

(12-98) Issue of “BPOs” and “CMAs” Resurfaces

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In May of this year, we addressed the Real Estate Agency’s warning that doing “broker price opinions” (BPOs) for lenders, mortgage brokers and others with no real interest in listing or buying property might well run afoul of state appraisal licensing laws. As we pointed out then, the problem is created by the fact that a real estate licensee can, under the applicable statutes, recommend a listing, selling or purchase price “in pursuing a listing agreement or in formulating an offer to acquire real estate.” They cannot, however, give “an opinion as to value on a given date or at a given time” We continue to get calls about whether a particular situation is or is not within one definition or the other. The Real Estate Commission now has issued another statement (see the October ORNJ) about providing BPOs for use in courts or administrative proceedings. This has convinced us that more needs to be said about the subject.

“Competitive Market Analysis” and “BPO” (actually “letter opinion”) are defined in ORS 696.010(8) & (11). Being definitional only, the provisions themselves don’t really prohibit or allow much of anything. According to its statutory definition, “competitive market analysis” means “a method or process used by a real estate licensee in pursuing a listing agreement or in formulating an offer to acquire real estate in a transaction for the sale, lease, lease-option or exchange of real estate.” According to the statute, “The purpose of competitive market analysis is a recommended listing, selling or purchase price or lease or rental consideration.” The analysis “may be expressed as an opinion of the value of the real estate in a contemplated transaction.” The statute goes on to define the “methods or process” as including, but not limited to, “an analysis of market conditions, public records, past transactions and current listings of real estate.”

“Letter opinion,” is defined by ORS 696.010(11) as “a document that expresses a real estate licensee’s conclusion regarding a recommended listing, selling or purchase price or rental or lease consideration of certain real estate and that results from the licensee’s competitive market analysis.” That’s it for the definition. The statute also gives the Real Estate Commissioner the authority to establish by rule the minimum contents of a letter opinion. By statute, the rules must include the distinction between a letter opinion and a real estate appraisal.

The rules promulgated under ORS 696.010(11) are found in OAR 863-10-270. If you are doing letter opinions, you need to know and follow the rules that follow.

“(1) Competitive market analyses and letter opinions may be used by real estate licensees in the normal course of their business where they are giving an opinion in pursuit of a listing, to assist a potential purchaser in formulating an offer or to provide a broker’s price opinion whether or not done for a fee.

“(2) The term ‘value’ as used in a competitive market analysis or letter opinion is the estimated worth of or price for a specific property and is not intended to mean or imply the ‘value’ was arrived at by any method of appraisal.

“(3) A competitive market analysis or letter opinion shall be in writing and shall contain at least the following:

- (a) A statement of purpose and intent;
- (b) A brief description of the property;
- © The basis of reasoning used to reach the conclusion of value including the applicable market data and capitalization computations;
- (d) Any limiting conditions;
- (e) A disclosure of any existing or contemplated interest of the licensee in the subject property;
- (f) The signature of the licensee issuing the competitive market analysis or letter opinion and the date of issuance;
- (g) A disclaimer that, unless the real estate licensee is also licensed by the Appraiser Certification and Licensure Board, the report is not intended to meet the requirements set out in the Uniform Standards of Appraisal Practice; and
- (h) A disclaimer that the competitive market analysis or letter opinion is not intended as an appraisal and that if an appraisal is desired, the services of a competent professional licensed appraiser should be obtained.”

Three things immediately are apparent from reading the rules. First, real estate licensees can do CMAs and BPOs, and get paid for doing so, if done “in the normal course of their business.” (OAR 863-10-270(1)). Second, “value” in a letter opinion means the “estimated worth of or price for a specific property,” not its “appraisal” value. (OAR 863-10-270(2)). Finally, if you do CMAs and BPOs, you have to follow certain content rules. (OAR 863-10-270(3)).

Following the content rules set out in OAR 863-10-270(3) is not just a good idea, it is the key to staying out of trouble with the Real Estate Agency and the Appraiser Certification and Licensure Board. If you have not already done so, you should sit down and develop a standard form letter opinion that makes certain the content rules are met. Here’s what one might look like:

LETTER OPINION BASED ON COMPETITIVE MARKET ANALYSIS

Purpose and Intent

This letter opinion is provided in the normal course of the undersigned real estate licensee’s business and is intended to express only the licensee’s recommended listing, selling or purchase price or a rental or lease consideration for the specific property described below. This letter opinion is made only in pursuit of a listing or to assist a potential buyer in formulating an offer. It has not been made for the purpose of submission as evidence of value to a court or administrative body.

THIS LETTER OPINION IS NOT INTENDED AS AN APPRAISAL.

If an appraisal is desired, the services of a competent professional licensed appraiser should be obtained. The undersigned licensee is not licensed by the Appraisal Certification and Licensure Board and this report is not intended to meet the requirements set out in the Uniform Standards of Appraisal Practice.

Description of the Property

[INSERT BRIEF DESCRIPTION OF SUBJECT PROPERTY]

Basis of Reasoning and Price Conclusion

[EXPLAIN REASONING USING CMA METHODS OR PROCESS. REMEMBER TO EXPRESS THE “VALUE” IN TERMS OF WHAT MIGHT BE OFFERED FOR THE PROPERTY OR WHAT IT MIGHT LIST OR SELL FOR GIVEN THE PRESENT MARKET CONDITIONS.]

Limiting Conditions

Any “value” or price statement in this letter is the estimated worth of or price for the specific property described above and is given only in the context of advising a potential seller or buyer. Such statements are not intended to mean or imply the “value” was arrived at by any method of appraisal. [YOU WILL WANT TO ADD OTHER LIMITATIONS TO THIS PHRASE DEPENDING ON THE PROPERTY AND THE CIRCUMSTANCES.]

Statement of Personal Interest

The undersigned real estate licensee has no existing or contemplated interest in the subject property. [IF THAT IS NOT THE CASE, SAY WHAT THE CASE IS. BUT IT WOULD BE VERY UNWISE TO BE GIVING LETTER OPINIONS AS TO PRICE IN A DEAL WHERE YOU HAVE AN INTEREST IN THE OUTCOME.]

Signature of Licensee

Date

As you can see, developing a standard BPO form can go a long way toward avoiding problems with the Real Estate Agency or the Appraisal Board. For instance, the Real Estate Agency has just reported that several licensees are under scrutiny by the Attorney General’s office and Appraisal Board because they gave opinions of value in a condemnation case. There is nothing you can do about your clients’ use of a letter opinion once issued, but you can protect yourself with clear disclaimers and statements of your intent and purpose. Those who find some of their clients don’t like the disclaimers and limitations contained in the letter, should ask themselves whether that isn’t a clue that what the client might want is a “cheap” appraisal. Your real estate license simply does not allow you to accommodate that need.

Other than having a good letter opinion form (and following it), the best way to protect yourself from a claim that your opinion was given for some purpose other than that allowed by law, is to send, and retain a copy of, a cover letter that explains the real estate sales nature of your relationship with the person requesting the BPO. For instance, a lawyer for an estate might want an opinion of what the property would sell for. A BPO in response would be within the law as long as the opinion is given “in pursuit of a listing.” If the estate might sell the property, then there is every reason for you to pursue a listing. To make the situation clear, simply send the BPO with a cover letter. Such a letter might go something like this:

Dear Estate Lawyer:

In response to your request, please find enclosed my letter opinion and competitive market analysis outlining the price at which we would anticipate listing the property and the range of offers we would expect given current market

conditions. I am providing this analysis in hopes that you will consider our firm's services when the time comes to list the property. As you can see from the professional approach we have taken to your need to understand what the property might be sold for, we here at Great Realty take real estate marketing seriously.

I hope the letter opinion will help you in deciding how best to handle the sale of the property. I can tell you in all honesty you will not find a better company or better agents than those here at Great Realty. Please contact me at your earliest convenience for a listing appointment. Thank you again for considering Great Realty.

That really is all there is to it. Have a letter opinion form that uses the right limitations, disclaimers and content. Do a decent market analysis. Pass on your work with a cover letter that explains the real estate sales context in which the opinion was given. If you can't do that, for instance because you're dealing with a lender in circumstances where no sale is being proposed, or a lawyer fighting a condemnation action, you ought to consider whether your actions are within the rules. If they aren't, no form or cover letter will help you. If, however, there is a potential real estate sale involved, you should be able to use CMAs and BPOs as the real estate service and marketing tools they are intended to be.