WISCONSIN REALTORS® ASSOCIATION

LEGAL UPDATE

A MONTHLY GUIDE TO WISCONSIN REAL ESTATE LAW & POLICY

DECEMBER 2019, 19.12

Top Ten Legal Developments for 2019

The world of real estate practice evolves and changes. This *Legal Update* provides a recap of some of the new developments impacting Wisconsin REALTORS® that came down the road in 2019, apart from the development of an updated WB-11 Residential Offer to Purchase. The developments included in this year-end summary include Wisconsin's 2019-21 budget, qualified opportunity zones, Supreme Court ruling regarding government taking of property, the letter of intent form for commercial transactions, wetland regulation reform, professionalism's emphasis on prompt and proper offer presentations, impact fees reform, MLS Clear Cooperation Policy, the new FHA condominium approval rules and the class action antitrust litigation filed against NAR.

State Budget

On Wednesday, July 3, 2019, Governor Tony Evers signed the 2019-21 state budget into law. The state budget spends approximately $82 billion over the biennium, an increase of approximately 5.4 percent over the previous budget. The governor used his partial-veto authority to change 78 provisions adopted by the Legislature.

The 2019-21 budget accomplished major goals of the real estate industry. The budget made housing more affordable by holding the line on property taxes and reducing income taxes by $450 million. Wisconsin made major investments in improving infrastructure. More money for a modernization of the DSPS website, along with a greater investment in K-12 education and broadband, were also positive measures. The budget also invests more in transportation than the prior budget and uses less bonding to do so.

The final budget in 2019 Wis. Act 9 includes a number of bipartisan priorities such as a middle-class tax cut, water quality initiatives, and increased education and transportation funding. Specifically, some of the most significant provisions impacting the real estate industry were:

1. **Income tax reductions** on average by $75 per person in 2019 and by $136 in 2020, and a reduction of $182 per year for married-joint filers.
2. **Property taxes increase** on average for the owner of a $174,000 median-value home, by $56 in the first year of the budget and $48 in the second year
3. **DSPS website modernization** via the $5 million allocated to update and modernize the Wisconsin Department of Safety and Professional Services (DSPS) website, credentialing systems and consumer portals.
4. **K-12 funding** increased by approximately $570 million over two years.
5. **Transportation funding** at $465 million primarily through a $95 increase in vehicle title transfer fees, from $69.50 to $164.50, and a $10 vehicle registration fee increase, from $75 to $85.
6. **Knowles-Nelson Stewardship** two-year program extension.
7. **Broadband expansion grant program** funded at $48 million throughout the biennium to reach more underserved areas of the state.
8. **Milwaukee mega-transportation projects** to expand I-43 in Milwaukee and Ozaukee counties to three lanes in each direction and complete the Zoo Interchange within the next two years. Initiates plans to widen I-43 from Silver Spring Drive in Glendale to Highway 60 in Grafton.

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For better or for worse, some key proposals did not successfully make their way into the final budget. These measures included the first-time homebuyer savings account, tax incremental financing limits, limits on the long-term capital gains exclusion, restoration of the state prevailing wage law, levy limits, stormwater management fees, highest and best use assessment with no vacant or dark store comparables and limits on the manufacturing and agricultural tax credit.

MORE INFO

See "Done Deal: Wisconsin state lawmakers agree on the state budget" in the August 2019 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Aug19/DoneDeal.aspx, "Melting the Property Tax Freeze" in the June 2019 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jun19/PropertyTax and "Bridging the Gap to Homeownership" in the May 2019 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/May19/Homeownership.

Qualified Opportunity Zones

The 2017 Tax Cuts and Jobs Act established "Opportunity Zones" to spur private investment in distressed communities throughout the United States. The opportunity zones (OZ) program encourages investment in some of the most economically challenged communities by offering tax incentives. This private investment, in turn, promotes economic growth and job creation.

Investors can re-invest unrealized capital gains into opportunity funds. These funds in turn invest in projects located within designated OZs. Investors can then temporarily defer and reduce taxes on the invested capital gains and eliminate taxes on future gains from the opportunity funds if held for 10 years.

Are there opportunity zones in Wisconsin?

There are 120 census tracts across 44 counties, 60 municipalities and two tribal reservations designated as OZs in Wisconsin. The median household income in Wisconsin OZs is $33,222, the median home value is $111,807, the median rent per month is $700, the homeownership rate is 40.60 percent, and 27.33 percent of the residents experience a severe rent burden.

How does the opportunity zone program benefit investors?

The OZ tax policies provide for the deferral or the exclusion of capital gains taxes on investments that are sold if the proceeds are reinvested into low-income or economically disadvantaged communities or neighborhoods that have been officially designated as OZs.

What are the opportunity zone tax benefits?

Investors can defer and reduce taxes up to 15 percent on capital gains realized from asset sales if these capital gains are reinvested into opportunity funds within 180 days of the asset sale. The taxation on the capital appreciation eventually realized on the opportunity fund's performance may be forgiven if the opportunity fund investment is held for at least 10 years. The core tax incentives are:

- **Temporary deferral** of inclusion in taxable income for capital gains reinvested into an opportunity fund until the date the opportunity fund investment is sold or exchanged, or December 31, 2026, whichever comes first.
- **Step-up in basis** for deferred capital gains reinvested in an opportunity fund, which effectively results in forgiveness of a proportional amount of the gain. The basis is increased by 10 percent if the investment in the opportunity fund is held by the taxpayer for at least five years and by an additional 5 percent if held for at least seven years, thereby excluding up to 15 percent of the original deferred gain from taxation.
- **Permanent exclusion** from taxable income of capital gains from the sale or exchange of an opportunity fund investment if the investment is held for at least 10 years. This exclusion only applies to post-investment gains accrued on investments made through an opportunity fund. There is no permanent exclusion for the initially deferred gain.

What does the OZ program mean for real estate professionals?

The OZ program provides a way for investors to invest capital gains without paying the tax on those gains immediately, which may encourage them to sell real estate assets they might otherwise hold on to in order to avoid taxes. On the back end, the opportunity funds created to invest in the zones will be looking for business property to invest in, which in many cases will include real property and/or involve development opportunities for real estate.

MORE INFO

See Opportunity Zones Frequently Asked Questions at www.irs.gov/newsroom/opportunity-zones-frequently-asked-questions, the February 2019 *Legal Update*, "Qualified Opportunity Zones," at www.wra.org/LU1902 and "Wisconsin Opportunity Zones" in the July 2019 Wisconsin Real Estate Magazine at www.wra.org/WREM/July19/OpportunityZones.

Government Taking of Property

In *Knick v. Township of Scott, Pennsylvania*, 588 U. S. _____ (2019), the United States Supreme Court reexamined the issue of government taking of property and ruled property owners no longer have to seek state-level compensation before filing takings claims in federal court.

One of the fundamental rights of property ownership is the right to exclude others from entering onto your property. Like other property rights, this right is supposed to be protected by the Fifth Amendment of the U.S. Constitution, which requires the government to fairly compensate a property owner if the government takes his or her property.

In Scott Township, Pennsylvania, some property owners lost this fundamental right. The township enacted an ordinance that broadened

the definition of "cemetery" to include suspected cemeteries and requires all cemeteries on public or private land to be open and accessible to the public during the day. The ordinance also authorizes law enforcement officials to enter and inspect private property within the township to determine if a cemetery exists, and the ordinance established a penalty up to $600 per violation.

Scott Township resident Rose Knick owns a 90-acre farm in the township, and her property, like many other rural properties, has various piles of rocks located throughout the property. According to Knick, the property is surrounded by a stone fence, and farmers who have rented her land have created several piles of rocks they dig up while plowing. The property has no records of ever being a burial site. Nevertheless, law enforcement officials entered onto her property, found the rock piles and believed them to be burial sites. Based on this determination, the township declared her property a cemetery and then issued a notice requiring Knick to allow the public to enter onto her property during daylight hours or face the threat of paying daily fines.

Knick filed a complaint in state court for a taking of her property, but the court declined to rule until the township actually prosecuted her. She then filed a similar claim in federal court, but the federal court dismissed her claim based upon a 1985 case, *Williamson County v. Hamilton Bank*, which prevents property owners from filing takings claims in federal court until they exhaust all options at the state level. As a result of the *Williamson* case, very few takings cases have been recently decided in federal court because of this state exhaustion obstacle.

Knick filed an appeal with the U.S. Supreme Court, asking the court to overturn the *Williamson* case, and the court agreed to hear her case. The court overruled the *Williamson* state litigation requirement and held property owners no longer have to seek state remedies before filing takings claims in federal court.

The court observed that under *Williamson* a property owner's takings claim was "premature" if he had not first sought compensation from the state. The unanticipated consequence was a Catch 22 scenario: a property owner who sought compensation in state court would have their federal claim barred because the full faith and credit statute required the federal court to honor the state court's decision. Fortunately, the court overruled the prior decision, finding a property owner acquires a right to compensation immediately upon an uncompensated taking because the taking itself violates the Fifth Amendment, and the property owner need not first seek compensation in state court.

This is a victory for property owners and experts believe the decision will have ramifications for similar challenges to local government environmental regulations or land use plans, helping property owners reach federal court quickly.

ⓘ MORE INFO

See the NAR discussion at www.nar.realtor/washington-report/u-s-supreme-court-makes-big-property-rights-decision, and read the case at www.supremecourt.gov/opinions/18pdf/17-647_m648.pdf.

Letters of Intent for Commercial Transactions

2019 saw the creation of a new WRA form designed for use in commercial transactions. Letters of intent give potential parties to a commercial transaction a non-binding way to propose terms for a possible future transaction. A letter of intent (LOI) is an agreement to agree in the future.

Under Wisconsin law, an agreement to agree is not an enforceable contract. An LOI reflects the parties' preliminary negotiations and provides a tangible indication that the parties are serious about entering into a potential transaction in the future. It gives the parties a non-binding picture of what a transaction between the parties might look like and may give them a sense of possible key terms.

An LOI can be used to propose a purchase price and earnest money amount in a contemplated sale or a rent amount and basic lease terms in a contemplated rental. An LOI presents an opportunity to see if the parties can even agree on basic business and economic issues without an intention to be bound.

REALTOR® Practice Tip

LOIs are not binding. Neither party is required to proceed even if they were able to agree on basic terms in the LOI. The parties do not have an enforceable contract unless they proceed to actually enter into a lease or offer.

Since an LOI is an informal agreement showing possible transaction terms, it takes the form of an informal letter or memorandum rather than a formal contract. LOIs are commonplace in commercial transactions, but it would be unusual to see an LOI in a residential transaction.

An LOI is not an enforceable contract so it should not look like a contract or contain provisions that would turn it into an enforceable contract. If an LOI contained provisions that did bind the parties, such as specifying an inspection that must occur by a deadline, the LOI can start to look a lot like a contract regardless of any language stating it is non-binding or not a contract. Including performance requirements obligating the other party to act or refrain from acting could lead to a court enforcing the "non-binding" LOI as a contract.

Because LOIs are so common in commercial transactions and some commercial practitioners do not have an LOI drafted by an attorney, the WRA created the WRA's Commercial Letter of Intent. A commercial agent who assists parties in preliminary negotiations by way of an LOI is strongly encouraged to utilize an LOI such as the WRA's Commercial LOI, available in zipForm and the WRA PDF forms packet.

REALTOR® Practice Tip

If a licensee is unsure of what an LOI is or how to use one, the licensee should consider referring the transaction. Additionally, a licensee can enlist the assistance of a fellow agent or an attorney who is knowledgeable in the use of LOIs.

ⓘ MORE INFO

See the May 2019 *Legal Update*, "Letters of Intent for Commercial Transactions," at www.wra.org/LU1905, LegalTalks: Commercial Letter of Intent at www.wra.org/Legal/Legal_Talks/LegalTalks__Commercial_Letter_of_Intent, and "The Purpose and Power of Letters of Intent: The undeniable role in commercial transactions" in the November 2012 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov12/LOI.

Wetland Regulation Reform

Wetlands in Wisconsin were defined by the state Legislature in 1978 as an area where water is at, near or above the land surface long enough to be capable of supporting aquatic or hydrophytic (water-loving) vegetation and which has soils indicative of wet conditions. Wetlands are areas where the frequent and prolonged presence of water at or near the soil surface drives the kind of soils that form, the plants that grow and the fish and/or wildlife communities that use the habitat.

Wetlands are regulated by the U.S. Army Corps of Engineers (USACE), the Wisconsin Department of Natural Resources (DNR) and by local counties, cities and villages. The DNR regulates all "Waters of the State." These waters generally include all wetlands, lakes, rivers, streams and ponds. Wisconsin's wetland regulations have been challenging to work with; filling, excavating, grading, mechanical clearing and the placement of structures are examples of activities that each may require a permit from the DNR and the USACE depending upon the type of wetland and the extent of the regulatory overlap.

2017 Wis. Act 183 (AB 547) enacted several significant wetland reforms to address regulatory concerns:

- Creates permit exemptions for certain discharges in urban growth areas and disturbances in certain nonfederal wetlands. For example, small disturbances up to one acre in lower-quality wetlands in urban areas may be allowed.
- Allows modifications, enhancements and maintenance to artificial or manmade wetlands without a permit. Prior law required permits, for example, for removal of muck and debris from retention ponds.
- Provides more flexibility for selecting mitigation options, for example, in choosing between on-site and off-site mitigation.
- Eliminates federal and state regulatory overlap as it authorizes the DNR to request jurisdiction from the EPA and USACE over the federal Clean Water Act Section 404 permit program, which regulates federal wetlands.
- Extends the life of wetland delineations (site maps identifying the specific type and location of wetlands) from five to 15 years. Wetland identifications and confirmation also will remain valid for 15 years for a nonfederal wetland if the parcel is subject to a storm water management ordinance.
- Prohibits the application of permit exemptions to rare and high-quality wetlands.
- Preempts local regulation by prohibiting local government from enacting an ordinance or adopting a resolution regulating an issue regulated by the Act's wetland permitting exemptions and mitigation requirements.

Three New Exemptions

Act 183 creates several new state wetland permit exemptions for different types of discharges. The nonfederal wetlands exemption exempts a discharge into a state wetland in an urban area if the discharge does not affect more than one acre of wetland per parcel, does not affect a rare and high-quality wetland, and the development related to the discharge is in compliance with any applicable storm water management zoning ordinance or discharge permit. Allowing small disturbances, up to one acre, to lower-quality wetlands in urban areas lets development occur in a more compact and contiguous manner, using less land with lower infrastructure costs.

In the nonfederal wetlands exemption for rural areas, a new exemption is created for a discharge into a state wetland outside an urban area, if the discharge does not affect more than three acres of wetland per parcel or any rare and high-quality wetland, and the development is a structure, such as a building, driveway, or road, with an agricultural purpose.

If an activity outside an urban area that is exempt from state wetland permitting requirements affects more than 1.5 acres of wetland, mitigation is required for the portion of the affected wetland that exceeds 1.5 acres. In other words, nonfederal wetland fills located in rural areas that are no greater than 1.5 acres are exempt from mitigation requirements. Similarly, discharges exempt from a permit in urban areas that affect more than 10,000 square feet per parcel must be mitigated. In other words, nonfederal wetland fills located in urban areas that are no greater than one-quarter acre are exempt from mitigation requirements.

The minimum mitigation ratio shall be at least 1.2 acres for each acre affected by the discharge.

Artificial wetlands are also exempt from state permit requirements. An "artificial wetland" means a landscape feature where hydrophytic vegetation may be present as a result of human modification to the landscape or hydrology and for which the DNR has no definitive evidence showing prior wetland or stream history that existed before August 1, 1991. Mitigation is not required for activities in artificial wetlands. The key here is determining if the wetland is artificial.

ⓘ MORE INFO

See the DNR Wetland Identification Program information at https://dnr.wi.gov/topic/Wetlands/identification.html. Also see the April 2019 *Legal Update*, "Wetland Regulation Reform," at www.wra.org/LU1904, "Wetlands benefit people and nature" at https://dnr.wi.gov/topic/Wetlands and "Wisconsin Legislature Passes Comprehensive Wetland Regulation Reform" in the March 2018 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/MAR18/Wetlands.

Professionalism: Prompt and Proper Presentations

The outcomes in real estate transactions are successful and best for everyone involved when real estate professionals work in the spirit of cooperation and courtesy rather than in combat mode. Even though real estate professionals may see themselves as competitors, they can work together courteously and cooperatively to provide clients, customers and the general public with high-level professionalism and trustworthy real estate service. The courtesies real estate professionals extend to each other are an important element of this cooperation. Simple courtesy improves efficiency and communications. Lack of courtesy can negatively affect clients and their impression of the real estate profession.

Part of this professional courtesy and communication that contributes to an overall impression of professionalism involves the communication and presentation of offers. Recent reports about listing brokers not presenting offers or not communicating with cooperating brokers and

buyers about the seller's response unfortunately do not reflect the high standards of REALTORS®.

Some reminders about the applicable rules and standards are in order. Much of this guidance is found in Wis. Admin. Code § REEB 24.13.

1. First of all, licensees must always promptly present all written proposals.
2. Licensees should not withhold offers simply because there are other offers waiting for the seller's response, per Wis. Admin. Code § REEB 24.13(3)(b). A good choice when there are multiple buyers is the WB-46 Multiple Counter-Proposal, allowing the seller to negotiate simultaneously with more than one buyer. Once all the offers are presented, it is the seller's decision – not the listing agent's – about which offer or offers to entertain.
3. The role of a licensee never involves substituting his or her judgement for that of a party. Rather, licensees always are to promptly present all offers and proposals in a fair, objective and unbiased manner so that the party can decide.
4. Common courtesy as well as professionalism and license law dictate agents should keep one another notified regarding what actions their respective parties are taking with regard to various proposals. This includes notice of whether the party has accepted, rejected or countered a submitted proposal, and confirmation of when the proposal was presented and when it was rejected or allowed to expire. These common courtesies are backed up in Wis. Admin. Code § REEB 24.13(4) regarding Notification of Action on Written Proposal.

ⓘ MORE INFO

See "The Best of the Legal Hotline: Prompt and Proper Presentations" in the January 2019 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jan19/Hotline, "2019: New Year's Resolutions of a Wisconsin Real Estate Professional" in the January 2019 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Jan19/Resolutions, "Cooperation and Courtesy: Keys to professional success" in the November 2019 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Nov19/Coorperation and Episode 5 of the Thursday Takeaways: "Professionalism" at www.wra.org/thursdaytakeaways/episode5.

Impact Fees Reform

Generally speaking, "impact fees" are financial contributions such as money or land, for example, imposed by communities on developers or builders to pay for capital improvements within the community that are necessary to service or accommodate a new development project. "Impact fees" means cash contributions, contributions of land or interests in land, or any other items of value that are imposed on a developer by a city, village or town under § 66.0617.

The Legislature used 2017 Wis. Act 243 to close loopholes in the impact fee law, which previously allowed local governments to impose excessive fees on new development. Act 243 provides flexible methods for impact fee payments and closed procedural loopholes relating to park fees.

- Municipalities are now barred from using impact fees for the operation or maintenance expenses of public facilities.
- Municipalities are prohibited from using impact fees to expand service capacity beyond that which is needed to serve the development for which the fee was created.
- Impact fees are payable to a municipality upon the issuance of a building permit.
- For impact fees in excess of $75,000, a developer may defer payment for a period of four years from the date the building permit is issued, or until six months before the municipality incurs costs related to the development for which the fees were imposed, whichever is earlier.
- Municipalities that collect impact fees are required to provide the developer with an accounting of how the fee will be spent.
- Impact fees not used within eight years must be refunded to the payer with interest. Fees collected for costs related to lift stations or sewage treatment or collection must be used within 10 years, unless the municipality adopts a hardship resolution to extend the time for an additional three years.
- State law provides that a person aggrieved by any fee imposed by a political subdivision may appeal the reasonableness of the fee in relation to the service for which the fee is imposed by filing a petition within 90 days after the fee is due and payable.
- With regard to parks, a city, village, town or county is now authorized to offer a subdivider the option of either dedicating land for a public park consistent with local park and comprehensive plans or paying a fee in lieu of dedicating land.

ⓘ MORE INFO

See the June 2019 *Legal Update*, "Impact Fees Reform," at www.wra.org/LU1906 and Wis. Stat. § 66.0602(2m) at https://docs.legis.wisconsin.gov/statutes/statutes/66/VI/0602.

MLS Clear Cooperation Policy

The National Association of REALTORS®' Board of Directors approved MLS Statement 8.0, also known as the Clear Cooperation Policy, on November 11, 2019. The policy requires listing brokers who are participants in an MLS to submit their listing within one business day of marketing the property to the public. The policy was proposed as a way to address the growing use of off-MLS listings and the concern that leaving listings outside of the broader marketplace excludes consumers, undermining REALTORS®' commitment to provide equal opportunity to all. The policy doesn't prohibit brokers from taking office-exclusive listings, nor does it impede brokers' ability to meet their clients' privacy needs.

Policy Statement 8.0 applies to any listing that is or will be available for cooperation. Pursuant to Policy Statement 8.0, "coming soon" listings displayed or advertised to the public by a listing broker must be submitted to the MLS for cooperation with other participants. MLSs may enact "coming soon" rules providing for delays and restrictions on showings during a "coming soon" status period, ensuring flexibility in participants' listing and marketing abilities, while still meeting the participant's obligations for cooperation.

The concept of "Coming Soon" and "Delayed Showing" can be achieved within the local MLS. Listings that are truly not yet ready to be shown can be shared with the MLS's brokers and agents to create exposure while the property is being prepared for showing. MLSs can also add clarity to the coming soon and delayed showing process by

defining specific statuses and showing requirements if these listings are to be included in the MLS. The most common implementations do not allow for showings of the listing until its status is changed to active, and any showings of the listing would immediately trigger that status change.

Here's the full text of MLS Statement 8.0:

> *Within one (1) business day of marketing a property to the public, the listing broker must submit the listing to the MLS for cooperation with other MLS participants. Public marketing includes, but is not limited to, flyers displayed in windows, yard signs, digital marketing on public facing websites, brokerage website displays (including IDX and VOW), digital communications marketing (email blasts), multi-brokerage listing sharing networks, and applications available to the general public.*

MLSs have until May 1, 2020, to adopt the policy.

This policy blends well with the Wisconsin licensee advertising rules in Wis. Stat. § 452.136(3) whereby there can be no advertising by a firm or licensee unless the firm is the listing firm, or the licensee or firm has the permission of the listing firm. In Wisconsin, a valid listing contract must describe the property, specify the price, include the commission, specify the term, be in writing and be signed by the person who is agreeing to pay the commission. A listing contract does not begin until the first day of the listing. A property may no longer be advertised or marketed in pre-agency; a firm wishing to advertise a property on behalf of the owner needs to have a listing contract. In addition, when a licensee wishes to advertise another firm's listing, the licensee needs to have the consent of the listing firm. The MLS provides the practical consent from the listing firm for the other firm to advertise the listing. Information obtained from the MLS, however, may only be used in the manner and within any limits specified in the MLS rules.

ⓘ MORE INFO

See the NAR Clear Cooperation FAQ at www.nar.realtor/about-nar/policies/mls-clear-cooperation-policy, which includes a form for submitting questions about the new policy; and "MRED endorses NAR pocket listing policy" at https://chicagoagentmagazine.com/2019/10/17/mred-endorses-nar-pocket-listing-policy (discussing and linking a white paper examining Chicago-based Midwest Real Estate Data's analysis and approach to pocket listings).

FHA Issues New Condominium Approval Rule

The Federal Housing Administration (FHA) published new condominium approval rules that include the ability to approve individual units in non-approved condominium projects. The revisions, effective October 15, 2019, do the following:

- Introduce a new single-unit approval process to make it easier for individual condominium units in a completed but unapproved project to be eligible for FHA-insured financing. For condominium projects with 10 or more units, no more than 10 percent of individual condominium units can be FHA-insured; and projects with fewer than 10 units may have no more than two FHA-insured units.
- Extend the recertification requirement for approved condominium projects from two to three years.
- Allow more mixed-use projects to be eligible for FHA insurance. FHA will require that the commercial/non-residential space within an approved condominium project not exceed 35 percent of the project's total floor area.

The FHA will require that approved condominium projects have a minimum of 50 percent of the units occupied by owners for most projects and will only insure up to 50 percent of the total number of units in an approved condominium project.

See the approval checklist for existing condominium projects as well as the submission criteria and instructions at www.nar.realtor/articles/approval-checklist-for-existing-condominium-projects to determine if a condominium project is eligible for FHA's Condominium Project Approval. This checklist is also available on the WRA Condo Law Resources page at www.wra.org/CondoLaw.

ⓘ MORE INFO

See "FHA Issues New Condominium Approval Rule: Comprehensive policy revisions include ability to approve individual units in nonapproved condo projects" at www.hud.gov/press/press_releases_media_advisories/HUD_No_19_121.

Class Action Antitrust Litigation Against NAR

Two class action antitrust law lawsuits were filed against NAR and some major real estate companies in 2019. These included the *Moehrl v. National Association of REALTORS®, et al.* litigation and *Sitzer and Winger v. NAR et al.*

Moehrl is a class action lawsuit on behalf of all parties who paid a broker commission since March 6, 2015, for the sale of residential real estate listed on one of the covered MLSs named in the pleadings, including the MLS in Milwaukee. The basic claim is that the MLS rule for a unilateral offer of compensation is a violation of the Sherman Antitrust Act. The allegations indicate that all listing brokers are required to make a non-negotiable offer of compensation to buyers' brokers. This is said to force sellers to pay for buyers' brokers' commissions. The alleged result is to keep commissions high, which harms sellers.

This litigation will likely take many years to play out. If the plaintiffs succeed, there could be widespread changes on the horizon for organized real estate and it would seem the future of the MLS would be in doubt.

NAR, of course, is mounting a formidable defense to these lawsuits. Katie Johnson, NAR general counsel and chief member experience officer, has indicated the plaintiffs' attorneys misunderstand and mischaracterize the pro-competitive, pro-consumer MLS system, which is designed first and foremost with the best interests of buyers and sellers in mind. She has reported that NAR believes these lawsuits are wrong on the facts, wrong on the economics and wrong on the law, and remains confident in its position to stand by the pro-competitive and pro-consumer MLS system.

The following is from the *Moehrl v. National Association of REALTORS®, et al.* Litigation FAQs on the NAR website at https://kwcapitalproperties.com/wp-content/uploads/2019/04/FAQs-Moehrl-v-NAR-et-al.pdf:

1. Is it okay to discuss the lawsuit with my clients?

Absolutely. Brokers and agents are encouraged to have transparent conversations with current and prospective clients about the services they will provide and how they will get paid for those services. This lawsuit doesn't change that. Brokers are compensated for their services and the Multiple Listing Service (MLS) system is uniquely designed to facilitate successful closings in the best interest of home buyers and sellers.

2. What is the lawsuit about?

After the National Association of REALTORS® (NAR) filed a motion to dismiss the original lawsuit, the class action plaintiff law firms decided to amend their complaint because they recognized the legal viability of NAR's position. What they came back with is very similar to the original complaint but adds additional plaintiffs and additional factual allegations that we believe are still grounded in baseless claims. The primary allegation is that home sellers are unfairly being required to pay the commissions of buyers' brokers which has led to inflated commissions being paid to buyers' brokers. The complaint falsely asserts that NAR rules encourage and facilitate anticompetitive steering because they allege buyers' brokers steer their clients to properties where the listing broker is offering higher commissions.

3. What is the significance of additional, similar lawsuits and more law firms signing onto the plaintiff's case?

After NAR's motion to dismiss the *Moehrl v. NAR* lawsuit demonstrated the plaintiff's case was not legally viable, the class action attorneys filed an amended complaint on June 14. That amended complaint consolidated one of the copycat lawsuits filed after *Moehrl v. NAR*, therefore adding more law firms to the plaintiff's representation in hopes they can receive a portion of attorney's fees. This kind of legal maneuvering piling on is very common among these career class action attorneys. NAR remains confident these lawsuits are baseless; therefore, we will continue with our plan to file a motion to dismiss *Moehrl v. NAR* on August 9. We plan to file a similar motion to dismiss in another copycat case that was filed in Missouri.

4. How can I explain to clients why listing brokers pay buyer brokers' commissions?

Commissions are initially set by the seller with the advice of the listing broker on how much to offer as compensation to the buyer's broker who successfully closes the transaction with a ready, willing and able buyer. The MLS is a tool to help listing brokers find cooperative brokers working with buyers to help sell their clients' homes. Without the collaborative incentive of the existing MLS, brokers would create their own separate systems of cooperation, fragmenting rather than consolidating property information. Consumers have a lot of different choices about what broker they want to work with in terms of everything from the commission model to their particular expertise to their customer service approach.

ⓘ MORE INFO

See the *Moehrl v. National Association of REALTORS®, et al.* Litigation FAQs at https://kwcapitalproperties.com/wp-content/uploads/2019/04/FAQs-Moehrl-v-NAR-et-al.pdf, the section regarding Class Action Antitrust Law Litigation in "Hot Topics in Broker Risk Reduction" at www.nar.realtor/legal/hot-topics-for-brokers, "Litigation Update: What REALTORS® need to know about the class-action lawsuits targeting real estate commissions" in the December 2019 *Wisconsin Real Estate Magazine* at www.wra.org/WREM/Dec19/LitigationUpdate and the July 2019 *Legal Update*, "Antitrust Dangers in the Real Estate World," at www.wra.org/LU1907. Read the *Moehrl* complaint at www.courthousenews.com/wp-content/uploads/2019/03/119cv1610-USDC-Northern-Illinois.pdf.

Updated WB-11 Residential Offer to Purchase

And what about the updated 2020 version of the WB-11 Residential Offer to Purchase?

ⓘ MORE INFO

For the latest information be sure to regularly visit the Forms Update Resource page at www.wra.org/formsupdate and review the resources listed therein, including magazine articles, *Legal Updates*, sample forms, a flowchart and numerous videos. Be sure to watch the WRA video on Topic 24: "FIRPTA Do's and Don'ts [Lines 516-536]" at www.wra.org/Legal/Legal_Talks/Legal_Talks__2020_WB11_Residential_Offer_to_Purchase_Form_Changes and the Thursday Takeaways – The WB-11 and FIRPTA at www.wra.org/ThursdayTakeaways/Episode9.

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