

Newport Beach Business License Tax (“BLT”)

Newport Beach Association of Realtors (“NBAOR”)

February 25th, 2014

NBAOR Position

The Association believes that the Business License Tax, as it is applied to Real Estate Agents working for a Broker of Record in Newport Beach should be eliminated because agents are not true independent contractors.

Points Supporting the NBAOR Position and the Elimination of the BLT

1. Bureau of Real Estate (“BRE”) requires that licensees affiliated with a particular broker must be fully supervised in all activities. *California Business and Professions Code. Section 10132*
2. Listings belong to the Broker of Record (“BOR”).

Supporting Points (cont'd)

3. Acts of the agent must be approved and authorized by the BOR (e.g., advertising, marketing). As with any employer, the BOR is responsible for all acts and omissions of the agent.

4. BOR's are required to carry Worker's Compensation insurance for agents.

Supporting Points (cont'd)

5. Commissions on transactions are paid to BOR with the split payable to the agent a matter of agreement with BOR. *Gipson v. Davis Realty Company* 215 Cal. App. 2nd 190, 203, (1963)

Note: State of CA can take jurisdiction over a commission dispute between a BOR and an agent in the same manner as an employee complaining about compensation issues. *Resnick v Anderson and Miles.* 109 Cal. App. 3d 569,572 (1980)

6. Agents are not able to function as an independent business, and must “hang” their license with a BOR. *Resnick v. Anderson and Miles.* 109 Cal. App. 3d 569,572 (1980)

Supporting Points (cont'd)

7. Errors & Omissions Insurance (“E&O”) is carried through the BOR and insurance carriers will not write for individual agents.

8. In general, agents cannot work for two BOR’s at the same time. *California Business and Professionals Code. Section 10137*

9. The CA courts have held that the BOR is responsible for all of the acts and omissions of the licensees. *Grubb and Ellis Co. v. Spengler, 145 Cal. App. 3d 890.895 (1983)*

Supporting Points (cont'd)

10. Courts have held that real estate agents are agents of the BOR, and may not be an independent contractor, and is an agent as a matter of law. *Payne v. White House Properties*. 112 Cal App. 3d 456471 (1980)

Note: No other IC must adhere to the types of limitations stated in the 10 points above.

Source: Tom Jacobson, Attorney for Orange County Association of Realtors, letter dated 7/7/2008 to Huntington Beach City Council.

Additional Points

- There is a precedent where many other cities in Orange County have eliminated or reduced the BLT (e.g., Huntington Beach, Anaheim, Tustin & Orange). Cities that have eliminated the BLT do not appear to have had a flood of IC's requesting similar treatment.

Additional Points (cont'd)

- The real estate industry and the IRS determined that real estate agents report income as independent contractors (Schedule C) due to the unpredictability and irregularity of the receipt of income and the irregularity of business expenses (this has to do mostly with the issue of fluctuating withholdings).

Additional Points (cont'd)

- If real estate agents were to be exempted from the City's business license requirements, one concern is that Newport Beach *could* face challenges from other types of independent contractors seeking a similar exemption.

We believe this concern is unfounded. Other Independent Contractors do not have the same restrictions placed on their state license that prevent them from acting as independent contractors.