BEFORE THE
REAL ESTATE AGENCY
STATE OF OREGON

IN THE MATTER OF:	) OAH Case No.: 1202930
	) Agency Case No.: 2011-492
CHRISTOPHER FOX,	)
	)
Licensee.	) **FINAL ORDER ON REMAND**

This matter came before the Commissioner following the Court of Appeals remand in Case No. A159689. The Court of Appeals remanded the case back to the Real Estate Agency for entry of an order consistent with the court's judgment. The Agency now issues this Final Order on Remand, which imposes a sanction of a one year suspension.

HISTORY OF THE CASE

On July 9, 2012, the Real Estate Agency (Agency) issued a Notice of Intent to Revoke with Notice of Contested Case Rights to Christopher Fox (Licensee). On July 30, 2012, Licensee requested a hearing.

On August 7, 2012, the Agency referred the hearing request to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) Jenifer Rackstraw was assigned to preside at hearing. A hearing was scheduled for October 23 and 24, 2013. The OAH reassigned the matter to Senior ALJ A. Bernadette House.

On September 24, 2012, Michael Gordon, Attorney at Law, notified the OAH that he had been retained by Licensee, and requested a postponement of the hearing date to prepare for the hearing. Mr. Gordon's unopposed motion was granted and the matter was rescheduled.

ALJ House convened a hearing on January 23, 2013 at the Agency's offices in Salem, Oregon. Licensee appeared with counsel, Mr. Gordon, and testified. The Agency was represented by Raul Ramirez, Senior Assistant Attorney General. The Agency also called Michael Donnelly, former manager of the Chatfield Family, LLC, a family trust. Licensee called Peter Bale, Agency investigator, and Grace Burch, real estate broker and former office manager, appearing in person, and T.J. Newby, former real estate broker and Mark Parsons, real estate broker and Licensee's former business associate, appearing by telephone. The record closed at the conclusion of hearing on January 23, 2013.

ISSUES

1. Whether Licensee's failure to reference zoning issues in promotional materials for the sale of 65 acres of property which he owned, located at 22600 Skyline Boulevard, Portland, Oregon (the property), constituted the following violations: knowing or reckless publication of materially misleading or untruthful advertising, and/or fraudulent or dishonest conduct substantially related to the fitness of Licensee to conduct professional real estate activity, in violation of ORS 696.301(4) and (14)(2005 edition); and/or failure to disclose material facts known by Licensee, as a real estate agent, which are not apparent or readily ascertainable to a party in a real estate transaction. ORS 696.805(2)(c) (2005 edition).

2. Whether Licensee's failure to accurately complete the Residential Real Estate Sale Agreement for the property, in two separate statements, constituted 1) fraud and/or dishonest conduct substantially related to his fitness to conduct professional real estate activity (ORS

696.301(14)) (2005 edition) and/or 2) violated the requirement that a seller's agent disclose material facts known by the seller's agent and which are not apparent or readily ascertainable to a party in a real estate transaction. ORS 696.805(2)(c) (2005 edition).

3. Whether Licensee's incorrect answer, indicating there were no zoning violations or nonconforming issues, on the Seller's Property Disclosure Statement related to the property constituted an act of fraud and/or engaging in dishonest conduct substantially related to the fitness of Licensee to conduct professional real estate activity, in violation of (ORS 696.301(14)) (2005 edition), and/or violated the requirement that a seller's agent disclose material facts known by the seller's agent and which are not apparent or readily ascertainable to a party in a real estate transaction. ORS 696.805(2)(c) (2005 edition).

4. Whether Licensee's signature on the July 17, 2006 warranty deed transferring the real property "free of encumbrances," to Skyline View, LLC, when Licensee was aware at that time of a State Land Division violation regarding the property, was an act of fraud and/or dishonest conduct substantially related to the fitness of Licensee to conduct professional real estate activity. ORS 696.301(14) (2005 edition).

5. Whether Licensee's failure to report a March 16, 2010 adverse judgment to the Agency until October 14, 2011, violated ORS 696.301(3) (2009 edition) and OAR 863-015-0175(4) (2009 edition, 1-1-09) which requires that a licensee notify the commissioner of any adverse decision or judgment resulting from any suit, action or arbitration proceeding in which the licensee was named as a party within 20 calendar days of receiving written notification of the adverse decision.

6. If so, whether the violations are grounds for discipline (ORS 696.301), and if so, whether the violations resulted in significant damage or injury, and exhibited dishonest or fraudulent conduct such that Agency's proposed revocation of Licensee's license is appropriate. ORS 696.396(2)(c)(A) and (C).

EVIDENTIARY RULINGS

Exhibits A1 through A24, and A26 through A27, offered by the Real Estate Agency, and Exhibits R1 through R19, offered by Licensee, were admitted into the record without objections.

Licensee objected to Exhibit A25, based on relevancy and the ALJ reserved ruling. Exhibit A25 is a copy of Claimant's Confidential Arbitration Hearing Memorandum. Reviewing the record, Licensee's objection is overruled. Licensee opened the door by introducing evidence regarding Licensee's opinion that the arbitration decision was based on an incomplete record, due in part to Licensee having represented himself until the contested case hearing was held. The Agency is entitled to address the record for the arbitration decision in rebuttal. Exhibit A25 is hereby admitted into evidence.

The parties agreed to an amendment to the Notice, at paragraph 2.5, top of page 4, adding the citation to the relevant ORS be added "Violation," immediately after, as ORS 696.301(3). The pleading in the OAH file was amended by hand, initialed and dated by the ALJ. On the record, the ALJ stated a certain order of marking the pleadings. The Agency's exhibits and submissions included a full copy of the pleading documents. The Agency's pleading record is accepted as the official record and a copy of the hand-amended Notice is included in that set of documents.

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FINDINGS OF FACT

(1) Licensee, a licensed real estate principal broker, owns and operates Estate Builders, Inc. (Estate Builders). Licensee incorporated Estate Builders in 1995. Licensed in real estate in Oregon since 1988, Licensee has also been dually licensed in Washington and Oregon for the past twenty years. (Test. of Licensee.)

(2) Licensee has extensive experience in real estate. His background in real estate began at age 15, working with his father throughout the 1960s and 1970s. Licensee's father was an experienced broker, with one of the largest real estate companies in Corvallis, Oregon. His father's office specialized in decreasing outflow and increasing income on properties. Licensee has also been a presenter for continuing education in the practice of real estate and has received commendations for his work. (Test. of Licensee; Ex. R19.)

(3) Licensee's practice historically has been 90 percent income property. Licensee buys, sells, and manages low income properties, including rentals and mobile home parks, throughout Oregon and Washington. Focusing on the type of property acquired and sold, he does not, as a matter of practice, regularly represent either buyers or sellers. Licensee does not regularly engage in property development as part of his real estate business. (Test. of Licensee; Ex. R19 at 2-3.)

Relevant facts related to the history of the property

(4) In 1965, Merlin F. Radke (Radke) purchased one parcel of property (approximately 82 acres) on Skyline Boulevard, and a second parcel (approximately 65 acres) with boundaries contiguous to the first, consisting of two tax lots, in 1966. A house had existed on the second parcel of property, known as 22600 NW Skyline Boulevard (the property), since at least 1942. (Test. of Licensee; Ex R14.)

(5) In 1967, Radke built a new house on a portion of the property, approximately 100 feet away from the original home-site. In addition to the new house, over time, Radke added other structures to the property, including, a storage/shop building of about 1000 square feet and six other storage units, all built by Radke. In 1971, Radke added substantial improvements to the house. (Test. of Licensee.)

(6) In 1981, Radke and Publishers Paper Company completed a property exchange agreement and a cutting boundary agreement involving two parcels of land with contiguous boundaries between the parties. One part, approximately 17.92 acres, of Radke's property on the downhill side away from Skyline Boulevard, was steep and forested. Publishers Paper owned approximately 19.36 acres of property with a boundary to Radke's parcel and with frontage on Skyline. The Publishers' parcel was relatively flat. (Test. of Licensee; Exs. R1, R2.)

(7) The parties executed the property exchange agreement on May 22, 1981, exchanging Radke's 17.92 acres for Publishers Paper's 19.36 acres. (Test. of Licensee; Ex. R1.) In July 1981, Pioneer National Title Insurance issued an original warranty deed by which Publishers conveyed the real property described in the attached report to Merlin F. Radke and a copy of a warranty deed by which Radke conveyed to Publishers the real property as described in the referenced reports as amended and subject to the noted exceptions. Pioneer issued an owner's title insurance policy in the amount of $45,000 to insure Publisher's fee simple title to the real property and easements free and clear of all liens and encumbrances to Radke. The consideration for the transfer of title to the property was an equal value exchange of property. (Ex. R1.)

(8) The parties later executed a Cutting Boundary Agreement, which was recorded with

Multnomah County Circuit Court on December 31, 1981. (Ex. R2.) Within 6 months, Publishers harvested 500 acres of its property which included the 17 acre parcel from Radke. (Test. of Licensee.)

(9) Multnomah changed the zoning for the 65 acres by map in 1980. The County confirmed the change by rule in 1982, when the minimum acreage necessary for residential use was increased to a minimum of 80 acres. The property, as of 1982, was not large enough for a new residential use. (Test. of Licensee.)

(10) In September 2004, Licensee purchased the 65 acre parcel of property from Radke. The property is located on Skyline Boulevard, at an altitude of approximately 1400 ft. to 1600 ft. elevation. Fifty to sixty percent of the property is flat and the location provides views of the Cascades and the Columbia River. Licensee bought the 65 acres, which included land recorded under three separate tax lots, in a single transaction. (Test. of Licensee.)

(11) At the time Licensee purchased it, the property was zoned CFU 1 (commercial forest use). CFU 1 designates land as a protected natural resource area for future generations. Property so zoned is intended for use in increasing timber harvest within the zoning and to decrease residential use within the zoned area. (Test. of Licensee.)

(12) Licensee did not own the timber rights to the property he purchased from Radke. Approximately two months after Licensee bought the property, the owner of the timber rights harvested the timber. The timber harvest revealed that Radke had disposed of 60 to 70 % more waste on the property than was readily apparent prior to the harvest. The additional waste included 30-to-40 55-gallon barrels of oil or solvents, 30 cars, and materials from 30 years of dumped waste from apartments and ruined buildings. (Test. of Licensee.)

(13) When Licensee purchased the property in 2004, the house did not meet current plumbing and electrical requirements. Radke's improvements had not been permitted and were non-compliant. Licensee knew that a new residence could not be built on the property due to the zoning. Licensee intended to bring the existing house up to code for his personal use under the zoning in effect at that time. Licensee intended to make improvements through a program offered by the City of Portland (the City) acting on behalf of Multnomah County. The program was called the "Get Legal" program. (Test. of Licensee.)

(14) In the Get Legal program, the City assisted owners of property located in rural areas of Multnomah County to bring unpermitted, not-to-code improvements up to current code requirements. The City's engineering, electrical, and plumbing departments worked with program participants to bring existing non-conforming buildings into compliance. (Test. of Licensee.)

(15) After purchasing the property, Licensee began the initial work to bring the house up to code and to clean up the property. He hired several individuals for the work, including an acquaintance, Gordon Linch, (spelling not provided). Through Linch, Licensee met Ernie Casella. (Test. of License.)

(16) In December 2004, after Publisher's logged the parcel it had acquired, a major windstorm caused additional significant damage to the property. Licensee contracted with Casella to repair the additional damage to the house and other structures. (Test. of Licensee.)

(17) Casella also represented himself to be knowledgeable on resolving zoning and permitting issues. Casella told Licensee that he had successful experience as an arbitrator between the City, the County and homeowners in similar land use issues. Licensee researched Casella's reputation in the community. Casella had worked on projects in the Pearl District and

other areas, and had a reputation for being thorough and professional in his business dealings. (Test. of Licensee.)

(18) Licensee determined that Casella had the skills and knowledge to resolve the issues with the property. Licensee hired Casella, and over time, spent approximately $80,000 to work on resolving the permitting and land use problems with the property. (Test. of Licensee.)

(19) On March 8, 2005, Licensee wrote Casella a letter outlining the issues with the property. In Licensee's letter to Casella, he outlined the history and the issues involving the property. Licensee intended the letter to disclose everything he knew about the property. In particular, Licensee wanted Casella to investigate the possibility that the third tax lot, that had been created by the timber company in 1981, could be split off, and sold. Licensee wanted to use the proceeds to keep the remaining acreage and finish the work on the house. (Test. of Licensee; Ex. R6.)

(20) In paragraph 5 of the March 8th letter, Licensee set out the details of the 1981 property exchange between Radke and Publishers, which created the 19-acre parcel (the third tax lot) that he was hoping to sell off. At the time he wrote the letter, Licensee knew that the County had red-flagged the property because it determined that the 1981 property exchange between Radke and Publishers created an illegal lot smaller than the minimum 80 acres required for residential development. (Test. of Licensee; Ex. R6 at 2.) Licensee believed he could work with the County to resolve the problem by offering to merge the third tax lot back with the adjacent original two tax lots, one made up of 37 acres (where the shop was located) and the other with 26.7 acres (where the house was located) to recreate the original larger parcel. Licensee outlined other proposals he believed might be ways to resolve the zoning so some portion of the parcel might be sold and/or the existing structure could be brought up to current building codes. (Test. of Licensee; Ex. R6.)

(21) At approximately the same time as the March 8, 2005 letter, Licensee also sent Casella a document from the Multnomah County Land Use Division which provided information on how an owner of CFU property could get approval for a template dwelling through County processes. Licensee believed the property met the minimum requirements for approval through the template process at the time he told Casella about the process. Licensee provided the information to Casella so that Casella could pursue getting the County's approval for the non-conforming use. (Test. of Licensee; Ex. R13.)

(22) Licensee knew the County had assessed taxes on Radke's improvements and had issued permits for electrical meters while Radke owned the property. The County assessed taxes for July 1, 2004 to June 30, 2005 on the parcel with the market values for the land at $160,430 and the structure at $59,600. He believed those actions by the County supported his seeking approval for the nonconforming use. (Test. of Licensee; Ex. A5.)

(23) Throughout the time Licensee owned the property, while he was selling the property, and continuing through the time of the contested case hearing, Licensee believed there were policies and land-use exceptions that would apply to legalize the zoning violations created by the 1981 tax lot division and Radke's improvements to the house on the property. Licensee's belief was based, in part, on the following: research on the applicable land use laws; discussions with County and City employees who worked with zoning and compliance issues in land use; and comparable lots in the area that had been granted exceptions under the County's process. (Test. of Licensee; Exs. A24, R4.)

(24) Licensee exhausted his available funds to clean up the property. He was unable to complete all planned upgrades to the existing house. Licensee decided to sell the property. Acting under his principal broker's license, License listed the property on the Regional Multiple

Listing Service (RMLS). (Test. of Licensee; Ex. A8 at 4.)[1]

(25) Licensee wrote the RMLS listing for the property and he was the principal broker at that time. Either Licensee or his staff entered the information into the RMLS system for the listing. The listing date was August 10, 2005. (Test. of Licensee; Ex. A9.)

(26) The RMLS listing format includes an area for "Remarks" where a listing broker can add information about the property that would be important for an interested party to know. Licensee's listing for the property did not include any statements addressing the property's zoning history and current "red-flag" status with the County. Licensee knew at the time the property was listed that it had been illegally divided in the 1981 Radke/Publishers Paper property exchange. (Test. of Licensee; Ex. A9.)

(27) Licensee, as an Oregon licensed principal broker, also oversaw the business activities of any real estate agents working under his principal broker's license. As a principal broker, Licensee was responsible for those agents' activities, including working with clients and with MLS listings. Licensee was responsible for the accuracy and fairness of the activities of any agent working under Licensee's principal broker's license, including any omissions or incorrect information included on the listing. (Test. of Licensee.)

(28) Licensee's work during the period of time at issue did not include property development. He did not regularly generate advertising for properties in his work but did list approximately 50 percent of his inventory on the RMLS. (Test. of Licensee.)

(29) Licensee met Mike Donnelly through Brent Maxson, a real estate licensee and Licensee's professional colleague at the time. (Test. of Licensee.) Maxson had met Donnelly in college and they remained friends. Maxson helped Donnelly in the past buy both residential and commercial properties. Maxson knew Casella and his reputation for successful permitting and construction projects. Maxson also knew that Casella worked with Michael Crane as a mortgage broker. Maxson believed Casella and Crane would be a good fit with Donnelly. Maxson introduced Donnelly to Casella and Crane for the purpose of considering a purchase of the property. (Ex. R5 at 1.)

(30) Donnelly, Crane and Casella agreed to buy the property together for $650,000. (Test. of Licensee; Exs. A13, R5 at 1.) Donnelly, Crane, and Casella signed the residential real estate purchase and sale agreement (the offer) for 22600 N.W. Skyline Blvd, Portland, Oregon in their individual capacities. Licensee knew that the three individual buyers intended to form Skyline View LLC, to complete the purchase of the property. (Test. of Licensee; Ex. A13 at 1.)

(31) In the transaction, Maxson acted as the Buyers' agent. (Exs. A13 at 1, R5 at 1.) Casella was the primary party acting for the three buyers. Maxson was aware that Casella had been working on permitting issues for the property. Casella told Maxson that he would solve the permit problems. (Ex. R5 at 1.)

(32) When later interviewed by the Agency's investigator (Bale), Maxson said that at some point he became aware that Casella and Crane might have misused funds belonging to Skyline View, LLC. Maxson knew that Crane controlled the funds for Skyline View, LLC. (Ex. R5 at 2.)

(33) The form of the offer was a standard industry form which was familiar to Licensee as one of those regularly used in the real estate industry. Paragraph 10 on page 2 of the offer is

[1] This finding of fact was rephrased for clarity. No substantive modifications were made

entitled "Seller Representations" and states, in part, the following:

> (7) Seller has no notice from any governmental agency of any violation of law relating to the Property * * * (9) Seller agrees to promptly notify Buyer if, prior to closing, Seller receive actual notice of any event or condition which could result in making previously disclosed material information relating to the Property substantially misleading or incorrect. These representations are based upon Seller's actual knowledge. Seller has made no investigations. Exceptions to items (1) through (9) are: _____. Buyer acknowledges that the above representations are not warranties regarding the condition of the Property and are not a substitute for, nor in lieu of, Buyer's own responsibility to conduct a thorough and complete independent investigation, including the use of professionals, where appropriate, regarding all material matters bearing on the condition of the Property, its value and its suitability for Buyer's intended use[.]

(Ex. A13 at 2.) (Emphasis in original.)

(34) Licensee was aware at the time the offer was signed that Multnomah County had determined the property had been illegally divided in the prior transaction between Radke and Publisher's Paper. Licensee discussed the property and the details of the transaction with Crane and Casella. Donnelly did not participate in those discussions. Licensee's understanding was that Crane and Casella represented Skyline View, LLC, in those discussions. Licensee knew that Casella had knowledge of all of the issues regarding the property based on his original business relationship with Casella. Licensee had no knowledge as to whether Donnelly, as the third member of Skyline View, LLC, was or was not informed by Casella of the issues with the property. (Test. of Licensee.)

(35) Licensee signed a Seller's Property Disclosure Statement regarding the sale of the property on July 7, 2006. He answered the questions on the form, including question "H" under the heading "Title" on page 2 of the agreement. To the question, "Are there any zoning violations or nonconforming uses?" Licensee checked "No." (Test. of Licensee; Ex. A7 at 2.) That answer was incorrect at the time Licensee completed it. Licensee was aware of the zoning violation regarding Multnomah County. Licensee's omission was not intentional. (Test. of Licensee.) Licensee did not complete the portions of the document that were completed by hand. Licensee initialed each page at the bottom in the area set designated for the Seller's signature. (Test. of Licensee; Ex. A7.)

(36) Licensee signed a warranty deed transferring the "real property free of encumbrances" from FOXC, LLC to the buyer Skyline View, LLC, on July 17, 2006. (Test. of Licensee; Ex. A20.) Licensee was aware of the zoning violations when he signed the deed. (Test. of Licensee.)

(37) Licensee had reviewed land-use law while he owned the property and at the time he was trying to sell the property. Licensee believed that the issues with the zoning could be resolved based on his review of land-use statutes and rules at the time he owned the property and at the time he sold the property. (Test. of Licensee; Exs. R8-R13.)

(38) The County has approved development on non-conforming lots that were less than the minimum 80-acres but that were greater than 19 acres. Licensee knew of those exceptions and he believed that was the reason the parties to the 1981 division created the new tax-lot in the size of 19.3 acres. (Test. of License.)

(39) Michael Donnelly is currently retired. Prior to retiring, Donnelly, among other business interests, managed a LLC for his family trust, the Chatfield Family Trust, LLC.

Donnelly, on behalf of the LLC, was looking for property for investment and development purposes. Brent Maxson, a realtor and friend of 25 years, had worked with Donnelly for a long time regarding real estate matters. Maxson brought the listing on the property to Donnelly for consideration. Donnelly was interested. Donnelly and other members of the family trust went to look at the property. (Test. of Donnelly.)

(40) Maxson reviewed the listing of the property with Donnelly, and looked at the property itself. Maxson had been looking for properties with potential for rehabilitation and resale for Donnelly. Donnelly relied upon Maxson's statements about the property when Donnelly told the members of the family LLC about the property. (Test. of Donnelly.)

(41) Donnelly met Licensee at some point and discussed the basics of "the whole deal" including the condition of the house at that time and Licensee's experiences with the property and its history. (Test. of Donnelly.) Donnelly was aware that Casella had performed most of the work as the contractor on the property, and had obtained all of the permits to do the rehabilitation, with the exception of the septic. (*Id.*)

(42) After Donnelly became interested in acquiring the property and forming an LLC, Maxson introduce Donnelly to Crane to assist in securing additional funds. Crane represented himself as having contacts in the financial system. Donnelly, Casella, and Crane decided to form Skyline View LLC. Crane became the managing partner of Skyline View. Crane assured Donnelly that he would be able to acquire additional finances through loans to complete the planned development of the property. (Test. of Donnelly.)

(43) Donnelly did not rely on the RMLS listing written by Licensee when considering the purchase of the property. Donnelly was aware of the extensive history of issues Licensee encountered trying to rehabilitate the house. He was aware of the permitting issues with the City but he did not know about the zoning issue with the County. Donnelly relied on Casella and Crane, as partners in the LLC, to advise him of any problems they encountered, specifically if they had knowledge of any zoning violations. (Test. of Donnelly.)

(44) On January 8, 2006, Donnelly, acting for his family LLC, signed the original offer and earnest money agreement (sale agreement), along with Michael Crane and Ernest Casella. The three purchasers also signed an Addendum to Purchase and Sale Agreement and Receipt for Earnest Money: Addendum A, on the same day. (Test. of Donnelly; Ex. A13 at 6.)

(45) On January 10, 2006, Licensee initialed each page of the purchase agreement including Addendum A, and signed as the Seller. (Ex. A13 at 7.) Licensee did not complete the handwritten portion of the January 10, 2006, Residential Real Estate Sale Agreement but he reviewed, initialed and signed the completed document. (Test. of Licensee; Ex. A13.)

(46) Addendum A included, among other things, an agreement that "all permits shall be issued through E.J. Casella and Associates[,]" "contractor release to E.J. Casella and Associates[,]" and "[p]roperty to be sold "AS IS[.]" (Ex. A14.)

(47) Addendum B, signed by all parties on February 14, 2006, included the statement that "All parties are aware that Purchasers will create an LLC as the purchasing entity." (Ex. A15.)

(48) Addendum C, signed March 27, 2006, included the statement that the new entity buying the property was "Skyline View, LLC." (Ex. A16.)

(49) Addendum D, signed on April 25, 2006, listed Skyline View LLC as the Buyer. A subsequent addendum listed Skyline View, LLC as the Buyer. (Exs. A17-A18.) The City issued

final electrical and plumbing permits. The septic permit took longer and delayed the closing until it was issued. (Test. of Donnelly.)

(50) The Chatfield Family LLC paid the down payment for the purchase price for the property. Neither Casella nor Crane put any money into the property. Donnelly, acting on behalf of the family trust, purchased the property with the intent to complete the current rehabilitation of the existing house, to sell it when rehabilitation was complete, and to possibly keep the 19 acre parcel for the family to develop with a residence for their own use. (Test. of Donnelly.)

(51) The property appraised at $1,250,000 in September of 2006. (Ex. A22 at 12.)

(52) In February 2012, Peter Bale, Agency investigator, conducted an investigation regarding a complaint filed against Licensee regarding his conduct during the sale of the property. As part of the Agency's investigation, Bale received documents from Donnelly regarding the transaction at issue. One of the documents included was an appraisal of the property commissioned by Michael Crane. (Test. of Bale; Ex. R16.)

(53) The appraisal report included with Donnelly's documents was completed by Carla Johnson, on January 28, 2008. Johnson, a licensed Oregon appraiser with Portland Residential Appraisals, Inc., completed an appraisal of the property for the purpose of a refinance of the existing mortgage. The property appraised at $1,600,000. In the portion allocated to consideration of the neighborhood, Johnson wrote, in part, that:

> [The] area is composed of large tracts of timberland. Where zoning allows, homesites have been created in recent years. Development of large custom homes of substantial value has become commonplace."

(Ex. R16 at 2.)

(54) Under the portion entitled "Site," Johnson indicated, among other things, that the area of the site was 65 acres, that the specific zoning was "CFU-commercial forest" and that the zoning description was "80 to 100 acre minimum lot size for new tracts-restrictive." (Ex. R16 at 1.) Johnson checked the box for "Legal Nonconforming (Grandfathered Use), and on the same line, included the following: "legal site – rebuild of home is ok." To the question "[i]s the highest and best use of subject property as improved (or as proposed per plans and specifications) the present use[,]" Johnson wrote: "issue of a building permit will be adequate proof of legality under zoning. CFU zoning is one of the most restrictive in the County." (*Id.*)

(55) Under "Sales Comparison Approach," Johnson indicated that she had researched the sale or transfer history of the subject property and comparable sales. (Ex. R16 at 2.)

(56) Following the appraisal, Skyline View, LLC acquired a construction loan to develop the property, secured by an interest in the property as collateral for the loan. Part of the proceeds from the loan was disbursed to repay the Chatfield Family LLC for the down payment loan and part was used to pay off the purchase price. (Test. of Donnelly.)

(57) At some point after Skyline View, LLC purchased the property and began work on the existing structure, Multnomah County issued a Stop-Work order. Donnelly received a copy and called Crane, who was in charge of the work at that time. Crane told Donnelly he had received the Stop-Work order and that it had been "taken care of." (Test. of Donnelly.)

(58) Following the issuance of the original Stop-Work order, on April 9, 2008, the County sent a letter to Skyline View LLC, c/o Donnelly and to Crane as Managing Partner which

included a Request for Voluntary Compliance. The County had determined that the County's zoning, which prohibited the project, took precedent over the permits issued by the City of Portland under which the City had allowed the rehabilitation work to proceed. The April 9, 2008 letter set out specific actions and deadlines under which the violations might be resolved. (Test. of Donnelly; Ex. A24.)

(59) On February 18, 2010, Michael Donnelly, acting in his capacity as the managing member of Skyline View, LLC, won an arbitration award against Licensee, FOXC, LLC, and Estate Builders, Inc. The arbitration panel found Licensee liable to Donnelly on Donnelly's claim of intentional fraud and awarded Claimant $666,450 in damages. Donnelly has been unable to collect on the damages award. (Test. of Donnelly; Ex. A2 at 7.)[2]

(60) Licensee, individually and in connection with his LLCs, was the party Donnelly first sued regarding the property, and the matter went to mandatory arbitration. Licensee was not represented by an attorney at the time arbitration began. Licensee answered requests for admissions and filed an answer to the initial claim without the advice of counsel. Licensee retained counsel for the arbitration hearing itself. Because Licensee did not have legal counsel throughout the arbitration, in Licensee's opinion, a substantial amount of relevant evidence was not submitted for consideration at the hearing. (Test. of Licensee.)

(61) Licensee talked to Crane about testifying at the arbitration proceeding against Licensee. Crane told Licensee he intended to testify to certain facts when he was called as a witness and that he would appear at the arbitration. Crane did not appear as promised. Crane was reached by telephone. Crane's testimony was different from what Crane told Licensee he was going to say. Crane had not been sued at the time of Licensee's hearing. (Test. of Licensee.)

(62) After receiving the arbitration award against Fox, Donnelly subsequently sued Crane and Casella for fraud involving the purchase of the property. Donnelly obtained a judgment against both. Neither Crane nor Casella has paid any portion of the arbitration awards against them. Sometime in 2010, Donnelly had Crane and Casella removed from partnership in Skyline View, LLC., on the basis of the judgments which found that Crane and Casella had engaged in fraud. Skyline View, LLC is currently in default on the construction loan, jeopardizing the LLC's ownership of the property. (Test. of Donnelly.)

(63) In Bale's investigative report to the Agency, he included notes of a February 1, 2012 interview with Michael Grimmett, with Multnomah County Code Enforcement. Grimmett told Bale that, considering the then-current situation with the zoning and the issues underlying the stop-work order, no development of the land was possible because there was no established use permitting the present residential use. Grimmett also told Bale that there were solutions to the problem and referred Bale to the August 9, 2008 letter from Multnomah County to Crane and Donnelly. (Test. of Bale; Ex. A24.)

(64) At the time of the sale to Donnelly and Skyline View, LLC., Licensee believed that the zoning issues created by Radke's property exchange with Publisher's Paper Company could be resolved. The property exchange occurred in 1981. The property created was in conformance with the county's then existing property specifications and road frontage requirements. The Forest Practices Act, which rendered the 17 acre parcel transferred to Radke a nonconforming use, was enacted in 1984. Under the Act, Licensee understood that counties could no longer engage in boundary and use issues independent of the state's rights and restrictions under the Act. (Test. of Licensee.)

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[2] The Commissioner supplemented this Finding of Fact to reflect Donnelly's testimony on damages,

(65) Licensee and Casella spoke several times prior to the sale. Casella told Licensee that he had had several discussions with individuals at the county. Casella represented to Licensee that the issues could be resolved and that the improvements to the existing house could be legally completed. (Test. of Licensee.)

(66) Licensee researched the law at the time of the sale at issue, including statutes related to minimum lots or parcel sizes. His understanding of the law was that the Forest Practices Act protected the rights of private land owners and their rights to actualize their rights to harvest timber on their properties by working with the timber companies. Licensee believed that any rights accrued to Radke through grandfathered or prior use allowance transferred to Licensee. Licensee believed that it had been legal for Publisher's Paper and Radke to actualize by a transaction that created a parcel larger than 19 acres but smaller than 85 acres under Multnomah County Commercial Forest Use policies as published in 2005. (Test. of Licensee.)

(67) Grace Burch, a real estate principal broker licensed in Washington since 1979, worked for Licensee as an office manager in his Portland office, for over three years beginning in early 2000. Burch completed her Certified Commercial Investment Manager (CCIM) course at the prompting of Licensee. She worked closely with Licensee's property management and business accounts. Based on her work with Licensee, Burch saw no evidence of Licensee having acted in any fraudulent or dishonest conduct in relation to any of his real estate activity. Licensee has a reputation in the real estate community for ethical conduct. (Test. of Burch; Ex. R19 at 1.)

(68) Membership in the CCIM requires that an individual comply with high ethical standards. (Test. of Burch and Gordon.) Qualification for membership includes completion of extensive coursework and international-level review of a candidate's portfolio of activity. Licensee has served as Secretary, Vice-President, President, and Education Chair for the Oregon and Southwest Washington CCIM chapter. The CCIM awarded Licensee multiple "transaction of the year" awards. In his role as Education Chairman, Licensee initiated bringing additional education for members of the CCIM in the Portland area. (Test. of Burch; Ex. R19 at 1.)

(69) Mark Parsons, real estate agent, licensed in Oregon since 1998, has worked with Licensee, beginning when both were licensed associates working for Donahue and Associates, from 1998 until 2000. Parsons then worked under Licensee as his principal broker from 2000 to 2012. He became an Oregon licensed principal broker in April 2012. Parsons opined, based on his experience as a peer and then working under Licensee's supervision, that Licensee is honest and ethical. (Test. of Parsons.)

CONCLUSIONS OF LAW

1. Licensee's failure to disclose the zoning violations in promotional materials for the sale of the property (as alleged in paragraph 2.1 of the Notice), violated ORS 696.301(4) (2005 edition); and ORS 696.805(2)(c) (2005 edition).

2. Licensee's failure to accurately complete the Residential Real Estate Sale Agreement for the property, in two separate statements (as alleged in paragraph 2.2 of the Notice), violated ORS 696.805(2)(c) (2005 edition) because Licensee failed to disclose material facts known by the seller's agent and which are not apparent or readily ascertainable to a party in a real estate transaction.

3. Licensee's incorrect answer, indicating there were no zoning violations or nonconforming issues, on the Seller's Property Disclosure Statement related to the property (as alleged in paragraph 2.3 of the Notice) violated ORS 696.805(2)(c) (2005 edition) because

Licensee failed to disclose material facts known by the seller's agent and which are not apparent or readily ascertainable to a party in a real estate transaction.

4. Licensee's signature on the July 17, 2006 warranty deed transferring the real property "free of encumbrances," to Skyline View, LLC, when Licensee was aware at that time of a State Land Division violation regarding the property (as alleged in paragraph 2.4 of the Notice), did not violate ORS 696.301(14) as determined by the Court of Appeals..

5. Licensee's failure to report a March 16, 2010 adverse judgment to the Agency until October 14, 2011, violated OAR 863-015-0175(4) (2009 edition) because licensee did not notify the commissioner of any adverse decision or judgment resulting from any suit, action or arbitration proceeding in which the licensee was named as a party within 20 calendar days of receiving written notification of the adverse decision.

6. The above violations are grounds for discipline.

OPINION

The Agency proposes to revoke Licensee's real estate principal broker license based on the violations alleged in the Notice, paragraphs numbered 2.1 through 2.5. Regarding the alleged violations and the appropriate sanction, the burden of proof falls upon the Agency as the proponent of a fact or position. ORS 183.450(2). *Harris v. SAIF,* 292 Or 683 (1982) (general rule regarding allocation of proof is that burden is on the proponent of the fact or position); *Gallant v. Board of Medical Examiners,* 159 Or App 175 (1999) (in the absence of legislation adopting a different standard, the standard of proof in an administrative hearing is by a preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.,* 303 Or 390 (1989).

Authority of the Agency to Act

Licensee holds a real estate principal broker's license, issued by the Agency, authorizing him to conduct professional real estate activity in Oregon. The Agency proposes to revoke Licensee's real estate principal broker's license as a disciplinary action for the violations alleged in the Notice of Intent to Revoke.

Statutes and Rules Governing the Conduct of Real Estate Licensees Relevant to Licensee's Conduct

Former ORS 696.301[3] provides grounds for disciplinary action by the Real Estate Commissioner for real estate licensees. In pertinent part, ORS 696.301 provides:

> Grounds for discipline. Subject to ORS 696.396, the Real Estate Commissioner may suspend or revoke the real estate license of any real estate licensee, reprimand any licensee or deny the issuance or renewal of a license to an applicant who has done any of the following:
>
> * * * * *

[3] All references to the Oregon Revised Statutes (2005 edition) and to the Oregon Administrative Rules are to those in effect at the time of the alleged conduct. Counsel for the Agency provided a copy of OAR 863-027-0020, entitled "Progressive Discipline of Licensees," certified effective date of January 1, 2009, which is the source of the rule relied upon in this decision.

(3) Disregarded or violated any provision of ORS 659A.421, 696.010 to 696.495, 696.600 to 696.785 and 696.800 to 696.870 or any rule of the Real Estate Agency.

(4) Knowingly or recklessly published materially misleading or untruthful advertising.

* * * * *

(14) Committed an act of fraud or engaged in dishonest conduct substantially related to the fitness of the applicant or licensee to conduct professional real estate activity, without regard to whether the act or conduct occurred in the course of professional real estate activity.

Additionally, a seller's agent has an affirmative duty to disclose the zoning issues and land-division violation to the parties pursuant to ORS 696.805. ORS 696.805, governing the conduct of a real estate licensee acting as a seller's agent, provides in relevant part that:

(2) A Seller's agent owes the seller, other principals and the principal's agents involved in a real estate transaction the following affirmative duties:

* * * * *

(c) To disclose material facts known by the seller's agent and not apparent or readily ascertainable to a party."

The Real Estate Commissioner is charged with promulgating rules providing for the progressive discipline of real estate licensees and to provide for an objective method for the investigation of complaints alleging grounds for discipline under ORS 696.301. ORS 696.396. OAR 863-027-0020 (renumbered from OAR 863-015-0230, ef. 1-1-09) is the Agency rule addressing progressive discipline of real estate licensees. OAR 863-027-0020 states, in relevant part, that:

(1) The goal of progressive discipline is to correct a licensee's inappropriate behavior, deter the licensee from repeating the conduct, and educate the licensee to improve compliance with applicable statutes and rules. Progressive discipline means the process the agency follows, which may include using increasingly severe steps or measures against a licensee when a licensee fails to correct inappropriate behavior or exhibits subsequent instances of inappropriate behavior.

(2) The commissioner will evaluate all relevant factors to determine whether to issue a non-disciplinary educational letter of advice or to discipline a licensee through reprimand, suspension or revocation under ORS 696.301, including but not limited to:

(a) The nature of the violation;
(b) The harm caused, if any;
(c) Whether the conduct was inadvertent or intentional;
(d) The licensee's experience and education;
(e) Whether the licensee's conduct is substantially similar to conduct or an act for which the licensee was disciplined previously;
(f) Any mitigating or aggravating circumstances;
(g) The licensee's cooperation with the investigation;

(h) Any agency hearing orders addressing similar circumstances; and
(i) The licensee's volume of transactions.

* * * * *

(4) A reprimand is the maximum disciplinary action the commissioner may issue against a licensee if the licensee has committed an act or conduct that constitutes grounds for discipline under ORS 696.301 and such act or conduct does not:

(a) Result in significant damage or injury;
(b) Exhibit incompetence in the performance of professional real estate activity;
(c) Exhibit dishonesty or fraudulent conduct; or
(d) Repeat conduct or an act that is substantially similar to conduct or an act for which the real estate licensee was disciplined previously.

(5) The commissioner may impose suspension or revocation only if the licensee has committed an act that constitutes grounds for discipline under ORS 696.301 and such act also meets the requirements of 696.396(2)(c).

Violations and analysis of penalty factors in order

Violations alleged in paragraph 2.1 of the Notice

The Agency alleged that Licensee created promotional materials for the property which failed to reference known zoning problems and the land-division violation, that Licensee provided those materials to Donnelly, and that Donnelly relied upon those documents relevant to his decision to make an offer on, and to purchase, the property. The Agency met its burden on the first allegation. Licensee generated, or was responsible for the generation of, the published listing documents, including the property description and the RMLS listing. The documents, as set out in the findings of fact, did not alert potential buyers of the then-current zoning history, including the land-division violation and its potential impact on the property, in those locations in the documents where it is reasonable to expect such issues to be addressed, in violation of ORS 696.805(2)(c).

In ORS 696.301, the legislature did not define the terms "reckless," "fraud" or "dishonest." In the context of use by the Agency, there is no indication that those terms are terms of art. Therefore, they are to be given their plain, natural, and ordinary meaning. *PGE v. Bureau of Labor and Industries,* 317 Or 606, 611 (1993). The ordinary meaning is presumably what is reflected in a dictionary. *Massee and Massee*, 328 Or 195 202 (1999). According to *Webster's Third New International Dictionary*, "knowing" is defined as "having or reflecting knowledge, information, or insight: marked by understanding and intelligence[.]" *Webster's Third New Int'l Dictionary*, 1252 (unabridged ed 2002). The evidence at hearing was that Licensee had knowledge of the violations prior to marketing the property for sale. Licensee therefore violated ORS 696.301(4) because he knowingly published materially misleading advertising in the form of the listing documents and promotional materials that he created to market the property.

While it is sufficient for the Commissioner to establish that Licensee's publication of the materially misleading advertising was *knowing* in order to impose discipline, the Commissioner also finds that Licensee's publication of the materially misleading information was reckless and therefore rejects the ALJ's opinion that it was not. Reckless conduct requires that one acts in a manner "lacking in caution: deliberately courting danger," or "marked by a lack of foresight or consideration[.]" *Webster's* at 1896.

Licensee has substantial experience over many years engaging in professional real estate activity. Licensee invested considerable resources on the property, including trying to remedy the zoning violations before he decided to market the property. Licensee was aware that the nature of the zoning violations restricted a person's ability to remodel or build a residence on the property. Given Licensee's experience and his knowledge of the nature and extent of the zoning violations, it is not credible that Licensee's failure to disclose the zoning violations was a simple oversight. It is not a defense to state that Cassella (as one of the buyers) was aware of the zoning violations because Licensee has an independent duty to not publish materially misleading information. Moreover, at the time that the parties entered into the sale agreement, each of the buyers was acting in an individual capacity. It was not until later in the transaction that the buyers formed an LLC and agreed that the LLC would be the purchaser. Also, at the time that Licensee listed the property on the MLS, no other prospective buyer would have been aware of the zoning violations. Under these circumstances, Licensee's conduct was reckless.

On appeal, the Court of Appeals was not persuaded that Licensee's conduct as described above demonstrated an intent to mislead. Consistent with the Court's opinion, the Agency does not find that Licensee violated ORS 696.301(14)(2005).

The Agency also alleged that Licensee's publication of the listing materials without reference to the zoning or land-division issues violated the duties required of a real estate agent under ORS 696.805(2). In the current matter, Licensee, acting as his own agent, was required to comply with the affirmative duties set out in ORS 696.805(2)(c). Licensee did not meet that obligation. Licensee admitted that he did not include known information regarding the zoning issues and the land-division violation.

Violations alleged in paragraph 2.2 of the Notice

On the January 10, 2006 Residential Real Estate Sales Agreement, Licensee, as the seller, represented that he had no notice from any governmental agency of any violation of law relating to the property. Licensee did not complete the handwritten portions of the January 2006 agreement but he did initial each page and he signed the agreement. Licensee, as a principal broker, was responsible for any agent working under his license. Licensee knew at the time he signed the Agreement that Multnomah County considered the land-division which occurred in 1981 illegal. Licensee's misrepresentation was a violation of his affirmative obligation, under ORS 696.805(2)(c), to disclose material facts of which he was aware and which were not readily apparent or readily ascertainable to a party in a real estate transaction.

On appeal, the Court of Appeals was not persuaded that Licensee's conduct as described above demonstrated an intent to mislead. Consistent with the Court's opinion, the Agency does not find that Licensee violated ORS 696.301(14)(2005).

Violations alleged in paragraph 2.3 of the Notice

Regarding the Seller's property disclosure statement, Licensee did, as alleged, mark "no" in answer to the question "[a]re there any zoning violations or nonconforming issues." That answer was not true. The ALJ concluded, however, that Licensee's false answer did not rise to the level of dishonesty or fraud because (1) Cassella was aware of the zoning violations; (2) Licensee relied on Cassella's knowledge of the problems; and (3) Licensee believed that Cassella would inform the other buyers of the zoning violations.

The purpose of the Seller's Property Disclosure Statement is to *disclose* any potential defects with a property being conveyed, whether or not a seller has any reason to believe that a buyer is aware of a particular defect. Here, there is no dispute that Licensee was the seller and that he was aware of the zoning violations. Licensee initialed and signed the form, and

acknowledging that the disclosures are based on 'SELLER'S ACTUAL KNOWLEDGE'. The Court of Appeals concluded that on these facts, Licensee had not engaged in an act of dishonesty in violation of ORS 696.301(14). Consistent with the Court's opinion, the Commissioner does not find a violation of ORS 696.301(14)(2005). .

As previously discussed, the zoning violations were material facts that were not readily ascertainable. Consequently, the Commissioner finds that by falsely answering this question on the Seller's Property Disclosure Statement, Licensee violated ORS 696.805(2)(c) (2005 edition)

Violations alleged in paragraph 2.4 of the Notice

As alleged by the Agency, Licensee signed the July 17, 2006 warranty deed transferring the "real property freed of encumbrances," to Skyline View LLC, knowing at that time of the land-division violation. The ALJ concluded that License's false representation also did not rise to the level of dishonesty because she opined that Licensee held an honest belief that (1) the buyer knew of the violations and (2) Licensee believed the zoning violations would be remedied. As stated before, Licensee's beliefs about what may happen in the future do not relieve him from the responsibility not to provide false answers or omit material facts on real estate documents. Here, it is also undisputed that Licensee was aware of the zoning violations and misrepresented the absences of any encumbrances by signing the warranty deed as shown in Exhibit A20. Nevertheless, the Court of Appeals determined that Licensee had not violated ORS 696.301(14). Consistent with the Court's opinion, the Commissioner finds that Licensee did not violate ORS 696.301(14)(2005 edition)

Violation alleged in paragraph 2.5 of the Notice Failure to timely report

Failure to comply with the Agency's rules constitutes grounds for disciplinary action against a licensee. ORS 696.301(3). OAR 863-015-0175(4) (2009 edition) required that a licensee notify the commissioner of any adverse decision or judgment resulting from any suit, action or arbitration proceeding in which the licensee was named as a party within 20 calendar days of receiving written notification of the adverse decision. As shown by the findings of fact, Licensee failed to timely notify the Agency of the April 29, 2010 Arbitration Award and thus, he violated his obligation under the rule. The Agency has grounds for imposing disciplinary action for this violation.

Sanction

Regarding an appropriate sanction for the violations Licensee committed, the factors set out under OAR 863-027-0020(2) must be considered in determining the severity of the sanction.

To begin, Licensee failed to include zoning issues and the land-division violation, which were relevant data affecting the potential use and/or development of the property, in the published promotional materials. Likewise, Licensee failed to mark the appropriate boxes and complete the required disclosures in the sales agreement and warranty deed. Licensee also failed to report the adverse arbitration award to the Agency within the required time-limit.

As set out in the findings, Licensee knew about the zoning issues and land-division violations when he listed the property for sale. Licensee admitted that he wrote the listing, and entered the information into the RMLS data base, or, at the very least, he was responsible for the actions of any of his agents who may have entered the information. At each opportunity to disclose, as set out in the findings of fact, Licensee failed to do so. The Court of Appeals did not determine that Licensee's conduct rose to the level of deception, but agreed that Licensee's conduct was reckless.

The evidence established that Donnelly was harmed in the transaction. Donnelly was looking at the property he purchased from Licensee as an investment, including remodeling of the home. That has not been possible because of the zoning violations still present in the property. Donnelly explained that he ended up with nothing more than a 'tree farm' because of the zoning violations. Even if the other buyers did not fully disclose material facts to Donnelly, Licensee had an independent duty to act in good faith and adherence to the real estate licensing rules. He failed to do so and as a result Donnelly has incurred substantial economic damage because of the zoning violations, and in pursuing Licensee through legal action.

Licensee has never been the subject of any disciplinary action in Oregon or Washington. He has been active and licensed in both states for a lengthy period of time and has a high reputation in the real estate community for ethics and knowledge. Licensee reported the matter once he was made aware that he had violated the reporting provision. Licensee was cooperative with the investigation. Licensee has extensive experience in real estate but not in the particular type of transaction that resulted in this proposed agency disciplinary action. Licensee has a reputation for competence in real estate.

The record establishes that Licensee's conduct as described above resulted in significant damage or injury to Donnelly, for purposes of ORS 696.396(2)(A). Based on the foregoing, the Commissioner has determined that a sanction of one year suspension is appropriate

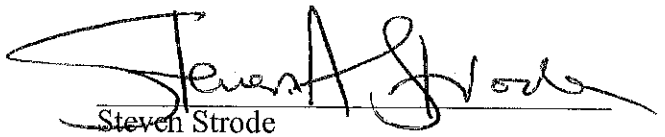
ORDER

Now therefore, the Commissioner orders as follows:

Licensee's Real Estate Principal Broker License is suspended for a period of one year beginning on June 1, 2019, and continuing through May 31, 2020.

IT IS SO ORDERED THIS 25th day of April , 2019

OREGON REAL ESTATE AGENCY



Steven Strode
Real Estate Commissioner

APPEAL RIGHTS

You are entitled to judicial review of this Order in accordance with ORS 183.482. You may request judicial review by filing a petition with the Oregon Court of Appeals in Salem, Oregon, within 60 days after the date of this Order.

Certificate of Mailing

On April 25, 2019, I mailed the foregoing Final Order on Remand issued on this date in OAH Case No. 1202930 and the Agency Case No. 2011-492.

By: First Class Mail

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