

BEFORE THE MARYLAND REAL ESTATE COMMISSION

MARYLAND REAL ESTATE
COMMISSION

*

*

v.

*

CASE NO. 2015-RE-255

STEVE ALLNUT,
Respondent

*

And

*

OAH NO. DLR-REC-24-18-13094

THE CLAIM OF LEE HENDLER
AGAINST THE
MARYLAND REAL ESTATE
GUARANTY FUND

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PROPOSED ORDER

The Findings of Fact, Proposed Conclusions of Law and Recommended Order of the Administrative Law Judge dated January 22, 2019, having been received, read and considered, it is, by the Maryland Real Estate Commission, this 25th day of February, 2019

ORDERED,

A. That the Findings of Fact in the recommended decision be, and hereby are, **ADOPTED;**

B. That the Conclusions of Law in the recommended decision be, and hereby are, **ADOPTED;**

C. That the Recommended Order in the recommended decision be, and hereby is, **AMENDED** as follows:

ORDERED that all real estate licenses held by the Respondent, Steve Allnut, be and hereby are **SUSPENDED** for sixty (60) days;

ORDERED that the Respondent, Steve Allnut, shall be assessed a civil penalty in the

amount of **Seven Thousand Five Hundred Dollars (\$7,500)**, which shall be paid to the Real Estate Commission within thirty (30) days of the date of this Order;

ORDERED that the Claimant, Lee Hendler, be reimbursed from the Maryland Real Estate Guaranty Fund in the amount of **Thirty Three Thousand Three Hundred Forty Nine and Seventy Five Cents (\$33,349.75)**;

ORDERED that all real estate licenses held by the Respondent, Steve Allnut, shall be suspended until the civil penalty is paid in full, and the Maryland Real Estate Guaranty Fund is reimbursed, including any interest that is payable under the law; and

ORDERED that the records and publications of the Maryland Real Estate Commission reflect this decision.

D. Pursuant to Annotated Code of Maryland, State Government Article § 10-220, the Commission finds that the Recommended Decision of the Administrative Law Judge required modification because it omitted the following: (1) a provision that the civil penalty be paid within a specified time period, (2) suspension of all licenses held by the Respondent until the civil penalty is paid, and (3) a provision that all real estate licenses of the Respondent be suspended and may not be reinstated until the amount paid by the Guaranty Fund is repaid in full together with the interest prescribed by law, in accordance with Annotated Code of Maryland, Business Occupations and Professions Article §§ 17-322 and 17-412.

E. Pursuant to Code of Maryland Regulations (COMAR) 09.01.03.09 those parties adversely affected by this Proposed Order shall have twenty (20) days from the postmark date of the Order to file exceptions and request to present arguments on the proposed decision before this Commission. The exceptions should be sent to the Executive Director, Maryland Real Estate Commission, 3rd Floor, 500 North Calvert Street, Baltimore, MD 21202.

MARYLAND STATE REAL ESTATE
COMMISSION

SIGNATURE ON FILE

25 February 2019
Date

By: _____

SIGNATURE ON FILE

2 February 2014
D

MARYLAND REAL ESTATE

* BEFORE MICHAEL D. CARLIS,

COMMISSION

* AN ADMINISTRATIVE LAW JUDGE

v.

* OF THE MARYLAND OFFICE OF

STEVE ALLNUTT,

* ADMINISTRATIVE HEARINGS

RESPONDENT,

*

and

*

IN RE CLAIM OF LEE HENDLER

*

AGAINST THE MARYLAND REAL

* OAH No.: DLR-REC-24-18-13094

ESTATE GUARANTY FUND

* REC CASE No.: 2015-RE-255

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES

SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT

DISCUSSION

PROPOSED CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On or about December 3, 2014, Lee Meyerhoff Hendler (Claimant) filed a Complaint against licensed real estate salesperson Martin Steve Allnutt (Respondent) and a Claim for compensation from the Real Estate Guaranty Fund (Fund) for losses she allegedly sustained as a result of the Respondent's misconduct. The Complaint and Claim arose out of a residential contract of sale entered into by the Claimant on September 11, 2013, for the purchase of 10717 Stevenson Road, Stevenson, Maryland (Property).¹

¹ The contract was fully executed on September 12, 2013. It was amended for the final time on October 9, 2013, with a closing date on or before November 19, 2013.

On April 10, 2018, after an investigation, the Maryland Real Estate Commission (REC or Commission), part of the Department of Labor, Licensing and Regulation (Department), determined that charges against the Respondent were warranted and that the Claimant was entitled to a hearing of her Claim; therefore, the Commission issued a Statement of Charges and Order for Hearing (Statement of Charges) against the Respondent. The Statement of Charges sets forth information about the charges and Claim and alleges the Respondent violated subsections 17-322(b)(4), (25), (32), and (33) of the Business Occupations and Professions Article (Business Occupations Article) of the Annotated Code of Maryland and Code of Maryland Regulations (COMAR) 09.11.02.01C and D and 09.11.02.02A. On April 13, 2018, the Commission forwarded the Statement of Charges to the Office of Administrative Hearings (OAH) to conduct a hearing.

On September 21, October 19, and October 22, 2018, I conducted a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Bus. Occ. & Prof. §§ 17-324(a) and 17-408(a) (2018).² Hope M. Sachs, Assistant Attorney General, Office of the Attorney General, represented the Commission on the charges against the Respondent. Shara Hendler,³ Assistant Attorney General, Office of the Attorney General, represented the Commission on the Claim for compensation from the Fund. The Claimant represented herself. Gerard G. Magrogan, Esquire, Monshower, Miller & Magrogan, LLP, represented the Respondent.

The contested case provisions of the Administrative Procedure Act, the procedures for Administrative Hearings before the Office of the Secretary of the Department, and the Rules of

² This case was initially scheduled for hearing on July 5, 2018. That hearing was postponed at the Respondent's request and rescheduled for August 29, 2018. The August 2018 hearing was also postponed at the Respondent's request.

³ Attorney Hendler and Claimant Hendler are not related.

Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 and Supp. 2018); COMAR 09.01.02; COMAR 09.01.03; and COMAR 28.02.01.

ISSUES

The issues are:

1. Did the Respondent violate the Business Occupations Article, subsections 17-322(b)(4), (25), (32), and (33), and COMAR 09.11.02.01C and D and COMAR 09.11.02.02A when he sold the Property to the Claimant?
2. If the Respondent violated any of the statutory provisions or regulations cited in paragraph 1 above, what is the appropriate sanction?
3. Did the Claimant established a compensable claim against the Fund under section 17-404 of the Business Occupations Article; and, if so, what is the appropriate award?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits that the Commission offered:

- REC Ex. 1: Notice of Hearing, dated June 22, 2018;
- REC Ex. 2: Statement of Charges, dated April 10, 2018;
- REC Ex. 3: The Respondent's licensing history;
- REC Ex. 4: The Commission's Report of Investigation, completed June 30, 2017 (Bates Nos. 1-48), with attachments 1 through 92 (Bates Nos. 49-376);
- REC Ex. 5: Flash Drive containing a narrated video of the Property;
- REC Ex. 6: Residential Contract of Sale, from the Porters to Lanall Renovations LLC, dated January 17, 2013;
- REC Ex. 7: Vision Tech Home Inspections, Inc., report, dated September 19, 2013;

REC Ex. 8(a-t): Photographs of the Property; and

REC Ex. 9: Howard County Renovations Invoice, dated September 24, 2013.

I admitted the following exhibits that the Respondent offered:

Respondent Ex. 1(a-n): Photographs of the Property.

I admitted the following exhibits that the Claimant offered:

Claimant Ex. 1: Summary of payments to remediate water overflow;

Claimant Ex. 2: Proposal from R. Noguera, undated;

Claimant Ex. 3: Invoices from DS Thaler & Associates, Inc., dated in February, March, May, June, and September 2014;

Claimant Ex. 4: Invoices from Little & Associates, Inc., dated May-August 2015, and one check, dated July 7, 2015;

Claimant Ex. 5: Invoices from Daft-McCune-Walker, Inc., dated in May-June 2016;

Claimant Ex. 6: Invoices from R. Noguera, dated December 2017; and

Claimant Ex. 7: Invoice from Schussler's Brooke Valley Farm Nursery, LLC, dated May 6, 2014.

The Fund did not offer any exhibits for inclusion in the record.

Testimony

Susan Marsh Porter, the former homeowner who sold the Property to the Respondent; the Claimant; and Noah Thomas Mumaw, the Claimant's real estate agent during her purchase of the Property, testified for the Commission.

The Claimant testified for herself.

Michael Langrill, former owner of Leg Work, Inc.; Diane Carson, the Commission's investigator; the Respondent; and Daniel Graybeal, currently construction manager for S & R Commercial, Inc., testified for the Respondent.

The Fund did not present any witnesses.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. Larry and Susan Porter sold the Property to Lanall Renovations LLC (Lanall) on or about April 8, 2013, in a short sale. Lanall is in the business of purchasing, arranging for renovation, and selling residential properties. The Respondent is the sole member of Lanall. The Commission has licensed him as a real estate salesperson since May 1989.

2. The Property is situated on 1.8 acres of land. The house has four bedrooms, four bathrooms, and a detached garage. The Porters' listing of the Property described the acreage as "marshy."

3. Beginning sometime in July 2011, the Property began to flood during significant periods of rainfall. The Porters' attributed the flooding to the owners of a property across the street clearing undeveloped land for subsequent development and in the process opening a culvert that diverted rainfall onto the Property. Prior to this development, the Property did not flood.

4. The Respondent and Mr. Langrill visited the Property to decide whether to purchase it. The date of this visit is not clear from the record. During the visit, Ms. Porter showed them a video on her cellular phone that depicted the flooding of the Property after a heavy rain. The video shows extensive flooding of the Property with large areas of ponding and pooling of rainwater, especially in the back yard.

5. Lanall hired Leg Work, Inc., (Leg Work) to renovate the Property. The renovation occurred from April to November 2013 to "make the Property more presentable and nice." At the time, Mr. Langrill was the "100% owner" of Leg Work. The renovations included, among other things, unclogging and cleaning all gutters, downspouts, and drains; replacing garage doors that had been damaged by water; demolishing and removing an in-ground pool; and cleaning a

gully⁴ on the northern edge of the property, extending it beyond the garage, and lining it with river rock.

6. On October 9, 2013, Lanall sold the Property to the Claimant for \$1,240,000.00.⁵ Prior to this, the Claimant had Vision Tech Home Inspections, Inc., (Vision Tech) inspect the Property on September 19, 2013. Among other things, Vision Tech identified the following: signs of dampness in the crawl space, water stains on the front wall in the laundry room, and condensation and wet soil under stairs in the basement. The inspection report recommended keeping exterior drains clean and clear, improving grading, and monitoring two culverts.

7. Before the Claimant was fully moved into the Property, her mover contacted her to report the Property was flooding from water gushing onto the grounds and pooling on various parts of the Property. Prior to this, the Claimant had no knowledge that significant rains caused the Property to flood. Since the Claimant's move into the Property, significant rainfall results in large amounts of rainwater flowing onto the Property, causing ponding and pooling of water over large areas of the yard. The ponding and pooling sometimes lasts for days.

8. The Claimant hired DSThaller & Associates, Inc., (Thaler) to assess the water problem and provide a proposal for remediation. She paid \$10,176.34 to Thaler for the assessment and plan development it performed in February, March, May, June, and September 2014. The Claimant ultimately rejected Thaler's proposal for remediation.

9. The Claimant hired Little & Associates, Inc., (Little) to assess the water problem and provide a proposal for remediation. She paid \$2,767.07 to Little for the assessment and plan development it performed from May-June 2015. The Claimant ultimately rejected Little's proposal for remediation.

⁴ During the hearing, the gully was often referred to as a swale.

⁵ The initial contract for sale was executed on September 12, 2013. After the Claimant's home inspection, the parties renegotiated the sale price, and the final contract was fully executed on October 9, 2013.

10. The Claimant hired Daft-McCune-Walker, Inc., (Daft) to assess the water problem and develop a plan for remediation. She paid \$1,230.50 to Daft for the assessment and plan development it performed in May 2016. The Claimant ultimately rejected Daft's proposal for remediation.

11. The Claimant rejected the proposals for remediation provided by Thaler, Little, and Daft because they were too expensive, required cooperation from a neighbor who refused to cooperate, or were both too expensive and required a neighbor's cooperation. In addition, Little's proposal intruded into the septic system.

12. In or around May 2014, the Claimant paid \$2,525.00 to Schussler's Brooke Valley Farm Nursery, Inc., (Schussler's) for lawn remediation it performed at the Property in May 2014. The Claimant had planned a double wedding to take place at the Property. Just prior to the wedding, a significant rainstorm inundated the Property with rain water, causing a soggy mess in the front and back yards. Schussler's work included laying topsoil on the affected areas and seeding, fertilizing, and mulching those areas.

13. In December 2017, the Claimant paid \$1,735.40 to Rudy Noguera to continue the gully on the left side of the Property to the Norway spruce at the end of the back of the property. The purpose of the extension was to remediate the ponding of the rain water at the back area of the Property. The extension did not prevent the flooding and ponding of water.

14. On a date that is not clear in the record, Mr. Noguera has submitted a rain garden proposal to the Claimant for the purpose of eliminating the pooling or ponding of water in the back of the yard. This proposal calls for the building of three "ponds" in which a variety of plants with root systems that rapidly absorb water are planted to absorb the rainwater that is diverted into them. The cost to install the rain gardens is \$14,214.58.

15. The Commission has never disciplined the Respondent or imposed a monetary penalty on him.

16. The Claimant is not the spouse of the Respondent or the personal representative of the spouse of the Respondent.

DISCUSSION

The Legal Context

The Charges against the Respondent

The Commission charged the Respondent with violating subsections 17-322(b)(4), (25), (32), and (33) of the Business Occupations Article and COMAR 09.11.02.01C and D and COMAR 09.11.02.02A. Section 17-322 of the Business Occupations Article provides, in pertinent part:

(b) Subject to the hearing provisions of § 17-324 of this subtitle, the Commission may deny a license to any applicant, reprimand any licensee, or suspend or revoke a license if the applicant or licensee:

...

(4) intentionally or negligently fails to disclose to any person with whom the applicant or licensee deals a material fact that the licensee knows or should know and that relates to the property with which the licensee or applicant deals;

...

(25) engages in conduct that demonstrates bad faith, incompetency, or untrustworthiness or that constitutes dishonest, fraudulent, or improper dealings;

...

(32) violates any other provision of this title; [or]

(33) violates any regulation adopted under this title or any provision of the code of ethics[.]

...

(c) Instead of or in addition to reprimanding a licensee or suspending or revoking a license under this section, the Commission may impose a penalty not exceeding \$5,000 for each violation.

COMAR 09.11.02.01 provides in pertinent part:

...

- C. The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate in the community any practices which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission charged with regulating the practices of brokers, associate brokers, and salespersons in this State.
- D. The licensee shall make a reasonable effort to ascertain all material facts concerning every property for which the licensee accepts the agency, in order to fulfill the obligation to avoid error, exaggeration, misrepresentation, or concealment of material facts.

COMAR 09.11.02.02 provides in pertinent part:

- A. In accepting employment as an agent, the licensee shall protect and promote the interest of the client. This obligation of absolute fidelity to the client's interest is primary, but it does not relieve the licensee from the statutory obligations towards the other parties to the transaction.

The Claim for Compensation from the Fund

Section 17-404 of the Business Occupations Article governs claims brought against the Fund and sets forth the following requirements that must be established by a claimant to obtain an award:

- (a) *In general.* — (1) Subject to the provisions of this subtitle, a person may recover compensation from the Guaranty Fund for an actual loss.
 - (2) A claim shall:
 - (i) be based on an act or omission that occurs in the provision of real estate brokerage services by:
 - 1. a licensed real estate broker;
 - 2. a licensed associate real estate broker;
 - 3. a licensed real estate salesperson; or
 - 4. an unlicensed employee of a licensed real estate broker;
 - (ii) involve a transaction that relates to real estate that is located in the State; and
 - (iii) be based on an act or omission:
 - 1. in which money or property is obtained from a person by theft, embezzlement, false pretenses, or forgery; or
 - 2. that constitutes fraud or misrepresentation.
- (b) *Limitation on recovery.* — The amount recovered for any claim against the Guaranty Fund may not exceed \$50,000 for each claim.

With respect to claims against the Fund, COMAR 09.11.01.14 states:

The amount of compensation recoverable by a claimant from the Real Estate Guaranty Fund . . . shall be restricted to the actual monetary loss incurred by the claimant, but may not include monetary losses other than the monetary loss from the originating transaction. Actual monetary losses may not include commissions owed to a licensee of this Commission acting in the licensee's capacity as either a principal or agent in a real estate transaction, or any attorney's fees the claimant may incur in pursuing or perfecting the claim against the guaranty fund.

Summary of the Testimony

The Commission's and Claimant's witnesses

Ms. Porter and her husband owned the Property from July 1999 until they sold it in 2013 to Lanall.⁶ Ms. Porter testified about a "water problem" at the Property that began in July 2011, when neighbors across the street cleared property to sell for development. Before that, according to Ms. Porter, the undeveloped property was "like a swamp" or a "holding pond." Ms. Porter testified that during the clearing process, a "drain" was opened, causing a "constant [water] run-off" onto the Property, which leaked into their basement, ruined their garage doors, caused "condensation" in their house, and rendered their in-ground pool unusable.⁷

Ms. Porter testified that the MRIS [Metropolitan Regional Information Service] listing of the Property in April 2013 described it as "marshy." See also REC Ex. 4 at page 350. Ms. Porter also testified that she met the Respondent and Mr. Langrill at the Property when they came to view it. She "absolutely" recalled discussing the water issue with them and showing them a video of the water problem that she took in September 2012 from her cellular phone.

⁶ The Residential Contract for Sale, and related documents, shows the Porters sold the property in a "short sale" to Lanall on April 9, 2013, for \$850,000.00. The settlement date was May 15, 2013. The Respondent is the sole member of Lanall, which is in the business of "flipping" residential properties. The Respondent described his role in Lanall as identifying properties, purchasing them, and selling them.

⁷ The record contains a "timeline" of the water issue. The timeline indicates that the company that cleared the property next to the Porters "opened a culvert allowing a path for all the water, mud and any debris to come thru the culvert onto our property." REC Ex. 4 at page 103. Although unsigned and undated, the record makes clear that either Ms. Porter drafted the timeline or someone else did based on Ms. Porter's statements.

Ms. Porter testified that she took the video to show to prospective buyers because she thought such disclosure was “prudent” to protect them as sellers. The video shows what the Property looked like after a “heavy” rain before Lanall’s purchase. It shows extensive and significant flooding, with accumulated water throughout much of the grounds. Ms. Porter also testified that even small rains resulted in “so much water.” She testified the Respondent did not say anything “remarkable” in response to seeing the video, except to call Mr. Langrill the “water guru.”

Ms. Porter addressed some of the content of the Maryland Residential Property Disclosure and Disclaimer Statement (D&D Statement) she signed related to the sale of the Property. Ms. Porter checked “yes” to the following inquiries:

Exterior Drainage: Does water stand on the property for more than 24 hours after a heavy rain? Yes No Unknown

Are there any other materials defects including latent defects, affecting the physical condition of the property? Yes No Unknown

REC Ex. 6 at page 20. Ms. Porter also testified she wrote the following “comment” to the second inquiry: “See enclosed contractors [sic] estimate[.]”⁸

The Claimant testified she viewed the Property twice before the purchase, at least once with her real estate agent, Mr. Mumaw. She offered to purchase the Property on September 11, 2013, and settlement occurred a “little earlier” than November 19, 2013. The initial purchase price was \$1,275,000.00. The final sale price was \$1,240,000.00, based on negotiations following the results from the pre-sale inspection of the Property. The contract for sale lists Lanall as the seller; the Respondent signed the contract as the “seller” above “Lanall Renovations LLC.” The parties also signed a D&D Statement, which is blank, except for the

⁸ The enclosure is an estimate from Turf Center Lawns, Inc., for work to remediate the water problem for \$13,300.00. Ms. Porter testified she “assumed” the estimate was made part of the D&D Statement.

following: "The owner(s) has actual knowledge of the following latent defects: "NONE." REC Ex. 4 at page 80.

Vision Tech Home Inspections, Inc., inspected the Property for the Claimant on September 19, 2013. It reported "some" signs of water damage, no "observed" signs of abnormal condensation, and no major structural defects. The report also lists the following observations: "signs" of crawl space dampness, water stains on a wall in the laundry room, a "musty" smell in the basement, and "some signs" of moisture stains in the attic wall. The report recommends: "[i]mprove grading and monitor crawl space." In regard to the Property's grounds, the report advises "keep drains clean/clear," monitor two culverts, and improve grading. The report also contains the following "remarks":

- Improve grading and monitor crawl space
- Keep right side crawl space access floor drain clean
- Improve grading at rear house crawl space area
- Recommend improving culvert water drainage at left side house past garage as discussed
- Improve grading at rear garage & and connect downspout extensions.

REC Ex. 7.

The Claimant testified that she had no knowledge of a water problem or flooding at the Property prior to settlement. She testified she learned of the problem in early December 2013, during her move into the Property, while she was at her prior residence. According to the Claimant's testimony, her mover telephoned her, telling her "a river was running behind the garage and the whole back yard flooded." When she arrived at the Property, she saw "a massive river running behind the back of the garage and the entire back yard was flooding. It was like nothing that I had ever seen before or imagined." The Claimant testified the yard looked like what was shown in the video, and it stayed that way for five days. According to the Claimant,

her yard floods “over and over and over again” after “major rain event[s]” or “a ten-minute hard rain.”⁹ When asked what she would have done differently if she had known about the water problem prior to the purchase of the Property, the Claimant said she would have “insisted on engaging an engineer.”

According to the Claimant’s testimony, the flooding causes three problems. First, it is a “tremendous nuisance” and causes much “anxiety” because she does not know whether during any rain the gully along the upper north property line will contain the water flow or, if not, what the extent of the flooding will be. She testified another nuisance is what happens with her dogs, who “love” to play outside in the yard which frequently is flooded and muddy and then they run through the house. Second, the flooding is causing damage to her Norway spruces that form a natural privacy boundary along the northern border of the Property. The Claimant testified standing water has caused the death of two spruces, resulting in gaps in the “wonderful privacy boundary,” and two pine trees on the eastern boundary of the Property. Finally, the Claimant testified the “most important” problem is that the flooding leaves about one-third of her property unusable, and because the water pools or ponds, does not drain for days, and afterwards leaves a boggy area creating a “serious health hazard” because it becomes a “mosquito breeding ground.”

The Claimant also testified that Charlie Andrews¹⁰ told her he had spoken to the Respondent about working together to address the water problem on the Property before Lanall sold the Property to the Claimant. The Claimant also testified that Wayne Shorb, from the County, told her another County employee, nicknamed “Beets,” had talked to the Respondent or Mr. Langrill about “opening up a southern outlet on the Property” as a way to manage the water problem and that whomever he spoke to said, “No way.”

⁹ The Claimant supported her testimony with twenty photographs, most of which depict extensive flooding on April 30, 2014, March 30, 2014, May 16, 2014, July 2014, December 14, 2014, and September 9, 2018. One photograph is not dated.

¹⁰ Mr. Andrews is the Claimant’s neighbor who built the house on the land that was cleared across the street from the Claimant’s.

The Claimant testified the water problem was “beyond anything that I’ve ever experienced as a homeowner” and “appalling.” She described it as “terrible” and as if there is “a river behind my garage and a lake in my back yard.” According to the Claimant, she was at the local post office, and the postmistress introduced her to Ms. Porter. Before that chance encounter, the Claimant testified she had never before met Ms. Porter. The Claimant testified Ms. Porter told her that she (Ms. Porter) told the Respondent about the water problem and showed him a video of it before he purchased the Property.

The Claimant testified that she spent about 250 hours researching, meeting with experts, hiring engineers, documenting, learning her options, and talking to attorneys to find a solution to the water problem. She also testified she hired the following three engineering firms to provide proposals to correct the problem: (i) Thaler,¹¹ (ii) Little,¹² and (iii) Daft.¹³ The Claimant testified that she paid those firms for only their proposals. She testified for different reasons — for example, the high cost of the proposed solution and the neighbors’ refusal to cooperate which was required because proposals could affect their property — she did not hire any firm to implement its proposal. The Claimant testified she paid \$10,176.34 to Thaler, \$2,767.07 to Little, and \$1,930.50 to Daft.

In addition, the Claimant testified she paid two contractors for work to either remediate or correct the water problem. The Claimant testified she paid \$1,736.36 to Rudy Noguera (Noguera) to extend a gully on the north side of the Property from the end of her stand-alone garage to the end of her property and line the gully with rock in an unsuccessful attempt to prevent further flooding.¹⁴ The Claimant also testified that she paid \$2,525.00 to Schussler’s to

¹¹ Claimant 3 consists of invoices from Thaler from February, March, May, June, and September 2014 for a total of \$10,176.34.

¹² Claimant 4 consists of invoices from Little from May-September 2015 for a total of \$2,767.07 and a canceled check from the Claimant to Little on July 7, 2015, for \$1,460.01.

¹³ Claimant 5 consists of invoices from Daft from May-June 2016 for a total of \$1,930.50.

¹⁴ Claimant 6 consists of invoices from Noguera in December 2017 for \$1,736.36 for work on the gully.

remediate lawn damage, especially to the back lawn that had flooded after a storm in April 2014.¹⁵ The Claimant testified a double wedding had been planned in her back yard, and the storm had caused a “mud pit.” According to the Claimant’s testimony, Schussler’s reseeded and performed other yard work “to fix up [the lawn] as best as we could” for the wedding. According to the Claimant, a rain storm a few days later “washed away” that work and Schussler’s did it again.¹⁶

The Claimant also testified that she obtained a proposal from Noguera to install rain gardens in her back yard for \$14,214.58 to remediate the flooding. The Claimant described the rain gardens as a storm water management technique that uses specific plants with root systems that efficiently absorb standing water. The Claimant testified the standing water in that area does not drain for days and has killed two of her fifty-year old Norway spruces on the north side and two pine trees on the east side of the Property.

In addition to the above, the Claimant requested \$15,000.00 for a “tree fund” to use to replace the spruce and pine trees that are dying because of the standing water. She also testified that she seeks \$5,000.00 as an “ongoing” remedial fund to “deal with” mosquitoes that flourish in her backyard and pose a significant health hazard.

Mr. Mumaw was the Claimant’s real estate agent during the purchase of the Property. He testified he and the Claimant visited the Property two or three times. Mr. Mumaw testified he spoke by telephone to the Respondent about why rocks had been placed on the side of the Property and whether there were any “water issues.” According to Mr. Mumaw, the Respondent said the landscaper (during Lanall’s renovation) put the rocks down, and he was not aware of any water problems.

¹⁵ Claimant 7 is an invoice from Schussler’s for \$2,525.00 for yard work.

¹⁶ The Claimant testified she fully moved into the Property in the beginning of November 2013. She testified that at the time of settlement and when she moved in, the grass in the back yard was “adequate.”

The following is what the Commission reported Mr. Mumaw said related to the rocks during his interview:

There was an entire area of new rocks on the side of the [P]roperty. And, it appeared that water had never run through them. Mr. Mumaw remembers asking [the Respondent] what the rocks were for. He responded saying water management purposes and we put the rocks in and this took care of it. Mr. Mumaw commented that there was no way to test for the effectiveness of the rocks because he remembers it was very dry and they had not had any significant rainfall at that time.¹⁷

REC Ex. 4 at page 27.

Mr. Mumaw specifically denied the Respondent disclosed flooding, a water problem, or that a water problem had been fixed to him at any time prior to the Claimant's purchase of the Property.

The Respondent's Case

Mr. Langrill testified he was the sole owner of Leg Work at the time of this incident.¹⁸ He agreed it "sounds right" that Leg Work did "rehabbing" work on the Property for the Respondent from April 2013 to November 2013. Mr. Langrill also testified that he personally did some work "just about every day" he was there and that when he was there, it sometimes was fifteen minutes and sometimes eight hours.

Mr. Langrill testified about the work done to the Property. He testified the clogged drain at the front of the free-standing garage had caused water seepage into the garage and damaged the doors. According to Mr. Langrill, the garage doors were replaced, and the drain was cleared to allow water to run away from the garage into the gully on the left side of the Property. He

¹⁷ Mr. Mumaw testified he did not remember telling Ms. Carson that the Respondent said the rocks were used for water management and that they "took care of it." He also specifically denied he told Ms. Carson that it looked like there might have been a water problem at the Property. Ms. Carson's report also indicates Mr. Mumaw said: "I engaged Mr. Mumaw in a discussion regarding the water problem. He stated that when they examined the [P]roperty it looked like there may have been a water problem; however, it appeared that the seller had taken care of it." REC Ex. 4 at page 27. Mr. Mumaw did not remember that and testified that Ms. Carson had asked him about the purpose of the rocks and he said rocks are typically used for water management.

¹⁸ At the time of his testimony, Mr. Langrill worked for H & E Equipment Services as an outside sales representative.

also testified the gully was cleared of debris, "dug out," extended past the garage, and lined with river rock. In addition, Mr. Langrill testified there was a "cut-out" line at the bottom of a basement wall indicating a past water issue. According to Mr. Langrill, the house's gutters and down spots were full of debris, with grass growing out of the gutters, requiring Leg Work to clear them and restore them to effectiveness. Mr. Langrill testified Leg Work also regraded some of the ground near the foundation so that water ran away from the house.¹⁹

In regard to rainfall during the time Leg Work was at the Property, Mr. Langrill testified he could not recall the weather conditions "100%" but "I know we had rains there and I know we had some good rains." He specifically testified that he saw no flooding, moving water, pooling or ponding, standing water, or a marsh on the Property; he saw "moving water" in the gully.

Mr. Langrill testified that Ms. Porter never showed him a video of flooding on the Property.²⁰ He testified he would have remembered the video if he had seen it, and he testified he saw "nothing like that" at the Property from April to November 2013. Mr. Langrill also testified Ms. Porter was at the Property "sometimes" when he was there, but he never spoke to her. Mr. Langrill testified there had been a "very big rainstorm" while they were working on the Property.

Mr. Langrill testified the in-ground pool at the Property was removed and an excavator was used to back-fill the area. According to Mr. Langrill, the excavator and other heavy equipment were used at the Property "quite a few times" during renovation. He testified none of the equipment ever sank into moist ground or got stuck in mud during the renovation.

Mr. Langrill recalled that someone spoke to him "near the end of the project" about diverting water from a property across the street onto the Property. He recalled a significant rain

¹⁹ The record includes an invoice from Howard County Renovations, described by Mr. Langrill as "a subsidiary" of Leg Work. Mr. Langrill described the invoice as an estimate of the cost of remodeling the Property. The estimate is for \$296,090.00.

²⁰ Prior to the hearing, counsel for the Respondent sent Mr. Langrill a copy of the video shown at the hearing. Mr. Langrill acknowledged the video showed extensive flooding at the Property.

storm resulted in “an enormous amount” of pooling water on that property, which was running off onto two other properties that also were across the street. According to Mr. Langrill, the Property was unaffected. Mr. Langrill testified several individuals, including some from the County, were across the street, and one person, whose name Mr. Langrill could not recall, asked him about installing a pipe at one of the other properties to divert water from there to the back yard area of the Property. He told them “no way.”

Mr. Langrill testified he knew of a culvert that runs under Stevenson Road and drains in the direction of the Property. He testified: “I think that’s the biggest source of the water coming thru to the Property as opposed to rainfall that sits up on a higher side and comes out on the neighbor’s property, I believe.”

Mr. Langrill also testified he has no ownership interest in Lanall, was never an employee of the Respondent or Lanall, and the only common interest he ever had with the Respondent was that they had at one time owned a rental house.²¹

Ms. Carson investigated the complaint against the Respondent. During a fifteen-month period, she interviewed the Claimant at the Property on May 10, 2016; July 29, 2016; and May 12, 2017. In addition, she interviewed Mr. Mumaw on November 1, 2016; Scott Miller, the Porters’ real estate agent during the sale of the Property to Lanall, on November 23, 2016, and May 22, 2017; Ms. Porter on May 31, 2017; and the Respondent on November 16, 2016. Ms. Carson could not remember whether it was raining during her three visits to the Property or whether she saw flooding at the Property. Ms. Carson testified what she wrote in her report is what she was told by the interviewees.

²¹ The record includes a signed statement from Mr. Langrill, dated January 27, 2015. In the statement, Mr. Langrill indicates Lanall and Leg Work “jointly considered the economic viability of purchase and resale of the Property, the scope and nature of repairs and renovation needed upgrades to be incorporated into the Property and the like.” REC Ex. 4 at page 353. He also states that during the seven-month renovation period from April to November 2013, he recollected “normal rainfall” that did not cause “any unusual flooding, inundation, runoff or ponding of water at [the Property] during or after any rain event.” *Id.*

The Respondent testified he has never been disciplined during his twenty-nine years of licensure by the Commission. He testified he has never referred to Mr. Langrill as a “water guru” or seen the video that was shown at the hearing before he had received a copy from his counsel in September 2018. He testified that he would not have purchased the Property from the Porters had he seen the video. The Respondent denied he ever spoke to or saw Mr. Andrews. He testified he did not see any disclaimer/disclosure statement from the Porters before he purchased the Property, and he could not recall whether he asked to see one. The Respondent testified that he saw the listing for the Property, acknowledged it describes the Property as “marshy,” but he testified he did not recall seeing that description, explaining “I didn’t scrutinize it [the listing].”

The Respondent testified he was aware of several water-related problems with the Property before Lanall purchased it from the Porters. He knew there was water damage to the garage doors. He could see that the gutters on the house “literally had tress growing out of them” and “vines in the fireplace that had infiltrated into the attic.” The Respondent also testified that the house was “in disrepair” and there was some water damage in the basement from water “dripping down through the gutters into the foundation.”

The Respondent testified he spoke to Mr. Miller about “water issues”; he denied Mr. Miller told him anything about flooding, standing, or pooling water on the Property. The Respondent testified he was at the Property between April and November 2013 about once every two weeks. He specifically denied seeing or being told about any water issues or health-related problems. In regard to the work done to the gully on the northern end of the Property, the Respondent testified that when he purchased the Property, the “ditch . . . looked like crap.” He testified the Property was at the bottom of a hill, and he assumed water flowed into the gully.

The Respondent also testified he was aware of a culvert that opened near the north property line of the Property. He testified that after he had received a demand letter from the Claimant's attorney,²² he went to the Property "to understand where this is coming from" and saw that a second culvert at the northern boundary of the property had been constructed. The Respondent testified that while Lanall was renovating the Property, there was ongoing construction across the street where a house was being built. At the time of the renovation, the driveway at that property had not been built, and the Respondent thought the porous land had absorbed rain water before it had been paved over. When the Respondent returned to the Property, the driveway was finished, and he speculated the second culvert had been constructed to divert water away from that property and into the gully on the Property.

The Respondent testified the removal of the in-ground pool at the Property was not done to gather water runoff and hide the flooding issue. He testified the pool was old, in bad shape, outdated, and "served no purpose" and "would only hurt us on the resale." The Respondent testified the pool was removed, back-filled, and reseeded solely on a cost-benefit assessment.²³

Mr. Graybeal is currently employed by S&R Commercial, Inc. At the time relevant to this matter, he testified he was the project manager for Leg Work. He testified he oversaw the renovation of the Property by making sure the workmen did what they were supposed to do. He testified he was at the Property "mostly . . . every day." It was unclear whether he was there every day from April through November or he was there most days on which renovation took place.

Mr. Graybeal testified heavy equipment was used during the renovation. He testified none of the equipment ever sank into the ground or got stuck in mud. Mr. Graybeal testified

²² The record includes a demand letter from the Claimant's attorney that is dated April 2, 2014.

²³ The Respondent testified that Howard Bank gave Lanall 100 percent financing for the purchase of the Property and a credit line for necessary renovations. He called that arrangement "unheard of" and considered there was no risk to him from the purchase because he knew that the renovated property would allow him to "at least break even."

“cosmetic changes” were made to the gully; it was cleared and anti-weed fabric and rocks were added.

Mr. Graybeal testified that he could not recall, but “it probably rained some” during the renovation. He specifically denied that he saw or was told about any moving water traversing the Property or any pooling, ponding, or standing water on the Property.

Mr. Graybeal’s memory of the events was poor, but he did recall that the gutters and downspouts were “really clogged.” When asked about whether he perceived any direct threats while at the Property, he recalled seeing a snake.

Analysis

The Charges against the Respondent

The Commission bears the burden of establishing, by a preponderance of the evidence, that the Respondent committed the statutory and regulatory violations alleged in the Statement of Charges. COMAR 09.01.02.16A. To prove something by a “preponderance of the evidence” means “to prove that something is more likely so than not so[,]” when all of the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002).

The Respondent has been charged with violations of subsections 17-322(b)(4), (25), (32), and (33) of the Business Occupations and Professions Article. The Respondent also has been charged with the violations of COMAR 09.11.02.01C, D and COMAR 09.11.02.02A.

Some material and significant background facts are not disputed. The Porters owned the Property before they sold it to Lanall for \$850,000.00 on or about April 9, 2013. Lanall is solely owned by the Respondent who, at all times relevant to this case, was, and is, licensed as a real estate salesperson affiliated with Re/Max Advantage Realty. Lanall is in the business of purchasing distressed properties, arranging for all necessary renovations, and reselling the properties for a profit. On or about September 12, 2013, Lanall sold the Property to the

Claimant for \$1,240,000.00. The disputed material fact is whether the Respondent knew the Property flooded and retained pooling water after significant rainfalls and withheld that information from the Claimant before the sale of the Property to her.

The Commission presented the testimony of Ms. Porter and the Claimant to support its allegation that the Respondent knew of the flooding issue before his sale of the Property to the Claimant. Ms. Porter testified she showed a video of the flooded Property to the Respondent and Mr. Langrill when they visited the Property. Ms. Porter was “absolutely” certain she discussed the water problem with, and showed the video to, them. The video depicted extensive and severe ponding and pooling of water on the Property after a “heavy rain” in September 2012.

The Claimant testified that her mover telephoned her while she was at her former residence managing the move to the Property and reported “a river was running behind the garage and the whole back yard flooded.” She testified that upon her arrival at the Property, there was a “massive river” and the “entire back yard . . . flood[ing] . . . was like nothing that I had seen before or imagined.” She testified the Property looks like what was depicted in the video after “a major rain event” or a “ten minute hard rain.” The Claimant also submitted photographs depicting water inundation at the Property in March, April, May, and July 2014, and September 2018. The photographs depict excessive water ponding and pooling on the Property.

The Respondent counters the Commission’s evidence through his testimony and the testimony of Mr. Langrill and Mr. Graybeal. Ms. Porter testified she showed the video to Mr. Langrill when he and the Respondent visited the Property before Lanall purchased the Property on or about May 15, 2013.²⁴ Mr. Langrill indicated the Respondent’s attorney sent him a copy of the video before the hearing. Mr. Langrill testified Ms. Porter did not show him the video.

²⁴ The record shows this was the settlement date.

At the hearing, there was no dispute that the renovation of the Property took place between April and November 2013. However, the record is not clear how often actual renovation work occurred during that period. Mr. Langrill testified he did some renovation every day he was at the Property, and he testified he was there sometimes for fifteen minutes and sometimes for eight hours. He did not testify actual renovation work took place every day or every weekday from April to November. He denied ever seeing flooding; moving water, except in the gully; pooling or ponding of water; or a marsh, swamp, or bog on the Property. Mr. Langrill testified that once after a "significant rain storm," he saw "a massive amount of pooling [of water]" on the property across the street, but he testified the Property "was fine."

The Respondent also indicated his attorney sent him a copy of the September video that was shown during the hearing. The Respondent testified Ms. Porter did not show him the video. He testified had he been shown the video, he would not have purchased the Property because the circumstances [of the video] were "extreme" and he would not "want to assume the liability." In addition, the Respondent testified he visited the Property "maybe" once every other week from April to November 2013. He denied he saw any water issues at the Property and specifically denied seeing anything like a marsh, swamp, or bog. He acknowledged he saw "wet land" across the street from the Property. The Respondent testified he was at the Property maybe once every two weeks. The Respondent also denied he had ever talked to Mr. Andrews about any water issues at the Property or to anyone else.

Mr. Graybeal was the project manager for Leg Work during the renovations on the Property from April to November 2013. He testified that he was there "almost every day."²⁵ When asked whether it rained at all during the renovation, he could not recall but added it

²⁵ It is not clear from the record that renovation took place every day during that period. It was also not clear to me that this testimony meant he was at the Property almost every day during that period or that he was at the Property almost every day there was remodeling work being done.

“probably did some.” He denied that he saw any water traversing the Property or pooling, ponding, or standing water on the Property, and denied that anyone had brought such things to his attention. Mr. Graybeal also denied seeing a marsh, a swamp, wet lands, or cattails growing on the Property.

Arguments of the Parties

The Commission and Claimant

The Commission argued that “compelling” evidence supports finding the Respondent had actual knowledge of the water problem at the Property. First, the Commission argued Ms. Porter testified she showed the video to the Respondent and Mr. Langrill, and the video showed an “incredible amount of rain water rushing onto the Property.” The Commission pointed out that Ms. Porter testified she took the video after a steady rain and testified the flooding of the Property also happened on a regular basis. According to the Commission, the video proves the Respondent’s prior knowledge of regular flooding of the Property before purchase and “makes clear” he prevaricated when he testified he did not see any flooding during renovation because how could there be flooding before the purchase of the Property, no flooding at all during the seven months period of renovation, and then regular flooding only after the Claimant moved into the Property.

Second, the Commission argued that the Respondent had prior knowledge of the water problem because the Porters’ D&D Statement identified the Property as “marshy.” The Commission attacked the Respondent’s denial of having seen the disclosure as incredible because he has been licensed as a real estate sales agent for twenty-nine years and knows about the seller’s obligation to provide such disclosures under section 10-702 of the Real Property Article.

Third, the Commission argued the Respondent had knowledge of the water problem because Mr. Andrews and Mr. Shorb said the Respondent had been told about it. The Commission pointed to the Claimant's testimony that Mr. Andrews had told her that he talked to the Respondent twice before he (the Respondent) bought the Property and at least one of those times, he (Mr. Andrews) specifically said they talked about working together to address the water problem. The Commission also pointed out that the Claimant testified that Mr. Shorb had told her that "Beets" talked to either the Respondent or Mr. Langrill about strategically installing a pipe to ameliorate the water problem on the Property.

Finally, the Commission argued the Respondent was not credible because he was a serial denier: he denied he saw the video; he denied ever talking to Mr. Andrews; he denied having a conversation with "Beets" or anyone from the County, and he denied Mr. Mumaw inquired of him whether the river rock in the gully was related to a water issue.

The Respondent

The Respondent argued the record contains no proof that Mr. Andrews spoke to the Respondent about any water problems on the Property. He emphasized that the Commission's report of its investigation of the complaint in which the Claimant reported only that she "was pretty sure" such a conversation took place. The Respondent also pointed out that the investigator never spoke to Mr. Andrews during her investigation.

The Respondent argued Ms. Porter was not a credible witness for a number of reasons. First, the Respondent contended Ms. Porter made "self-contradictory" statements about the video. The Respondent explained a letter from Ms. Porter to the Claimant, dated November 19, 2014, states that Ms. Porter showed a video from July 2011 to the Respondent and Mr. Langrill; however, Ms. Porter identified the video shown at the hearing as having been taken in September 2012. The Respondent argued Ms. Porter testified the July 2011 video was "conveniently" lost

when her phone dropped into water and had to be replaced. The Respondent added that Mr. Langrill also testified he had not seen the video, and he had no incentive to commit perjury.

Second, the Respondent argued Ms. Porter should not be believed because she “embellish[ed]” her testimony. The Respondent pointed out that Ms. Porter testified the Respondent had responded to the video by saying he was not concerned because Mr. Langrill is a “water guru.” The Respondent believed this an embellishment because Mr. Langrill and the Respondent testified that phrase was unfamiliar to them. In addition, the Respondent pointed out that although Ms. Porter told Ms. Carson the flooding of the Property compromised the foundation of her former house, the record contains no evidence the foundation had been compromised. The Respondent further gave as an example of embellishment Ms. Porter’s report to Ms. Carson that the house needed to be torn down due to the water damage and the Respondent had demolished the pool to create a holding pond to capture the water. The Respondent emphasized the record contains no evidence to support either contention.

Finally, the Respondent also argued that Ms. Porter was not a credible witness because she acted like a “truculent six-year old” when counsel for the Respondent asked her why she simply did not close the culvert that she claimed was the source of the running water that flooded the Property and she refused to answer.

In addition, the Respondent argued that the “evidence” relied on by the Commission to support its allegation that he knew about the water problem is based only on speculation and conjecture. In this regard, the Respondent argued that after a fifteen-month investigation and a 376-page report of its findings, the Commission had not produced one witness to testify he or she and the Respondent were present at the Property when it flooded. The Respondent also argued the only two witnesses who were present at the Property “just about every working day” prior to the sale to the Claimant—Mr. Langrill and Mr. Graybeal— testified that they never observed any

flooding, ponding, pooling, or moving water. The Respondent argued that Mr. Langrill “has no incentive to dissemble” and Mr. Graybeal is “so far removed from this now that all it was, was an inconvenience for him to come in here [to testify].”

Finally, the Respondent argued the Commission’s charges are illogical. The Respondent explained the illogic this way: The Commission has asked this forum to believe that the Respondent knew of the water problem by reviewing the video but nonetheless purchased the Property to flip it because the Respondent thought it would not rain during the renovations and sale or that somehow he would be able to prevent it from raining. The Respondent emphasized he had testified he would not have purchased the Property had he seen the video and argued that anyone else with “common sense” would have done the same thing because there would have been unknown costs associated with the remediation.

The Resolution of the Critical Conflicting Testimony

The parties did not dispute the materiality of the water problem depicted in the video. Despite that, the Commission argued the items listed on the standard Maryland Residential Property Disclosure and Disclaimer Statement are *prima facie* material facts. Item 12 is: “Exterior Drainage: Does water stand on the property for more than 24 hours after a heavy rain?” However, the Respondent’s principal defense is he had no knowledge of the water problem before the sale of the Property. For the following reasons, I disagree.

I find Ms. Porter to have been a credible witness when she testified that she showed the video to the Respondent and Mr. Langrill when they visited to inspect the Property prior to Lanall’s purchase of the Property in April 2013. Ms. Porter is not a party to this proceeding; she has no established or discernable interest in the outcome of this proceeding. Moreover, the record contains no proof that she harbored a bias against the Respondent or had any prior experience with him that reasonably could have left her with bitterness, angry, resentment, or

any bias toward him that would motivate her to harm the Respondent. In other words, she was an unbiased, disinterested witness without any discernable reason for her to fabricate or prevaricate. For these reasons alone, I find Ms. Porter to have been a believable witness when she testified she showed the video to the Respondent.

In addition, the following considerations supplement my credibility determination in regard to Ms. Porter. First, her demeanor throughout her testimony gave me no reason to question her truthfulness. I watched her carefully during her testimony. The Respondent's "truculent six-year old" description was not consistent with my observation. Although I cannot point to anything specific about Ms. Porter's demeanor that left me with the feeling she was telling the truth, her overall demeanor was what I would expect from a witness who was confident and comfortable with her testimony. Second, I found it noteworthy that the initial encounter between Ms. Porter and the Claimant was serendipitous. The Claimant's undisputed testimony was they met for the first time at the local post office where they were introduced by the postmistress. Ms. Porter did not seek out the Claimant, had not known her before this encounter, and simply shared her experience of the sale of the Property to the Respondent and mentioned the video. Finally, Ms. Porter's testimony about the circumstances of when she showed the video was detailed. She explained where she was when the Respondent arrived for the visit, whom she was with, and where the video was shown. She "absolutely" remembered discussing the water problem with and showing the video to the Respondent.

In reaching my credibility determination related to Ms. Porter, I considered the Respondent's arguments in favor of reaching the opposite determination. I found them unpersuasive. The argument that Ms. Porter's testimony was self-contradictory misstates the record. Ms. Porter's November 2014 letter to the Claimant does not say the video she showed the Respondent was taken in July 2011. The relevant part of Ms. Porter's short letter reads:

This is to confirm that I showed Steve Allnutt and his partner Ethan [Mr. Langrill] the video showing the water flow and damage to the property caused by the opening of the culvert on 10720 Stevenson Rd. by Jefferson and Denise Wright in July 2011.

Ms. Porter did not say that the video she showed the Respondent was taken in July 2011.

She wrote that the water problem resulted from an event in July 2011. She also did not testify the video she showed the Respondent was lost when her cellular phone was damaged and replaced. She merely testified the September 2012 video was taken when other videos of the water problem stored in her cellular phone were lost when that phone was replaced. The record does not support the Respondent's "self-contradiction" argument.

Similarly, the Respondent's argument that Ms. Porter's testimony about showing the video to the Respondent should not be believed because she "embellished" other parts of her testimony was unpersuasive. Whether the Respondent actually referred to Mr. Langrill as a "water guru" or whether flooding of the Property damaged the foundation does not affect my credibility determination. If it were necessary to the outcome of this case to resolve whether the Respondent referred to Mr. Langrill as a water guru, I would find that he had. My credibility determination related to Ms. Porter is also unaffected by any possible embellishment related to the house's foundation, tearing down the house, and the reason the swimming pool was removed. Those issues are tangential to the question of showing the video.

In regard to the Respondent's and Mr. Langrill's specific denial that Ms. Porter showed them the video, I do not find them to have been credible witnesses. As a party witness, the Respondent has a direct interest in the outcome of this case. This direct interest is a motivator to tailor testimony to achieve a desired outcome. On the other hand, Ms. Porter had no such direct interest. In regard to Mr. Langrill, the record shows he and the Respondent had a prior business relationship where the viability of the businesses was mutually beneficial. They both were or are sole owners of the businesses — Lanall and Leg Work — involved in either the purchase or

renovation of the Property. They have participated in up to twenty flipping ventures together. In addition, they jointly owned a rental property in the past. This relationship provides some basis for Mr. Langrill to testify in a manner to support the Respondent thereby maintaining the viability of a future mutually beneficial business relationship. For these reasons, I resolve the credibility issue in favor of Ms. Porter.²⁶ Accordingly, I find that the Respondent knew the Property had a very significant flooding problem because he saw the video that depicted extensive flooding and pooling of water on the Property before he sold the Property to the Claimant.²⁷

The Respondent presented evidence that the Property did not flood throughout Leg Work's renovation of the Property from April through November 2013. The Respondent, Mr. Langrill, and Mr. Graybeal testified that they never saw any flooding or ponding or pooling of water on the Property. Their testimony contrasts with Ms. Porter's and the Claimant's testimony. Ms. Porter testified that the Property flooded whenever there was a heavy rain or when it "stormed" and would become damp and wet even during a "small rain." The Claimant testified the Property floods after every significant hard rain — after a "ten-minute hard rain" and a "major rain event." She supplemented that testimony with photographs showing, flooding, ponding, or pooling in March-May and July 2014 and September 2018.

²⁶ In resolving this issue, it is not necessary to address Mr. Graybeal's testimony. There is no allegation that he was shown the video, and he offered no relevant testimony related to whether Ms. Porter showed the video to the Respondent.

²⁷ In reaching this finding, I have not given any probative weight to the Claimant's hearsay testimony Mr. Andrews and "Beets" discussed the water problem with the Respondent during the renovation period. This hearsay testimony was not given any probative weight based on a lack of recognized indices of reliability. *See e.g., Travers v. Baltimore Police Dep't*, 115 Md. App. 395, 413-414 (1997) (hearsay statements admissible but reliability established because the statements were made to police officers during their investigation, very shortly after the event that was the subject of the statements written statements, and corroborated); *Kade v. Charles H. Hickey Sch.*, 80 Md. App. 721, 726 (1989) (unsigned, undated, and unsworn written statements not reliable). I have also not relied on the Porters' description of "marshy" on their listing. The Respondent testified he saw the listing but did not recall seeing the "marshy" description because he did not "scrutinize" the listing. I did not rely on this evidence because, even if he had seen the marshy, it is too vague to put him on notice that the Property had the significant water problem depicted in the video.

The record also establishes that during the renovation period, Leg Work cleaned gutters, downspouts, and drains, cleaned-out and placed river rock in a gully along part of the northern property line, and graded property along one area of the foundation. I do not find that these renovations obviated the water problem at the Property. It simply strains credulity beyond its most malleable limits to believe that the water problem on the Property prior to the Respondent's purchase in April 2013 stopped throughout the renovation period during April-November 2013 and then resumed after the Claimant purchased the Property in December 2013.

The record includes Weather Underground documentation of daily precipitation purported around the "airport" during April through November 2013. These documents show that there was no rainfall during the majority of days in each of the relevant months: April: 20 days, May: 20 days, June: 16 days, July: 16 days, August: 20 days, September: 28 days, October: 21 days, and November 23 days. Moreover, on days where there was rainfall, the number of days that rainfall was greater than .50 inches were: April: 2 days, May: 3 days, June: 3 days, July: 2 days; August: no days, September: 1 day, October: 3 days, and November: 2 days.²⁸ The Respondent testified he was at the Property about once every other week. He did not testify how long he was there, where he was on the Property, and on what days he was there. Neither Mr. Graybeal nor Mr. Langrill testified about how often renovation work took place from April to November. Mr. Langrill testified he was there "just about" every day sometimes for fifteen minutes and sometimes for eight hours. Mr. Graybeal's testimony that he was "mostly there every day" was unclear. It was not clear whether he meant renovation work took place every day and he was there for most of those days or that he was there for most of the days that renovation took place.

²⁸ On December 28, 2013, around the time the Claimant testified her mover contacted her to report the Property was inundated with water, the rainfall was 1.04 inches. Daily rainfall of 1.04 inches or more occurred only eight times from April through November 2013: on May 24, 2013; June 1, 10, and 13, 2013; September 21, 2013; October 10 and 11, 2013; and November 26, 2013.

I have already addressed my findings related to the credibility of the Respondent and Mr. Langrill. In regard to Mr. Graybeal, I found him credible; however, I also note that he often acknowledged he was unable to remember what had occurred in relation to the renovation in 2013, and I cannot find based on his testimony whether he was there during a significant rain. Nonetheless, I cannot fully reconcile Mr. Graybeal's testimony that he never saw any flooding, ponding, or pooling of water on the Property with the video and the Claimant's testimony. It is only possible to speculate about possible explanations; for example, Mr. Graybeal may not have been able to recall flooding that occurred five years ago or flooding had occurred on days when renovation work did not take place. This puzzlement, however, does not counterbalance my determination about the Claimant's and Ms. Porter's relevant testimony and the common sense consideration that the ponding, pooling, and flooding seen in the video and described by the Claimant and seen in her photographs can start and stop as described above without any evidentiary based explanation contained in the record.

The Respondent's common sense argument is that it would not make sense for him to have seen the video, as testified to by Ms. Porter, and to have purchased the Property. For the following reasons, I am not persuaded. The Respondent is in the business of "flipping" residential properties. His common sense argument depends on what makes sense — or is an acceptable risk — in the business of flipping residential properties. By experience, I am not familiar with this business. The Respondent's testimony that he would not have assumed the liability involved in purchasing the Property had he seen the video, by itself, is not persuasive. In this regard, the Respondent also testified a local bank had provided him unusually enticing financing for the purchase. He testified his pre-purchase cost analysis satisfied him the purchase was an acceptable business risk. He testified that based on the bank's unique financing, he was

not going to lose money. I cannot determine what would have made sense in this context. I do not have the experience, nor does the record contain any evidence, from which I can decide that common sense, under the factual circumstance I have found here, would preclude purchase of the Property or the risk would have been worth taking. Accordingly, I am not persuaded by this argument.

Did the Respondent Violate the Business Occupations Article and COMAR

Section 17-322(b)(4)

Under section 17-322(b)(4) of the Business Occupations Article, the Commission may sanction the Respondent if he intentionally or negligently failed to disclose to the Claimant a material fact that he knew or should have known about the Property. The “material fact” requirement was not in issue at the hearing. As discussed below, I found the Respondent had specific knowledge that the Property flooded during significant rainstorms resulting in ponding and pooling of rainwater on the Property. The Respondent hotly contended knowledge of the water problem; he did not dispute his failure to disclose it.²⁹ The Claimant’s unrefuted testimony was that the Respondent did not disclose the water problem to her. Accordingly, I find that the Respondent is subject to sanctions because he intentionally failed to disclose the water problem to the Claimant as required under section 17-322(b)(4) of the Business Occupations Article.

Section 17-322(b)(25)

Under section 17-322(b)(25) of the Business Occupations Article, the Commission may sanction the Respondent if he engaged in conduct during the sale of the Property that shows bad faith, untrustworthiness or that constitutes dishonesty or improper dealings. The Respondent’s failure to disclose the water problem to the Claimant prior to her decision to purchase the

²⁹ The D&D Statement completed by the Respondent related to his sale of the Property, signed by him on August 25, 2013, and by the Claimant on September 11, 2013, indicates “None” in response to the following: “The owner(s) has actual knowledge of the following latent defects: _____.” REC Ex. 4 at page 80.

Property shows bad faith, untrustworthiness, and constitutes dishonesty and improper dealings. The Claimant was entitled to know about this material issue before she decided to purchase the Property. Accordingly, I find that the Respondent is subject to sanctions because his concealment showed bad faith, a lack of trustworthiness, and constituted dishonesty and improper dealings during the sale of the Property that is prohibited under section 17-322(b)(25) of the Business Occupations Article.

Section 17-322(b)(32)

Under section 17-322(b)(32) of the Business Occupations Article, the Commission may sanction the Respondent if he has been shown to have violated any provision of Title 17 of the Business Occupations Article other than those enumerated at section 17-322(b). The Commission did not specifically address this statutory prohibition at the hearing. I treat that omission as an abandonment of this specific charge, and do not address it further. Accordingly, I do **not** find the Commission has shown the Respondent violated section 17-322(b)(32) of the Business Occupation Article.

Section 17-322(b)(33)

Under section 17-322(b)(33) of the Business Occupations Article, the Commission may sanction the Respondent who has violated any regulation adopted under Title 17 or the Code of Ethics. As I will discuss below, the Respondent violated COMAR 09.11.02.01 and .02. Chapter 02 Title 9, Subtitle 11 addresses the Code of Ethics for the real estate profession. The Commission adopted this chapter pursuant to sections 17-207 and 17-208 of the Business Occupations Article. Accordingly, I find that the Respondent's conduct violated section 17-322(b)(33) of the Business Occupations Article based upon his violation of COMAR 09.11.02.01 and .02.

COMAR 09.11.02.01C and D

COMAR 09.11.02.01C requires a licensed real estate salesperson to protect the public against misrepresentation and to strive to eliminate practices that could be damaging to the public or to the dignity and integrity of the real estate profession. The Respondent's concealment of the water problem misrepresented the soundness, desirability, and livability of the Property. It damaged the Claimant (as will be further addressed below) and the dignity and integrity of the real estate profession.

COMAR 09.11.02.01D requires a licensed real estate salesperson to make a reasonable effort to ascertain material facts about a property for which he or she assumes agency to fulfill the obligation not to misrepresent or conceal material facts. The Respondent admitted he saw the Porters' D&D Statement but not the part that described the Property as "marshy" because, in his words, he did not "scrutinize" that statement. This failure to "scrutinize" was a failure "to make a reasonable effort[]" to ascertain all the facts to avoid misrepresentation and concealment.³⁰

COMAR 09.11.02.02A

COMAR 09.11.02.02A acknowledges a licensed real estate agent's primary "fidelity" to his or her client but, nonetheless, explicitly requires the agent to comply with his or her statutory obligations to the other parties in the transaction. As discussed above, I have found that the Respondent violated sections 17-322(b)(4) and (25) of the Business Occupations Article. Based on those statutory violations, which required the Respondent to act in a good faith, honest,

³⁰ The Porters' D&D Statement also disclosed that there is standing water on the Property for more than twenty-four hours. The Respondent testified that he did not see or ask to see that statement before the purchase of the Property. It seems that had the Respondent "scrutinized" that statement and not missed the "marshy" description, as he claims, it would have led him to seek out the D&D Statement for additional information about the nature of "marshy," if he were to have made a reasonable effort to ascertain material facts about the Property.

proper, and trustworthy manner toward the Claimant, I also find that he violated COMAR 09.11.02.02A.³¹

What is the Proper Sanction?

Upon a finding of a violation of the enumerated obligations and prohibitions at section 17-322(b) of the Business Occupations Article, the Commission may reprimand a licensed real estate salesperson or suspend or revoke his or her license. In addition, under section 17-322(c), the Commission may also impose a monetary penalty up to \$5,000.00 for each statutory violation. To determine the amount of the monetary penalty, the Commission must consider:

- (i) the seriousness of the violation;
- (ii) the harm caused by the violation;
- (iii) the good faith of the licensee; and
- (iv) any history of previous violations by the licensee.

Md. Code Ann., Bus. Occ. & Prof. § 17-322(c)(2)(i)-(iv) (2018).

The Commission recommended a sixty-day suspension of the Respondent's license and a \$2,500.00 penalty for each of "five" alleged statutory violations, that is, a total monetary penalty of \$12,500.00. I agree that the Respondent's misconduct warrants both discipline and a civil penalty. The Respondent's misrepresentation and dishonesty harmed the Claimant and damaged the integrity of the profession. I find a sixty-day suspension of his license reasonable.

Considering the factors listed above — the seriousness of the violation, the harm caused by the violation, and the good faith of the Respondent — I find a penalty of \$2,500.00 for each violation, for a total penalty of \$7,500.00, reasonable. The Respondent's testimony that he has no history of previous violations with the Commission was not refuted and is corroborated by the Respondent's licensing history.³² This clean, lengthy history is significant and justifies the

³¹ It is the Respondent's violations on COMAR 09.11.02.01 and .02 that are the bases for my finding that he violated section 17-322(b)(33) of the Business Occupations Article.

³² On the date of the sale of the Property to the Claimant, the Respondent had been licensed for twenty-three years. REC Ex. 3.

imposition of less than the maximum penalty for each violation. However, the other factors militate in favor of a penalty with meaningful deterrence for the following reasons. The misconduct was serious. The misconduct was harmful to the profession and the Claimant because her decision to purchase the Property was not a fully knowing one; she has endured the limitations imposed on her full enjoyment of the Property due to the water-problem; and she must assume the unanticipated extra cost of remedying the water problem. Finally, the Respondent acted in bad faith because he knew of the water problem and concealed it. Based on these considerations I agree that the Commission's recommendation of a \$2,500.00 penalty per violation is reasonable, and I adopt it.

However, I reject the Commission's recommendation for a total monetary penalty of \$12,500.00. The Commission based this recommendation on what it argued were violations of five statutory provisions enumerated in section 17-322(b) of the Business Occupations Article. The Commission's Statement of Charges alleges the Respondent violated four statutory provisions: section 17-322(b)(4), (25), (32), and (33). At the hearing, the Commission did not identify a fifth violation. Of the four alleged violations, I have found the Respondent violated three: section 17-322(b)(4), (25), and (33). Accordingly, in addition to a sixty-day suspension of the Respondent's license, I recommend a total monetary penalty of \$7,500.00.

The Guaranty Fund Claim

Under section 17-407(e) of the Business Occupations Article, the Claimant bears the burden of proof to establish the validity of the Claim for recovery from the Fund. The burden is by a preponderance of the evidence. Md. Code Ann., State Gov't §10-217 (2014); COMAR 09.01.02.16C. To prove something by a "preponderance of the evidence" means "to prove that something is more likely so than not so[,]" when all of the evidence is considered. *Coleman*, 369 Md. at 125 n.16.

To establish a compensable claim for actual loss from the Fund, the Claimant must prove three elements: (1) her claim is based on an act or omission occurring during the provision of real estate brokerage services by a licensed real estate salesperson; (2) the Respondent provided real estate brokerage services involving a transaction related to real estate located in the State; and (3) the Respondent's act or omission constituted misrepresentation.

The Respondent argued that the Claim must fail "as a matter of statutory and substantive law." In this regard, the Respondent made several arguments. He argued he had not engaged in real estate brokerage services, a necessary element of a compensable Claim. "Provide real estate brokerage services" is defined as:

to engage in any of the following activities:

- (1) for consideration, providing any of the following services for another person:
 - (i) selling, buying, exchanging, or leasing any real estate; or
 - (ii) collecting rent for the use of any real estate;
- (2) for consideration, assisting another person to locate or obtain for purchase or lease any residential real estate;
- (3) engaging regularly in a business of dealing in real estate or leases or options on real estate;
- (4) engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate sales;
- (5) engaging in a business that subdivides land that is located in any state and sells the divided lots; or
- (6) for consideration, serving as a consultant regarding any activity set forth in items (1) through (5) of this subsection.

Md. Code Ann., Bus. Occ. & Prof. § 17-101(l) (2018). The Respondent argued he sold his own property because he was the sole member of Lanall, and Lanall was the seller of the Property to the Claimant. According to this argument, the Respondent was "only a pass through entity and nothing more." However, the Respondent further argued that if I were to adopt the "legal fiction" that Lanall was a separate "legal person" from the Respondent, the transaction still fails because the Respondent did not receive any consideration for his services based on his testimony that neither he nor the brokerage he is affiliated with received any commission for the sale. The

Respondent argued this fact was established by the Respondent's testimony and corroborated by the HUD-1 Settlement Statement. REC Ex. 4 at pages 321-325. The Respondent further explained this argument by insisting "the key to the gateway to open the Fund is the need for a license. The fact that he [the Respondent] had a license is irrelevant." For support of this argument, the Respondent requested I "look at" *Sheppard v. Bay County Realty, Inc.*, 297 Md. 88 (1983), and *Maryland Real Estate Commission v. Johnson*, 320 Md. 91 (1990). According to the Respondent, these cases stand for the proposition that a claimant may only get access to the Fund "if the complained about activity requires a Maryland real estate license."

The Respondent next argued that the law limits access to the Fund when, as here, the Respondent is not shown to have affirmatively stated to anyone anything about flooding or the lack thereof at the Property. The Respondent argued it had not been proven he had prior knowledge of the flooding at the Property for a number of reasons, including (1) no testimony that the Respondent or Mr. Langrill was at the Property when it flooded during Lanall's ownership of the Property; (2) the Commission cannot impute knowledge of flooding to the Respondent from the Porters' description of the Property as "marshy" on the listing document; and (3) the "misdated" video was never shown to the Respondent or Mr. Langrill. The Respondent argued he could not have "affirmatively" concealed the water problem because its provenance was a confluence of topography, removal of vegetation from the nearby property that was being cleared for development in 2011, and a culvert that drained onto the Property. This argument was not explained further. For support of this argument, the Respondent cited to an OAH decision, *In re Carl J. Johns*, DLR-REC-22-04-34761 (Ofc. Admin. Hrg's March 31, 2005), that the Commission adopted as the final agency decision. The Respondent quoted from that decision: "Any recovery [from the Fund] can only be for action which is willful, and essentially borders on theft or fraud, not mere negligence or incompetence." *Johns* at page 4. I

have disposed of part of this decision above. I have found as a fact that the Respondent had prior knowledge of the water problem based the video. I am persuaded by Ms. Porter's testimony that she showed the video that depicted the flooding of the Property to the Respondent prior to his sale of the Property to the Claimant in September 2013. I have also not been persuaded that condition did not exist during April 2013 through to the sale to the Claimant. Not disclosing that condition constituted an intentional omission or misrepresentation of a critical condition of the Property. Negligent misrepresentation can include a negligent failure to disclose. *See Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 135-36 (2007). Accordingly, I find that the Respondent's failure to disclose this condition of the Property during the course of the real estate transaction constituted a misrepresentation.³³ The facts in *Johns* are different from the facts in this case, and the *Johns* decision did not address misrepresentation by omission.³⁴ Furthermore, because this situation involves the Respondent's knowingly withholding information he was obligated to disclose I also find this action constituted fraud.

The Respondent's final argument challenged the amount of actual loss claimed by the Claimant. The Respondent argued that Mr. Noguera's proposal for a rain garden (\$14,214.58) is essentially for "upgrading the Property." The Respondent further argued the Claimant's payments to Thaler (\$10,178.34), Little (\$2,767.07), and Daft (\$1,930.50) were for nothing more than plans because none of those contractors did "a tangible thing" on the Property to remediate the alleged water problem. The Respondent also argued the Claimant's payment to Mr. Noguera

³³ Intentional misrepresentation is simply another name for fraud. *See B.N. v. K.K.*, 312 Md. 135, 149 (1988). Thus, I consider negligent misrepresentation within the scope of subsection 17-404(a)(2)(iii)(2) of the Business Occupations Article; to hold otherwise would impermissibly render statutory language nugatory and meaningless. *See Baltimore Bldg. & Constr. Trades Council, AFL-CIO v. Barnes*, 290 Md. 9, 15-17 (1981) ("a statute . . . is to be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory").

³⁴ The Respondent also addressed in his closing argument that the Claimant had been put on notice of the water problem as a result of the content of the Home Inspection Report. While it is correct that the inspection report mentions dampness, the need to improve some grading at the Property, water stains in the laundry room, wet soil, exterior drains that need to be kept cleaned and clear, and two culverts that needed to be monitored, those conditions, considered separately or together, cannot reasonably be found to have put the Claimant on notice of the nature or extent of the flooding shown on the video and which occurred, and continued, shortly after the Claimant's purchase of the Property.

(\$1,736.36) to extend the gully at the northern boundary of the Property was mentioned in the Claimant's home inspection report prior to her purchase of the Property.³⁵ Finally, the Respondent dismissed the payment to Schussler's (\$2,525.00) as nothing more than to satisfy the Claimant's desire for a new lawn. In sum, this argument was that the Claimant had no actual loss attributable to his "acts or omission."

I am not persuaded by the Respondent's arguments related to the Claim against the Fund. In regard to the Respondent's argument that he was not providing real estate brokerage service but was merely selling a property he owned as the sole member of Lanall, the cases on which the Respondent relied are inapposite; both cases address whether an individual's action involved a real estate transaction. In *Sheppard v. Bay County Realty, Inc.*, 297 Md. 88 (1983), the issue was whether the sales, by licensed real estate brokers, of shares in limited partnerships set up to develop real estate was within the statutory scope of sales "arising out of [a] real estate transaction." The Court holding was "no" with the following explanation:

In order for a licensee's loss causing conduct to be the basis of a claim against the Fund, that conduct must arise out of a transaction in which the licensee is acting in a capacity of which a license is required. The types of activities for which the licensee is acting in a capacity for which a license is required are set forth in the definition of "real estate broker" found in § 212(a).

...

The real estate transaction referred to in the Act is not any transaction in which real estate is in some way involved, but it is a transaction arising out of a real estate business. In the context of the real estate broker's subtitle, a real estate business is a business of acting as a real estate broker. It is a business in which the one conducting it engages in those activities for which a broker's license is required.

Sheppard, 297 Md. at 95-96.

³⁵ The Respondent also mentioned the Claimant did not request that he remediate any of the concerns raised in the home inspection report. Instead, the parties negotiated a reduction to the purchase price of the Property, and they signed an "as is" addendum to the contract for sale. On October 9, 2013, the "as is" addendum was removed from the contract of sale.

In *Johnson*, the Court decided whether the seller of businesses that were subject to leases “arose out of a real estate transaction” and therefore the “broker handling the transaction was required by the statute to be a licensed real estate broker.” The Court’s holding was “no” with the following explanation:

The sales agent in the instant case was engaged by prospective purchasers for the purpose of finding businesses which the purchasers could acquire. The sales agent was not hired to procure any interest in real estate for his client. He located businesses for his clients and arranged for the sale of

those businesses. Where the businesses were subject to leases, the sales agent specifically left the procurement of the lease to the purchasers.

...

Since the sales agent’s performance did not in any way affect the leases of the premises where the businesses were located, the sales agent did not perform any act or render any service for which a real estate broker’s license is required under § 212(a).

Johnson, 576 Md. at 102. The *Johnson* case involved the sale of a business. Here, the transaction directly involved the sale of real estate. The Court in neither *Johnson* nor *Sheppard* addressed whether a sole member of a limited liability company who sells residential property owned by the company is engaged real estate brokerage services.

The situation here is different from that in *Sheppard* or *Johnson*, and neither decision controls the outcome of this case. Despite the Respondent’s argument that he did not need a real estate license because he owned, as the sole member of Lanall, the Property, he was engaged in the “provision of real estate brokerage services” under the statute. Under section 17-101(l)(1)(i) of the Business Occupations Article, “real estate brokerage services” includes selling real estate for another person for consideration. Under section 1-101(g) of the Business Occupations Article, a “person” is an “individual, receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind and any partnership, firm, association, corporation, or other entity.” Here, the Respondent sold real estate to the Claimant for Lanall, a company or an entity. Moreover, “providing real estate brokerages services” includes (1) “engaging regularly in

a business of dealing in real estate” and (2) “engaging in a business the primary purpose of which is promoting the sale of real estate through a listing in a publication issued primarily for the promotion of real estate purchases.” What happened in this case falls within both of these provisions.

Furthermore, the Respondent’s argument that his actions cannot be considered “providing real estate brokerage services” because he received no consideration for the sale is unpersuasive. The legal definition of “consideration” is “[s]omething (such as an act, a forbearance, or return promise) bargained for and received by a promisor from a promisee; that which motivates a person to do something, esp. to engage in a legal act.” *Black’s Law Dictionary* 370 (10th ed. 2014). The Respondent promised the sale of the Property for \$1,240,000.00. Whether he or the brokerage with whom he is affiliated received a “commission” is insignificant. I find this transaction constituted the provision of real estate brokerage services for consideration.

I am satisfied that the record supports finding that the Respondent has a valid claim. Her claim is based on the Respondent’s failure to disclose the water problem during the sale of the Property while he was licensed as a real estate salesperson. I am also satisfied that the money she spent to remediate the back lawn area to allow for the wedding at the Property and the money she spent for proposals to correct the water problem are compensable from the Fund as actual loss. There was good reason for the Claimant not to follow through with the proposals from Thaler, Little, and Daft. Their proposals were either unreasonably expensive or required the cooperation of neighbors who refused to cooperate or both. In addition, her payment to Mr. Noguera to extend the gully on the northern boundary, even though that remedy did not rectify the flooding, was reasonable as an attempt to contain the flooding. I also find it is reasonable to include in the Claimant’s actual loss the cost to install the rain garden proposal. This project is designed to expedite the significant and extraordinary pooling of water that occurs toward the

rear of her property. The total of those costs is \$33,349.85 (\$10,176.34 + \$2,767.07 + \$1,930.50 + \$2,525.00 + \$1,736.36 + \$14,214.58 = \$33,349.75). I reject the Claimant's request for \$2,350.00 to pay a "specialist in rain forest design" to install the rain garden proposal. The record contains no evidence to support that cost or the need to have a "specialist" perform the work. I also reject the Claimant's request for \$10,000.00 to replace trees that have died as a result of the standing water. The Claimant provided no documentation of actual replacement costs.³⁶

PROPOSED CONCLUSIONS OF LAW

I conclude the following:

1. The Respondent violated subsections 17-322(b)(4), (25), and (33) of the Business Occupations Article and COMAR 09.11.02.01C and D and .02A.
2. The Real Estate Commission should suspend the Respondent's real estate salesperson license for sixty days and impose a monetary penalty of \$7,500.00. Md. Code Ann., Bus. Occ. & Prof. §§ 17-322(b), (c) (2018).
3. The Claimant is entitled to an award from the Fund in the amount of \$33,349.75 for the actual loss she sustained as a result of Respondent's misconduct in his capacity as a licensed real estate salesperson in connection with the sale of the Property. Md. Code Ann., Bus. Occ. & Prof. § 17-404 (2018); COMAR 09.11.01.14.

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Real Estate Commission **ORDER** as follows:

1. The Respondent's real estate license be suspended for sixty days.
2. The Respondent pay a monetary penalty in the amount of \$7,500.00.

³⁶ The Claimant testified that she also wanted the Respondent to subsidize a reserve fund of \$5,000.00 to address mosquito problems that could arise from the ponding or pooling of water and the residual saturated condition of her property during significant rain storms. I reject this request as speculative. She offered no evidence of any unusual mosquito problems at the Property or how this Fund would be used.

3. The Maryland Real Estate Commission Guaranty Fund pay the Claimant \$33,349.75 for her actual loss as a result of the Respondent's wrongful acts or omissions.
4. The records and publications of the Maryland Real Estate Commission reflect this decision.

SIGNATURE ON FILE

January 22, 2019
Date Decision Issued

Michael D. Carlis
Administrative Law Judge

MDC/dn
#177100

SIGNATURE ON FILE