

Broker Price Opinion/Appraisal Revisited

Approximately three years ago an issue arose with respect to the purposes for which a market analysis prepared by a broker for a fee (a Broker Price Opinion) may be used in Michigan. The issue was addressed in this column and insofar as we knew, it had been put to rest. However, a recent letter from the Office of the Attorney General (the "Letter") has again raised questions about this issue, and we have been asked to address those questions.

In order to illustrate the issue, we will use the same example MAR presented to us in 2009. A REALTOR® licensed as an associate broker charges a fee of \$125 for a "property valuation assessment" *i.e.*, Broker Price Opinion and an additional \$300 for representation at a Board of Review hearing, with respect to the value of property for real property taxation. It was contended in 2009 that a REALTOR® could not provide a Broker Price Opinion for that purpose. The Letter has raised the same question again.

In 2009, there were two potential sources for this controversy. First, at the time, a document entitled "Frequently Asked Questions-Legal Issues" could be found at www.michigan.gov (the "FAQs"). One of the FAQs addressed the following question:

As a licensed real estate salesperson, am I to perform a 'broker price opinion'?

The answer began by citing the text of Section 2601 of the Occupational Code, MCL 339.2601(a) (i) and (ii) (the "Statute"). The answer went on to state that a market analysis could be performed by real estate licensees, at no charge, for the purpose of helping a customer or potential customer to establish a sale price or rental rate as specified in subsection (i) of the Statute. The answer provided that brokers and associate brokers, unlike salespersons, could perform a market analysis for a fee as long as the analysis contained the following statement: **"This is a market analysis, not an appraisal and was prepared by a licensed real estate broker or associate broker, not a licensed appraiser."** The answer concluded with the following statement:

'If a real property evaluation is required for purposes such as appealing taxable value, settling an estate if the real property will not be sold, settling a divorce if the real property will not be sold, obtaining a home equity loan, waiving private mortgage insurance (PMI), or generally testifying as to value in a court of law, then the valuation must be done by a licensed Real Estate Appraiser... (collectively the "Limitations").'

This initial source of the 2009 controversy no longer exists. This FAQ can no longer be found at www.michigan.gov. While there is no

legal significance for its absence from the website, it certainly does not bolster a claim that the Limitations apply to a Broker Price Opinion.

Second, in 2009 we were aware of information being provided by private organizations who also took the position that a Broker Price Opinion could only be used to assist a seller in establishing a listing price, assist a buyer in establishing offering price or to help a landlord or tenant establish a rental rate. These private organizations also took the position that a Broker Price Opinion was subject to the Limitations.

The legal source of the Limitations would appear to be an administrative rule promulgated by the Department of Licensing and Regulatory Affairs under Article 26 of the Occupational Code, which regulates real estate appraisers. The Rule, R 339.23101(f), defines a market analysis and provides as follows:

Market analysis as performed by a real estate licensee' means the activity defined in section 2601(a) (i) and (ii) of the act, and means analysis solely for the purpose of establishing potential sale, purchase, or listing price of real property or the rental rate of real property and is not for the purpose of evaluating a property for mortgage lenders in the primary or secondary mortgage market [emphasis added] (the "Rule").

There are two problems with citing the Rule as support for the Limitations. First, the Rule only prohibits a market analysis from being used for the purpose of valuing a property for mortgage lenders in the primary and secondary market. Second, the Rule appears to be premised on an incorrect reading of the Statute.

In subsection (i) of the Statute, the Legislature clearly established limitations on the use of a market analysis prepared by a salesperson licensed under Article 25 of the Occupational Code. Such a market analysis under this subsection may be used "... solely for the purpose of assisting a customer or potential customer in determining the potential sale, purchase, or listing price of real property or the rental rate of real property as long as a fee or any other valuable consideration is not charged for that analysis."

In subsection (ii) of the Statute, the Legislature addressed the terms under which a broker or associate broker may provide a market analysis for a fee. This subsection requires a broker or associate broker to provide the statement quoted in bold-face print above, **"This is a market analysis, not an appraisal and was prepared by a licensed real estate broker or associate broker, not a licensed appraiser."** None of the Limitations imposed on



salespersons in subsection (i) are imposed on a broker or associate broker in providing a market analysis for a fee pursuant to subsection (ii).

The Rule provides that a market analysis may be used “solely for the purpose of establishing potential sale, purchase, or listing price of real property or the rental rate of real property. . .” Obviously, the Rule cannot impose limitations or restrictions that are not imposed by the Statute. The definition of market analysis in the Rule does not reflect the authorization for Broker Price Opinions set forth in subsection (ii) of the Statute.

The Letter appears to interpret the Limitations contained in subsection (i) of the Statute as applying to both salespersons and brokers. This is a conclusion that is not supported by a reading of the two subsections. Subsection (i) specifies that no fee or any other valuable consideration may be charged for a market analysis provided by a salesperson. Subsection (ii) provides that brokers or associate brokers may charge a fee for market analysis so long as the tombstone stating that the analysis is not an appraisal is clearly included. Clearly subsections (i) and (ii) of the Statute were adopted by the Legislature to impose different limitations on salespersons, brokers and associate brokers.

The Letter goes on to address the question of whether salespersons, brokers and associate brokers may conduct a market analysis for persons who are not interested in selling their properties, but rather wish to use the market analysis to appeal “their taxable values, settle estates, settle divorces, etc.” Based upon what we believe is an incorrect interpretation of the Statute, the Letter concludes that a market analysis performed by a real estate licensee would not be exempt from the definition of “appraisal,” and could only be conducted in accordance with Article 26. In other words, Boards of Review, the Michigan Tax Tribunal and Circuit Courts would be barred by the Occupational Code from considering testimony of a real estate broker or associate broker on a valuation question.

As I stated in 2009, we are unaware of any law or rule that would restrict a Board of Review, if it so chose, from considering a Broker Price Opinion as part of an appeal by taxpayers as to the valuation of their real property. Further, no Michigan court rule or rule of evidence prohibits a court from considering a Broker Price Opinion when the value of real property is at issue in a divorce, settling an estate or any other situation which a court may be called upon to decide the value of real property.

Michigan Rule of Evidence 702 generally establishes the conditions for when expert testimony may be received by a court. MRE 702 provides:

If the court determines that scientific, technical or other specialized knowledge will assist the trier of fact to un-

derstand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case [emphasis added].

The determination as to whether a proposed expert meets the conditions imposed under MRE 702 is solely within the discretion of the trial judge on a case-by-case and expert-by-expert basis. The trial judge is not restricted by the Limitations. A trial judge will decide based on the qualifications of each REALTOR® offering a Broker Price Opinion as expert evidence.

We also note that the Michigan Tax Tribunal, in Rule 205.1252, requires a party pursuing a property tax appeal to file a valuation disclosure with the Tribunal. There is no requirement in this Rule that the valuation disclosure be prepared by a licensed appraiser. Further, when appearing before a Board of Review, often the amount at issue for a homeowner does not justify the cost of a formal appraisal.

In sum, we still conclude that brokers and associate brokers may provide Broker Price Opinions under subsection (ii) of the Statute for any lawful purpose so long as they comply with the terms of this subsection. Further, it is our position that in Michigan, the courts as well as quasi-judicial administrative bodies have the discretion to determine whether they will admit Broker Price Opinions and what weight they will give to such opinions of value.

The Letter also addresses the question of whether a broker or associate broker may allow a salesperson to complete a market analysis under the broker’s supervision and charge consumers a fee, then split the fee with the salesperson. The conclusion in the Letter on this issue is completely consistent with the position of MAR and its legal counsel over the past several years. Obviously, a salesperson cannot charge and collect a fee directly from a consumer for preparing a market analysis. As provided in subsection (ii) of the Statute, the Broker Price Opinion must be prepared by the broker or associate broker. Further, the fee for the Broker Price Opinion must be paid to the broker or associate broker. There is no limitation as to with whom the fee may be shared after it is received by the broker or associate broker. Further, there is no limitation on the assistance that a salesperson can provide to a broker or associate broker in the preparation of the Broker Price Opinion. The broker or associate broker must sign and is responsible for the Broker Price Opinion. **MAR**

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