statute, AS 08.88.171(b). This section provides that an associate real estate broker may not be:

under indictment for or seven years have elapsed since the person has completed a sentence imposed upon conviction of a felony or other crime that, in the judgment of the commission, affects the person's ability to practice as an associate real estate broker competently and safely or upon conviction of forgery, theft, extortion, conspiracy to defraud creditors, or fraud[.]<sup>[11]</sup>

The first issue is whether the statute operates as an automatic bar to licensing an applicant who, like Mr. Draper, has been convicted of a felony, regardless of the type of felony, within the seven year period preceding his application. The Division moved for summary adjudication in its favor based upon this theory.<sup>12</sup> The Division's motion for summary adjudication was denied, holding, as a matter of law, that the licensing statute does not automatically prohibit a person, who had been convicted of a felony within seven years of the date of his application, from obtaining a license as an associate real estate broker. Instead, in order to preclude licensing, the felony conviction must be one that, in the Commission's judgment, impacts the ability to practice safely and competently. The applicable portions of the order denying summary adjudication are repeated below.

The second issue arises because summary adjudication was denied. It is a factual issue: whether Mr. Draper's 2008 felony DUI conviction affects his "ability to practice as an associate real estate broker competently and safely." As discussed below, it does not.

#### A. Summary Adjudication

The Division argued that, as a purely legal matter, Mr. Draper's application should be denied because the licensing statute for associate real estate brokers, AS 08.88.171(b), mandates that an applicant cannot receive an associate real estate broker's license when he or she has been convicted of a felony, regardless of the type of felony, within seven years of the date of application. Mr. Draper, while agreeing that he had been convicted of a felony within seven years of the date of his application, argued that the statute did not preclude licensing for any felony conviction that occurred within seven years of the date of his application, but instead only for felony convictions which "affect[] his ability to practice as an associate real estate broker

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<sup>11</sup> AS 08.88.171(b); § 5 ch 51, SLA 2007.

<sup>12</sup> Summary adjudication is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. *See, e.g., Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

competently and safely” and convictions for ““forgery, theft, extortion, conspiracy to defraud creditors, and fraud.””<sup>13</sup>

### 1. Applicable Statute and Legislative History

Alaska Statute 08.88.171(b) contains the licensing requirements for associate real estate brokers. In 2005, the statute contained a requirement that an associate real estate broker could not be “under indictment for, or [that] five years have elapsed since the person has completed a sentence imposed upon conviction of, forgery, theft, extortion, conspiracy to defraud creditors, or any other felony involving moral turpitude.”<sup>14</sup> In 2007, the Alaska legislature amended the statute to instead read that an associate real estate broker could not be:

under indictment for or seven years have elapsed since the person has completed a sentence imposed upon conviction of a felony or other crime that, in the judgment of the commission, affects the person’s ability to practice as an associate real estate broker competently and safely or upon conviction of forgery, theft, extortion, conspiracy to defraud creditors, or fraud[.]<sup>[15]</sup>

The underlying legislation, House Bill 205, was introduced at the request of the Alaska Association of Realtors.<sup>16</sup> Dave Feeken, the chair of the Industry Issues Working Group for the Alaska Association of Realtors, testified at each committee meeting held on the legislation.<sup>17</sup> At several points in his testimony, Mr. Feeken referred to the licensure bar pertaining to any felony sentences that fell within the seven year period.<sup>18</sup> However, he also stated that the seven year licensure bar applied to any “crime or felony” which affected the ability of the licensee to “practice competently and safely.”<sup>19</sup> Assistant Attorney General Gail Horetski testified that the intent was to provide the Commission with discretion to determine if a felony conviction affected a person’s ability to practice the profession, and she proffered a drug felon as an example.<sup>20</sup> Representative Gara explained that one of the purposes of the bill was to provide the

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<sup>13</sup> Draper Opposition to Motion for Summary Judgment, pp. 4 – 5.

<sup>14</sup> AS 08.88.171(b) (prior to 2007).

<sup>15</sup> AS 08.88.171(b); § 5 ch 51, SLA 2007.

<sup>16</sup> Committee Minutes: Senate Labor and Commerce Committee on Committee Substitute for House Bill 205 May 8, 2007 (Statement of Eleanor Wolf, staff for sponsor Representative Kurt Olsen).

<sup>17</sup> Committee Minutes: House Labor and Commerce Committee April 13, 2007; House Finance Committee April 17, 2007; House Finance Committee April 18, 2007; Senate Labor and Commerce Committee May 8, 2007.

<sup>18</sup> Committee Minutes: House Labor and Commerce Committee April 13, 2007; House Finance Committee April 17, 2007.

<sup>19</sup> Committee Minutes: House Finance Committee April 17, 2007.

<sup>20</sup> Committee Minutes: House Finance Committee April 18, 2007 (this reference relies on the printed committee minutes, because the portion of the audio recording pertaining to HB 205 was missing from the online recording of the April 18, 2007 House Finance Committee hearing).

Commission with the discretion to take away a license for felonies besides forgery, theft, extortion, or conspiracy to defraud creditors.<sup>21</sup>

## 2. Felony Conviction

Alaska courts interpret statutes based on reason, practicality, and common sense, while taking into account the plain meaning of the words used, the purpose of the law, and the intent of the drafters.<sup>22</sup> Even non-ambiguous language will not be construed in a way that is “plainly unreasonable in light of [the statute’s] intent.”<sup>23</sup>

In this case, the statutory language, read in isolation, permits either of two interpretations. The Division argues that it should be read as disallowing licensure for real estate brokers who have:

- any felony convictions within seven years of the application date;
- a conviction for any other crime that, in the Commission’s judgment, impacts the ability to practice safely and competently; or
- a conviction for crimes involving forgery, theft, extortion, conspiracy to defraud creditors, or fraud.

Mr. Draper argues that the statute should be read as disallowing licensure for real estate brokers who have:

- any felony convictions within seven years of the application date that, in the Commission’s judgment, impact the ability to practice safely and competently;
- a conviction for any other crime that, in the Commission’s judgment, impacts the ability to practice safely and competently; or
- a conviction for crimes involving forgery theft, extortion, conspiracy to defraud creditors, or fraud.

The structure of the statute favors Mr. Draper’s interpretation. The statute reads “for a felony or other crime that, in the judgment of the commission, affects the person’s ability to practice as an associate real estate broker competently and safely.” In other words, as a matter of grammatical structure, the clause “that, in the judgment of the commission, affects the person’s ability to practice as an associate real estate broker competently and safely” refers to both felony

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<sup>21</sup> Committee Minutes: House Finance Committee April 18, 2007 (this reference relies on the printed committee minutes, because the portion of the audio recording pertaining to HB 205 was missing from the online recording of the April 18, 2007 House Finance Committee hearing).

<sup>22</sup> *Young v. Embley*, 143 P.3d 936, 939 (Alaska 2006).

<sup>23</sup> *Progressive Insurance Co. v. Simmons*, 953 P.2d 410, 517 (Alaska 1998).

convictions and convictions for other crimes. The Division’s interpretation, that the qualifying clause only applies to other crimes and not to felony convictions, would be persuasive if the statutory language read “for a felony, or other crime that in the judgment of the commission affects the person’s ability to practice as an associate real estate broker competently and safely.” Because there is no punctuation separating “a felony” from “other crime,” the statute as written provides the Commission with discretion to determine whether a felony conviction, other than for the specifically enumerated offenses, precludes an applicant from licensure.

Further, it must be noted that if the legislature had intended to create a blanket prohibition against licensure for any felony conviction, as contrasted to a felony that affects a person’s ability “to practice competently and safely,” it certainly could have. A review of other professional licensing statutes demonstrates that it has explicitly chosen both paths, depending on the profession being regulated:

<u>Profession</u>	<u>Prohibition Against Licensing/Practice</u>
Certified Public Accountants	“conviction of a felony under the laws of any state or of the United States.” <sup>24</sup>
Acupuncture	“convicted of a felony or other crime that affects the licensee’s ability to continue to practice competently and safely.” <sup>25</sup>
Audiologist	“convicted of a felony or other crime that affects the licensee’s ability to continue to practice competently and safely.” <sup>26</sup>
Chiropractors (licensing by credential)	“convicted of a felony within the five years preceding the date of the application.” <sup>27</sup>
Collection Agency	“convicted of a felony.” <sup>28</sup>
Dental Hygienist	“convicted of a felony or other crime that affects the licensee’s ability to continue to practice competently and safely.” <sup>29</sup>
Dentistry	“convicted of a crime that adversely reflects on the applicant’s ability or competency to practice dentistry or that jeopardizes the safety or well-being of a patient.” <sup>30</sup>

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<sup>24</sup> AS 08.04.450(a)(5).

<sup>25</sup> AS 08.06.070(4).

<sup>26</sup> AS 08.11.080(4).

<sup>27</sup> AS 08.20.141(2)(C).

<sup>28</sup> AS 08.24.110(a)(4).

<sup>29</sup> AS 08.32.160(4).

<sup>30</sup> AS 08.36.110(1)(H).

Dietitians and Nutritionists	“convicted of a felony or of another crime that affects the licensee’s ability to continue to practice competently and safely.” <sup>31</sup>
Naturopaths	“convicted of a felony or other crime that affects the licensee’s ability to continue to practice competently and safely.” <sup>32</sup>
Big Game Guides	“a felony within the last five years.” <sup>33</sup>
Hearing Aid Dealers	“convicted of a felony or other crime that affects the individual’s ability to continue to practice competently and safely.” <sup>34</sup>
Physicians	conviction for a Class A or unclassified felony; or a conviction for a Class B or Class C felony where the offense “is substantially related to the qualifications, functions, or duties of the licensee.” <sup>35</sup>
Midwives	“convicted of a felony or other crime that affects the licensee’s ability to continue to practice competently and safely.” <sup>36</sup>
Nurses	“convicted of a felony or other crime if the felony or other crime is substantially related to the qualification, functions or duties of the licensee.” <sup>37</sup>
Optometrists	“convicted of a felony or other crime which affects the licensee’s ability to continue to practice competently and safely.” <sup>38</sup>
Pawnbroker Employees	“conviction . . . for a felony or for a misdemeanor involving dishonesty” within five years of the date of employment. <sup>39</sup>
Pharmacy	“convicted of a felony or has been convicted of another crime that affects the applicant’s or licensee’s ability to practice competently and safely.” <sup>40</sup>
Physical Therapy	“convicted of a state or federal felony or other crime that affects the person’s ability to continue to practice competently and safely.” <sup>41</sup>

Finally, the legislative history of the statute confirms that, when it chose to write the statute in a way that appears to give the Commission discretion to consider whether the felony

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31 AS 08.38.040(4).  
32 AS 08.45.060(4).  
33 AS 08.54.605(a)(1(B)).  
34 AS 08.55.130(4).  
35 AS 08.64.326(a)(4).  
36 AS 08.65.110(4).  
37 AS 08.68.270(2).  
38 AS 08.72.240(4).  
39 AS 08.76.310.  
40 AS 08.80.261(a)(4).  
41 AS 08.84.120(a)(3).

affects the associate real estate broker's ability to practice, the legislature was acting deliberately. Representative Gara and Ms. Horetski both explained to legislators that the language of the statute grants discretion to determine if a conviction for a felony or other crime, other than the specifically enumerated crimes, "affects the person's ability to practice as an associate real estate broker competently and safely."<sup>42</sup> Mr. Feeken's testimony also provides clarity that the crime or felony must be one that the Commission finds affects the ability of the applicant to practice competently and safely.<sup>43</sup> The Division's view that the licensure prohibition applies to all felony convictions within the seven year time window would run directly counter to the way the provision was understood at the time of enactment.

Because the statute does not provide a blanket prohibition against licensure for an applicant who has been convicted of a felony (or has not completed the sentence for his conviction) within seven years of the date of his application, it instead requires that the felony conviction be one that, in the Commission's judgment, impacts the ability to practice safely and competently. As a result, the Division's motion for summary adjudication was denied and the case proceeded to hearing.<sup>44</sup>

***B. Does Mr. Draper's Felony Conviction for DUI Affect his Ability to Practice as an Associate Real Estate Broker Competently and Safely?***

The evidence presented at hearing focused upon the undisputed fact that Mr. Draper cannot legally drive. The Division's witnesses testified about their personal experience with real estate agents and their perception that being able to drive to properties was an essential part of real estate practice.<sup>45</sup> The resulting argument was that an inability to drive interfered with a person's ability to practice real estate competently. However, having a driver's license is not a requirement for any type of real estate license, as agreed to by the Division's witnesses.<sup>46</sup> In fact, the Division's argument, if extended to its logical conclusion, leads to a result where a person who does not drive, either by choice or due to a physical disability such as a seizure

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<sup>42</sup> Committee Minutes: House Finance Committee April 18, 2007 (these references rely on the printed committee minutes, because the portion of the audio recording pertaining to HB 205 was missing from the online recording of the April 18, 2007 House Finance Committee hearing).

<sup>43</sup> Committee Minutes: House Finance Committee April 17, 2012 at 2:33:26 pm.

<sup>44</sup> Mr. Draper raised two factual defenses, laches and estoppel, to the Division's motion for summary adjudication. It was not necessary to address those factual defenses, because the summary adjudication order found that his felony DUI conviction was not an automatic bar to his licensure. However, if the Commission interprets AS 08.88.171(b) to forbid licensing for an applicant who has a felony conviction, regardless of the type of felony, incurred within the seven year time period preceding the application, a remand would be necessary to address and resolve those factual defenses.

<sup>45</sup> Real Estate Commission former Licensing Examiner Harris testimony; Investigator Wirawan testimony.

<sup>46</sup> *Id.* See AS 08.88.171.



disorder, would have to be denied a license even if qualified under all the statutory and regulatory criteria. The fact that Mr. Draper does not have a driver's license is not a valid reason for denying him an associate real estate broker's license.

The other arguments presented by the Division pertained to essential character flaws. Those were that a person who has a felony DUI engages in risky behavior, is untrustworthy, and is unreliable. These are reasons that led to this Commission holding that a felony DUI was a crime involving moral turpitude and denying a real estate license for applicant Jose Guarderas.<sup>47</sup> However, *Guarderas* is distinguishable because it involved an earlier version of the real estate licensing statute that required applicants for any type of real estate not have a felony conviction for a crime involving moral turpitude.<sup>48</sup> The *Guarderas* decision found, as a purely legal matter, that a DUI was a crime involving moral turpitude, which led to the result that a having a felony DUI conviction made an applicant ineligible for a real estate license.<sup>49</sup> The current version of the real estate licensing statutes eliminates the automatic licensing bar for persons convicted of a felony crime involving moral turpitude, and instead provides the Commission with discretion to determine whether the felony conviction is one that affects an applicant's ability to practice safely and competently.

Mr. Draper is currently licensed as a real estate salesperson. The only impediment to Mr. Draper's being licensed as an associate real estate broker is his felony DUI conviction. The chief distinction between a real estate salesperson and an associate real estate broker is that an associate real estate broker may be the direct supervisor of a real estate broker's branch office, which may include responsibility for real estate trust funds.<sup>50</sup> There is no evidence in the record that shows Mr. Draper's felony DUI conviction affects his ability to safely and competently handle these duties. By way of contrast, the example of a drug felon proffered by then Assistant Attorney General Horetski, during the legislative hearings on the 2007 amendments to the real estate licensing statutes, is one that could conceivably affect a person's ability to practice as an associate real estate broker safely and competently. There is an arguable causal connection between drug crimes and property crimes, which would make a drug felon ineligible to be a real

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<sup>47</sup> *In the Matter of Guarderas*, OAH Case No. 05-0563 (Real Estate Commission Decision, adopted 2006) (<http://aws.state.ak.us/officeofadminhearings/Documents/REC/REC050563.pdf>).

<sup>48</sup> See AS 08.18.171 version preceding the 2007 amendments which gave rise to the current version of the licensing statute AS 08.18.171.

<sup>49</sup> *Id.*

<sup>50</sup> AS 08.88.311; As 08.88.331.

estate professional. There is no similar connection between a felony DUI conviction and property crimes.

The conduct underlying Mr. Draper's DUI conviction, that of driving while intoxicated, was undeniably risky. However, in the four year time span since his arrest for that offense in June of 2008, and when his application was denied in June 2012, he has neither had a criminal offense nor a drink. He successfully completed his criminal probation without a single violation and completed an alcohol treatment program. In addition, he has managed to actively engage in the practice of real estate in that four year period, without any complaints to the Commission.

A useful counterpoint to Mr. Draper's case is a recent engineering licensing case, where the applicant, Michael Ward, had six criminal convictions including three misdemeanor DUI convictions, the last of which occurred after he applied for his engineering license and which he disclosed prior to his application being acted upon. The Board of Registration for Architects, Engineers, and Land Surveyors initially denied the application. After a complex series of appeal proceedings, the board approved Mr. Ward's application with the condition that he was placed on a probation status, as allowed by AS 08.01.075(a)(7).<sup>51</sup> Although, the *Ward* decision is not binding on the Commission, it demonstrates that multiple criminal offenses which involve risky behavior (three misdemeanor DUIs) are not an automatic bar to professional licensure.

Mr. Draper has practiced real estate since his June 2008 felony DUI offense without being able to drive, without having any complaints filed against him with the Commission, and without incurring any subsequent criminal charges or convictions. That history, including his completion of an alcohol treatment program, shows that he has met his burden of proof by a preponderance of the evidence and demonstrated that his 2008 felony DUI conviction does not affect his ability to practice as an associate real estate broker competently and safely.

#### **IV. Conclusion**

The licensing statute, AS 08.88.171(b), does not bar persons convicted of any felony (or who have not completed the sentence for their conviction) within seven years of the date of their application from being licensed as an associate real estate broker. Instead, the statute authorizes denial only if the conviction is for a felony that affects an applicant's ability to practice safely and competently as an associate real estate broker. Mr. Draper has shown that his 2008 felony

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<sup>51</sup> *In the Matter of Ward*, OAH Case No. 10-0455-AEL (Board of Registration for Architects, Engineers, and Land Surveyors, adopted 2012) (<http://aws.state.ak.us/officeofadminhearings/Documents/AEL/AEL100455%20Board's%20Decision%20After%20Remand.pdf>).

DUI conviction does not affect his ability to practice safely and competently as an associate real estate broker. The Board should therefore exercise its discretion in his favor and grant his application.

Dated this 31st day of October, 2012.

By: Signed  
Lawrence A. Pederson  
Administrative Law Judge

### **Adoption**

The Alaska Real Estate Commission adopts this decision as final under the authority of AS 44.64.060(e)(1). 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. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 5<sup>th</sup> day of December, 2012.

By: Signed  
Signature  
  
Anita Bates  
Name  
  
Chairperson  
Title

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