IN THE MATTER OF THE REAL ESTATE SERVICES ACT

-AND-

ACADIA.WEST HOMES LTD

-AND-

HAROLD KYLE

-AND-

DAVID GOLD

-AND-

EILEEN JESPERSEN

ORDERS UNDER SECTIONS 51 AND 49 OF THE REAL ESTATE SERVICES ACT

UPON reviewing the submissions and exhibits contained in the Investigation Report prepared by the Staff of the Superintendent of Real Estate (the "Staff"), I am of the opinion that:

Background

1. On or about September 25, 2008, the Superintendent of Real Estate (the "Superintendent") received a complaint alleging that David Gold ("Gold") appeared to be providing real estate services without being licensed to do so under the Real Estate Services Act, S.B.C. 2004, c. 42 ("RESA").

2. In support of the complaint of September 25, 2008, the Superintendent received a copy of a contract of purchase and sale dated July 23, 2008 pursuant to which Gold acted as a dual agent for both purchaser and vendor in the sale of a manufactured home located at Whittaker Road. The contract of purchase and sale was on the letterhead of Acadia-West Homes Ltd. ("Acadia").

3. Acadia is a registered company in British Columbia with a registered and records office at Slater Street in Victoria, British Columbia. Harold Kyle ("Kyle") is the sole director of Acadia.
4. The Real Estate Council of British Columbia (the “Council”) has confirmed that neither Acadia, nor Kyle, nor Gold, nor Eileen Jespersen (“Jespersen”) is licensed to provide real estate services in the Province of British Columbia.

Earlier complaints

5. The September 2008 complaint was not the first complaint the Superintendent has received in respect of Acadia and/or Jespersen and/or Gold.

6. On December 7, 2006, the Superintendent received a complaint from the Real Estate Council that Acadia appeared to be conducting business which would require licensing under RESA. After investigating that complaint, the Superintendent wrote Acadia’s then counsel a warning letter. That letter, dated August 29, 2007, included the following:

“As a result of legislative changes, motor dealers selling chattel homes are no longer required to be registered under the Motor Dealer Act; however, effective November 1, 2005, manufactured home dealers who provide real estate services are require to obtain a license under [RESA].

... 

Acadia’s website contains many representations with respect to the land associated with the manufactured homes it has listed for sale, such as: 55+ park and pets allowed with park approval; pad rent is $320 per month, includes water and garbage pick-up; quarter acre lot; ocean views; and rent will be frozen for 3-5 years. By providing these representations your client is providing real estate services and therefore a licence is required.

In addition, Acadia’s sales agents must not hold themselves out as real estate agents or make statements which the public would reasonably interpret as meaning they are licensees. In particular, your client’s website states that Ms. Jespersen, “is able to offer you the greatest choice in mobile home listings of any real estate agent...”

7. On August 31, 2007 and September 4, 2007, two further complaints relating to Acadia were received.

8. The August 31, 2007 complaint alleged that Gold and Acadia were providing real estate services without being licensed under RESA. The September 4, 2007 complaint alleged that Gold and Jespersen, operating under Acadia, were selling mobile homes and leasing the lots of those mobile homes without being licensed under RESA.
9. On September 5, 2007, the Deputy Superintendent of Real Estate (the "Deputy Superintendent") sent a warning letter to Gold regarding the complaints received. In her letter, the Deputy Superintendent wrote as follows:

"Providing the following information, in the process of selling a manufactured home, appears to qualify for the exemption set out in Regulation 2.10:

- The address where the home is currently located; and
- Current pad rental without comment on whether such a rent could continue or what is included in the rent.

..."

In accordance with Bulletin RESA-05-01, as mentioned above, if you make representations about the land such as availability, value, and price, then it is considered to be providing real estate services. More specific examples of these types of representations include:

(i) existence of other buildings on the real estate;
(ii) the size of the leased lot on which the home is located;
(iii) lease restrictions (adult, senior);
(iv) views;
(v) what services are included/not included in the pad rent; and
(vi) assurances regarding changes in the amount of the pad rent."

..."

... In the event that any further complaints are received in relation to these activities, regulatory action will be taken."

**Applicable legislation**

10. Section 1 of RESA provides the following definitions:

"providing", in relation to real estate services, includes

(a) offering to provide such services,
(b) holding oneself out as a person who provides such services, or
(c) soliciting for the purpose of the provision of such services;

"real estate" means

(a) real property,
(b) regardless of whether it is or is not an interest in real property, a cooperative interest, shared interest in land or time share interest, as these are defined in the Real Estate Development Marketing Act, and
(c) a right in relation to real property that is defined by regulation to be real estate, but does not include a right in relation to real property that is excluded by regulation;

"real estate services" means
(a) rental property management services,
(b) strata management services, or
(c) trading services;

"remuneration" includes any form of remuneration, including a commission, fee, gain or reward, whether the remuneration is received, or is to be received, directly or indirectly;

"trading services" means any of the following services provided to or on behalf of a party to a trade in real estate:
(a) advising on the appropriate price for the real estate;
(b) making representations about the real estate;
(c) finding the real estate for a party to acquire;
(d) finding a party to acquire the real estate;
(e) showing the real estate;
(f) negotiating the price of the real estate or the terms of the trade in real estate;
(g) presenting offers to dispose of or acquire the real estate;
(h) receiving deposit money paid in respect of the real estate but does not include an activity excluded by regulation,

11. Section 3(1) of RESA states as follows:

Requirement for licence to provide real estate services

"3(1) A person must not provide real estate services to or on behalf of another, for or in expectation of remuneration, unless the person is
(a) licensed under this Part to provide those services, or
(b) exempted by subsection (3) or the regulations from the requirement to be licensed under this Part in relation to the provision of those real estate services."

12. Section 2.10 of the Real Estate Services Regulation states as follows:

Exemption for persons providing information only
2.10 (1) A person who is providing trading services only by providing information is exempt from the requirement to be licensed under Part 2 of the Act.

(2) Without limiting subsection (1), that subsection applies to

(a) the provision of material and other information of a general nature that is produced to assist owners to sell or otherwise dispose of their own real estate by themselves, and

(b) the publication of information contained in an advertisement of specific real estate.

Current complaint and investigation


14. The website at www.mobilehomesgreatervictoria.com is registered to Gold ("Gold's Website").

15. On November 27, 2008, Staff member Colin Chin ("Chin") reviewed Gold's Website and found numerous listings of mobile homes which contained information about the property on which the mobile home for sale was located. Two examples are set out below:

(a) Listing for #_Selwyn Road, Langford

The listing stated that the property had a private sundeck, carport and paved driveway with two parking spaces. The lot was described as being sloping and sunny, bordered by a "private creek", in a "secluded and quiet area."

The listing included contact information for Gold. The footer on the webpage read "Acadia-West Homes Ltd."

(b) Listing for Fraser Lane, Royal View.

The listing stated that the property had "a fabulous garden and is centrally located in Family Park." The property was described as having "mature gardens", storage and garden sheds and a carport.

The listing included contact information for Gold. The footer on the webpage read "Acadia-West Homes Ltd."

16. On December 11, 2008, Chin sent a pretext email to Gold requesting more information about one of the mobile homes which was listed on
Gold's Website. On December 11, 2008, Gold sent Chin the following response:

"The pad fee is $490/mo. and includes, water, sewage and weekly garbage pickup and there's also full recycling by the municipality. For any other matter about the park, please call me at the number shown below and we can discuss the park in more detail."

17. On February 16, 2009, Staff member Karyn Jackson ("Jackson") contacted Gold to arrange a viewing of one of his listings. Jackson and Chin attended at the viewing and provided them with MLS listings for two mobile homes in Victoria: one at Cooper Road and one at Fraser Lane. The MLS listings indicated that they were prepared by David Hale of Keller Williams Realty West. Gold took Chin and Jackson to view both homes, at which time he advised as follows:

(a) With respect to the Cooper Road property, Gold advised that the pad fee included sewage and water, and that the lease was month to month.

(b) With respect to the Fraser Lane property, Gold advised that: the mobile home park was on First Nations Land, and that the Band Council followed BC tenancy legislation; the pad fee was $325/month, and had not gone up significantly in the recent past; the property's dimensions were approximately 80 x 40 feet; the storage shed was approximately 10 x 10 feet; and he believed that the lease ran until 2010, but could provide exact information later.

(c) When asked why the MLS listings were in the name of David Hale, Gold advised that Hale listed the property on MLS on Gold's behalf, but that Gold himself handled all inquiries.

18. On February 18, 2009, Jackson requested, and obtained, a copy of the lease agreement for Golfview Estates, the mobile home park on which the Fraser Lane property is located.

19. On May 1, 2009, Chin viewed the website registered to Jespersen at www.mobilehomesvictoria.com ("Jespersen's Website").

20. Chin's review of Jespersen's Website showed that it had numerous listings of mobile homes and contained information other than a description of the mobile home itself, the property address and/or current pad rental. One example is set out below:

(a) Listing for Craigflower Road, Esquimalt
The description included a reference to “access to covered sundeck for your morning coffee” and the existence of a “carport and storage shed with parking for 2 vehicles.”

Contact information was provided for Jespersen and the footer of the webpage read “Acadia-West Homes Ltd.”

21. On May 1, 2009, Chin sent a pretext email to Jespersen requesting more information about one of the mobile homes which was listed on Jespersen’s Website. On May 1, 2009, Jespersen sent Chin the following response:

“...The park is located by Gorge waterways and their [sic] is a bus right outside the park entrance [sic]. Admirals Walk Mall is within walking distance, which has grocery store and many more. The pad rent is $335 pr.m. which includes water, garbage pick-up and cable vision. Thanks, Eileen.”

22. On May 13, 2009, Chin called Kyle and alerted him to the fact that Gold’s Website and Jespersen’s Website contained listings making representations about the land, for which they were not licensed. During that discussion, Kyle advised as follows:

(a) Jespersen and Gold are employees of Acadia;

(b) He was not aware that their respective websites contained representations about the land;

(c) A feature sheet for each mobile home was given to the webmaster who loaded content onto each website;

(d) The websites were not intended to include representations about the land; and

(e) He is aware of the provisions of RESA as they relate to representations about land and will speak with Gold and Jespersen to have that information removed.

23. On May 13, 2009, Kyle called Chin and advised as follows:

(a) He had misspoken in their earlier discussion: Gold and Jespersen were not his employees, but rather independent contractors of Acadia;

(b) He has advised the webmasters of the Gold Website and Jespersen Website that certain information could not be posted as it contravened the provisions of RESA.
(c) Kyle would contact Chin once the changes to the Gold Website and Jespersen Website have been made.

24. On May 15, 2009, Kyle contacted Chin to confirm that all information contravening RESA had been removed with respect to current listings on the Gold Website and the Jespersen Website.

25. On May 18, 2009, Chin reviewed the Gold Website and the Jespersen Website and confirmed that no information contravening RESA was to be found on either.

AND WHEREAS I find that:

1. Neither Acadia, nor Gold, nor Kyle, nor Jespersen is licensed under RESA to provide real estate services within the Province of British Columbia. A license is required pursuant to s.3 of RESA for a person to provide real estate services to or on behalf of another.

2. Real estate services under RESA include trading services in respect of real estate. By making representations about the real estate on which the mobile homes are located Gold and Jespersen, who were agents of Acadia, a company controlled by Kyle, were engaging in trading services for which a license is required.

3. Neither Acadia, nor Kyle, nor Gold nor Jespersen is exempted from the requirement to be licensed by subsection 3(3) of RESA, nor are they exempted from the requirement to be licensed by operation of the Real Estate Services Regulation.

4. While Kyle took steps in mid-May 2009 to ensure that the Gold Website and Jespersen Website were changed to remove information which contravened RESA, it is significant that Acadia/Kyle and Gold had been told, specifically, by this office, by letters dated August 29 and September 5, 2007, which of their activities constitute a breach of RESA. In spite of these earlier warnings, breaches were occurring in 2009.

5. The breaches identified in the most recent investigation were not limited to the content of the websites identified. Specifically, both Gold and Jespersen made representations about real estate to Staff posing as prospective purchasers when neither was licensed to do so. Given the earlier warnings sent by this office in 2007, these breaches appear deliberate in nature.

I THEREFORE CONSIDER THAT Acadia, Kyle, Jespersen and Gold are conducting themselves in a manner that would enable me to make an order under section 49 of RESA.
I AGREE with Staff that a hearing would require approximately three witnesses, would take approximately two days to complete and could not be held for at least six months due to scheduling of parties, witnesses, counsel and the hearing officer.

I FIND that the length of time that would be required to hold a hearing in order to make an order under section 49 of RESA would be detrimental to the due administration of RESA given that it would likely result in further non-compliance with the provisions of RESA. Acadia, Kyle, Gold and Jespersen continued to breach the provisions of RESA in spite of earlier warnings provided by this office following earlier complaints that they were engaged in unlicensed activity. Continued non-compliance would harm the reputation of the British Columbia real estate industry and would be detrimental to the public interest.

I AM FURTHER OF THE OPINION that it is in the public interest to make a summary order under section 51 of RESA so that the public is protected against further non-compliance with RESA.

I THEREFORE ORDER, pursuant to sections 51(2)(a) and 49(2)(a) of RESA that Acadia, Kyle, Gold and Jespersen:

Cease and desist conducting, directly or indirectly, real estate services in British Columbia, effective immediately.

TAKE NOTICE that Acadia, Kyle, Gold and Jespersen may appeal this Order to the Financial Services Tribunal under section 54(1)(e) of RESA, or request a hearing before the Superintendent under sections 51(3) and 45(6) of RESA.

Dated at the City of Surrey, in the Province of British Columbia this 1st day of June, 2009.

W. Alan Clark
Superintendent of Real Estate
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