



facility. As part of the listing agreement, Tibbles decided that he would act as a dual broker, having fiduciary duties to both the seller and any potential buyer in the event a buyer approached Tibbles about the property.

3. After listing the property, Tibbles became aware that the property had been subjected to hazardous substance/petroleum contamination which had resulted from a petroleum release on the property. Tibbles learned of this when he inquired about the property with the State of Montana Department of Environmental Quality (MDEQ). As a result of his inquiry to MDEQ, Tibbles received in late 2000 a copy of a letter prepared by MDEQ (Exhibit 1). The letter, prepared in 1996, explains the nature of the contamination (a leaking underground waste oil storage tank) and that no further corrective action was required to remedy the environmental problem. That same letter also indicates that the property owner "still may be responsible for any damages not yet identified resulting from leaks, spills, or improper closure of the tank(s)." *Id.*

4. Les Breaw became interested in purchasing the property and contacted Tibbles about the property. On February 20, 2003, Tibbles and Breaw met at the property and looked it over. Breaw asked Tibbles if there had ever been any environmental issues with the property. Tibbles responded that he had a letter from the Department of Environmental Quality that indicated that no further corrective action was required. Tibbles did not provide a copy of the letter to Breaw at that time. Other than to state that no further corrective action was necessary, Tibbles did not inform Breaw of the nature of the contamination during this meeting nor did he disclose any of the other contents of the letter. Most significantly, Tibbles did not inform Breaw that the letter very clearly indicated that the property owner faced additional liability for any undiscovered environmental issues on the property.

5. On February 26, 2003, Breaw entered into a buy-sell agreement for the property. Breaw provided a non-refundable earnest money deposit of \$11,000.00 at the time he entered into the buy-sell agreement. Breaw utilized Tibbles' services as a dual broker. Tibbles prepared the buy-sell agreement. At no time prior to entering into the buy-sell did Tibbles ever provide a copy of the 1996 MDEQ letter to Breaw or inform him of all of the letter's contents. It was not until March 12, 2003, some three weeks after the buy-sell agreement had been reached and the non-refundable deposit had been paid, that Tibbles provided Breaw with a copy of the letter. At this time, Breaw first learned of the potential for additional liability for any undiscovered environmental problems with the property.

6. Breaw took possession of the property. In August, 2003, Breaw decided not to go through with the transaction in part because of the environmental issues with the property. Breaw signed a release that released the property seller, but not Tibbles, for all liability as a result of the failure of the transaction. Breaw did not recover his earnest money deposit.

7. In 2004, Breaw filed a complaint with the Board of Realty Regulation alleging that Tibbles had failed to disclose the existence of the previous environmental clean-up of the property. This complaint was initially dismissed by the Board of Realty

Regulation without prejudice. Subsequent evidence convinced the Board to reopen the matter and resulted in the instant charge against Tibbles' license.

### III. CONCLUSIONS OF LAW<sup>1</sup>

#### A. *Tibbles Committed Unprofessional Conduct By Failing To Disclose Material Facts.*

1. The Department bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126.

2. Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

\* \* \*

(18) conduct that does not meet the generally accepted standards of practice.

3. Montana Code Annotated § 37-51-313(7)(a) provides that a dual agent "has a duty to disclose to a buyer or seller any adverse material facts that are known to the dual agent, regardless of confidentiality considerations."

4. Montana Code Annotated § 37-51-102(2)(a) defines an "adverse material fact" as a fact "that should be recognized by a broker or salesperson as being of enough significance as to affect a person's decision to enter into a contract to buy or sell real property . . ." It can include a fact that materially affects the value or structural integrity of the property or presents a documented health risk to occupants of the property. Mont. Code Ann. § 37-51-102(2)(a)(I).

5. Administrative Rule 24.210.641(1) provides that, in any transaction where a licensee is involved as a licensee, a violation of any statute can be considered in determining whether or not the licensee failed to meet generally accepted standards of practice under Montana Code Annotated § 37-1-316(18). See also, *May v. Landmark Real Estate*, 2000 MT 99, ¶47, 302 Mont. 326, ¶47, 15 P.3d 1179, ¶47.

6. Tibbles' own testimony demonstrates the violation in this case. Tibbles admitted that he never disclosed to Brew the potential for future liability for the

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<sup>1</sup> Statements of fact in the conclusions of laws are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

hazardous waste contamination of the property until after the buy-sell agreement had been entered and Breaw's earnest money had become non-refundable. Tibbles also admitted that he never provided the MDEQ letter nor disclosed the gist of the letter - that a previous leak from an underground waste oil storage tank had occurred but been remediated - until after the agreement had occurred and Breaw's earnest money was gone. The potential for future liability and the nature of the spill were "adverse material facts" within the meaning of Montana Code Annotated § 37-51-102(2)(a)(I) and should have been disclosed. Tibbles' testimony establishes the violation of Montana Code Annotated § 37-51-313(7)(a). Because that statute has been violated, BSD has also proven a derivative violation of Montana Code Annotated § 37-1-316(18). Admin. R. Mont. 24.210.641(1).

7. Tibbles has attempted to deflect attention away from his conduct by casting Breaw as incredible in light of Breaw's previous dealings with another seller in a different transaction. The problem for Tibbles, however, is that even if Breaw were found to be not credible, it is Tibbles' testimony that establishes the violations in this matter.

8. A regulatory board may impose any sanction provided for by Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Montana Code Annotated § 37-1-312 provides that a regulatory board may impose probation with terms and levy a fine not to exceed \$1,000.00 per occurrence.

9. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the Board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

10. BSD has requested that Tibbles' license be placed on probation for 18 months, that Tibbles be ordered to complete 8 hours of ethics for real estate professionals, and that he be fined \$500.00. The hearing examiner is very concerned that Tibbles' Montana license has previously been sanctioned for somewhat similar conduct. At hearing, Tibbles admitted that his Montana license had previously been disciplined (apparently by consent decree) for failure to disclose the cost of extending power to a certain piece of real property. This is an aggravating factor here because the previous conduct involves a failure to disclose material facts, the very essence of the instant case. Because Tibbles has repeated his conduct in the face of previous sanctions, aggravation of the sanctions in this case is appropriate and must include an extended period of probation, a fine, and additional training in real estate to both protect the public and to rehabilitate the licensee. In addition, the public's protection requires that the order include a provision that Tibbles' license will be revoked if he engages in any similar conduct while his license is on probation or otherwise fails to comport with any term of his license probation.

#### IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Board enter its order placing Tibbles' license on probation for a period of 18 months with the terms (1) that Tibbles at his own expense enroll in and successfully complete at least 8 hours of continuing education in the area of real estate ethics within six months of the final order issued in this matter, (2) that Tibbles shall, at all times, comport with the requirements of Mont. Code Ann. Title 37, Chapters 1 and 51 and Admin. R. Mont. Title 24, Chapter 210, (3) Tibbles shall pay a fine of \$500.00 within 30 days of the date of the entry of the final decision in this matter, and (4) that in the event Tibbles fails to comport with any of the terms of this order, that his license be REVOKED.

DATED this 8th day of June, 2006.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU  
By: /s/ GREGORY L. HANCHETT  
GREGORY L. HANCHETT  
Hearing Examiner

#### NOTICE

Mont. Code Ann. § 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.