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STATE OF WISCONSIN
BEFORE THE AUCTIONEER BOARD

IN THE MATTER OF DISCIPLINARY	:		FINAL DECISION
PROCEEDINGS AGAINST	:	:	AND ORDER
CARL SEITZ,			:
LS0812292AUC			
RESPONDENT.	:		

Division of Enforcement Case No. 05 AUC 018

The State of Wisconsin, Auctioneer Board, having considered the above-captioned matter and having reviewed the record and the Proposed Decision of the Administrative Law Judge, makes the following:

ORDER

NOW, THEREFORE, it is hereby ordered that the Proposed Decision annexed hereto, filed by the Administrative Law Judge, shall be and hereby is made and ordered the Final Decision of the State of Wisconsin, Auctioneer Board.

The rights of a party aggrieved by this Decision to petition the department for rehearing and the petition for judicial review are set forth on the attached "Notice of Appeal Information."

Dated this 21st day of July, 2009.

Timothy Sweeney
Member
Auctioneer Board

STATE OF WISCONSIN
BEFORE THE AUCTIONEER BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST
CARL SEITZ,
RESPONDENT.

**PROPOSED DECISION
AND ORDER**
Case No. LS-0812292-AUC

DOE case no. 05 AUC 018

PARTIES

The parties in this matter under section 227.44 of the Statutes and section RL 2.037 of the Wisconsin Administrative Code, and for purposes of review under sec. 227.53, Stats. are:

Complainant:

Division of Enforcement
Department of Regulation and Licensing
1400 East Washington Ave.
Madison, WI 53708-8935

Respondent:

Carl Seitz
S91 W37851 Antique Lane
Eagle, WI 53119

Disciplinary Authority:

Auctioneer Board
1400 East Washington Ave.
Madison, WI 53703

APPLICABLE STATUTE AND RULE

Wisconsin Statutes

480.24 Disciplinary proceedings and actions.

...
(2) Subject to the rules promulgated under s. 440.03 (1), the board may reprimand a registrant or deny, limit, suspend or revoke a certificate under this chapter if it finds that the applicant or registrant or an auction company representative of an auction company that is an applicant or registrant has done any of the following:

...
(d) Advertised in a manner which is false, deceptive or misleading.

Wisconsin Administrative Code

RL 123.02 False advertising.

No registrant may advertise in a manner which is false, deceptive or misleading.

PROCEDURAL HISTORY

A. The Complaint in this matter was filed against Craig Otto, Trans-Group LLC, and Carl Seitz on December 23, 2008. The case was assigned for hearing before Administrative Law Judge Peggy Wichmann.

B. Craig Otto and Trans-Group LLC entered into a settlement agreement and were removed from this case before the date set for hearing.

C. Mr. Seitz filed an Answer to the Complaint on January 9, 2009.

D. The case was reassigned for hearing to Administrative Law Judge Nick Schweitzer on January 14, 2009.

E. A prehearing conference was held on January 30, 2009 at which a hearing was scheduled for March 10, 2009.

F. A prehearing conference was held on February 20, 2009.

- G. Attorney Lara Herman for the Department's Division of Enforcement filed a Motion in Limine on March 3, 2009.
- H. A prehearing conference was held on March 4, 2009 at which the hearing was rescheduled to March 26 and 27, 2009.
- I. A prehearing conference was held on March 17, 2009 at which the Motion in Limine was argued.
- J. A Ruling on the Motion in Limine was issued on March 24, 2009 restricting how much reference would be permitted to the Estate Board's consideration of this same matter.
- K. The hearing was held as scheduled on March 26, 2009 and completed on that day. Testimony was received from Herbert Reynolds, John Streiter, Harlan Clinkenbeard, Richard Lust, Candace Bloedow, Bruce Bennett, and the respondent, Carl Seitz.

FINDINGS OF FACT

1. Carl Seitz is registered as an auctioneer in Wisconsin. He holds registration number 52-241, first granted on March 1, 1995. Seitz resides at S91 W37851 Antique Lane in Eagle, Wisconsin.
2. On June 29, 2005, Mr. Seitz conducted an auction of real estate, a 5 ½ acre lot and house owned by Herbert Reynolds at N W25011 Lindsay Road, and a 2 acre lot and house owned by Tim Ringle at N45 W25045 Lindsay Road, both in the City of Pewaukee, Wisconsin.
3. At the time of the auction, the Reynolds and Ringel properties were zoned residential.
4. Mr. Seitz, along with others conducting the auction, was responsible for ads that said the properties had "commercial potential." This included a 4 foot by 8 foot sign in the yard of one of the properties that said "commercial potential" [tr., pp. 34-35].
5. The statement in the advertisements for the auction of the Reynolds and Ringel properties that the properties had "commercial potential" was misleading.

CONCLUSIONS OF LAW

- I. The Auctioneer Board is the legal authority responsible for investigating allegations of unprofessional conduct by auctioneers, sec. 480.24, Stats., and it has subject-matter jurisdiction over this case in which an allegation of unprofessional conduct was filed against the respondent, Carl Seitz.
- II. The Auctioneer Board has personal jurisdiction over the respondent, Carl Seitz, based on his being registered as an auctioneer and based on notice under sec. 801.04 (2), Stats.
- III. The respondent, Carl Seitz, violated the prohibition against misleading advertising in sec. 480.24 (2) (d), Wis. Stats., and sec. RL 123.02, Wis. Admin. Code by advertising the Reynolds and Ringel properties as having "commercial potential".

ORDER

THEREFORE, IT IS ORDERED that the respondent, Carl Seitz, is hereby reprimanded.

IT IS FURTHER ORDERED that the Respondent, Carl Seitz, pay half of the costs of the Department's investigation and prosecution of this matter. Payment shall be made by certified check or money order and sent to:

Department Monitor
Department of Regulation and Licensing,
PO Box 8935, Madison, WI 53708-8935
Fax (608) 266-2264
Tel. (608) 267-3817

If Mr. Seitz fails to make the payment as ordered, his auctioneer registration shall be suspended, without further hearing and without further Order of the Board, and said suspension shall continue until the full amount of the costs has been paid to the Department of Regulation and Licensing.

ANALYSIS

This is a class 2 proceeding under the authority of ch. 227, Stats. and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a Complaint alleging a violation of an auctioneer rule by Mr. Seitz. The specific allegation was that he (along with others responsible for the auction) advertised real estate in a misleading fashion when he said it had “commercial potential” when in fact it was zoned residential and the City of Pewaukee had no plan to change the zoning to commercial.

The Ringel and Reynolds properties auctioned by Mr. Seitz on June 29, 2005, were zoned residential by the City of Pewaukee, but there was some commercial development within a mile of the properties in two directions, the road on one side of the properties, State Highway 164, was being widened, and the road on the other side of the properties, Lindsay Road, was torn up at the time for the laying of water and sewer lines to serve a new residential area nearby [tr., p. 78].

Mr. Seitz testified that the idea of advertising the properties as having commercial potential was originally suggested by Mr. Ringold, and that he and the other persons involved in conducting the auction agreed that it would “achieve the best amount of money for the property”. Mr. Seitz said that he tried to contact the plan commission but did not receive an answer by the time they prepared the ads. He said that when they learned that the zoning was residential,

“I made that decision, not Mr. Otto. I said, ‘If we advertise it commercial potential, we’re not breaking any rules. I know that people have the right to come in and ask for a zoning change, and that’s the reason why we can say this property has commercial potential. We are saying that down the road in the future this property would be very valuable as a mini mart or a little filling station.’”

[tr., pp. 220-223]. Mr. Seitz’s position was essentially that cities have plan commissions and other mechanisms in place to consider zoning changes, and that since such a change is always possible, it was not misleading to use the phrase “commercial potential.” Mr. Seitz also said that any inference that the properties were zoned commercial was outweighed by the fact that he announced at the beginning of the auction that they were residential.

The strongest evidence presented against this position was given by Harlan Clinkenbeard, the city planner for the City of Pewaukee [tr., pp. 96-120], who acknowledged that a person would have the right to ask the city plan commission for a zoning change, to appeal any denial to the common council, and to appeal a denial by the common council to circuit court [tr., pp. 109-111]. However, he testified that there have been no plans to change the residential zoning for the properties in question in the past 29 years, that the city’s current long-range land-use plan calls for the area to be residential, and that a proposed long-range land-use plan intended to be effective until 2035 calls for the property to remain residential [tr., pp. 99-102]. Mr. Clinkenbeard testified in addition to the city plan, an arrangement had been made with the Village of Pewaukee whereby the village would supply sewer and water services to homes in this area (the construction that was visible at the time on Lindsay Road) in return for an assurance that the area would not be developed [tr., 104-106]. And Mr. Clinkenbeard testified that he considered the phrase “commercial potential” to be misleading: “I think it would be misleading because nothing that we have -- nobody’s ever said that we were going to allow commercial in that area. It’s not planned for that. The chances of getting commercial in that area are slim to none” [tr., p. 107].

Herbert Reynolds, the owner of one of the properties [tr., pp. 31-68], testified that he considered the phrase “commercial potential” to be misleading, and his reason was as follows:

Because my neighbor was -- he was letting people sell cars on his property, and he lives in the village. And the village got after him for not having permits and the all the rest of it, but they also told him that these are not commercial corners, therefore they never will be a commercial building on any one of these corners.

[tr., p. 35]

John Streiter, whose family owned property in the area and who still farms nearby [tr., pp. 69-95], testified that he considered bidding on the properties, some of which he would have used for storing farm machinery, but that he checked with the City of Pewaukee and the city planner told him that his proposed use “wouldn’t fly” because the property was zoned residential, that there was sewer for so many houses, and that it wouldn’t be rezoned “without doing all this extra stuff”. Incidentally, Mr. Streiter was present at the auction and he testified that he was talking with a bunch of 10 to 15 people whom he knows but doesn’t see regularly and he doesn’t recall Mr. Seitz explaining prior to the auction that the property was zoned residential [tr., 94]. Since he had an interest in the commercial potential of the property, he probably would have remembered if he’d heard such a statement. It’s entirely possible that in talking to other people he simply missed a statement by Mr. Seitz, but his testimony underlines the ineffectiveness of any spoken *caveat* that may have been given at the beginning of the auction in overcoming the information that was communicated by the ads.

Richard Lust [tr., pp. 120-172] testified as an expert witness with extensive experience in auctions, including real estate auctions. He expressed the opinion that describing the properties as having commercial potential was misleading. In fact, the ads entered as exhibits 1, 2, 3 and 6 all state that the properties have “commercial hwy frontage potential” [tr., pp. 137, 144]. Mr. Lust emphasized that the properties were zoned residential rather than commercial, and that this created the danger that a person might be misled into purchasing them for commercial development at the auction without a contingency clause for rezoning that would almost certainly have been included if it had been handled as a real estate transaction [tr., 138-139]. Even though Mr. Lust agreed with Mr. Seitz that no-one was in fact caught in that situation, I take his statement as an illustration of the reason behind the Board’s advertising rule, which clearly rejects an attitude of *caveat emptor*. Mr. Lust offered another situation in which a potential buyer

might be misled by the ads, i.e. that a person interested in purchasing a single family home might be scared away because of potential commercial development [tr., p. 169]. Mr. Lust also expressed the opinion that any announcement made at the beginning of the auction regarding zoning would be helpful but that it would not make the advertising itself any less misleading [tr., pp. 154, 156-157].

Mr. Lust expressed the opinion that -- based on a position taken by the Auctioneer Board early in its existence -- a person who holds a real estate license in addition to being an auctioneer, as both he and Mr. Seitz do, should be held to a higher standard in the auction of real estate, not just to follow the rules of the auctioneer profession but also to follow the rules of the real estate profession [tr., pp. 146-151]. This Proposed Decision is not based on that opinion of Mr. Lust or that position of the Auctioneer Board. In fact, the relationship of the auctioneer board and its rules to the real estate board and its rules was raised as an issue in this proceeding, but it was not pursued at any length. The citizen complaint that led to this action against Mr. Seitz was also filed with the Real Estate Board, which declined to open it for formal investigation. Mr. Seitz naturally wanted to use the Real Estate Board's decision as evidence that he hadn't violated that Board's rule against false advertising, which is effectively the same as the Auctioneer Board's rule. Prior to the hearing, I ruled that Mr. Seitz would be allowed to place the Real Estate Board's decision on the record, which he did, but also that I would point out in this Proposed Decision that another board's decision is legally irrelevant. The reasons I gave for the ruling, which I repeat here, are as follows:

1. We do not know the basis for the Real Estate Board's decision. I am familiar enough with the Department's investigative and prosecutorial process to know that although a case may be closed because no violation is found, a case may also be closed for "prosecutorial discretion", which means that a violation was found but a decision was nevertheless made not to spend further resources pursuing the violation.
2. The Real Estate Board is a separate "jurisdiction" from the Auctioneer Board and a decision by the Real Estate Board is no more binding on the Auctioneer Board than an Illinois decision is binding on a Wisconsin court.
3. The definition of "relevant evidence" in the Wisconsin Evidence Code, sec. 904.01, Stats., is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Real Estate Board's decision does not make it more or less likely that a violation occurred.

It is my opinion that Mr. Seitz advertised the properties as if commercial development was a real possibility, not just remotely possible. It may not have been "false" advertising, but it was definitely misleading, and by advertising them in that way, especially in the absence of an explanation that the properties were currently zoned residential, he unfairly put the burden on any potential purchaser to investigate the possibility of commercial development. His motivation may have been good, to obtain the best price for the property owners (as well as a successful sale for himself), but the rules require more than the amount of research he did in this case, and more in the way of truthfulness about the properties than he displayed in this case. It may well have been that he obtained information from the city planner only after the ad copy was prepared, and that he decided to proceed without change, on the theory that "anything is possible", but he owed more than that to the public and the profession. A reprimand is appropriate.

Under sec. 440.22, Stats., when discipline is imposed on a credential-holder, the Department has the authority to impose all or part of the costs of a proceeding on the credential-holder. The Board is directed to exercise discretion in its imposition of costs by considering certain factors, including the number of counts charged, contested, and proven; the nature of the misconduct; the level of discipline; the respondent's cooperation with the disciplinary process; prior discipline; and other relevant circumstances. In this case, the misconduct was not as serious as violations in some other cases and the level of discipline is relatively low, a reprimand. Although Mr. Seitz required the Department to take the case to hearing, that is his right, and at no point did he hinder or delay the disciplinary process. Given this balance of factors, the proposed order includes a provision that Mr. Seitz pay some, but not all, of the Department's costs of investigating and prosecuting this matter.

Dated and signed: April, 2009

Nick Schweitzer
Administrative Law Judge
Department of Regulation and Licensing