

“I Do Not Have a C of O For the Fourth Bedroom But What Can You Do For Me?”

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By Edward I. Sumber, Board Counsel**

On many occasions we have addressed the ability of the Department of State to determine that a licensee is “untrustworthy” or “incompetent” because of various violations of the License Law. Sensitivity to the Regulations of the Department of State regarding advertising is a clear necessity particularly when dealing with owners who have properties which are not in compliance with local zoning ordinances.

Typical Homeowner Issues

Anyone in the brokerage business for even a short period of time will encounter a homeowner who has “finished the basement”, “added a bedroom”, “expanded the deck” or “installed a swimming pool” without having obtained building permits or certificates of occupancy. These very same homeowners often ask the listing broker to advertise their home as a four bedroom when there is a certificate of occupancy for three bedrooms or to show the three and one-half baths when there is a certificate of occupancy for one and one-half baths, etc.

Department of State Regulations

Department of State Regulation 175.25 focuses on broker advertising. This provision states in part:

- (a) All advertisements placed by a broker must indicate that the advertiser is a broker or give the name of the broker and his telephone number.**

- (b) All advertisements placed by the broker which state that property is in the vicinity of a geographical area or territorial subdivision must include as part of such advertisement the name of the geographical area or territorial subdivision in which such property is actually located.**

This particular DOS Regulation is used extensively to impose fines upon brokers who identify a property as one located in “Scarsdale” but does not indicate that the property is actually located in the City of Yonkers. The fact that the post office address is “Scarsdale” is irrelevant. Similar circumstances occur in sections of Mt. Vernon and Yonkers which adjoin Bronxville where the properties enjoy a Bronxville address but are actually located in the City of Mt. Vernon or Yonkers.

The DOS Regulations specify that any advertisement by a licensee must accurately identify “the geographical area or territorial subdivision in which the property is actually located”.

“Untrustworthy” or “Incompetent”

The Department of State uses its discretion to determine that a licensee is untrustworthy and/or incompetent when the broker inaccurately describes a property or misleads the public in the licensee’s advertisements. In an April 8, 1998 memorandum, the Division of Licensing advised that “any mention of a possible second apartment without clear indication that a permit would be required is deemed to be “untrustworthy”. DOS advised at that time that the following terms are deemed suspect by the DOS: “mother-daughter”, “second kitchen”, “income producer” and “income possible”.

More importantly, DOS indicated that it is an extreme violation of the DOS Regulations to advertise a one or two family residence (based upon building department certificates of occupancy) as a residence “with three, four or five incomes...”.

The Licensee’s Obligations

A licensee must make it clear to prospective buyers that the “mother-daughter” legal status can only be achieved through formal applications by the buyer for a variance. Similarly, accessory apartments are not the same as showing a property as a “two family residence”. An accessory apartment is usually one occupied by a family member and requires that the owner of the property also reside in the structure. A two family residence however, is one which can be used or rented by unrelated parties.

“Blind Ads”

Many licensees are not familiar with the verbiage “blind ads”. In such an ad, the licensee only provides a telephone number. A review of Regulation 175.25 indicates clearly that such an advertisement is improper in that the broker must set forth the name of the broker’s firm and must clearly indicate that the party who placed the ad is a licensee.

The Age of Branding and Salesperson Identity

The internet has significantly changed the way properties are advertised and how real estate licensees operate in a highly competitive environment. Principal brokers continue to be responsible for the acts of their licensees and have a duty to monitor the websites established by salespersons affiliated with the firm. In many instances, licensees do not identify their firm affiliations. This remains a violation of DOS Regulations which require that the licensee clearly identify the licensee’s firm affiliation, the address at which the salesperson may be contacted as well as telephone numbers

that identify the firm as well as the individual licensee. For many years it was DOS's position that a salesperson's name could not be displayed more prominently than the broker's or firm's name. The proliferation of websites has made this rule virtually unenforceable and it has been inferred that the Department of State no longer will enforce this position. No official data has been obtainable from the New York State Department of State to confirm this and no one should rely on such a position.

Advertising Rules

The following rules, set forth many years ago in the Realtor's "Desktop Reference Manual" should continue to be a guideline for every licensee:

1. Do not advertise a use which is in violation of local zoning or building ordinances;
2. Review advertisements from the perspective of whether they could mislead the reader as to the permissible use of the premises;
3. Take reasonable steps to ensure the factual accuracy of the attributes claimed in the advertisement;
4. Take reasonable steps to ensure that the claimed attributes are not in violation of local ordinances;
5. If you have reason to know that the configuration of the premises is in violation of local ordinances, recommend to seller clients that they remedy the problem; and
6. If premises appear to be out of compliance with local ordinances, notify prospective purchasers that the property may only be used in compliance with all applicable ordinances.