NEW JERSEY REAL ESTATE COMMISSION

NEW JERSEY REAL ESTATE COMMISSION, Complainant, v. JODI GOLDBERG, licensed New Jersey real estate broker-salesperson (SB0447834), and STANLEY KOMITO[1], licensed New Jersey real estate salesperson (SP7851723), Respondent.	)	Docket No.: MON-16-003 REC Ref No.: 10001202 **FINAL ORDER OF DETERMINATION AS TO JODI GOLDBERG ONLY**

THIS MATTER was heard by the New Jersey Real Estate Commission ("Commission") in the Department of Banking and Insurance, State of New Jersey at the Commission Hearing Room, 20 West State Street, Trenton, New Jersey on April 25, 2017.

BEFORE: Commissioners Linda K. Stefanik, Eugenia K. Bonilla, Sanjeev Aneja, Jacob Elkes, William Hanley, Denise M. Illes, Kathryn Godby Oram, and Harold J. Poltrock.[2]

APPEARANCES: Marianne Gallina, Regulatory Officer, appeared on behalf of the complainant, the New Jersey Real Estate Commission staff ("REC"). Glenn D. Kimball, Esq. appeared on behalf of Respondent Jodi Goldberg ("Respondent"). The Respondent was present.

[1] This Final Order pertains only to Respondent Jodi Goldberg and does not addresses allegations in the Order to Show Cause related to Stanley Komito ("Komito"). Komito was involved in this real estate transaction as the seller's agent and his actions will be addressed in a separate proceeding.

[2] Commissioners Oram and Poltrock were present at the hearing, but they voted no to the motion to find: certain violations of N.J.S.A. 45:15-1 et seq., and N.J.A.C. 11:5-1.1. et seq.; insufficient evidence of certain alleged violations; and to impose associated penalties.

STATEMENT OF THE CASE

The REC initiated this matter on its own motion through service of an Order to Show Cause ("OTSC") dated April 28, 2016, pursuant to N.J.S.A. 45:15-17, N.J.S.A. 45:15-18, and N.J.A.C. 11:5-1.1 et seq.

The OTSC alleges that the Respondent's conduct is in violation of N.J.S.A. 45:15:15-17a in that she made a false promise or substantial misrepresentation to her clients, Elissa and Neil Visoky ("Visokys"), that 6 Miro Circle in Marlboro, New Jersey ("Subject Property") had a private treed yard, knowing that this material condition would change as a major subdivision on a contiguous lot was slated for construction. It also alleges that Respondent's failure to disclose the future construction is also in violation of N.J.S.A. 45:15-17e in that it demonstrates unworthiness, incompetency, bad faith, or dishonesty and constitutes a breach of her fiduciary duty, in violation of N.J.A.C. 11:5-6.4(a).

Furthermore, the OTSC alleges that the Respondent failed to ascertain and disclose water drainage concerns on the Subject Property related to the pending construction project, information material to the physical condition of the Subject Property, in violation of N.J.A.C. 11:5-6.4(b) and (c). Lastly, the OTSC alleges that the Respondent is in violation of N.J.A.C. 11:5-6.4(c)2i because she possessed actual knowledge of an off-site condition which could materially affect the Subject Property that she did not disclose.

The Respondent, through her attorney, Glenn D. Kimball, Esq., filed a timely Answer on June 20, 2016, wherein she admitted to some allegations and denied others as set forth in the OTSC.

A hearing was scheduled on April 25, 2017, at which time the following exhibits were offered by the REC and admitted into evidence by stipulation:

S-1 Seller's Disclosure Statement, signed by seller, Laurie Kradle, dated July 30, 2009;

S-2 Seller's Disclosure Statement, signed by the seller, Laurie Kradle, acknowledged by Neil and Elissa Visoky, dated July 30, 2009;

S-3 Contract of Sale, dated August 17, 2009;

S-4 Prudential Relocation Homeowner Disclosure Statement, signed by the seller, Laurie Kradle-Godlzweig, dated July 27, 2009;

S-5 Resolution of the Marlboro Township Planning Board, Granting Preliminary Major Subdivision Approval to Applicant Bayfield Properties, LLC, dated July 15, 2007;

S-6 Resolution of the Marlboro Township Planning Board, In the Matter of Bayfield Properties, LLC for Final Major Subdivision Approval and Bulk Variance, dated July 15, 2009;

S-7 Photographs of the Subject Property;

S-8 Statement of Jodi Goldberg, dated January 30, 2015;

S-9 Profile and Reviews of Jodi Goldberg on Trulia.com, undated; and,

S-10 Handwritten Notes prepared by Jodi Goldberg and the REC Investigator, undated.

The following exhibits were offered by the Respondent and admitted into evidence by stipulation:

R-1 New Jersey Department of Banking and Insurance Consumer Inquiry and Response Center Complaint Form and Letter, filed by Neil and Elissa Visoky, dated October 2, 2013;

R-2 MLS Listing for the Subject Property, dated August 17, 2009;

R-3 MLS Listing and Exterior Photos of 12 Vista Drive, Morgansville, New Jersey, dated April 20, 2017;

R-4 Seller's Disclosure Statement, signed by seller, Laurie Kradle, dated July 30, 2009;

R-5 Homeowner's Disclosure, signed by seller, Laurie Kradle, dated July 27, 2009;

R-6 Email correspondence between Jodi Goldberg and Trulia Representative, Vince A. dated September 20, 2016, including 20 unverified reviews of Jodi Goldberg submitted by clients from 2012 – 2015 including a review submitted by Neil and Elissa Visoky;

R-7 REC Investigator's Report written by Robert Spillane, dated February 10, 2015;

R-8 REC Supplemental Investigator's Report written by Robert Spillane, dated February 18, 2015;

R-9 Township of Marlboro Application of Clearing Permit – Tree Removal, dated February 14, 2012;

R-10 MLS Listings for homes on Silverleaf Way, effective for February 4, 2011 to December 31, 2011;

R-11 Bargain for Sale Deed between Paragon Homes II, LLC and Old Mill Estates, LLC, dated December 22, 2011; Deed between Felix Elinson and Old Mill Estates, LLC, dated December 22, 2011; Letter from Moishie M. Klein to William J. Mehr, Esq., dated March 31, 2011; Addendum to Contract for Sale of Real Estate between Paragon Homes II, LLC and Marble Arch Homes, Inc., dated February 2, 2011; Contract for Sale of Real Estate between Paragon Homes II, LLC and Marble Arch Homes, Inc., dated January 11, 2011;

R-12 Re/Max Listing Agreement/Exclusive Right to Sell Agreement for homes at 1 through 5 Silverleaf Drive, dated January 17, 2012 to January 17, 2013;

R-13 Grinkevich Lawn & Landscaping Estimate for the Planting and Labor Costs for 34 18' to 19' Leyland Cypress Trees in the Amount of $63,512.00, dated March 20, 2013;

R-14 Proposal from Errol's Landscaping Estimate for the Planting and Labor Costs for 34 18' – 20' Green Giant Arborvitea Trees ($114,000) or 22 18' – 20' Norway Spruce Trees ($135,000), dated March 20, 2013;

R-15 Google Earth Image of Subject Property, dated April 18, 2017;

R-16 Photographs of Subject Property taken from 1 Silverleaf Road and Old Mill Road, undated;

R-17 Memorandum of Pre-Construction, dated February 8, 2012;

R-18 Civil Part, Law Division Complaint, Neil Visoky and Elissa Visoky v. Rimos International, Inc. d/b/a Re/Max Central, Jeffery Fox and Jodi Goldberg, dated January 8, 2014; and,

R-19 Letter of Complaint to REC, written by Neil and Elissa Visoky, dated September 20, 2012.

TESTIMONY OF THE WITNESSES

Neil Visoky

Neil Visoky ("Visoky"), the buyer of the Subject Property, testified on behalf of the REC. Visoky filed the complaint against the Respondent that provided the basis for the OTSC.

Visoky began his testimony detailing how the Respondent came to be his agent. He was in Marlboro, visiting a friend, when the pair saw an open house and wandered inside on a whim. The Respondent and Visoky met at that time, where they spoke briefly, and Visoky testified that he instantly felt very comfortable with the Respondent. He found the Respondent accommodating, professional and having a pleasant demeanor. Visoky introduced the Respondent to his wife, Elissa Visoky, that same day, and the couple began to work with the Respondent as their buyer's agent to find a home in the area. Visoky testified that, in addition to that first meeting, he chose to work with the Respondent because she was a long-time resident of Marlboro, and was recognized in the area as a successful real estate agent.

Visoky further testified that, prior to moving to Marlboro, he had lived in Staten Island, New York for over 40 years. Visoky stated that the homes in Staten Island were very close in proximity, the outdoor spaces offered no privacy and the area was noisy. As a result, his number one priority was to find a home with a private backyard that offered a "park-like setting" with mature landscaping in a developed neighborhood. Visoky admitted that other features, such as a pool or a finished basement, were on their "wish list," but that these were secondary in importance

to the backyard space because these items could be added to the home later. Often, as they toured properties with the Respondent, the Visokys would look at the backyard area first. If the backyard was not satisfactory, they would not go inside to see the rest of the property.

Visoky also testified that the Respondent showed him and his wife approximately 40 to 50 homes during their search. The couple thought that they had found the perfect home in the summer of 2009 because it featured the park-like setting they desired, but their offer was declined and the search continued. Later in 2009, Elissa Visoky was searching online for homes in the area that met their criteria when she saw the Subject Property for sale. The Visokys drove to the home that day and met the owner, who offered to show them the property. Visoky described his elation when he saw the backyard space was "an absolute forest," densely populated by mature trees, creating the park-like setting they wanted. Very soon afterwards, the Respondent met them at the property to see it for herself and, with her help, the Visokys made an offer immediately. They closed on the Subject Property in December 2009.

Visoky testified that his initial experience was that the Respondent was very positive. He recommended the Respondent's services to his sister and brother-in-law, who were also looking to move into the area. Visoky also stated that when he saw the Respondent and her husband at a restaurant shortly after closing on the Subject Property, he paid for their dinner to show his gratitude. In addition, he testified that during their search for a home, he learned that a longtime friend had opened a large real estate firm in the Marlboro area. His friend encouraged Visoky to work with his firm instead of the Respondent, but Visoky testified that he was so loyal to the Respondent that he decided to continue his relationship with her instead of working with his longtime friend. Visoky reiterated that the litigation stemming from the Respondent's actions was

not motivated by money, or the desire to finance a pool. Visoky stated that he and his wife are very upstanding, professional people.

Visoky further testified that in early 2010, he noticed orange survey tape being placed around a number of trees on the lot directly behind their home. They contacted their neighbor, Howard Meller ("Meller"), to see if he knew what was going on. Meller told Visoky that the previous owners of the Subject Property and several other neighbors, including him, had been involved in litigation for years to prevent the 15 acres of land behind their homes from being cleared and developed into a subdivision. Meller also expressed surprise that the Respondent had not told the Visokys about the pending construction. Visoky testified that upon hearing this news, he and his wife were devastated and felt that if the land was going to be developed they would "lose everything."

Shortly afterwards, Visoky went to the Marlboro Township Planning Board ("Planning Board") to gather information. At the same time, the Visokys began to look for a new home in light of the pending construction. Visoky learned that the Planning Board had been considering the construction of the subdivision, often referred to as "Silverleaf," since 2005. More recently, the Planning Board had expressed concerns regarding the adverse effect of storm and water runoff on properties adjacent to the Silverleaf homes, including the Subject Property, the installation of fences along the perimeter and which trees they could cut down for construction. (Exhibit S-5). Visoky learned that the prior owner of the Subject Property had made plans to have the developer install extensive drainage work in the backyard to prevent flooding on the property due to water run-off concerns related to this construction. Lastly, he learned that the Planning Board had granted final approval for construction of nine new dwellings on a lot contiguous to the Subject

Property on July 15, 2009, approximately five months before they had closed on the home. (Exhibit S-6).

In the course of reviewing Planning Board documents, Visoky testified that he learned that the Respondent had attended Planning Board meetings, including meetings where the Silverleaf subdivision was discussed. Visoky asserted that the Respondent had attended four years of Planning Board meetings so she knew that something was going to be constructed behind his house, specifically in light of the fact that the subdivision received final approval in 2009, only months before they closed on the property. Furthermore, Visoky argued that as the Respondent touted herself as an "area expert," she should have known that the land behind his home had been sold and that construction was a possibility.

Visoky testified that construction on the contiguous lot began within a year of his closing on the Subject Property, beginning with the clearing of the trees that he testified had created the "park-like setting." Within two years, the first Silverleaf property was completed, mirroring the Subject Property. Visoky had taken a number of photographs to document the impact of construction on his property. (Exhibit S-7). The photographs show that the yard was rendered unusable while extensive drainage work was installed in the backyard. Additional photographs show that a vinyl fence erected around the perimeter of the subdivision was visible when standing on the back deck of the Subject Property. On cross-examination, Visoky acknowledged that the Township of Marlboro Application of Clearing Permit for Tree Removal was issued on February 14, 2012. (Exhibit R-9). The Application provides that the Start of Work Date for the Tree Removal would be February 12, 2012. However, Visoky could not say with certainty that the work actually began in February 2012. After reviewing the Memorandum for a Pre-Construction

Conference dated February 2012, Visoky was still unable to confirm the exact date when construction began on the lot behind his property. (Exhibit R-17).

Visoky testified that while no trees were removed from the Subject Property, many trees were removed from the contiguous lot, destroying their park-like setting that was the basis for their purchase of the property. To rectify the loss of privacy, he purchased 30 to 35 mature trees and had them planted on his property at a cost of approximately $30,000. Visoky stated that he had obtained estimates in March 2013, one in the amount of $63,000 and another in the amount of $113,000 - $145,000. (Exhibits R-13 and R-14). Visoky admitted that he filed a civil lawsuit against the Respondent in January 2014, wherein he supplied R-13 and R-14 as proof of damages. Visoky ultimately chose to have his trees planted by a third company that charged approximately $30,000 for the labor and trees. When asked why he did not provide an estimate from this third company when filing the January 2014 lawsuit, Visoky stated that he had not received a written estimate because he approached the third company in person. The receipts that he was given upon completion of the work were handed over to his lawyer. Visoky produced three receipts for the planting of trees dated June 13, 2013, June 13, 2013 and June 24, 2013. Visoky maintained that the trees he had planted do not create the park-like setting he had when they first purchased the home, but that the family is at peace with what they have been able to create. He lamented that he had to pay for the trees and maintain them; however, he feels his property is now beautiful.

The Respondent and Visoky had a number of conversations following his discovery that the contiguous lot was going to be developed. Visoky recalled the Respondent stating, "in hindsight, maybe I should have told you." On another occasion, the Respondent compared the installation of an apple orchard behind her home to the construction behind Visoky's home. Lastly, Visoky testified that while on a walk with his wife in their neighborhood they encountered

the Respondent. During this interaction, the Respondent made statements to the Visokys indicating that she believed all monies collected by the family in litigation relating to the construction of the Silverleaf homes would be used to purchase a pool. Visoky stated that this hearing and the complaint filed against the Respondent could have been avoided had the Respondent just told the family that the lot behind the Subject Property may be slated for development so that they could have made an informed decision. When asked on cross-examination why Visoky waited one year to file a complaint[3] with the REC regarding the Respondent's conduct, Visoky asserted that he initially began speaking to an attorney a year ago and wanted to wait for a period of time to see if the Respondent would make the Visokys feel whole before filing his complaint.

During cross-examination, Visoky admitted that prior to purchasing the Subject Property he had been interested in one other homes, one of which is located at 12 Vista Drive, which backed onto a nature preserve. (Exhibit R-3). Visoky made an offer on the home with the nature preserve behind it, but their offer was not accepted. When asked why Visoky did not ask the Respondent about the preservation of nature behind the Subject Property prior to ownership, Visoky admitted that he was so excited about the forest and had so much faith in the Respondent at that time, that he did not ask whether the trees would remain behind the Subject Property. Visoky emphasized that while he may not have specifically asked about the status of the forest, he and his wife visited the property with the Respondent multiple times, and on each occasion they exclaimed how excited they were about the forest behind the home, making it very clear they wanted to purchase the home

[3] The Respondent entered Exhibits R-1 and R-19 into evidence at the start of the hearing. R-1 is the complaint Visoky filed against the Respondent on October 3, 2013 with the REC and a four page letter written by the Visokys submitted with that complaint. R-19 is a letter addressed to New Jersey Real Estate Commission dated September 20, 2012. The letters are very similar in content but are dated approximately one year apart.

because the yard was engulfed by a massive forest. He asserted that the Respondent should have mentioned that the forest would not be there for long.

Visoky testified that he reviewed the MLS listing for the Subject Property, the Seller's Disclosure and the Homeowner's Disclosure prior to finalizing the purchase of the property. (Exhibit R-3, Exhibit R-4, Exhibit R-5). These disclosure documents state that the previous owners were not aware of any off-site conditions to the area that could adversely affect the value or desirability of the property, such as noise, threat of condemnation, or street change. In addition, these documents state that the previous owners had nothing that they believed that they should disclose to the prospective buyer that may materially or adversely affect the value of the desirability of the property, including zoning violations, non-conforming units, setback violations, zoning changes, or road changes. Visoky maintains that the previous owners lied on these disclosures and that his investigation confirmed what his neighbor, Meller, had stated. The Planning Board's activities revealed that the previous owners had attended meetings to arrange for major drainage work to be done on the Subject Property to alleviate flooding that would arise due to the construction of the Silverleaf Development.

Visoky also stated that he relied completely on the representations of the Respondent and not on these documents. When asked if Visoky believed that the Respondent, also reviewing these documents, absent any additional knowledge, would have any reason to believe that construction was slated to occur on the lot contiguous to the Subject Property, Visoky was unwilling to provide an answer as he would need time to review each document carefully before being able to answer.

During his testimony, Visoky reviewed several recent photographs of the Subject Property from the view of Old Mill Road, where the Silverleaf homes have been constructed. (Exhibit R-16). Visoky testified that his house could not be seen from the photographs because there are trees

present. Visoky also maintained that the photographs were taken from a favorable angle. Visoky then reviewed the current listing for 12 Vista Drive, the property that Visoky had made an offer on in early 2009 which had not been accepted. (Exhibit R-3). The listing shows that the backyard had recently been cleared of trees to make room for a pool. Visoky also admitted that he has put a pool into his back yard at the Subject Property. Furthermore, Visoky testified that he would have put a pool into the backyard space of any property he purchased in such a way that would have required the least number of trees be removed.

Finally, Visoky could not explain why the Respondent did not reveal that construction was planned for the lot behind the house they ultimately chose, the Subject Property. Visoky maintained that he did not know her motives because he was not in her head, but that she had no reason to "trick" them into buying this house. He posited that she may not have valued privacy the way that they did and minimized its importance. Another theory he suggested was that maybe she had gotten tired of working with them, as together they had seen 40 to 50 properties, and she was ready to walk away.

Visoky testified that while he is a practicing attorney in New York that handles liquor licenses and some New York real estate transactions, he did not opt to do his closing himself but chose an attorney from Staten Island that regularly handles real estate transactions in New Jersey. Visoky admitted he did not verbalize his wish list to his attorney or ask about the land behind the property he was buying at any point during the attorney review process. He stated that he was unfamiliar with real estate transactions in New Jersey and relied on the Respondent for the entirety of the transaction.

Visoky stated that he filed a lawsuit against the sellers, the Respondent, Respondent Komito, the Relocation Company, and ReMax Central. (Exhibit R-18). The sellers settled with

the Visokys for $2,500. Komito, the Relocation Company, and Coldwell Bank also settled with the Visokys in the amount of approximately $28,000 before legal fees were paid. Visoky testified that the most difficult part of the civil litigation stemming from these events is proving damages in this matter, which is why the price of the trees he had installed became relevant. Visoky stated that he did not sue the attorney that represented him at closing because he is not a litigious or vindictive person. He is only suing the Respondent because he strongly believes that the Respondent knew about the construction and did not tell them.

Visoky testified that at no point during the housing search did the Respondent indicate that a potential property would be unsuitable for the Visokys due to activity on an adjacent property. Visoky also testified that it did not occur to him to look into the unnamed forest behind the Subject Property before purchasing the house. He reiterated that he relied entirely on the Respondent because she was an expert in the area.

Robert Spillane

Robert Spillane ("Spillane") testified on behalf of the REC as the investigator assigned to this matter.

Spillane interviewed the Respondent as part of his investigation into the Visokys' complaint. During this interview, the Respondent confirmed that she did attend one Planning Board meeting in 2007 - 2008 with the express intent of meeting William Bolton ("Bolton"), a developer from Paragon Home Development, who was planning on constructing a residential development in Marlboro at the time.[4] The Respondent stated she did not know the exact location of the new development, but she wished to solicit his business. (Exhibit S-8). Spillane testified

[4] The Silverleaf properties were eventually developed by Marcel Gestetner of Marble Arch Homes, but at the time of this Planning Board meeting, the original developer, Bolton of Paragon Home Development was in attendance representing this construction project.

that he did not know if the Respondent was successful in meeting Bolton at that meeting. The only person who was able to confirm her attendance was the complainant, Visoky.

During her interview with Spillane, the Respondent informed him that the Visokys were so pleased with her agent services that they posted a positive review on her behalf on Trulia.com shortly after they closed on their home, in 2009 - 2010. (Exhibit S-9). When the Respondent attempted to show Spillane the Visokys' review on the website, she was unable to locate it. Spillane was also unable to locate any postings from the family on Trulia.com. Spillane suggested that this may be because of how long ago the posting was submitted or due to internal Trulia.com policies. Spillane testified that the Respondent provided him with the contact information for Rachel Webster at Trulia.com. (Exhibit S-10). Spillane contacted Webster, who had received language for a review from the Respondent representing language that was originally submitted by the Visokys, to be reposted on Trulia.com, as the previously submitted review was no longer on the website. Spillane also testified that he did not know whether or not the Trulia.com review was being contested by the Visokys.

Lastly, Spillane testified that he spoke to Respondent Komito as part of his investigation into the complaint filed against the Respondent. It was already established that while Respondent Komito had known about the Silverleaf development being constructed adjacent to the Subject Property, Spillane was unable to find any documentary evidence that Respondent Komito told the Respondent or the Visokys what he knew. However, during an interview with Spillane, Respondent Komito stated that it was his belief that the Respondent knew that the property adjacent to the Subject Property was going to be developed based on previous conversations between them. (Exhibit S-7).

Jodi Goldberg

The Respondent testified on her own behalf. The Respondent testified that she has been practicing as a realtor in the Marlboro and Manalapan area for 12 years and has been a resident of Marlboro for 30 years.

The Respondent testified about the Trulia.com review. The Respondent testified that when a buyer closes on a home, the Respondent sends an email to them asking them to write a testimonial on her behalf on Trulia.com. The buyer has to sign-in or register at Trulia.com, provide the address of the home that they purchased, the date of closing, and the price they paid for the home. Only then are they permitted to leave their review of the Respondent's services. Once the testimonial is published on the site, the Respondent's assistant copies the language of the testimonial and uses it verbatim on other platforms, like jodigoldberg.com or realtor.com, to solicit new clients. (Exhibit S-9). As an example, the Respondent referred to Exhibit R-6, which is the language of a testimonial posted on remax.com. The Respondent testified that the language used was copied directly off the Trulia.com website after it was submitted by the Visokys shorty after closing on the Subject Property. The Respondent testified that she did not author any of the wording, but only sent to Trulia.com the same language the Visokys had originally submitted so it could be put back on Trulia.com.

The Respondent confirmed that she attended a Planning Board meeting in 2007 – 2008 to market her services to Bolton. She was unable to recall how she knew he would be in attendance, as it was over nine years ago. At the time, Bolton was a builder at Paragon Homes who had completed other developments in the Marlboro area. The Respondent was unable to remember why Bolton was in attendance at the meeting, but after referencing Exhibit S-6, she was able to confirm that he was in attendance as the applicant for the construction of the Silverleaf subdivision. At the time, she did not know this application had been ongoing for many years, even though she

was a resident and real estate agent in the area. The meeting was focused on the relocation of Council on Affordable Housing ("COAH") homes in the neighborhood, and the Respondent eventually lost interest. The Respondent testified that she left the meeting and waited outside so she would be able to introduce herself to Bolton as he left the meeting. She testified that she was not present for the portions of the meeting during which the subdivision was discussed. The Respondent also testified that she did not look at the meeting's agenda, and thus she was unaware of how long she would have to wait for Bolton. The Respondent testified that by attending that meeting, she did not learn any information about the location of the Silverleaf homes.

The Respondent further testified that the Visokys were very excited when she met them at the Subject Property. The Respondent testified that between 2008 and 2009, neither the sellers of the Subject Property nor Respondent Komito advised her that homes were going to be constructed on the lot adjacent to the Subject Property. Furthermore, the Respondent testified that while the Visokys were very clear in their desire to have a park-like setting in their backyard, Visoky never asked her what was planned for the empty space behind the home. If he had asked her, the Respondent would have suggested that he speak to the Planning Board or Zoning Board to do their due diligence. The Respondent testified that with the development that she had seen in Marlboro and behind her own home, she did not have any reason to suggest to the Visokys that they undertake an independent investigation into Planning Board activities before purchasing the Subject Property.

Lastly, the Respondent testified that when she sold the house to the Visokys she did not know that the lot directly behind the Subject Property was going to be developed or that it would be cleared of trees.

FINDINGS OF FACT

Based on the pleadings, the testimony of the witnesses, and the documentary evidence duly admitted into the record, the Commission makes the following findings of fact:

1. The Respondent is a licensed New Jersey real estate broker-salesperson currently licensed with ACS Realty, Inc., d/b/a ReMax Central, licensed New Jersey real estate broker, whose mail office is located at 520 Route 9 North, Manalapan, New Jersey, 07726. Respondent was first licensed in New Jersey on January 6, 2004.
2. In 2009, the Visokys contacted the Respondent and informed her that they were interested in purchasing a house in Marlboro, New Jersey. They were specific in their desire for a home that had a private, quiet and serene backyard with mature trees.
3. The Respondent and the Visokys viewed over 40 properties together before they visited the Subject Property located at 6 Miro Circle, Marlboro, New Jersey.
4. The Respondent conducted a visual inspection of the Subject Property with the Visokys present.
5. The Visokys entered into a contract of sale for the Subject Property on August 17, 2009. The closing on the property took place on December 17, 2009.
6. The Visokys were never notified by the Respondent about the imminent construction on the property adjoining theirs.
7. After the Visokys closed on the Subject Property, the construction of new homes on the contiguous property began. Trees were removed from the adjacent property and pipes and drainage lines were installed on the Subject Property. Visoky obtained information from the Planning Board and discovered that the major subdivision approval had been granted by the Planning Board in July 2009 for the property contiguous to the Miro Circle property. The property was being developed by Paragon Homes. Hearings for that subdivision were

held between April 2008 and July 2009. Visoky obtained information from the Planning Board verifying that the seller of the Subject Property had appeared in April 2008 and had testified at the subdivision hearings. The Respondent admitted that she had, in fact, attended a Planning Board meeting in 2008 with the express purpose of meeting the developer, William Bolton of Paragon Homes. Respondent testified that she obtained no information during that meeting or from Bolton concerning his or Paragon Homes' plans for developing property or clearing trees at the property adjacent to the Subject Property.

8. As part of the Planning Board's resolution approving the Paragon Homes development, the Planning Board specifically required that "any adverse impacts on adjoining property owners from storm water runoff shall be immediately addressed by the applicant and/or owner of the property." This information was not provided to the Visokys by the Respondent.
9. A piping and drainage system had to be installed on the Subject Property because of the construction on the adjacent properties.

CONCLUSIONS OF LAW

In light of the above findings of fact, the Commission makes the following conclusions of law with regard to the charges contained in the OTSC and summarized above:

1. There is insufficient evidence to conclude that the Respondent made false promises or substantial misrepresentations to the Visokys by representing that the Subject Property had a private treed yard when she knew that this material condition would change, in violation of N.J.S.A. 45:15-17a, as alleged in the OTSC.
2. The Respondent is in violation of N.J.S.A. 45:15-17e in that her conduct demonstrated incompetency because she failed to ascertain the potential plans for the development of the

property adjacent to the Subject Property or to advise her clients (the Visokys) that they may want to further investigate any potential plans for the development of the property adjacent to the Subject Property, despite her knowledge of the importance to the Visokys that a property have the private treed yard.

3. The Respondent is in violation of N.J.A.C. 11:5-6.4(a) in that she violated her fiduciary duty to the Visokys when she failed to ascertain the potential plans for the development of the property adjacent to the Subject Property or to advise her clients (the Visokys) that they may want to further investigate any potential plans for the development of the property adjacent to the Subject Property, despite her knowledge of the importance to the Visokys that a property have the private treed yard.
4. There is insufficient evidence to conclude that the Respondent failed to ascertain and disclose water drainage concerns on the Subject Property related to the planned construction on the adjacent lot, information material to the physical condition of the Subject Property, in violation of N.J.A.C. 11:5-6.4(b) and (c), as alleged in the OTSC.
5. There is insufficient evidence to conclude that the Respondent possessed actual knowledge of the construction project on the lot adjacent to the Subject Property that she failed to disclose to the Visokys, in violation of N.J.A.C. 11:5-6.4(c)2i, as alleged in the OTSC.

DETERMINATION

At the conclusion of the hearing and executive session in this matter, the Commission voted in favor of finding certain violations alleged and imposing the sanctions described in this Final Order of Determination. In arriving at the determination in this matter, the Commission took into consideration the testimony of the witnesses and the documentary evidence admitted during the course of the hearing.

The Real Estate Brokers and Salespersons Act, N.J.S.A. 45:15-1 et seq. ("Act") charges the Commission with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]" in order to protect New Jersey real estate consumers. Goodley v. New Jersey Real Estate Comm'n, 29 N.J. Super. 178, 181-182 (App. Div. 1954). The Commission is empowered to suspend and revoke the licenses of, and impose fines against, real estate licensees that commit any of the offenses enumerated in N.J.S.A. 45:15-17 or the real estate regulations. Maple Hill Farms, Inc. v. New Jersey Real Estate Comm'n, 67 N.J. Super. 223, 232 (App. Div. 1961); Division of New Jersey Real Estate Comm'n v. Ponsi, 39 N.J. Super. 526, 527 (App. Div. 1956). Courts have long recognized that the real estate sales industry should exclude individuals who are incompetent, unworthy, and unscrupulous, in order to protect the public interest. See Div. of New Jersey Real Estate Comm'n v. Ponsi, supra at 532-533. Thus, the Commission has the power to suspend, revoke, or place on probation the license of any licensee for "any conduct which demonstrates unworthiness, incompetency, bad faith, or dishonesty." N.J.S.A. 45:15-17e.

The OTSC alleges that the Respondent is in violation of N.J.S.A. 45:15-17a, which prohibits licensees from making false promises or substantial misrepresentations to their client or principal. The Respondent is charged with misleading the Visokys to believe that the Subject Property had a private treed yard, a material condition, that she knew would be removed when the construction of new homes on the lot adjacent began. Visoky contends that the Respondent knew about the construction project because she had attended years of Planning Board meetings during which the construction project had been discussed. Therefore, her omission of such facts to the Visokys constitutes a substantial misrepresentation. In addition, Investigator Spillane testified that based on his interview with Respondent Komito, it was Respondent Komito's belief that the Respondent knew that the property adjacent to the Subject Property was going to be developed.

The Commission finds that the evidence presented is not sufficient to conclude that the Respondent made a false promise or substantial misrepresentation to the Visokys, in violation of N.J.S.A. 45:15-17a. The Respondent's testimony regarding her attendance at a Planning Board meeting was credible. The Respondent testified that she did attend one Planning Board meeting in 2007 - 2008 with the express purpose of meeting Bolton, who was in attendance to represent the construction project that is at issue, with the express intent of soliciting future business. However, she testified that this meeting occurred before a location for the development had been finalized; furthermore, she testified that she was not present at that meeting while the construction project was being discussed as she left the meeting early and waited to speak to Bolton outside. In addition, Investigator Spillane testified that he was unable to find evidence to substantiate Respondent Komito's belief that the Respondent knew about the development or any documentation where Respondent Komito informed the Respondent of such. Thus, after considering both the documentary and testimonial evidence presented at this hearing, the Commission concludes that the evidence is not sufficient to support a finding that the Respondent violated N.J.S.A. 45:15-17a.

Next, the OTSC alleges that the Respondent is in violation of N.J.S.A. 45:15-17e, which prohibits conduct demonstrating unworthiness, incompetency, bad faith, or dishonesty. Visoky's testimony clearly establishes that they selected the Respondent as their real estate agent because she marketed herself as an "area expert" with 30 years of experience. His testimony also established that he and his wife were emphatic in expressing to the Respondent that privacy and a "park-like" setting were of the utmost importance to them in searching for a home. As a real estate licensee and "area expert," the Respondent should have been aware that vacant lots in Marlboro were susceptible to construction, and as a result, she should have ascertained or advised her client

to ascertain the status of the lot behind the Subject Property, knowing how important the privacy afforded by the vacant lot was to the Visokys. In addition, the Respondent testified that had Visoky asked her specifically about the adjacent lot, she would have advised him to contact the Township Planning Board or Zoning Board to further investigate the status of the lot. However, the Respondent, as the Visokys' real estate agent, was required to disclose any information that should have been relevant to the purchase of the house and should not have needed Visoky's specific inquiry to suggest that he investigate further. Lastly, in addition to knowledge she had gained in a professional capacity, the Respondent admitted to personal knowledge of the town's ongoing development, specifically, the apple orchard recently constructed on a lot behind her own home. Thus, the documentary and testimonial evidence presented during the hearing establish that the Respondent's failure to ascertain or advise her client to ascertain the status of the lot behind the Subject Property demonstrates incompetence within the meaning of N.J.S.A. 45:15-17e.

The OTSC also alleges that the Respondent is in violation of N.J.A.C. 11:5-6.4(a), which requires licensees to strictly comply with the laws of agency and the principles governing fiduciary relationships while also dealing fairly with all parties to the transaction. Once a fiduciary relationship has been established, the licensee owes a duty of "absolute fidelity and good faith" to the principal and is duty bound to "disclose . . . all the facts within [the licensee's] knowledge which [are] material to the business for which [the licensee is] employed." Silverman v. Bresnahan, 35 N.J. Super. 390, 395 (App. Div. 1955). As their real estate agent, the Respondent and the Visokys had established a fiduciary relationship that requires the disclosure of all facts material to the Subject Property. As the evidence indicates that the Respondent may have not had actual knowledge of the development slated for the adjacent lot, she was still obligated to either

ascertain or advise her clients to ascertain the status of the adjacent lot. Thus, her failure to do so violated her fiduciary duty and is in violation of N.J.A.C. 11:5-6.4(a).

The OTSC alleges that the Respondent's conduct is in violation of N.J.A.C. 11:5-6.4(b), which requires licensees to make a reasonable effort to ascertain all material information[5] concerning the physical condition of a property for which he or she "accepts an agency." The Respondent is charged with failing to make a reasonable effort to ascertain and disclose information material to the physical condition of the Subject Property in that she failed to obtain information from the Planning Board indicating that there were water drainage concerns on the Subject Property related to the new construction proposed on the adjacent lot and failed to disclose same to the buyers. Under N.J.A.C. 11:5-6.4(b)1, a reasonable effort is made by inquiry to the seller or their agent about any physical conditions that may affect the property or a visual inspection of the property to determine whether there are any readily observable physical conditions affecting the property. The documentary evidence submitted and the testimony of both the Respondent and Visoky indicate that the Respondent made a satisfactory effort under N.J.A.C. 11:5-6.4(b) to ascertain material information concerning the property. Visoky testified that the Respondent came to the Subject Property when requested and made a visual inspection of the property. At that time, it was not readily observable that water drainage concerns would arise on the property due to future construction on the adjacent lot that had not yet begun. Furthermore, as drainage concerns were not readily observable during a visual inspection, the Seller's Disclosures also did not indicate any drainage concerns existed on the property, giving the Respondent no

[5] Information is deemed "material" under N.J.A.C. 11:5-6.4(b)2 if a reasonable person would attach importance to its existence or non-existence in deciding how to proceed in the transaction, or if the licensee knows or has reason to know that the recipient of the information is likely to regard it as important in deciding how to proceed.

reason to further investigate. (Exhibits S-1 and S-2). Thus, sufficient evidence was not presented to find that the Respondent is in violation of N.J.A.C. 11:5-6.4(b).

Lastly, the OTSC alleges that the Respondent's conduct is in violation of N.J.A.C. 11:5-6.4(c) and N.J.A.C. 11:5-6.4(c)2i. N.J.A.C. 11:5-6.4(c) requires that licensees disclose all information material to the physical condition of any property which they know or which a reasonable effort to ascertain such information would have revealed to their client. N.J.A.C. 11:5-6.4(c)2i requires that licensees who possess actual knowledge of an off-site condition that may materially affect the value of residential real estate, other than newly constructed properties, must disclose that information to prospective purchasers prior to the signing of the contract. As previously discussed, the Respondent made a reasonable effort to ascertain information material to the physical condition of the property during her visual inspection of the home. During this inspection, the Respondent did not readily observe any future signs of water drainage issues due to construction. Therefore, the Commission finds that the Respondent is not in violation of N.J.A.C. 11:5-6.4(c) as she had no information to disclose to her client after her reasonable effort. Similarly, as previously discussed, the documentary and testimonial evidence presented at the hearing did not establish that the Respondent possessed actual knowledge of the construction project slated to take place on the lot adjacent to the Visokys' property. Therefore, the Commission concludes that there is insufficient evidence to find the Respondent in violation of N.J.A.C. 11:5-6.4(c) or 6.4(c)2i.

As discussed above, the Commission finds the Respondent's conduct is in violation of N.J.S.A. 45:15-17e (conduct demonstrating incompetency) and N.J.A.C. 11:5-6.4(a) (violation of fiduciary duty). However, a closer examination of the facts is necessary before taking action against the Respondent's real estate salespersons' license.

Although the Respondent's conduct was incompetent, the Commission found there was insufficient evidence that the Respondent had actual knowledge of the development plans for the adjacent lot or the drainage issues that existed on the property that she withheld from the Visokys due to unworthiness or unscrupulousness on her part. However, the Respondent's failure to advise the Visokys to investigate the status of the adjacent lot, knowing how important the privacy afforded by the lot was to her client, constitutes incompetency under N.J.S.A. 45:15-17e. For these reasons and after weighing the testimony and evidence presented, the Commission finds that the appropriate action in this matter is to require the Respondent to complete three continuing education hours in Agency, which shall not contribute to her license renewal requirement, within a period of six months. This action would best protect the public interest.

Pursuant to N.J.S.A. 45:15-17, the Commission may impose a penalty of not more than $5,000 for the first violation of the Act, and a penalty of not more than $10,000 for any subsequent violation. In Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), the Supreme Court established the following seven factors to evaluate the imposition of fines in administrative proceedings and these factors are applicable to this matter which seeks the imposition of penalties under the Act: (1) the good or bad faith of the respondent; (2) the respondent's ability to pay; (3) the amount of profits obtained from the illegal activity; (4) any injury to the public; (5) the duration of the illegal activity or conspiracy; (6) the existence of criminal or treble actions; and (7) any past violations. Id. at 137-139. Each of these factors is discussed below.

The first factor examines the good or bad faith of the Respondent. The evidence presented does not demonstrate that the Respondent acted in bad faith in her failure to ascertain that construction was slated for a lot adjacent to the Subject Property or that her failure to advise the Visokys to investigate further by contacting the Planning Board or Zoning Board was motivated

by any malicious intent. Rather, as was determined by the Commission, this conduct demonstrates incompetency.

As to the second factor, the Respondent did not testify to or produce evidence of any circumstances that would render her unable to pay monetary penalties assessed. Rather, the testimony revealed that she is a successful real estate salesperson in Marlboro Township.

The third factor examines the amount of profits obtained from the Respondent's conduct. Visoky testified that, had the Respondent ascertained or advised further investigation into the status of the lot adjacent to the Subject Property, he and his wife would not have purchased that home. Visoky did state that had this occurred, he would have continued to work with the Respondent as their search continued. Thus, the Respondent's conduct permitted the Visokys to purchase a home, and as a result for the Respondent to earn a commission, earlier than it may have otherwise occurred.

Regarding the fourth factor, in order to protect consumers, the Commission is charged with the "high responsibility of maintaining ethical standards among real estate brokers and sales[persons]." Goodley v. New Jersey Real Estate Comm'n, supra. at 182. Therefore, the public is harmed when individuals fail to comply with Commission regulations. When a licensee is unable to conduct herself in accordance with the high standards expected of her profession, the public's confidence in the real estate industry is eroded. In this matter, Visoky relied on the Respondent to guide him through the process of purchasing a home in New Jersey, a state with which he was unfamiliar. In breaching her fiduciary duty to him, by failing to ascertain or advise further investigation into the adjacent lot, the Visokys primary purpose, to purchase a home with a private outdoor space, was unnecessarily disrupted for many months and not rectified without a

substantial cost. This result is precisely why this profession demands such high standards from licensees.

The fifth factor of the Kimmelman analysis is the duration of the illegal activity or conspiracy. The Respondent's breach of fiduciary duty is an isolated incident that occurred only when she failed to ascertain or advise her client to investigate the status of the lot contiguous to the Subject Property prior to purchase.

Regarding the sixth factor, the Respondent is currently party to a civil lawsuit filed against her by Visoky in Monmouth County stemming from the conduct at issue here. The outcome of the proceedings is unknown at this time.

Lastly, there is no evidence of prior violations of the Act or corresponding regulations by the Respondent.

In light of the mitigating factors discussed in the above Kimmelman analysis and the violations the Commission has concluded that the Respondent committed, the Commission has determined that it is appropriate that the Respondent shall pay a fine in the amount of $500 for breaching her fiduciary duty when she failed to advise the Visokys to investigate the vacant plot of land behind their home or ascertain the status of the land herself. Because the Respondent's conduct appears to be an isolated incident, the Respondent lacked bad faith, and any profit made was realized prematurely (i.e. she made the profit earlier than she would have had she advised the Visokys to investigate the adjacent lot), the Commission finds that this fine is fully warranted, and is not excessive or unduly punitive.

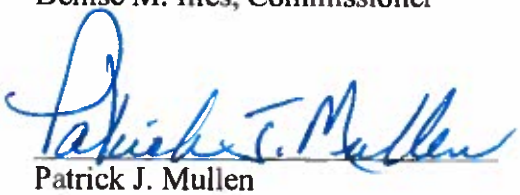
Accordingly and pursuant to N.J.S.A. 45:15-17, the Commission imposes the following sanctions:

I. Respondent Goldberg shall pay a fine in the amount of $500.

II. Respondent Goldberg shall complete three continuing education hours in Agency, which shall not contribute to her license renewal requirement, within a period of six months, upon issuance of this Final Order.

SO ORDERED this 25th day of October, 2017.

By: Linda K. Stefanik, President
Eugenia K. Bonilla, Vice-President
Sanjeev Aneja, Commissioner
Jacob Elkes, Commissioner
William Hanley, Commissioner
Denise M. Illes, Commissioner



Patrick J. Mullen
Director of Banking

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