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

In the Matter of the Surety Fund Claim of:	)	
	)	
LAZETTE T. HALL,	)	
	)	
Claimant,	)	
	)	
v.	)	
	)	
GREG ERKINS,	)	
	)	
Respondent.	)	OAH No. 06-0353-RES
	)	Commission No. S-26-011

DECISION AND ORDER

I. Introduction

This case is a claim against the Real Estate Surety Fund arising from a residential purchase in Chugiak. Lazette Hall, a first-time homebuyer, was represented in the transaction by Diamond Realty. She purchased two dwellings, one of which she viewed only briefly and one of which she and her representatives did not go inside at all prior to closing. After closing, she left the buildings unattended for several weeks in winter weather. Upon moving in, she has been disappointed with the condition of the homes, and has been distressed to learn that an adjoining lot comprising a portion of her lawn and driveway was not part of the purchase. She brought this claim against the listing broker, Gregory T. Erkins, largely on the basis of what she perceives as defects in the disclosure statements the seller provided.

The Office of Administrative Hearings held a two-day hearing on September 6 and 7, 2006 to explore the allegations in the Surety Fund claim. Because Mr. Erkins, the listing broker, did not engage in fraud, deceit, wrongful misrepresentation, or conversion, and because his acts were not the cause of Ms. Hall's losses, no payment from the Surety Fund is appropriate in response to the allegations against him.

II. Facts

The record on which this decision is based consists of testimony from seven witnesses, the exhibits filed with Ms. Hall's complaint and with Mr. Erkins's motion to dismiss (all of which were admitted in bulk at the hearing without objection), and new exhibits denoted 1-41

that were presented at the hearing (likewise admitted without objection). To speed the process of preparing a decision, specific evidentiary sources are not cited below for most matters that were undisputed during the hearing.

A. Background to the Sale

In 1999, Daniel and Judith Claugus bought the property at issue in this case, then part of a larger tract, in a distress sale related to an impending foreclosure. The property, located on Bending Birch Drive in Chugiak, encompasses two dwellings: a 3002 square-foot log home with a full unfinished basement and two floors above, and a 903 square-foot ranch. There are also various outbuildings. A lot was sold off prior to 2005, leaving about 2.40 acres.

Early in their possession of the property, the Clauguses encountered freezing damage in the forced hot water heating system of the log house. They made repairs to the heating system in May of 2000.

Although they made the purchase primarily as an investment, the Clauguses lived in the log home from 2002 to 2004. They never lived in the ranch. Prior to moving into the log home, they replaced the septic system and installed new carpet. In 2002 or later (perhaps as late as mid-2005), the Clauguses painted the interior of the log house. In the northwest corner of the house in the living room, there was extensive wall rot and mildew. The Clauguses painted over the damaged wall without addressing the source of the moisture and without killing the mildew.[1]

In 2004 the Clauguses moved out and began trying to sell the property by owner. After they moved out, Mr. Claugus's 24-year-old son, Daniel Jr., rented the ranch house and also had access to the log house. Mr. Claugus describes his son as "probably not as responsible as he should have been." At one point Mrs. Claugus tried to evict Daniel Jr. for nonpayment of rent.

In May of 2005, Mr. and Mrs. Claugus decided to list the property with E-mail Realty. Greg Erkins, a licensed broker managing E-mail Realty, took primary responsibility for the listing.[2]

Greg Erkins gave Daniel Claugus State of Alaska Residential Real Property Transfer Disclosure Statements to fill out, and then met with him at a restaurant to go over the listing paperwork. At the time of the meeting, Greg Erkins had apparently visited the property once,

---

[1] The findings regarding the painting over of water damage are based primarily on the testimony of William Marshall, a repair contractor for Ms. Hall, who was a highly credible witness. Mr. Marshall testified convincingly that it would have been impossible for someone living in the home to be unaware of these moisture problems. He found preexisting mold and fungus under the paint in the northwest corner.

[2] The client was first brought to E-mail realty by John Erkins, Greg Erkins's son, who is a salesman with the firm.

walking through only the log house. The details of that visit were not explored by the claimant at the hearing.

Erkins thought it best to fill out separate disclosures for the two houses, since it was possible a buyer would want to subdivide the property in connection with the purchase. Claugus apparently came to the restaurant with only one disclosure partly filled out, and the two men worked together to complete the forms. Erkins labeled one form "2-Story" and one form "Ranch."[3] Claugus made most or all of the check marks on the forms, although it is possible that a few boxes were checked by Erkins based on information Claugus provided orally. Claugus also wrote most longhand entries on the forms.

The standard disclosure statement form has a section near the top of the first page entitled "Property Features," where the seller is to list the presence and number of various appliances and accessories. Both Claugus disclosure forms were highly inaccurate in their listing of property features. To give some examples: "3" wood stoves are indicated for the tiny ranch house, whereas the house has none; no water filtering system is claimed, but the property has an elaborate one; a greenhouse is indicated, but the only greenhouse is on the lot that the Clauguses had sold previously. There is no apparent pattern to the errors in listing property features, some of which inflate the property's features and some of which fail to note positive features; they seem the result of ordinary sloppiness.

The standard disclosure statement form has a section entitled "Structural Components," where the seller is instructed to circle components that have known defects or malfunctions or have had major repairs in the last five years, and then to describe the defects, malfunctions, or repairs in an addendum. On the advice of Erkins, Mr. Claugus did not make any circles in this section on the form for either house. Instead, on the 2-Story form, Greg Erkins wrote in his own hand the following entry under "Comments" below the "Structural Components" section:

> Buyer purchasing "as is." Items above in need of upgrade, replacement, or repair. Buyer to rely on independent inspection since non-owner occupied.

For reasons that are unclear, the ranch disclosure was left almost entirely blank, with only the top half of the first page filled out, and nothing at all written in the "Structural Components" section or on subsequent pages.

With the concurrence of the Clauguses, E-mail Realty listed the property with more than one option for structuring the purchase. As initially listed, a buyer could pay $449,950 and

receive $30,000 in escrow for closing costs, repairs and upgrades, or could pay $419,950 without the escrow (these asking prices were later reduced to $429,950 and 399,950, respectively).[4] At the higher price, the MLS listing noted "2 great fixer-uppers" and described the $30,000 allowance; at the lower price it simply noted "SOLD 'AS-IS.'"

B. The Clauguses' Sale to Ms. Hall

Lazette Hall comes from southern California. She had never purchased a house before the purchase at issue in this case. In 2005, she and her then-boyfriend, Javier Mercado, were in the market to purchase a home for themselves and Ms. Hall's young son. The property also needed to house Jerry Eugene Bates, a plumber and pipefitter by training who now works as a tutor and caregiver to Ms. Hall's son and as a general helper with family affairs. Mr. Bates assisted with the 2005 purchase.

Ms. Hall learned of the Claugus property through its MLS listing. After driving by twice during July of 2005, she engaged Diamond Realty as buyer's agent and asked them to arrange a viewing. The licensees assisting her at Diamond Realty were Jason Brouillet and Kristy Murdock.[5]

After some difficulties with scheduling and locating a key, Kristy Murdock took Hall, Bates, and Mercado through the log house around August 1, 2005. They spent about 20 minutes in the log house.[6] They did not look behind the curtains. They did not look inside the ranch, because it was occupied and the occupant would not let them in. They did not investigate behind building supplies and weeds obscuring the foundations of the two houses. Ms. Hall concluded that the log house was "a fixer-upper" in need of cleaning and cosmetic work, but that it was livable in its present condition.

Ms. Hall and Mr. Bates did not view the property again until after closing Ms. Hall's purchase in late November.

On August 4, 2005, Hall and Mercado submitted an offer on the property through Brouillet.[7] The offer was at the asking price at the time for purchasing the property without a

---

3 The forms are Hearing Exhibits 1 and 2.

4 Direct examination of Greg Erkins; Motion to Dismiss Exhibits A-C.

5 Testimony of Bates. Commission records indicate that Brouillet and Murdock held active licenses at the time; they expired in early 2006.

6 Direct exam of Hall. Ms. Hall testified that she felt "rushed." Note that the prospective buyers were accompanied by their own representative during this visit; Greg Erkins was not present.

7 Motion to Dismiss Exhibit G, pp. 1-7.

$30,000 repair allowance, $399,950, but it included as a concession the payment of the buyers' closing costs up to $12,000. The offer was contingent on "seeing other unit."

Hall and Mercado certified in their offer that they had received a disclosure statement for the property. It is clear, however, that Ms. Hall did not rely in any way on the disclosure statements when she made her offer. She testified that she did not review the statements until September 19, 2005.[8]

On August 10, the Clauguses countered,[9] proposing that the closing cost allowance be capped at $9,000 and that the earnest money be increased. The counteroffer provided, "Buyer to view other unit within 48 hours."

The following day Hall and Mercado submitted their own counteroffer,[10] proposing $10,000 in closing costs and an intermediate figure for earnest money. There was no mention of viewing the ranch. A provision was added for "Home Inspection for Larger unit."

On August 15, the sellers signed the Hall/Mercado counteroffer of August 11.[11] They wrote in or appended some minor provisions about timing. They also wrote in: "All contingencies removed with return of this Counter-Counter Offer." However, a fair reading of the document as a whole indicates that some contingencies were still part of in the contract, including a contingency for "Property Inspection" and one for financing approval with associated well and septic tests. The August 15 document provided for buyer acceptance by initials prior to August 17. Hall and Mercado initialed the agreement.[12] Ms. Hall intended to assent.[13] The parties treated the purchase and sale agreement, as modified by the counteroffers through August 15, as a binding agreement assented by all.

On August 17, 2005, REGAL Home Inspections, Inc. conducted an inspection of the log house on behalf of Ms. Hall and Mr. Mercado. At the time of the inspection, the gas was shut off but there was electric service at the property. REGAL wrote a report[14] noting a number of concerns, including:

--sagging roof above master bedroom

--sagging ceiling in master bedroom

---

8 Like much of Ms. Hall's testimony, this testimony was elicited with extensive prompting by her attorney. In this instance, the testimony was not advantageous to Ms. Hall's claim.

9 Hearing Exhibit 40.

10 Motion to Dismiss Exhibit G, p. 8.

11 Motion to Dismiss Exhibit G, pp. 9-10.

12 By comparing Motion to Dismiss Exhibit G, p. 9, with Hearing Exhibit 41, one can see the addition of the initials.

13 Cross-exam of Hall.

--damaged and missing parts in the gas forced hot water heating system

--moisture stains on the interior walls

The report recommended further professional evaluation of these and other items. Ms. Hall read the report but testified that it "didn't tell me much." Ms. Hall understood that recommendations for further evaluation were something that home inspectors put in their reports to release themselves from liability. She testified that her buyer's licensee told her that, instead of the inspection, it is the seller's disclosure that you rely on.[15] She and Mercado did not seek to back out of the purchase based on the report, nor did they request repairs or financial concessions. They did not seek further evaluation of the noted defects. Mr. Bates "looked through" the report and estimated that it would cost about $10,000 to fix the noted defects.[16]

The purchase and sale agreement, which used an MLS form chosen by the buyers or their licensees, contained a clause providing that any inspection reports "become a material amendment to the State of Alaska Residential Real Property Transfer Disclosure Statement."[17] The agreement provided that after receiving an inspection report, the buyers would have the amount of time to terminate the agreement that AS 34.70.020 allows after any amendment to a disclosure statement (three to six days).

On September 12, the property was surveyed. The surveyor prepared and delivered an as-built survey shortly afterward.[18]

The purchase and sale agreement, as amended, contemplated well and septic tests.[19] On September 14, 2006, the parties amended the agreement to extend the closing date and to add the following provision:

> Tests for Health Authority not required for this loan. Sellers will credit $850 the amount of the tests to the Buyers for these test at closing. Buyers will hold Sellers and Agents harmless for failure to follow through with these tests and buying property "as-is" in it's present condition which they will verify upon walk through that they are in working order. [sic][20]

---

14 Hearing Exhibit 4.

15 Cross-exam of Hall.

16 The $10,000 estimate comes from the direct exam of Bates. The quotation comes from the ALJ's questioning of Bates. Bates went on to testify that the first time he reviewed the report "thoroughly" was after closing.

17 Motion to Dismiss Exhibit G, p. 4.

18 Hearing Exhibit 3.

19 A reference to the tests is found in the handwritten additions to the "Counter-Counter Offer" of August 15.

20 Hearing Exhibit 39, p. 1. Though signed only by Mercado and Hall, there seems to be no dispute that this amendment was treated as part of the contract.

The buyers signed this amendment on the recommendation of Brouillet and Murdock.[21] The buyers did not subsequently check the well and septic system, and they did not review any public documents regarding these systems.[22]

For financing, the buyers used Alexander Brouillet Investment Mortgage ("Brouillet Mortgage"), a firm whose principals were related to Jason Brouillet. Brouillet Mortgage commissioned an appraisal. In late September, the appraisal came back at $410,000.

On October 15 and 17, two more sets of changes to the contract were agreed.[23] Mercado was dropped from the purchase, with Lazette Hall becoming the sole buyer. The closing date was extended to November in exchange for a payment to the seller of $2442.45.[24] The sellers agreed to finance ten percent of the purchase at eight percent interest. Finally, the purchase price was raised to $410,000, with "Seller . . . to credit Buyer with $10,000 towards closing costs in consideration for increase in sales price." Note that the agreement had already called for a $10,000 credit toward closing costs.

About a week later the lender or mortgage broker contacted Mr. Claugus directly and told him that if he did not pay a $12,500 consulting fee to them, the transaction would not close.[25] Mr. Claugus agreed.

The transaction closed on November 18, 2005.[26] The buyer and her licensees did not conduct a walk-through before closing. At closing, the settlement agent credited $10,000 (not $20,000) from the sellers toward the buyer's closing costs.[27] The $850 credit for waiving well and septic tests was not applied. It is not clear whether Diamond Realty, representing Ms. Hall, reviewed the settlement statement to check its fidelity to the agreement. However, Diamond did receive a commission of $12,300. Greg Erkins received a commission of $8,200. With respect to the financing arranged by Jason Brouillet's relative, there was a broker origination fee of $6,560. The additional $12,500 "consulting fee" from the seller to the lender or mortgage broker

---

21 Direct exam of Hall.

22 Cross-exam of Bates; re-direct exam of Bates.

23 Again, the copies of these amendments in the record (*e.g.*, Motion to Dismiss Exhibit G, pp. 11-12) lack signatures, but the testimony at the hearing indicated that the changes were assented by all and treated as part of the contract.

24 This payment was not collected at closing. It may have been paid by other means.

25 Defense testimony of Greg Erkins. Because of objections from the claimant's counsel, this aspect of the transaction was not explored in detail at the hearing.

26 The closing documents are all dated November 17 and 18. Recording may have taken place a few days later.

27 The settlement statement is an unmarked exhibit to Ms. Hall's original complaint, found nine pages before the end of the packet of documents filed with the complaint.

is not reflected in the settlement statement, but evidence at the hearing suggests that it was paid by other means.

C. Events After the Closing

At some time shortly after closing, Mr. Bates toured the log house with Mr. Claugus.[28] There was electric service at the house at the time, and the house appears to have been heated. Mr. Bates flushed the toilets to ascertain that they were working. Mr. Claugus mentioned that a goat had been kept in the basement of the log house at one time. There is no evidence that Mr. Bates expressed any surprise or displeasure at what he saw on this occasion.[29] At some point thereafter, Mr. Claugus took himself off the electric service to the property.

The closing took place at a time of winter conditions in Alaska. Temperatures dropped to very low levels in the weeks after the closing. On November 21, 2005, the low temperature in Chugiak was 14°F. On November 26 it was -2°F. On November 30 it was -9°F, and the mean temperature for the day was below zero Fahrenheit.[30]

Ms. Hall and her representatives did not visit the property again until December 11, 2005. The heat was off when they arrived. They turned it on. The top floor of the log house immediately flooded from portions of the heating system that had broken where pipes had frozen and split, or where pipes had been disconnected.[31] The flooding caused water damage. The septic system had also frozen, and sewage backed up onto the floor of the basement when the plumbing was used. Further, the septic system was in need of pumping.[32] One toilet had burst from freezing.[33]

Ms. Hall and Mr. Bates were dismayed with other aspects of the property. Ms. Hall discovered that only half of the windows had screens. Mr. Bates looked into the attic and discovered that the trusses seemed homemade, with inadequate spacing. He looked behind materials stacked along the foundation of the log house and found substandard footing work. He

---

28 ALJ questioning of Bates.

29 Mr. Claugus testified that Bates expressed no surprise. There was no contrary testimony.

30 The historical weather data for Chugiak is available from many sources, such as wunderground.com. A party objecting to the taking of official notice of these facts may file an objection and submit evidence or authority to refute the officially noticed facts. Any such filing should be made prior to the date set in this case for submission of proposals for action under AS 44.64.060(e), and should be submitted separately from any proposal for action filed under that provision.

31 Hearing Exhibits 15, 20, 21 and 30 show piping that has split from freezing. In addition to the direct damage from the freezing, Mr. Bates theorizes that some repairs had been attempted by someone after the freeze-up, but had been left incomplete so that pipes were disconnected. This theory was less clearly established at the hearing. Hearing Exhibit 29 purportedly illustrates an example of an incomplete repair.

32 Hearing Exhibit 8.

33 *See* Hearing Exhibit 32.

entered the ranch for the first time and discovered that some items listed as "property features" on the Disclosure Form, such as the three wood stoves that had been listed, were not present (the ranch had a partly functioning gas forced hot air furnace instead). He noted that it had a foundation consisting of rotten logs, and that it was sagging to a degree that several doors and windows could not be opened or closed.

When she met her neighbor, Ms. Hall was shocked to learn that the greenhouse, a light pole, one of the driveways, and most of what she perceived as her front lawn were not on the lot she had purchased. In January of 2006, she took down the heavy drapes in the living room and discovered for the first time that mold was coming through the paint work. She also discovered blue masking tape that indicated to her that the Clauguses had been painting in the living room.

To date, Ms. Hall has spent between $5000 and $10,000 on repairs. The living room of the log house has not been repaired, and is not habitable due to leaks and mold.

In April of 2006, Ms. Hall filed this Surety Fund claim against Greg Erkins. She has also filed a civil suit against Mr. and Mrs. Claugus.

III. Discussion

To recover from the Surety Fund, an individual must show a loss in a real estate transaction that resulted from a licensee's fraud, misrepresentation, deceit, or conversion of trust funds.[34] Fraud, misrepresentation, or deceit can be found on the basis of nondisclosure in some circumstances, such as where conduct is induced through a "literally true statement [that] omits additional qualifying information likely to affect the listener's conduct."[35] However, to support a recovery from the Surety Fund a misstatement or nondisclosure must be "wrongful;" an innocent misrepresentation or nondisclosure is not enough.[36]

The central contention in this Surety Fund claim is that Greg Erkins perpetrated a fraud though his role in helping his client prepare disclosure statements that were to prove incomplete and inaccurate. In large measure, this contention turns on Mr. Erkins's advice to Mr. Claugus that he could leave the "Structural Components" section of the disclosures blank and instead insert an "as-is" clause providing that the buyer would rely on independent inspection.

Ms. Hall argues that, in the absence of a written waiver, AS 34.70 does not allow a seller to skip parts of the form or to substitute an as-is provision for explicit disclosure of items of

---

[34] *See* AS 08.88.460(a).

[35] *Carter v. Hoblit*, 755 P.2d 1084, 1086 (Alaska 1988); *see also, e.g., Spence v. Griffin*, 372 S.E.2d 595, 599 (Va. 1988).

[36] *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984).

which the seller has actual knowledge. Ms. Hall may be correct; that issue will not be decided in this opinion. However, it will be important to bear in mind that giving incorrect advice about the disclosure process to a seller is not, in itself, a fraud, wrongful misrepresentation, or deceit. Ms. Hall retains the burden to show that Mr. Erkins himself committed a fraud, made a misrepresentation with a wrongful state of mind, or engaged in deceit.

The disclosure obligations in AS 34.70 are obligations of "the transferor."[37] Mr. Erkins was not the transferor. A licensee who is not a transferor could, no doubt, engage in deceit in connection with the AS 34.70 disclosure process, but much more that the mere existence of a defective disclosure would have to be shown to establish that kind of deceit. Since the disclosure duty does not fall on the licensee, and therefore the licensee has no duty to investigate the matters covered in the disclosure, it is difficult to imagine a circumstance where the licensee could be found to have engaged in deceit in the absence of a showing that he or she was specifically aware of a particular defect in the home, and was aware that the defect was being misrepresented or concealed in disclosures the licensee was passing to the other party.

A final consideration is Ms. Hall's almost complete lack of reliance on the disclosure statements. Although she received the statements before she made her first offers, she did not review them until long after she had made her offers and committed to the purchase. By the time she first reviewed the disclosure statements, she already had the home inspector's report in hand, which had been made an amendment to the disclosure by agreement of the parties and which discussed many items not fully explored in the original disclosure forms. To the extent that she did not rely on the disclosure statements for information, they cannot be said to have misled her or to have caused any losses she attributes to the property not being in the condition indicated.

Against this background, each of the alleged deceptions by Mr. Erkins will be reviewed below.

A. Defective Heating System in Log House

Among the most distressing events when Ms. Hall occupied the house was the immediate flooding when the heating system was turned on. Ms. Hall seeks to recover from the Surety Fund for this event.

The heating system in the log house was apparently functioning just after the closing when Mr. Bates walked through the house with Mr. Claugus. Mr. Bates noted no evidence of ruptures or incomplete repairs at that time. When Ms. Hall and Mr. Bates came to the log home

on December 11, 2006, the forced hot water heating system was ruptured as a result of freezing. There is some evidence that repairs had been attempted but left incomplete.

The conclusion is inescapable that the heating system froze between closing and December 11. It is conceivable that Mr. Claugus, who still may have had access to the house, played a role in the freeze-up or in the possible attempted repairs, although this was not established at the hearing. It is also possible that the freeze-up and associated damage is wholly the result of Ms. Hall leaving the house unheated and unattended for 23 days during severe winter weather. However, no circumstances have been articulated, much less proven, that would connect these post-closing events to Mr. Erkins.

Ms. Hall also seeks recovery from the Surety Fund because the disclosure statement for the log house failed to state that the heating system had been repaired in 2000. The "Structural Components" section of the Disclosure Statement instructs sellers to note and describe "major repairs performed within the last five years."

This aspect of Ms. Hall's claim fails for three reasons. First, the evidence at the hearing did not establish that the repairs in 2000 were major. Second, the evidence at the hearing did not establish that the repairs took place within five years of the date of the Disclosure Statement, which was prepared on May 17, 2005. Counsel for Ms. Hall elicited testimony that the repairs occurred in May of 2000, but did not establish whether they happened before or after May 17 of that year. Third, there is no evidence that Mr. Erkins was aware of the May, 2000 repairs; hence, he cannot be found to have concealed them.

B. Defective Septic System

Another highly distressing event when Ms. Hall occupied the house was the sewage spill into the basement that resulted from a full septic tank with frozen lines leading to it. Again, Ms. Hall seeks to recover from the Surety Fund for the cost of cleaning up the spill and making the septic system functional.

The sewage system was working when Mr. Bates went through the house with Mr. Claugus just after closing. It froze up after that time. As with the freezing of the heating lines, the freezing of the septic system after closing cannot be connected to Mr. Erkins. Likewise, while there is evidence that the septic tank was too full and needed pumping by the time the Clauguses left the property, there is no evidence at all that Mr. Erkins had any way of knowing that the system needed pumping.

---

[37] AS 34.70.010.

It is also notable that Ms. Hall, on advice of her own licensees, waived having the septic system evaluated in exchange for a promise of $850. In the waiver, she promised to hold the sellers *and their agents* (primarily Mr. Erkins) harmless for the failure to test the system. Ms. Hall did not subsequently collect the $850 credit, but this occurred only because she and her representatives did not ensure that it appeared in the settlement agent's closing statement. Mr. Erkins is entitled to rely on Ms. Hall's promise to hold him harmless from her decision not to have the septic system checked.

C. Undisclosed Water Damage in Log House

Ms. Hall established by a preponderance of the evidence for purposes of this hearing that there was significant water damage around the living room of the log house; that the Clauguses must have been aware of the water intrusion; and that they concealed the evidence of the intrusion with paint. On the disclosure statement for the log house, the "no" box has been checked for the question, "Are you aware of any water leaking into the home?" This was a misleading disclosure. It was partly remedied by the inspection that became an amendment to the disclosure, which noted "moisture stains and walls in need of repair,"[38] but a specific disclosure of the water intrusion, mold, and water damage that was present before painting was never made.

Ms. Hall has not made a case that Mr. Erkins was deceptive on this point, however. There is no direct evidence that Mr. Erkins knew of water intrusion into the home. Moreover, the signs of water intrusion appear to have been somewhat subtle. Neither Ms. Hall nor Mr. Bates noted any signs of water damage when they viewed the home in the summer of 2005. Indeed, they did not discover the main area of water damage until January of 2006, a month after they began working on the house to make it habitable. It is improbable that Mr. Erkins knew about undisclosed water intrusion. Since he apparently lacked knowledge of the condition, and since he had no duty to investigate the issue independently, his participation in an AS 34.70 process where it was not fully disclosed was innocent rather than wrongful, and there is no Surety Fund liability.

D. Sagging Roof on Log House

Ms. Hall observes that the "Structural Components" section of the disclosure calls for defects or malfunctions of the roof to be noted and described. Instead, the as-is clause was

[38] Hearing Exhibit 4, p. 20.

inserted. Ms. Hall contends that the Surety Fund should reimburse her for the sagging that she later found in the roof, which according to her witnesses is the result of improper framing.

The sagging of the roof was specifically disclosed in the inspection report, which by contract was treated as an amendment to the disclosure statement. The report stated more than once that the inspector "noted sagging" above the master bedroom and recommended evaluation by a roofing contractor; the report also noted sagging in the ceiling of the master bedroom and recommended evaluation by a structural engineer.[39] This cured any defect in the disclosure form on this point. Ms. Hall chose to proceed with the purchase in spite of this disclosure, and chose not to have the matter evaluated further.

E. Ice Damming on Roof of Log House

The disclosure statement asks if the seller is "aware of any ice damming on the roof." Mr. Claugus checked the "no" box. Mr. Bates testified that ice damming has occurred since the purchase, and Ms. Hall evidently surmises that it had occurred in the past as well and seeks compensation for that condition.

There is no evidence that Mr. Erkins knew of, or could have known of, ice damming at the property. He listed and marketed the property in the late spring and summer, and hence would have no firsthand knowledge. There is no evidence that his clients told him of past ice dam problems.

F. Appliances in Log House not Working

Ms. Hall testified that she found the dishwasher and trash compactor not to be in working order when she moved in, and she apparently seeks compensation for these items. On the disclosure form, the boxes for neither of these appliances were checked; hence the sellers did not offer to include a dishwasher or trash compactor in the sale. The purchase and sale agreement did not mention them, so they remained outside the transaction. Apparently, the sellers left the two appliances in the home anyway when they moved out. This is not a fraud or deception.

G. Defective Plumbing in Log House

Ms. Hall seeks to recover from the Surety Fund for three defects in the plumbing that she discovered when she occupied the house: a burst toilet; a toilet upstairs that has to be plunged every time someone uses it; and a faucet in a bathroom sink that had to be replaced.

---

[39] Hearing Exhibit 4, pp. 9, 10, 22; Hearing Exhibit 38.

The burst toilet clearly resulted from the freezing of the house that, as explained in Part A, occurred after closing and cannot be connected to Mr. Erkins. As to the other two defects, no evidence was offered at the hearing to suggest that Mr. Erkins knew that these plumbing fixtures needed work.

H. Missing Screens for Log House

Ms. Hall testified about, and apparently seeks to recover from the Surety Fund for, her discovery that only half the windows in the log house have screens. The disclosure statement for the log house indicated under "Property Features" that window screens were built in and would remain with the property. It did not indicate how many screens were built in. The home inspection report, which by contract became an amendment to the disclosure statement, indicated that screens were not present.[40] Nothing in these two disclosure documents, taken together, gave Ms. Hall a basis to expect any particular number of screens.

Ms. Hall has not made a case that any misrepresentation or deception was made regarding screens.

I. Defects in Foundation of Log House

Ms. Hall and her representatives noted problems with the foundation of the log house after they moved building materials that were piled against the house. Little detail was provided about the nature of the defects.

The disclosure statement did not characterize the foundation; it was included in the as-is provision. Ms. Hall's inspector noted no problems with the foundation but could not inspect all of it because it was "not fully visible."[41]

To the extent that Ms. Hall contends that Mr. Erkins wrongfully concealed the condition of the foundation through these disclosures, the contention is unsupported. There is no evidence that Mr. Erkins was told of defects in the foundation. If a home inspector evaluating the foundation could not see any defects, it is not reasonable to infer that Mr. Erkins could see defects. Accordingly, there is no basis to conclude that he had knowledge of these alleged defects that he should have disclosed.

J. Pet Goat Kept in Log House

The disclosure form indicated that the only pet ever kept in the log house was a small dog. Evidence at the hearing showed that a goat had been housed in the basement for a short

---

[40] Hearing Exhibit 4, p. 19.

time. No evidence was elicited as to when this occurred or whether Mr. Erkins had any way of knowing about it. There was no evidence of damage attributable to the goat. Under these circumstances, there is no basis for a Surety Fund recovery.

K. Defects in Ranch House

Ms. Hall has raised many issues about the condition of the ranch house as she discovered it when she first went inside after closing. However, her claims relating to the ranch house fail for at least two reasons.

First, condition of the ranch house was not material to the transaction. It was so unimportant to Ms. Hall that she did not even insist upon viewing it before committing to a purchase and sale agreement, and she closed the purchase still not having viewed the house.[42] She expressly excluded it from her home inspection contingency, and the home inspector she employed did not attempt to evaluate it. She received a disclosure statement relating to the ranch that was obviously incomplete,[43] with nearly all questions unanswered and page after page left blank. She initialed each of these pages, but she did not ask for a more complete disclosure. One must conclude that she did not care about the condition of the ranch.

Second, there is no evidence that Mr. Erkins had visited the ranch, discussed the ranch with the sellers, or otherwise had any basis to know about its condition.

L. Property Boundaries Not as Expected

One of the most unsettling discoveries Ms. Hall made after her purchase was that she had purchased only Lot 2 shown on the as-built survey attached to this decision as Attachment A. Lot 3 had previously been sold. A light pole used by Ms. Hall, a lawn she associated with her house, a driveway, and a greenhouse were all located on Lot 3.

Ms. Hall unquestionably was given the as-built, and indeed signed a certification relating to it, but she credibly testified that she did not understand it and believed she had purchased the entire corner of Bending Birch Drive. Had she purchased the entire corner, the acreage purchased would have greatly exceeded the 2.40 advertised for this property, but again it is likely that Ms. Hall did not appreciate that distinction.

---

[41] Hearing Exhibit 4, p. 4.

[42] Ms. Hall blames her lack of a viewing of the ranch house on others, including Mr. Erkins. Nonetheless, the central fact is that she proceeded with the purchase, rather than walking away, in spite of having no viewing of the ranch house.

[43] It is arguable that no separate disclosure form was required for the ranch, which was an outbuilding to a single-family residence.

Ms. Hall seeks to lay this misunderstanding at Mr. Erkins's door. The primary basis is that the Clauguses' disclosure statement for the ranch indicated that there was a greenhouse on the property, and the log house disclosure indicated that no features were shared with neighboring tracts. However, Ms. Hall did not rely on the disclosure statements in making her offers in August; she did not even look at them until September. In making her offers, therefore, she must have relied on an understanding of the property boundaries that came from another source. The understanding did not come from Mr. Erkins, who had no direct dealings with her at all. The natural source for that understanding would be her own licensees; certainly, it was their responsibility to ensure that she knew what she was buying.

By the time she closed the transaction, Ms. Hall did have the sellers' disclosures in hand. However, she also had an as-built that made the layout of the property perfectly clear. The property boundaries were not being misrepresented. The fact that she misunderstood them is regrettable, but is not a result of deception; it is most likely a result of inadequate counseling with her licensees.

IV. Conclusion

Ms. Hall was advised in this transaction by two licensees who received a $12,300 commission. The transaction also seems to have benefited a relative of one of the licensees through mortgage brokerage fees supplemented by a questionable consulting fee of $12,500. Nonetheless, Ms. Hall purchased a home she had viewed for only twenty minutes, on a tract whose boundaries she fundamentally misunderstood. Many of her later disappointments appear to be traceable to a level of assistance from her licensees that was not commensurate with the compensation they received. Additional losses resulted from her unexplained decision to leave the property vacant and unheated for several weeks after closing and recording. Finally, some losses appear to be due to concealment of water damage by the sellers. These circumstances, though regrettable, do not establish conduct by the listing broker that would support a Surety Fund recovery.

Because Ms. Hall has failed to prove fraud, wrongful misrepresentation, deceit, or conversion of trust funds by Gregory Erkins, Surety Fund claim S-26-011 is denied.

DATED this 12th day of October, 2006.

By: _____
Christopher Kennedy
Administrative Law Judge

Adoption

On behalf of the Alaska Real Estate Commission, the undersigned 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 14 day of December, 2006.

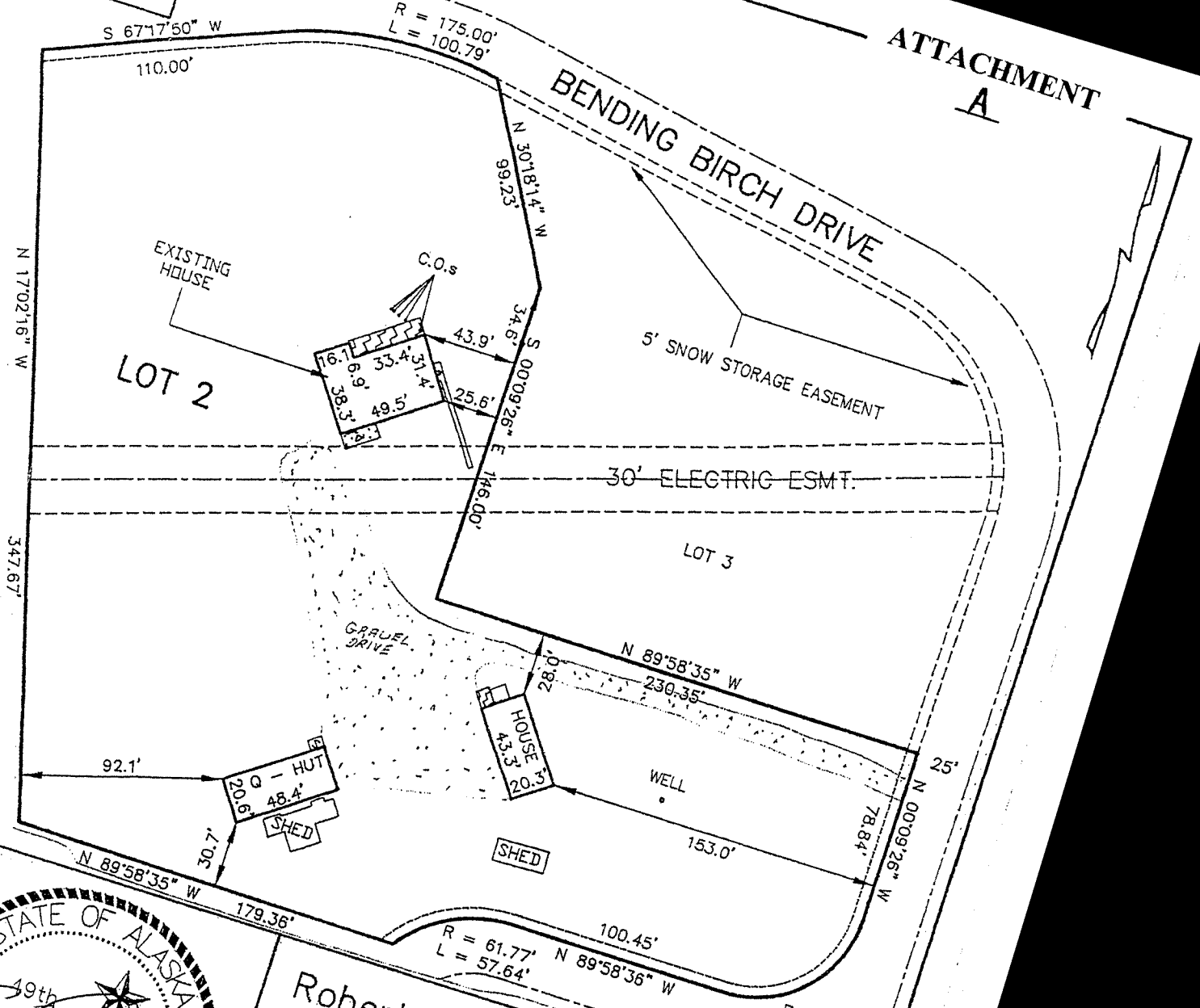
By: _____
Signature

GENE DUVAL
Name

CHAIRMAN
Title

ATTACHMENT A

ROPOSED FINISHED FLOOR LEV. (ASSUMED)	
ROPOSED BUILDING CORNER LEV. (ASSUMED)	
OMING DISTRICT	
RONT BUILDING SETBACK	
IDE SETBACK	
EAR BUILDING SETBACK	



SURVEY CERTIFICATION

LOT PLAN

hereby certify that I have physically surveyed e lot drawn and described hereon, and that I ve found or established all of the lot corners shown on the plan and to the best of my owledge and abilities, all dimensions have been assured true and correct.

OUNDATION AS-BUILT

Robert E. Johns, Jr., hereby certify that I ve performed an As-Built survey of the undation on this lot and that all the nensions and information as shown hereon e true and no encroachments exist unless own otherwise.

AL STRUCTURE AS-BUILT

Robert E. Johns, Jr., hereby certify that I ve performed an As-Built survey of the ucture on this lot and that all the nensions and information as shown hereon e true and no encroachments exist unless own otherwise.

STATE OF ALASKA
49th
ROBERT E. JOHNS, JR.
4121-S
Registered Professional Land Surveyor

SURVEY TYPE

☒ LOT SURVEY
☐ FOUNDATION AS-BUILT
☐ FINAL STRUCTURE AS-BUILT
☐ PLOT PLAN . . . AS-BUILT . . . LOT SURVEY . . . TOPOGRAPHY
☐ AS-BUILT . . . NO CORNERS SET ☐ RECERTIFICATION AS-BUILT . . . NO CORNERS SET

PLANS & LOT SURVEYS

IT IS THE RESPONSIBILITY OF THE BUILDER OR OWNER, PRIOR TO CONSTRUCTION, TO VERIFY PROPOSED BUILDING GRADE RELATIVE TO FINISHED GRADE AND UTILITY CONNECTIONS AND TO DETERMINE THE EXISTENCE OF ANY EASEMENTS, COVENANTS OR RESTRICTIONS WHICH DO NOT APPEAR ON THE RECORDED SUBDIVISION PLAT.

UNDER NO CIRCUMSTANCES SHOULD AN AS-BUILT BE USED FOR CONSTRUCTION OR FOR ESTABLISHING BOUNDARY OR FENCE LINES. THE SURVEYOR TAKES RESPONSIBILITY FOR THE INITIAL TRANSACTION ONLY AND ASSUMES FINANCIAL LIABILITY ONLY FOR THE COST OF THE SURVEY. LISTED DISTANCES PREVAIL OVER SCALING. REPRODUCTION MAY CAUSE ERRORS IN SCALE.

Prepared by
Robert E. Johns, Jr. & Assoc.
Professional Land Surveyors
842 E. 12 AVE.
ANCHORAGE, ALASKA 99501

Scale: 1" = 70'		
Date Surveyed:	Rec. Lot S.F.	
Date Drawn: 9-12-05		Rec. Plat File No.
Legal Description: 9-14-05	Drawn by: REJ	Checked by:
L2 B2 Duke & Duchess	Grid: NW1057	W.O. 5-295

SET REBAR
FOUND REBAR
(100.2) ASSUMED ELEV.

SYMBOLS
EXISTING / PROPOSED
DRAINAGE
WOOD FENCE
METAL FENCE
ASPHALT
CONCRETE
WOOD DECK

NOTE:
ONLY THOSE IMPROVEMENTS ABOVE GROUND AND VISIBLE WILL BE SHOWN. FENCES, WELLS, SEPTIC CLEANOUTS, SIDEWALKS, DRIVEWAYS, ETC., ARE SHOWN IN THEIR APPROXIMATE LOCATION, ONLY. SNOW MAY PREVENT SOME IMPROVEMENTS FROM BEING SEEN AND LOCATED. ALL DISTANCES ARE RECORD UNLESS OTHERWISE NOTED.

AS-BUILT SURVEY CERTIFICATION

DATE: November 17, 2005

ORDER NO: 66354

We/I, the undersigned hereby certify that there has been no change to the attached as-built survey done for the property described as:

Lot Two (2), Block Two (2), DUKE & DUCHESS SUBDIVISION, according to the official plat thereof, filed under Plat No. 2001-75, in the records of the Anchorage Recording District, Third Judicial District, State of Alaska.

as prepared by Robert E. Johns, Jr., and dated or re-certified as of September 14, 2005.

SELLER(S):

DANIEL W. CLAUGUS

JUDITH A. CLAUGUS

BUYER(S):

LAZETTE T. HALL

RULES OF APPELLATE PROCEDURE

Rule 602. Time — Venue — Notice — Bonds.

(a) **When Taken.**

(1) *Appeals from the District Court.* An appeal may be taken to the superior court from the district court within 30 days from the date shown in the clerk's certificate of distribution on the judgment.

(2) *Appeals from Administrative Agencies.* An appeal may be taken to the superior court from an administrative agency within 30 days from the date that the decision appealed from is mailed or otherwise distributed to the appellant. If a request for agency reconsideration is timely filed before the agency, the notice of appeal must be filed within 30 days after the date the agency's reconsideration decision is mailed or otherwise distributed to the appellant, or after the date the request for reconsideration is deemed denied under agency regulations whichever is earlier. The 30-day period for taking an appeal does not begin to run until the agency has issued a decision that clearly states that it is a final decision and that the claimant has thirty days to appeal. An appeal that is taken from a final decision that does not include such a statement is not a premature appeal.

(3) Rule 204(a)(2) — (6) concerning the timing of appeals applies to appeals to superior court.

(b) **Venue.**

(1) *Appeals from the District Court.* Venue for an appeal from a district court decision shall be at the superior court location within the same judicial district as the district court that would best serve the convenience of the parties.

(2) *Appeals from Administrative Agencies.* Unless otherwise provided by law, venue for an appeal from an administrative agency decision shall be at the superior court location that would best serve the convenience of the parties.

(c) **Notice of Appeal.**

(1) A party may appeal from a judgment or agency decision by filing a notice of appeal with the superior court. The notice of appeal must specify the parties taking the appeal and their current addresses, designate the judgment, agency decision or part thereof appealed from, and name the court to which the appeal is taken. At the time the notice of appeal is served and filed, it must be accompanied by:

(A) a statement of points on which appellant intends to rely on appeal. The grounds for appeal stated in the statement of points on appeal constitute the sole basis for review by the superior court. On motion in the superior court, and for cause, the statement of points may be supplemented;

(B) if required, the filing fee as provided by Administrative Rule 9;

(C) if required, a bond for costs on appeal as provided by paragraph (d) of this rule;

(D) a copy of the district court judgment or agency decision from which the appeal is taken; and

(E) proof of service on all parties to the appeal. In an appeal from an agency decision, the notice of appeal must be served on the head of the agency and, if the agency is a state agency, on the Attorney General of Alaska, at Juneau, Alaska.

(2) An appellant seeking to have the cost bond waived or reduced, an extension of time to file the bond, or to appeal at public expense shall file an appropriate motion at the time the notice of appeal is filed.

(3) The clerk of the superior court shall refuse to accept for filing any notice of appeal not conforming with the requirements of this rule.

(d) **Notification by Clerk.**

(1) In an appeal from a district court which is not at the same location as the superior court, the clerk shall send a copy of the notice of appeal to the district court and shall notify the district court of the date by which it must

forward the record on appeal as provided by Rule 604(a)(1).

(2) In an appeal from an administrative agency, the clerk shall send a copy of the notice of appeal to the agency and request the agency to submit a list of the names and addresses of all counsel who appeared in the matter before the agency, and of all persons who appeared therein pro se. The agency shall file the list with the clerk within ten days of service of the request. The clerk also shall notify the agency of the date by which it must prepare the record in accordance with Rule 604(b)(1).

(e) **Cost Bond.**

(1) In a civil case or an appeal from an administrative agency, unless a party is exempted by law, or has filed an approved supersedeas bond under Rule 603(a)(2), a bond for costs on appeal must be filed in superior court with the notice of appeal. The amount and terms of the bond are governed by Rule 204(c)(1) and Civil Rule 80.

(2) The cost bond exemptions provided by Rule 204(c)(2) apply in appeals to superior court.

(f) **Supersedeas Bond.** The appellant may file a supersedeas bond pursuant to Rule 603(a)(2) in lieu of a cost bond.

(g) **Cash Deposit.** The appellant may deposit cash in the amount of the bond with the court in lieu of filing a cost or supersedeas bond. At the time of the deposit, appellant also shall file a written instrument properly executed and acknowledged by the owner of the cash, or by the owner's attorney or the owner's authorized agent, setting forth the ownership of the fund; agreement to the terms of Civil Rule 80(f); and satisfaction of the conditions specified in Rule 204(c)(1) if the deposit is in lieu of a cost bond, or Rule 204(d) if the deposit is in lieu of a supersedeas bond.

(h) **Parties to the Appeal.** All parties to the trial court or agency action when the final order or judgment was entered are parties to the appeal. A party who files a notice of appeal, whether separately or jointly, is an appellant under these rules. All other parties, including the agency in an appeal from an administrative agency decision, are deemed to be appellees. An appellee may elect at any time not to participate in the appeal by filing and serving a notice of non-participation. The filing of a notice of non-participation shall not affect whether the party is bound by the decision on appeal.

(i) **Joint or Consolidated Appeals.** If two or more parties are entitled to appeal from a judgment or order of a court or agency and their interests are such as to make joinder practical, they may file a joint notice of appeal. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party.

(j) **Service of Documents.** Papers filed or served in the appeal must be served on all parties, except appellees who have elected not to participate in the action.

(SCO 439 effective November 15, 1980; amended by SCO 460 effective June 1, 1981; by SCO 495 effective January 4, 1982; by SCO 510 effective August 30, 1982; by SCO 514 effective October 1, 1982; by SCO 554 effective April 4, 1983; by SCO 575 effective February 1, 1984; by SCO 847 effective January 15, 1988; by SCO 888 effective July 15, 1988; by SCO 1015 effective January 15, 1990; by SCO 1250 effective July 15, 1996; by SCO 1284 effective January 15, 1998; by SCO 1385 effective April 15, 2000; by SCO 1411 effective October 15, 2000; and by SCO 1476 effective October 15, 2002)

Note: Ch. 77 SLA 2002 (HB 157), Section 2, adds new Chapter 26 to Title 6 of the Alaska Statutes, concerning providers of fiduciary services. According to Section 9 of the Act, AS 06.26.760(b)(2) has the effect of amending Appellate Rule 602 by postponing the deadlines for the filing of appeals to the superior court from a district court or an administrative agency by a trust company when the Department of Community and Economic Development has taken possession of the trust company.

Sec. 44.62.520. Effective date of decision; stay. (a) A decision becomes effective 30 days after it is delivered or mailed to the respondent unless

(1) a reconsideration is ordered within that time;

(2) the agency itself orders that the decision become effective sooner; or

(3) a stay of execution is granted for a particular purpose and not to postpone judicial review.

(b) A stay of execution may be included in the decision or, if not included in it, may be granted by the agency at any time before the decision becomes effective. The stay of execution may be accompanied by an express condition that the respondent comply with specified terms of probation. The terms of probation shall be just and reasonable in the light of the findings and decision.

(c) If the respondent was required to register with a public officer, a notification of suspension or revocation shall be sent to that officer after the decision becomes effective. (§ 20 (ch 2) ch 143 SLA 1959)

NOTES TO DECISIONS

Applied in DeNardo v. State, 740 P.2d 453 (Alaska 1987).

Quoted in Pan Am. Petro. Corp. v. Shell Oil Co., 455 P.2d 12 (Alaska 1969); Union Oil Co. v. State, Dep't of Natural Resources, 526 P.2d 1357 (Alaska 1974).

Sec. 44.62.530. Default. If the respondent does not file a notice of defense or does not appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without notice to the respondent. If the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence. Nothing in this chapter may be construed to deprive the respondent of the right to make a showing by way of mitigation. (§ 21 (ch 2) ch 143 SLA 1959)

Collateral references. — 2 Am. Jur. 2d, Administrative Law, §§ 365, 366.

Sec. 44.62.540. Reconsideration. (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence. (§ 22 (ch 2) ch 143 SLA 1959; am § 10 ch 63 SLA 1995)

Effect of amendments. — The 1995 amendment, effective September 3, 1995, added the second sentence in subsection (a).

Editor's notes. — Under § 11, ch. 63, SLA 1995, the amendments to subsection (a) made by § 10, ch. 63, SLA 1995 apply "to an accusation under AS 44.62.360 and a statement of issues under AS 44.62.370, filed on or after September 3, 1995."

Non-Adoption Options

1. The undersigned, on behalf of the Alaska Real Estate Commission and in accordance with AS 44.64.060, declines to adopt this decision, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2006.

By: _____
Signature

_____
Name

_____
Title

---

2. The undersigned, on behalf of the Alaska Real Estate Commission and in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

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 _____ day of _____, 2006.

By: _____
Signature

_____
Name

_____
Title

---

3. The undersigned, on behalf of the Alaska Real Estate Commission and in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

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 _____ day of _____, 2006.

By: _____
Signature

_____
Name

_____
Title

---

4. The undersigned, on behalf of the Alaska Real Estate Commission and in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

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 _____ day of _____, 2006.

By: _____
Signature

_____
Name

_____
Title