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We need an open, comprehensive grow-op list

Two weeks ago in this column, I asked whether listing agents should be required to disclose that a home was, or might have been, a marijuana grow operation, or whether they should disclose only if the seller tells them it was a grow-op?

Would the public interest be better served, if the Real Estate Council of Ontario (RECO) amended its rules to require disclosure of all material facts about a property that the agent is or should be aware of that could affect a buyer's decision? I raised the questions after I was asked by two clients whether the house they considered buying had been a grow-op. The listing agent was silent on the issue and declined to answer questions on the subject.

I was swamped with emails from agents, homeowners and fellow lawyers. Nearly all came down strongly on the side of mandatory disclosure by vendor and agent.

One response was from Sandra Gibney, communications manager of RECO the governing body of Ontario's real estate agents and brokers. She noted that agents not only have an obligation to disclose, but must "take reasonable steps to determine the material facts" relating to the transaction.

The regulations also state that the registrant must disclose to the customer all material facts "that are known by, or ought to be known by, the broker or salesperson."

Gibney referred to two RECO discipline cases involving the failure to disclose the existence of a grow-op.

One involved Mississauga agent Donna Burgess. According to the decision of a RECO panel in June, Burgess was representing both the buyer and seller in a 2005 transaction, but failed to disclose to the buyers that the home they were planning to purchase had been a grow house. (See text below.)

This was a material fact, and she was aware of it because in 2003, she had helped the sellers buy the same property. At that time the agreement of purchase and sale contained a disclosure that the use of the property "may have been for the growth or manufacture of illegal substances."

Burgess failed to inform the buyers about the disclosure, claiming she had forgotten about it. The buyers and sellers signed a mutual release and the deposit was refunded.

A complaint was filed with RECO and a discipline panel ruled that Burgess had failed to comply with the Code of Ethics. It ordered her to pay a penalty of \$15,000.

Given that there are thousands of current and past grow-ops in Ontario, and the listings of few, if any of them, disclose the history of the property, I would have expected to see more discipline cases like the Burgess decision.

Len Chapman, a Royal LePage sales rep in Richmond Hill, emailed to say RECO's rules already require disclosure of facts that an agent ought to know.

True enough, but it seems they are being widely ignored when it comes to grow-ops.

The vast majority of agents and brokers I've dealt with over the years are competent, honest and ethical. I wrote about the issue to alert readers to the signs of grow-ops, since the history of a property despite RECO rules to the contrary is not always disclosed as it should be.

The courts have ruled that police must disclose the existence of grow-ops, but it clearly isn't happening in an open and effective way. It's time this province had a comprehensive and fully accessible database to eliminate the excuses.

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Real Estate Council of Ontario

DISCIPLINE DECISION

IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO

BY-LAW NO. 10 OF THE REAL ESTATE COUNCIL OF ONTARIO

BETWEEN:

MANAGER OF COMPLAINTS, COMPLIANCE AND DISCIPLINE

REAL ESTATE COUNCIL OF ONTARIO

- AND DONNA

BURGESS

DATE OF DECISION: June 21, 2007

FINDINGS:

In violation of Rules 1(1), 1(2), 2, 10, 11 and 21 of the RECO

Code of Ethics

PENALTY: Administrative Penalty of \$15,000.00 payable to RECO within

180 days of sending this decision.

COSTS AND EXPENSES: N/A

WRITTEN REASONS:

REASONS FOR DECISION

The hearing was held at 10:30 a.m. on June 21, 2007 and proceeded as an Agreed Statement of Facts and Joint Submission as to Penalty. The Agreed Statement and Joint Submission was submitted to the panel by RECO s Counsel. The Respondent did not attend. The Agreed Statement and Joint Submission read:

AGREED STATEMENT OF FACTS AND JOINT SUBMISSION AS TO PENALTY

1. At all relevant times Donna Burgess was a Member of RECO and was registered as a salesperson with the broker Brokerage A.

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2. In 2002 the dwelling situated on property located at 1-A Street, City A, Ontario (the Property) was used for the cultivation of marijuana plants (hereafter, this use of the Property is described as a grow house). Region A Regional Police determined that, as of September 2002, there were 215 marijuana plants located on the Property at different levels of growth, including in the hallways and basement of the dwelling, at an estimated value of approximately \$223,000.00. The grow house had been operating for an indeterminate time.

3. By an Agreement of Purchase and Sale dated March 15, 2003 (the 2003 Agreement of Purchase and Sale) a buyer identified as Consumer A agreed to purchase the Property, which transaction was completed on or about June 30, 2003 (the 2003 Transaction). Ms. Burgess represented Consumer A as the buyer s representative in the 2003 Transaction.

4. Prior to the execution of the 2003 Agreement of Purchase and Sale, the prior use of the Property as a grow house was disclosed to Ms. Burgess. The 2003 Agreement of Purchase and Sale included the following written disclosure:

The Buyer acknowledges that the use of the property and buildings and structures thereon may have been for the growth or manufacture of illegal substances and acknowledges that the Seller makes no representations and/or warranties with respect to the state of repair of the premises and the Buyer accepts the property and the buildings and structures thereon in their present state and in an as is condition.

5. On or about January 25, 2005 Ms. Burgess listed the Property for Sale on the City B Real Estate Board Multiple Listing Service (the MLS) on behalf of Seller A, acting under a Power of Attorney for Consumer A. The MLS Listing prepared at the authorization of Ms. Burgess stated the following:

Lovely Home! Close To All Amenities, Street B and Street C, Street D, Close To Shopping Mall.

All Electric Light Fixtures, Fridge, Stove, Washer, Dryer, B/I Dishwasher, B/I Microwave, California Shutters, Cac, Cvac, Gdo And Remotes, Interlocking walkway. Entrance to House From Garage.

No Disappointments.

24 Hours Notice To Tenants For Showings. Thanks For Showing!

6. On or about April 16, 2005 Ms. Burgess showed the Property to Buyer A and Buyer B (collectively, the Buyers). The Buyers became clients of Brokerage A, represented by Ms. Burgess.

7. On April 18, 2005 the Buyers and Seller A made an agreement of purchase and sale for the Property with a completion date of June 17, 2005 (the 2005 Agreement of Purchase and Sale). Ms. Burgess, on behalf of Brokerage A, represented all parties to that transaction.

8. In June 2005, prior to the completion date, the Buyers became aware of the prior use of the Property as a grow house. Up to this point in time, Ms. Burgess had not disclosed to her clients, the Buyers, that the Property had been a grow house, nor did she give them a copy, or disclose the existence of the written disclosure that she and Consumer A were given in the 2003 Transaction, described above.

9. From on or about June 8, 2005, Buyer A called Ms. Burgess and left several telephone voice messages. After Buyer A contacted the office manager at Brokerage A, Ms. Burgess called Buyer A back. Ms. Burgess indicated that she was aware that a previous owner had been preparing the Property to be a grow house but the operation was stopped by police before it began. Ms. Burgess indicated that she had forgotten to tell this to the Buyers. After this conversation, Ms. Burgess also faxed to Buyer A the written disclosure about the grow house which she had been provided in the 2003 Transaction, set out in detail above.

10. On June 9, 2005 the Buyers requested a mutual release from the 2005 Agreement of Purchase and Sale, including return of their deposit funds, which was agreed to.

11. Ms. Burgess failed to disclose that the Property had been a grow house i.e., failed to disclose what she had been told about the Property and in light of that information, failed to verify whether the Property had been a grow house on behalf of her clients the Buyers, when this information could have practicably been obtained.

12. The Property was later re-sold. Ms. Burgess did provide disclosure with respect to the grow house to the ultimate purchasers. The Property was inspected, which did not uncover evidence of structural damage to the Property resulting from the grow house.

Ms. Burgess is responsible under the following Rules of RECO Code of Ethics:

Rule 1 Ethical Behaviour A member shall:

- 1) endeavour to protect and promote the best interests of the Member s client.
- 2) endeavour to protect the public from fraud, misrepresentation or unethical practice I connection with real estate Transactions.

Rule 2 Primary Duty to Client A member shall endeavour to protect and promote the best interests of the Member s Client. This primary obligation does not relieve the Member of the responsibility of dealing fairly, honestly and with integrity with others involved in each transaction.

Rule 10 Misrepresentation or Falsification A member shall not make any statement or participate in the creation of any document or statement that the Member knows or ought to know is false or misleading.

Rule 11 Discovery of Facts A member shall discover and verify the pertinent facts relating to the Property and Transaction relevant to the Member's Client that a reasonably prudent Member would discover in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts.

Rule 21 Advertising A member shall ensure that all advertising and promotion by or on behalf of the Member, including for Properties and services, is not false, misleading or deceptive.

AGREED PENALTY:

Ms. Burgess be ordered to pay a penalty of \$15,000.00 within 180 days of the date of the decision of the Discipline Committee.

The undersigned Parties consent that this matter is settled by way of this Agreed Statement of Facts and Joint Submission as to Penalty.

Accordingly, the Agreed Statement of Facts and Joint Submission as to Penalty will be heard at RECO Chambers on a date chosen by RECO.