

Transcript of listening session regarding rulemaking activity for Chapter 308-124 WAC

March 18, 2024

Ellis Starrett (00:06):

You're welcome to add information to the chat or use the raise hand icon when you'd like to talk. We do have a section for comments, and when we start taking comments, we will open the mic to allow three minutes per person for comments. As a courtesy, all participants, please keep your mics muted and to reduce the background noise until you're called on to speak. So, thank you so much, just so that we can make sure that everyone has the opportunity to be able to hear. With that, let's go ahead and jump to the agenda, Kristin, thank you.

(00:44):

Today, we're going to review the statutes once again. For folks who didn't make the last meeting, this will be, again, I guess your first time. But we'll go ahead and review some of those statutes, talk about the survey, have a little bit of a recap from last time. Just so you know, I know somebody had requested to record, I'm recording this session. I'm happy to provide you a copy of the recording. It is public record, so we're happy to share that afterwards. Then, we'll take some comments and then we'll talk about next steps. So, that is the agenda today.

(01:29):

We have James Manuel here today with us to share a little bit about our statutory authority. James, would you go ahead and take a moment to introduce yourself and then share the statutory authority?

James Manuel (01:47):

Hi, Ellis. Yes, thank you so much. James Manuel. Excuse me. Are you able to hear me?

Ellis Starrett (01:57):

Yes.

James Manuel (01:58):

Okay. Hi, Ellis. Thanks so much. James Manuel. I'm our Tribal and Federal Liaison here with our Policy and Legislative Unit. Wanted to step through the authority pieces that, I guess, allow us to complete this rulemaking. So, as you know, Substitute Senate Bill 5191 was passed by the legislature. It had some language in there that was new to the agency, the broker agency individual relationship. And the authority that we're really viewing this that allows us to do this rulemaking is already in statute. And so, RCW 1885.041 gives the director general powers and duties, and among those is to designate rules to implement the licensing structures for occupational licensing.

(02:53):

Then specifically within 020 of 86 in the next chapter, it says the firm must enter into services agreements with the principal before, and the new language with this legislation or as soon as reasonably practical after its appointed broker commences rendering real estate broker services. And so, the law itself stipulates before any intent of today's discussion is to, or options to define the as soon as reasonably practical after. Any questions on that or any initial responses from the group today? Okay. I'll hand it back to you, Ellis. Next slide.

Ellis Starrett (03:36):

Thank you so much, James. All right. So, we shared the language at our last meeting for the modification WAC 308-124 paragraph five to define reasonably practical. We did make some minor adjustments based on the feedback, so I'm going to go ahead and read through this. For folks, you can read along with me. I just want to make sure that anyone who can't see the screen hears it as well. So, as soon as reasonably practical means prior to the firm's broker drafting documents or records as identified in chapter 308-124C WAC on behalf of the principal, but no later than five calendar days of the firm's appointed broker providing real estate brokerage services as defined in chapter 1885-011 subsection 17A through H RCW, whichever is soonest.

(04:37):

The hope here with we had heard some concerns about not being clear, what are those services? And so, we just wanted to cite directly to the law and specifically 17A through H, right? That is the language. And then, trying to structure it so it's clear that the real meaning of this is as soon as reasonably practical is as soon as possible but no later than five days. So, really putting the emphasis, or trying to put the emphasis on that it's prior to the firm brokers drafting documents or records. Right? That was our attempt to clarify that language and make that adjustment. If you can go to the next slide, Kristin, that'd be great.

(05:30):

Then, of course we didn't make any, or not of course, but we didn't make any changes to this language because we didn't receive feedback. We're just adding that underlined section to the existing WAC here. Broker's price opinions referral agreements. All right, next slide. Kristin. Kristin Partain is joining us to share. Well, you've been running the slides, and thank you so much, Kristin. But if you wouldn't mind speaking to the [inaudible 00:06:03], please.

Kristin Partain (06:03):

No worries. Thank you, Ellis. Hello everyone. Kristin Partain. I'm with Organizational Change Management here at Department of Licensing. I was the one who helped with the, excuse me, I just had a coughing attack so I apologize for my voice going in and out. So, here is some of the information that you're looking at that is part of that survey. We had 85 responding. A majority said this change would not impact their current business processes, and 21 replied that they would incur additional costs. The rest of the language on this slide is some of the actual responding comments by the people who answered the survey, and so I so appreciate that because it helps us to really hear what you all have to say and what you think. This is why these meetings were put into place.

(07:02):

Additionally, one responded with, "I will be forced to alter the nature of my service delivery from one that is focused on providing excellent service in order to ensure a client wants to continue working with me to one that is focused on securing a client commitment from the onset, regardless of quality of service I have provided. I feel this will make clients uncomfortable and potentially lock consumers in with disreputable and self-serving agents." Some of the other comments are, "Remove the five-day period," "More paperwork at expense of transactional work," "Time as cost," "Required to get something done, which is non-event. The law needs to be more specific on when these brokerage service agreements need to be signed. It's vague and ambiguous." So, I'm going to go ahead and hit the next slide. This goes back to Ellis. Thank you.

Ellis Starrett (08:10):

Thank you, Kristin. Actually, I'm going to have James speak to this slide because I really appreciate he has the clearer language. I'm up here, the people person in the group, folks, so just so you know that's my skill set that I bring. No, I'm just kidding. I really think that James has a great grasp on this. James, can you walk us through some of the recap from last time?

James Manuel (08:41):

Yeah, thanks so much, and I just wanted to be mindful that this is what we heard last time. If there are any clarifications or you want to add additional context, I think that is the purpose of today's meeting. So with that in mind, one of the items that we had heard is that this rule does not substantially impact a broker's liability. The five business, the original proposal had five business days as defined as reasonably practical. One of the items that we had heard from stakeholders and others is that with the weekend work that is often occurring, this can turn into a full week rather than five business days. And if provided a timeframe, we heard concerns from brokers that individuals may wait until the end or we may be creating a floor of the five days rather than what the current language says is before.

(09:34):

Then, we had also heard that DOL does not have rulemaking authority under Chapter 1886. So, a little bit of our thinking behind this is that as stated before, we do have regulatory authority and does not have civil oversight. So, we clarified the definition as before by adding five calendar days in response to the one-week concern that business days can bring five days to. We did review options, consulted with the Attorney General's office, and opted in and were leaning towards the consumer protection that defining the five days has rather than leaving it undefined, which is currently in place. Then, the Real Estate Commission Authority is advisory, that's currently an RCW. So, we certainly want to share information with this group and hear your feedback, but we think we're in a firm place as far as the authority to do this rulemaking going forward. Hand it back to you, Ellis.

Ellis Starrett (10:42):

Thank you so much, James. So, some of our next steps are obviously if we're going to continue forward with the language, we're going to hold a public hearing. We're going to hear public testimony, and that will of course really help us to understand with each comment that we receive or written comment or testimony in-person, we would obviously need to respond to that and provide that clear response as to why we disagree or what our official stance is on that

concern. Then, we would file a CR103. I want to remind folks that they can still reach out to me at TheRulesCoordinator@dol.wa.gov. That's on the screen.

(11:42):

I think that one of the other pieces that I wanted to... I lost my thought there. I do want to ask, Kristin, do we still have the other questions coming up? I felt like next steps came before I was ready for it, but I think I just lost my track.

Kristin Partain (12:07):

Is that what you were looking for?

Ellis Starrett (12:07):

Yes, that's what I'm looking for. Thank you. As a reminder, each person who wants to comment will have three minutes. Kristin, if you want to go ahead and throw up the timer, I do want to let folks know, I have seen the messages in the chat and I appreciate that and we will copy that and make sure that we have that documented. So, thank you, Erin, thank you, Paul, for your comments in the chat. And then, I see a hand, I think it is Annie. Go ahead, Annie. Annie, you are muted. Oh, there you go.

Annie (12:51):

Yeah, sorry, it took me a second to figure out how to get unmuted. I'm on my phone.

Ellis Starrett (12:51):

No worries.

Annie (12:51):

I have a question. I think this might be for James. I just want to verify, if you all are proceeding under RCW 1885-041, that begins with the director with the advice and approval of the commission may issue rules. So, is it true that you will require the approval of the commission before you make this language into a formal rule?

Ellis Starrett (13:20):

James, do you want to take that question or do you want me to?

James Manuel (13:24):

Yeah, I'd be curious I guess what program starts. I would point to another section of the RCW that clearly states the Real Estate Agency Commission is advisory. Right? And so, I think it would call into question whether the... Because the authority says the Real Estate Commission is advisory, I am aware of that verbiage that says with the advice and approval. I don't read the RCW as allowing the Real Estate Commission to veto any rules because of the advisory nature, and I can put the RCW verbiage into the chat as well. But yeah, to your point, that's something we have considered, consulted with our AGO's office on, and feel comfortable that the commission's role is advisory without necessarily the power to veto rules. I'd be curious if there's any other different opinions on that.

Annie (14:15):

So, I'm sorry, just to be clear, are you saying that there's a different statute under which you would proceed that is advisory that requires advisory only? Or are you reading 1885-041 to say that you don't require the approval of the commission, you only have to advise?

James Manuel (14:34):

I am saying that the statute that created the Real Estate Commission stipulated that the commission is advisory without power, and doesn't stipulate any additional powers that would allow it to veto agency rulemaking.

Annie (14:47):

Can you tell me that statutory authority?

James Manuel (14:49):

Yeah. Yeah, let me dig it out for you. It's something we had considered before this meeting. Give me one moment.

Ellis Starrett (14:58):

Thank you, James. I'm going to see if I can pull it up here, too.

Annie (15:04):

So while he's looking for that, maybe can I ask a further question along those lines? If the commission actually voted as a majority or even unanimously against the notion of this rule, would the department proceed with the rule anyway?

Ellis Starrett (15:41):

I actually don't, that wouldn't be my decision. That would be Jen Claussen's decision, Jennifer Claussen. But I appreciate the question, Annie. I think that when we talk about next steps, another thing to add is that of course after this, we compile all the information, the survey results, the notes from the discussion, the concerns that have been provided, and we bring those to our leadership and then leadership makes a determination on how to proceed. So, although I can say that this is the direction that we're headed, we haven't had that final meeting or that final conversation with the commission. We haven't done those final steps, and so nothing is certain until we would file language. That being said, I do want to reiterate James's point that we have to navigate this situation with our advisory committee, with the Real Estate Commission. We're doing our best to work with everyone given that the concerns that have been raised and the disagreement about how we proceed. So, I just couldn't answer that definitively.

James Manuel (17:06):

So, I did drop into the chat but it was the 1885-021. So in the creation of the commission, there's a clause that says the members who shall act in an advisory capacity to the director. I'm appreciative to your point, which points to the 85041, with the advice and approval of the commission. I think we've consulted with our AGO's office on whether that verbiage would have the authority to substantially veto. I think to your point, it's not any question of if the commission disagreed with this rule whether we'd proceed. I think that's certainly, as Ellis said, up to Jen Claussen. But I think from one of the items that we've been working with the AGO's Office on is

this advisory piece at the creation of the Real Estate Commission, kind of paired with that verbiage of the advice and approval of the commission. So, it's something we're appreciative of and if there's any public comments that speak to that, I certainly want to hear that so we can take that back to our teams.

Ellis Starrett (18:16):

I think we'll let Sabrina go next and then we'll loop back. Because, Annie, I see you still have your hand raised. Go ahead, Sabrina.

Sabrina Jones-Schroeder (18:26):

So, just want to go on record again that the three commissioners that were on the subcommittee looking at this issue are opposed to a five-day rule. Because there might be some folks on this listening session that were not on the prior listening session or in prior commission meetings. I don't know for a fact, but I'm pretty sure the other three commissioners who were not on that subcommittee are in agreement. So, to Annie's point, I believe you'd have a unanimous or consensus that the commissioners are opposed to implementing any date period of time, whether it's two days or three days or five days. It flies in the face of the legislative intent because there could be times when it would be less than five days. So, we're opposed. We're opposed to this rule.

Ellis Starrett (19:17):

Thank you, Sabrina. I really appreciate your you bringing that to the space. I appreciate you making it transparent to everyone else who's here that that is your position and that others are, it sounds like, very likely to agree with that. I think this is a difficult situation in the sense that we really respect, obviously, our partners at the Real Estate Commission. We really have had really strong and good relationships with everyone, all of our stakeholders in this area. And so, this has been a very difficult thing for us to figure out how do we effectively administer the law that we've been given? How do we create a process for our staff that they're able to follow and that we're able to equitably uphold the rules that we're administering? It creates a very difficult situation, and we brought those concerns up in the legislative session saying we can't equitably administer a law that doesn't give us clear guidance. We raised that and we were told that we should do rulemaking.

(20:27):

And so, it's a tricky situation and I don't bring it up to negate anything that anyone has shared, only to add that context and let you know what we're grappling with. And I can't say, it's not my role one way or another, to say whether or not we're going to adopt the rules as written. But I just want to express again how this, we are really, like at my role in administering the rule making process, we are very committed to public input in general, especially our commissions. And so, I just want you to feel that respect and appreciation.

Sabrina Jones-Schroeder (21:10):

For sure, and I fully respect the hard work that DOL staff is doing. Let me just throw this out here for fodder. Scattered throughout the agency law that we've been operating under since 1996, there are squishy guidelines, and I'll use a different one than I used in the last listening session. We have duties as licensees to exercise reasonable skill and care. I know that when I

teach agency law classes and I teach my agents, I ask the question, "What is reasonable skill in care? How if a consumer says to you, you violated the duty of reasonable skill in care, how is a judge going to know how is the department going to know that you have violated that duty?" And they scratch their heads and they think.

(22:02):

The reality is that that standard is what that licensee did hold up against what the average bear licensee would do. And I don't see why there is the huge push to put the guardrails on this, the five days, when this could be another one of those squishy standards, that if there is a consumer complaint to the DOL that my licensee did not have me sign a Brokerage Services Agreement as soon as practically possible. Well, what's as soon as practically possible? Well, it's when would other licensees have done this. I think as time goes on, and you probably already have it two and a half months into the year, what as soon as reasonably practical will become? It'll become an industry standard. Just like what does the average bear agent do in exercising reasonable skill and care in the conduct of their business? So, again, I caution against trying to put a firm guardrail on it. I think the agency law has a ton of squishiness already and we've been doing okay. The department has been doing just fine administering the agency law with all of its squishiness for all of these years.

Ellis Starrett (23:22):

Thank you, Sabrina. I do see the questions in the chat, I appreciate that. Again, I'm going to glance over them to see if there's anything that we can speak to right now, but I do appreciate-

Kelsey Stone (23:40):

Ellis? Really quickly, this is Kelsey. I just wanted to call your attention. I know that some folks are commenting in the chat about the timeline calendar days versus business days. We did receive some feedback in the first stakeholder listening session that there was a recommendation to move it to calendar days, as most folks are working on weekends and holidays. So, I think that that's something that we can definitely think about what's going to work best for folks. We want to make sure that that's consistent for everybody on what that timeline understanding is. But that's why we did change it to calendar days, as based on recommendation from the last listening session feedback.

Ellis Starrett (24:17):

Thank you so much, Kelsey. I really appreciate you bringing that back to the, adding that to the conversation, because I wanted to have context as why we were doing that. All right, other comments? Again, you've submitted these comments here. For folks, just as a reminder, the Regulatory Fairness Act is a law that looks at the impact on small businesses, but it's really on businesses and professions when we do rulemaking. And so, we're collecting this information now, but I want to be clear, the context is we're looking at what is the impact. That's the stage of the rulemaking process that we're in. So, we propose a rule with the CR-101, which we did. And before we file the language and say this is really for sure what we're considering and we want to have a public hearing and collect your testimony, we take this time to look at the impact and to be able to speak to what is the cost, what will it take to administer this? Not what the law requires you to do, but what does the rule specifically require of us?

(25:40):

That being said, all of your comments are added to the rulemaking file and we have an obligation to respond to those. So, I want to be clear just again on the context of why we're here today, thank everyone for taking the time to adjourn. We are recording this session as a reminder. I know several of you have tried to get a recording yourself, but I'm happy to provide a copy of this recording to anyone. It is a public record. I should have it downloaded after this meeting within a couple of hours. It just takes Zoom some time to process those recordings. But I'm happy to get anyone a copy, and it's a part of the rulemaking file. I see, Annie, you have your hand raised again, so we'll go ahead and give you three more minutes. Go ahead and jump in.

Annie (26:36):

Thanks. So, I have a comment and then a question. My comment is, I presume you all are familiar with, excuse me, I'm sorry. The NAR proposed settlement of Friday, which if it takes effect will prohibit any offers of buyer broker compensation on the MLS. If your rule takes effect and brokers don't enter a Buyer Agency Agreement for up to five days, five business days, even following the beginning of real estate brokerage services, that means that brokers and buyers will literally be working together for five days without any form of agreement or offer of compensation to a buyer broker. Extraordinarily dangerous if brokers have never considered that before. I would even suggest that the survey results you've received prior to this meeting or prior to Friday's announcement of the NAR lawsuit, may not truly be a reflective of what a broker might consider to be their risk in light of the NAR settlement.

(27:42):

Second, I have a question. For those of you who would actually, staff, if you believe that it would be easier to implement the law based on this rule, my question would be what would you do in the following circumstance? Seller interviews five different listing brokers, one every day of the week, and then takes the weekend to make a decision and decides on the following Monday, so seven days later. Or however, let's say two weeks later, they make a decision that they want to hire broker number one. And it's now been, let's just say, 10 days since they interviewed broker number one and when broker number one would have provided real estate brokerage services in the form of a broker price opinion and other brokerage services. So now, it's been more than five days, business or calendar, since they had that meeting with the seller and provided real estate brokerage services. Under your rule, wouldn't that listing broker now be prohibited from entering a listing agreement with that seller because it will have been more than five days? How would you interpret that set of facts under your new rule?

Ellis Starrett (28:54):

I appreciate the question, Annie. I think that I would probably want to give people a little bit longer to be able to respond to that question, so I don't think that we can respond to it here. But I think I appreciate the question. It's a good scenario. I think that these kinds of scenarios are things that our team is trying to think about and figure out and work through. Because I think there's this piece about, it's not five days, right? It's as soon as reasonably practical. But if people are not doing that and they're saying, "Oh, I think this is completely reasonable for me to just completely ignore the law," then we actually have something to enforce. But I do appreciate the scenario. I think that, again, we're trying to work through those complicated scenarios ourselves.

(29:47):

Okay. All right. I think I'm looking for other hands. I haven't seen other hands. Kelsey or Kristin, can you help me with the chat? Is there anything you think that we can speak to today?

Kristin Partain (30:04):

No, it's more about comments and providing additional information to DOL.

Ellis Starrett (30:12):

Great. Sabrina, I see your hand again, so go ahead.

Sabrina Jones-Schroeder (30:16):

Yeah, I just want to point out the one comment that was made in the chat, to highlight that our contracts speak to a five day or less period of time being business days only. I would hate to see the DOL adopt a rule that has a five calendar day rule. It could create just genuine confusion in the industry. So, I thought that was an excellent comment worth pointing out.

Ellis Starrett (30:44):

I really appreciate you raising that, Sabrina, and for whoever else raised it in the chat. For the team, DOL team, let's revisit that just because, gosh, I know how challenging that can be sometimes, you know? We have five business days, five calendar days, which one is it on this? If it's relating, let's think about that. So, I appreciate that and I see Shelly, I see your hand raised. Go ahead.

Shelly Schmitz (31:15):

I would like to go back to Annie's statement about NAR, as that just came out on Friday. I know there's a lot of, we'll call it, digesting of it over the weekend and today. The DOL really does look at this ruling. I'm concerned that with what happened before Friday, comments were made, maybe decisions are kind of being weighed, and after Friday it could change how things are looked at. Because that NAR decision is quite impactful to how we will do our business.

Ellis Starrett (31:54):

Thank you, Shelly. I need to brush up. I'm not sure how much our staff have had time to consume it over the weekend. It was a very sunny weekend and I hope you all were taking a little bit of time, although I know it's a busy time for home buying. That being said, I think I obviously need a little bit more understanding on it as well before we proceed. So, thank you for raising it. We can definitely take a look at that and make sure we're reviewing that.

(32:30):

Okay. I'm looking for other hands. I don't see any. Annie, I can't tell if your hand is still raised or if you're maybe raising it again. Okay. She put it down. Okay. All right. I really appreciate everyone's time. I can imagine how frustrating and challenging it is. I obviously am not, I don't have an individual profession, I don't own a business, but I have a lot of family. Most of my family is small business owners and I know how frustrating it is when the state has to come in and have its say about the work that you do. We have this obligation of implementing these rules or figuring out how we're going to administer these laws, and I just know it can be really, really challenging.

(33:30):

I do genuinely appreciate your time and raising the concerns. It helps us to try to do our best and figure this out as an organization, and I hope you know that it's genuinely appreciated. I do know that it's frustrating and I can't solve all the world's problems, and I certainly can only play my part in this process, but I know you're trying to do the best thing for everyone. And so, I appreciate that and I respect that, and we're going to try to do our best.

(34:16):

I don't know what else to add today. Just as a reminder for next steps, we're going to take the survey feedback and we're going to provide a qualitative analysis of that feedback. Right? This is how many people responded, these are the overall trends, here's some highlights of the different comments that are made in these themes. We'll also provide, here's what we heard in these sessions. So, not only the impact on the rulemaking with that kind of legal perspective, but also the substance of the comments, right? This is what we're hearing, these are the concerns, are we still feeling like we're sure about our decision and our path forward? Then, there would be a notice to follow that would share what our next steps are.

(35:08):

I know I can't off the top of my head, think of when our next Real Estate Commission meeting is. Can anyone remind me of that? You're free to unmute if you have that information handy. I'm going to look at the chat and see if anyone rescued me in the chat.

Kelsey Stone (35:29):

May 16th.

Ellis Starrett (35:31):

May 16th. So, I'm not sure how that will align with next steps or not, but I know that we'll be reaching to, we typically reach out to key stakeholders first, and then we follow with the entire listserv. So, there'll be more information forthcoming and that's what I can share about our next steps. Then, of course if we go ahead and file the ruling, which you will all be notified. If we modify things, we typically will send out a separate notice and say, okay, here's how the language was modified. Give that time to saturate and give more time for feedback before we take a next step to file for the public hearing.

(36:21):

With that, since I'm not seeing any hands raised, I'm going to give ramble and pause here, just make sure that no one else is about to raise their hand. I'm going to go ahead and wrap up this meeting. Thank you again for your time. Feel free to email TheRulesCoordinator@dol.wa.gov. That is me and my team, check that inbox and they can send anything to me specific to this. Feel free to reach out and you'll hear from us soon. So, thank you. Thank you for your time.