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A lot going on in 2016

Realtors® Legislative Meetings

Spring has sprung and Realtors® nationwide are ready to spring into action and further our advocacy efforts in Washington D.C. This month, many Michigan Realtors® will make the pilgrimage to our nation's Capitol in order to network with Realtor® colleagues from all over the country and engage in many educational and leadership-oriented opportunities. Additionally, we will meet with your Michigan Congressional Delegation. At those meetings, we will impress upon Congress the continued importance of a healthy housing market and what this means to the American economy. We'll reinforce the importance of FHA for homeownership, supporting point that FHA is very necessary to a vibrant housing market and historically has had default rates between 1 and 2%, furthering the argument that it is not the down-payment that leads to defaults but the lack of a sound qualifying process. We will continue to defend against threats to the Mortgage Interest Deduction and work toward a solution to Flood Insurance that makes long-term sense. We will also call for clear, concise, and common sense regulatory guidance from the Federal government.

This year, the National Association of Realtors® has prepared some great opportunities to pay visits to the CFPB, HUD, EPA, and the FAA in order to discuss the current regulatory landscape, seek clarification and voice concerns. These field trips have become a great offering over the last two years and will provide a new avenue of dialogue on issues that are most important to our industry.

PAC For the SOO

The Fourth Annual PAC for the SOO will take place in Sault Ste. Marie on May 25th and 26th. This has become a truly great grassroots RPAC fundraising event - one that celebrates the beauty of our state. Sponsored by the Eastern Upper Peninsula Association of Realtors®, PAC for the SOO features great educational opportunities, with 8 CE credits available (2 legal), and a beautiful late spring backdrop in the Upper Peninsula of Michigan. I strongly encourage you to find time for this special event in your busy schedule. It's a great time to slow down, network, and explore the UP. The Tahquamenon Falls are just a short day trip away.

District Director Elections

Michigan Realtors® is always looking for fresh input, ideas and perspectives. I want to appeal to past and current leadership to reach out and identify future leaders and encourage those individuals to engage our association and get involved on the committee level or even get a seat at the table of the board of directors. Realtor® involvement and volunteerism is what makes our association the incredible entity that it is today. There is no better way to determine how to bring greater value to our membership than to engage and involve our members.

If you've been active at your local association and have ever thought about getting more involved with the Michigan Realtors®, this may be the year for you to take that next step. District Director nominations are now open. The Michigan Realtors® Board of Directors has 14 Director positions that are based on our Congressional Districts. Six of those districts (1, 4, 6, 9, 11, and 14) are up for election this Fall. If you reside in one of those Congressional Districts and satisfy the necessary candidate criteria,* this could be a great opportunity for you to grow as a leader and contribute to your association. I can tell you from my own experience, it has been a defining aspect to my career. The deadline to submit your nomination is Friday, July 22, 2016.

**Criteria found at <http://mirealtors.com/>*

District-Director-Elections

As I speak about getting involved, I am reminded of what an awesome industry we have chosen to be a part of. I have traveled across our wonderful country from Florida to Massachusetts, Montana, California, Oklahoma, Texas and so many other states, and I am so touched by the grassroots efforts of our Realtor® family. In no other industry do we find volunteers giving back to their communities the way Realtors® do. In no other industry do we find the advocacy efforts and tireless work that match the efforts of our Realtor® family. I have never been more aware of the fact that we truly belong to the greatest industry in the world...we are Realtors®...and I am proud!

Thank you for all that you do! ●

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COMING EVENTS

June 8, 2016

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October 5-7, 2016

The Convention

Soaring Eagle Casino & Resort, Mt. Pleasant

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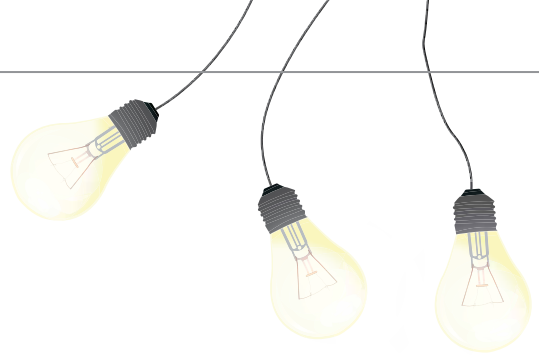
About the same time last year, this column featured an article highlighting some of the recent changes to real estate continuing education and the new role that Michigan Realtors® and our CE Marketplace would play in tracking and approving those credits. This past month, Governor Snyder applied his signature to the one remaining piece of that transition -- protection in the law verifying CE Marketplace credits against a department audit.

Over the last 2 years, utilizing grants from the Department of Licensing and Regulatory Affairs (LARA), Michigan Realtors® developed CE Marketplace. CE Marketplace offers a state-of-the-art tracking system that is easy to use for licensees, class sponsors and educators looking to take or provide real estate continuing education courses. The new law signed by the Governor now means the surest way to protect against a license renewal audit by LARA is to take classes certified by CE Marketplace.

Public Act 30, of 2016 was sponsored by Senator Tonya Schuitmaker (R- Lawton), a familiar name to Realtors® as a former member of the Board of Real Estate Brokers and Salespersons (BREBS) and the sponsor of the Broker Responsibility Act (Public Act 91 of 2008). Public Act 30 certifies in an audit, any credits verified through a tracking system operated by a statewide real estate trade association (read CE Marketplace). The bill is the last in a number of changes by the Department to turn over the tracking of continuing education credits to licensees and third parties. The Michigan Association of CPAs and Michigan Realtors® currently serve in this capacity for their respective licenses. Under the new law, other third parties could serve as a possible provider for all other professional licenses.

Last October's renewals were the first to reflect the real estate licenses' new self-reporting requirements for continuing education. With the change, LARA began





Last October's renewals were the first to reflect the real estate licenses' new **SELF-REPORTING REQUIREMENTS** for **CONTINUING EDUCATION**.



implementing new audit procedures with stiff penalties for those licensees failing to complete their continuing education requirements. The responsibility of keeping track of continuing education classes falls on the licensee, which is why taking and tracking credits approved through CE Marketplace is in your best interest.

CE Marketplace works with premier educators, real estate schools, local Realtor® associations and brokerages around the state to provide quality and cutting edge continuing real estate education. Those classes and sponsors that have been certified by CE Marketplace are meeting those high standards, and now have the added benefit of audit protection. The only way to get the new protections under the law is by taking classes certified by CE Marketplace to verify your attendance. So look for those classes with CE Marketplace certification and take the guesswork out of completing your continuing education credits.

To find a CE Marketplace certified class near you visit www.CEMarketplace.net. Click on the calendar or use the advanced search for classes in your area -- and get verified.

Follow-up on Expanded Transfer Tax Exemption (U)

Thanks to a Michigan Supreme Court decision and legislation in which the Michigan Realtors® played a key role, sellers whose homes declined in value since they purchased them, can now claim an exemption under the State Real Estate Transfer Tax. Additionally, those sales that have occurred since July 24, 2011 that meet the criteria of the declining value exemption can apply for a refund of their transfer tax already paid.

Under the expanded exemption, a sale is exempt from state transfer tax under exemption (u) if the State Equalized Value (SEV) at the time of sale is equal to or less than the SEV at the time it was purchased, so long as the sale is for fair market

value. Meaning the sale was an arm's length transaction and not a distressed or discounted sale.

The exemption matters – at 0.75%, state transfer tax on the sale of home for \$200,000, for example, is \$1,500. This is a great opportunity for Realtors® to reach out to their past clients and maybe put a little money back into a seller's pocket. The refund application is available through the Michigan Department of Treasury (form 2796) and is easy to use. Based on some valuable input from membership, the trickiest part of the process has been tracking down the initial SEV where it goes back over 10 years. However, over the last few weeks we've developed an informational toolkit to help Realtors® support their clients and obtain all the necessary information for the application.

As part of the toolkit, we have developed a Freedom of Information Act template. The template provides the seller with the ability to request property specific information from the local government in order to accurately apply for the refund/exemption.

The Tool Kit can be accessed at the following link: <http://www.mirealtors.com/Portals/0/Documents/StateRealEstateTransferTaxRefundGuidance.pdf>. ●

Succession Planning as a Business Tool

What's next for older agents?

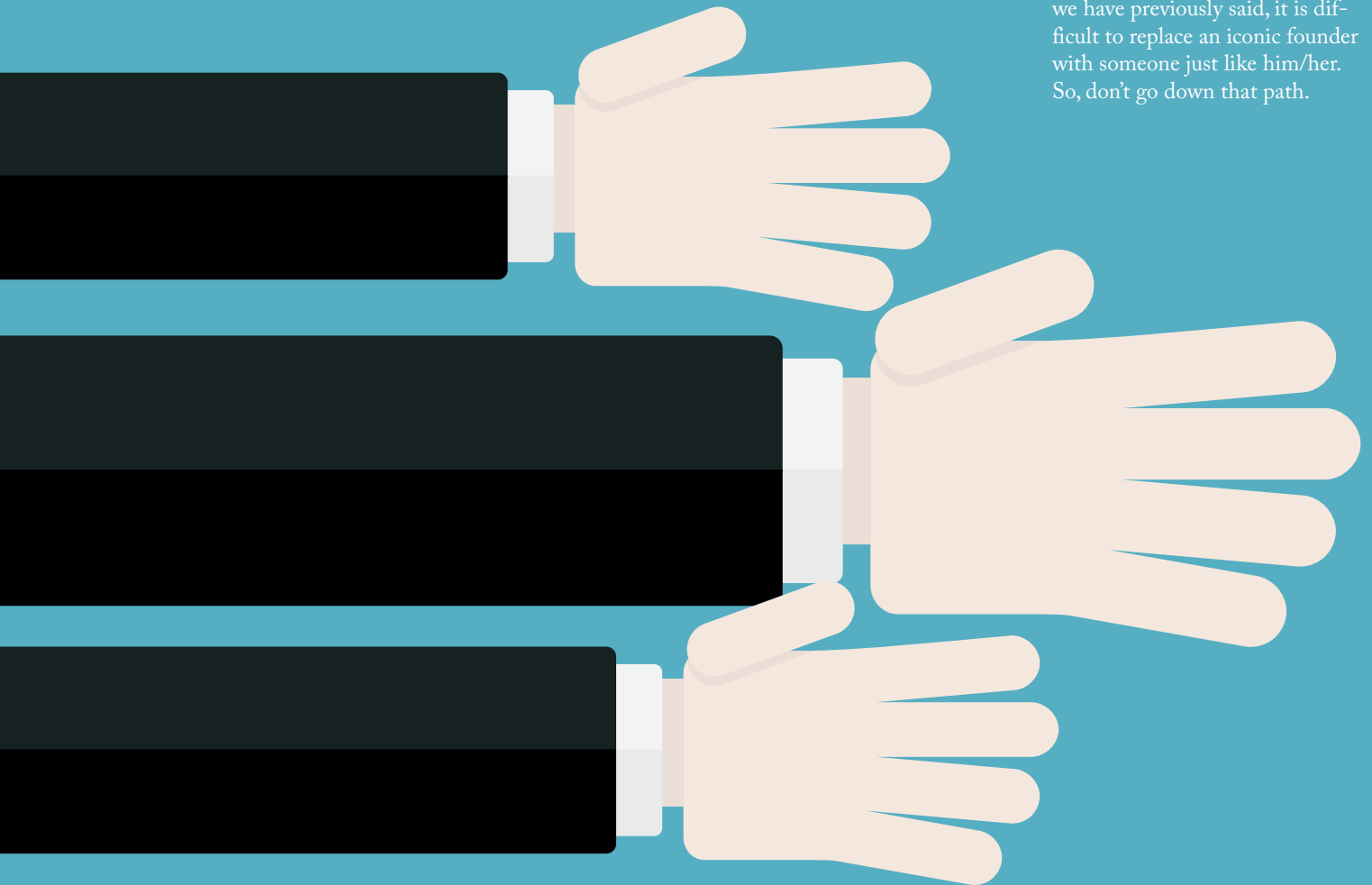
BY STEVE MURRAY,
PUBLISHER

There are a great many people who comment that the difference in the ages of real estate agents and the average age of buyers is vast, and likely causing problems, or perhaps will cause problems. While we don't subscribe to that theory (the age difference 30 years ago was likely the same), we do know that there is an entire generation of both agents and brokers who are thinking about "what's next?" They are north of 55 years old, have accumulated some net worth and are trying to figure out what is next with their careers, businesses and lives.

Counseling Agents and Teams

While most of our work has been with broker-owners for the last 29 years, we are increasingly counseling agents and teams about the same topic. How does an owner of a realty business establish a plan, other than a sale, for his or her business? What are the keys to successfully establishing a succession plan?

We would offer this. First, don't try and replace yourself with yourself. In all likelihood, you have grown your business with your skills, background, relationships and view of the world. As we have previously said, it is difficult to replace an iconic founder with someone just like him/her. So, don't go down that path.



Consider Future Skills

Instead, consider what skills are needed to continue to drive your organization forward. Can that be found in one person or a team? Some firms have been successful using personality assessment tests to line up the people skills of potential successors as a starting point.

Selecting several people in your organization who might have the skills to lead your business is also key. It may take more than one person to fill the roles the founder has provided. The next steps involve

investing your time in educating this team about the business and the environment, testing their ability to make decisions and be responsible and most importantly, testing their ability to work as part of a team to achieve mutual goals.

Measure Results

Lastly, whether you are building a team as part of a succession plan or simply to strengthen your company, measure results rigorously. We've found that it doesn't mean only measuring financial or operating results, but also gauging how well these potential future leaders work together and support each other. As Patrick Lencioni said in his book, "The Five Dysfunctions of a Team," it is the attention to results and not egos and status that marks a truly effective team.

Thinking about how you would build a future team should be the goal of a business owner whether he/she intends to sell or not. One of the biggest weaknesses in residential brokerages is the lack of investment in the leadership and business skills of the firm's management teams. The important thing is to invest your personal time in doing so. ●



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It may take **MORE THAN ONE PERSON** to **FILL THE ROLES** the founder has provided.





Social Media Posts That Get You in Trouble

The Code of Ethics addresses how you should behave online. Here are a few provisions to keep in mind.

BY MELISSA M. KELLOGG

It's often misunderstood how the Code of Ethics extends to conducting yourself online. What you wouldn't say or do in front of someone, you also shouldn't do on social media and other online platforms. In general, any guideline for offline behavior applies to online as behavior well.

"Real estate professionals often let their guard down online, making the mistake of treating their communications on social media as casual conversation and forgetting that there are guidelines to uphold in that space as well," says Carolyn D'Agosta, GRI, broker-owner of Carolyn D'Agosta and Associates in San Diego and 2016 chair of NAR's Professional Standards Committee.

A major misconception is that comments made in Facebook groups and other online forums are private. "That's often not the case," states Ginger Wilcox, chief industry officer for online mortgage servicer Sindeo, who has trained Realtors® on the Code. "It's up to the group administrator to set the privacy settings of the group, so you should never assume comments you make in groups aren't viewable by the public. When practitioners discuss commissions or working with difficult agents in Facebook groups, they're potentially running afoul of the Code and risking exposing their behavior publicly. Even if the group is private, a fellow member could take a screen shot of the conversation and file an ethics complaint against you," Wilcox warns.

So what kinds of comments or posts should you be wary of making online? Here are some

common hazards that get professionals into trouble (read about the specific Articles mentioned below at NAR's Code of Ethics page):

VENTING ABOUT ANOTHER AGENT

"This is a common subject to come up in relation to the Code," says Katherine Lawton, NAR's manager of Professional Standards and Administration. "It's not smart to air your frustrations about a colleague online because it could violate Article 15, which prohibits Realtors® from making false or misleading statements about other real estate professionals. You can also get into trouble in blog comments by suggesting another agent's client take a negative action against that agent," D'Agosta warns. "For example, responding to a frustrated seller by saying *Fire your listing agent and I'll help you* can easily become an ethics violation."

SHARING ANOTHER AGENT'S LISTING

Re-tweeting or sharing another agent's listing on your own social media timeline could constitute an improper advertisement of their listing. This commonly happens when agents visit an open house and, after leaving, post about it on their feeds. *You cannot engage in any practice that is inconsistent with exclusive-representation agreements that practitioners have with their clients*, states Article 16. Lawton recommends getting the listing agent's permission — a verbal agreement is fine — before sharing anything about their listing online.

A **MAJOR MISCONCEPTION** is that **COMMENTS** made in Facebook groups and other online forums **ARE PRIVATE.**

WATCH WHAT YOU SHARE ON PERSONAL ACCOUNTS

Many agents have Facebook business profiles that note their role as a real estate professional and the company for which they work. That generally satisfies the requirement of Article 12, Standard of Practice 12-5, that *Realtors® must clearly identify themselves and their company when advertising online*. But your personal Facebook profile may not include such details, and if you post listings or other advertorial material on that page, you could be violating the Code. Bruce Aydt, ABR, CRB, senior vice president and general counsel for Berkshire Hathaway HomeServices Alliance Real Estate in St. Louis, says that it's "not always clear when a post constitutes advertising." His rule of thumb is that if you're in doubt, include a link in the post to a webpage that displays your company's logo prominently. That's especially important on Twitter because you often can't fit the name of your company in each tweet.

WATCH WHAT YOU SHARE ON

A common topic that comes up in real estate-related Facebook groups is commissions. If someone is complaining about a commission they received and asking for feedback, it can be tempting to spill your own experience. Aside from it being in poor taste, you could be revealing confidential financial details about your client if you speak in too many facts about a commission, Wilcox says. "Article 1, SOP 1-9, requires Realtors® to preserve the privacy of confidential information about their clients even after the end of their business relationship. You would need their permission first before revealing such details publicly in order to avoid an ethics violation."

If you have questions about whether your online behavior is compliant with the Code, Lawton advises calling your state or local association's legal hotline. Their input is important since enforcement of the Code is done at the local level. "They are a great resource for all of these issues," Lawton adds.

"You should also read through the Code and familiarize yourself with its provisions, especially Article 12 as it relates to marketing and advertising," D'Agosta says. "It's your responsibility to know what the Code says as well as to know what your state's real estate commission guidelines are."

Wilcox says the bottom line is that when it comes to social media, "assume everything is public." ●

* **Melissa M. Kellogg** is a freelance business writer and marketing coach who specializes in writing about digital marketing, technology, finance, real estate, and business management. She is based in Fort Collins, Colo., and can be reached at melissa@melissamkellogg.com. Reprinted from *Realtor® Magazine Online* (<http://www.realtormag.realtor.org>) March 2016 with permission





Do your associates have the
NO. 1 SKILL?

BY LARRY KENDALL, CHAIRMAN OF THE
GROUP, INC. AND AUTHOR OF NINJA SELLING

Have you seen the latest National Association of Realtors® (NAR) survey? Eighty-nine percent of buyers and sellers rate negotiation as the key skill they are looking for in selecting a real estate professional. This high percentage may be related to the shortage of inventory and multiple contract negotiations in many markets. *How are your team's negotiation skills? What can you do to help them perfect those skills?*



Start by helping your associates understand the five basic negotiation points of a real estate contract. Most real estate contracts are lengthy. All the pages of legalese are designed to help buyers and sellers agree on just five negotiating points. Here they are:

PRICE

Are you in a seller's market with multiple offers? Will buyers need to offer full price or above to compete for this property? What about a price escalation clause?

TERMS

Cash is king, as long as it can be verified. Conventional loans are next in line, followed by FHA and VA. If you are in a competitive seller's market, and your buyer is a low-down payment buyer (FHA or VA), can he or she get help from a family member to raise his or her offer to conventional financing to be more competitive?

What about the earnest money? In some markets, a winning strategy is to release all or a portion of the earnest money to the seller upon contract acceptance. This strategy is effective in markets with a history of buyers making offers on multiple properties, then deciding which one they want and using the inspection clause to walk away from the others.

DATES

Closing and possession dates can often be the most important negotiating point of all. Sellers don't like to make a double move. Sometimes they want time to find another home. Buyers who match their closing and possession dates to the seller's goals are more likely to win. Often a closing with a seller rent back (sometimes at reduced or free rent) for up to 60 days makes the difference.



How are your team's **NEGOTIATION SKILLS** ... and what can you do to help them **PERFECT THOSE SKILLS?**



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INCLUSIONS AND EXCLUSIONS

Remember the buyer's markets in the 1980s where the price sometimes included the cars in the garage? Fortunately, those days are over. However, in many resort markets, the price may include the furnishings.

CONTINGENCIES

This one is a biggie. The cleaner the buyers can make their contract (and still be comfortable); the more likely they are to win in a multiple offer situation. The two biggest contingencies generally involve the loan and the inspection. A buyer who is pre-approved (not just pre-qualified) has an advantage. However, the property will still need to appraise. Do the buyers have enough extra cash that they can agree to buy the property so long as it appraises for a minimum amount? If so, they can modify the appraisal clause unless they are buying FHA or VA.

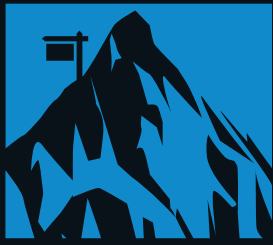
On the inspection clause, if the listing real estate professional had the property pre-inspected by a reputable inspector, and the seller is also offering a Homeowner's Warranty, would the buyer be willing to accept these inspections and waive the inspection clause? If the buyer is competing for a property where contracts will be collected and then presented to the seller at one time several days later, is there time for the buyer to get his or her inspector into the property and have an inspection done BEFORE he or she writes the contract? If the property inspects, they can write an offer waiving the inspection clause.

The strategies mentioned here can be used by buyers to compete in a multiple offer market. They can also be used by sellers to request concessions from buyers when they receive multiple offers. These strategies are generally unnecessary in buyers' markets and may vary by state law.

Regardless of the market, your associates should be familiar with the five negotiating points. We recommend you have them rehearse their strategies and share best practices, so they become master negotiators. After all, it is the No. 1 skill for which customers are looking. ●



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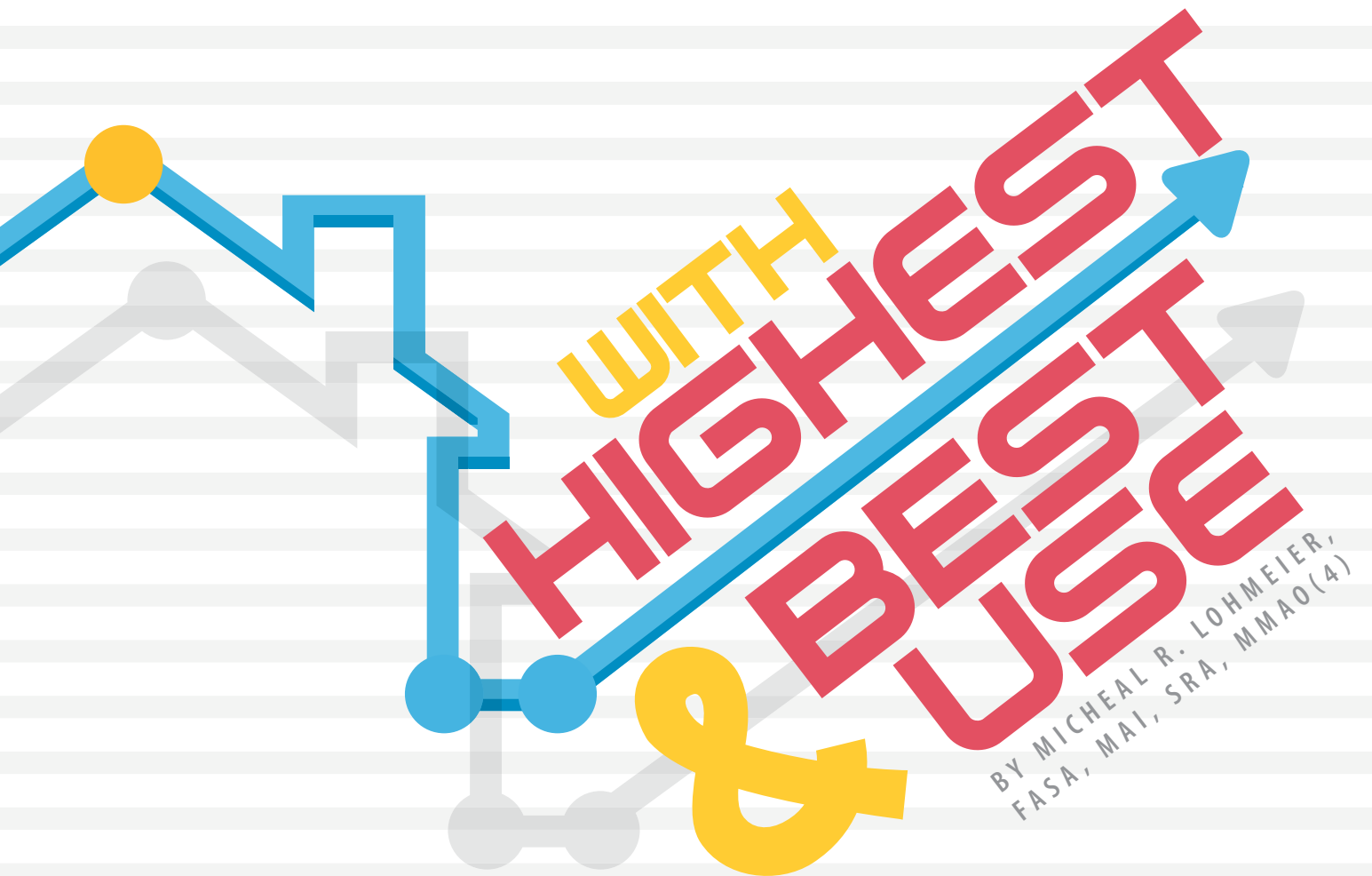
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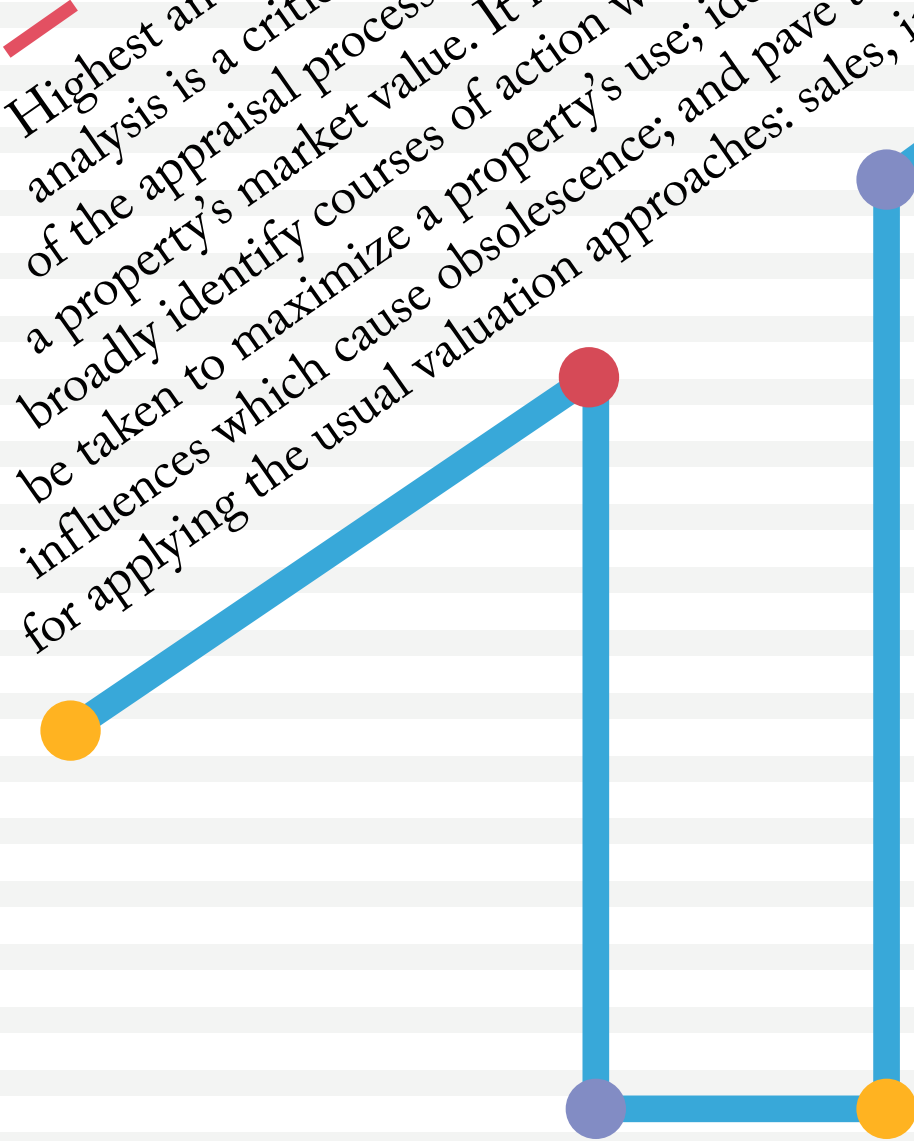


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Highest and best use analysis is a critical component of the appraisal process in developing a property's market value. It helps to broadly identify courses of action which should be taken to maximize a property's use; identify influences which cause obsolescence; and pave the direction for applying the usual valuation approaches: sales, income and cost.

There are circumstances in which highest and best use may be easily determined, such as a house situated within a well-established residential neighborhood or an industrial building located within an industrial park. When a subject property meets current market demand preferences, then its highest and best use may easily be determined to continue as it is currently improved and used. But when the property's improvements do not meet current market demands, then highest and best use helps an appraiser identify the course of actions that should be taken to maximize its use.

A property's highest and best use should not be overlooked or automatically assumed by an appraiser. A house situated in a well-established residential neighborhood could still be discovered to possess some functional obsolescence resulting from any over or under-improvements.

An over-improvement for a house may include greater living area size and qualities of construction, atypical basement finishes, in-ground pools and similar characteristics that might exceed the market's demands. Under-improvements could include a living area which is smaller than required, inferior qualities of construction, design and floor plan flaws and other features inferior to market demands.

Highest and best use conclusions help an appraiser determine which valuation approaches to value are relevant for use. For example, if analyzing a newer residential property that exhibits physical depreciation but does not show any influences of obsolescence, an appraiser may conclude that the cost approach is a relevant technique. If, on the other hand, highest and best use

concludes a property does suffer from functional obsolescence where remodeling, rehabilitation or some type of corrective construction is necessary, then it may be that only a portion of cost analysis is appropriate within a sales or income approach.

Developing highest and best use examines four criteria of the property *as vacant* and *as improved*. These four tests are performed in an attempt to narrow what might be a vast range of alternative uses for a property into a single highest and best use for a property. The first three criteria evaluating potential uses are legally permissible, physically possible and financially feasible. The first two tests, legal and physical, are done in whichever order easily eliminates the majority of alternative uses. The third test for financial feasibility is performed only on the uses that resulted after the first two tests were performed. The last test is to study the financially feasible uses in order to conclude the maximum productive use of the property.

When studying a property's highest and best use as vacant, an appraiser considers a property vacant and ready to be put to its highest and best use. When a property is improved you can think of this as studying the property *as if vacant*. An appraiser is attempting to determine whether the land should be developed or left vacant. When an appraiser concludes a property should be developed, then highest and best use will help in recognizing just when improvements would become financially feasible to undertake.

When studying a property's high-

est and best use as improved, an appraiser considers a property as it currently exists compared to the *ideal improvement* for the site. An ideal improvement is one which maximizes the market preferences for the site, conforms to current market preferences for the market area, and uses the most appropriately prices materials.

When an appraiser concludes a property should be renovated, rehabilitated or altered in some manner to create greater functionality, then highest and best use will help in recognizing just when and how the changes should be made. When an appraiser concludes a property should be maintained as it currently exists, then highest and best use will help in recognizing when changes may become warranted in the future for changes which would be financially feasible to make.

Highest and best use decisions are applied to each of the valuation approaches. Applying a cost approach, an appraiser will estimate charges necessary to make the site ready for development, which may include demolition of any existing improvements. Functionally obsolete items are identified and measured as deductions along with physical depreciation to any construction cost estimates for developing the property. This also includes recognizing any excess and/or surplus land.

When applying the sales comparison approach, an appraiser will study the subject property's improvements for all forms of depreciation not recognized by the sales used. This includes any deferred maintenance and inutility inherent in the subject property to ensure the comparable sales are adjusted properly. This, as well as recognizing any excess and/or surplus land.

This story is brought to you by MiCREA

The Michigan Council of Real Estate Appraisers was created in 2004 with one purpose: to serve Michigan's Realtor®-appraisers through advocacy, benefits, data resources, and educational offerings. The Council, steered by a committee of fifteen appraisers representing more than 2800 members, is Michigan's strongest voice for the rights and needs of appraisers in the state. The services and value MiCREA provides to its members complement in numerous ways the services provided to members by their local associations and appraisal organizations.



When applying the income approach, an appraiser will study the subject property's improvements for comparison to other rental, capitalization rate and expense comparable properties. Adjustments are made similar to the sales approach, however highest and best use analysis may reveal some elements of comparison are more relevant for one approach than the other. For example, in some cases excess land may be an adjustable element of comparison in the sales approach, but not relevant for adjustment to rental properties in the income approach.

Regardless of whether you are developing a market value opinion for a vacant parcel of land or an improved property, highest and best use is critical in the valuation process. Neglecting the proper analysis of highest and best use may lead to inaccurate decisions about the property's use and utility as well as misleading results from each valuation approach applied. For further information on this topic I would strongly recommend you take a seminar or class specific to highest and best use analysis. ●

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Clear and Understandable

Article 9 of the Realtor® Code of Ethics (“Code”) requires that for the protection of all parties, Realtors® shall, whenever possible, make certain that purchase agreements and other real estate documents are written in “clear and understandable” language which express the specific terms, conditions, obligations and commitments of the parties. There are very good reasons for the requirements imposed by Article 9 of the Code, as demonstrated by a recent Court of Appeals decision in which it could be argued that the language was not “clear and understandable.”

On October 4, 2011, the Sellers and Buyer One entered into a purchase agreement in which Buyer One agreed to buy the Sellers’ residence for \$1,225,000. The purchase agreement contained several contingencies. The financing contingency stated as follows:

Payment of the full purchase price upon execution and delivery of Warranty Deed, contingent upon Buyer’s ability to obtain, at Buyer’s expense a Conventional mortgage loan in the amount of 80%. Buyer agrees to make application for said loan within _____ business days of the effective date of the Agreement, and to obtain and furnish to Seller evidence of conditional loan commitment within _____ business days of the effective date of this agreement. Buyer shall furnish Seller with unconditional loan commitment no later than (Date) _____. [Emphasis in original.]

(the “Financing Contingency”). None of the blanks in the Financing Contingency provision had been filled in.

In addition, Buyer One’s obligation to purchase the Sellers’ residence was contingent on Buyer One’s sale of her existing home:

SPECIAL CONDITIONS OF SALE (if any): This agreement is subject to the sale and close of Buyers [sic] home The seller may continue to market the property for sale. If another offer is made that is acceptable to the Seller’s [sic] than the Seller’s [sic] shall then notify the Buyers in writing of the second accepted agreement giving the Buyers 5 days to remove all contingencies and proceed towards closing. If the Buyers are unable to do so, the first accepted agreement would be considered null and void, and the earnest money deposit shall be returned in full.

Sellers and Buyer One were unable to close within the deadline established in the purchase agreement.

In February, 2012, they agreed to extend the purchase agreement for sixty days. Another sixty-day extension was signed on April 12, 2012. On April 27, 2012, Buyers Two appeared on the scene and offered to buy the Sellers’ property for \$1,285,000.

On May 3, 2012, Buyer One’s agent sent correspondence to the Sellers’ agent presumably attempting to waive Buyer One’s contingency with respect to the sale of her existing home. The email from Buyer One’s agent stated:

Here is the Waiver of Contingency for the contingency for [Buyer One] to sell her home. She is moving forward to secure her financing.

The waiver that was attached to the agent’s email stated:

I (We) the undersigned parties to that certain Purchase Agreement dated: 10/17/11 . . . do hereby remove the contingency(ies) concerning that which is indicated on the Purchase Agreement: An acceptable offer has been made on the above mentioned property, and per the five day first right of refusal, the buyers acknowledge in writing that they have until May 5, 2012 to remove the contingency of the sale of their home

It must be remembered that the blanks in the Financing Contingency as to when Buyer One was to make an application for a loan and when she was to provide an “unconditional loan commitment” were left blank. On May 4, 2012, Buyer One provided the Sellers with a letter from Raymond James Financial indicating she was pre-qualified for a mortgage loan, subject to Buyer One meeting certain conditions. Buyer One followed up with a conditional acceptance letter from Raymond James Financial on May 11, 2012. The “conditional acceptance” listed several conditions for Buyer One to satisfy in order to receive a loan.

In the meantime, the Sellers accepted the offer from Buyers Two for \$1,285,000. Buyers Two filed a lawsuit for specific performance, naming the Sellers and Buyer One as defendants, along with the listing broker. Buyer One filed a cross-claim against the Sellers. In other words, the Sellers were now being sued by both Buyers Two and Buyer One.

In July, 2012, Buyer One’s lawyer made a settlement offer in which he indicated that Buyer One was willing to purchase the property for \$1,285,000, the amount Buyers Two had originally agreed to pay for the Sellers’ property. Buyers Two’s lawyer then in-

creased their offer to \$1,400,000. The Sellers accepted Buyers Two's higher offer. Thereafter, Buyers Two settled their claims with Buyer One and the Sellers settled their claim with the listing agent. The only claim remaining in the case was Buyer One's claim against the Sellers.

At the Trial Court, Buyer One claimed that she had a binding purchase agreement with the Sellers by reason of the fact that she had timely obtained evidence of the necessary financing and had effectively waived the condition on the sale of her existing home within five days of Buyers Two's offer. The Trial Court ruled in her favor, finding that Buyer One had in fact obtained necessary evidence of financing and had timely waived the contingency with respect to the sale of her home.

The Court of Appeals did not agree with the decision of the Trial Court. The Court of Appeals started its analysis by citing well-established Michigan law that a contract must be interpreted according to its plain and ordinary meaning and that if contractual language is unambiguous, courts must interpret and enforce the contract as written. Buyer One argued that the Financing Contingency only required her to show that she had the "ability to obtain" financing and that the pre-qualification letters met that requirement. The Sellers contended that the Financing Contingency plainly required Buyer One to obtain "an unconditional loan commitment" before the Sellers had any obligation to sell her the property. Further, the Sellers contended that Buyer One's failure to obtain an unconditional loan commitment within the required time (whatever that might be) terminated the purchase agreement.



Continued on page 23...

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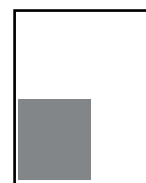
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...Continued from page 21

The Court of Appeals found that the purchase agreement between the Sellers and Buyer One permitted the Sellers to continue to market the property and, if they receive an acceptable offer, notify Buyer One in writing. The Court of Appeals further found that Buyer One had five days to remove all contingencies and proceed to closing. In addition, the Court of Appeals found that the Financing Contingency required Buyer One to provide the Sellers with an “unconditional loan commitment.” The Court of Appeals referred to the Random House College Dictionary for the definition that “commitment” refers to the “state of being committed,” which in the context of this case meant that the lender would be obligated to make the loan. The Court of Appeals went on to find that a “commitment” is “unconditional” if it is “not limited by conditions.” Notwithstanding the fact that the parties had not filled in the blanks in the Financing Contingency, the Court of Appeals found that the purchase agreement plainly required Buyer One to furnish the Sellers with an unconditional loan commitment at some point before the purchase agreement expired. Thus, in order to win, Buyer One had to present evidence that she obtained an unconditional loan commitment before the expiration of the purchase agreement.

The Sellers and Buyer One had extended the purchase agreement twice. There was no dispute that the purchase agreement, as extended, had expired on June 11, 2012. The Court of Appeals found that there was no evidence in the record that Buyer One had obtained an unconditional loan commitment before (or after) the date of expiration of the purchase agreement. The Court held that the mortgage pre-qualification letter and the conditional acceptance letters did not qualify as “unconditional loan commitments” because in each instance the lender indicated it was not obligated to provide financing unless certain conditions were met. Thus, the Court of Appeals reversed the Trial Court and found in favor of the Sellers.

While hindsight is always 20/20, it is obvious that



There are very good reasons for the requirements imposed by **ARTICLE 9 OF THE CODE** [of Ethics]. . .

steps could have been taken to avoid what turned into costly and expensive litigation. First, dates should have been inserted in the Financing Contingency to make it clear when Buyer One had to demonstrate her ability to perform financially. The absence of those dates in the Financing Contingency enabled Buyer One to argue that she had the right to satisfy the Financing Contingency at any time up and until the date of the expiration of the purchase agreement. Second, the waiver of Buyer One’s contingency to sell her own home could have been written with greater clarity. The ambiguity in the waiver language undoubtedly emboldened the Sellers to proceed with Buyers Two. Finally, there was a term in the Financing Contingency which at least in this author’s experience could not be met, i.e., obtaining an “unconditional loan commitment.” This author has never seen such a commitment. Further, such a commitment would not seem possible under the new lending rules.

Again, there is a reason why Article 9 requires terms and conditions to be “clear and understandable.” The failure to provide certain terms and/or the insertion of ambiguous terms leaves the door wide open for creative lawyers when a dispute arises between the parties. Such disputes are not cheap and are rarely productive. ●



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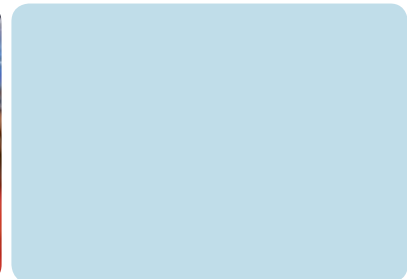
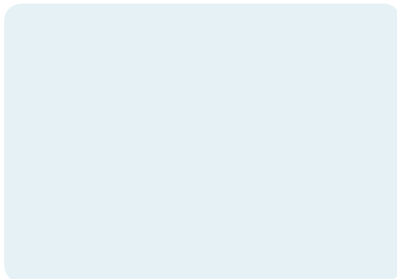
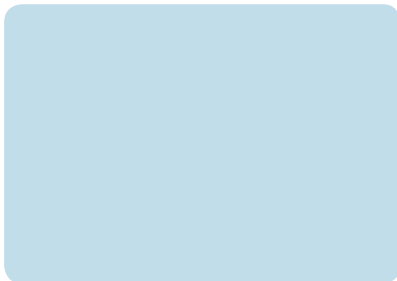
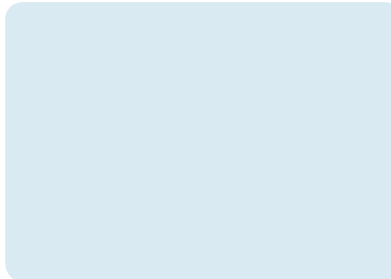
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