



**Report
Of the Commissioner of the Department of Professional and
Financial Regulation**

**To the Joint Standing Committee on Business, Research and
Economic Development**

Sunrise Review of LD 1525, Sec. 28

“An Act to Amend Real Estate Brokerage Laws”

Commercial Leasing Brokerage

January 15, 2006

John Elias Baldacci
Governor

Christine A. Bruenn
Commissioner

I. Introduction

The State of Maine currently regulates real estate brokerage practices through the Maine Real Estate Commission which is authorized to administer and enforce licensing and brokerage laws. Public Law 2005, chapter 378, enacted by the 122nd Legislature, requires the Commissioner of the Department of Professional and Financial Regulation to conduct an independent assessment (“sunrise review”) of the need to expand the current real estate brokerage scope of practice to include commercial leasing.

II. Sunrise Review

Pursuant to 5 MRSA § 12015(3), “sunrise review” is required of any legislation that proposes to regulate professions not previously regulated, or that proposes to expand existing regulation. Sunrise review is a systematic review of proposed new or expanded regulation undertaken to ensure that the purpose of the regulation is to protect the health, safety, and welfare of the public.

The sunrise review process consists of applying the evaluation criteria established by statute, 32 MRSA § 60-J, to the proposed system of regulation to determine whether the occupation or profession should be regulated, or whether current regulation should be expanded.

Under the law, the sunrise review process may be conducted in one of three ways:

1. The Joint Standing Committee of the Legislature considering the proposed legislation may hold a public hearing to accept information addressing the evaluation criteria;
2. The Committee may request the Commissioner of Professional and Financial Regulation to conduct an independent assessment of the applicant’s answers to the evaluation criteria and report those findings back to the Committee; or
3. The Committee may request that the Commissioner establish a technical review committee to assess the applicant’s answers and report its finding to the Commissioner.

Copies of 5 MRSA § 12015(3) and a summary of the Sunrise Review process are included in Appendix A.

III. Charge from Legislature

Public Law 2005, chapter 378, enacted by the 122nd Legislature requires the Commissioner of the Department of Professional and Financial Regulation to conduct an independent assessment (“sunrise review”) of the proposed expansion of the current scope of practice of real estate brokerage to include leasing of any nonresidential property that does not include any residential component. This report documents the independent assessment pursuant to 32 MRSA § 60-K.

IV. Independent Assessment by Commissioner

The requirements for an independent assessment by the Commissioner are set forth in 32 MRSA § 60-K. The Commissioner is required to apply the specified evaluation criteria set forth in 32 MRSA § 60-J to all answers and information submitted to, or collected by, the Commissioner. After conducting the independent assessment, the Commissioner must submit a report to the Committee setting forth recommendations, including any draft legislation necessary to implement the report’s recommendations.

The Commissioner’s report to the Joint Standing Committee on Business, Research and Economic Development must contain an assessment as to whether final answers to the evaluation criteria are sufficient to support some form of regulation. In addition, if there is sufficient justification for some form of regulation, the report must recommend an agency of State government to be responsible for the regulation and the level of regulation to be assigned to the applicant group. Finally, the report must reflect the least restrictive method of regulation consistent with the public interest.

V. Evaluation Criteria

As part of the independent assessment process, the Commissioner must review the responses to the evaluation criteria submitted by the applicant group and interested parties. In this instance, the Maine Association of Realtors (“MAR”) and the Maine Commercial Association of Realtors® (“MCAR”) combined are considered the “applicant group.” Although the Department sent sunrise surveys to the Maine Association of REALTORS®, the Maine Chamber of Commerce, and the Maine Apartment Owners & Managers Association, only the Maine Association of Realtors and the Maine Commercial Association of REALTORS® submitted survey responses. Both Associations support requiring commercial leasing brokers to be licensed by the State, however, they would not require property managers or attorneys to become licensed as commercial leasing brokers even though they may engage in commercial leasing.

The Department’s analysis tracks the evaluation criteria set forth in 32 MRSA § 60-J, and is presented in this report as follows:

1. The evaluation criteria, as set forth in the statute;
2. A summary of the responses received from the applicant group and interested parties; and

3. The Department's independent assessment of the response to the evaluation criteria.

Evaluation Criterion #1: Data on group proposed for regulation. A description of the professional or occupational group proposed for regulation or expansion of regulation, including the number of individuals or business entities that would be subject to expanded regulation; the names and addresses of associations, organizations and other groups representing the practitioners; and an estimate of the number of practitioners in each group.

Responses:

Both MAR and MCAR note that the current membership of each association would potentially be affected by a legislative decision to expand the definition of real estate brokerage to include commercial leasing. MAR reports having 5,048 members, all of whom are involved in the sale of real property and MCAR reports a total of 120 business members, all of whom are engaged in commercial leasing activity. Both associations note that the Maine Real Estate Commission currently licenses approximately 9,000 individuals and brokerage companies.

Department assessment:

Current real estate brokerage law permits any individual with or without a real estate license to engage in commercial leasing activity. Although an expansion of the scope of practice of real estate brokerage to include commercial leasing would appear to have little or no impact on the current membership of the associations and on the licensee pool of the Real Estate Commission as a whole, the impact of such a change on individuals who may engage in commercial leasing today but who are not licensed by the Real Estate Commission would be significant. Unlicensed commercial leasing agents would be required to meet all state licensing requirements to obtain a real estate brokerage license in order to continue their commercial leasing activity. Clearly, the burden resulting from the expansion of the current scope of practice will fall heavily on those whose commercial leasing activities have not required state licensing and oversight. The interested parties did not provide any information on the potential number of individuals and or businesses in this category.

Evaluation Criterion #2: Specialized skill. Whether practice of the profession or occupation proposed for expansion of regulation requires such a specialized skill that the public is not qualified to select a competent practitioner without assurances that minimum qualifications have been met.

Responses:

The applicant groups assert that commercial leasing requires specialized skills and education because the transactions at issue involve complex financial questions and require knowledge of market conditions and market lease rates.

Department assessment:

The applicants' submission does not specify the types of educational courses and/or training that would be appropriate to prepare someone for a career in commercial leasing. Real estate brokerage courses currently required as prerequisites to licensure by the Real Estate Commission focus on residential brokerage. It is not clear what courses might be appropriate for commercial leasing activity. Moreover, it is not clear whether those courses are currently available in Maine.

Evaluation Criterion #3: Public health; safety; welfare. The nature and extent of potential harm to the public if the profession or occupation is not regulated, the extent to which there is a threat to the public's health, safety or welfare and production of evidence of potential harm, including a description of any complaints filed with state law enforcement authorities, courts, departmental agencies, other professional or occupational boards and professional and occupational associations that have been lodged against practitioners of the profession or occupation in this State within the past 5 years.

Responses:

The applicant groups set forth three bases for expanding the scope of real estate brokerage to include commercial leasing. First, the value of commercial leases is often higher than the value of real estate sales. Thus, if the conveyance of real estate is regulated, then commercial leasing activity should likewise be regulated. Second, the applicant groups note that 45 other states require a license to engage in commercial leasing activity. Third, the lack of regulation of commercial leasing in Maine places Maine commercial landlords and tenants at risk.

Department Assessment:

Sunrise review is typically triggered when an organized group of unregulated individuals petitions the Legislature for a new licensing program. Under those circumstances, evidence of consumer complaints against individuals within the unlicensed profession that relate to the quality of service to the public is an important factor to be taken into account when the Legislature evaluates the public need for a new or expanded licensure program. In the context of this sunrise review to evaluate the public need for protection through regulation of commercial leasing, no information about complaints against individuals engaged in commercial leasing for incompetent or unskilled services within the past five years was submitted by the applicant groups.

The Department notes that commercial leasing has engendered a significant body of Maine contract law that provides commercial landlords and tenants with appropriate remedies for breach of contract, insurance issues related to leased property and damages. See, generally, Rodriguez v. Tomes, 610 A.2d 262 (1992); Handy Boat, Inc. v. Professional Services, Inc., 1997 Me Superior Ct., CA Doc. No. CV-432; Daigle

Commercial Group, Inc. v. Raymond St. Laurent v. J.P. Maloney Auction Co., Inc., 1999 ME 107 (1999).

Evaluation Criterion #4: Voluntary and past regulatory efforts. A description of the voluntary efforts made by practitioners of the profession or occupation to protect the public through self-regulation, private certifications, membership in professional or occupational associations or academic credentials and a statement of why these efforts are inadequate to protect the public.

Responses:

MAR and MCAR provided information about various professional certifications available to commercial leasing agents available through professional organizations, including Certified Commercial Investment Member (“CCIM”) and the Society of Industrial and Office REALTORS (“SIOR”), both of which offer designations and seminars in the practice of commercial leasing. The applicants also note that only a small number of Maine licensed real estate agents have obtained these certifications; the seminars are based on national practices rather than on the local Maine market, and that additional education and regulation is needed to protect the public from untrained commercial leasing agents.

Department Assessment:

Aside from the assertion that commercial leasing agents should be required to obtain an educational grounding in commercial leasing concepts, no specific information on the kinds of educational courses and opportunities that would prepare a commercial leasing agent for the profession was provided. Further, it does not appear that such courses are currently available in Maine at this time. In the absence of existing commercial leasing courses, the Real Estate Commission would be required to contract with a consultant to research and develop courses. This approach, of course, would result in significant additional cost to the Commission. The Department notes, however, that the Maine Commercial Association of Realtors is in an advantageous position to provide an enhanced level of training and educational opportunities for its member organizations as an alternative to state regulation of commercial leasing brokers.

Evaluation Criterion #5. Costs and benefits of regulation. The extent to which regulation or expansion of regulation of the profession or occupation will increase the cost of goods or services provided by practitioners and the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers.

Responses:

Both applicant groups assert that the costs of regulating and licensing commercial leasing brokers would be minimal, given that the Real Estate Commission is already established for the purpose of regulating real estate brokerage. Further, both groups opine that

regardless of the amount of the costs, the benefit of regulation to the public would greatly outweigh those costs. The benefits to the public would be the same as the benefit to the public of licensing and regulating real estate brokers in Maine.

Both groups explain that commission fees flowing from lease agreements are already charged to the consumer and are dictated by competition between commercial brokerages. The applicants explain further that under current Maine law, *“out-of-state brokers are coming into Maine and brokering transactions without using Maine brokers. It is counterproductive for the State of Maine to allow money and business to leave the state of Maine, especially at a time when money is so tight. Also, how much of the taxes on the out-of-state Broker commissions actually go to the Maine government? Regulating this practice should provide additional business and revenue to Maine.”*

Department Assessment:

Neither MAR nor MCAR provided information on the relative numbers of out-of-state commercial leasing brokers doing business in Maine. However, it is apparent that an important by-product of regulating commercial leasing agents to the applicant groups would be to increase the amount of commissions received by in-state commercial leasing agents, many of whom presumably already hold a real estate brokerage license. Although increasing commissions flowing to Maine licensed real estate brokers is a valid business objective, it is a weak basis for imposing new state licensing requirements on a group of individuals.

Evaluation Criterion #6: Service availability under regulation. The extent to which regulation or expansion of regulation of the profession or occupation would increase or decrease the availability of services to the public.

Responses:

MAR and MCAR both state that imposing license requirements on commercial leasing brokers will increase the amount and quality of services available in the state. *“Maine consumers will obtain representation from Maine licensed brokers who will have local knowledge and expertise of the Maine market.”*

Moreover, licensing requirements will increase Maine broker representation, which will provide additional revenue and jobs for the State of Maine. *“When clients are represented by brokers in Maine, our own state’s businesses stand a much better chance to be located within Maine properties. How many out-of-state brokers know of Pat’s Pizza or other Maine chains? Why should Maine businesses be put at the bottom of the list for Maine properties? ...”*

Department Assessment:

Typically, the state imposition of licensing requirements results in a decrease in available services for which a license is required. In this situation, however, imposition of

licensing requirements on commercial leasing agents may have only negligible impact on Maine citizens. Rather, the proposed licensing requirements, if imposed, would have the effect of deterring out of state commercial leasing brokers from doing business in Maine, thus, funneling new commissions to Maine licensed real estate brokers who also engage in commercial leasing brokerage.

Again, although increasing commissions to Maine licensees in this profession may be a valid business goal, approaches other than state licensing are available to achieve that goal. The sole purpose of an occupational and professional regulatory board is to protect the public health and welfare of Maine citizens.¹ State intervention through licensure should be reserved only for those situations in which the public does not possess the skills or information to make informed decisions to select a service provider without an indication that minimum licensure requirements have been met. Imposing licensing requirements for any other purpose would have the impact of diminishing the significance of the State's responsibility to safeguard the safety and welfare of the public. In our view, erecting barriers to practice in a particular profession for economic reasons in the name of public protection may not be an appropriate use of the State's police power nor is it a sound public policy approach.

Evaluation Criterion #7: Existing laws and regulations. The extent to which existing legal remedies are inadequate to prevent or redress the kinds of harm potentially resulting from non-regulation and whether regulation can be provided through an existing state agency or in conjunction with presently regulated practitioners.

Responses:

None submitted.

Department Assessment:

Commercial lease agreements are contracts developed through negotiations between and among parties to the agreement. Commercial and residential leases are governed by common law contract principles as well as by Title 14 of Maine Revised Statutes § 6001 et. seq. The terms of these agreements are subject to interpretation by the parties and the courts.² Disputes between the parties that arise out of these contracts are resolved in the context of the judicial system. The Department is aware of no information that indicates that the judicial system is not the appropriate arbiter of commercial lease agreement disputes. Moreover, the Real Estate Commission has no record of having received any written or anecdotal information suggesting that contract disputes arising from

¹ 10 MRSA § 8008 provides, “The sole purpose of an occupational and professional regulatory board is to protect the public health and welfare. A board carries out this purpose by ensuring that the public is served by competent and honest practitioners and by establishing minimum standards of proficiency in the regulated professions by examining, licensing, regulating and disciplining practitioners of those regulated professions. Other goals or objectives may not supersede this purpose.”

² Commercial leases and commercial landlord and tenant issues are governed by 14 MRSA § 6017.

commercial leases should be resolved in a different forum. Clearly, the potential harm to the parties to a commercial lease is economic in nature. Claims for financial damages are properly resolved in the judicial setting.

Evaluation Criterion #8: Method of regulation. Why registration, certification, license to use the title, license to practice or another type of regulation is being proposed, why that regulatory alternative was chosen and whether the proposed method of regulation is appropriate.

Responses:

Both applicant groups make reference to the current regulation of real estate brokerage by the Maine Real Estate Commission and the similarity of issues and skill sets between real estate brokers and commercial leasing brokers for the proposition that the appropriate level of regulation is to expand the current statutory authority of the Real Estate Commission. Thus, the Commission could regulate the activities of commercial leasing activities in the same manner as it regulates real estate brokerage activities. In addition, the groups infer that the regulatory costs attributable to regulation of commercial leasing could be assimilated into the current fee structure of the Commission.

Department Assessment:

Any discussion of the appropriateness of one method of regulation over another would be premature at this time given that the proponents have not demonstrated a clear need for public protection. The Real Estate Commission was established by the Legislature out of a concern that ordinary citizens making what, for most people, would be the largest financial purchase -- a home -- would be at risk without the skills and financial information provided by real estate brokers. The Commission's current regulatory process provides that public protection. Since commercial leases are contracts between knowledgeable business people, less governmental protection is necessary because knowledgeable business people should be able to negotiate the terms of a lease to their respective satisfaction and resolve disputes through mediation or litigation.

Evaluation Criterion #9: Other states. Please provide a list of other states that regulate the profession or occupation, the type of regulation, copies of other states' laws and available evidence from those states of the effect of regulation on the profession or occupation in terms of a before-and-after analysis.

Responses:

The applicants provided information indicating that 45 states and the District of Columbia currently require a license to conduct commercial leasing activity. The applicants attached a sampling of the laws of other states that regulate commercial leasing through licensure.

Department Assessment:

There are various reasons why some states impose regulation on a profession or occupation and other states do not. The evolution of professional and occupational licensure in a particular state is largely a matter of the public's experience with a particular profession. The fact that many states license commercial leasing brokers is one, but not the most persuasive indicator of the public's need for protection in the absence of regulation.

Evaluation Criterion #10: Previous efforts to regulate. Please provide the details of any previous efforts in this State to implement regulation of the profession or occupation.

Responses:

The applicant groups submitted information indicating that in 1944, Maine real estate brokerage law defined "real estate broker" as "*any person, firm, partnership, association, or corporation who for a compensation or valuable consideration sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers for rent, any real estate or the improvements thereon for others, as a whole or partial vocation.*" (Emphasis added.) The applicants also note that the phrase "who leases or offers to lease, or rents or offers for rent" was deleted from the statute in 1988 when the real estate brokerage sections of Title 32 were recodified.

Department Assessment:

The Department confirms that the change described by the applicant groups did occur.

Evaluation Criterion #11: Mandated benefits. Please indicate whether the profession or occupation plans to apply for mandated benefits.

Responses:

The applicant groups responded in the negative.

Evaluation Criterion #12: Minimal competence. Please describe whether the proposed requirements for regulation exceed the standards of minimal competence and what those standards are.

Responses:

The applicant groups responded that licensing standards for commercial leasing representatives requiring compliance with standards of ethics and fiduciary responsibility would not exceed the standards to which real estate brokers are held.

Department Assessment:

Statement noted.

Evaluation Criterion #13: Financial analysis. Please describe the method proposed to finance the proposed regulation and financial data pertaining to whether the proposed regulation can be reasonably financed by current or proposed licensees through dedicated revenue mechanisms.

Responses:

The applicant groups state that the funding of an expansion of the regulatory program of the Real Estate Commission “*will be addressed through additional licensing fees and fees for education.*”

Department assessment:

Given that educational courses and opportunities would need to be developed and approved, it would be premature to discuss how an expansion of regulation would be funded. Currently, state law requires that all licensing programs within the Department of Professional and Financial Regulation must be funded entirely from dedicated licensing fees.

VI. Considerations and Conclusions of the Commissioner

State sunrise review law requires the Commissioner to engage in a two-step evaluation process guided by 13 evaluation criteria. First, the Commissioner must evaluate the information provided by the applicant group in support of its proposal to regulate or expand regulation of a profession. Second, the Commissioner must recommend whether the Committee should take action on a proposal. If the Commissioner’s recommendation supports regulation or expansion, the report must include any legislation required to implement that recommendation. The recommendation must reflect the least restrictive method of regulation consistent with the public interest.

The purpose of the sunrise process with respect to licensing of commercial leasing brokers is to assess the public need for new regulation and the consequences to the public and the regulated community of the creation of a new regulatory program or the expansion of an existing regulatory program.

The following factors have been considered in formulating the Department’s recommendations:

1. The absence of information that the public is in jeopardy because commercial leasing brokers are not required to obtain a state license;

- 2 The absence of information with respect to the estimated number of individuals and businesses that would be required to obtain a license to engage in commercial lease brokerage services if those services required a state license;
- 3 The absence of documented complaints against individuals or businesses who have harmed Maine citizens because of the quality of their commercial leasing services; and
4. Information indicating that the Maine Legislature narrowed the definition of real estate brokerage in 1988 to exclude rental and leasing activities.

Having reviewed the material submitted, the Department finds that the applicants have not substantiated the need for public protection through state regulation of commercial leasing brokers. The Department has no information about the number of people and businesses that would be impacted by new licensing requirements. Even if a case had been made by the applicants that the public is placed at risk without regulation of commercial leasing brokers, a decision to impose new licensing requirements without an idea of the numbers of individuals and businesses impacted would not be advisable. At best, the impact would be negligible because most commercial leasing agents are already licensed as real estate brokers. At worst, new licensing requirements imposed on commercial leasing companies currently operating in Maine without state regulation could pose an unjustified burden on those companies. To impose any new license requirements without clear benefit to the public would not be a sound exercise of state authority.

New state regulation would not achieve the applicant groups' stated goal of providing better service without specific information about the skills, education and training needed by commercial leasing brokers. Moreover, the state would need assurance that such educational opportunities are actually available in Maine.

The proponents assert that the Legislature should consider the value of property rights at issue in determining whether to regulate commercial leasing. In regulating real estate sales, the Maine Legislature determined that the conveyance of real estate without state regulation placed the public in jeopardy when purchasing a home and imposed licensing requirements on real estate brokers. The purchase of a home is one of the largest and most critical investments that Maine citizens can make. Although the value of commercial leasing agreements may involve much higher dollar amounts and may involve greater legal complexity than real estate sales, the parties involved are more sophisticated and more able than home buyers to manage the transaction details. The Department is not persuaded that commercial landlords and tenants are at risk without regulation. The parties to commercial leasing agreements currently have adequate legal and contract remedies noted earlier in the report. In the absence of any information indicating that these remedies are not adequate, it would not appear to be a good use of state resources to expand this program.

The applicant groups have identified a financial issue that relates to the business activities of out-of-state commercial leasing brokers. Maine commercial lease brokers feel that they are losing out on commissions that currently accrue to the benefit of out-of-state brokers. Specifically, the applicant groups opine *“out-of-state brokers are coming into Maine and brokering transactions without using Maine brokers. It is counterproductive for the State of Maine to allow money and business to leave the state of Maine, especially at a time when money is so tight. Also, how much of the taxes on the out-of-state Broker commissions actually go to the Maine government? Regulating this practice should provide additional business and revenue to Maine.”* Without taking a position on whether this statement is factual, the Department is of the view that imposing licensing requirements on a category of individuals and businesses for the singular purpose of increasing commissions to commercial leasing brokers who are based in Maine is not an appropriate use of the State’s police power that lies at the heart of state licensure of professions and occupations. There are other options available to the applicant groups to achieve the stated goal.

Finally, the Department notes that in 1986 and 1987 the Real Estate Commission was the subject of what is now referred to as “sunset review.” The legislation that resulted from the review committee’s (Joint Standing Committee on Audit and Program Review) analysis included a narrowing of the focus of the Real Estate Commission to the conveyance of real estate and eliminated, among other language, that part of the definition of real estate brokerage that had referred to the rental or lease of real property.

A review of Real Estate Commission records revealed that prior to the change in the definition of “real estate brokerage” deleting rental and lease references that became effective on January 1, 1988, (PL 1987, c. 395), the Real Estate Commission had received 60 complaints involving leases, rental deposits or property management. Of those 60 complaints, only one case involved commercial property. That complaint, which was ultimately dismissed by the Real Estate Commission, involved a rented store. The complainant alleged misrepresentation of the acceptable uses of the property; plumbing and wiring repairs; and fire insurance coverage. Based on this complaint history and the 1988 recodification of the real estate brokerage laws to exclude lease and rental activities, it does not appear that the public has been placed in jeopardy either before or after the Legislature’s decision to eliminate state regulation of commercial leasing brokerage.

Based on these considerations and the submissions of the applicant groups, the Department concludes that the public health, safety and welfare of Maine citizens is not jeopardized in the absence of state regulation of commercial leasing activity and that reinstatement of state licensure and regulation of commercial leasing brokers is not warranted.