

Real Estate Division dispute highlights differences in governance

By Margaret Jackson and Jessica Fender

The Denver Post

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Erin Toll, state real estate regulator, should be replaced or assisted by a board, critics say.

A dispute between Colorado's top real estate regulator and lawmakers who say she's overstepped her bounds has brought new focus to the differences between rules governing mortgage brokers and rules that related professions abide by.

The dispute boiled over this week when Real Estate Division director Erin Toll inexplicably went on leave after she revealed — and days later recanted — that mortgage broker and state Sen. Ted Harvey, R-Highlands Ranch, was under investigation.

Lawmakers are now considering legislation requiring inquiries into mortgage brokers' practices be kept confidential unless investigators find wrongdoing. They're also moving forward with a plan hatched in February to install an oversight panel with industry ties.

Both provisions would bring the brokers in line with the way real estate agents and appraisers are governed, but one of the architects of Colorado's nascent mortgage-broker regulations said the profession is treated differently for a reason.

Colorado decided on a director-only model, as opposed to an oversight board, just as neighborhoods in 2007 were engulfed in foreclosures resulting from bad mortgages and the state was one of two that did not regulate brokers, said former House Rep. Rosemary Marshall.

"I would be very concerned about any model that . . . interferes with the opportunity for the division, when they have a legitimate complaint from a consumer, to investigate," Marshall said. "The industry regulating the industry never works."

As of May 2008, the division had denied 75 brokers registration or licenses for falsifying their applications, for past deceptive trade practices or for past denials of professional licenses due to fraud, theft, deceit or breach of fiduciary duty, according to a legislative report.

Marshall said she had expected her legislation would be used to ferret out and prosecute those who intentionally defrauded the public. She's less certain about the division using its heightened powers to fine and revoke licenses of those like Jason Lyon, who make technical violations, she said.

In his first few months working under Federal Housing Administration regulations, Lyon misclassified his staff as contractors instead of employees. He caught the error after seeking advice from the FHA and immediately corrected the problem, he said. But two years later, he's still under investigation by the division.

"I policed myself," he said. "Not one customer said they got a bad loan."

It's situations like Lyon's and other constituents who have complained to lawmakers that led Rep. Mike May, R-Parker, to seek to strip Toll of some of her power by instituting an oversight board.

"It's unchecked power. And whether they abuse it or not, it was a defect in the original legislation," May said. "Everybody else seems to be able to do their job with a board."

Part of the discomfort of those overseen by the division may also come from the newness of the regulations.

While real estate brokers and appraisers have long been required to be licensed with the Division of Real Estate, it wasn't until July 2006 that a bare-bones broker registration program was formed through legislation. In Marshall's 2007 bill, the director was given the power to largely determine fines, to craft rules governing her job and decide which federal regulations to enforce on the state level.

Appraiser Steven Gerhard supports Toll but also believes a board could strengthen broker regulation.

"Erin Toll is absolutely essential to identify, prosecute and eliminate substandard real estate brokers, mortgage brokers and appraisers," he said. "The current state regulatory model for mortgage brokers is inconsistent with other regulated real estate activities."

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editorial

Let dust settle on mortgage dispute

In the midst of a battle between a legislator and the state's real estate chief, lawmakers should hold off on proposed new rules.

By The Denver Post

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The skirmish between Colorado's real estate division chief and a state senator has reached a fever pitch. That much is clear. But it's not clear why legislative Democratic leaders are allowing a measure stripping power from real estate chief Erin Toll to continue.

The legislature ought to put the proposed changes on hold until the dust settles.

Much about the situation remains murky, but we know this: In November, the state Division of Real Estate began looking into the advertising practices of American Home Funding, a mortgage brokerage firm that state Sen. Ted Harvey, R-Highlands Ranch, works for, according to Toll.

Harvey and other Republicans subsequently raised concerns about what they said was the heavy hand of Toll and the Division of Real Estate.

They also pushed to amend a bill requiring mortgage companies to register with, and be regulated by, the Division of Real Estate. The amendment would create a board that would have oversight of investigations into the activities of mortgage brokers, a power that Toll now has.

Republicans say Toll crossed a line when she went public with the investigation, linking it to Harvey.

"The abuse of power is that she went to the press claiming I was under investigation as my motivation for wanting a board," Harvey said, according to a Post story. "That's inappropriate, and I would be saying this if it happened to any lawmaker."

The Department of Regulatory Agencies later issued a clarifying statement, saying only the company that Harvey is associated with is under scrutiny.

If this happened the way it has been characterized, then Toll was over the line. She is on leave, with no official explanation.

But what in the world is Harvey doing involved in legislation that would strip power from a public official who is investigating a company he is involved with?

He told The Post he didn't know about the investigation until told by a reporter earlier this month. Documents obtained by The Post under open records laws indicate the president of the company was informed in January of problems with the advertising.

Beyond the question of why Harvey would be involved, why are legislative Democrats letting him? Last we checked, Democrats still have the majority over at the Capitol.

We think the measure creating a board of mortgage loan originators ought to be put on hold until the situation shakes out.

Perhaps it's a good change to state law, perhaps not. The board would consist of seven members, appointed by the governor with the consent of the Senate.

However, such a change ought to be contemplated and made independent of any single case, and remote from what could be construed as self-interested exchanges between administration officials and state legislators.

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business

Embattled real estate regulator Toll hires an attorney

By Margaret Jackson and Jessica Fender

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"She was an unguided missile that always sought the headline." Former Gov. Bill Owens, describing Erin Toll, above (Denver Post file photo)

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On leave from her job heading the state's Division of Real Estate, Erin Toll has hired an attorney who specializes in employment rights of public workers.

Evergreen attorney Bill Finger said Thursday that Toll hired him to help her "solve the problems, whatever they are."

Finger declined to say whether Toll's leave is forced or voluntary but said she is protected from being fired under the state constitution.

"She can only be fired for cause," Finger said. "She has a right to continue on as a state employee during good or adequate performance. She can only be taken away for bona fide, good-cause reasons."

Neither Toll nor state officials have been willing to discuss her sudden leave, which division employees were notified of Tuesday afternoon.

Toll's absence comes in the wake of increasing tensions between Toll's office and state Sen. Ted Harvey, R-Highlands Ranch, whose employer, American Home Funding, is under investigation by the division.

Since taking over the division in September 2006, Toll has earned a reputation as an aggressive enforcer of real estate laws and regulations, but her tactics have been characterized by some as overzealous and heavy-handed.

Toll was passed over for the real estate job the first time she applied because her superiors worried about "overly aggressive" tendencies, said Matt Mayer, a former deputy director of the Department of Regulatory Affairs, or DORA, who oversaw the Division of Insurance, where Toll worked as deputy commissioner before taking the reins at the Division of Real Estate.

Praise, complaints

"She had a tendency to overstate and overplay. We never thought we were getting a balanced view," Mayer said. "She didn't exhibit the type of judgment needed for the position of authority she wanted."

Toll ultimately was hired by then-DORA director Tambor Williams.

Toll came into DORA under former Gov. Bill Owens, who on Thursday characterized Toll as a regulator who perceived potential violators as the enemy.

"She was an unguided missile that always sought the headline," Owens said. "Ms. Toll's primary objective was to keep her name in the news by lashing out at her perceived enemies."

During her three years as the division's director, Toll has investigated numerous mortgage brokers and appraisers, including participants in an alleged scam to abuse the state's conservation easement program.

Appraiser Mark Weston, who worked closely with Toll on reforming the state's conservation easement regulations, described Toll as an effective professional who has brought about important regulatory reforms.

"To all those who have expressed concern about heavy-handed or excessively aggressive enforcement tactics, we should take a pause and think how lucky we are to have someone in an appointed position to enforce the laws and protect the consumer," Weston said.

"Erin is one of the few appointed or elected officials I've ever worked with that did what needed to be done," he said.

A driving force

The number of cases referred to the Colorado attorney general's office during Toll's tenure has increased substantially, said Mike Saccone, spokesman for the office.

"In light of the situation we find ourselves in today and all the various things that are going on with real estate, that seems entirely appropriate," he said.

The attorney general's office has one criminal case, 293 civil or administrative cases, and more than 15 consumer-protection cases as a result of Toll's investigations.

At the time Toll joined the Division of Real Estate, there were two attorneys devoted to handling cases out of the division. Today, there are seven.

Toll also was the driving force behind laws passed in recent years regulating mortgage brokers and appraisers.

Doug Braden, immediate past president of the Colorado Association of Mortgage Brokers, said a number of mortgage brokers have complained to the association about Toll's zealous investigative tactics, as well as the stricter regulations governing the industry.

"But a lot of the people who came to us complaining were breaking the rules and engaging in illegal mortgage broker activity," said Braden, who serves on the division's rulemaking task force for mortgage loan originators. "She made every effort to do the right thing in pursuing those people who harm consumers."

Several brokers who have complained to lawmakers about the investigation process declined to comment on the record, citing fears of retaliation or loss of business. Those who have already exited the industry were more willing to talk.

Brokers' reactions

Kathy Conway spent two years under investigation until the division on Feb. 4 finally found that she inappropriately originated loans for her unlicensed son and fined her \$16,500.

But Conway, who disagrees with the finding, left the mortgage broker business in October under the stress of a prolonged investigation.

"It's just been a nightmare," Conway said. "It's like being in an interrogation room in the police station. Two years is a long time to be stressed out."

The division referred all media calls to DORA spokesman Chris Lines, who did not return a phone call seeking comment.

In another case, former broker Kirt McGhee said it took months and the direction of an administrative law judge before the division told him why he was under investigation: A dispute involving a rent-to- own property he oversaw. Two years after the division opened the case, McGhee said he is still uncertain of the complaints' status, has been unable to get answers from the division and has left the industry after a decade.

"She (Toll) got rid of a lot of the riffraff and the people who probably shouldn't have been doing loans," McGhee said. "But this has cost me about \$18,000 total. I'm in this huge gray hole, and I don't know what's going on."

Boulder attorney Jon Goodman said his office has dozens of clients each year who were investigated by the division and has always felt the cases were resolved fairly and efficiently.

"Not all cases are prosecuted as graciously as we would like, but at the end of the day, all of them seem to get resolved fairly," he said. "The division is doing a pretty good job."

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business

Mortgage feud boiled over

By Jessica Fender and Margaret Jackson

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Erin Toll is on leave from the Real Estate Division, whose parent agency had to clarify that Sen. Harvey wasn't part of a probe. (Denver Post file photo)

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The sudden disappearance from duty of the woman charged with enforcing Colorado's real estate regulations marks the latest development in long-standing tensions between her office and a mortgage-broker-turned-state senator.

Employees of the Division of Real Estate learned Tuesday afternoon that executive director Erin Toll was on leave but received no other details.

Toll and her division have been warring with Sen. Ted Harvey, R-Highlands Ranch, for weeks in a series of increasingly heated confrontations that have left her claiming she feels threatened and him accusing her of abusing power.

Most recently, Toll told the media that Harvey and his company were under investigation by her division, though the division's parent agency, the Department of Regulatory Agencies, later clarified that only the company was under their microscope.

The situation has escalated to the point where executive branch officials from Gov. Bill Ritter down have clammed up and Harvey's employer has hired a high-powered law firm.

Toll has been a lightning rod to some in the real estate industry since she was appointed to lead the Division of Real Estate in September 2006. She has launched a series of high-profile investigations into numerous mortgage brokers and appraisers, including participants in an alleged scam to take advantage of the state's conservation easement program.

In September, Toll and an investigator from her office were sued for violating the privacy rights of two mortgage brokerages after seeking their bank records as part of an investigation. A judge ruled in October that the Division of Real Estate had a right to subpoena the bank records.

Division employees have not been told why Toll is on leave, whether it was voluntary or how long she would be out. They were informed that Marcia Waters, the division's director of investigations and compliance, has been named acting executive director.

Meanwhile, DORA spokesman Chris Lines — speaking for executive director Barbara Kelley and Division of Real Estate spokesman Zach Urban — said he could not discuss the matter because it is a personnel issue.

Toll declined to comment, and a spokesman for Ritter's office did not return a call seeking comment.

Tensions between Harvey and Toll have simmered at least since a Feb. 3 meeting in which he and House Minority Leader Mike May, R-Parker, met with Lines and two division investigators at the Capitol, May said.

The topic: Creating a board that would have oversight over the investigation of mortgage brokers.

The discussion became heated when the division representatives rejected the idea and likened their jobs to criminal investigators, said May, who called the meeting after he received complaints from a constituent who felt harassed by the division.

"They get the death penalty before they're convicted," May said. "It was McCarthyism. They were an agency out of control."

Toll said in an interview before her leave that her investigators left the meeting feeling threatened by Harvey, who said he later apologized for his tone.

Shortly afterward, DORA chief Kelley formally rejected the plan for board oversight in a letter arguing that "resolutions of critical complaints take much longer through a board model."

Then came a March 2 committee meeting, where Harvey openly criticized Toll for attempting to postpone her division's performance review by three years without telling the bill's sponsor.

Harvey stripped the delay from the bill with unanimous support from the committee. At the time, Toll said, "We don't care," according to committee tapes.

Investigation disclosed

In an interview after the hearing, she told The Denver Post that she felt verbally "assaulted" by Harvey.

"He was vicious," she said. "He said I was trying to gouge mortgage brokers by imposing high fines. He said in testimony that I had too much power. I couldn't tell anybody that he has a direct interest."

At that time, she also said that he and his company have been under investigation since November for false advertising.

It's at that point, Harvey said, that Toll crossed a line.

"The abuse of power is that she went to the press claiming I was under investigation as my motivation for wanting a board," Harvey said. "That's inappropriate, and I would be saying this if it happened to any lawmaker."

May said he asked the legislative attorney to review the statute that prohibits a person from trying to intimidate or influence a public servant in the course of his or her duties. A violation of that law is a Class 4 felony.

Harvey said he didn't know about the investigation until approached by a reporter. Neither, he said, did his company, American Home Funding, which sent advertisements that resembled government documents and required "a call to action." Both Urban and division investigator Cary Whitaker received the notices.

Documents obtained under the Colorado Open Records Act indicate that Whitaker told American Home Funding president Derrick Strauss of the problems with the advertisements but still received another flier.

The company has retained the services of lawyer Jason Dunn with the high-profile firm Brownstein Hyatt Farber Schreck.

Shortly after news of the investigation appeared in print, DORA issued an unsigned statement clarifying Harvey was not under investigation.

And on Friday, Senate lawmakers — including Harvey — approved bill amendments that would require board oversight and confidentiality of ongoing mortgage broker investigations.

"Chatter" behind scenes

Prior to taking over the Division of Real Estate, Toll gained national attention while working for the Colorado Division of Insurance, where she helped lead a broad-reaching investigation of kickback arrangements in the title insurance industry. That investigation resulted in multimillion-dollar settlements with three of the country's largest title insurers and helped change industry practice regarding so-called reinsurance programs.

Lately, talk in the mortgage broker community has been about how heavy-handed Toll is, said mortgage broker James Spray, adding that a number of people were surprised by the news of her leave.

"I'm not sure that I subscribe to that, but it seems to be quite a bit of the chatter," he said. "She was brought in to do a job, and she was doing the job she was brought in to do and doing it well. She, however, was dangerously visible, perhaps overly visible."

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Colo. real estate division chief on leave as legislators debate mortgage-broker oversight

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Erin Toll, director of the Colorado Division of Real Estate, is on leave from her job, and the nature of her absence is unclear.

The news follows on the heels of a controversy related to the division's investigation into a company that employs state Sen. Ted Harvey, R-Highlands Ranch, and a debate related to Toll's oversight of mortgage brokers.

Spokesmen for the division and for Gov. Bill Ritter declined to comment because it is a personnel matter.

Toll also declined to comment.

Toll became a target of criticism this month after her office disclosed that American Home Funding, which employs Harvey as a broker, was under investigation for allegedly sending out advertising fliers designed to look like official tax documents.

After the investigation became public, the division sent out a news release clarifying that Harvey was not the target of the investigation.

Harvey could not be reached for comment Tuesday evening.

On Friday, the Senate approved an amendment to a mortgage regulation bill that would strip Toll of her authority to regulate mortgage brokers, replacing her with a board that would be appointed by the governor.

Supporters of the amendment noted that it was an issue of fairness because others in the real estate industry are regulated by boards.

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