

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

POMY KACZ

v.

No. 15 CM 10905

ILLINOIS DEPT. OF FINANCIAL
AND PROFESSIONAL REGULATION

ORDER

THIS MATTER COMING for decision and ruling at 11 a.m. on Plaintiff's motion for summary judgment, due notice having been given, and the Court being fully advised,

IT IS HEREBY ORDERED

That the Plaintiff's motion for summary judgment is granted as to Count II, for the reasons stated in the Court's written decision of July 7, 2017, ^{at 11 a.m.} incorporated herein, and that the Administrative Proceeding against the Plaintiff is null and void, and that the judgment and prior orders are vacated.

By this order and entry, the Court decrees that Count I is moot. The Court otherwise declares this order and appealable.

Attorney No.: 332069

Name: Blade

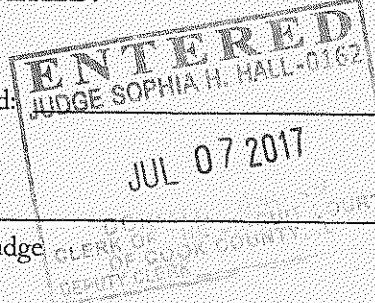

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ENTERED:

Dated:  Judge  Judge's No. _____

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

MARK POMYKACZ)

Plaintiff,)

v.)

ILLINOIS DEPARTMENT OF)
FINANCIAL AND PROFESSIONAL)
REGULATION,)

Defendant.)

Case No. 15 CH 10905

Hon. Sophia H. Hall

DECISION

This matter comes on to be heard on plaintiff Mark Pomykacz' Motion for Summary Judgment of Plaintiff's Amended Complaint against defendant Illinois Department of Financial and Professional Regulation. Count I seeks administrative review of defendant's decision imposing discipline for plaintiff's violations of provisions of the Illinois Real Estate Appraiser Act, 225 ILCS 458/1 et seq. In Count II, plaintiff claims that defendant violated his right to due process of law under article 1, section 2, of the Illinois Constitution, arguing that the Act in effect at the time of the filing of the administrative proceeding did not apply to him.

Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *County of Knox ex rel. Masterson v. Highlands, LLC*, 188 Ill. 2d 546, 550 (1999). The interpretation of a statute is a matter for the court, appropriate for summary judgment. *Matsuda v. Cook County Employees & Officers Annuity & Benefit Fund*, 178 Ill. 2d 360, 364 (1977).

The Facts

The facts are not in dispute. Plaintiff is an Illinois licensed real estate appraiser. In November, 2012, he prepared an appraisal report concerning the Marquis Ethanol plant in Hennepin, Illinois, for an Illinois governmental body, the Illinois Valley Community College. It is not disputed that the appraisal was not related to any federal transaction, but regarded the assessment of *ad valorem* taxes. The College filed an objection to plaintiff's appraisal report through an *ad valorem* tax appeal.

On January 16, 2014, pursuant to the authority and procedures of the Act, the defendant filed an amended administrative complaint against plaintiff seeking revocation or suspension of plaintiff's Illinois real estate appraisal license and the imposition of the maximum fine of

\$25,000 for violations of section 10-10, which sets forth the standards of a professional appraisal practice. A hearing was held November 19 and 20, 2014.

On February 18, 2015, the Administrative Law Judge (“ALJ”) issued a Report and Recommendations finding that there were errors and omissions in plaintiff’s appraisal report. The ALJ recommended a reprimand and imposition of a \$10,000 fine. On March 10, 2015, the Real Estate Appraisal Administration and Disciplinary Board adopted the ALJ’s Report and Recommendations.

Thereafter, plaintiff moved to dismiss the administrative proceeding or for a finding in his favor. In part he argued that he had not received due process. On June 2, 2015, the Secretary of the Department denied the motion and issued a final order.

Plaintiff filed the original complaint herein on July 16, 2015, and on September 14, 2015 filed the two count Amended Complaint adding Count II claiming violation of his right to due process of law. Defendant moved to dismiss Count II arguing that plaintiff had waived any due process argument because he failed to raise the issue in the administrative proceeding. This Court denied the motion on July 8, 2016.

In denying defendant’s motion, this Court found that plaintiff’s due process claim is a facial challenge to the Act. Relying on *Poindexter v. State*, 229 Ill. 2d 194, 207-208 (2008), this Court held that the Count II challenge to the Act claiming the proceedings against plaintiff were not authorized, would result in a decision which would affect the jurisdiction of defendant in all such disciplinary proceedings, not just the plaintiff’s discipline. Accordingly, though not raised in the administrative proceeding, the challenge in Count II was properly before this Court.

History of the Act

Section 1-5 is the focus of plaintiff’s due process challenge in Count II. To interpret the section, this Court must consider the history of amendments to the Act and the use of the phrase “in connection with a federally related transaction.”

Section 1-5 Legislative Intent

Section 1-5 “Legislative Intent,” was preceded by Section 5 entitled “Legislative Purpose” contained in prior Illinois legislation passed to implement the federal requirements contained in Title XI of the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 [12 U.S.C. § 3331 et seq.]. The federal legislation addressed appraisals used in federally related transactions.

Section 5. Legislative Purpose. The purpose of this Act is to repeal and replace Article 2 of The Real Estate License Act of 1983 and, in order to protect the public, to require real estate appraisers in federally related

transactions to obtain a real estate appraiser license. It is the intent of the General Assembly that this Act be consistent with the provision of Title XI of the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 [12 U.S.C. § 3331 et seq.], Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), and the Illinois Human Rights Act.

225 ILCS 457/5 (2001). P.A. 90-571, §5 eff. July 1, 1998.

Section 5 contained the limiting language “federally related transaction.” Thus, real estate appraisers involved in federally related transactions were required to hold a real estate appraiser license.

In 2002, when the Illinois Real Estate Appraisal Licensing Act, at issue herein, was passed, the language in section 1-5 titled “Legislative Intent,” slightly revised the section 5 limiting language to similarly read “in connection with a federally related transaction.”

Section 1-5. Legislative Intent. The intent of the General Assembly in enacting this Act is to evaluate the competency of persons engaged in the appraisal of real estate in connection with a federally related transaction and to license and regulate those persons for the protection of the public. Additionally, it is the intent of the General Assembly for this Act to be consistent with the provision of Title XI of the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 [12 U.S.C. § 1331 et seq.].

225 ILCS 458/1-5 (2002) amended by P.A. 92-180, § 1-5; eff. July 1, 2002.

The Act defines “federally related transaction,” in section 1-10.

“Federally related transaction” means any real estate-related financial transaction in which a federal financial institutions regulatory agency, the Department of Housing and Urban Development, Fannie Mae, Freddie Mae or the National Credit Union Administration engages in, contracts for, or regulates and requires the services of an appraiser.

225 ILCS 458/1-10 (2002).

A year after defendant filed the January 16, 2014 amended administrative complaint against plaintiff, section 1-5 was amended effective January, 2015, deleting the limiting language “in connection with a federally related transaction.”

Section 1-5. Legislative Intent. The intent of the General Assembly in enacting this Act is to evaluate the competency of persons engaged in the appraisal of real estate and to license and regulate those persons for the

protection of the public. Additionally, it is the intent of the General Assembly for this Act to be consistent with the provision of Title XI of the federal Financial Institutions Reform, Recovery and Enforcement Act of 1989 [12 U.S.C. § 3331 et seq.].

225 ILCS 458/1-5 (2015). P.A. 92-180, § 1-5; 98-1109, § 10.

Section 5-5 Licensing

Section 5-5 implements the licensing scheme. When the Act was passed in 2002, section 5-5(a) and (c), also, contained the limiting language “in connection with a federally related transaction.”

(a) Beginning July, 1, 2002, it is unlawful for a person to act or assume to act as a real estate appraiser, to engage in the business of real estate appraisal, to develop a real estate appraisal, to practice as a real estate appraiser, or to advertise or hold himself or herself out to be a real estate appraiser in connection with a federally related transaction without a real estate appraiser license issued under this Act. A person who violates this subsection is guilty of a Class A misdemeanor.

....

(c) The licensing requirements of this Act do not require a real estate broker or salesperson who holds a valid license pursuant to the Real Estate License Act of 2000 [225 ILCS 454/1-1 et seq.], to be licensed as the real estate appraiser under this Act, unless the broker or sales person is providing or attempting to provide an appraisal report, as defined in Section 1-10 of this Act [225 ILCS 458/1-10], in connection with a federally-related transaction.

225 ILCS 458/5-5(a)(c); P.A. 92-180, § 5-5; eff. July 1, 2002.

As appears from the above, section 5(a) provides the penalty for acting as a real estate appraiser without a license, and section 5(c) states when a real estate appraiser license is required.

In 2009, section 5-5 was amended. Section 5(a), the penalty section, was amended deleting the limiting language “in connection with a federally related transaction.” However, the limiting language was not deleted from section 5(c), the license requirement section.

In the January 2015 amendments to the Act, section 5(c), licensing requirement, was amended to delete the limiting language “in connection with a federally related transaction.” This deletion occurred at the same time that the limiting language was deleted from section 1-5 “Legislative Intent.”

Analysis

In his motion for summary judgment, plaintiff argues that his right to due process of law was violated by the defendant's proceedings against him because the Act did not apply to his appraisal in connection with the assessment for the College to use in a state *ad valorem* tax proceeding. He argues that the stated intent of the Act in section 1-5 limited the application of the Act to appraisals "in connection with federally related transactions." Plaintiff argues that the defendant's administrative proceedings and sanctions, pursuant to section 10-10 of the Act were beyond the defendant's authority. Plaintiff claims the defendant's unauthorized action has impacted him in his trade and profession.

In construing a statute, this court must ascertain and give effect to the intent of the legislature. *Slepicka v. Illinois Dep't of Pub. Health*, 2014 IL 116927, ¶ 14. The statutory language must be given its plain, ordinary and popularly understood meaning. *Id.* Each word, clause and sentence must be given a reasonable construction if possible and should not be rendered superfluous. *Chicago Teachers Union, Local No. 1 v. Bd. of Educ. of the City of Chicago*, 2012 IL 112566, ¶ 15. In determining the meaning of a statute, a court will not read language in isolation, but must consider it in the context of the entire statute. *In re Marriage of King*, 208 Ill. 2d 332, 343 (2003).

The Due Process of Law Clause of the Illinois Constitution (1970), article 1, section 2, protects fundamental justice and fairness. *People v. Lindsey*, 199 Ill. 2d 460, 472 (2002). It protects a person's pursuit of their occupation. *Caldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton*, 105 Ill. 2d 389, 397 (1985).

Defendant raises three arguments to support its position that the Act applies to all appraisals and is not limited to appraisals "in connection with federally related transactions." First, defendant argues that section 1-5 is a preamble and thus the limiting language is not substantive. Second, defendant, alternatively, argues that the 2015 amendment deleting the limiting language applies retroactively to 2014 because the change is procedural not substantive. Third, defendant argues that section 5-5 is specific to regulation and controls over the general statement of intent in section 1-5.

Legislative Intent

First, Defendant argues that the statement of intent in section 1-5, as written in 2014 when the administrative proceeding was filed, is a preamble. Therefore, though the language "in connection with federally related transactions" is contained therein, defendant argues it is not substantive and thus does not affect the scope of the Act's application to appraisals.

Plaintiff responds that section 1-5 is not a preamble. First, section 1-5 is not in the nature of a preamble. It is not identified as such. Often a preamble is signaled by the term “whereas.” Additionally, a preamble customarily precedes the enacting clause, such that it is not regarded as a part of the operative provisions. *Atkins v. Deere & Co.*, 177 Ill. 2d 222, 228 (1997). Plaintiff argues that section 1-5 on its face is an operative expression of the legislative intent carrying the title, “Legislative Intent.” Additionally, subsequent amendments to the Act did not change that expression of intent in section 1-5. That expression of intent however, was changed in January 2015 with the amendment deleting the limiting language “in connection with federally related transactions,” and at that same time, as shown above the limitation was deleted from section 5(c), licensing requirement.

This Court, accordingly, finds that section 1-5 is an operative provision of the Act which, prior to the amendment in January 2015, expressly limits the application of the Act to evaluating, licensing and regulating appraisals in connection with federally related transactions.

Retroactive Application

Second, defendant, alternatively, argues that if this Court finds that the intent of the legislature was to limit the Act to appraisals in connection with federally related transactions, then, the January 2015 amendment, deleting the limiting language of the Act, should apply retroactively to the administrative complaint filed and proceedings held in 2014. Plaintiff argues that the statement of intent and licensing requirement provisions cannot be applied retroactively because the provisions are substantive, not merely procedural.

An amendment to legislation that is procedural in nature may be applied retroactively. *Thomas v. Weatherguard Constr. Co.*, 2015 IL App (1st) 142785. An amendment is procedural if it changes the “machinery for carrying on” with the case, which includes “pleadings, process, evidence and practice.” *Id.* at ¶ 66. On the other hand, an amendment is substantive if it alters a person’s substantive rights. *Id.* A substantive change creates or defines rights. *Id.*

Defendant argues that the 2015 amendment to section 1-5 was procedural because it is a statement of legislative intent, and, thus, it is not a legally operative section. Defendant further argues that the January 2015 deletion of the limiting language in that section does not alter or change substantive provisions of the Act that govern defendant’s authority to require licensure and to impose discipline as contained in section 5-5. The amendment is merely a procedural change.

Plaintiff argues that the 2015 amendment to section 1-5 eliminating the “in connection with a federally related transaction” language is substantive because it affects who might be subject to discipline pursuant to the Act. Plaintiff argues that by deleting the limiting language,

the Act is expanded to apply to appraisals other than appraisals in connection with federally related transactions, such as appraisals performed in connection with state related transactions. Such an expansion is not procedural but adds new categories of appraisals subject to the requirements of the Act.

This Court finds that the amendment to section 1-5, eliminating the limiting “in connection to federally related transaction” language, is a substantive change. The amendment to this Act changed its scope by expanding it to govern appraisals not previously subject to the provisions of the Act. Therefore, the 2015 amendment cannot be applied retroactively to plaintiff’s 2014 appraisal.

Specific vs General

Finally, defendant argues that the specific provisions in section 5-5 governing penalty and licensing requirements have precedence over the general statement of intent in section 1-5 limiting the scope of the Act. Plaintiff responds that since the provisions of section 1-5 and section 5-5 both contained limiting language, there is no need to resort to the specific vs. general analysis to harmonize them.

The rule of statutory construction is to ascertain the intent of the legislature, and that is, first, found in the statutory language. *People v. Jurisec*, 199 Ill. 2d 108, 118 (2002). The plain language of the statute governs. *Id.* In *Knolls Condo. Ass’n v. Harms*, 202 Ill. 2d 450, 458-59 (2002), the court set forth the principles of construction, including the requirement to construe legislation and provisions within legislation so they are in harmony.

The controlling principles of statutory construction are well settled. In construing a legislative enactment, a court should ascertain and give effect to the overall intent of the drafters. A court presumes that the legislature intended that two or more statutes which relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative. Statutes relating to the same subject must be compared and construed with reference to each other so that effect may be given to all of the provisions of each if possible.. Even when an apparent conflict between statutes exists, they must be construed in harmony with one another if reasonably possible. It is also a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision, either in the same or in another act, both relating to the same subject the specific provision controls and should be applied. *Id.* (Internal citations omitted.)

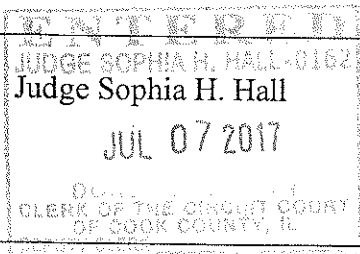
In 2014, at the time of the filing of the administrative proceeding, section 1-5 “Legislative Intent” and section 5-5(c), license requirement, both contained the same limiting language “in connection with federally related transactions.” No change occurred to either until

January 2015 when the amendment deleted that language from both sections. Accordingly, the Court need not use a specific vs. general analysis to harmonize the two sections. The legislative intent for the scope of the Act and the requirement that an appraiser have a license were both limited to federally related transactions in 2014.

Conclusion

Accordingly, this Court grants plaintiff's Motion for Summary Judgment as to Count II finding that the Act, as it existed prior to the January 2015 amendment, did not apply to plaintiff's appraisal in connection with a state transaction. Accordingly, this Court finds that the administrative proceeding against plaintiff is null and void. The Court vacates the reprimand and fine.

Entered: _____
Date: _____



A rectangular court stamp with a double-line border. The text inside the stamp is arranged as follows: 'ENTERED' in a large, spaced-out font at the top; 'JUDGE SOPHIA H. HALL-0162' in a smaller font below it; 'Judge Sophia H. Hall' in a standard font below that; 'JUL 07 2017' in a large, bold font in the center; and 'CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL' in a small font at the bottom.