

TOWN OF FAIRFAX

STAFF REPORT

TO: Mayor, Members of the Town Council **DATE:** May 4, 2011

FROM: Michael Rock, Town Manager
Judy Anderson, Town Clerk



SUBJECT: Introduction and First Reading of Ordinance No. 762, An Ordinance of the Town Council of the Town of Fairfax Amending Section 5.16.130 of the Fairfax Town Code to Remove Real Estate Agents from Business License Fee Obligations

Recommendation

Staff recommendation is to:

1. Make a motion to waive further reading and to read the title only of Ordinance No. 762, An Ordinance of the Town Council of the Town of Fairfax Amending Section 5.16.130 of the Fairfax Town Code to Remove Real Estate Agents from Business License Fee Obligations; and
2. Make a motion to introduce Ordinance No. 762, An Ordinance of the Town Council of the Town of Fairfax Amending Section 5.16.130 of the Fairfax Town Code to Remove Real Estate Agents from Business License Fee Obligations

Discussion

In July of 2010, the Town Council received a letter from the Marin Association of Realtors requesting that only brokers and not individual real estate agents be charged a business license fee. The supporting arguments for this change are included in their letter dated July 27, 2010. Staff supports this change.

Staff recommends that the Town Council review the business license fees charged to brokers to consider raising the fee for brokers and/or perhaps basing the fee on the number of agents employed. Further consideration might be given to including the brokers operating within Fairfax to be subject to the gross receipts calculation that is applied to most merchants in town.

Fiscal Impact

If all brokers pay the required fees, the Town should receive about the same revenue as in the past.

Attachments

Draft Ordinance No. 762
Marin Association of Realtors letter of July 27, 2010
Current Business License Fees

AGENDA ITEM # **16**

ORDINANCE NO. 762

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF FAIRFAX
AMENDING SECTION 5.16.130 OF THE FAIRFAX TOWN CODE TO REMOVE
REAL ESTATE AGENTS FROM BUSINESS LICENSE FEE OBLIGATIONS

The Town Council of the Town of Fairfax, California does ordain as follows:

Section 1. Municipal Code Amended:

Section 5.16.130 REALTORS of the Town of Fairfax Municipal Code is hereby amended to state as follows:

"Every real estate broker ~~or real estate agent~~ conducting, carrying on or managing business consisting of the buying or selling of real estate within the town shall pay a license fee to be fixed from time to time by resolution of the Town Council."

Section 3. Notice of Adoption

Copies of the foregoing ordinance shall within fifteen days after its final passage and adoption be posted in three public places in the Town of Fairfax, to wit: Bulletin Board, Fairfax Town Offices, Town Hall; Bulletin Board, Fairfax Post Office; and Bulletin Board, Fairfax Women's Club Building, which said places are hereby designated for that purpose.

Section 4. Effective Date

This ordinance shall take effect and be in force 30 days after its adoption.

The foregoing ordinance was duly and regularly introduced at a regular meeting of the Town Council of the Town of Fairfax held in said town on the 4th day of May, 2011 and thereafter adopted at a regular meeting on the 1st day of June, 2011 by the following vote, to wit:

AYES:
NOES:
ABSENT:

Larry Bragman, Mayor

Attest:

Town Clerk



July 27, 2010

The Honorable Lew Tremaine, Mayor
Town of Fairfax
142 Bolinas Road
Fairfax, CA 94930

Dear Mayor Tremaine: *LEW-*

It recently came to our attention that the Town of Fairfax has had on its books since the 1980s a law that imposes a business license fee on real estate brokers *or* real estate agents. The law, which apparently has not been enforced for quite some time, applies to those “conducting, carrying on or managing business consisting of the buying or selling of real estate within the town...”

I am writing to let you know that the Marin Association of REALTORS® is against business license taxes being imposed on real estate sales people (see our reasons below), and would like to work with you and your colleagues to have this ordinance modified immediately so that it does not apply to real estate agents. As you may know, in 2003 we successfully lobbied to prevent San Rafael from implementing a similar tax. Copies of news coverage about our lobbying efforts are enclosed for your information.

On a related matter, we understand that the town council is considering outsourcing the collection of business license taxes to a private company. Given the concerns listed above, if the current law is still on the books when Fairfax retains the services of the company, we respectfully ask that you instruct them not to seek to collect the tax from real estate agents, only from the broker/owner of an office whose agents conduct business in Fairfax.

Our Position

For purposes of paying local business license fees, the Marin Association of REALTORS® opposes efforts to impose a business license tax on real estate sales people who conduct business in Fairfax, or to classify real estate salespeople as being anything other than employees of the brokers for whom they work.

Supporting Arguments

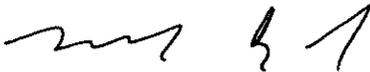
There is a strong body of evidence -- including provisions of the California Business and Professions Code (Sections 10132, 10137, 10160, 10177, and 16300) -- that supports our point of view:

- Courts have concluded that an agent is the broker's employee
- State law prohibits the imposition of a business license tax on income for services earned in an employment relationship
- Real estate salespeople are unable to list or sell property unless they work for a broker
- Current statutes prohibit business license taxes on commissions earned by salespersons

In addition, implementation of a business license tax may violate Proposition 218, which prohibits the imposition of a new “general” tax without majority voter approval.

We look forward to working with you to modify Fairfax’s business license tax ordinance so that it does not apply to real estate agents.

Sincerely,

A handwritten signature in black ink, appearing to read 'Edward Segal', with a stylized flourish at the end.

Edward Segal
Chief Executive Officer/Governmental Affairs Director

Enclosures

cc: The Honorable Lew Tremain, Mayor



January 30, 2003

THURSDAY

Marin

Marin Independent Journal

Real estate agents gripe about San Rafael tax

City lists them as independent contractors

By Keri Brenner

LI reporter

Marin's real estate agents are at odds with the city of San Rafael, which has become the first in the county to tax individual agents as independent contractors. The city, complying with

a two-year-old state law, has begun contacting real estate brokers, seeking a list of their agents who work under them in the same office.

Those listed agents are being sent notices that they are independent contractors and must pay an annual business license tax of \$135.48 or a portion of their gross receipts, whichever is greater. Under the previous system, only the broker in

charge paid the business license tax, which covered all agents in that office. The broker added on either a flat fee for each agent, or a portion of each agent's gross receipts.

Although the move comes as the entire state is under a severe budget crisis, city spokeswoman Lydia Romero said the enforcement program was "absolutely not" a bid to squeeze out a new source of

revenue for the city. She said the city was not even sure it would gain any revenue at all.

"We're under the assumption that we're probably going to have a wash," Romero said. Realtors in Marin do not agree. Larry Brackett, president and chief executive of Marin's Frank Howard Allen Realtors, estimated that if the enforcement ap-

plied only to his individual agents in offices in San Rafael, it would mean an additional \$10,000 to the city.

"Obviously, it's an attempt to raise additional money," Brackett said. "It's a tough one, I think. Obviously, I think the city needs to clarify how they're going to implement it. We've not been able to get a clear reading on it," he said. See Tax, page A11

Tax

From page A1

added.

Dave Fahrner, president of the Marin Association of Realtors, said his group objects to the city classifying agents as independent contractors.

"We don't oppose just and legal business fees," said Fahrner, who also works for Frank Howard Allen in Mill Valley. "But this specific fee we do oppose because of San Rafael's interpretation of the status of real estate sales people.

"They're treating us as if each sales person were an independent business, and that's not the case," Fahrner said. "Sales people operate under a broker, and we're responsible to that broker."

Fahrner said the Marin real estate community defeated a similar action in 1993 in San Anselmo. In recent years, real estate communities in San Mateo and San Jose have also fought off bids by those cities to tax individual agents, Fahrner said.

"I'm not happy about it," said Peter Richmond, of the Mill Valley office of Pacific Union Real Estate Group and a member of MAR's government committee. "From what I know about it, it seems to be an attempt by the city to find some additional revenues."

He said enforcement should be across the board and not single out any particular profession.

"I don't have a problem with government raising revenues," Richmond said. "But it has to be done rationally."

Romero said the action followed passage of a state law two years ago that clari-

fied who could be charged a business license tax. Since the law passed, the city has been addressing each group of professionals individually, and already has contacted insurance brokers, massage therapists and beauticians, she said.

Nena McNamara, San Rafael's revenue supervisor, said it was difficult to calculate exactly how the city's coffers would be affected by the change. That's because at the same time each broker's tax is reduced, agents' taxes will be added, she said. The net effect is dependent on gross receipts, which are variable and taxed according to a tax table.

McNamara said agents have 45 days from the date of their letter to pay the business license tax. After that, a 10 percent penalty will be assessed.

She said the tax would apply to agents whose offices were in San Rafael, as well as agents who worked on sales or purchases of homes in the city. However, she said the enforcement would start with agents who were based in San Rafael.

Elissa Giambastiani, chief executive of the San Rafael Chamber of Commerce, said she has heard concerns about whether real estate agents eventually would need business licenses in every Marin city where they buy or sell homes.

"The feeling is that if San Rafael initiates it, others will follow suit," she said. "I don't see it as helping or hindering business — I see it as being an area of controversy and one that needs far more clarification, not only in San Rafael, but in all other Marin cities as to what they will do."

Contact Keri Brenner via e-mail at kbrenner@marinij.com

MARIN

Realtors reject fees

Attempt to make agents buy licenses stirs controversy

By Kerri Brenner

UJ reporter

Marin Association of Realtors officials yesterday said the group "flatly rejects" efforts by the city of San Rafael to collect business license fees from individual real estate agents, and criticized the city for its "zeal to generate additional tax revenues."

City officials, however, denied

the collection efforts were budget-motivated and said the association blindsided them with its surprise public statements at San Rafael City Hall yesterday.

The dispute, which centers on the re-classification of agents as independent contractors instead of employees of the office's real estate broker, comes as severe budget cutbacks statewide have Marin school districts and municipalities warring pink slips and seeking alternative financing for dozens of programs.

"We will not allow our members to become the targets of those who

are seeking quick fixes to their budget problems," said association president Dave Fahrner after "serving" Ken Nordhoff, the assistant city manager, with a letter blasting the business license fee collection program.

Nordhoff, however, said he was surprised at being rebuffed by the real estate group since he thought the city and association officials had come to a meeting of the minds last week on a compromise plan. The plan, he said, would have allowed each broker to decide

See Realtors, page C2

BEKINS

Let Our Family Help
Your Family Move!

FAMILY OWNED SINCE 1990
(415) 883-2391 • 111 Hamilton Dr. Novato
www.bekinsagent.com/Approving

7/593034



OBJECTION: Dave Fahrner of Frank Howard Allén Realtors (left) presents a letter to San Rafael Assistant City Manager Ken Nordhoff stating opposition to a city rule requiring real estate agents to get business licenses and pay fees. Jack Wilkinson (center) works for Avalar Real Estate and Mortgage Network.

UJ photo/Frankie Frost

Realtors

From page C1

whether to classify the agents in his or her office as employees or independent contractors.

"We had agreed at a meeting last Wednesday to move in one direction, and now they are moving in another direction and they didn't give me the courtesy of notifying me of that change or of telling me they were moving in another direction," Nordhoff said, after receiving the letter from Fahrner and Jack Wilkinson, past president and chairman of the association's subcommittee on taxation.

Nordhoff also denied that the city was trying to balance its budget on the backs of real estate agents. He said the collection plan was seen as "revenue-neutral," meaning it isn't expected to generate more money than is already collected.

"We had no intention of generating new revenues" through the collection efforts, Nordhoff said. "The whole purpose of the (city's) business license program is making sure everyone is licensed according to federal and state law, and according to the business and professional codes."

Late last year, the city sent 56 Marin real estate brokers a letter, asking them to list their agents and classifications, and to return the list to the city. City staff then sent each agent who was listed as an independent contractor a letter, which said the agent would need to remit an annual fee of \$185.48 or a portion of his or her gross receipts — whichever is greater — to the city.

Until that time, only the broker in each real estate office paid the annual business license fee, based on a formula using the number of agents in the office and gross receipts.

City staffers have said the changes in collection efforts were based on state Assembly Bill 205, passed two years ago. The bill, later codified under the California Business and Professions Code, sets forth a standard for classifying workers as either employees or independent contractors. Under the city's interpreta-

tion of that code, real estate agents would be independent contractors.

But the association, which represents more than 1,200 real estate agents, "flatly rejects any efforts to classify real estate salespeople who list or sell property in San Rafael as being anything other than employees of the brokers for whom they work," Fahrner said yesterday.

He said he was "confused as to why they are even bothering" with the collection plan if it does not generate new revenue. He added he saw "no compromise" in the draft plan presented by the city last week, and said it was just a restatement of the new fee collection policy.

"It is wrong for the city of San Rafael to unilaterally reclassify real estate salespersons as independent businesses, and it will be wrong for any other city to try to do the same thing," Fahrner said. "It is important that, in their zeal to generate additional tax revenues, every municipality is careful to follow the letter and spirit of the law."

Fahrner added the association did not agree with the city's interpretation of the state business and professions code.

In his letter, Fahrner, an agent with Frank Howard Allen Realtors in Mill Valley, presented a list of four demands. They were that the city:

- ▶ Immediately cease its efforts to require any real estate salesperson to obtain a business license.

- ▶ Return to its policy in place in November 2002 of not asking brokers if their agents are independent contractors.

- ▶ Immediately notify the 56 real estate brokers who are licensed in San Rafael that the city is rescinding its policy on the matter.

- ▶ Issue a news release about these actions.

Nordhoff said later he would review the association's letter again before deciding on a response.

Contact Keri Brenner via e-mail at kbrenner@marinij.com

EDITORIAL

Is the battle over license fees worth it?

WHAT APPEARS TO BE CLEAR is that San Rafael city officials' compromise over requiring local real estate agents to get city business licenses was missing a critical key to success — agreement.

City officials were surprised when they got a letter from the Marin Association of Realtors protesting the change after they thought they had struck an agreement with the organization.

The change pursued by the city would essentially reclassify agents as independent contractors who each would require a \$135 annual license to do business in San Rafael, rather than be covered by their broker's license, which is the case today.

City officials say they were implementing a change in the law, made two years ago, which they say opens the door to classifying agents as independent contractors.

Interestingly, Assistant City Manager Ken Nordhoff says the change is a wash from a revenue standpoint.

The question, therefore, is why make the change? Why aren't other Marin cities pursuing similar shifts? Wouldn't it make more sense in such a small county if all of the municipalities had a uniform business license system?

The letter from the association seems to prefer the status quo, a reflection that the longstanding interpretation works fine for both agents and the firms for which they work.

The association appears firm in its stance.

The city, facing the possibility of laying off workers and cutting programs as a result of local and state budget cuts, has bigger fish to fry than taking on local real estate agents.

If the change is "revenue-neutral," as City Hall explains it, then perhaps officials would be wiser to set their sights on other matters.

Saturday, March 15, 2003

*Roger C. Grossman, Publisher
Jackie Kerwin, Executive Editor*

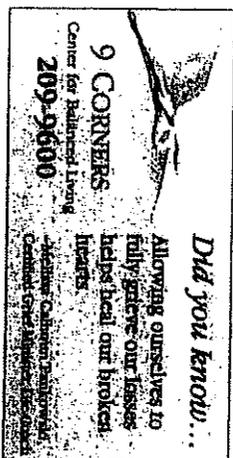
OPINION

*Doug Bunnell, Deputy Editor / News
Brod Breithaupt, Editorial Page Ed*

Ma

- > Former activist, Novato Lumber owner dies at 84 / B2
- > Judge orders trial in transgender teen's killing / B3
- > Some Comcast patrons irked by Internet price hike / B6

MARIN



Did you know...

Allowing ourselves to fully explore our issues helps fuel our broker's ideas

9 CORNERS
Center for Balanced Living
209-96600

—Katherine Coleman Thompson, M.A.,
—Carmel Goodwin, Ph.D.

San Rafael drops revised license plan

"The relationship between our organizations has been seriously damaged due to your grossly disrespectful, unprofessional and dishonest behavior."

—San Rafael City Manager Rod Gould

But city manager is angry about 'ambush' by Realtors

By Keri Breuner

1/1 reporter

San Rafael officials said they will scrap efforts to revise their business license fee collection program for real estate agents, but blasted the Marin Association of Real-

tors for "grossly disrespectful, unprofessional and dishonest behavior" in the matter.

The dispute, which heated up last week after public statements by the real estate group's San Rafael City Hall, is the latest in a string

of similar battles around the state in recent years between agents and the cities where they buy and sell properties.

Although the flap comes during an extremely tight time for local government budgets, San Rafael City Manager Rod Gould, in a strongly worded March 13 letter to real estate association President David Fahner, said it was an issue of fair-

ness, not finances. "We will now accept your contention that all real estate salespeople are employees, for the purpose of business licensing," Gould said in the letter. "This was never about additional revenue, as you well know. It was simply about fairness to all those the city seeks to license in San Rafael."

Gould said the city will retract its November letter to 56 Marin real estate brokers

asking them to tell the city whether agents who worked for them were employees or independent contractors. Employees are not subject to an individual business license fee — they are covered under their broker's license — but independent contractors would have been asked to pay \$135 or a portion of gross sales for a business license.

See Agents, page B2

"The city has charged that we are a special interest group with an agenda and an attitude. That's exactly what we are and what we have."

—Real estate association President David Fahner

B

Agents

From page B1

Fahrner said he was satisfied by the outcome.

"The city's decision to go back to its original policy is an important victory, not just for our 1,200 members, but for all taxpayers in San Rafael," Fahrner said. "It's also a wake-up call for the other Marin cities that any new taxes they try to collect must be fair, just and equitable."

Could, in the three-page letter, rebuked Fahrner and other association officials for making a "180-degree about-face" after a March 5 meeting in which the city proposed what it called a compromise plan. He also said Fahrner "ambushed and embarrassed" Assistant City Manager Ken Nordhoff by showing up at City Hall last week to present a letter to Nordhoff, and having it

recorded by a photo and an article in the Independent Journal.

"The relationship between our organizations has been seriously damaged due to your grossly disrespectful, unprofessional and dishonest behavior," Gould said.

Gould said the city would change its relationship with the association from that of a congenial partnership to one in which the city views the organization as a "special interest group with an agenda and an attitude."

Fahrner said he had "absolutely nothing to apologize for in our continuing efforts to advocate and defend the best interest of our members." He said the association would strive to have a good working relationship with

the city, but not at the cost of fairness to its members.

"The city has charged that we are a special interest group with an agenda and an attitude," he added. "That's exactly what we are and what we have."

Similar proposals were fought by real estate agents in San Anselmo in 1993, Fountain Valley, Huntington Beach and Irvine in recent years, San Jose in 1998, and, in recent months, in San Mateo, according to research materials from the California Association of Realtors, a statewide trade group.

Contact Keri Brenner via e-mail at kbrenner@marinij.com

TOWN OF FAIRFAX, CA

BUSINESS LICENSE FEE SCHEDULES - PLEASE USE APPLICABLE SCHEDULE

Effective January 1, 2011 All Licenses Are Subject to a \$25.00 Administration Fee

A) **Section # 1.00 - RETAIL, SERVICE, WHOLESALE, MANUFACTURING, HOTELS**

| | | |
|--|---------------------|---------------|
| | Base Fee: | \$ <u>100</u> |
| | Gross Receipts Fee: | \$ _____ |
| | TOTAL: | \$ _____ |

The Business License Fee is comprised of a Base Fee and Gross Receipts Fee.

Calculate your fee from the Gross Receipts table below and add to Base Fee. The Gross Receipts Fee must be paid on the total combination of any and all of the above titled businesses in this category. **CONTRACTORS ONLY PAY BASE.**

| <u>Gross Receipts</u> | <u>Fee</u> | <u>Gross Receipts</u> | <u>Fee</u> | <u>Gross Receipts</u> | <u>Fee</u> |
|-----------------------|------------|-----------------------|------------|-------------------------|------------|
| \$ 0 - \$10,000 | \$ 6 | \$ 50,001 - \$ 75,000 | \$ 47 | \$ 200,001 - \$ 250,000 | \$ 156 |
| 10,001 - 25,000 | 16 | 75,001 - 100,000 | 63 | 250,001 - 300,000 | 188 |
| 25,001 - 37,500 | 23 | 100,001 - 150,000 | 94 | 300,001 - 350,000 | 219 |
| 37,501 - 50,000 | 31 | 150,001 - 200,000 | 125 | 350,001 - 400,000 | 250 |

Add \$ 31.00 for each additional \$ 50,000 gross receipts, or fraction thereof, above \$ 400,000.

B) **Section # 2.00 - THEATERS** - Base Fee: \$ 250, plus a Gross Receipts Fee on Gross Receipts over \$37,500 (i.e. if gross receipts are \$100,000, the fee is calculated on \$ 62,500, which amounts to a \$ 47 Gross Receipts Fee).

C) **Section # 3.00 - HOME OCCUPATION** - Annual Fee: \$ 100 (no Gross Receipts Fee required)

D) PROFESSIONAL/SEMI-PROFESSIONAL AND TRADE BUSINESSES

If you are a professional and have no employee's to report and are purchasing a license for number of professionals only please use section number 4.00. If you are a professional and have employees to report please use section number 4.01 and 4.02.

Section # 4.00 - Number of practicing professionals _____ X \$135 = \$ _____

Section # 4.01 - Number of practicing professionals _____ X \$135 = \$ _____

Section # 4.02 plus number of employees _____ X \$ 30 = \$ _____

If you purchase section # 4.01 and 4.02 at the same time, only one administration fee is charged. If you purchase these licenses separate, then you will be charged a separate fee.

E) CONTRACTORS

Section # 5.00 Business address in Fairfax:
Annual Base Fee: \$100

Section # 5.01 Business address outside of Fairfax
Annual Base Fee: \$75

F) **Section # 6.00 - MULTIPLE HOUSING/APARTMENTS** (unit occupied by owner in multiple residential units with less than five (5) units is exempt)
Number of Units _____ X \$ 25 = \$ _____

G) DELIVERY VEHICLES

Section # 7.00 - Number of vehicles (weight up to 1 ton) _____ X \$ 80 = \$ _____

Section # 7.01 - Number of vehicles (weight up to 2 tons) _____ X \$ 120 = \$ _____

Section # 7.02 - Number of vehicles (weight up to 3 tons) _____ X \$ 175 = \$ _____

Section # 7.03 - Number of vehicles (weight over 3 tons) _____ X \$ 265 = \$ _____

H) REALTORS

Section # 8.00 - Fixed place of business in Fairfax: \$ 175

Section # 8.01 - Fee for each Realtor conducting business with no office in Fairfax: \$ 200

NOTE: If a Realtor fails to achieve \$ 25,000 in commissions from Fairfax sales - a refund of all but \$ 75 will be made. Refund is to be requested no later than June 1st of the following year.

I) **CANVASSERS/PEDDLERS/SOLICITORS** - **Section # 9.00** Annual Fee: \$ 120 **Section # 9.01** Fee per day: \$ 40

J) TAXICABS/AUTO OR BUSES FOR HIRE

Section # 10.00 - 1 to 7 passengers: \$100 - 8 to 15 passengers: \$ 120 - Over 15 passengers: \$ 125

K) **Section # 11.00 - COMMERCIAL FILMING** - For information, please call Town Hall offices at (415) 453-1584.

L) **Section # 12.00 - CHRISTMAS TREES** - \$100 annually for each location