STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF REAL ESTATE,	)	
Petitioner,	)	
vs.	)	Case No. 97-0876
LEONARD OHLSSON, t/a SPRUCE CREEK FLY-IN REALTY,	)	
Respondent.	)	

RECOMMENDED ORDER

Notice was provided and on May 30, 1997, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes (Supp. 1996). The hearing location was the Grand Jury Room, Volusia County Courthouse, 120 West Indiana Avenue, DeLand, Florida, Charles C. Adams, Administrative Law Judge, conducted the hearing.

APPEARANCES

For Petitioner: Andrea D. Perkins, Esquire
Department of Business and
Professional Regulation
400 West Robinson Street, Suite N-308
Orlando, Florida 32801

For Respondent: William A. Parsons, Esquire
Woerner & Parsons
2001 South Ridgewood Avenue
South Daytona, Florida 32219

STATEMENT OF THE ISSUES

Should Petitioner impose discipline against Respondent's real estate broker's license for alleged violations of Section 475.25(1), Florida Statutes and Rule 61J2-10.032(1), Florida Administrative Code?

PRELIMINARY STATEMENT

On October 10, 1996, an administrative complaint was issued by the State of Florida, Department of Business and Professional Regulation, Florida Real Estate Commission, under FDBPR Case No. 96-81064, charging Respondent with violations of the aforementioned statute and rule. The administrative complaint advised Respondent that he could contest the facts and allegations, among other matters. On January 9, 1997, Respondent requested resolution of the dispute through a formal hearing pursuant to Section 120.57(1), Florida Statutes. On February 25, 1997, the case was received by the Division of Administrative Hearings and was assigned to the undersigned. The hearing proceeded on the date described.

Petitioner served a Request for Admissions on Respondent. Respondent admitted some facts contained within the request and those admissions have been considered in preparing the Recommended Order. Additionally, Respondent filed an answer to the administrative complaint in which he conceded certain factual allegations contained in the complaint. Those concessions were considered in preparing the Recommended Order.

In view of the admissions and answer to the administrative complaint, as part of Petitioner's Exhibits A-F, Petitioner concluded its presentation without calling witnesses. The Petitioner's Exhibits A-F were admitted. Respondent's composite Exhibit No. 1 was admitted. Respondent testified in his own behalf and presented his wife, Patricia Ann Ohlsson, as a witness.

A transcript of the hearing was prepared and filed with the Division of Administrative Hearings on June 16, 1997. Petitioner filed a proposed Recommended Order on June 26, 1997. On June 20, 1997, Respondent filed a proposed Recommended Order together with written argument. The proposals and argument have been considered in preparing the Recommended Order.

FINDINGS OF FACT

1. Petitioner is a state government licensing and regulatory agency charged with the responsibility and duty to prosecute administrative complaints pursuant to the laws of the State of Florida. In particular, Petitioner gains its authority from Chapters 120, 455 and 475, Florida Statutes, and rules promulgated in accordance with those chapters.

2. Respondent is, and at all times material to this case, was a licensed Florida real estate broker, issued license number 05125020 in accordance with Chapter 475, Florida Statutes.

3. The last license issued to Respondent was as a broker t/a Spruce Creek Fly-In Realty, 210 Cessna Boulevard, Daytona,

Florida 32124.

4. At times relevant to the inquiry, Respondent served as a selling broker for N.E. Cornish related to property located in Volusia County, Florida. The property was described as lot M-211 and the North 1/2 of lot M-212, Fly-In Spruce Creek, Inc., subdivision unit 1, as recorded in MB 33, Page 108, the Public Records of Volusia County, Florida.

5. In furtherance of the sale of the property, Respondent prepared a real estate sales contract. Pursuant to the contract, Alan Wright and Sara Wright agreed to purchase the property from Mr. Cornish, subject to contingencies set forth in the contract. The contract was entered into by the principals and accepted by Respondent as real estate broker. The last person to sign the contract executed the contract on December 13, 1995.

6. The Wrights paid a cash deposit of $1,000 at the inception of the contract. That money was placed in Respondent's escrow account for his real estate brokerage firm.

7. Under the contract, the Wrights had the option to purchase the property at $180,000 until April 1, 1996, subject to other offers being presented to Mr. Cornish in the amount of $180,000 or more. In no event were the Wrights obligated to pay more than $195,000, should Mr. Cornish receive an offer from another buyer.

8. As part of the contract option to purchase with the first right of refusal, should Mr. Cornish receive another

bonafide offer equal to the $180,000 option to purchase by the Wrights, and should the Wrights exercise their option within two working days, the Wrights were obligated to make an additional deposit of $9,000 to perfect their purchase.

9. Once the Wrights exercised the option and paid the additional $9,000, it was incumbent upon Mr. Cornish, at the buyer's expense, to have the lots combined as one, with one assessment obtaining for the monies owed to the property owners' association for annual assessments associated with the subdivision.

10. Finally, the contract stated that the failure by the Wrights to exercise their option to purchase by April 1, 1996, would cause the forfeiture of the $1,000 deposit.

11. Sometime in January 1996, Mr. Wright became convinced that the lots could not be combined for purposes of the property owners' association assessment. He expressed this sentiment to the Respondent in a letter dated January 24, 1996, which the Respondent received. In pertinent part, the correspondence stated:

> . . . I have been told by numerous property owners, and the Manager of the POA, that it is not possible to combine two single family lots into one lot with one assessment. I am told that it has never been done before and is not likely to happen now.
>
> Lenny, based upon the very real possibility that the lots cannot be combined to one assessment, I am requesting a resolution of this question now.

> Your suggestion that I initiate such action by giving you an additional $9,000 is unacceptable because Sara and I have not yet decided whether or not we will eventually purchase the lot. I am not asking that Mr. Cornish actually combine the lots at this time. I simply want written assurance from the POA that it can be done. I want to know now, not some time after we return to Michigan having decided to buy the lot.
>
> If you are unable or unwilling to obtain such written assurance from the POA, please return our $1,000 deposit.

12. In response to the correspondence dated January 24, 1996, Respondent spoke to Mr. Wright, and in that conversation Respondent showed Mr. Wright information purportedly describing how lot M-220 in the subdivision had been a multiple family lot with eight assessments and the county had agreed to bring the zoning into a single lot, resulting in a single assessment. Respondent also told Mr. Wright that Mr. Cornish was not interested in combining the Cornish lots into one lot without a sale, because of the belief that it diminished the value of the property. Mr. Cornish was only interested in combining the two lots into one when there was a purchaser desirous of having a single lot. Consistent with the contract, Respondent reminded Mr. Wright that Mr. Cornish was willing to combine the two lots upon receipt of the additional deposit of $9,000. Following this conversation, Respondent believed that Mr. Wright was satisfied that the lots could be combined for purposes of achieving a single assessment by the property owner's association, but it was

not resolved whether Mr. Wright would be willing to pay the additional deposit of $9,000. Respondent held the perception that Mr. Wright would make that decision at a later date.

13. There were other conversations following the January 24, 1996, correspondence. In these conversations Mr. Wright demanded a refund of the $1,000 deposit.

14. In conversations between Respondent and Mr. Wright, Respondent was unwilling to refund the $1,000 deposit because he believed the lots could be combined into one.

15. Without Respondent's knowledge, Mr. Wright wrote to the Petitioner on March 15, 1996, to complain about Respondent's conduct. That correspondence enclosed a copy of the contract between Mr. Cornish and the Wrights. It related Mr. Wright's belief that the two lots could not be converted into a single lot for purposes of the property owner's association assessment. This belief was premised upon information purportedly obtained from the attorney representing the property owners' association to that effect. The complaint letter also referred to a perceived problem concerning suitability of the subject lots for placement of a hangar sufficiently large to accommodate an airplane which Respondent intended to place on the property. (The community where the subject property is located is a community in which the property owners are allowed to maintain airplanes and hangars for the airplanes on their real property.) The correspondence directed to Petitioner alludes to attempts

made by Mr. Wright to have the Respondent return the $1,000 deposit. The letter to Petitioner from Mr. Wright refers to Respondent's refusal to return the deposit money based upon the assumption that the two lots could be converted into one lot for purposes of the property owners' association assessment. The complaint letter from Mr. Wright also alleges that Respondent had stated that the suitability of the lot for placement of the hangar and airplane was a case of "buyer beware" and not Respondent's problem.

16. As a result of Mr. Wright's complaint, Petitioner wrote to Respondent with a copy of the March 15, 1996, letter from Mr. Wright attached to Petitioner's correspondence. The correspondence from Petitioner to Respondent was received by Respondent on April 3, 1996. The Petitioner's correspondence indicated that an investigator for Petitioner would visit Respondent's office concerning the complaint by Mr. Wright.

17. Having received the Petitioner's correspondence dated April 3, 1996, with Mr. Wright's March 15, 1996, letter attached, Respondent replied to Petitioner with his own correspondence. Respondent's reply stated in pertinent part:

> . . .We are a Planned Unit Development with a Property Owners Association and we have common property for which there are assessments made to gain revenue to maintain. There are Single Family lots and homes with one assessment, Commercial Lots and buildings with three assessments and Multi Family lots with eight assessments.

The larger Single Family lots have been sold and several residents have tried to combine several lots into one lot to avoid several assessments. This cannot be done as our rules state that combining of lots to avoid assessments is not permitted. Several Multi Family lots are presently being upgraded to Large Single Family lots. These lots are not being combined, they are being rezoned. After rezoning they will be Single Family with Single Family assessment. Many of our residents prefer this to have additional condominium units constructed. We also have residents with opposing views.

Mr. Wright, who told me that he was in real estate in Michigan, looked at building sites at Spruce Creek and made a deposit on a lot that was multi family zoned. The contract was to hold the lot while he looked at other lots to insure he found the most suitable for his purpose and to see if the community was the one in which he wished to settle. Mr. Wright had stipulated that he wanted the lot to be changed to a single family lot and to have a single family Property Owners assessment. The owner agreed and that this would be done after Mr. Wright had decided that this lot was the one that he actually wanted. Mr. Wright was to make an additional deposit before April 1, 1996 indicating he wanted the lot and the owner would go ahead with the change. Mr. Wright did not make the additional deposit.

Mr. Wright, during his two month visit, in which he and his wife rented a home from us, decided to mount his own investigation and unfortunately spoke mainly with persons with opposing views of the lot owner and not many of persons with the same views of the owner, who is incidentally one of the original developers of Spruce Creek, and Mr. Wright decided that the owner could not change the lot.

My interpretation of the contract is hat [sic] upon the additional deposit, the owner of the lot had to perform to the satisfaction

> of the Buyer. If he could not the Seller had to return all deposits. I don't see anywhere where it says - upon determination of the Buyer, all the deposits will be returned. I kept the Seller apprised of the ongoing situation and he does not wish to return the deposit at this time.
>
> I, at this time can not see a dispute. I am holding the deposit money in my sales escrow account and am awaiting further contact by your office.

18. According to Respondent, after April 1, 1996, Mr. Cornish asked Respondent whether Mr. Wright still intended to buy the property in question. Respondent told Mr. Cornish that Mr. Wright, "still wants the lot." In his testimony Respondent indicated that Mr. Cornish stated that Mr. Cornish wanted Respondent, "just to hang on to the money in the escrow account . . . ."

19. Subsequently, by an administrative complaint signed October 16, 1996, FDPR Case No. 96-81064, Petitioner accused Respondent of violating Chapter 475, Florida Statutes and Rule 61J-10.032, Florida Administrative Code related to the $1,000 deposit paid by Mr. Wright.

20. In correspondence dated October 24, 1996, Respondent addressed the administrative complaint in which he stated:

> Please be advised that the undersigned is having a dispute over escrow funds with a Mr. Allan Wright, I understand that you are aware of this fact but I have been told that I still should inform the Commission in writing.
>
> The undersigned knows that the Commission

must be notified of any disputes over escrow funds but I was unaware that I had a dispute until receiving notice from Investigator James Pierce on April 3, 1996. Once receiving notice from I made the assumption that you were notified.

21. In Leonard Ohlsson, d/b/a Spruce Creek Fly-In Realty, Plaintiff vs. Alan Wright and Sarah Wright, his wife and N. E. Cornish, Defendants, in the County Court, Seventh Judicial Circuit, in and for Volusia County, Florida, Case No. 96-12238-COD1-71, Respondent filed a complaint for interpleader concerning the $1,000 deposit. This complaint was filed on December 18, 1996. On February 26, 1997, the Court disposed of the $1,000 deposit which had been interpled with the Court.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Section 120.57(1), Florida Statutes.

23. Petitioner intends to impose discipline against Respondent's real estate broker's license. It must prove the allegations in its administrative complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Respondent is presumed to know the responsibilities which he has for conducting his profession in accordance with that license. Wallen v. Florida Department of Professional Regulation, Division of Real Estate, 568 So. 2d 975 (Fla. 3d DCA 1990).

24. Related to the business transaction between Mr. Cornish and the Wrights, in which Respondent held the $1,000 deposit in escrow, Respondent is accused of the failure to provide written notification to the Petitioner upon receiving conflicting demands within 15 business days of the last party's demand, or upon a good faith doubt as to whom is entitled to any trust funds held in his broker's escrow account, and the failure to institute one of the settlement procedures set forth in Section 475.25(1)(d)1, Florida Statutes, within 15 days after the date the notification is received by the Petitioner, in violation of Rule 61J2-10.032(1), Florida Administrative Code, and therefore in violation of Section 475.25(1)(e), Florida Statutes.

25. In pertinent part, Section 475.25(1)(d)1, Florida Statutes, states:

> . . . if the licensee, in good faith, entertains doubt as to what person is entitled to the accounting and delivery of the escrowed property, or if conflicting demands have been made upon him for the escrowed property, which property he still maintains in his escrow or trust account, the licensee shall promptly notify the commission of such doubts or conflicting demands and shall promptly:
>
> a. Request that the commission issue an escrow disbursement order determining who is entitled to the escrowed property;
>
> b. With the consent of all parties, submit the matter to arbitration;
>
> c. By interpleader or otherwise, seek adjudication of the matter by a court; or

d. With the written consent of all parties, submit the matter to mediation. The department may conduct mediation or may contract with public or private entities for mediation services. However, the mediation process must be successfully completed within 90 days following the last demand or the licensee shall promptly employ one of the other escape procedures contained in this section. Payment for mediation will be as agreed to in writing by the parties. The department may adopt rules to implement this section.

If the licensee promptly employs one of the escape procedures contained herein, and if he abides by the order or judgment resulting therefrom, no administrative complaint may be filed against the licensee for failure to account for, deliver, or maintain the escrowed property.

26. Rule 61J2-10.032(1), Florida Administrative Code, states in pertinent part:

(1)(a) A real estate broker, upon receiving conflicting demands for any trust funds being maintained in the broker's escrow account, must provide written notification to the Commission within 15 business days of the last party's demand, and the broker must institute one of the settlement procedures as set forth in s. 475.25(1)(d)1., Florida Statutes, within 30 business days after the last demand.

(1)(b) A broker, who has a good faith doubt as to whom is entitled to any trust funds held in the broker's escrow account, must provide written notification to the Commission within 15 business days after having such doubt and must institute one of the settlement procedures as set forth in s. 475.25(1)(d)1., Florida Statutes, within 30 business days after having such doubt. The determination of good faith doubt is based upon the facts of each case brought before the Commission. Based upon prior decisions of

> the Commission, good faith doubt shall be deemed to exist in the following situations:
>
> 1. the closing or consummation date of the sale, lease, or other real estate transaction has passed, and the broker has not received conflicting or identical instructions from all of the parties concerning the disbursement of the escrowed funds;
>
> 2. the closing or consummation date of the sale, lease, or other transaction has not passed, but one or more of the parties has expressed its intention not to close or consummate the transaction and the broker has not received conflicting or identical instructions from all of the parties concerning disbursement of the escrowed funds;

27. The $1,000 deposit made by Mr. Wright and placed by Respondent in his escrow account for the brokerage firm was escrowed property. Mr. Wright made a demand for the return of his deposit directed to Respondent. Mr. Cornish asked that the deposit money be maintained in the escrow account. No evidence has been presented to establish that Mr. Cornish made a conflicting demand for the receipt of the escrowed property. Consequently, it has not been proven that Respondent violated Rule 61J2-10.032(1)(a), Florida Administrative Code, related to the failure to comply with notification requirements to Petitioner and other appropriate disposition (settlement procedures) in the event that conflicting demands have been made upon Respondent to disburse the $1,000 deposit he maintained in the escrow account.

28. As addressed in Rule 61J2-10.32(1)(b)2, Florida

Administrative Code, prior to the date of the sale of the subject property, Mr. Wright expressed his intention not to consummate the transaction. Respondent was made aware of that intention. By inference, Mr. Cornish had a contrary intention. Consequently, Respondent was presented with a good faith doubt. Petitioner proved that Respondent violated Rule 61J2-10.032(1)(b)2, Florida Administrative Code by not notifying Petitioner within 15 business days after being presented with a good faith doubt and instituting a settlement in accordance with 475.25(1)(d)1, Florida Statutes, 30 business days after that occurrence.

29. As related in Rule 61J2-10.032(1)(b)1, Florida Administrative Code, it has been proven that the consummation date for the real estate transaction passed. Beyond that date Mr. Wright had maintained his instructions concerning the disbursement of the escrowed funds. Respondent was aware of those instructions. Mr. Wright wanted the deposit returned. Respondent did not receive identical instructions from Mr. Cornish concerning the disbursement of the escrowed funds when compared to the preferred outcome requested by Mr. Wright. Mr. Cornish wanted the money held in escrow. Therefore, in accordance with Rule 61J2-10.032(1)(b)1, Florida Administrative Code, there was good faith doubt concerning the proper disposition of the escrowed funds. That doubt existed from the point in time at which Mr. Cornish expressed the desire not to

return the deposit and to hold the deposit in escrow. The exact date that Mr. Cornish expressed that view is unknown. But it has been proven that Respondent did not provide written notification to the Petitioner within 15 days after having a good faith doubt. Given that Respondent might reasonably believe that he was relieved of the necessity to provide the written notification to Petitioner in view of the fact that the Petitioner was already aware of Mr. Wright's complaint, the need to file written notification might seem a meaningless gesture. Nonetheless, it is a requirement that Respondent failed to meet. More importantly, Respondent failed to institute one of the settlement procedures set forth in Section 475.25(1)(d)1, Florida Statutes, within 30 business days after entertaining a good faith doubt. Thus, Petitioner proved a violation of Rule 61J-10.032(1)(b)1, Florida Administrative Code.

30. By violating Rule 61J2-10.032(1)(b), Florida Administrative Code, Respondent has violated Section 475.25(1)(e), Florida Statutes, as alleged in the administrative complaint. Respondent is subject to discipline in accordance with Section 475.25(1), Florida Statutes, pursuant to the guidelines set forth in Rule 61J2-24.001(3), Florida Administrative Code.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED

That Final Order be entered finding Respondent in violation of Rule 61J2-10.032(1)(b), Florida Administrative Code, and Section 475.25(1)(e), Florida Statutes, and imposing a fine of $1,000 and requiring the Respondent to complete a 30-hour broker management course within 90 days of issuance of the Final Order.

DONE AND ENTERED this 15th day of July, 1997, in Tallahassee, Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of July, 1997.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.