

RECO Discipline: Zoning and Development Disclosure



By Brian Madigan

This case seems rather straightforward. The owner of a property situate in the Grand River Conservation area lists his property for sale. The agent, Ralph Murphy fails to ascertain the zoning and the development restrictions that apply to the property.

Murphy is approached by a purchaser who wants to build on the site. There is certainly a nice view of the Grand River. It's close, in fact, too close "for development" according to the Grand River Conservation Authority.

The listing agreement was somewhat on the faulty side. It said that the present use was "single family dwelling". Both the vendor and the purchaser knew that the property was vacant. So, you would have thought that the Murphy would have known this too!

Murphy acts for the purchaser and prepares an Offer, but never has the purchaser sign a representation agreement or an acknowledgement that he obtained a copy of the offer.

AGREED STATEMENT OF FACTS

1. John Murphy is a Member of RECO and at all relevant times was registered as a broker trading on behalf of the broker Brokerage ABC Realty.
2. On July 7, 2003, Murphy listed for sale vacant rural property.
3. The Property is approximately 5.8 acres in area. The municipal zoning designations applicable to the Property include in part the designation General Agricultural – A1.

That designation covers a triangular area in a corner of the south-eastern portion of the Property with dimensions of 125 feet more or less by 250 feet more or less.

The majority of the Property is covered by the zoning designation Open Space Conservation – OS2.

4. The Property lies entirely within the floodplain of the Grand River. It is subject

to the jurisdiction of the Grand River Conservation Authority which prohibits new development on the Property.

5. At the time he listed the Property, Murphy checked with the Township about the zoning on the Property. Murphy was aware the Property was subject to the jurisdiction of the Conservation Authority.

6. Murphy did not disclose either the zoning designations nor the jurisdiction of the Conservation Authority on the MLS Listing.

On the MLS Listing, Murphy described the property as:

“A Unique Parcel With The Grand River Running Thru. On A Dead End Road Offering Privacy. From City B go West On Road A To Road B Turn Right (North) To Road C, Then Turn Right (East) To Sign on Left (North) Side of Road”.

7. On October 15, 2003, the Robert Jones made an agreement to buy the Property for \$25,000.00, with a completion date of January 30, 2004. That transaction was completed.

8. Murphy represented the Jones as well as the sellers with respect to the Agreement of Purchase and Sale and the related transaction. The Agreement of Purchase and Sale includes the following:

“The parties to the transaction acknowledge that the Listing Broker represents the interests of the Seller and Buyer, and there has been, and is, dual agency. The Seller and the Buyer have previously acknowledged and consented to such dual agency”.

Notwithstanding this, Murphy did not enter into a buyer representation agreement with the buyer at the earliest practical opportunity and before an offer to purchase was prepared and submitted.

9. Murphy failed to personally verify, discover and disclose whether new development on the property would be permitted, in circumstances where the Buyer’s intentions were known, the Conservation Authority’s jurisdiction was known, and this information could practically have been obtained.

10. The Agreement of Purchase and Sale inaccurately disclosed the Property’s present use as “Single Family Residence”.

Notwithstanding this, all parties to the Agreement of Purchase and Sale understood that the Property was vacant land.

11. Murphy did not have Jones execute the Acknowledgement section on the Agreement of Purchase and Sale indicating receipt of an executed copy of that Agreement.

12. On February 9, 2004, Jones received from the Municipality documents indicating that the Conservation Authority had previously refused an application to build on the Property because the Property was entirely within the Grand River floodplain.

13. The Conservation Authority later independently confirmed to Jones new development would not be permitted on the Property.

14. Murphy acted unprofessionally, including:

A. By failing to personally verify, discover and disclose whether new development on the property would be permitted, in circumstances where Jones' intentions were known, the Conservation Authority's jurisdiction was known, and this information could practically have been obtained.

B. By not disclosing the applicable zoning designations on the MLS Listing. Furthermore, by failing to refer to the issue of the jurisdiction of the Conservation Authority in any way on the MLS Listing.

C. By making or authorizing an Agreement of Purchase and Sale that was inaccurate in representing the present use of the property as Single Family Residence.

D. By not having Jones execute the Acknowledgement section on the Agreement of Purchase and Sale indicating receipt of an executed copy of that Agreement.

Murphy 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.
- 4) render services, including giving advice and opinion, based upon the Member's knowledge, training, qualifications and expertise.

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 4 - Written Representation Agreements – A member shall enter into a written Representation Agreement with a Client at the earliest practical opportunity and in all cases before any Offer to Purchase is submitted.

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.

Decision of the Panel

Having reviewed and considered the Agreed Statement of Facts, the Panel concluded that Murphy breached Rules 1(1), 1(4), 2, 4, 11 and 21 of RECO's Code of Ethics.

The Panel makes the following order:

Administrative Penalty of \$7,000.00 payable to RECO within 30 days.

COMMENT:

You might wonder about this case. The property was rather large 5.8 acres in total, but only a sliver was zoned agricultural and the rest was conservation lands. So, where was the house going to be? Exactly, what was Murphy told? He actually went to the municipality, so he must have been told something, and whatever that was, he chose to ignore it. Or, at least he never passed the information on to anyone.

Perhaps, he was simply optimistic about a successful rezoning application and a release of the lands from the no development zone by the conservation authority. But, how likely was that? Obviously, not very likely, since this was just an outright refusal.

Did he really know about the prior application? If not, why not? Had the vendor ever applied?

Posting "single family" on the listing seems rather silly. There was no building on site. This was an open 5.8 acre field. It is this statement which gives rise to the misrepresentation.

Murphy also knew that Jones wanted to build, that was the reason for the purchase, he wasn't acquiring a property with access to the grand river for hunting and fishing. He wanted to build a house.

The focus then turned to his representation of Jones. He failed to have an agency agreement signed (now a buyer's representation agreement). The panel perhaps was somewhat "picky" about the acknowledgement signing, but at this point, they are going to identify all the mistakes, even the small ones.

A much more serious view, might have been the “conflict of interest”, with Murphy acting for both sides. Then again, he really makes a mess of the deal for both parties. The only apparent winner at least in the short term would be Murphy who was entitled to a commission.

Let’s consider that matter. The property sold for \$25,000 and the commission might have been \$1,250 (5%). Even though he was the broker, he probably had at least \$500 in expenses, to net \$750, and in all likelihood be subject to income tax of \$375 (50% of the net). You will notice that the RECO fine is \$7,000 or almost 20 times his profit on this deal, not to mention costs, downtime, bad publicity and the loss of clients, together with the risk of exposure to a lawsuit.

Recommendations:

In a similar case to the present:

- Check the zoning with the Municipality
- Get something in writing
- Check the jurisdiction of the Conservation authority
- Get something in writing
- Obtain copies of all relevant maps, zoning by-laws and restrictions
- Advise the vendor
- Obtain copies of any applications that the vendor has made
- If such is not immediately available, obtain authorization to obtain this from the vendor’s solicitor or the municipality or conservation authority, as the case may be
- Be careful about the listing
- This is the spot where you can misrepresent the property (and incur liability)
- Also, watch any advertising
- Caution the buyer
- Consider referring the buyer to another sales representative, due to the potential conflict of interest
- Document the buyer’s relationship and instructions
- Put a condition in the Offer, depending upon the buyer satisfying himself that the property can be developed
- This transfers the risk to the buyer and the buyer’s solicitor

As a rule, I use fictitious names. The actual case is published on RECO’s website and is available to the public. For educational purposes, the names of the parties really don’t have any bearing. If you need to quote the case, you will have to obtain the proper legal citation.

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