

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
DIVISION OF REAL ESTATE,)
)
Petitioner,)
)
vs.) Case No. 11-0071PL
)
ANNE HURST,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 13, 2011, a duly-noticed hearing was held in Lake City, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph A. Solla, Esquire
Department of Business and
Professional Regulation
Division of Real Estate
400 West Robinson Street, Suite 801N
Orlando, Florida 32801-1757

For Respondent: William J. Haley, Esquire
Brannon, Brown, Haley, & Bullock
Post Office Box 1029
Lake City, Florida 32056-1029

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated section 475.25(1)(b) & (c), Florida Statutes (2007), as alleged in the Administrative Complaint and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On July 1, 2010, Petitioner, the Department of Professional Regulation, Division of Real Estate (Petitioner or DBPR), filed an Administrative Complaint against Respondent, Anne Hurst (Ms. Hurst or Respondent), alleging that she violated section 475.25(1)(b) and (c). Respondent executed an Election of Rights form July 27, 2010, disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. On January 10, 2011, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was originally scheduled for hearing March 18, 2011. At the request of both parties, the matter was rescheduled for April 13, 2011, and proceeded as scheduled. At hearing, Petitioner presented the testimony of Angela Francis, George Curtis, and Russell Wright. Petitioner's Exhibits 1-7 were admitted into evidence. Respondent testified on her own behalf and presented the testimony of Doris Redish. Respondent's Exhibits 1-9 were admitted.

The Transcript of the proceedings was filed with the Division on April 25, 2011. At the request of the parties, the time for filing proposed recommended orders was extended until May 16, 2011. Both parties timely filed Proposed Recommended Orders which have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of real estate pursuant to section 20.165 and chapters 455 and 475, Florida Statutes.

2. At all times material to this Administrative Complaint, Respondent was licensed as a real estate broker associate in the State of Florida, having been issued license number 3057283.

3. At all times material to this Administrative Complaint, Respondent was licensed with Re/Max Professionals, Inc., a real estate corporation.

4. At the time of hearing, Respondent was licensed with Access Realty of North Florida, Inc., a licensed real estate corporation.

5. Respondent's address of record is 757 West Duval Street, Lake City, Florida 32055.

6. At all times material to the Administrative Complaint, Respondent was the listing agent for a property known as 831 South West 5th Street, Live Oak, Florida (5th Street property).

7. On March 4, 2008, Respondent listed the property as having a Commercial Intensive (CI) zoning. At the time of the listing, zoning classifications for property in Live Oak were not available on line, and could only be obtained by calling for the information.

8. At the present time, George Curtis is employed by the City of Live Oak and handles inquiries regarding zoning for properties in the City of Live Oak. He does not recall receiving

a telephone call from Respondent regarding the zoning classification for the 5th Street property. However, at the time of Respondent's inquiry, Mr. Curtis was just starting his employment with the city, and did not yet have an office. Inquiries were at that time directed to the City Clerk's office. Mr. Curtis could not state that no call was received by that office, or, if received, what information was given.

9. The listing for the property states at the bottom, "[t]his information is deemed reliable, but is not guaranteed." Respondent listed the property zoning as CI after calling to inquire regarding the appropriate zoning for the property. While she testified that her call was to the Suwannee County office as opposed to the City of Live Oak, it is found that the call must have been made to the City, given the telephone call described below.

10. The property described in the listing is not zoned CI, but rather Commercial Neighborhood (CN).

11. In Live Oak, CI zoning is the most intense zoning district, and is limited to major arterial roads in the city. It is intended to meet the needs of a regional population. CN zoning is intended to provide for commercial use on a more limited scale, in terms of the size of the building that can be placed and the types of uses. It is intended to meet the needs of a neighborhood area.

12. A funeral home would not be a permitted use for property zoned CN. It would require a zoning change.

13. A funeral home would be permitted on a property zoned as commercial general (CG). The CG category is between CI and CN.

14. In September 2008, Respondent contacted the City of Live Oak and was referred to George Curtis about the possible use of the property on SE 5th Street as a daycare. During their telephone conversation, he told her that in order to operate a daycare on the property, the owner would need to receive a special exception to the zoning requirements. He obtained her e-mail address and sent her an e-mail with attachments regarding obtaining special exceptions. Respondent believed, based upon their conversation, that the same would be true for any business to be located on the property.

15. Mr. Curtis does not recall telling Respondent at that time that the property was not zoned as CI.

16. On October 16, 2008, Respondent sent the following e-mail to Mr. Curtis:

Hi George, the contract for a day care on 831 SW 5th Street, Live Oak (lots 14, 15, 16, Block E, Hildreth) fell through. I now have a pending contract but the buyers want to use the property for a funeral home. Do you see any problem with this? Anne

17. The e-mail was sent at 5:01 p.m. At 5:22 p.m., Mr. Curtis sent the following reply:

Hello Anne:

I believe this property was Neighborhood Commercial between Green and Ammons on the south side of 5th. C-N does not have any allowances for a Funeral Home, even as a Special Exception. A petition could be proposed to the City Council for Residential-Office or Office Zoning that does allow for the Funeral Home (with also a Special Exception) but other criteria would have to be evaluated to be sure that parting and buffering requirements could be met after any zoning change took place--which is also a process that is not guaranteed but a possibility--there is no way to predict whether the rezoning and the special exception would be approved. This would probably be a 4-6 month process start to finish plus the associated fees to try.

Funeral Homes are allowed by right in General Commercial Zoning but you have to front a major street (129/90/51, etc. to get considered for that zoning...)

Hope this helps -- wish I had better news...

18. Respondent claims that she never received this e-mail, and that she never deleted it from her computer. She testified that when she did not receive a response, she called the zoning office and was told that a special exception would be required for a funeral home. She passed this information on to Mr. Wright.

19. On October 17, 2008, Russell Wright made an offer to purchase the property on S.W. 5th Street for \$45,000. The contract (Petitioner's Exhibit 3) has been reduced and copied several times, and as a result, is illegible in most respects. However, it can be ascertained that the contract was made on

October 17, 2008, and signed by the sellers on October 22, 2008. The contract specified that closing was to take place October 31, 2008, which it did. The contract also specified that the Buyers would pay \$5,000 down, and the Sellers would finance the remainder at 8 percent, with payments of \$485.31.

20. As part of the closing, the Buyers and Sellers signed an Affidavit of Buyer and Seller Regarding Contract Compliance, which stated "all of the contingencies and conditions set forth in the contract (and all addendums thereto) between the Seller and Buyer have been satisfied, performed or waived by the Buyer and the Seller"

21. Because of the condition of Petitioner's Exhibit 3, it cannot be determined whether the form contract made any representations regarding zoning and who was responsible for determining the appropriate zoning for the property.

22. On October 23, 2008, Respondent sent an e-mail to Russell Wright with attachments labeled "Petition for Special Exemption," "How the Future Land Use Plan Map - Brochure," and "Sec. 12.2 Special Exceptions." The message in the e-mail reads:

Hi Russ, here's the contact person who deals with the zoning in Live Oak, and the forms for filing. I received 1 of the forms back from you, the As Is Rider but I still need the corrected Lead based paint disclosure that I sent with the AS Rider in yesterday's fax. Please complete this form and fact back to me. The Seller's [sic] are going to close at 9:00 am on Friday 31st, please let me know as soon as possible a time that would be convient [sic] for you and your wife to attend. Regards, Anne.

23. Mr. Wright acknowledged receiving an e-mail, but not the documents. He sent Respondent the other documents required for closing. After the closing, he called her and stated that he could not locate the paperwork related to special exceptions, and on November 3, 2008, she mailed it to him. With the paperwork was the following note:

Dear Russell and Marcus:

I have enclosed the paperwork for the Special exception. If you have any questions you may call George Curtis at 386-362-2276. Mr. Curtis is the development manager for the City of Live Oak.

Regards,
Anne

24. Mr. Wright began making renovations on the property in order to open a funeral home. In July 2009, he began the process of getting his city occupational license. He could not obtain the license because the property was not zoned for his intended use.

25. At that point, Mr. Wright contacted city officials, including George Curtis and the Mayor of Live Oak. Mr. Curtis advised Mr. Wright that he had sent an e-mail to Respondent advising her that a funeral home could not be operated on the property with its present zoning.

26. Mr. Wright wrote to Respondent, demanding that she compensate him for the fact that he could not open the funeral home without a zoning change. The letter stated in pertinent part:

The Mayor of Live Oak and Mr. George Curtis has informed me that I can apply for a zoning change so that My Wife and I can open our business. But it will cost \$750.00 to file the initial papers. And that is NOT a guarantee. To date with the down payment and monthly payments and renovation cost, your dealings have cost us \$25,000 plus pain and suffering and embarrassment. And we have property that we can't use for the intention it was purchased. Ms. Hurst, we are allowing you and your firm to settle this matter out of court.

Ms. Hurst we will settle this matter for the amount of \$50,000.00 which is damages plus pain and suffering. If you and ReMax Professionals, Inc., are not willing to settle with us out of Court, we will retain the Attorney with whom my Wife and I have consulted. . . .

27. It is clear from the evidence that Mr. Wright chose to believe that he could open a funeral home on the property without any further administrative action either to change the zoning or to obtain a Special Exception for its intended use. Neither belief is consistent with the credible evidence that Respondent sent him information regarding Special Exemptions and the process to obtain them. All of the information given to him is consistent with his need to follow up with the City's zoning department, which he did not do.

28. Based on the more persuasive evidence presented in this classic, "he-said, she-said" case, it is found that Respondent did not receive the October 17, 2008 e-mail from George Curtis, but believed that a Special Exemption would be required to operate a funeral home on the property, and that she supplied

information to Mr. Wright to that effect. Mr. Wright's claim that Respondent represented that the property could be used as a funeral home with no further action is rejected.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes.

30. This disciplinary action by Petitioner is a penal proceeding in which Petitioner seeks to suspend or revoke Respondent's license as a real estate associate. Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

31. As stated by the Florida Supreme Court:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

32. Count One of the Administrative Complaint alleges that the Respondent's conduct violated section 475.25(1)(b), which

provides in pertinent part that the Florida Real Estate Commission may discipline a licensee who:

(b) Has been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme. It is immaterial to the guilt of the licensee that the victim or intended victim of the misconduct has sustained no damage or loss; that the damage or loss has been settled and paid after discovery of the misconduct; or that such victim or intended victim was a customer or a person in confidential relation with the licensee or was an identified member of the general public.

33. The Administrative Complaint states that Respondent violated section 475.25(1)(b) by concealing the property's proper zoning as commercial neighborhood as opposed to commercial intensive; by misrepresenting to the buyer that the property was zoned as commercial intensive; by concealing from the buyer that operation as a funeral home would not be permitted; by concealing from the buyer the e-mail from George Curtis dated October 16, 2008; and by concealing from the buyer that the operation of a funeral home was not permitted under a special exemption in a commercial neighborhood zone.

34. As stated above, the burden of proving the allegations in the Administrative Complaint is by clear and convincing evidence, which is a significant burden. In this case, the burden has not been met.

35. Critical to Petitioner's case is whether Respondent inquired regarding the zoning when listing the property, and whether she received the October 16, 2008, e-mail notifying her of its actual zoning status and what would be required to operate a funeral home on the property. Mr. Curtis testified that, in March of 2008, zoning inquiries could be made to the clerk's office, and that the information was not then available on the internet. Respondent claimed that she made an inquiry and was told the property was zoned CI. Her listing for the property includes the disclaimer that the information included was "deemed reliable but not guaranteed." Under these circumstances, the evidence is not clear and convincing that she knew the property was zoned CN as opposed to CI.

36. Similarly, the evidence is not clear and convincing that Respondent received the October 16, 2008, e-mail from George Curtis. Mr. Curtis did not have his e-mail settings set to receive a notice that she did not receive the message, and could only testify that he sent it. He could not say she received it. Her subsequent actions are consistent with her testimony that she did not receive it. Further, she not only forwarded to Mr. Wright information related to special exemptions, she

forwarded to him contact information for Mr. Curtis. Forwarding Mr. Curtis' contact information is inconsistent with concealing information he had given her.

38. Count Two of the Administrative Complaint charges Respondent with violating section 475.25(1)(c), which makes it a violation to "advertise. . . property or services in a manner which is fraudulent, false, deceptive, or misleading in form or content. The commission may adopt rules defining methods of advertising that violate this paragraph."

39. Petitioner did not cite and the undersigned has not located any rules defining methods of advertising that violate section 475.25(1)(c). Here, the listing for the property clearly listed the zoning as CI as opposed to the correct designation, CN. The advertisement on its face indicated that it was "deemed reliable but was not guaranteed." The unrebutted evidence was that Respondent sought information regarding the proper zoning and was told (mistakenly) that the property was zoned CI. She did not receive written confirmation of the zoning. Listing the incorrect information does not rise to the level of fraudulent, deceptive, or misleading. The information is, however, false. Count Two has been proven by clear and convincing evidence.

40 The Florida Real Estate Commission has adopted disciplinary guidelines to provide notice of the range of penalties that can be expected for violations of chapter 475. For a violation of section 475.25(1)(c), Florida Administrative

Code Rule 61J2-24.001(3)(d) provides that the customary penalty would be a fine of up to \$5,000 and up to a one-year suspension. The rule also specifies aggravating and mitigating factors that can be considered in determining the appropriate penalty, including the disciplinary history of the licensee. In this case, the Department presented no evidence to indicate that Respondent had been disciplined previously. Moreover, she did check to see what zoning was proper. In this instance, a minimal penalty is all that should be imposed.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Florida Real Estate Commission enter a final order dismissing Count One in the Administrative Complaint; finding a violation of section 475.25(1)(c), as alleged in Count Two; imposing a reprimand and fining Respondent \$250.00.

DONE AND ENTERED this 8th day of June, 2011, in Tallahassee, Leon County, Florida.



Administrative Law Judge
Division of Administrative Hearings
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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.