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Virginia M. Gibbs, Chairman
Appraisal Subcommittee Federal Financial Institutions
Examination Council
Suite 310
2000 K Street, NW
!ashington, !C 20006

Re: **ASC's position that Board Counsel must allow ASC s staff to observe executive sessions of the Board.**

Dear Ms. Gibbs:

The Kansas Real Estate Board requested that as their general counsel I respond to the above-referenced issue identified in your May 16, 2005 letter to Chairman James Pfeffer. Following the Silliman disciplinary hearing in March 2005 before the Kansas Real Estate Appraisal Board's duly appointed hearing panel, ASC staff indicated they would be staying during the quasi judicial deliberations *(not* an executive session). General counsel for the hearing panel stated that ASC staff could not be present during these deliberations.

The Kansas Real Estate Appraisal Board respectfully, but strongly, disagrees with the ASC's position for the following reasons:

Initially, the Board points out that under the Kansas Open Meetings Act, K.S.A. 75-4317 *et seq.,* deliberations of a Board hearing panel are not "executive sessions" for which the Board may permit other persons to observe and/or participate.' Generally speaking, the Board would not object to ASC staff observing executive sessions. K.S.A. 75-4319 specifies the type of subjects that may be discussed in an executive session. This statutory list of executive session topics does *not* include quasi-judicial deliberations. In contrast, K.S.A. 75-4318, which requires open public meetings of administrative agencies contains a specific exemption for quasi-judicial deliberations:

> "(f) The provisions of the open meetings law shall not apply: (1) to any administrative body that is authorized by law to exercise quasi-judicial

'Attomey General Opinion No. 86-14 opined that persons other than members of the body may be present during executive sessions if the motion to go into executive session so requests.

> functions when such body is deliberating matters relating to a decision involving such quasi-judicial functions."

In other words, in Kansas quasi judicial deliberations are exempt from the Kansas Open Meetings Act .[2] Even in states whose "sunshine" statutes cover quasi judicial deliberations, courts have interpreted "openness" requirement as not applicable to such deliberations.

However, all hearings of the Board are conducted according the Kansas Administrative Procedures Act (KAPA), K.S.A. 77-501 et *seq.* Pursuant to K.S.A. 77-523 within that Act, *hearings* are required to be "open to public observation" and the Board has scrupulously adhered to this requirement. However, nothing in Kansas law requires that quasi-judicial deliberations of a Board hearing panel take place either publicly or in the presence of interested persons, such as ASC staff. In fact, what little legal guidance is available tends to strongly support the exact opposite conclusion.

Additionally, nothing requires that Board hearings be conducted and decided by a hearing panel comprised of three Board members. This has simply been the Board's chosen manner, to date. K.S.A. 77-514, within KAPA, authorizes the following persons to serve as a presiding (or hearing) officer of an agency hearing:

1. the agency head (i.e., the entire Board),
2. one or more members of the agency head,
3. an administrative law judge assigned by the Office of Administrative Hearings, or
4. one or more other persons designated by the agency head.

As seen, Board hearings may conducted and decided by a single hearing officer. Surely the ASC would not insist on one of their staff being present while such a such hearing officer mentally deliberates the requisite findings of fact, conclusions or law and any appropriate order, or insist that such a hearing officer deliberate out loud in the presence of ASC staff. The quasi judicial deliberations of a hearing panel comprised of two or more members of the Board are no different in that their mental processes are not, and should not be, subject to observation by, or disclosure to, anyone. The mere presence of persons other than the duly designated hearing officers could easily affect their quasi judicial deliberations in the same way that the mere presence of an outside person could affect the deliberations of a jury.

Further, nothing requires that hearings be conducted in conjunction with a regularly

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[2] *See also Attorney General Opinions No. 97-40 and 97-41.*

[3] *See Nasrallah v. !issouri State Board of Chropractic Examiners, 1996 WL 678640 (!o. 1997) and cases cited therein; Common Cause of !tah v. !tah Public Service Commission, 598 P.2d 1512 (!tah 1979); Della Serra v. Borough of Mountainside, 481 A.2d 547 (N.J. 1984); School Dist. No. 9 v. District Boundary Board, 351 P.2d 106 (!y. 1960); Stillwater Savings & Loan v. Oklahoma Savings & Loan Bd., 554 P.2d 9 (Okla. 1975); !rizona Press Club. Inc. v.!rizona Bd of Tax Appeals, 558 P.2d 697 (Ariz. 1976); Jordan v. Dist. Of Columbia, 362 A.2d 114 (!.C.App. 1976).*

scheduled Board meeting when ASC staff may easily observe a hearing. The Silliman case was scheduled at that time for the convenience of the ASC staff. And, nothing requires that deliberations of a hearing panel occur directly following a hearing. While this typically happens, frequently during the course of the Board's general counsel drafting of the order, follow-up deliberations to clarify findings of fact and/or conclusions of law occur either by conference call or e-mail. As the Missouri Court of Appeals pointed out:

> "'[d]eliberations' are not an event or an occurrence, but rather a process. In other words, the Board does not 'deliberate' for an hour or two and the 'deliberation' is then ended. Rather, the Board members discuss the issues and may even preliminarily reach a decision, but then the findings of fact and conclusions of law must be drafted and circulated, perhaps modified or revised, and again, circulated before being ultimately issued. In the case at Bar, the Board held its hearing on July 7, 1994, but the findings and conclusions weren't entered until August 3, 1994. Undoubtedly each Board member privately thought about and considered the issues between the time of the hearing and the entry of the formal order almost a month later. All of this process is 'deliberation' and it would be absurd to think that every minute of it must be open to the public."[5]

Surely the ASC is not suggesting that ASC staff be allowed to listen in to such follow-up conference calls or copied on follow-up e-mails between the hearing officers and their lawyer. Further, the hearing panel's lawyer is present during the primary deliberations as well in order to respond to legal questions of panel members and in order to draft an order that accurately reflects the hearing panel's findings of fact, conclusions of law and disciplinary order (if warranted). The presence of additional persons during such quasi-judicial deliberations would create a breach of the attorney-client confidential relationship - something the hearing panel is unwilling to do.6

In responding to the question of whether quasi-judicial deliberations should be conducted in a non-public manner, Attorney General Opinion No. 97-40 quoted the following from a !lorida Supreme Court decision:

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[4]"While there are a variety of procedures which could be used, after hearing evidence and arguments a public body or agency may simply call its hearing to a close and deliberate over the course of a matter of hours, days or weeks.' Kansas Attorney General Opinion No.97-41.

[5]*Nasrallah v. !ssouri State Board of Chiropractic Examiners,* 1996 WL 678640 (!o. App. W.D. 1997).

[6] *Fisher v. Mr. Harold's Hair Lab, Inc.,* 215 Kan. 515, 519, 527 P.2d 1026, 1030 (1974), citing Hutton v. Hutton, 184 Kan. 560, 565, 337 P.2d 635, 639 in which the following was quoted approvingly: ". . . (I)f the client chooses to make or receive his communication in the presence and hearing of third persons it ceases to be confidential and is not entitled to the protection afforded by the [confidentiality] rule, in that the very nature of the transaction and the circumstances surrounding it are inconsistent with the notion that the communication was ever intended to be confidential."

> "The regular activities of an agency and those which are quasi-judicial are altogether different. Those rights of persons and property involved in a hearing should be preserved in a judicial atmosphere which is essential to a fair and impartial deliberation upon the rights involved. To afford less in such a judicial type of proceeding would be a denial of due process and of a fair hearing in which a person's rights and interests are at stake, as much as if he were before a judicial tribunal.
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> . . . .
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> "The result of depriving an administrative body of free deliberation among themselves, just as a regular judicial body or jury may do, is to shut off the free flow of discussion among them and an exchange of ideas and an open discussion of differing views to the end that a fair and just result may be reached by the body based upon the evidence and arguments at the hearing. Ask any juror. The answer will be that the free interchange and discussion among the group is essential to a fair and just conclusion of the interests before them for decision. This is not the area in which one need fear the alleged 'private deals' and extraneous considerations to the matter at hand, so that really the asserted reason undergirding the sunshine law is not present in a judicial deliberation of a matter before an administrative board for a review of judicial character. The basic concept of the 'right of the public to know' is fulfilled upon reaching such a fair and just result which is then publicly conveyed.'"

The Board agrees fully with this sentiment and strongly believes that to safeguard licensee's due process rights, its hearing panels must continue to deliberate without ar extraneous influence - even the mere presence of ASC staff.

Another case, this one from the District of Columbia Court of Appeals, emphasizes ft value of private deliberations by members of an administrative board when exercising quasi-judicial function:

> "This is the first time that this court has had to consider the impact of the open meetings amendment, s 1-1503a, to agency actions under the Administrative Procedure Act. To interpret this provision as broadly as petitioner would have us do, would mean that in an adjudicatory proceeding, even though testimony and arguments are entertained in public and the transcript made available to the parties and any interested person, the members of the quasi-judicial agency when they convene to review the record and discuss possible findings would have to admit the parties and any member of the public to their deliberations. Such a construction of the amended act is not an appealing one. It would effectively prevent the frank

[7] *Canney v. Board of Public Instruction of Alachua County, 278 S. 2d 260, 264-65 (!la. 1973).*

> exchange of views in private among members of quasi-judicial agencies in reaching a decision - thus putting them on an entirely different footing from appellate courts and juries - to say nothing of federal administrative agencies - where experience has shown that the free flow of discussion unimpeded by the presence or reactions of the parties to the controversy has encouraged fair and just results."[8]

The Board suspects the paucity of case law on the specific topic of the presence of outside persons during deliberations is due the extreme rarity of anyone even suggesting, much less insisting, on being present during deliberations of the finder of fact, whether a jury or an administrative hearing panel. The sanctity of the deliberative process is time-honored in this country and does not allow for inquiry into the mental processes of those designated as "deliberators." By allowing persons, such as ASC staff, to be present during deliberations, would be to completely reveal the mental processes of the hearing panel, albeiet there would be no inquiry into their mental processes. Such disclosure of the hearing panel's frank exchange of views and free flow of discussion is totally unacceptable. Certainly, the order resulting from a hearing that reflects the decision of a Board hearing panel regarding its findings of fact, conclusions of law and order of discipline (if warranted)[10] is a public record from which the ASC may "monitor" whether the decision comports with law." For the ASC's convenience, a copy of the Final Order resulting from the Silliman hearing (which ASC staff observed) is enclosed.

Finally, the Board is of the firm opinion that the presence of ASC staff during quasi judicial deliberations is not in any way related or necessary to the ASC's monitoring responsibilities regarding Title XI compliance. The Board does not find any relationship between its hearing panel's quasi judicial deliberations and:

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[8] Jordan v. District *of* Columbia, 362 A.2d 114 (!.C. Court of Appeals 1976).

[9] "Unless authorized by statute, an administrative body performing a quasi judicial function is not subject to inquiry concerning its mental processes in reaching a decision." Kosik v. Cloud County Community College, 250 Kan. 507, 517, 827 P.2d 59, 66 (1992); see also Mobile Pipeline Co. v. Rohmiller, 214 Kan. 905, 522 P.2d 923 (1974), citing Chicago B. & O. Ry.Co. v. Babcock, 204 U.S. 585, 27 S.Ct. 326, 51 L.Ed.2d 636, together holding that the mental processes of administrative officials, juries, arbitrators and judges may not be inquired into regarding the process by which conclusions were reached in a deliberative setting. See also Nasrallah v. Missouri State Board *of* Chiropractic Examiners, 1996 WL 678640 (!o.App.W.D.) and cases cited therein affirming deliberations of Board after hearing is completed may b in private.

[10] As required by K.S.A. 77-526(c).

"Following a hearing, an administrative agency is required to issue an order that contains written findings of fact in order to "facilitate judicial review, avoid judicial usurpation of administrative functions, assure more careful administrative consideration to protect against careless and arbitrary action, assist the parties in planning their cases for rehearing and judicial review, and keep such agency within its jurisdiction as prescribed by the Legislature." Suburban Medical Center v. Olathe Community Hospital, 226 Kan. 320, 331, 597 P.2d 654, 663 (1979).

5. the Board's recognition and enforcement of the standards, requirements and procedures prescribed pursuant to Title XI,

6. the adequacy of the Board's authority that permits it to carry out its functions under Title XI, or

7. the Board's decisions concerning appraisal standards, appraiser qualifications, and supervision of appraiser practices not being made in a manner that carries out the purposes of Title XI.

The Board would regret the ASC taking the severe action of initiating the decertification process. However, the Board is aware that such a decision is subject to judicial review, which in such unfortunate event the Board would avail itself of fully and vigorously.

Sincerely,

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Camille Nohe
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