



DIALOG

The periodic bulletin

from

The Arizona Department of Real Estate

Volume 2008 — Issue 2



Let The Conversation Continue:

A Message from the Commissioner

Inside this Issue

Partners for Success	2
COE	3
Walk to End DV	3
RE Consumer Forum	3
A Note from Industry	4-5
US Court v. Stroman	5
Legislative Update	5-8
Apache & La Paz IGA	8
Hiring Workers	8
Lunch with the Commissioner	8
Enforcement & Compliance	9
Disciplinary Actions	9
We Must Invest to be Sustainable?	10-11
Assistants: Asset or Liability	11-15
Substantive Policy Statement	15-17

While there continues to be a level of hesitancy in our real estate market, Arizona's Department of Real Estate remains committed to protecting Arizona's consumers and the good reputation of our industry. I believe the most effective means of preventing harm is to educate the Public, Industry and Department staff of our rights and responsibilities during a real estate transaction. Thank you for taking a moment to read *Dialog* and continuing to educate yourself.

I frequently mention the Real Estate Recovery Fund while speaking with groups and discover that there are few, if any, in the audience who are familiar with it. Consequently, I want to highlight it and educate our readers about this resource.

The Real Estate Recovery Fund was established July 2, 1963. It benefits consumers who are financially harmed due to the actions of a real estate licensee during a purchase, sale or lease of real estate in Arizona (including a cemetery plot) , or from a property management transaction executed by a licensee on the applicant's Arizona property. New sales agents and brokers deposit \$10.00 and \$20.00 into the Fund, respectively. Should the fund balance drop below \$600,000.00, a contribution would be expanded to renewing agents and brokers until the minimum balance is reach. As of March 1st, 2008, the fund balance is \$890,717.83.

How to File:

An "Application for Payment from the Real Estate Recovery Fund" is available at www.azre.gov or by calling the Customer Assistance Team at 602-771-7730. It must be submitted with:

A court order awarding payment and recorded by an Arizona County Recorder.

Documentation showing the applicant exhausted all efforts to collect the money from the defendants/respondents.

The court order must be against a person licensed at the time of the transaction.

It must also find the person's conduct violated duties under the real estate statutes (Title 32, Chapter 20) or Rules of the Commissioner (ACC R4-28-101 thru R4-28-1313).

The Fund may pay up to \$30,000 per transaction with a \$90,000 cap per licensee. For example, approximately \$365,000 in losses were suffered by former clients of Russell Bosworth of Arizona High Performance Realty (AHPR) as a result of his misuse of client funds. The fund can pay only up to \$90,000 of potential claims. This means that \$275,000 would be ineligible for payment from the fund.

Eligible losses include:

- Misappropriated earnest money, down payment, security deposit, rent income, or money fraudulently withheld that was intended for a mortgage or other expense on property managed by a licensee
- Repair costs for defects or transaction losses where the licensee misrepresented the condition of a property or actively misrepresented the financial condition of the parties or the property.
- Reasonable attorney fees and court costs awarded by the court..

Ineligible losses consist of:

- Lost profits, speculative losses, investments in notes, mortgages, limited partnerships or other securities where the applicant did not engage the services of the licensee
- Repair costs for defects when the purchaser was aware of, or notified about, the defect

Continued on pg 2

Let The Conversation Continue: A Message from the Commissioner



Commissioner signing a recovery fund payment as a result of Russell Bosworth matter.

Continued pg 1

- Punitive damages, post-judgment interest, undocumented transactions or losses
- Money spent on lodging, meals, travel, photocopies or phone calls, and losses exceeding out-of-pocket losses.

In 2006, 4 applications to the Recovery Fund were received and 2 obtained payment for a total of \$36,652.80. During 2007, 18 applications were received and 10 obtained payments for a total of \$240,862.59. 3 applications from 2007 are still pending. I anticipate receiving more applications in 2008 as the public gains more awareness of this resource.

The Real Estate Recovery Fund can help make consumers whole when financially harmed. It exists because the Public, Industry and Department worked together in 1963 to establish it as a consumer resource. In 2007, all three Entities worked together again to establish the Condominium Recovery Fund. For more information on this new fund, please visit www.AZRE.gov. Whether you are a consumer or a licensee, the Arizona Department of Real Estate and I are always willing to help and look forward to serving your needs.

Respectfully yours,

Commissioner



Pictured at the PARTNERS meeting are Jim Palmer, Supervisor Graham County, Sam Wercinski, Arizona's Real Estate Commissioner and Terry Goddard, Arizona's Attorney General.

"I thought the ADRE seminar was both informational and insightful, and I look forward to working with your Staff" stated Paul Melcher, Yuma Planning and Zoning Director

PARTNERS for Success Well-Attended

PARTNERS For Success, hosted by the Arizona Department of Real Estate, is a task force organized to develop new and better techniques for investigating and gaining compliance from illegal subdividers in Arizona. The first meeting was held on 2/14/08.

During the morning session, participants heard from Supervisor Jim Palmer, Graham County, Attorney General Terry Goddard and Commissioner Sam Wercinski, Arizona's Real Estate Commissioner. A lively discussion ensued in identifying and discussing the

challenges that the counties and the department face in combating illegal subdivisions.

In the afternoon county and department staff "brain stormed" ideas on determining best practices. Counties who have partnered with ADRE and signed the Intergovernmental Agreement (IGA) are Cochise, Gila, Yuma and Apache.

The PARTNERS presentations and summaries are available on our website:

<http://www.azre.gov/COMMISH/COMMISH.html>

Future meeting dates will be announced shortly.

Spring Community Education and Outreach Program Continues

The first spring COE started at Mohave County (Lake Havasu) on March 3, 2008. That COE was quickly followed by one in Yavapai County (Prescott) on 3/6. Coconino County (Flagstaff) on the same date, Yuma County on 3/11; La Paz on 3/12; Navajo/Apache 3/17; Gila County 3/17; Gila 3/17; Pinal 3/18; and, Maricopa on 3/21.

Commissioner Wercinski provided an update on illegal subdivisions, drop houses and the

Homebuyers' and Renters' Bill of Rights as well as hot topics for industry and consumers.

The Schedule for upcoming COE is as follows:

Greenlee County, 3/25; Graham County, 3/25; Cochise County, 3/26; Santa Cruz, 3/26 and Pima County, 3/27.

Please visit the Department's website: www.azre.gov to view additional information.

If you are interested in bringing having a COE in your community, club, association or office, please contact : Robert Hall at :

rhall@azre.gov



Commissioner Wercinski discussing "Hot Topics" at a COE in Yavapai County.



April is Financial Literacy Month

Visit the Department of Financial Institutions at

<http://www.azdfi.gov/foreclosure/Intro.htm>

Walk to End Domestic Violence

The 6th Annual Walk to End Domestic Violence will be held on Saturday, April 26, 2008. The race will begin at Wesley Bolin Plaza at 7:30 a.m.

Join Commissioner Wercinski and other department staff at this worthy event.

You can register to participate in the 5k walk or 5k run.

Online registration is available now: <http://azfoundationforwomen.org/dv-walk/index.html>.

Be sure to select **TEAM**

GOVERNOR when you complete online registration!

Contact Jessica White, Community Relations, Governor's

Office for Children, Youth & Families.

Email her at: JWhite@az.gov

Violence against women is present in every country, cutting across boundaries of culture, class education, income, ethnicity, and age. (United Nations Children's Fund, "Domestic Violence Against Women's and Girls, Innocent Digest, No. 6 , May 2000)

Real Estate Consumer Forum held in Southern Arizona

On February 7, 2008, a Real Estate Consumer Forum was held in Tucson, Arizona.

Commissioner Wercinski hosted the event with participation by Felicia Rotellini, Superintendent , Department of Financial Services and Brian

Livingston, Registrar of Contractors.

The Forum was well-attended and generated many questions. Many of the participants were not familiar with resources available to them.

Future forums will be held

throughout the State and will touch on timely topics such when builders cease to business, mechanic liens, and other "hot" topics. If you have any suggestions for future locations or topics, please contact Mary Utley at

mutley@azre.gov



At the Consumer Forum held in Tucson, Commissioner Wercinski presented vital information to home buyers and industry members.

A Note from Industry: What's New at the Arizona Association of REALTORS®

Tom Farley Takes Over Helm of AAR

Effective April 1, 2008, Tom Farley will become the Chief Executive Officer for the association. Farley currently serves the association as Vice President of Governmental Affairs.



"Together, we can build on our past successes by moving forward with innovative technology tools, advance our professional development efforts, and provide strong advocacy for the benefit of our members and their clients." Stated Tom Farley, newly selected AAR CEO

"Mr. Farley's proven record of success representing AAR's public policy vision and his significant contribution to the association's political influence growth during his 11-year tenure has earned our collective confidence and respect," said 2008 AAR President John Gall. "I want to acknowledge the diligence of the CEO Search Committee, chaired by 2005 AAR President Tim Hatlestad, and the professional assistance from the Leonard Pfeiffer Company, Washington, D.C., in the conduct of this important search and decision."

"I look forward to continuing the vision that Ty Strout and the AAR leadership and staff have worked diligently to provide in partnership with our 21 local associations for the REALTOR® membership," said Tom Farley. "Together, we can build on our past successes by moving forward with innovative technology tools, advance our professional development efforts, and provide strong advocacy for the benefit of our members and their clients."

TM Excitement Building in Arizona

AAR is now providing a transaction management ("TM") system as a member benefit.

Transaction management (TM) training has begun, and the amazing potential of TM as it spreads throughout Arizona is becoming increasingly evident:

- Brokers, imagine your transaction processes becoming more consistent, thus reducing your risk. Through different views, you will be able to monitor operations more effectively. At any moment, you can see what's missing in files and alert agents of needed documents. Preferred lenders, escrow services, and inspectors can be given the ability to provide documents electronically.

- Agents, imagine your broker authorizing you to manage all of your transactions from anywhere in the world. You will be alerted to items needing attention and be able to view upcoming deadlines for all transactions from one screen. Sending other agents documents and communicating with them happens more smoothly. Clients can be invited to view and print files 24/7, minimizing routine updates.

TM is a key component in the AAR Workspace environment – the online control panel where we envision brokers and agents will monitor and manage all aspects of their real estate businesses. AAR's primary goal in offering TM is to provide its members tools to help them be more productive and streamline their businesses, enabling brokers to focus on managing and agents to focus on selling. AAR strives to provide its members the edge in becoming "...the best prepared real estate practitioner with the highest standards."

For more information go to www.aaronline.com/TM/

Certified Risk Management Specialist Certification Program

AAR's newest program is designed to enhance members' success. The program will increase members' knowledge and allow them to successfully manage real estate transactions for clients while reducing exposure to risk. The classes will be taught by real estate attorneys. *Arizona Real Estate: A Professional's Guide to Law and Practice* is the textbook for all classes.

The focus of the program can be expressed by the definition of "risk management." "Risk" is defined as "the chance that something will go wrong" or "to put someone in a situation where the person could be exposed to damage or loss." "Management" is defined as "the act of handling something successfully" or "the skillful use of resources." Therefore, "Risk Management" is defined as handling a transaction by using available resources to reduce the chance that something will go wrong that could damage the buyer or seller.

The program consists of a resale, commercial, or vacant land contract class (1), core courses (3), and elective courses (1) = 6 days. The students must:

Attend one of the core contract classes (2 day class)

Attend the Essential Skills for a Successful Closing (financing & escrow) class; Agency, Employment, and the Standard of Care class; and Disclosure & Due Diligence class (1 day

A Note from Industry: What's New at the Arizona Association of REALTORS®

Continued from pg 4

REALTORS® who earn this certification go the extra mile to protect their clients' interests as well as their own. For more information, go to www.aaronline.com/documents/CRMS_FAQs.pdf

New AAR Residential Lease Agreement

The new AAR Residential Lease Agreement is now available for use. There were numerous changes to the form, including changes in the format, font size and title. The major substantive changes are:

A Tenant Attachment has been added to the front of the form.

The personal property to be included in the lease is prompted.

At the end of the stated lease term, the lease automatically continues on a month-to-month basis, with all other terms and conditions remaining the same, unless either party provides written notice to the other of their intention to terminate

The refundable security deposit and the non-refundable charges for cleaning, pets, and redecoration have been separated and clarified.

The form now specifies what pets (including, but not limited to animals, fish, reptiles or birds) are allowed to occupy the premises, if any, and includes an option to require the tenant to maintain a liability insurance policy to cover any liability incurred due to pet.

The tenant is obligated to pay rent and remain responsible for the security of the premises until all keys and garage door openers have been physically returned to landlord or otherwise satisfactorily accounted for by the tenant.

A crime-free provision is included.

The tenant agrees to investigate all applicable state, county, and municipal swimming pool

barrier regulations and agrees to comply with the regulations while occupying the Premises.

Addresses the presence of smoke detectors, carbon monoxide detectors, and fire sprinklers.

The landlord is not obligated to allow the Premises to become the subject of a trustee's sale. The tenant is obligated to notify Landlord immediately upon receipt of any notice of trustee's sale and acknowledges that the tenant's rights under the Agreement may be terminated in the event of a trustee's sale.

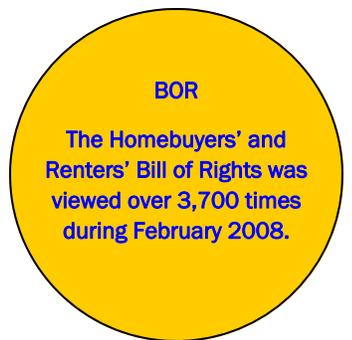
The tenant may provide and update the Landlord with the name and contact information of a person who is authorized to enter the Premises to retrieve and store tenant's personal property, if the tenant dies during the term of the Agreement.

The Soldiers and Sailors' Civil Relief Act is addressed.

The form now contains an acknowledgment that the Landlord has provided the required information on residential rental property to the applicable county assessor as required by law.

Due to the numerous changes, review the AAR Lease Agreement carefully before utilizing the form in a transaction. The new form is available at: www.aaronline.com

Editor's Note: K. Michelle, Esq., is General Counsel for the ARIZONA ASSOCIATION OF REALTORS®



U.S. COURTS DISMISS STROMAN CASES, ONE APPEAL PENDING

The latest U.S. federal court rulings involving the attempts of several real estate regulators to reach the alleged unlicensed activities of Texas timeshare broker Stroman Realty, Inc. (Stroman) was issued recently in Stroman Realty, Inc. v. Wercinski. Stroman, whose brokers are licensed only in Texas, engages in interstate secondary-market timeshare sales using the internet and other marketing means. Stroman has filed lawsuits in Texas federal courts against Arizona, Illinois, California and Florida regulators who have issued cease-and-desist or similar orders demanding a halt

to Stroman's activities in their jurisdictions. The suits have alleged that, under the U.S. Constitution's Commerce Clause, non-Texas state regulators cannot exert authority over Stroman's business activities. In the Wercinski case, the U.S. Fifth Circuit Court of Appeals upheld the dismissal of Stroman's suit, concluding that the Texas federal district court has no personal jurisdiction over the Arizona Commissioner of Real Estate. A similar result was reached by the U.S. Seventh Circuit Court of Appeals in Stroman Realty v. Martinez, in which the court

upheld the dismissal of Stroman's Oral arguments have been held suit against the Illinois and a decision is pending. A Department of Financial and more detailed summary of these Professional Regulation (IDFPR). cases is available to ARELLO The court ruled, among other members through the things, that the "abstention ARELLO Online Resource doctrine" bars federal court Library (ORL), resource #961. interference with IDFPR's efforts to regulate Stroman's Illinois activities. Still ongoing is Stroman Realty v. Antt, et. al., a Fifth Circuit case in which Florida and California real estate regulators are appealing the order of a Texas federal judge that permanently enjoins them from pursuing efforts to stop Stroman's alleged practices in those states. *Amicus Curie* briefs were filed by 13 states and the Commonwealth of Puerto



ADRE Legislative Action Update



HB 2123 – landlord charges; utilities

HB 2123 outlines the requirements for landlords of recreational vehicle and mobile home parks when charging their tenants separately for utilities.

Action: Passed House and has been transmitted to the Senate.

HB 2131 – HOA's, Registration, Disclosure

This bill requires homeowners associations and condominium associations to register with the Department of Real Estate. It requires the Department to post information on our website regarding the association, including every document which is recorded. The bill does not provide any oversight or regulation by the Department. There is no enforcement mechanism.

Action: Passed the House Homeland Security and Property Rights Committee.

HB 2141 – Home sales; water supply disclosure

A subdivider who sells one or more lots located outside of an active management area shall record a document that contains a statement of water adequacy for that lot.

Action: Passed House Environment and House Water committees.

HB 2221 – County Subdivisions; Notification

If a reservation of an area within a subdivision for public use terminates due to a public agency's failure to exercise the reservation, the agency must notify the subdivider within 14 days of the termination.

Action: Passed House, ready for Senate.

HB 2349 – Loan Originator Licensing

Beginning January 1, 2010, loan originators must be licensed and regulated by the Dept. of Financial Institutions. Grounds for disciplinary action and requirements for licensure, including an examination administered by an examination committee, are established. Makes other changes related to licensing of mortgage brokers, including requiring brokers and other licensees who employ loan originators to complete continuing education units.

Action: Passed House, referred to Senate Finance Committee

HB 2495 – Military Electronic Ranges

This bill requires a city or town that contains any portion of the sensitive electronic testing range of a military base to notify the office of the base commander when an application is received to 1) rezone the property; 2) issue a building or other

development permit; 3) subdivide or otherwise divide the property. The strike everything amendment requires municipalities and counties to notify the military base commander of a military electronics range (MER) when certain land use applications are deemed complete. Additionally, land sellers must disclose whether or not the property up for sale is located in a MER. The Department of Real Estate must record a document in the county which includes a geospatial description of the boundaries of the MER.

Action: Same bill as 1387 in the Senate. Bill passed committee in both House and Senate and is waiting for floor vote.

HB 2842 – Drop Houses

HB 2842 increases the penalty for the smuggling of human beings from a Class 4 felony to a Class 3 felony, creates a statutory definition of drop house, and changes statutes relating to forgery and smuggling. The bill stipulates that forgery in which the forged instrument is involved in the purchase, lease, or renting of a dwelling that is used as a drop house is a class 3 felony. Assigns a Class 4 felony to persons or companies

Legislative Update

Continued from page 6

lease or broker a transaction involving property that the person or company knows or has reason to know will be used as a drop house.

Action: passed House committees, waiting for floor vote.

SB 1043 – Real estate disclosure; liens

This bill requires title insurance agents and real property escrow agents to disclose in writing to the buyer and seller that title insurance may be available.

Action: Passed FIIR in the Senate. Awaiting floor vote.

SB 1006 – Military License Extensions

This bill requires licensing agencies to extend the license of a person who is called to active federal military duty for 180 days after the licensee is taken off of active federal military duty. The licensee, or the licensee's agent, is responsible to notify the Department of the active federal military duty.

Action: Passed Senate, transmitted to House.

SB 1232: Real Estate Dept; Business Broker Designation

The specific designation of persons who specialize in the business of selling businesses is no longer recognized in statute. Those who already have the designation will be allowed to keep it through the current licensing period.

Action: Passed Senate; ready for House

SB 1350: Real Estate Transfers; Disclosures

Submitting for recordation an affidavit of value which the person knows to be false or incomplete is an instance of "deceptive practice" and is sanctionable under laws governing consumer fraud.

Action: Passed Senate Commerce; waiting for floor vote

SB 1387 – See HB 2456

SB 1491 – Subdivision Reports; Notice

Beginning Jan 1, 2009, a subdivider must record all public reports and amendments to public reports on the property in the county in which the property is located. Likewise, a seller of unsubdivided land must record public notices and amendments in the county in which the land is located. If the ADRE determines a violation of statutes pertaining to subdividing has occurred, the dept must record a public notice, stating among other things, that no

building permits are allowed to be issued for the land until appropriate approval is acquired.

Action: Passed Government Committee; waiting for Senate Floor

Editor's Note: ADRE Legislative Action Update is written by Tory Anderson, Assistant Commissioner—Policy and Special Projects. Contact her at: tanderson@azre.gov

Merging Appraisal Licensure/Regulation with the Department of Real Estate

HB 2774 reflects the Governor's plan to merge the existing Board of Appraisal duties into the Arizona Department of Real Estate. This plan is good for Arizona.

This merger will provide better consumer protection by utilizing economies of scale to achieve more effective and efficient oversight of appraisers and registered property tax agents (hereafter referenced as a group called "appraisers").

The Governor's plan places regulation of appraisers into a cabinet level agency, underscoring her recognition that oversight needs to be elevated for the benefit of the Public and the reputable appraisers. ADRE is lead by ONE Commissioner (not a commission of industry members as some may mistakenly believe). He is a member of the Governor's cabinet, with full time staff of 63 employees currently.

By statute, the Commissioner must not be an active real estate licensee to ensure no conflict of interest. Appraisers will gain more independence from mortgage companies and real estate practitioners if regulated by ADRE.

Several meetings and discussions were successfully completed between the Board of Appraisal executive director, Arizona's Real Estate Commissioner and his senior level staff. An initial plan discussed by ADRE and the executive director of the Board allows ADRE to hire two full time investigators to work on appraisal complaints and mortgage fraud.

Continued on page 8

ADRE Legislative Action Update

Continued from page 7

This will result in more timely and fair resolution of complaints and enforcement and compliance to correct harm when it occurs.

Existing processes at ADRE will allow for a smooth merger of appraisal licensees with other ADRE regulated licensees (agents, brokers, real estate schools, developments, timeshares and more) utilizing technology that will also permit more efficient renewal of licensing.

If you have any questions about the proposed merger or legislation, please contact Tory Anderson, Assistant Commissioner of Policy and Special Projects, at tanderson@azre.gov.

Note: The bill appears to be stalled in the legislature and may not make progress this year.

Department of Real Estate partners with Apache and La Paz Counties to ensure consumer protection

Apache County and La Paz are the newest counties to approve the Intergovernmental with agreement with the Department.

The IGA underscores the Department's shift in focus and resources to combat illegal subdivisions across Arizona. The goal is for cases to be dealt with more efficiently and timely and also to deter new illegal activity.



ADRE staff looks on as Commissioner Wercinski sign the IGA for Apache County

Hiring Workers for Your Business: Are They Independent Contractors or Employees?

Learn how to make the distinction between an independent contractor and an employee. Hear about how to avoid common pitfalls on taxes, unemployment insurance and workers' compensation caused by hiring a contractor who's really an employee. During this webinar recording, you will hear speakers from the Internal Revenue Service and Washington State Department of Labor & Industries talk about these topics as well as the tax responsibilities and reporting requirements for each type of worker.

All you need in order to view and listen to this presentation is a computer with internet access and speakers. The

The hyperlink to a recorded version of the webinar is shown below. You may access it at anytime to view all or a part of the presentation.

Click on this link to play the recording: <https://cc.readytalk.com/play?id=0c1dgsd9>

For additional instructions on playback, click here: <https://www.callinfo.com/help/>

Note: Recording playback requires Flash. If you do not have Flash installed, you will be prompted to install it before playback begins.

Editor's Note: IRS update is provided by Lisa Novak, Sr. Stakeholder Liaison, IRS Communication Liaison & Disclosure. Contact information:

Lisa.a.novack@irs.gov

Karen Sousa, a guest at one of the Commissioner's Lunch, stated "The luncheon was a breath of fresh air."

"Lunch with the commissioner"

Over the past few months, Commissioner Wercinski and his Assistant Commissioners have presented updates on the Department to the Southeast Valley Regional Association of REALTORS® and Scottsdale Area Association of REALTORS®. The presentations have been very successful!

On **April 21, 2008**, Tucson Association of REALTORS® will be hosting the lunch from **11:30 am to 1:00 pm**. For further information or to RSVP please contact Leslie Holland: Leslie@tucsonrealtors.org

Enforcement and Compliance
in alpha order by type of action

Total Disciplinary Actions Resolved through Issuance of Provisional License and the Accelerated Settlement Agreement Process (ASAP)

Name Ernesto Rodriguez
Location: Surprise, Arizona
License Unlicensed Individual
Summary: Department denied Respondent's application for license based on multiple convictions.
Order Date: December 7, 2007
Action ALJ ruling uphold Department denial of license
Name: Alejandro Guillermo Sapiens
Location: Tucson, Arizona
License: SA537199000
Summary: Respondent convicted of multiple felonies from 2005 through 2007 for Driving under the Extreme Influence of Alcohol, Resisting Arrest and Aggravated Driving under the Influence of Intoxicating Liquor. Respondent sentenced to 5 years Probation.
Order Date: January 17, 2008
Action: Revocation of license
Name Savannah J. Varns
Location: Glendale, Arizona
License: SA569546000
Summary: Respondent tested positive for alcohol, Respondent under a Consent Order not to consume alcohol.
Order Date: December 6, 2007
Action Uphold Summary Suspension. Revocation of license.

Advertising	2
Convictions	13
Failure to Disclose in a Timely Manner	15
Forgery	1
Misrepresentation	1
Negligence	1
Other Jurisdiction Sanction	2
Property Management	1
Subdivision (illegal)	2
Subdivision Violations	5
Unlicensed Activity	1
Grand Total	44



WE MUST INVEST TO BE SUSTAINABLE?

By Jim Holway for the *Arizona Republic*
February 2, 2008

This article is one in a series of articles contributed by Arizona State University's Global Institute of Sustainability. The Institute catalyzes and advances interdisciplinary research and education on environmental, economic, and social sustainability.



I am often asked: Are our current growth and water use “sustainable?” This simple question does not have a simple answer. First, we have many options on how we choose to use our water. Second, the backdrop against which we view our water supply and use is constantly changing—our population continues to expand, our economy grows, our desires and expectations evolve, and we respond to any number of external events, including new technologies, global climate, and energy availability. Third, sustainability can be defined and measured in different ways with differing results.

Arizona, like most other regions of the world, initially developed through exploiting its natural resources, often at rates that would deplete the region over time. A key sustainability challenge is to look far enough into the future to anticipate the needs for new resources, technologies, and even changes in our behavior. We will need the ability to make adjustments in a timely manner and avoid crossing critical thresholds that could result in unacceptable or irreversible damage to our environment, economy, and community. Groundwater overuse, for example, could dewater an aquifer and compact the aquifer's underground structure. This overuse could lead to permanent loss of water

storage capacity, increased vulnerability to drought, drying up of streams, or even land subsidence and fissuring. All of these scenarios have occurred in Arizona.

Sustainable management becomes increasingly complex as population growth and lifestyle changes place higher demands on resources. To meet that demand, we must increase our investments in new water resources, physical infrastructure, and social institutions; otherwise we won't be able to maintain our region's ability to respond to changes. One of Arizona's political challenges is that many of our leaders miss this fundamental relationship. They want to allow continued growth, but do not want to invest in the tools needed to effectively manage and serve our increasingly complex communities.

Arizona has made significant advances in linking water and growth to address long-term sustainability. These include requiring Arizona's larger or faster-growing local governments to consider water adequacy in their long-range plans; rules that require a “100-year renewable water supply” before land can be subdivided within Active Management Areas, and; last year's legislation allowing cities and towns (as well as counties, if they have a unanimous vote of their county supervisors) to adopt an ordinance requiring new subdivisions to have a 100-year water supply.

During the coming year, Arizona's leaders will be considering major growth-management, transportation and water-management initiatives. My hope is that we will, in fact, look far into the future to envision and plan for strong and healthy communities and that we will be willing to invest to make it happen.

My not-so-short list of priority goals for assuring a sustainable Arizona water supply include:

- Develop long-range water-demand projections along with information on water supplies;
- Forge regional partnerships to coordinate long-range watershed and aquifer management;
- Secure future supplies;
- Understand and prepare for climatic variability and global climate change;

Continued page 11

WE MUST INVEST TO BE SUSTAINABLE?

Continued from page 10

- Modify the state's regulatory framework and water-management organizations to evolve with continued growth, to require water adequacy in both urban and rural areas, and to facilitate water transfers; and
- Address environmental quality, ecosystem health, and quality-of-life concerns related to water management

Jim Holway, former Assistant Director of the Arizona Department of Water Resources, is a Professor of Practice and Director of the Sustainability Partnership at ASU's Global Institute of Sustainability.

An earlier version of this essay also appeared in the ASU Morrison Institute for Public Policy report

Sustainability for Arizona: The Issue Of Our Age

TRIPLE C SCHEDULED FOR SOUTHERN ARIZONA

Triple C meetings focus on a specific topic. All are welcome! This is the time to bring opportunities and challenges to the Commissioner.

Commissioner Wercinski is committed to open dialog. If you would like to meet with him regarding a topic not listed, please contact Tory Anderson at tanderson@azre.gov

All are welcome to attend the Commissioner's Conversation

(Triple C) on 5/20/08 from 1pm-2pm at .

ASSISTANTS: ASSET or LIABILITY

By: John P. Hale, ABR, CRS, GRI

The Issue: Who, What, Where, When and Why

Real estate "Assistants" come in only two forms: licensed or, unlicensed, i.e., possessing a valid State of Arizona Department of Real Estate Salesperson or (with a remote chance) Associate Broker license. Beyond that distinction, there may be other variations of what they do and what they are called. Some examples of how they may be referred to include: Personal Assistant, Professional Assistant, Buyer Assistant, Transaction Coordinator, Listing Assistant, Virtual Assistant, Secretary, Clerk, Person Friday, Support Staff, etc. – call them what you will. What you call this person

is not nearly as important as: why you want them, what you are having them do, who is ultimately responsible for what they do, where they are doing it, when it has to be done, and who is paying them for what they do.

Depending on the answers to all of those questions, it may be possible for an Assistant to be an employee, a sole proprietor, or some other legal form of business entity. In the case of a Virtual Assistant, it may that you contract with a company on the internet – and never actually see anyone.

Because there are so many variables involved, and because the rules of engagement are so strict, there is concern that there may be many real estate agents and brokerages that are, perhaps unknowingly, not fully

compliant with all of the rules when it comes to employing assistants. Hence, this discussion is intended to illuminate all of the factors relevant to having a relationship with an Assistant that complies with all of the rules and therefore reduces your risk.

The Law

Arizona Revised Statutes (A.R.S.) [32-2101\(46\)](#), [32-2121](#), and [32-2122](#), and [32-2155](#) all address this issue as it relates to the responsibilities of the employing broker and licensees. Essentially, what these statutes collectively say is that any person that is doing anything related to a real estate transaction that may interface with the public is responsible to the employing broker. And, conversely, that the employing broker is

ASSISTANTS: ASSET or LIABILITY**Continued from page 11**

responsible for anything that impacts the real estate transaction and the parties to it.

ADRE Policy

The Arizona Department of Real Estate (ADRE) has issued a Substantive Policy State No. 2005.04 which provides official advice on the topic of “unlicensed assistants” and is reprinted here in its’ entirety:

Arizona Department of Real Estate
SUBSTANTIVE POLICY STATEMENT
No. 2005.04

Short Title: Unlicensed Assistants

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedure Act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under ARS 41-1033 for a review of the statement.

Description of Practice/Procedure:

In looking at the issue of unlicensed assistants, various aspects must be considered, including what activities the individual will perform and how the individual is paid.

If an unlicensed assistant is paid on any basis that relies on the ultimate sale of a property, then that person

must be licensed.

An unlicensed assistant in the employ of a licensed real estate broker may:

- Perform telephone duties, to include calls to:

- 1) collect demographic information
- 2) solicit interest in engaging the services of a licensee or brokerage
- 3) set or confirm appointments (with no other discussion) for:

- A licensee to list or show property
- A buyer with a loan officer
- A property inspector to inspect a home
- A repair/maintenance person to perform repairs/maintenance
- An appraiser to appraise property
- 4) mortgage and/or title companies to track the status of a file, check daily interest rates and points, whether buyer has been qualified, confirm closing appointment for licensee, and so forth
- *Assist a licensee at an open house*
 - Unlock a home for a licensee so that licensee can show a buyer the property or preview the property (no discussion about the property)
 - Deliver documents (as a mail or delivery service only)

An unlicensed assistant shall not perform the following activities:

- Hold/host an open house without an agent being present
- Perform a walk-through inspection
- Answer questions relating to a

transactional document

- Give instructions to inspectors, appraisers or maintenance/repair people. Because these instructions are part of the licensee's regular duties and there is a direct relationship to the (potential) transaction, a license is required in order to give instructions to inspectors appraisers or repair/maintenance people

Authority: A.R.S. § 32-2101(46) defines the activities of a real estate broker, for which licensure is required pursuant to A.R.S. § 32-2122. See also A.R.S. § 32-2121. Policy Program: Enforcement

Effective Date: Revised April 3, 2000; Revised & Renumbered 5/28/04; Renumbered 4/01/05.

In addition, our current Commissioner, Sam Wercinski, has recently issued the following statement:

“In looking at the issue of unlicensed assistants, various aspects must be considered, including what activities the individual will perform and how the individual is paid. If an unlicensed assistant is paid on any basis that relies on the ultimate sale of a property, then that person must be licensed.”

NAR Resources

The National Association of REALTORS® (NAR) is a great resource for more information on this topic. For example,

Continued on page 13

ASSISTANTS: ASSET or LIABILITY

Continued from page 12

the following statistics come from the 2005 NAR Member Profile:

Characteristics of Personal Assistants

■ **15%** of REALTORS® use at least one personal assistant

■ **48%** of personal assistants are unlicensed

■ **54%** of personal assistants are employed part-time

■ **79%** of personal assistants work exclusively for one REALTOR®

The [Real Estate Professional Assistants](#) (REPA) is a comprehensive two-day certification course offered by the NAR that provides an intensive introduction to the real estate business and to the specific ways support staff can become valuable assets to their employers.

The following link will take you to lots and lots of additional information about using personal assistants: <http://www.realtor.org/libweb.nsf/pages/fg114>.

AAR

The Arizona Association of REALTORS® (AAR) has also published some useful information about Assistants available at the following link:

<http://www.aaronline.com/Career/AssistantArticles/default.aspx>

Insurance Concerns

Are Assistants, licensed and/or unlicensed covered by Errors and Omissions (E&O) insurance or legal defense fund? Licensed Assistants

identified on the employing broker's policy. Unlicensed Assistants may or may not be covered. This is certainly something worth checking into. Every insurance company and each policy may be different. Just assuming that there is proper coverage for Assistants actions could be a costly mistake.

Remember that any individual participating in a transaction could ultimately be named in a complaint. It is imperative that you know what your company policy is regarding this issue and insurance coverage.

There is also the matter of general liability / property and casualty insurance as it may relate to Assistants. Every situation and set of circumstances are going to require evaluation and consideration for the risks and protections that may be present and necessary.

Employment Status & IRS Issues

On the topic of paying people, guess who else is interested in such matters. Our friends at the [Internal Revenue Service](#) (IRS) are definitely interested and watching us. The "safe harbor" that has been created exclusively for real estate agents by the IRS is something that only applies to licensed persons and their business entity or legal form based on their relationship with the brokerage.

Assistants are likely to be properly considered as employees by the IRS. When that is the case, all of the following come into play:

Employee Withholding. Employers are responsible for the withholding and timely remittance of federal income taxes, state and local income taxes, and FICA taxes from wages paid to

their employees.

Employer Payroll Taxes. Employers owe, and must remit, their own share of payroll taxes, such as FICA and federal and state unemployment insurance, on employee wages.

Labor Laws. Worker's compensation, working conditions, and minimum wage laws all impose on employers certain financial and other requirements for the benefit of employees.

Employee Benefits. Employees generally enjoy employer funded benefit programs such as vacations, holidays with pay, health insurance, and pension and profit sharing plans; contractors generally do not receive these benefits.

Reporting. Wages paid to employees (along with the amounts of the various taxes withheld) are reported on Form W-2; amounts paid to contractors are reported on Form 1099. Additionally, Forms 940 and 941 (and perhaps others) must be filed for wages paid to employees.

Unemployment Compensation. More information for employers can be found at: <http://www.azdes.gov/esa/uitax/benefit.asp>.

New Hire Reporting. A mandatory requirement under [Arizona Revised Statute 23-722.01](#) and the [Federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996](#). Employers are required to report all newly hired and rehired employees within 20 days of hire to the Arizona State Directory of New Hires.

Continued page 14

ASSISTANTS: ASSET or LIABILITY**Continued from page 13**

The IRS uses a twenty question test to assess the level of control ("yes" answers provide evidence of an employer-employee relationship):

1. Is the worker required to follow your instructions in completing the job or accomplishing the task?
2. Do you provide the training necessary for completion of the job?
3. Are the worker's specific personal services required for successful completion of the job?
4. Are the worker's services crucial to the success or continued existence of your company?
5. Do you set work hours?
6. Does the worker have a continuing relationship with your company?
7. Do you hire, supervise, or pay any of the worker's assistants?
8. Is the worker precluded from seeking assignments with other companies or from refusing assignments offered by your company?
9. Do you specify the location where the work must be performed?
10. Do you direct the order or sequence of tasks to be performed?
11. Do you require progress reports?
12. Is the worker paid by the hour,

week, or month, rather than for the completion (or stage of completion) of the project?

13. Does the worker work only for your company?

Do you pay business overhead and incidental expenses?

Do you provide equipment, tools, and materials?

Is the work performed on your premises or using your facilities?

Are the worker's services not available to the general public?

Do you provide a minimum "salary" and therefore shield the worker from the risk of profit or loss on the job?

Do you have the right to terminate the worker even if the job results are achieved?

Are you required to pay the worker for time spent even if the job is not completed?

It won't help you if you didn't answer the questions honestly. The more yes answers you have, the more likely is the case for an employee versus an independent contractor.

An excellent discussion of this topic was published by our AAR General Counsel, Michelle Lind, Esq. at this link: <http://www.aaronline.com/RM/Feb07.aspx>

Contract Services

There are now a number of individuals and companies that are in the business of providing real estate assistant services on a variety of levels. Some are acting as part-time sole proprietor contractors. Some have created a legal for of LLC, PC, and a variety of

partnerships and corporations to address their own legal status and liabilities. There are .com companies that don't even reveal where they are physically located. There are even people who are licensed with one real estate brokerage but doing part-time Assistant work for a licensee of a different brokerage. What are the risks?

Agency Issues

Suppose you decide to use an Assistant who is licensed – but their license is with a competing real estate brokerage in town. Their business is slow, or they are fairly inexperienced and you offer them some work as your temporary transaction coordinator and agree to pay them a certain fee or percentage by the deal. Do we have any issues? Yes, we do.

First of all there is the problem of who is paying who. Only your employing broker may pay their employing broker for anything related to a real estate transaction. That can be done – but is it?

The second problem is the potential for a conflict of interest that may adversely affect the client(s) – an "agency" issue. What if your Buyer is purchasing a property listed by your Assistant's broker. Has dual agency been disclosed? It would have to be.

This issue may arise when using a Virtual Assistant as well.

Who Pays Who?

Perhaps one of the more sensitive components of this issue is who

ASSISTANTS: ASSET or LIABILITY**Continued from page 14**

pays who. If your licensed Assistant is being paid a bonus or referral fee tied to a specific transaction they can only be paid through their employing Broker. If the assistant is also paid hourly for general support it is always advisable to do so through a payroll leasing company so the tax, withholding and benefits issues described earlier are addressed.

Office Policy Manual

Commissioner's Rule [R4-28-1103, Broker Supervision and Control](#) requires a written Policy Manual to be developed by every real estate brokerage that is customized to their workplace and practices. One of the topics that must be covered in the Policy Manual is the supervision of and accountability for all associate brokers, salespersons, and employees. This includes "Assistants" of all types. Employing brokers are always ultimately responsible for the acts of anybody within the scope of their employment – in any form.

The written policy should include the Broker's policy concerning Assistants, permissible and prohibited activities, compensation, equipment/office space, withholding tax, worker's compensation insurance, company liability, etc., etc.

Other Documentation

As with everything in real estate, it didn't happen unless it is written down. Be sure to have a written "employment agreement" with anybody working for you.

It would also be a great idea to have a written agreement of understanding covering the roles and responsibilities of all parties involved – to include, at a minimum, the employing broker, you, and the Assistant.

Note: *This information provides general legal information and should not be relied upon as legal guidance. Before acting, both the relevant laws and legal counsel should be consulted. This information should not be construed as specific legal advice nor as an opinion on particular facts, cases, or situations.*

LAW BOOKS

We ordered 2,000 Law Books and only 500 are left! Order yours now!

ADRE

SUBSTANTIVE POLICY STATEMENT

No. 2008-01

Short Title: Pre-license Education Waiver

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedure Act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under ARS 41-1033 for a review of the statement.

Description of Practice/Procedure:

No waiver will be granted for the mandated ninety-classroom hours for real estate salesperson or brokers pre-licensure curriculum.

Authority: A.R.S. §32-2124(B), (C), (J), (L), A.A.C. §R4-28-301 (B). A.R.S. §32-2102 provides that the Department of Real Estate, under the direction of the Real Estate Commissioner, shall administer Title 32, Chapter 20.

Policy Program: Education/Regulation

Effective Date: February 8, 2008

Short Title: Subsequent Owners/Public Reports

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedure Act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under

Description of Practice/Procedure:

A subsequent owner of 6 or more lots located within an existing platted subdivision for which a Public Report was previously issued may qualify for a Special Order of Exemption from the requirement to obtain a new Public Report if:

The subsequent owner has satisfied all provisions and requirements of A.R.S. §32-2181.02(B)(2), except for the requirement of §32-2181.02(B)(2)(a) that the Public Report must have been issued within the past two years.

The subsequent owner demonstrates compliance with the assured water supply requirement described in A.R.S. 32-2181(C).

Authority: A.R.S. §32-2181(B) and §32-2181.01. A.R.S. §32-2102 provides that the Department of Real Estate, under the direction of the Real Estate Commissioner, shall administer Title 32, Chapter 20.

Policy Program: Developments (Subdivisions)

Effective Date: February 8, 2008

Short Title: Acceptable Forms of Payment

This substantive policy statement is advisory only. A substantive policy statement does not include internal procedural documents that only affect the internal procedures of the agency and does not impose additional requirements or penalties on regulated parties or include confidential information or rules made in accordance with the Arizona Administrative Procedure Act. If you believe that this substantive policy statement does impose additional requirements or penalties on regulated parties you may petition the agency under ARS 41-1033 for a review of the statement.

Description of Practice/Procedure:

The Department will only accept payment for fees and for any other purposes when made by credit card, cash, check, or money order.

Acceptable checks include pre-printed personal or business account checks or drafts, either in-state or out-of-state. Two-party checks, counter checks or any check not pre-printed with the name and address of the account holder, the name of the subject financial institution and the account number are considered unacceptable forms of payment.

Payment of a civil penalty shall be by credit card, money order, certified check, cashier's check or cash.

If an individual or entity has an outstanding "bad check," no further checks or payment of any other kind for any purpose will be accepted by the Department from that individual or entity until the outstanding check is redeemed, using a credit card, cashier's check, money order, certified check or cash.

The Department will accept one form of payment per transaction.

Authority: A.R.S. §§ [32-2125.01](#), -2129, -2130, -2186, -2194.02, -2195.02, -2196, -2197.05 and -2198.09 authorize the Commissioner to assess fees and prescribe the amounts to be charged. A.R.S. § 35-142(I) authorizes state agency acceptance of credit card payments pursuant to § 35-315.

Policy Program: Commissioner's Office

Effective Date: February 8, 2008

ARIZONA DEPARTMENT OF REAL ESTATE

Main Office:

2910 North 44th St., 1st Floor
Phoenix, Arizona 85018
Phone: 602.468.1414
Fax: 602.468.0562

Southern Arizona Office:

400 W. Congress, Suite 523
Tucson, Arizona 85701
Phone 520.628.6940
Fax 520.628.6941

www.azre.gov

DIALOG

THE PERIODIC BULLETIN FROM THE ARIZONA DEPARTMENT OF REAL ESTATE

An official publication of the State of Arizona

JANET NAPOLITANO
Governor

DEPARTMENT OF REAL ESTATE

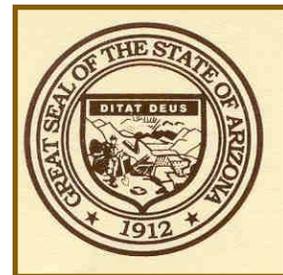
SAMUEL P. WERCINSKI
Commissioner

Mary C. Uteley
Assistant Commissioner
Communications & Public Relations

REAL ESTATE ADVISORY BOARD

Gary Brasher, Chair
Lisa A. Suarez, Vice-Chair
Frank Dickens
Kathy Howe
Bruce Mosley
Thomas J. Pancrazi
Patti Shaw
Ann White

Volume 2-Issue 2



Note: Please check your mailing label and if the date above your name is more than 1 year old, you must subscribe for another year. Send your request along with a check for \$10 payable to ADRE and note on your envelope.

© 2008 ARIZONA DEPARTMENT OF REAL ESTATE.

DIALOG, THE PERIODIC BULLETIN, OR "DIALOG," IS SCHEDULED TO BE PUBLISHED 6 TIMES A YEAR AND IS AVAILABLE FROM THE WEB SITE ABOVE. FIRST-CLASS MAIL SUBSCRIPTIONS ARE AVAILABLE FOR \$10 PER YEAR. ARTICLES REPRINTED FROM OTHER PUBLICATIONS DO NOT NECESSARILY REFLECT THE POLICIES OR INTERPRETATIONS OF LAW BY THE ARIZONA DEPARTMENT OF REAL ESTATE.