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White paper proposals target real estate fraud

'Dual agency' by realtors could be outlawed in new legislation.

Suzy is a first-time home buyer. She is on a strict budget and having trouble qualifying for a mortgage on a particular house - her dream home. To "help her out," Suzy's real estate salesperson shows her how to falsify financial information on a mortgage application to qualify for more money from a bank.

Following the salesperson's advice, Suzy obtains a mortgage, but soon runs into financial difficulty. After a few months, she is forced to sell her new home incurring a significant loss.

Suzy's story is an actual case taken from the complaint files of the Ministry of Consumer and Commercial Relations.

Falsified or misleading financial information on mortgage applications connected to purchases of real estate is a problem in the industry. These actions affect honest home buyers and other industry stakeholders.

Often in these fraud-like cases, the borrower is advised to obtain a false employment letter. Sometimes, an offer will be crafted with an artificially high price and fictitious deposit or down payment, along with a side agreement providing for a rebate, kickback or credit for unneeded renovations. If the lender is aware of the side agreement and knowingly provides a mortgage, there is nothing wrong with the arrangement since there has been full disclosure.

But in most of these types of cases, the lender is never told of the side agreement.

The Ontario government is concerned about this type of activity, and it is one of many issues addressed in a new white paper called The Real Estate and Business Brokers Act - Proposals for Reform.

The paper is available from (416) 326-8555 or on the web at www.ccr.gov.on.ca.

The government has proposed to make it an offence for real estate agents or brokers to falsify or assist in falsifying any information or documentation relating to a real estate transaction. It would also be an offence to furnish false or deceptive documentation and to induce or counsel anyone to falsify or supply deceptive information.

Government files also tell the story of Jessica, who saw a newspaper ad for an affordable townhouse while she was house-hunting in her area. At first glance, the property appeared to be everything she was looking for. After further research, however, she discovered that the advertisement was very misleading.

She tried to have the ad removed, but because it was not placed by a registered salesperson or broker, she found that this was a next to impossible task.

At the moment, Ontario laws governing false or misleading advertising do not apply to a number of entities that regularly advertise real estate transactions. These include real estate consultants and the actual property owner or its employees.

The government proposes that real estate advertising rules should be extended to any business that advertises real estate transactions, and not just real estate agents and brokers.

Under existing laws, when a real estate broker or sales person advertises in a way which might be false, deceptive or misleading, the legal complexities before an order to cease advertising takes effect could delay action by weeks or months.

As well, there is no authority to require a retraction or correction of a misleading advertisement even after a cease advertising order takes final effect.

It is proposed that the Real Estate and Business Brokers Act would create the authority for immediate remedies, such as compliance orders, on licensed agents and brokers who breach the advertising rules.

At the moment, there are no specific penalties under the act for improper advertising other than suspension or revocation of registration. The government wants to amend the act to create the authority for penalties in cases of false or misleading advertising.

One of the thorniest issues which the white paper tackles, and one which is bound to create the most controversy in the real estate community, is the problem of dual agency.

In Ontario, real estate agents are free to represent both vendor and purchaser, as long as there is full disclosure to both sides.

In such cases, the agent has a tricky trust obligation to both clients, and cannot conceal from one party any information given to her by the other party.

In a true dual agency situation, if a seller advises the agent that she won't take less than \$150,000 for her house, the agent is required to reveal that confidence to the purchaser.

The government notes that some jurisdictions provide that broker companies can only act for vendors or purchasers in any given transaction, but not for both.

Other jurisdictions address potential conflicts of interest by providing specific guidelines, including disclosure requirements that a broker must follow in a dual agency situation.

If this prohibition on dual agency was enacted in Ontario, no real estate agent could ever "double end" a deal - that is, receive the seller's and buyer's portion of the commission.

The government wants to know if it should prohibit dual agency in real estate transactions, or if it should enact explicit provisions to govern dual agency situations.

Consultation sessions are being held later this month and next. Written submissions on these proposals should be sent to the government before Nov. 3.

Call (416) 326-8555 or 1-800-268-1142 for more information. We would also be interested in your opinions on any of the government proposals.