

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA LAND SALES,)
CONDOMINIUMS AND MOBILE HOMES,)
)
Petitioner,)
)
vs.) CASE NO. 95-0951
)
ERNI HIRSCH,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on November 14, 1995, by videoconference. The parties, their witnesses, counsel and the court reporter participated from the videoconference center in Miami, Florida; the Hearing Officer presided from the videoconference center in Tallahassee, Florida.

APPEARANCES

For Petitioner: Laura L. Glenn, Senior Attorney
Department of Business and
Professional Regulation
Division of Regulation - Legal F
1940 North Monroe Street
Tallahassee, Florida 32399-0792

For Respondent: Tracy Hirsch, Esquire
John Militana, Esquire
Militana, Militana and Militana, P.A.
8801 Biscayne Boulevard, Suite 101
Miami Shores, Florida 33138

STATEMENT OF THE ISSUE

On September 22, 1994, the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, Bureau of Timeshare issued a notice to show cause to Erni Hirsch alleging that Ms. Hirsch violated various provisions of Chapter 721, Florida Statutes, regarding vacation and timeshare plans. Specifically, the agency charged that Ms. Hirsch sold multiple timeshare periods as a "successor developer" or "concurrent developer" without providing required notices and filings. The issue is whether the violations occurred and, if so, what penalties and remedial action are appropriate.

PRELIMINARY STATEMENT

Ms. Hirsch responded to the notice to show cause with denial of the allegations and a request for formal hearing. The case was referred to the Division of Administrative Hearings and the hearing was scheduled. After continuances for good cause, the hearing proceeded as stated above.

At hearing Petitioner presented testimony of Richard Thrawl, Christina Frank and Elizabeth Baker; Respondent testified on her own behalf and presented the additional testimony of Jennifer Armstrong West. The Hearing Officer received the following exhibits in evidence: Petitioner's nos. 1, 3, 3a, 3b, 3c, 3d, 4, 6, 7, 7a, 8a, and 11; and Respondent's nos. 1 and 2. Petitioner's exhibit no. 5 was rejected as irrelevant; Petitioner's nos. 9 and 10 were withdrawn; and Petitioner's nos. 2, 8, 8b, 8c, 8d, 8e and 12, taken under advisement at hearing, are now received. The exhibits are relevant, although in part cumulative. The reports corroborate stipulations by the parties. Mr. Bell's deposition, offered as expert testimony, has been considered for a limited purpose of establishing how the agency has applied the laws in Mr. Bell's experience at the agency.

After hearing, a transcript and corrected transcript were filed. The parties filed proposed recommended orders; Petitioner also filed a corrected recommended order, memoranda and a motion for official recognition which, unopposed, is granted.

Specific rulings on the parties' proposed findings of fact are found in the attached Appendix. Motions for attorney's fees by both parties are addressed in a separate order entered this same date.

FINDINGS OF FACT

1. Erni Hirsch resides in Hollywood, Florida. She has a bachelor's degree in elementary education and a master's degree in public administration, and she has completed a doctorate program in public administration.

2. Prior to 1973, Ms. Hirsch was an elementary school teacher and worked on curriculum for Dade County public schools. From 1973 through 1993, she worked for the Seminole Tribe of Florida setting up adult schools on the reservations, doing grant development and then acting as business manager for the tribe. She was employed full-time by the tribe and worked sometimes sixty to seventy hours a week. She now considers herself retired.

3. Ms. Hirsch is married and has three grown children. The family used to go camping, but in the mid-1980's Ms. Hirsch began purchasing timeshare periods for the family's vacations. She initially purchased a timeshare period in the Hollywood Beach Tower, where she lives, and used it for a beach club and to trade for timeshare periods elsewhere.

4. Ms. Hirsch continued purchasing timeshare periods, upgrading them into better exchange groups. She purchased timeshare periods in other plans, in other cities in Florida and sold them or she traded them in exchange clubs for her personal use and that of her family and friends.

5. While she initially sold timeshares to family and friends, she eventually started advertising timeshare periods in the newspaper, giving her name and home telephone number to contact. In response to inquiries, she sent lists of the various timeshare periods she owned; she also sent letters or

information sheets explaining the concept of timesharing and the exchange programs. When she had purchasers, she suggested they get representation by an attorney or title company. She did not receive escrow deposits and did not maintain an escrow account. Any escrow money was held by the attorney or title company. In some cases when purchasers changed their minds before closing, Ms. Hirsch let them have their money back. She never received complaints from purchasers and does not know whether the Department of Business and Professional Regulation (agency) received complaints.

6. As stipulated by Ms. Hirsch, she owned and transferred title from herself to others in thirty-eight timeshare periods in twenty-one timeshare plans, as follows:

HOLLYWOOD BEACH HOTEL AND TOWER

Project No. PRXI000584:

I. M. Racoma and Helen T. Racoma, No. 305, Wk 25, Deed Recorded 10/11/91

Rolando V. and Concepcion Barcenilla, No. 305, Wk 26, Deed Recorded 10/11/91

HOLLYWOOD BEACH HOTEL

Project No. PRXI000186

Jack Sweetser and Virginia Sweetser, No. 604, Wk 22, Deed Recorded 10/4/91

Michael Mikola, No. 603, Wk 27, Deed Recorded 10/23/91

WESTGATE VACATION VILLAS, PHASE I

Project No. PRTI000603

Gregory M. Makozy and Maria Makozy, No. B-04, Wk 45, Deed Recorded 9/21/93

Danielle Hirsch, No. A-08, Wk 24, Deed Recorded 2/23/94

WESTGATE VACATION VILLAS, PHASE III

Project No. PRTI000608

Paul A. Pritchard and Faith M. Pritchard, No. L9, Wk 13, Deed Recorded 7/23/93

WESTGATE VACATION VILLAS, PHASE IV

Project No. PRTI000609

Leonard A. and Louise E. Bussiere, No. K-09, Wk 6, Deed Recorded 4/7/92

WESTGATE VACATION VILLAS, PHASE V

Project No. PRTI000610

Sanford Hirsch, No. J-09, Wk 36, Deed Recorded 4/13/94

Ronald T. and Helen D. Reichenbaum, No. G-06, Wk 51, Deed Recorded 11/19/92

WESTGATE VACATION VILLAS, PHASE VII

Project No. PRTI000612

Roger L. Deskins, No. P-05, Wk 7, Deed Recorded 4/22/93

Anthony B. and Valerie A. Leatheart, No. X-10, Wk 52, Deed Recorded 2/13/92

WESTGATE VACATION VILLAS, PHASE IX

Project No. PRTI000565

Richard D. Penner and Lorna R. Penner, No.

U-10, Wk 21, Deed Recorded 3/25/93

Danielle Hirsch, No. V-05, Wk 31, Deed

Recorded 2/23/94

Leo and Moreen T. Blanchette, No. T-08, Wk 39,

Deed Recorded 9/24/92

WESTGATE VACATION VILLAS, PHASE XI

Project No. PRTI000651

Richard and Eileen Wells, No. Q-11, Wk 22,

Deed Recorded 1/22/92

RESORT WORLD OF ORLANDO, PHASE I

Project No. PRXMI00376

Mitchel Vogel and Bonnie Vogel, No. B-105,

Wk 45, Deed Recorded 1/8/93

Delores Miller, No. 212, Wk 46, Deed Recorded

12/23/92

R. P. and M. O. Gardiner, No. B-107, Wk 44,

Deed Recorded 7/27/92

R. P. and M. O. Gardiner, No. A-115, Wk 43,

Deed Recorded 7/27/92

Annette Carmona, No. C-211, Wk 33, Deed

Recorded 9/23/92

Philip J. and Shelagh M. Price, No. 214,

Wk 14, Deed Recorded 9/23/92

RESORT WORLD OF ORLANDO, PHASE II

Project No. PRXMI00620

Phase II (A)

Peter J. and Madeline A. Nolan, No. A-217,

Wk 29, Deed Recorded 9/22/92

Phase II (B)

George P. and Karen L. Wong, Trustees, No.

E-222, Wk 52, Deed Recorded 7/92

Phase II (C)

Gregory P. and Carol Gordon, No. C-234, Wk

23, Deed Recorded 8/7/91

Phase II (G)

Lillie R. Long, No. 274, Wk 41, Deed Recorded

11/5/92

THE OAKS AT RESORT WORLD, PHASE IV

Anthony M. and Debra A. Kozar, No. 425, Wk 15,

Deed Recorded 12/2/92

THE SPAS AT RESORT WORLD, PHASE V

Mark J. Wilma, Anna E. Wilma, William K.

Zelenc and Nicolett J. Zelenc, No. 527, Wk 11,

Deed Recorded 6/24/93

CLUB SEVILLA

Horace Curry and Sandra E. Curry, No. 321,

Wk 44, Deed Recorded 9/20/91

HIGH POINT WORLD RESORT, PHASE I
Marc Van Hove, No. 105, Wk 41, Deed Recorded
3/12/92

VISTANA FALLS CONDOMINIUM
Robert L. and Hein T. Hopkins, No. 220, Wk 24,
Deed Recorded 11/11/93
John T. and Deborah L. Ryan, No. 208, Wk 36,
Deed Recorded 7/13/93

VISTANA CONDOMINIUM
Project No. PRXPI00605
Prabhas and Madulika Kejriwal, No A-12, Wk 27,
Deed Recorded 5/21/93

ORANGE LAKE COUNTRY CLUB VILLAS
Project No. PRXPI00325
James O. and Hildegard J.L. Buss, No. 225,
Wk 51, Deed Recorded 9/7/93

CLUB ORLANDO VACATION RESORT I
Project No. PRTI000652
Mitchel and Bonnie Vogel, No. 144, Wk 18
(even years), Deed Recorded 1/8/93

SAND AND SURF, A CONDOMINIUM
Project No. PRXMI00398
Clearwater Properties, Inc., No. 255, Wks
51/52, Deed Recorded 8/3/90

SEVEN SEAS, A CONDOMINIUM
Project No. PRXI000431
Bing S. Laj, No. 310, Wk 51, Deed Recorded
10/6/89
Barbara Uzmack, No. 108, Wk 32, Deed Recorded
8/29/88

7. Each of the timeshare plans is located in the State of Florida. Except for the two grantees named Hirsch, there is no evidence of kinship between Ms. Hirsch and the purchasers.

8. At all times material to the allegations of the order to show cause, each of the timeshare plans was comprised of more than seven timeshare periods over a period of at least three years. The initial purchase price was \$1,000 or more in thirty-four of the timeshare periods sold by Ms. Hirsch; in four periods the purchase price was less than \$1,000. For each timeshare period the purchaser from Ms. Hirsch was contractually and statutorily obligated to pay a recurring maintenance fee.

9. Ms. Hirsch's income from her sales of timeshare periods was:

YEAR	TIMESHARE GROSS INCOME	TIMESHARE NET INCOME
1995	\$ 7,000	(\$2,000)
1994	\$ 70,000	(\$3,000)
1993	\$ 75,000	\$3,893.02
1992	\$109,000	\$5,981.12
1991	\$ 25,000	\$ 500.00

10. Ms. Hirsch stipulates that, as charged in the notice to show cause with respect to the timeshare periods she offered and sold, she:

a. did not file any public offering statements with the Petitioner for review and approval with respect to the timeshare periods and timeshare plans prior to offering them to the public;

b. did not provide her timeshare purchasers with a public offering statement that had been approved by the Petitioner with respect to the timeshare periods and timeshare plans prior to closing on sales;

c. did not establish an escrow account with an approved escrow agent as to each timeshare plan;

d. did not at any time place all funds or other property received from or on behalf of purchasers into an escrow account with respect to the timeshare plans;

e. closed on sales of the timeshare periods prior to providing her timeshare purchasers with an approved public offering statement; and

f. did not provide Petitioner with the names and addresses of the persons to whom she had sold timeshare periods.

11. During the relevant period Ms. Hirsch did not incorporate as a business, maintain an office outside of her home, maintain a business telephone, or otherwise operate in other than her own individual capacity. Where she lives she is not permitted to operate an office out of her home.

12. The agency began investigating Ms. Hirsch's timeshare sales activities upon complaint from Michael Lucas of American Timeshare Resales, in the Orlando/Kissimmee area. Sometime in 1993, Ms. Hirsch received a notice of the agency's investigation.

13. After being informed of the agency's concern, Ms. Hirsch contacted someone in Orlando with the Department of Business and Professional Regulation's Division of Real Estate. From that contact she understood that she was not subject to regulation as long as she was selling timeshare periods that she owned herself. She also contacted an attorney whom she understood specialized in condominium and timeshare law. She received an opinion letter from another attorney in the same firm, Becker and Poliakoff, P.A. The letter stated that arguably she was not a successor or concurrent developer because she purchased her timeshare periods from individuals who were not themselves developers. The

letter concluded there were no cases directly on point and the agency might claim that her sales in the ordinary course of business qualified her as a developer. (Respondent's exhibit no. 2)

14. When the agency did, indeed, pursue its administrative enforcement action, Ms. Hirsch ceased buying and selling timeshare periods. At the time of hearing she had two left, which she used, and she disavowed any further interest in acquiring more.

15. Considering the totality of the facts and circumstances, it is evident that what started as a family vacation program developed into a business pursuit. It is impossible to ignore the volume of the timeshare periods being sold, the active advertising campaign and the gross income being generated (over \$100,000 in one year, 1992). The fact that there were net losses or very small net gains only establishes that large sums were being spent in the enterprise. The evidence belies any claim that all of the timeshare periods were acquired by Ms. Hirsch for her own occupancy, even if the trades for other periods in other plans are considered.

16. Ms. Hirsch did not intend to commit any violations and she did not intend to deprive her purchasers of their statutory rights. As a layperson, albeit well-educated and experienced in financial matters, she obviously never considered herself a "developer" of any sort; she relied on advice of counsel in that regard as well. It is evident that Ms. Hirsch unwittingly slipped within the regulatory reach of timeshare law.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Section 120.57, Florida Statutes.

18. The agency's notice to show cause alleges that Ms. Hirsch's activities in selling timeshare periods were within the regulatory jurisdiction of the Division of Florida Land Sales, Condominiums and Mobile Homes of the Department of Business and Professional Regulation. More specifically, the agency alleges that Ms. Hirsch was a "successor developer" or "concurrent developer" and had the duty to file various notices and statements and to maintain an escrow account.

19. The core legal issue for resolution is whether Ms. Hirsch was a successor or concurrent developer. She concedes, as found above, that she did not file the notices and statements.

20. Chapter 721, Florida Statutes, is the "Florida Vacation Plan and Time-Sharing Act." The chapter applies to all timeshare plans consisting of more than seven timeshare periods over a period of at least three years in which the facilities or accommodations are located within Florida. The chapter also applies to offerings of timeshare plans under which the prospective purchaser's total financial obligation is \$1,000.00 or more during the entire term of the plan. Sections 721.03(1) and (9), Florida Statutes (1993).

21. Section 721.03(3), Florida Statutes (1993), provides:

(3) When a time-share plan is subject to both the provisions of this chapter and the provisions of chapter 718 or chapter 719, the plan shall meet the requirements of both chap-

ters unless exempted as provided in this section. In the event of a conflict between the provisions of this chapter and the provisions of chapter 718 or chapter 719, the provisions of this chapter shall prevail.

22. Section 721.05, Florida Statutes (1993), provides these relevant definitions:

(9) "Developer" includes:

- (a) A "creating developer," which means any person who creates the time-share plan;
- (b) A "successor developer," which means any person who succeeds to the interest of the persons in this subsection by sale, lease, assignment, mortgage, or other transfer, but [the term includes only those persons who offer time-share periods for sale or lease in the ordinary course of business and does not include an owner of a time-share period who has acquired his unit for his own occupancy]; or
- (c) A "concurrent developer," which means any person acting concurrently with the persons in this subsection with the purpose of creating, selling, or leasing time-share periods in the ordinary course of business, but the term does not include a person who has acquired a unit for his own occupancy.

* * *

(21) "Offer to sell," "offer for sale," "offered for sale," or "offer" means the solicitation, advertisement, or inducement, or any other method or attempt, to encourage any person to acquire the opportunity to participate in a time-share plan.

* * *

(26) "Seller" means any developer or any other person, or agent or employee thereof, who is [offering time-share periods for sale to the public in the ordinary course of business, except a person who has acquired a time-share period for his own occupancy and later offers it for resale]. The term "seller" does not include a person who is conveyed, assigned, or transferred more than seven time-share periods from a developer in a single voluntary or involuntary transaction and who subsequently conveys, assigns, or transfers all of the time-share periods received from the developer to a single purchaser in a single transaction.

* * *

(30) "Time-share period" means the period or periods of time when a purchaser of a time-share plan is afforded the opportunity to use the accommodations or facilities, or both, of a time-share plan.

(31) "Time-share plan" means any arrangement, plan, scheme, or similar device, other than an exchange program, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser, in exchange for a consideration, receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during a given year, but not necessarily for consecutive years.

* * *

(33) "Time-share unit" means an accommodation of a time-share plan which is divided into time-share periods.

[Emphasis added]

23. Petitioner contends that Ms. Hirsch offered timeshare periods in the ordinary course of business and did not acquire them for her own occupancy, and was thus a successor or concurrent developer.

24. The determination of whether a person has "acquired his unit for his own occupancy" for purposes of Section 721.05(9), Florida Statutes (1993), may reasonably be made by examining the totality of facts and circumstances surrounding the acquisition and ownership of the unit, including the volume, frequency or manner of promotion and sale. The "ordinary course of business" criteria is designed to ensure that persons who legitimately acquire timeshare periods for their own occupancy can resell them without being subject to Chapter 721.

25. Strictly read, the definitional exemption in Section 721.05(9), Florida Statutes (1993), applies to "units," not "periods," and Ms. Hirsch is not alleged to have purchased or sold an entire timeshare "unit," as defined above. Even if the exemption can be read to include the purchase and sale of timeshare "periods," Ms. Hirsch, as found above, did not herself occupy all of the periods. Rather, she initially acquired some for herself and family, but based on the volume of sales, advertising and gross income her hobby grew into an enterprise, or business.

26. Ms. Hirsch argues that she did not sell timeshare periods in the ordinary course of business because (as uncontroverted) she never sold more than seven periods in a single year in a single condominium with more than 70 units. She relies on the presumption in Rule 61B-15.007(2), Florida Administrative Code (formerly, Rule 7D-15.007, Florida Administrative Code), which provides:

(2) For purposes of the above definitions (of successor and concurrent developers), one is presumed to offer condominium parcels for sale or lease in the ordinary course of business where that person:

(a) Offers more than 7 parcels, or for condominiums comprised of less than 70 parcels, where that person offers more than 5 parcels in the condominium within a period of 1 year; or

(b) Participates in a common promotional plan which offers more than seven parcels within a period of 1 year.

27. Although the rule addresses condominiums, the agency has applied the rule, pursuant to Section 721.03, Florida Statutes, cited above, in a declaratory statement regarding the sale of timeshare periods. In Re: Petition for Declaratory Statement, Alfred S. Scope, 10 FALR 6616 (9/15/88) concluded that a bank which had acquired timeshare periods, through foreclosures or otherwise, would be presumed a "developer" if it offered more than seven timeshare periods for sale in a condominium within a period of one year.

28. The rule both advances and frustrates Ms. Hirsch's argument. Even though she would be excluded from the definition of developer under subsection (2)(a), she plainly sold more than seven timeshare periods in a single year. The terms of Rule 61B-15.007(2)(b), Florida Administrative Code, do not require the seven parcel/periods to be in a single condominium of any size.

29. The 1995 Legislature has helped clarify the regulatory scope of Chapter 721 by adding this language to the definition of "developer":

(d) The term "developer" does not include:
1. An owner of a timeshare period who has acquired the timeshare period for his own use and occupancy and who later offers it for resale; [provided that a rebuttable presumption shall exist that an owner who has acquired more than seven timeshare periods did not acquire them for his own use and occupancy];
[Emphasis added]

30. When violations of Chapter 721, Florida Statutes, are found, the agency has the authority to issue an order requiring a developer, seller or other person to cease and desist from the unlawful practice and to take appropriate affirmative action. The agency also has the authority to impose civil penalties of up to \$10,000.00 for each offense. Section 721.26, Florida Statutes (1993).

31. In this case, the agency has met its burden of proving that Ms. Hirsch violated Chapter 721, Florida Statutes. This conclusion is based on a reasonable interpretation of the definition of "developer" and the finding that Ms. Hirsch was selling timeshare periods "in the ordinary course of business." Despite this conclusion, it is recommended that NO civil penalty be assessed. As found above, the violations were unintended; Ms. Hirsch sought legal advice and she voluntarily ceased her activity when it became obvious that the agency's interpretation of the law found her subject to requirements of which she was previously ignorant.

32. The requirements of Chapter 721 which relate to Ms. Hirsch's activities and which she is proven to have violated are:

(a) furnishing each purchaser with a copy of the approved offering statement (Section 721.07, F.S.);

- (b) establishing an escrow account and depositing purchasers' deposits in the account (Section 721.08, F.S.); and
- (c) providing a 10-day right of cancellation (Section 721.10, F.S.).

Other violations were alleged, but not proven, as conceded in agency counsel's proposed recommended order (page 5).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby recommended that the Department of Business and Professional Regulation enter a final order finding that Ms. Hirsch violated Sections 721.07, 721.08 and 721.10, Florida Statutes, and ordering that she cease and desist.

DONE and ENTERED this 21st day of February, 1996, in Tallahassee, Florida.

MARY CLARK, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 1996.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 95-0951

To comply with the requirements of Section 120.59(2), Florida Statutes (1993), the following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact.

- 1.-3. Adopted in substance in paragraph 5.
- 4.-5. Adopted in paragraph 6.
- 6. Adopted in paragraph 7.
- 7.-10. Adopted in paragraph 8.
- 11. Accepted as a conclusion of law.
- 12. Adopted in paragraph 9.
- 13. Accepted, but unnecessary. The figures speak for themselves.
- 14.-16. Adopted in substance in paragraphs 5 and 15.
- 17.-18. Rejected as argument, but incorporated in part in conclusions of law.
- 19. Rejected. Respondent's testimony is credited, but only to show that she made some attempts to determine her legal obligations. It is accepted that the Division of Real Estate does not regulate timeshares; it does, however, regulate persons who sell or offer to sell real property.

- 20. Adopted in paragraph 13.
- 21.-23. Adopted in part in paragraph 13; otherwise rejected as argument or unnecessary.
- 24. Adopted in substance in paragraph 15.
- 25.-26. Rejected as unnecessary.
- 27. Adopted in paragraph 10.
- 28. Adopted in paragraph 5.

Respondent's Proposed Findings of Fact.

- 1. Adopted in substance in paragraph 2.
- 2.-3. Adopted in paragraph 3.
- 4. Rejected as unsubstantiated by the evidence (as to whether she contacted any agency prior to reselling any timeshare period).
- 5. Accepted that she understood that to be the agency's response. See paragraph 13.
- 6.-10. Adopted in substance in paragraph 5.
- 11. Adopted in substance in paragraph 11.
- 12.-14. Rejected as unnecessary.
- 15. Adopted in paragraph 12.
- 16. Rejected as unnecessary.
- 17. Adopted in paragraph 12, except that she received notice sometime in 1993.
- 18.-19. Adopted in part in paragraph 13. The opinion letter was more equivocal than characterized in this proposed finding.
- 20. Rejected as contrary to the weight of evidence. Respondent did not contact counsel until after she was contacted by the agency.
- 21. Rejected as contrary to the evidence. The purchase price, only, was less than \$1,000.
- 22.-23. Rejected as contrary to the evidence.
- 24.-25. Addressed in conclusion of law no. 26.

COPIES FURNISHED:

Laura L. Glenn, Senior Attorney
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Tracy Hirsch, Esquire
John Militana, Esquire
Militana, Militana and Militana, P.A.
8801 Biscayne Boulevard, Suite 101
Miami Shores, Florida 33138

Lynda L. Goodgame, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

W. James Norred, Acting Director
 Department of Business and Professional
 Regulation
 Division of Florida Land Sales,
 Condominiums and Mobile Homes
 Northwood Centre
 1940 North Monroe Street
 Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the Final Order in this case concerning their rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
 DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)	
PROFESSIONAL REGULATION,)	
DIVISION OF FLORIDA LAND SALES)	
CONDOMINIUMS AND MOBILE HOMES,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 95-0951
)	
ERNI HIRSCH,)	
)	
Respondent.)	
_____)	

ORDER

Both parties have renewed requests for rulings on pending motions for attorney's fees arising from discovery disputes. See, Petitioner's Motion for Order Awarding Attorney's Fees and Costs, filed January 26, 1996; and Respondent's Motion for Ruling, filed February 8, 1996.

After consideration of the requests and all relevant matters of record, the motions for fees and costs are DENIED.

Both parties, in the prehearing and post-hearing stages of this proceeding have filed an extraordinary amount of pleadings; the case was vigorously prosecuted and equally vigorously defended. Both sides engaged, at times, in

unseemly hyperbole and rancor. Locked in a dance of mutual hostility, both parties waltzed perilously close to "bad faith." Neither should be compensated by the other.

The prior hearing officer did not award fees, as claimed by counsel for Petitioner. The hearing officer granted an unopposed motion to compel and provided a deadline for filing affidavits for fees and costs. Thus prodded, Respondent filed additional responses to the discovery. Petitioner's affidavit was filed, but even if fees were appropriate, the fees described in the affidavit are excessive and pertain, in part, to another motion, which was denied.

DONE and ORDERED this 21st day of February, 1996, in Tallahassee, Florida.

MARY CLARK, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of February, 1996.

COPIES FURNISHED:

Laura L. Glenn, Senior Attorney
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Tracy Hirsch, Esquire
John Militana, Esquire
Militana, Militana & Militana P.A.
8801 Biscayne Boulevard, Suite 101
Miami Shores, Florida 33138

Lynda L. Goodgame, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

W. James Norred, Acting Director
Division of Florida Land Sales,
Condominiums and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO JUDICIAL REVIEW

PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

=====
ORDER ON REMAND
=====

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES
1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-1030

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
DIVISION OF FLORIDA LAND SALES,
CONDOMINIUMS AND MOBILE HOMES,

Petitioner,

vs.

DOAH CASE NO. 95-0951
DBPR CASE NO. T594408

ERNI HIRSCH,

Respondent.

_____ /

ORDER ON REMAND

THIS CAUSE came before the Division Director upon the issuance of the Hearing Officer's Recommended Order, the filing of Petitioner's Exceptions to the Hearing Officer's Recommended Order (PERO) and Respondent's Exceptions thereto and being otherwise fully advised in the premises, the following rulings are made as to Petitioner's Exceptions to the Hearing Officer's recommended findings of fact:

1. The Division accepts Petitioner's Exception as to the Hearing Officer's preliminary statement. (PERO: paragraphs 1-7, pages 1-3). On remand, the Division directs that the Hearing Officer clarify what exhibits were admitted into evidence, and to what extent they were admitted, so that the agency can determine whether the findings of fact are supported by competent substantial evidence.

2. The Division rejects the Petitioner's Exception regarding recommended findings of fact numbers 1-5 (PERO: paragraphs 8-11, pages 6-9). Although the findings are for the most part irrelevant to determining whether the charges in the Notice to Show Cause have been proven, they do provide a background for the development of the ultimate findings.

3. The Division accepts Petitioner's Exception regarding recommended finding of fact number 8. (PERO: paragraph 11, page 9). The more accurate terminology of a "Notice to Show Cause," suggested by Petitioner is hereby substituted for the term "order to show cause" as used in the Hearing Officer's Recommended Order.

4. The Division accepts Petitioner's Exception regarding finding of fact number 10. (PERO: paragraph 11, page 9). Petitioner did not present evidence showing Respondent's status as a managing entity or showing her vicarious liability under any other legal theory. Therefore, finding of fact 10(f) is stricken in its entirety.

5. The Division rejects Petitioner's Exception regarding finding of fact number 11 as it relates to the first sentence of the finding of fact, but accepts Petitioner's Exception with regard to the second sentence. (PERO: paragraph 11, page 9). The finding is not probative of any material issue of fact and it is not supported by competent substantial evidence. Therefore, the second sentence of finding of fact number 11 is stricken in its entirety.

6. The Division accepts Petitioner's Exceptions relating to finding of fact number 13. (PERO: paragraph 11, pages 10 & 11). Inasmuch as the only evidence of the alleged statement is from an employee of the Division of Real Estate (a Division not having jurisdiction over this matter), who did not testify at the hearing, the statement is inadmissible hearsay and is not sufficient in itself to support a finding. Therefore, sentence two of finding of fact number 13 is not supported by competent substantial evidence and is stricken.

7. The Division accepts Petitioner's Exceptions relating to finding of fact number 14. (PERO: paragraph 11, page 11). The finding is not supported by competent substantial evidence and is contrary to the evidence; therefore the first sentence of the finding of fact number 14 is stricken in its entirety.

8. The Division accepts Petitioner's Exceptions relating to finding of fact number 16. (PERO: paragraph 11, pages 11 & 12). No provision in Chapter 721, Florida Statutes, requires a finding of intent to support a violation of Section 721.05(9)(b), Florida Statutes (or any other provision of Chapter 721). Therefore, this finding is erroneous and is stricken in its entirety.

9. The Division accepts Petitioner's Exceptions as stated in paragraph 12 of Petitioner's exceptions. (PERO: paragraphs 12-15, pages 12-15). The identified findings, which the Hearing Officer did not address, are essential to the resolution of this cause. Accordingly, on remand, the Hearing Officer is directed to make findings of fact for those issues identified in subparagraphs 12.a. - 12.c. and 12.e. - 12.f. of Petitioner's Exception to the Recommended Order.

10. The Division rejects Petitioner's exception as expressed in paragraph 12.d. of Petitioner's exceptions (PERO: paragraph 12, page 14). The finding is unnecessary as a finding of fact and the Hearing Officer's rulings on the

evidence on remand will determine whether Mr. Bell's opinion may be cited as evidence in support of the Division's ultimate conclusions of law.

11. The Division reserves ruling on Petitioner's exceptions to the recommended conclusions of law and the recommended penalty, and on Respondent's exceptions to the recommended conclusions of law, and the Hearing Officer's Order of February 21, 1996, until the Hearing Officer submits an Order in response to this Order on Remand. (PERO: paragraphs 13-19, pages 15-20). Ruling is reserved so that the Division's rulings on these issues may take into account all of the findings of fact necessary to the resolution of this cause. A copy of Petitioner's and Respondent's exceptions are attached for ease of reference.

Based upon all of the foregoing, it is

HEREBY ORDERED:

That this cause is remanded to the Hearing Officer for the limited purpose of clarifying what exhibits were admitted into evidence, as referenced in paragraph one of this Order, so that the agency may fulfill its duties pursuant to Chapter 120 and Chapter 721, Florida Statutes. See, e.g., Cohn v. Department of Professional Regulation, 477 So.2d 1039 (Fla. 3d DCA 1985).

DONE AND ORDERED this 21st day of May 1996, at Tallahassee, Leon County, Florida.

ROBERT H. ELLZEY, JR., DIRECTOR
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Dept. of Business Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1030

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Militana, Militana & Militana, Attorneys for Respondent, 8801 Biscayne Boulevard, Suite 101, Miami Shores, Florida 33138, by U.S. Mail this 29th day of May, 1996.

CAROLYN HOWARD, DOCKET CLERK

COPIES FURNISHED TO:

Laura Glenn, Bureau Chief
Denise Bryant, Senior Attorney

=====

RESPONSE TO ORDER ON REMAND

=====

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF FLORIDA LAND SALES,)
CONDOMINIUMS AND MOBILE HOMES,)
)
Petitioner,)
)
vs.) CASE NO. 95-0951
)
ERNI HIRSCH,)
)
Respondent.)
_____)

RESPONSE TO ORDER ON REMAND

The agency's order on remand entered May 21, 1996 states that the case is remanded

... for the limited purpose of clarifying what exhibits were admitted into evidence, as referenced in paragraph one of this Order, so that the agency may fulfill its duties pursuant to Chapter 120 and Chapter 721, Florida Statutes....

Paragraph one of the order on remand provides this direction:

On remand, the Division directs that the Hearing Officer clarify what exhibits were admitted into evidence, and to what extent they were admitted, so that the agency can determine whether the findings of fact are supported by competent substantial evidence.

In response to that direction the hearing officer refers to the Preliminary Statement in her recommended order, pages 2 and 3. The following exhibits were received in evidence: Petitioner's 1, 2, 3, 3a, 3b, 3c, 3d, 4, 6, 7, 7a, 8, 8a, 8b, 8c, 8d, 8e, 11 and 12; and Respondent's exhibits nos. 1 and 2. All of the exhibits received in evidence were read and considered, along with the testimony of the witnesses, in determining whether the alleged violations occurred and if so, what penalties and remedial action were appropriate. The deposition of Mr. Bell was considered for the limited purpose of establishing how the agency has applied the laws in Mr. Bell's experience at the agency. This means merely that Mr. Bell's opinions were not credited in a manner that would supplant the hearing officer's responsibilities as trier of fact.

DONE and ORDERED this 21st day of June, 1996, in Tallahassee, Florida.

MARY CLARK, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of June, 1996

COPIES FURNISHED:

Laura L. Glenn, Senior Attorney
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Tracy Hirsch, Esquire
John Militana, Esquire
Militana, Militana and Militana, P.A.
8801 Biscayne Boulevard, Suite 101
Miami Shores, Florida 33138

Linda L. Goodgame, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Robert H. Ellzey, Director
Division of Florida Land Sales,
Condominium and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030