



SANTA CRUZ ASSOCIATION OF REALTORS® LEGISLATIVE WATCH

Santa Cruz County to Hold Public Hearing on New Swimming Pool Regulations

The Santa Cruz County Board of Supervisors will hold a meeting on Tuesday, April 4 to discuss potential regulations relating to swimming pool barriers. According to County staff, there are currently two inconsistent sections of the County Code that need to be brought into agreement.

While pool barriers of some kind have always been required in Santa Cruz County, the requiring portions of the county code have been difficult to enforce due to the conflicting sections of the county code. The stated purpose of the public hearing is to delete the outdated portion of the code and replace it with the already existing new code which has been adopted from the state Uniform Building Code (UBC). County staff will also be conducting a review of the code for safety issues. There are rumors, while unconfirmed, that the county may require the creation of swimming pool barriers **at point of sale**. Government Affairs representatives will be monitoring this issue closely to ensure that REALTORS® and homeowners are not adversely affected.

Patriot Act Reauthorization Signed Into Law

After being extended at the end of 2005 for five weeks, and again during the first week of February for an additional five weeks, the Patriot Act Reauthorization has passed in the Senate and the House of Representatives. President George W. Bush signed the measure into law on March 9, 2006. The reauthorization mirrors the conference report that failed to clear the Senate in December.

The new law: 1) increases the judicial review of nondisclosure orders (which prohibit recipients of search orders from discussing the order with outside parties) to require a more direct link to national security; and 2) enables recipients of National Security Letter subpoenas to discuss the order with their own legal counsel. Specifically, new provisions in the reauthorization require the government to link their subpoena request of confidential business records under the Foreign Intelligence Surveillance Act to an actual ongoing inquiry of suspicious activity, and allow business owners whose records have been seized pursuant to a National Security Letter to talk with an attorney about potential legal consequences.

The original Patriot Act was enacted in response to the September 11 terrorist attacks. Most of the provisions of the Act enhance law enforcement powers and provide funding for various anti-terrorism programs but do not directly affect the real estate industry. However, there are two primary areas that real estate professionals need to be concerned with: 1) The Patriot Act, in its definition of financial institutions includes "persons involved in real estate settlements and closings" and 2) the original law granted the government virtually unchecked seizure authority for business records that may pertain to terrorist or espionage activity.

The National Association of REALTORS® (NAR) joined with other industry groups to advocate for a more appropriate balance between the government's ability to seize business records, and business's rights to keep records confidential.

Also, in 2006 the Department of the Treasury is expected to draft proposed regulations that cover the financial aspect of the closing transaction and



has welcomed NAR input. Treasury has previously raised concerns that there may be loopholes in the settlement transaction that may be conducive to money laundering activity.

Pittsburgh Condo Deal Puts Banks into Residential Real Estate

The National Association of REALTORS® (NAR) has responded to the recent defense by the Office of the Comptroller of the Currency (OCC) of its approvals permitting national banks to engage in new real estate and commercial activities. In a letter to the OCC chief counsel, NAR President Thomas M. Stevens raised additional concerns with the OCC's approval letter that gives a national bank, PNC, the right to build, own and market 32 residential condominiums in downtown Pittsburgh despite the longstanding congressional prohibition against mixing banking and commerce.

"It seems strange to us that the OCC would permit a national bank to breach limitations imposed by the National Bank Act simply to achieve a target return on its investment. Such a rationale will inevitably lead to allowing national banks to engage in virtually any type of commercial activity that enables national banks to achieve a reasonable economic return, if there is some physical or temporal relationship to bank premises," Stevens wrote.

The OCC has stated that the development of residential condominiums is not a new power for national banks. However, Stevens reminded the OCC that this position is at odds with its prior action in which the OCC indicated that the development of residential condominiums was not within the authority of a national bank. In 1997, the OCC

considered a proposal from a national bank to develop residential condominiums. At the time, the OCC stated that it had not previously approved this real estate development activity as permissible for national banks. After requesting public comment, the OCC did not approve the bank's request.

The OCC has done an about-face and has now simply approved the real estate development activity which it said was new in 1997. Stevens pointed out that if the OCC thought it was important enough to seek public comment in 1997 on the new activity, the OCC should have sought public comment in 2005 as well.

Stevens said the condominium approval, along with approvals of Union Bank of California's investment in a windmill farm and a Ritz Carlton Hotel in Charlotte being developed by Bank of America, dramatically increases the risk exposure of national banks and threaten the safety and soundness of the nation's banking system.

In December 2005, the OCC approved Bank of America's plans to build and own a \$65 million Ritz Carlton Hotel in Charlotte to provide lodging for the bank's out-of-area visitors. The bank indicated only 37.5 percent of the 150 rooms would be used by persons related to the bank's business. Bank officials expect the hotel to generate profits of as much as \$2.6 million by its third year, according to the Charlotte Observer.

That same month the OCC also approved plans by PNC to build and own a \$170 million mixed-use building in downtown Pittsburgh that would include ground floor retail and restaurant space, five floors of hotel space for 158 rooms, and four floors of residential condominiums, which would be sold when completed. The bank expects to occupy only





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25 percent of the office space and 10 percent of the hotel rooms.

Union Bank of California received OCC approval late last year for an equity investment in 70 percent of a wind energy project, which would allow the bank to take advantage of federal tax credits. The company intends to purchase wind turbines and land in order to generate electricity. Despite Union Bank's claim the deal is structured as an investment rather than a loan only to take advantage of the tax credits, the OCC is not requiring the windmill company to repay the principal, and periodic payments are conditioned on revenues generated by the company.

REALTORS® Step Up Opposition to Wal-Mart Bank's Application

The National Association of REALTORS® will actively oppose the application for federal deposit insurance by Wal-Mart Bank, a proposed Industrial Loan Company (ILC) headquartered in Salt Lake City, and has requested the opportunity to testify at upcoming hearings. The Federal Deposit Insurance Corporation has scheduled public hearings in April in the Washington, D.C., area, and the Kansas City, Mo., metro area on Wal-Mart Bank's application. NAR is opposing Wal-Mart's application for the same reason that it has opposed permitting national banks to broker real estate – banking and commerce should not be mixed.

"We believe that approval of this application would set a serious precedent and lead to the erosion of the national policy against mixing banking and commerce," said NAR President Thomas M. Stevens.

Noting that banking organizations also oppose the Wal-Mart application, Stevens said, "We don't think the policing prohibiting the mixing of banking and commerce can be applied selectively. If the banking industry opposes Wal-Mart's entry into banking, they should also oppose the entry of big banking conglomerates into real estate brokerage and development. The same arguments apply. What's good for the goose should be good for the gander."

C.A.R. Victorious in Legal Ruling on Malicious Prosecution Case

The California Association of REALTORS® (C.A.R.) received a favorable ruling this week from the San Diego Superior Court denying a motion to strike C.A.R.'s malicious prosecution complaint against San Francisco trial lawyer David Barry and plaintiff Arleen Freeman. Such motions are typically used in malicious prosecution cases and frequently are successful unless the underlying malicious prosecution case has a reasonable likelihood of success.

The Court agreed with C.A.R.'s position that no reasonable attorney could think there could be another lawsuit on the same matter that had already been dismissed by the federal district court and the federal court of appeals. The Court found C.A.R. demonstrated sufficient evidence of malice to go forward with the case against Barry.

In 1997, Freeman sued C.A.R. in federal court, lost on summary judgment, and a U.S. Court of Appeals upheld C.A.R.'s dismissal. Despite these clear rulings, Freeman re-filed against C.A.R. in the same federal court and also sued the attorneys in the case. The U.S. Ninth Circuit Court of Appeals



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upheld all of the district court's dismissals in C.A.R.'s favor for the second time.

Lawyers are required to have some legal basis for pressing a suit. In this case, David Barry brought three lawsuits on the same matter, two of which were against C.A.R.. State law prohibits malicious prosecution such as when litigants re-file the same matter against the same defendants, causing the defendants to incur attorneys' fees and costs to get it dismissed. At some point, litigation is supposed to be conclusive.

C.A.R. filed the malicious prosecution action against Arleen Freeman and her attorney, David Barry, in September 2005.

Barry has brought over a dozen legal actions against C.A.R. and organized real estate for more than two decades, yet in these cases, his clients have never obtained a judgment against associations of REALTORS® except in one case on a narrow legal issue pursuant to a settlement to avoid the costs of trial.

C.A.R. Sponsored Legislation Focuses on DRE Licensing Requirements

This year, C.A.R. is sponsoring two bills that focus on the level of experience required to obtain a real estate license. The legislation is intended to further protect consumers by ensuring that real estate agents have sufficient training and expertise before assisting in the largest financial decision families make.

AB 1963 (Leslie), "Real Estate Brokers License," seeks to make two years of "general real estate experience" a requirement for those seeking a broker license. Existing law allows the real estate commissioner to grant a broker license to applicants

without the two years of real estate experience if they hold a degree from a four-year college or university and specialized in real estate or can demonstrate the equivalent education and experience. C.A.R. is sponsoring AB 1963 to prevent such "degree brokers" without real estate experience from also supervising inexperienced salespeople. Under AB 1963, all applicants must have two years of general real estate experience in addition to passing the broker license exam and holding a valid salespersons license before they are granted a broker license.

C.A.R. also is sponsoring AB 2429 (Matthews/Negrete McLeod), "Real Estate Salesperson Licensure." Existing law allows an applicant for a real estate salesperson license to receive a "conditional license" whereby the applicant can sell real property if they have passed the license exam but only completed one of three required real estate courses. AB 2429 would require all salesperson applicants after Dec. 31, 2009, to complete all three of the pre-license courses prior to receiving a license.

Both bills were introduced in the State Assembly in February. AB 1963 was referred to the Business and Professions committee where it will wait for a hearing. AB 2429 was also referred to the Business and Professions committee and may have a hearing on March 26.

Please Note: The Legislative Watch is prepared by the Santa Cruz Association of REALTORS®. The Legislative Watch is only a summary not intended to provide legal advice and should always be verified for accuracy. For more information on a local agency, please call SCAOR at (831) 464-2000 to contact the Local Governmental Relations Liaison assigned to that agency or municipality.

