



NORTH CAROLINA REAL ESTATE COMMISSION

Real Estate Bulletin

Volume 23

Fall 1992

Number 3

Governor appoints Polk to Commission



James K. Polk

James K. Polk of Raleigh has been appointed by Governor Martin to serve as a public member of the N.C. Real Estate Commission for a three-year term expiring July 31, 1995. North Carolina Superior Court Judge A. Leon Stanback administered the oath of office to Mr. Polk at a ceremony held September 9 at the Commission's office in Raleigh.

Since 1987, Mr. Polk has served as the Governor's Special Assistant for Minority Affairs. He assumed his current position after 18 years as owner and CEO of a consulting firm in Charlotte, N.C.

Mr. Polk attended Johnson C. Smith University in Charlotte and Temple University in Philadelphia. He has served on the Board of Trustees at Central Piedmont Community

College and currently serves on the Board of Visitors at the University of North Carolina at Charlotte.

A former member of the Board of Directors for United Way of both Mecklenburg County and North Carolina, Mr. Polk has served on the Advisory Board of the Boy Scouts of America and the Board of Directors of the American Red Cross.

He is a current member of the Foundation for the Carolinas and is on the Board of Directors of both the N.C. Association of Minority Businesses and the N.C. Institute of Minority Economic Development.

Mr. Polk is an Elder at Grier Presbyterian Church in Charlotte and former Chairman of the Corporation for Carawba Presbytery of the Presbyterian Church of the U.S.A.

The recipient of numerous civic and trade awards including the Distinguished Service Award from the Cleveland County Business and Professional Association and the Rosa Parks Award for Citizenship, Mr. Polk was named Minority Advocate of the Year by the U.S. Small Business Administration. □

Two new employees join Commission's Real Estate Education and Licensing Division

The Commission has two new employees in its Real Estate Education and Licensing Division. They succeed Faye A. Hewett – who transferred to the Legal Division when Legal Secretary Ann Roman relocated her residence to another state – and Denise Manning, who also moved to another state.



Wanda E. Johnson has been employed as a License Specialist. She comes to the Commission with twenty-one years' secretarial experience. In her new

position, Wanda will assist Real Estate Licensing Officer Evelyn Johnston – focusing on corporate licensing, reciprocal licensing, and license reinstatement.



Amy C. Jones is the new Education and Examination Clerk. She attended Vance-Granville Community College in Henderson. Employed to assist

Real Estate Education and Examination Officer Mel Black, Amy will be involved in working with various aspects of the education and examination programs. □

Real Estate Licensees as Buyers' Agents

by Miriam J. Baer, Assistant Legal Counsel

In North Carolina, real estate licensees are traditionally presumed to be agents for the seller, whether they are acting as the listing agent or the selling agent, because it is the seller who pays them. In the absence of an agreement or other strong evidence to the contrary, that is still the case today.

The listing agent agrees to represent the seller by virtue of the listing contract. Although the selling agent often works more closely with the buyer, he too agrees to act as the agent of the seller, typically by accepting the listing agent's offer of subagency through the MLS. Thus, both agents owe the seller a variety of fiduciary obligations including the duties of loyalty, obedience, confidentiality and disclosure of information.

(Continued on page 5)

**NEW PUBLICATION
AVAILABLE!**

See page 3.

REAL ESTATE BULLETIN

Published quarterly as a service to real estate licensees to promote a better understanding of the Real Estate License Law and Rules, and proficiency in ethical real estate practice. The articles published herein shall not be reprinted or reproduced in any other publication without specific reference being made to their original publication in the North Carolina Real Estate Commission Real Estate Bulletin.

NORTH CAROLINA REAL ESTATE COMMISSION

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EXAM RESULTS

	Passed	Failed
July 1992		
Brokers	68	69
Salesmen	278	171
August 1992		
Brokers	49	52
Salesmen	247	175
September 1992		
Brokers	64	48
Salesmen	270	191

COMMISSION STAFF UPDATE

The following Commission staff members have made appearances before various real estate industry and related groups since the last issue of the *Bulletin*. Special Deputy Attorney General Thomas R. Miller, the Commission's Legal Counsel, spoke in Durham at a seminar for real estate agents where he discussed buyer brokerage and issues relating to offers to purchase real estate, and he explained the proper use of trust accounts by commercial real estate agents to the Commercial Listing Exchange of the Charlotte Association of REALTORS®. . . Deputy Legal Counsel Blackwell M. Brogden, Jr., talked to the Hendersonville Board of REALTORS® about offers to purchase and contract and related topics, and spoke on "Buyer Agency" at a meeting of the Pitt-Greenville Board of REALTORS®. . . Assistant Legal Counsel Miriam J. Baer presented a talk entitled "Real Estate Do's and Don'ts" at a meeting of the Elkins-Jonesville Board of REALTORS®. . . Marilyn E. Tomei, Associate Legal Counsel, went to Shelby where she addressed the Cleveland County Association of REALTORS® on "Buyer Brokerage, Property Information Disclosure," and she appeared before the Ashe County Board of REALTORS® in Jefferson to talk about real estate trust accounts. Marilyn also participated in the Educational Fair of the Raleigh Board of REALTORS® where her presentation concerned common problems facing real estate agents. . . Consumer Protection Officer Anita R. Burt was at the Legal Liabilities Seminar of the Rocky Mount Area Association of REALTORS® to discuss various license laws and rules governing real estate practice in the

Clinard honored by NARELLO

Senior Commission Investigator James K. Clinard has been named by the National Association of Real Estate License Law Officials (NARELLO) as a finalist for Investigator of the Year. A former highway patrolman, Jim has over 26 years' service with the Commission. He was honored in



Jim (right) accepts award presented by Robert Volkert, the Chairman of NARELLO's Investigative and Enforcement Committee.

1981 as recipient of NARELLO's Certified Real Estate Investigator designation.

Jim and his wife Minnie reside in Colfax, North Carolina. They have five children and two grandchildren. □

state . . . and Stephen L. Fussell, the Commission's Information Officer, attended a meeting of the Wilkes County Board of REALTORS® in North Wilkesboro where he spoke on offers to purchase, lease options, agency disclosure, and related topics. (*Individuals and groups requesting a speaker from the Real Estate Commission are reminded that a "Speaker Request Form" is available from the Commission Office.*) □



MONTHLY TRUST ACCOUNT SHORT COURSE IN RALEIGH

DATES

December 8
February 9

January 12
March 9

All Raleigh courses start at 1:00 p.m. and end at approximately 4:30 p.m.

To register for the course, telephone the Real Estate Commission Office (919-733-9580) at least 10 days prior to the course and ask for the Education Division. Please have your real estate license number (if any) handy! Registrations will be confirmed in writing, giving registrants more detailed information concerning the location of the course.

New publication addresses fair housing issues

"Yes. It is a violation of the fair housing laws to deny a qualified real estate agent access to or membership in any membership listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting housing, because he or she is a member of one of the protected categories," is the answer.

What's the question? Find out by reading the Real Estate Commission's newest publication, *Questions and Answers on: Fair Housing*. It is available free of charge from the Commission office. [Please see "Publications Order Form" on this page.]

Like the Commission's popular *Questions and Answers on: Tenant Security Deposits*, the new publication is designed in easy-to-read pamphlet format. It addresses issues of concern and interest to real estate licensees as well as consumers.

After explaining the purpose of the fair housing laws, this timely publication poses questions and gives responses which focus on the laws as they apply to this state. □



Looking Back to the Beginning

The year was 1927. The city was Greensboro. And the Commission was in session, 30 years before the founding of the North Carolina Real Estate Commission as we know it today.

This short-lived licensing and regulatory agency bears much resemblance to our current Commission in Raleigh. . . . And there are many differences.

Executive Director Phillip T. Fisher – who heads up a staff of over 40 employees, which serves close to 80,000 real estate licensees, who are regulated by seven Commission members – recently came across a bit of history. It was the 1927-1928 *Annual Report and Roster of Licensed Real Estate Brokers and Salesmen* for the North Carolina Real Estate Commission.

The 32-page booklet makes for interesting reading. Prefaced with an open letter to the then Governor of North Carolina, the Honorable Angus W. McLean, the booklet was dated March 20, 1928.

It reports the ratification of the Real Estate License Law by the North Carolina General Assembly on February 28 of the previous year. The law sounds familiar, requiring licenses for anyone who "for a compensation or valuable consideration sells or offers for sale, buy (sic) or offers to

buy, or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or rents or offers for rent, any real estate or the improvements thereon for others. . . ." Not only were brokers, salesmen and corporations required to be licensed; unincorporated firms were, also.

However, the law applied to only eight counties: Buncombe, Durham, Forsyth, Guilford, Henderson, Lee, Rowan, and Wake.

Buncombe County led the state in the number of licensees – 290 – of which 57 were firms or corporations, 119 were brokers, and 114 were salesmen.

In Lee County, there were only two licensees – one firm and one broker. The total number of licensees for all eight counties was less than 1,000.

Application fees were \$10 for brokers and \$5 for salesmen, with renewal fees at \$5 and \$2, respectively.

Like today's Commission, the members were appointed by the Governor. Unlike today's Commission, its members totaled only three.

One Commission member was chosen to fill the salaried position of Secretary, and his personal office in Greensboro served as the official Commission Office.

A clerk-stenographer was paid \$85 per month, a salary which the Report said was approved by the N.C. Salary and Wage Commission.

The Commission also selected an attorney to "advise it on legal matters and to assist in the preparation of forms." And the legal matters were many. The Report cited facts and figures in various cases in which the Commission played a part in regulating the real estate industry of its day.

In closing, the Report stated the Commission's purpose in issuing it: ". . . as an account of its more important activities for the past year for the consideration and judgment of the Executive and Legislative Departments, and all citizens of the State, but more particularly for those citizens of the eight counties affected by the Law . . ."

The Report proved prophetic in its statement, ". . . when the citizens of the State realize the value of a Law of this kind, all the remaining counties will want to adopt it." □

PUBLICATIONS ORDER FORM

Publication

No. Copies Requested

"Questions and Answers on: Tenant Security Deposits"

(Free Brochure)

Also available in bulk to property managers to distribute to tenants and landlords.

(Orders of more than 100 copies require special consideration.)

"Questions and Answers on: Fair Housing"

(Free Brochure)

(Orders of more than 100 copies require special consideration.)

"A Buyer's Guide to Vacation Real Estate in N.C."

(Free 28-page Booklet)

Also available in bulk to coastal and western N.C. real estate firms to distribute to clients and customers.

(Orders of more than 50 copies require special consideration.)

Firm Name

Phone

Street Address (NOT P.O. Box)

City

State

Zip

Send to N.C. Real Estate Commission, P.O. Box 17100, Raleigh, N.C. 27619-7100.

THE MOBILE HOME: Real Property or Personal Property?

by Robin M. Barefoot

The following article was originally published in the April 27, 1992 edition of the North Carolina Lawyers Weekly. The author is a title attorney at a title insurance company in Chapel Hill, North Carolina. The article is reprinted here with her permission (with minor modifications to address issues pertinent to real estate licensees).

Real estate agents sometimes encounter a transaction in which a mobile or manufactured home is being transferred with the property that is being sold. In such case, an issue may arise as to whether the mobile or manufactured home is real property or personal property. What follows is intended to guide real estate agents through an understanding of the issues raised in these transactions.

Definition

A mobile/manufactured home (m/m home) is a dwelling which is factory-built to the specifications of the National Manufactured Housing Construction and Safety Code as promulgated by the U.S. Department of Housing and Urban Development. It is transported to the building site either on its own chassis or on a flat bed truck.

In a recent case involving a restrictive covenant which prohibited mobile homes, the North Carolina Court of Appeals ruled that a factory-built modular home, designed and constructed to travel on wheels from place to place was a "mobile home," even though the axles, wheels and tongues were removed after the structure was placed on the lot.

North Carolina courts have uniformly held that the term "trailer" within a restrictive covenant includes "mobile homes." The North Carolina General Statutes also include the term "manufactured home" when it is used in the context of restrictive covenants.

M/M Homes as Motor Vehicles

Every m/m home is treated initially as a motor vehicle. At the time it is sold or transferred from the manufacturer to a retailer, ownership is evidenced by a manufacturer's Certificate of Origin.

When the home is sold by a retailer, the customer or the retailer acting on behalf of the customer applies to the Division of Motor Vehicles for a Certificate of Title. The DMV issues the Certificate of Title based upon the manufacturer's Certificate of Origin. If the home is subsequently resold, the Certificate of Title is assigned to the new purchaser.

Most m/m homes are sold and financed as personal property, just like motor vehicles. Ownership of the home is evidenced by a Certificate of Title. Any lien or security

interest in the home is evidenced by a notation on the Certificate of Title or perfected by the filing of a UCC financing statement.

M/M Homes as Real Property

More and more frequently, however, m/m homes are being placed on permanent foundations in residential subdivisions or on individual tracts of land. In these situations, the homes are being sold and financed as real estate, and loans used to purchase or refinance them or the land to which they have been affixed are secured by deeds of trust.

There are legal and practical implications when an m/m home is sold and financed as real estate. First, information relative to whether the m/m home has been placed on a permanent, enclosed foundation with the wheels, moving hitch and axles removed is often requested by the lender. An affidavit from the owner or his attorney addressing these points is recommended.

When the m/m home is new and placed directly on a lot foundation by the manufacturer and not sold by a retailer, there will likely be a manufacturer's Certificate of Origin but no Certificate of Title. While recognizing that it is the intention of the new owner to treat the m/m home as real estate, it is nonetheless recommended by the Registration Section of the DMV that the new owner apply for a Certificate of Title. After the Certificate of Title has been issued, it can be readily canceled if the m/m home is to be treated as real estate, but having issued the Certificate of Title allows the owner to have the title reissued should he decide in the future to sell the m/m home independent of the land.

Once the Certificate of Title is canceled, no independent intervening liens can arise on the m/m home. Title to the home and lot can be transferred together by deed and any loan can be secured by a deed of trust. The home should also be listed as real property for city/county ad valorem taxes. If the owner chooses to disregard the recommendation of the DMV and does not apply for and obtain a Certificate of Title, the Certificate of Origin must be destroyed to prevent a subsequent issuance of the Certificate of Title.

Similarly, when the purchaser of an m/m home already owns the lot on which the home is to be placed, the purchaser or his attorney must cancel the prior owner's Certificate of Title. It is suggested by the DMV that a new owner should have a Certificate of Title issued in his name before canceling the prior certificate. The DMV explains that when a Certificate of Title is assigned upon purchase of an m/m home and then canceled for treatment of the home as real property, it cannot be reissued to the assignee, nor upon

his request, but only to the name appearing on the face of the certificate (presumably, the seller) and only upon that person's request. The home should also be listed as real property for city/county ad valorem taxes.

Cancellation of Certificate of Title

Cancellation of the title is effectuated by writing the following information on the face of the Certificate of Title: "This home has been placed on a permanent foundation and declared to be real estate." The owner should then sign and date the title certificate directly beneath this statement. If there are any liens noted on the title, these liens must be satisfied or with the consent of the lienholder, transferred to other collateral (perhaps to the property where the home is to be located, evidenced by a note and deed of trust). Satisfaction or transfer of a lien must also be noted on the face of the title. The owner should then send the Certificate of Title, along with a short cover letter to:

Registration Section
Division of Motor Vehicles
1100 New Bern Avenue
Raleigh, NC 27697
(919) 733-3025

If the Certificate of Title is lost, the DMV requires that a replacement Certificate of Title be issued to the owner, and then canceled for treatment of the m/m home as real property.

Conclusion

The importance of complying with the steps outlined above will be dictated in each case by whether the lender considers the m/m home as part of its collateral, or whether the loan was made on the basis of the land value exclusive of the home. Failure to subject the m/m home to the lien of the lender's deed of trust will prevent the lender from exercising its right of foreclosure against the m/m home.

Commission Comments

There is a common belief among real estate licensees that they are prohibited by law from selling mobile homes. This is untrue. When a sale involves only a mobile home, but no real property, a real estate license is not required. However, in some cases the licensee must obtain a motor vehicle dealer's license from the Division of Motor Vehicles.

Nevertheless, when the land on which the mobile home rests is included in the listing agreement or sales contract, a real estate license is required. Similarly, when a mobile home's Certificate of Title is canceled and the mobile home becomes part of the real property, a North Carolina real estate license is required to list and sell the mobile home/land combination. □

Buyers' Agents

(Continued from Page 1)

There is now a growing interest on the part of some licensees to act as agents for prospective buyers rather than agents for sellers. In these situations, the individual who, in a traditional co-brokerage transaction, would have been the "selling agent" (a subagent for the seller), instead agrees to act as the buyer's agent or "buyer's broker." This means that no fiduciary relationship exists between the buyer's agent and the seller; the duty owed by a buyer's agent to the seller is simply one of fairness and honesty. However, the buyer's agent does have a fiduciary relationship with the buyer, requiring the buyer's agent to act in the best interest of the buyer and to obtain the lowest possible price for that buyer.

Two central issues often arise in transactions involving buyers' brokers: disclosure and compensation.

Disclosure

Because buyer's brokerage is still a new concept in this state and is relatively unusual in residential transactions, disclosure is a must, and in fact is required by law.

Under the Real Estate License Law, it is unlawful for a licensee to make a willful or negligent misrepresentation or omission of any material fact. The fact that an agent represents a buyer is material, and should be disclosed at the earliest opportunity. Failure to do so would be considered a negligent or willful omission.

The Real Estate License Law also prohibits a licensee from representing more than one party in a transaction without the knowledge of all the parties for whom he acts. If the licensee is being paid by the seller but purporting to represent the buyer, the law requires disclosure of that fact.

Disclosure (which can be oral) should be made as soon as possible - usually when the buyer's agent sets the appointment to show the property. A listing agent who receives a request from a buyer's agent to show the property should normally permit the showing. The listing agent should not foreclose any potential purchaser from the seller, whether or not that purchaser is represented by another real estate agent.

It is recommended that the buyer's agent make written disclosure to all parties when a buyer whom he represents becomes seriously interested in negotiating the purchase of a particular property. Such disclosure should be made no later than at the time of presentation of the offer. Buyers' agents should ask an attorney to draft a form disclosure statement which can be used in applicable transactions. It is preferable to have the disclosure statement signed by all parties. Although written disclosure is not required by law, it more clearly demonstrates that all parties

were aware of the buyer's agency situation.

The written disclosure should also address the manner in which, and by whom, the buyer's agent will be paid. This "compensation and disclosure agreement" thus serves the dual functions of notifying all concerned whom each licensee represents and how each will be paid.

Compensation . . .

Traditionally, all agents involved in real estate transactions have been paid by the seller. Listing agents have been paid in accordance with their listing contract with the seller, and have in turn shared their commissions with selling agents in accordance with a cooperating brokerage agreement or through the MLS.

With the entrance of buyers' brokers into the market, however, the manner of paying those brokers has created confusion and friction between the parties and their agents.

. . . By the Buyer

Buyer's brokerage works most smoothly when each party is responsible for his own agency costs. The seller pays the listing agent according to the terms of the listing contract, and the buyer pays his agent according to the terms of a separate agreement. Thus, if the buyer is willing to pay his own agent, that buyer's agent should ask his attorney to develop a form compensation and disclosure agreement to provide for his compensation by the buyer and to make the necessary disclosures as discussed earlier.

The compensation and disclosure agreement may provide for payment to be based on either an hourly wage or a flat fee. In either case, the buyer's agent may choose to also charge the buyer for expenses. In the case of a flat fee, the buyer's agent may want to consider charging a graduated fee based upon the price range of the house. Thus, the brokerage fee for a house listed in the \$75,000 - \$100,000 range might be less than the fee for a house in the \$200,000+ range. The buyer's agent could also include some bonus or incentive payments based on the percentage decrease from the list price he negotiates for the buyer.

It is not recommended that a buyer's agent be paid based upon a percentage of the purchase price, because that would create a conflict of interest for the buyer's agent. He would receive a higher commission if the buyer paid more for the house. However, his agency duties to the buyer require him to negotiate as low a price as possible, thereby creating a clear conflict of interest.

In addition, the buyer's agent should include in the compensation agreement a definite termination date. The compensation agreement is analogous to a listing contract, and as such, should not be for an

indefinite time.

Likewise, the compensation agreement should include a Fair Housing disclosure to provide that the buyer's agent will show the buyer properties without regard to the race, color, religion, sex, national origin, handicap or familial status of the buyer or seller.

. . . By the Seller

The primary difficulty with the buyer paying his own broker is that it may increase the total agency cost of the transaction. If the seller pays a full commission to the listing agent while the buyer pays an additional fee to the buyer's agent, the transaction is more expensive for the parties, perhaps making it more difficult for the buyer to purchase property.

To avoid the problem of extra brokerage fees, some buyers' agents attempt to obtain payment from the listing agent. Others ask listing agents to reduce their fees. If all parties agree, in order to expedite the transaction, the listing agent may choose to share his commission with a buyer's agent or to reduce his own commission, perhaps by the amount which otherwise would have been shared with a selling agent or by a comparable flat fee. This does not mean that the buyer's agent becomes the agent of the seller. Instead, the buyer's agent continues to owe the full range of fiduciary duties to his principal, the buyer.

However, unless listing agents agree to do so, they are not required to reduce their commissions in order to facilitate a sale to the buyer who has his own agent. A listing agent may refuse to negotiate a commission split with the buyer's agent since the buyer is rejecting the listing agent's offer of sub-agency. At the time of listing, a listing agent should discuss with the seller the possibility of a buyer's agent entering the transaction and how that would be handled, so that the seller cannot later complain that he lost a sale due to the listing agent's unwillingness to work with a buyer's agent.

If the seller is opposed to payment of the buyer's agent, the seller can prevent the listing agent from sharing his commission, even if the listing agent is willing to do so. Remember that as an agent and a fiduciary of the seller, the listing agent owes the seller a duty of loyalty and obedience. For a listing agent to share his commission with a buyer's agent *against the wishes of the seller* would be both disloyal and disobedient. Therefore, the seller has veto power with regard to payment of a buyer's agent. But the seller should understand that by exercising that veto power, he may lose a sale.

After discussing the situation with the seller, the listing agent should be prepared to advise a buyer's agent whether co-brokerage

(Continued on page 8)

The Americans With Disabilities Act and Real Estate Licensees

Portions of this article were taken, with permission, from (1) an article by William C. Goolsby and Jack Purdie of the Washington Center for Real Estate Research which appeared in the newsletter of the Washington Department of Licensing, and (2) a special report on the ADA published by the Hawaii Real Estate Research & Education Center.

Real estate licensees need to be aware of the potential impact of the Americans with Disabilities Act (ADA) of 1990 on their real estate businesses. This far-reaching law affects both the private and governmental sectors and requires many real estate brokers to comply with its provisions regarding employment discrimination and accessibility for the disabled in the workplace. Licensees also have secondary responsibilities for compliance in connection with their roles as service providers and agents.

The following overview is not intended as a definitive interpretation of the ADA or its expected impact, but merely as an introduction to ADA provisions that affect the real estate industry. Real estate agents should contact their own attorneys for more detailed information and advice as to the impact of the law on their businesses.

Brokers' Responsibilities as Employers

As of July 26, 1992, businesses with 25 or more employees were required to fully comply with the ADA in regard to employment practices (Title I). Businesses with 15 to 24 employees must comply with Title I by July 26, 1994, while businesses with 14 or fewer employees are exempt from compliance with Title I.

Employers may not practice employment discrimination against "qualified individuals with disabilities." A qualified individual with a disability is further defined as "an individual with a disability who meets the skill, experience, education, and other job-related requirements of a position held or desired, and who, with or without *reasonable accommodation*, can perform the *essential functions* of a job."

A person with a disability includes any individual who has a *physical or mental impairment* that *substantially limits* one or more of his/her *major life activities*, as well as any individual with a record of impairment or who is perceived or regarded as having a disability. "Physical or mental impairment" is very broadly defined and

can include virtually any physiological disorder and a broad range of mental or psychological disorders. "Major life activities" include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, learning and working. "Substantially limits" means unable to perform a major life activity that the average person in the general population can perform or being significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity. "Essential job functions" pertains to fundamental job duties and not the marginal functions of a particular position.

Title I requires that employers provide "reasonable accommodation" allowing disabled individuals equal opportunities in all aspects of employment. These accommodations may include modifying existing facilities for ready accessibility, offering flexible work schedules, job structuring, modifying or purchasing equipment, modifying training materials, or providing qualified readers and interpreters. Employers may argue against providing for disabled workers if they can demonstrate "undue hardship" in modifying their place of business. Although "undue hardship" must be determined on a case-by-case basis, factors that will be considered include the nature and cost of the accommodation, the overall financial resources of the employer, the type of operation, and the impact of the accommodation on operations.

The Act also includes general employment criteria concerning: hiring, advancement and discharge, compensation, training, and other terms and conditions of employment; limiting, segregating, or classifying because of a disability; and discrimination through the use of medical examinations. The Equal Employment Opportunity Commission (EEOC), which is charged with administering the employment discrimination provisions of the ADA, makes distinctions between "essential" and "non-essential" job duties. EEOC regulations consider written job descriptions evidence of a particular job's essential functions. If the employee is capable of performing "essential tasks," then he may not be discriminated against. Job descriptions must accurately use the ADA's definition of an essential function

to prevent the EEOC, a judge, or a jury defining what is or is not an essential function.

The National Association of REALTORS® (NAR) has prepared an Americans With Disabilities Act compliance kit including definitions, compliance checklists and a list of technical resources. A copy of this kit is available to NAR members from the North Carolina Association of REALTORS® headquarters.

Brokers' Responsibilities as Service Providers

Title III of the ADA requires *most places of public accommodation* and *commercial facilities* to be designed, constructed or altered to comply with accessibility standards for the disabled. Although not specifically included in the federal regulations, a real estate brokerage office seems to clearly fall within the definition of "places of public accommodation." Thus, brokers and other businesses may be accountable under the provisions of the ADA for not providing ready accessibility to their place of business for persons with disabilities. The building should provide alternatives to steps, narrow doorways, undersized bathroom stalls, etc. as outlined in the Architectural and Transportation Barrier Compliance Board (ATBCB) guidelines.

Compliance deadlines are somewhat different for public accommodation than for employment. Brokers and other businesses with 11 to 25 employees and gross receipts of \$500,000 to \$1 million can be sued for discrimination under the public accommodation section (Title III) of ADA if they are not in compliance after July 26, 1992. Unlike Title I of the ADA, *there is no exemption for small businesses in Title III*. Businesses with 10 or fewer employees and gross annual receipts of \$500,000 or less must comply with Title III of ADA by January 26, 1993.

All facilities ready for "first occupancy" after January 26, 1993, must be accessible and useable by individuals with disabilities. *Existing* public accommodations and commercial facilities must be altered to provide access to "primary function" areas. Elevators are not required in some buildings of two or less stories or with 3000 or less square feet.

Particularly affected are those brokerages that conduct property management activities

(Continued on page 8)

Disciplinary Action

Penalties for violations of the Real Estate License Law and Commission Rules vary depending upon the particular facts and circumstances present in each case. Due to space limitations in the Bulletin, a complete description of such facts cannot be reported in the following Disciplinary Action summaries.

STEPHANIE S. AREY (Charlotte) – By Consent, the Commission suspended Ms. Arey's broker license for one year effective July 1, 1992. Sixty days of the suspension are to be active and the remaining period stayed for a probationary term of one year. The Commission found that Ms. Arey, as broker-in-charge of a real estate firm, had failed to adequately supervise a salesman who had listed a condominium for sale and subsequently had leased it on two occasions without the owner's knowledge or permission. The Commission further found that the salesman had failed to properly account for or remit to Ms. Arey rents and other monies collected.

THOMAS W. BALLOU (Newport) – By Consent, the Commission revoked Mr. Ballou's broker license effective July 15, 1992. The Commission found that Mr. Ballou and his corporation had violated the county's subdivision regulation by entering into a contract to sell a lot in a new section of a subdivision which he had developed but which had not been approved. The Commission also found that when the transaction could not be completed, Mr. Ballou was unable to refund the clients' earnest money because he had used it to replace trust monies that he had converted in other transactions. Mr. Ballou neither admitted nor denied any misconduct.

JAMES E. BODY (Charlotte) – By Consent, the Commission suspended Mr. Body's broker license for one year effective July 1, 1992. The Commission then stayed its Order for a probationary term of one year. The Commission found that Mr. Body had paid a "finder's fee" to an unlicensed corporation and its unlicensed representative. Mr. Body neither admitted nor denied any misconduct.

JAMES R. CREECH, III (Carolina Beach) – By Consent, the Commission suspended Mr. Creech's salesman license for 18 months effective October 15, 1992. Three months of the suspension are to be active and the remaining period stayed for a probationary term of 15 months. The Commission found that Mr. Creech had authorized a contractor to make cosmetic repairs to a property to conceal structural defects and subsequently had failed to inform buyers that the structural defects existed. Mr. Creech neither admitted nor denied any misconduct.

VICTORIA L. (HAYES) EDGAR (Char-

lotte) – By Consent, the Commission revoked Ms. Edgar's salesman license effective July 1, 1992. The Commission found that Ms. Edgar had listed a condominium for sale and then on two occasions had leased it without the owner's knowledge or permission. The Commission further found that Ms. Edgar had failed to properly account for or remit to her broker-in-charge rents and other monies collected. Ms. Edgar neither admitted nor denied any misconduct.

GORDON B. JONES (Kitty Hawk) – By Consent, the Commission suspended Mr. Jones' broker license for one year effective June 1, 1992. The Commission then stayed its Order for a probationary term of eighteen months. The Commission found that Mr. Jones had commingled trust monies in operating accounts under his control at two different real estate firms. The Commission also found that he had allowed unlicensed employees at one firm to wrongfully expend trust monies, which led to a trust account shortage.

NANCY M. KAFINA (Carolina Beach) – By Consent, the Commission revoked Ms. Kafina's broker license effective July 9, 1992. The Commission found that Ms. Kafina, as broker-in-charge of a real estate firm, had failed to maintain adequate records of trust or escrow funds and had converted trust monies to her own use. Ms. Kafina neither admitted nor denied any misconduct.

EDWRITH H. KEITH (Knightsdale) – By Consent, the Commission reprimanded Mr. Keith effective June 16, 1992. The Commission found that Mr. Keith had failed to deposit and maintain an earnest money deposit in a trust or escrow account, had failed to reconcile internal trust account records to bank records on a monthly basis, and had failed to obtain his clients' and customers' permission before depositing their funds into an interest-bearing trust account.

MID-ATLANTIC RESORTS, INC. (Grandy) – By Consent, the Commission reprimanded and fined Mid-Atlantic Resorts, Inc., \$2,000 effective June 10, 1992. The Commission found that Mid-Atlantic Resorts, Inc., developer of High Dunes time share project, had used unlicensed persons to conduct sales without the knowledge of the project broker.

KARL P. NOONAN (Charlotte) – By Consent, the Commission suspended Mr. Noonan's broker license for one year effective July 1, 1992. Two months of the suspension are to be active and the remaining period stayed for a probationary term of 10 months. The Commission found that Mr. Noonan had failed to directly disclose to a participant in a sales transaction the amount of a "finder's fee" he was to receive from the seller. The Commission noted that the pay-

ment was disclosed on the settlement statement. Mr. Noonan neither admitted nor denied any misconduct.

GARY W. PENNY (Durham) – By Consent, the Commission suspended Mr. Penny's broker license for one year effective August 15, 1992. The Commission then stayed its Order for a probationary term of one year upon the condition that he complete the Commission's Trust Account Short Course on or before December 31, 1992. The Commission found that Mr. Penny had failed to maintain trust monies in a properly designated trust or escrow account and to keep accurate records of funds he collected. The Commission also found that, in a separate real estate transaction, he had failed to disclose material facts to a party involved in the transaction.

PENNY MANAGEMENT CORPORATION (Durham) – By Consent, the Commission suspended the corporate real estate broker license of Penny Management Corporation for one year effective August 15, 1992. The Commission then stayed its Order for a probationary term of one year. The Commission found that the corporation had failed to maintain trust monies in a properly designated trust or escrow account and to keep accurate records of funds it collected. The Commission also found that, in a separate real estate transaction, the corporation had failed to disclose material facts to a party involved in the transaction.

RAMON C. RODRIGUEZ, JR. (Fayetteville) – By Consent, the Commission revoked Mr. Rodriguez's broker license effective July 6, 1992. The Commission found that Mr. Rodriguez had failed to deposit and maintain trust monies in a trust or escrow account, had failed to account for and remit earnest money deposits, and had commingled trust monies with his own funds.

SIDNEY M. SALLING (Wilmington) – The Commission revoked Mr. Salling's broker license effective July 1, 1992, for misrepresenting to sellers that he would obtain a release of liability when he purchased their former residence and assumed their loan. The Commission also found that Mr. Salling had recorded false deeds which purported to convey the sellers' subsequent residence to himself and then to another party.

SPRINGSTEED REALTY, INC. (Charlotte) – By Consent, the Commission suspended the corporate real estate broker license of Springsteed Realty, Inc., for one year effective July 1, 1992. The Commission then stayed its Order for a probationary term of one year. The Commission found that Springsteed Realty, Inc. had failed to supervise a salesman who had listed a condominium for sale and subsequently had leased

Disciplinary Action

(Continued from page 7)

it on two occasions without the owner's knowledge or permission. The Commission further found that the salesman had failed to properly account for or remit to her broker-in-charge rents and other monies collected. The principal broker of the corporation was unaware of the salesman's activities.

KEITH N. SUDDRETH (Lenoir) – By Consent, the Commission revoked Mr. Suddreth's broker license effective August 17, 1992. The Commission found that Mr. Suddreth had been convicted of criminal offenses which could reasonably affect his performance in the real estate business; namely, first-degree rape, second-degree burglary, assault with a deadly weapon inflicting serious injury, first-degree sexual offense, and first-degree kidnapping.

JAMES E. VAUGHAN, JR. (Duck) – By Consent, the Commission revoked Mr. Vaughan's broker license effective August 14, 1992. The Commission found that Mr. Vaughan and his property management corporation had failed to maintain trust monies in a trust or escrow account and had failed to promptly account for and remit earnest money deposits to his clients and tenants. The Commission also found that Mr. Vaughan had used trust monies for purposes other than those for which they were intended and had allowed a shortage to accrue in his trust account.

THOMAS N. VINCENT (Winston-Salem) – By Consent, the Commission accepted the permanent, voluntary surrender of Mr. Vincent's broker license effective July 10, 1992. The Commission dismissed without prejudice charges that Mr. Vincent had violated the Real Estate License Law based upon his federal criminal conviction for possession with intent to distribute marijuana. Mr. Vincent neither admitted nor denied any misconduct. □

ADA

(Continued from page 6)

as part of their business. Although the ADA doesn't directly address residential property (the Fair Housing Act and subsequent amendments cover residential property), many other types of property owned or managed by the real estate industry is impacted, and the property management firm is responsible for compliance. Properties impacted include office buildings, shopping malls, restaurants, hospitals, convention centers, banks, depots, galleries, etc.

Real estate licensees may also be considered to have a responsibility under the Law of Agency in connection with ADA compliance when selling, buying or leasing commercial facilities for others. Licensees should disclose any known ADA infringements to buyers, sellers, or lessees. If suit is brought under the ADA alleging discrimination against a disabled individual, brokers or their agents could be held partially liable for damages if they failed to disclose known ADA infringements.

For Additional Information

Brokers may obtain additional information on the ADA from the sources listed below. It is strongly suggested, however, that every broker who owns or manages a real estate business contact his/her attorney for advice regarding compliance with the ADA.

Governor's Advocacy Council for Persons with Disabilities:
1-800-821-6922

U.S. Equal Employment Opportunity Commission:
1-800-669-EEOC

Office on Americans with Disabilities Civil Rights Division
U.S. Department of Justice:
(202) 514-0301

U.S. Architectural & Transportation Barriers Compliance Board:
(202) 653-7834

Note

The North Carolina Real Estate Commission has no role in enforcing the ADA and cannot provide information on ADA applicability and compliance. Please do NOT contact our office for ADA information. □

Buyers' Agents

(Continued from page 5)

will occur, so that the buyer's agent will know the limitations of the transaction. If no commission split can be arranged, the buyer and his agent may consider another property.

If the selling and listing agents will cooperate, a "compensation and disclosure agreement," as mentioned in the "Disclosure" section, should be completed. Such an agreement cannot be included in the purchase contract because Commission rule prohibits the inclusion of commission provisions in form contracts.

In addition, whenever a portion of the commission is to be paid to a buyer's agent, the lender must be advised, and the payment must appear on the closing statement.

Caveat

Because buyer's brokerage is a new and largely untested area, the Commission does not have forms available for use by licensees interested in acting as buyers' brokers. Interested licensees should therefore contact their own attorneys for further advice and assistance. □

77,700 copies of this public document were printed at a cost of \$.127 per copy.

ATTENTION

The Real Estate Commission now includes the county as part of the address-of-record for each licensee. Please check the county shown on your address label to the right. IF IT IS INCORRECT, please print (in ink) your county in the space provided below and return this entire address section to the N.C. Real Estate Commission, P.O. Box 17100, Raleigh, N.C. 27619-7100.

County _____

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REAL ESTATE COMMISSION
P.O. Box 17100
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