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September 22, 2008

Nathan A. Poore
Town Manager
Town of Falmouth
271 Falmouth Road
Falmouth, ME 04105

RE: Real Estate Brokerage Activities

Dear Nathan:

You have asked whether certain activities of Bob Shafto, an independent contractor hired by the Town to serve as Open Space Ombudsman, constitute "real estate brokerage" activities under Maine law. If they do, Bob would be required to hold a real estate brokerage license from the Maine Real Estate Commission in order to legally engage in those activities. Bob does not now have a broker's license.

Bob receives a fixed annual fee for his services as Open Space Ombudsman. The range of services, as listed in the October 6, 2006 Request for Qualifications, is very broad. Most of the services are unrelated to the acquisition of land. Nevertheless, Bob does approach landowners to inquire about the Town's possible acquisition of land in furtherance of the Town's Open Space Plan. Bob becomes involved, along with you, in negotiating the terms and conditions of a sale of the land to the Town. The owner/seller may or may not be represented by a real estate broker and may or may not have listed the land for sale.

Importantly, Bob does not receive a commission or any part of the proceeds from any land sale in which he is involved on behalf of the Town. The services he provides in connection with land acquisition are part of the suite of services he provides under his consulting agreement with the Town.

Definition of Real Estate Brokerage

Under Maine's Real Estate Brokerage License Act (32 M.R.S.A. §§ 13001, et seq.), "Real estate brokerage" means a single instance of

- offering, attempting to conduct or conducting services on behalf of another
- for compensation, or with the expectation of receiving compensation,
- calculated to result in the transfer of an interest in real estate.

Real estate brokerage includes, but is not limited to, procuring of prospects calculated to result in, or acting as a finder to facilitate, the purchase, sale or exchange of real estate. Anyone engaging in real estate brokerage activities in Maine is required to obtain a license from the Maine Real Estate Commission, unless they satisfy a statutory exception.

The definition of real estate brokerage is quite broad. It is intended to protect the public by ensuring that those who participate in land transactions are reliable, educationally qualified and licensed by the State. Reading the definition liberally, Bob might be engaging in real estate brokerage because, on occasion, he contacts prospective sellers of real estate and participates in negotiating the terms of sale.

What arguably distinguishes Bob from the typical real estate broker is that Bob does not receive compensation specifically for this service of contacting land owners and does not receive any of the proceeds from any real estate transaction. These activities are an incidental part of the many activities Bob performs for the Town in connection with his role as Open Space Ombudsman. However, the definition of a broker, by its terms, does not turn on how the compensation is computed or paid and so one could argue that since Bob is receiving compensation for all of his services, at least some portion of that compensation must be for the “brokerage” activities, and therefore, Bob should have a brokerage license.

Exceptions to Brokerage

The Maine Real Estate Brokerage License Act provides several exceptions to the license requirement (e.g., for attorneys-at-law, auctioneers, and time share transactions). More importantly, there is an exception for transactions by the owner of the real estate or its regular employees, provided that the “real estate transaction services rendered by the employee are performed as an incident to the usual duties performed for the employer.”

There are a couple of obvious problems with applying the owner exception here: (1) The Town is not the owner of the property but rather the purchaser; and (2) Bob is not an employee of the Town. A rather unusual case decided in 1967 could provide support for the proposition that the Town is an “owner.” In *McKenna v. Peddle Land Developments*, 229 A.2d 332 (Me. 1967), a seller attempted to void a sale to a land development company because the company did not have a brokerage license. The Law Court found that no real estate brokerage relationship existed where the purchaser was a corporation with the authority to purchase, manage and develop real estate. The Court considered the purchaser an “owner” because, at the end of the transaction, it was the owner of the property. Under that reasoning, no brokerage license was required under the owner exception. If this reasoning were applied to the Town, which has the authority to purchase, manage, and develop real estate, it would be considered the “owner” of the property and would be able to take advantage of the owner exception.

Even if the Town is an “owner,” Bob would have to be an “employee” in order to qualify for the exception. Bob is not an employee of the Town but, rather, is an independent contractor. It is true that the real estate transactions services he renders are performed as an incident to the usual duties he performs for the Town and, in this respect, operates like an employee. Further, it is my understanding that Bob merely participates in the discussions with the seller of land and that you, as Town Manager (employee), direct the negotiations and actually participate in them. A court may well look at these circumstances and conclude that the employee exception applies. However, if the Town wants to minimize its risks regarding the issue of real estate brokerage, it would ensure that whoever performs these particular activities on behalf of the Town is an employee of the Town.

In the end, we have two arguments that Bob is not acting as a broker and therefore does not need a license: (1) He does not perform those services for compensation or with the expectation of receiving compensation that is tied to the real estate transaction; and (2) the Town falls under the owner exception and Bob is acting like an employee whose activities are incident to the usual duties he performs and is simply providing assistance to the Town Manager, who is the lead person in the negotiations. Unfortunately, there is no statutory or case law that specifically addresses the issue presented here so the outcome of a challenge is not without doubt.

What is the risk of operating without a real estate broker’s license?

There is enough ambiguity in the brokerage statute and a strong enough argument that the activities in question do not constitute brokerage that it is fair to look at the risks involved with continuing the activities as if a brokerage license were not required.

Performing real estate brokerage activities without a license is a civil violation incurring a penalty of up to \$2,000 for each violation, plus the amount of compensation received in the subject transaction. Any officer or agent of an entity, e.g., the Town, who personally participates in or is accessory to a violation is subject to the penalty. In the situations we’re talking about, there has been no compensation in connection with any real estate transaction, so the penalty would be expected to be \$2,000 per violation.

Notably, such an action would have to be brought by the Maine Attorney General’s Office in Superior Court because the Maine Real Estate Commission does not have jurisdiction in this situation. The Maine Real Estate Commission has jurisdiction only over licensed or formerly licensed individuals – not over anyone who has never been licensed, such as Bob. If a complaint were to be made to the Maine Real Estate Commission that Bob performed real estate brokerage services without a license, the Maine Real Estate Commission would not have any recourse against Bob or the Town. Any legal action would have to be initiated by the State Attorney General’s Office, presumably in response to a complaint from the Real Estate Commission, or, less likely, a concerned and aggrieved private citizen. Given the size of the potential recovery and the -

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- presumably – small number of violations that have occurred, it seems unlikely that the Attorney General would have any interest in prosecuting this matter.

Summary

Because of the broad definition of real estate brokerage, there is some risk that the activities Bob performs in connection with the Town's purchase of real estate could be deemed to be activities requiring a brokerage license. That risk would, however, be reduced to almost zero if the activities were performed by an employee of the Town rather than by an independent contractor.

In any event, enforcement of the statute requires action by the State Attorney General and not by an administrative commission. For many reasons, it is unlikely that the Attorney General would be inclined to vigorously pursue this issue against either the Town or Bob individually.

I would be happy to discuss any of this further with you. Please don't hesitate to give me a call once you have had a chance to review this letter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'W. L. Plouffe', with a long, sweeping horizontal line extending to the right.

William L. Plouffe

WLP/