

MINUTES OF THE Senate COMMITTEE ON Federal and State Affairs

The meeting was called to order by Senator Edward F. Reilly, Jr. at
Chairperson

11:00 a.m./p.m. on March 2, 1990 in room 254-E of the Capitol.

All members were present ~~except~~:

Committee staff present:

Mary Galligan, Legislative Research
Deanna Willard, Committee Secretary

Conferees appearing before the committee:

Proponents

Janet Stubbs, Home Builders Assoc. of Kansas
Stephen Critchfield, Critchfield, Inc.
Mike Everhart, Everhart Homes

Opponents

Karen France, Kansas Assoc. of Realtors
Gene Yockers, Real Estate Commission

The minutes of the March 1 meeting were approved.

Hearing on: SB 577 - Real estate brokers and salespersons, licensure; exemptions

Staff said this bill was referred to Federal and State Affairs from the Senate Local Government Committee, where it was amended as shown.

Janet Stubbs, Home Builders Association of Kansas, gave testimony urging passage of this legislation to permit builders to market their product with their own employees. (Attachment 1)

Written testimony was distributed from Ron Hageman, General Contractor, Manhattan, asking for this legislation to allow an employee to sell his company product without being licensed. (Attachment 2)

Written testimony was distributed from Bob Hogue, Builder, Topeka, which urged passage of SB 577 to increase new home affordability. (Attachment 3)

Steve Critchfield, Critchfield, Inc., gave testimony in support of the bill which would allow employees to participate in the sales process. (Attachment 4)

Mike Everhart, Everhart Homes, Overland Park, spoke on behalf of the bill saying he shouldn't be forced to hire a realtor who might not represent him to sell his product. (Attachment 5)

Karen France, Kansas Association of Realtors, appeared in opposition to SB 577, saying the issue goes directly to the protection of the public. (Attachment 6)

Gene Yockers, Kansas Real Estate Commission, testified against SB 577, saying the primary function of the REC is to protect the public and expressing concern that this would set a precedent for others wanting to be exempt from the license act. (Attachment 7)

The meeting was adjourned at 11:55 a.m.

SENATE
FEDERAL AND STATE AFFAIRS COMMITTEE
MARCH 2, 1990

SB 577

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Janet Stubbs, Executive Director of the Home Builders Association of Kansas, a trade association representing approximately 2000 members across the State.

This is not a new issue. It is an issue about which the builder and developer members of my association give strong support based upon their belief that they should be able to have an employee, who works on their houses or in their business, conduct business on their behalf for which they the builder/developer are responsible.

It is our view that the prospective purchaser can obtain more knowledge about new construction from the person who has worked on the house in some capacity and knows the builders method of construction practices. The employee of the builder will have the confidence of and in the builder and his product.

You will hear arguments from opponents of this legislation that to pass legislation as proposed in SB 577 "will cause harm to the public" because a licensed salesperson is not handling the transaction. I remind the Committee that a builder may sell his own property without licensure under current law, and often does. If a builder were lacking in integrity, as is perceived by the opponents, then he could take advantage of the buyer under current law without involving another party.

As you listen to the testimony to follow, please keep in mind that anyone the builder/developer employs in his construction company is an "employee" and subject to control by his "employer" in an employee/employer relationship. The builder is legally liable to the customer for the actions of his employee, just as the broker is liable for the actions of the salesperson. However, the salesperson is an "independent contractor" of the broker and not subject to the same controls the builder has of his "employee". This was specifically spelled out in SB 176 of 1986.

New construction sales is a different business than is the sale of existing structures. Requiring education, even the 30 hours of the basic real estate license courses, contains little, if any, information beneficial to the builder's employee for the type situation we envision. For example, the builder is quite knowledgeable in the area of finance. He must be to run his own business, acquire construction loans, etc.

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A builder of today has an attorney prepare his contracts for use in selling his product and would not benefit from a course in contract law provided by the Real Estate Association. Home Builders Associations, at all levels, provide many courses each year on many subjects to professionalize and train the builders to compete in this very competitive market place. To require education courses through the Kansas Association of Realtors for the purpose we are seeking, would have little, if any, benefit to anyone except KAR.

The builder/developer is a merchant and manufacturer. He is asking to be permitted to market his product in the most economical and efficient method possible. Just as other merchants do. The opposition will tell you that a purchaser of a new home is investing his "life savings" which will be at risk under this proposal. We agree that consumers work hard to save a down payment for their dream home. However, that dream will not be jeopardized more by the provisions of SB 577 than it is today.

I would point out to you that a farmer makes just as large an investment, and sometimes greater, when he purchases a new combine or tractor. However, no one is suggesting that the dealer be required to employ a salesperson who has completed a specific number of hours being trained and tested in the operation of these machines before he can be employed. We trust the implement dealer to employ a person who will represent him by instilling confidence in the customer with the knowledge of the product. This is rewarding for all concerned, including the customer. The dealer is responsible for hiring a conscientious, responsible person who wants to keep customers coming back because they are satisfied with the product and service and will tell their acquaintances.

The question has been raised by the opponents regarding the safety of earnest money. Although the builder currently transacts sales and handles earnest money, we do agree to the amendment which places earnest money in a title company's escrow account, if the Committee is more comfortable with the inclusion of this provision.

The opponents of this legislation have placed considerable emphasis on the need for access to the Recovery Fund, which is available only when a licensed real estate agent is used and the consumer suffers a loss.

It is important that the Committee refer to K.S.A. 58-3067 which says that (1) payments shall be made only pursuant to an order of a court of competent jurisdiction, (2) payments shall be limited to \$15,000 aggregate per transaction, irrespective of the number of claimants or parcels of real estate in the transaction, (3) payments for claims against any one licensed broker or salesperson shall not exceed an aggregate of \$30,000 within a calendar year, or in no event exceed an aggregate of \$50,000 on one licensee.

Although, we do not believe the educational requirements placed in the bill by the Senate Local Government Committee would be beneficial for the employee's showing of the employer's property, we would be willing to work with the Committee on an educational requirement explicitly defined to ensure the intended regulations for the individuals being addressed in this legislation.

In conclusion, my information advises that Colorado, Oklahoma, and Missouri have such an exemption as proposed in SB 577. I have a copy of the Colorado statutes. We ask your favorable consideration of this measure for Kansas builders, developers and home buyers. Our opponents have stressed that this is a consumer issue. We agree. The consumer should not be forced to pay a 6% sales commission to a licensed agent who may or may not be able to answer the questions he may have regarding the construction of his new purchase. If we are truly concerned about affordable housing in Kansas, then we must work to enable more Kansas citizens to qualify for a loan. The amount of commission added to the actual cost of a home will prohibit some buyers from qualifying.

We urge you to pass legislation to permit builders to market their product with their own employee.

Hageman Construction
2708 Amhearst
Manhattan, Kansas 66502
Phone (913)537-4424

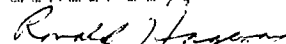
To who it may concern:

I, Ron Hageman, an independent residential contractor, have an employment of five people on the job site. One of these people is my brother who has worked for me for over six years. He works on the finishing end of each project, and often people stop in to look around and usually are loaded with questions. I feel there is nobody better qualified (including the approximate one hundred fifty licensed realtors in town) to show these people around and answer their questions accurately. Who better knows what goes into the home than the people who build it?

Several of my new homes are purchased by local people in the move-up market and are sold direct without a realtor involved. These people would rather put their trust in my employees, who know what is going into the home than licensed realtors, who are generally full of answers, but most of which are made up of cosmetic guess-work.

In closing, I feel there needs to be a change in legislation to allow an employee to be able to sell a product of his or her company without being licensed. Again I ask, who is better qualified to sell a product than the people who build it?

Sincerely,



Ron Hageman, General Contractor

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In Support of SB 577

Bob Hogue
Builder/Developer
Topeka, Ks

The Homebuilders Association of Kansas supports SB 577 because existing law is in direct conflict with free market principles and it artificially increases the cost of building a new home without adding anything of value.

Building homes for a living has become a high risk, highly technical, and very complicated business. Under present Kansas law, home builders are forced to:

- 1) Personally sell their homes.
- 2) Arbitrarily sell 5% of their stock to a staff member so that the staff member can sell the home.
- 3) Let a licensed real estate associate sell the home

Typically, the sole owner of stock in a building company is the President of the company. This person has little if any time and energy left at the end of the day to meet with customers, explain the technical ramifications of this product vs. that, detail and demonstrate the functioning of various design elements, compare methodology to alternatives and all the other things that should be done to properly educate a potential new home purchaser. That leaves only the licensed real estate associate who for the most part is no better educated about new construction than the public at large. A new home today is nothing like yesterday's generic home. A new home salesperson must be specially trained in a wide variety of complicated issues if the consumer is to be well served by the process. Current Kansas law issues a defacto monopoly to real estate firms who have little if any incentive to properly train their personnel to sell new homes. The builder has little if any control over what is said about their product or how it is demonstrated to a potential purchaser.

Not only are the new homes different today from the ones in existence when current Kansas law was written, but the ancillary functions relating to mechanics liens, titles, and banking have also changed. Many of the things a real estate sales associate was trained to do when selling new homes have become obsolete due to tighter banking criteria, a better lien law, and more restrictive title and closing requirements. In short, real estate sales associates have outlived their usefulness as the front-line information dispenser for new home sales and the buying public would be better served by persons who may or may not own 5% of the stock of the company.

Kansas is still blessed with affordable home prices when compared to national averages. However, the present law is needlessly costing Kansans millions of dollars in monopolistic fees that add no value for the consumer. In 1989 in Topeka, considering only those new homes listed by MLS (about 70% of the total new home sales), consumers spent \$1,047,000 on real estate commissions to licensed real estate associates. On a typical \$80,000 new home in Topeka, a potential savings to the consumer of \$2400 to \$4800 would exist if SB 577 were to pass. There is nothing else this legislature can do to so painlessly reduce the cost of new homes in Kansas.

SB 577 would increase competition in the market place, allow builders to better demonstrate their products, result in better educated purchasers, reduce the cost of building a new home, and increase new home affordability. I urge you to pass SB 577.

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SENATE
FEDERAL AND STATE AFFAIRS COMMITTEE
MARCH 2, 1990

SB 577

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE;

My name is Stephen Critchfield, President of Critchfield, Inc. & Signature Homes. I am writing in support of SB 577.

My company is an eight year old firm that develops, builds, and markets new homes and new home neighborhoods. In addition, I act as consultant and sales company for several large and small building operations. I have been involved in this business for over fourteen years and hold an active brokers license as well as membership in the Wichita Area Board of Realtors and the multiple listing service. I believe this bill will help the states builders and not negatively effect the consumer or the real estate industry.

I recent the past statements and innuendoes made by the real estate industry regarding the ethics and business practices of the building industry. This industry has no more or less ethical people in it than does the real estate industry. A real estate agent has a license to lose for unethical practices, a builder has his company to lose. The builder retains all liability for the actions of his employee which is far more restrictive than that of a broker over an independent contractor.

My employees are far more knowledgeable about my policies and procedures and past customers than most real estate agents. Currently my secretary is unable to answer questions by phone regarding simple issues that most prospects ask before visiting the property. I know of no other manufacture whose employees are barred from participating in the sales process by law.

As far as the future of the real estate industry, I don't logically believe that this industry is threatened by this minor change. Most builders must rely on the multiple listing service in order to have their product exposed to the out of town buyer. You must be licensed and a member of the local board in order to be a member of the M.L.S. system. Licensed agents will still be able to show builders homes and receive compensation for selling the properties. In addition they also would be able to act as buyer brokers for their clients in negotiations with builders and their employees.

Builders today must be hands on, the margins have gotten to small. The builder must have the flexibility to compete fairly in the market.

Finally my employees would be willing to attend orientation regarding contracts and other matters as long as the licensed agents would attend orientation regarding the business of the builders including warranties, operations and procedures.

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Everhart Homes

7620 Slater, Overland Park, Kansas • (913) 642-7240

3/2/90,

Kansas Senate Federal And State Affairs Committee

Thank you for allowing me a chance to speak on behalf of bill #577. I live and build in the Kansas City area. The majority of Builders in our area build fewer than 10 homes per year. I am a member of the Home Builders Association and a member of the Kansas Association of Realtors and I am a licensed real estate agent in the state of Kansas. I have listened to representatives of the Kansas Association of Realtors on this and the House bill and I am here to tell you they do not represent all agents and brokers, nor even all members of the Kansas Association of Realtors in what they expressed in opposition to these bills.

Let me first talk about what is going on out there in the market place. A large number, perhaps even a majority of the real estate agents I have dealt with over the last several years do not represent me even though their fiduciary responsibility is to me as the Seller. That is reality in the market. My employees, who know my product intimately, may not discuss the price of my homes, financing, or become in any way the procuring cause in selling one of my homes without committing an illegal act. Instead I must hire a sub-contractor (the broker), who in turn hires another sub-contractor, (the agent), to sell my product. I must legally, keep my distance in order to maintain that relationship. I have little or no control over a sub-contractor other than not hiring them again. This isn't realistic since I am forced to hire a realtor to sell my product. Catch 22!

I am responsible for the actions and statements of my employees in my business. The frustrating fact is that I am also responsible for the actions and statements of the broker and agent who are sub-contractors, even though I cannot legally have control over what they say and do and even though they may not truly be representing me. Even with the advent of written acknowledgements stating whom the realtor is working for, I continue to hear the majority of agents I am in contact with confirm that the market reality is that the agents or cooperative agents are representing the buyer even though that same agent is legally representing me.

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This is the only industry I know of where the manufacturing company cannot sell its own product and must hire an independent contractor and hope that contractor will represent the person paying their fee. I am frustrated and tired of hearing realtors saying they cannot talk about the unique features of my homes because they might offend the other builders. I contracted with them to market my product. Twice in 10 years I have been able to get a realtor into one of my homes to demonstrate it so they would know what my product was all about, and yet with so little regard for my homes, I still have to hire them.

I have also heard and read many things lately about affordable housing. Most builders and developers in the U.S. spend 1.5 - 3.5% on marketing. In my area I must spend 5 - 7%. I recently listened to a representative of the real estate commission state that real estate commissions are negotiable. Reality is that you pay 5 - 7% or you don't get the realtor to list your home. I as a builder and developer am forced to pay an average of 2 - 4% more to market my homes than is typical elsewhere. Frankly, this additional 2 - 4% expense on a home is a large stride away from affordable housing.

Finally, this bill will not adversely affect the consumer. I as a builder, have no problem with escrow monies that I might collect at contract stage from a consumer being placed in a title company escrow account for the protection of all. I am currently responsible for any contract to sell my product even if a realtor wrote it. If someone sues over the transaction, I am the one they sue. The line of responsibility leading directly to the builder is already well established. We simply wish to have some control over one of the most important ingredients in home building: the marketing.



Executive Offices:
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Topeka, Kansas 66611
Telephone 913/267-3610

TO: THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
FROM: KAREN FRANCE, DIRECTOR GOVERNMENTAL AFFAIRS
DATE: MARCH 2, 1990
SUBJECT: SB 577

Thank you Mr. Chairman and members of this committee. On behalf of the Kansas Association of REALTORS®, I appear today to oppose Senate Bill 577.

Some may think that we oppose the bill merely because we want our members to sell the houses for the homebuilders. Ladies and gentlemen, this issue goes far beyond any desire our members might have to make a few dollars. This issue goes directly to the protection of the public. We ask that you take some time to examine those public policy issues.

We have always recognized, as does our license law, the ability of owners to sell their own property. We believe that is an inherent right in this country to have the ability to sell your own property. However, the state has recognized since 1947, when the first Real Estate Brokers' and Salespersons' License Act was passed, that there are certain rules which need to be followed when a person begins to sell real estate on the behalf of another individual.

The Kansas Real Estate Brokers' and Salespersons' License Act exists for the protection of the public. I would like to take a few minutes to review some

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of the requirements of that law so that you can get a picture of exactly what it is that these employees for the builders want to exempt themselves from.

This license law requires that persons who will be selling real estate, dealing with people's life savings, have proven they have a working knowledge of the real estate laws and procedures of the state. Anyone who seeks a real estate license in this state must have a minimum of 30 hours of pre-license education and must pass an exam which demonstrates at least a minimum competency level of understanding of the real estate transaction.

I have a copy of the book used in our Principles of Real Estate Class. You would find essentially the same topics in that class as what has been amended into the bill here in New Section 2. That makes me ask the question, why do we need New Section 2? If we are teaching the same basic real estate coursework covering the basics of the real estate profession, then wouldn't it make sense to retain the system which we have now and continue to require that all persons entering the real estate profession take this minimum curriculum before they are permitted and then provide an exam testing to make sure they can demonstrate a basic mastery level of all of these concepts?

While no system is perfect, we believe these requirements help to insure that individuals who take on this serious responsibility have some sort of education and understanding to carry the real estate transaction out legally.

It is human nature that people will make mistakes. But when people are dealing with people's life savings and possibly the largest purchase of their lives, ignorance of the law on the part of an employee selling the property, could mean drastic consequences for the innocent buyer.

The Kansas Real Estate Commission has a KBI background search performed on

all applicants to make sure they have no criminal convictions or judgments against them which would indicate any history of dishonesty. We believe the public should not be dealing with people selling real estate who have a history of extortion or embezzlement, or larceny.

The buying public probably does not know that such a background search is performed. Perhaps many of you did not know. But I am sure that you, as public policy makers, feel better knowing that someone is looking out for the unknowing public to help insure that people with a proven track record of these kinds of offenses are not put in a position to take advantage of vulnerable people.

Under the license law, the Kansas Real Estate Commission audits the records of brokers to insure that there is no double contracting, to insure that earnest money deposits are deposited on a timely basis, to insure that there are no unlawful withdrawals from the trust accounts. In general, these audits help to insure that people involved in the sale of real estate are dealing with the public's money in a fair and legal manner.

While the amendments on page 2 require the builder to place earnest money deposits in an escrow company trust account, there is no time limit put on the builder as to when they must deposit that money. Under the license law, brokers have five business days after the purchase agreement is signed by all parties.

In general, it is the function of the Kansas Real Estate Commission, under the statutory guidelines of the license law, to not only make sure people have demonstrated some sort of competence in the understanding of the real estate transaction, but also to keep a lookout over the licensees to make sure that their methods of business are in the best interest of the public.

It has been pointed out that employees for other types of businesses can sell real estate without a license. Employees of lending institutions can sell property owned by the institutions without a real estate license. However, we would like to point out that lending institutions are regulated and there is

someone providing oversight of the practices and procedures to insure that the public's trust is not violated. When that public trust is violated there is recourse against the persons responsible.

Attorneys for corporations can sell property without being licensed real estate agents. However, attorneys are trained in the legal knowledge of the real estate transaction and the inherent duties and responsibilities of acting as an agent for another person. They are also bound by a Code of Ethics which puts their license to practice law at risk, if they do not follow the law.

If you make the changes proposed in this legislation today, you are going much further than what has been presented here today. You have actually permitted many other people to escape from the license law. For example, relocation companies are companies which come in and purchase homes from or for corporations who have moved their employees to another location. Under this provision, a relocation firm can come into town, hire a bunch of employees, have them sit through a class and then go out and start dealing with the consumers, without anyone ever checking to make sure their business practices are fair and legal.

Also, as the language is presented, it says that any corporation under this subsection is not required to be licensed as a broker. Corporations are never granted real estate licenses.

Our license law also provides added protection of the public by providing the Real Estate Recovery Revolving Fund. Money from this fund is used to reimburse persons who suffer monetary damages by reason of violations of the license law. This fund comes into play when a person from the public has received final judgment in court against a licensee, and the licensee has no assets to pay the judgment. This typically arises where the licensee has filed bankruptcy.

This Recovery Fund was set up to insure the public was protected in the event a licensee defrauded the unwary public and then went bankrupt, which would have left the injured consumers out in the cold. If this bill passes, there is no similar protection for persons who happen to purchase a home from a homebuilder's employee, rather than from a licensee. There are no bonding requirements for homebuilders. There is no recovery fund to fall back on, in the event a consumer incurs damages. These consumers are left out in the cold. If you are seriously considering making changes for the homebuilder, you should also consider bonding the homebuilders.

Ladies and gentlemen, we do not care if the homebuilders sell their own homes. We are not concerned that they be a member of our organization. We believe that for every builder testifying here today, there are hundreds of licensed real estate people who do a good job and provide builders with quality service and they will continue to have those good working relationships. We do not feel builders are forced to utilize the services of one of our members in order to sell their homes.

What we do believe is, that these employees can go and earn their license by taking educational hours and passing a minimum competency exam and then going about their business of selling homes.

We believe this is the least they can do in order to help insure that the buying public, the prospective purchasers who place their trust in them, will have a better chance at dealing with knowledgeable, honest individuals. We believe the public is entitled to this protection. We hope you believe this too.

Thank you for your attention. I will be happy to answer any questions you might have.

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Senate Federal and State Affairs Committee
March 2, 1990
Senate Bill 577

Mr. Chairman and members of the committee:

My name is Gene Yockers, and I am here on behalf of the Kansas Real Estate Commission to testify against Senate Bill 577.

The primary function of the Real Estate Commission is to protect the public. The license act is based on the concept that an owner may sell his or her own property. If the owner hires someone else to sell it, that person has to be licensed.

There are several points I would like to make concerning SB-577, as amended.

Lines 7-11. (These same comments are applicable to lines 18-24.)

"Such employee shall not be required to be licensed as a salesperson. Any corporation to which this subsection applies shall not be required to be licensed as a broker."

We do not license corporations. Any individual who does real estate activities for the corporation must have a license. If an officer, it must be a broker's license; an employee can hold either a broker's license or a salesperson's license.

"Any earnest money received pursuant to a contract for sale or lease under this subsection shall be deposited in an escrow account held by a title insurance company."

I do not know that title companies hold escrow accounts. Parties to any real estate contract may designate who is to hold the earnest money deposit and sometimes a title insurance company is designated. When a real estate broker handles a transaction that provides the earnest money be deposited with a title insurance company, the broker delivers the contract and earnest money check to the title company and obtains a receipt.

First of all, can the law require parties to a real estate contract to agree that the earnest money be held by a title insurance company? If it can, then who is going to determine if the unlicensed builder complies? How is it going to be enforced? What happens to the builder if he doesn't comply? There is no license to suspend or revoke. Will the county attorney prosecute?

Line 4. By inserting "residential," the amendment would totally remove the current exemption for commercial real estate.

New Sec. 2 (lines 27-42)

This section provides that these employees of corporations - these builders and their employees - must complete a course of instruction approved by the commission.

When does the course have to be completed? How are these people going to know what courses are approved and where they can go to take the course unless the commission prints lists and disseminates information? What is the fiscal impact going to be on the agency to approve courses and do this work for people who pay no license fees?

Most important of all, who is going to know whether they take the education or not? And what is the penalty if they don't? Here again, there is no license to suspend or revoke. Will the county attorney prosecute?

The Real Estate Commission takes disciplinary action for violations of the license act. Acts which are prohibited by the law are for the protection of the public. The potential of license suspension or revocation is a deterrent to wrongdoing if the license is required in order to engage in real estate activities.

Under subsection (c) of 58-3039, and I will quote only a part: "The commission may accept proof of experience in the real estate or a related business or a combination of such experience and education which the commission believes qualifies the applicant to act as a broker."

In the event these folks wanted to be licensed as a real estate broker and they can show proof of experience and education, the two-year licensure period would be waived and they could hire salespersons who would be licensed under the act.

The Kansas Real Estate Commission has a real estate recovery revolving fund whereby any member of the public aggrieved by the acts of a real estate licensee can, under conditions set out in the law, recover damages through a court order. This entire bill as it is written would harm the public in the fact that they would not have access to that recovery.

A similar bill was defeated in 1984. Since that point in time, any number of builders have become brokers. The commission has a concern as to whether those brokers, who are builders, would renew their licenses and maintain their marketing staff. We have no way of measuring what the fiscal impact would be on this agency.

In summary the commission also has concerns as to whether this would set a precedent for anyone else wanting to be exempt from the license act, further diluting the commission's ability to function in the protection of the public.

Thank you very much for hearing the concerns of the commission in this matter.