



NORTH CAROLINA
REAL ESTATE LICENSING BOARD

Real Estate Bulletin

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NEW BOARD MEMBER



C. Bayless Ridenhour, of Concord, was appointed to the Licensing Board by Governor Holshouser on October 31, 1973 to a term expiring on July 31, 1976. He succeeds Brantley Poole of Raleigh whose term expired.

Mr. Ridenhour was born in Cabarrus County and educated in the Concord Public Schools. He entered the U. S. Navy from high school, serving thirty years until retirement in 1953 with the rank of Lt. Commander. After retirement from the Navy, he formed the Ridenhour General Agency, Inc., an insurance and real estate brokerage firm. In 1969, he sold the insurance agency but continued in the real estate business.

He has been active in the local and state Association of Realtors and has served as president of the Concord-Kannapolis Board. He is a member of Rotary, United Church of Christ, serves on the Salvation Army Advisory Board and is a member of the Cabarrus Country Club. His hobbies are golf and fishing. He is married to the former Anne Sapp of Cabarrus County and they have one daughter, Mrs. H. A. Viola of Biltmore Forest, Asheville, North Carolina.

Owner's Liability For Broker's Commission

In the recent case of Peeler Insurance & Realty, Inc., v. Fred Harmon, decided by the North Carolina Court of Appeals, it was held that where a contract gave a real estate agent the exclusive right to sell the owner's property at a specified price and provided that the owner would pay the agent a commission of 5% of the sales price "if the property is sold or exchanged by you, by me, or by any other party before the expiration of this listing, at any terms accepted by me, or within three months thereafter, to any party with whom you or your representative have negotiated," the owner who sold the property in competition with the real estate agent to the agent's prospect is liable for the brokerage commission called for in the contract.

In this action plaintiff seeks to recover brokerage commissions alleged to be due under a contract from defendant to plaintiff for the sale of certain lands belonging to defendant.

The parties stipulated that defendant executed the written contract alleged in the complaint. The contract is dated April 1, 1971, bears the heading "EXCLUSIVE LISTING CONTRACT," and contains the following provisions:

"In consideration of your agreeing to list the above-described property for sale and in further consideration of your services and efforts to find a purchaser, you are hereby granted the exclusive right, for a period of 6 month(s) from date, to sell the said property for the price of \$108,000 and on terms of all cash to me or upon such other terms and conditions as may be agreed upon later.

"If the property is sold or exchanged by you, by me, or by any other party before the expiration of this listing, at any terms accepted by me, or within three months thereafter, to any party with whom you or your representatives have negotiated, I agree to pay you a commission of 5% of the gross sales price."

Plaintiff's evidence tended to show: C. M. Peeler, Jr., is the president of plaintiff corporation and had been in the real estate business in Cleveland County since 1961 when he was licensed as a real estate broker, his license being in effect continuously since that time. In 1971 Mrs. Marie Callahan was employed by plaintiff as a licensed real estate "salesman." At her request defendant executed the contract in question after which she advertised the subject property for sale and showed it to various persons including Mr. Camp. Following several conversations with him, Mrs. Callahan obtained from Camp a written offer (dated 18 June 1971) of \$90,000 for the property. She communicated the offer to defendant who stated that he would not accept \$90,000 for the property and pay a brokerage commission but that he would accept \$90,000 net to him. Mrs. Callahan advised defendant that Camp would not pay more than \$90,000, that she "could not afford to work for nothing," and that she would try to find another buyer for the property. Mrs. Callahan advised Camp that defendant had refused the offer and that Camp would have to increase his offer in order to get the property. Camp informed Mrs. Callahan that he would not increase his offer and further stated that he was going to contact

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REAL ESTATE BULLETIN

Published quarterly as a service to real estate licensees to promote a better understanding of the Real Estate Licensing Law, Rules and Regulations, and proficiency in ethical real estate practice.

NORTH CAROLINA REAL ESTATE LICENSING BOARD

813 BB&T Bldg.

Raleigh, North Carolina 27602

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LAND LEASING FIRMS UNDER SCRUTINY

Attention in Florida has recently focused on questionable land listing firms who contact property owners and offer to list their lots for resale.

The resale listing firms persuade owners of highly promoted subdivisions in Florida, as well as the Southwest, to pay them fees of from \$50 to \$500 merely to list the lots for sale in publications distributed to selected lists of investors.

Groundwork for this business was set up in the 1950s and early 1960s when thousands of Americans bought land sight unseen and are still holding on to it hoping to sell at a profit. But the pitch of the land listing firms could well appeal to even the most satisfied property owner since they often promise to resell the land at double or triple the original price. However, most of the firms make their money from the listing fees and need not, and for the most part **do not**, sell any lots.

At least one ALDA member has taken steps to warn its property owners of these fraudulent listing schemes. The **Diamondhead Corporation** of Mountainside, New Jersey, sent out letters to all their property owners early this month explaining the situation. Enclosed with the let-

NCREEF PRESENTS \$125,000 GRANT TO UNC-CH

The North Carolina Real Estate Educational Foundation recently announced a \$125,000 grant to the School of Business Administration, of the University of North Carolina at Chapel Hill. The Foundation is a non-profit corporation affiliated with the North Carolina Association of Realtors.

Realtor Jim Fountain, Wilmington, President of the Foundation, presented an initial check of \$25,000 to Dr. Maurice W. Lee, Dean of the School of Business Administration. The remaining \$100,000 will be presented in annual installments of \$10,000.

The grant will be used to support the academic, advanced management, and research activities of the School of Business Administration, especially those activities relating to the real estate profession in North Carolina.

ter was a lengthy article from the September 3, 1973, **Miami Herald** which gave detailed coverage to the land listing business.

Kevin M. Hayes, Director of Consumer Affairs for Diamondhead, did not comment on the contents of the article, but advised the property owners to "thoroughly investigate" before listing a lot and paying a fee. Hayes also pointed out that Diamondhead did not authorize brokers to charge a fee for reselling lots, but only a commission, if they were successful. The Diamondhead letter emphasizes that they make every effort to keep the names of their property owners confidential.

According to the **Herald** article, the land listing firms have come under the scrutiny of both OILSR and the Florida Division of Consumer Affairs. The Association hopes that other land development companies will alert their purchasers to the land listing practices since they are damaging to both the consumer and the development companies. A copy of the **Miami Herald** article may be obtained from the ALDA national office in Washington, D. C. (Legislative Report, American Land Development Association)

LICENSE STATISTICS

Licensees as of September 30, 1973
Brokers 14,807
Salesmen 3,555
18,362

Examination—July, 1973

	PASSED	FAILED
Brokers	583	264
Salesmen	114	51

Examination—August, 1973

	PASSED	FAILED
Brokers	422	216
Salesmen	124	70

Examination—September, 1973

	PASSED	FAILED
Brokers	353	192
Salesmen	103	52

LICENSES SUSPENDED-REVOKED

R. SHELDON NELSON — GREENSBORO — broker — revoked effective October 20, 1973 — violation of G.S. 93A-6(a) (8), (12), (13).

BOB MORRIS — ASHEBORO — broker — revoked effective November 1, 1973 — violation of G.S. 93A-6(a) (8), (12), (13), (15) and regulation # 12.

ROBERT E. AUTRY — FAYETTEVILLE — salesman — revoked effective November 29, 1973 — violation of G.S. 93A-6(a) (7), (8).

RICHARD S. BURKEEN, BURKEEN REALTY — FAYETTEVILLE — broker — revoked effective November 30, 1973 — violation of G. S. 93A-6(a) (7), (8).

DISPOSING OF INVESTMENTS IN UNDEVELOPED LAND AT CAPITAL GAIN RATES

In recent years, an increasing number of people have acquired undeveloped land for investment. Eventually they may have to decide whether to subdivide the property or sell the tract of land intact. Subdividing often results in higher per acre prices, but it also requires more cash, work and time. Tax considerations may also be an important factor in the choice of alternatives.

A person holding real property primarily for sale in the ordinary course of a trade or business is considered a "dealer" and will pay taxes at ordinary rates on his profits. However, under a special statutory pro-

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OWNERS LIABILITY FOR BROKER'S COMMISSION

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defendant directly about the property. Mrs. Callahan told Camp "that only the real estate agent was supposed to do that" but Camp stated that he did not care about that and restated his intention of talking with defendant.

The parties stipulated that in July 1971 defendant sold and conveyed the lands in question to Camp (and wife) for \$90,000.

At the conclusion of plaintiff's evidence defendant's motion for a directed verdict, pursuant to G.S. 1A-1, Rule 50, was allowed and from judgment dismissing the action, plaintiff appealed.

BRITT, Judge.

Did the court err in allowing defendant's motion for directed verdict and dismissing the action? We hold that it did.

Brokerage contracts can be classified both as to type of listing and method of payment to the broker. The former category may be subdivided into two groupings: those in which the listing is exclusive and those in which the listing is non-exclusive. Likewise the latter category may be subdivided into two groupings: those in which the broker is to receive a percentage of the purchase price and those in which the broker is to receive everything he can get over a certain amount.

Our research fails to disclose a case from an appellate court of this State involving an exclusive listing contract. However, by stating that the particular contract in question was not an exclusive listing contract, it would appear that our Supreme Court has recognized the existence of this classification by implication. **Thompson v. Foster**, 240 N.C. 315, 82 S.E. 2d 109 (1954) and **Sparks v. Purser**, 258 N.C. 55, 127 S.E. 2d 765 (1962).

We are faced with the question, does the principal breach his contract by selling in competition with his broker who has an exclusive listing? Before we can reach this question, however, we must first determine the nature of the exclusive listing in this case. R. Lee, North Carolina Law of Agency and Partnership, § 38, p. 54 (3d ed. 1967) indicates two types of "exclusive

agencies." The first of these is the true "exclusive agency," and is denominated as such, which, "... precludes the principal from hiring another agent to sell the same property, but it does not preclude principal himself from procuring a customer without paying compensation." The second of these is properly denoted an "exclusive right to sell" and, "... precludes the principal himself from competing with the agent."

Although the term "exclusive right to sell" appears in the portion of the contract in the case at hand quoted above, a reading of the cases of other jurisdictions leads us to believe that mere use of this term should not be determinative. Since the right of alienation has become such an integral part of property, it is only proper that the contract specifically negative this right before it is lost. See Annot., 88 A.L.R. 2d 936 (1963) for a listing of cases so indicating.

This brings us to the question of whether the terms in this contract specifically negatives the right of defendant to sell his property in competition with his broker during the term of the contract. We feel that they do and that such a holding is compatible with the general theory of the law of this State as evidenced by those cases dealing with non-exclusive listings. The clear meaning of the second quoted paragraph is that if the property were sold by anyone, including the principal, at any terms accepted by the principal, to someone with whom the agency had negotiated, then the agency would be entitled to compensation. In **DeBoer v. Geib**, 255 Mich. 542, 238 N.W. 226 (1931), "If, said property is sold . . . by you, by myself, or any other person . . ." was interpreted as giving an exclusive right to sell. A similar passage was so interpreted in **Rubin v. Beville**, 132 So. 2d 783 (Fla. App. 1961). See also Annot., 88 A.L.R. 2d 936 (1963) for other cases so holding. The sale in this case clearly falls within the term of the contract.

While the facts in **Realty Agency, Inc. v. Duckworth & Shelton, Inc.**, 274 N.C. 243, 251, 162 S.E. 2d 486, 491 (1968), are quite different from those in the case at hand, our holding finds support, albeit in a negative way, in the following language by Justice Sharp: " * * * This is not

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DISPOSING OF INVESTMENTS

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vision, a person who subdivides an undeveloped tract will generally not be considered a dealer if he holds the property at least five years, makes no substantial improvements to it, has not previously held it primarily for sale to customers, and does not so hold any other real property in that taxable year. Even if the taxpayer passes these tests, gain on the lots sold in and after the year in which the sixth lot is sold from a single tract will still be taxed as ordinary income to the extent of 5% of the selling price.

Court decisions have also established that if the taxpayer does not subdivide but instead buys and sells whole parcels of land, he will nevertheless be considered a dealer if his activities are found to constitute a trade or business. On the other hand, if his activities more nearly resemble those of an investor, his gains will be treated as long-term capital gains. In a recent court case involving a professional man who had gains for buying and selling nine separate parcels of undeveloped land over a four-year period, the following factors were held to support his investor status:

Profits from the sales were small in relation to his total annual income — from 5% to 30% in the years considered;

He did not plat, subdivide, advertise or otherwise actively attempt to sell the properties. He had merely used the services of a real estate agent who was approached by interested buyers from time to time;

The low frequency of sales was not sufficient to indicate dealer status.

If a person restricts his real estate transactions to the extent indicated above, he may reasonably expect to be taxed at capital gain rates on his land sales. But any other activity regarding undeveloped property may lead to dealer status and resulting ordinary income treatment.

(Ernst & Ernst Tax Notes)

1974 EXAMINATION SCHEDULE

The examination and filing dates for the 1974 broker and salesman examinations are listed below. (The Licensing Board reserves the right to change the examination schedule without prior notice.)

FILING DATE

January 18, 1974
February 15
March 22
April 19
May 24
June 21
July 19
August 23
September 20
October 18

BROKER & SALESMAN EXAMS

February 23, 1974
March 23
April 27
May 25
June 22
July 27
August 24
September 28
October 26
November 23

NO EXAM IN DECEMBER

TEST CENTERS

The examinations will be administered by Princeton Educational Testing Service at the following locations:

Asheville High School
Main Bldg. — Rotunda
419 McDowell Street
Asheville, North Carolina

Central Piedmont Community College
Mecklenburg Hall
Lobby — 1st Floor
Elizabeth Ave. & King's Drive
Charlotte, North Carolina

Lenoir Community College
Administration Bldg. — Room 125
New Bern Highway (Hwy. 70 East)
Kinston, North Carolina

Meredith College
Administration Building
3800 Hillsborough Street
Raleigh, North Carolina

University of North Carolina — Greensboro
McIver Building
1000 Spring Garden Street
Greensboro, North Carolina

OWNERS LIABILITY FOR BROKER'S COMMISSION

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a situation in which an owner, who has listed real estate with the broker at a specified price, reduces the price and sells it to the broker's prospect. When that occurs, clearly the broker is entitled to compensation. (Citations.)" See also **Aiken v. Collins**, 16 N. C. App. 504, 192 S.E. 2d 617 (1972).

We conclude that plaintiff's evidence was sufficient to withstand defendant's motion for directed verdict. The judgment appealed from is Reversed.

NORTH CAROLINA
REAL ESTATE LICENSING BOARD
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