



The Strategies Behind Real Estate Licensure

Examining the impact on marketability and earning potential

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There is an economic principle often used in evaluating business decisions known as opportunity cost. Webster defines it as the “cost in terms of foregone alternatives.”

This principle can be applied to right of way professionals who are faced with the decision of whether or not to work in a state that requires real estate licensure. This decision not only impacts the agent’s earning potential, it can also impact their marketability in an increasingly competitive industry.

Variations by State

For several years, a handful of states have required agents who contract to purchase right of way possess a valid real estate license for that state. The key word here is ‘contract.’ The requisite is derived from the definition

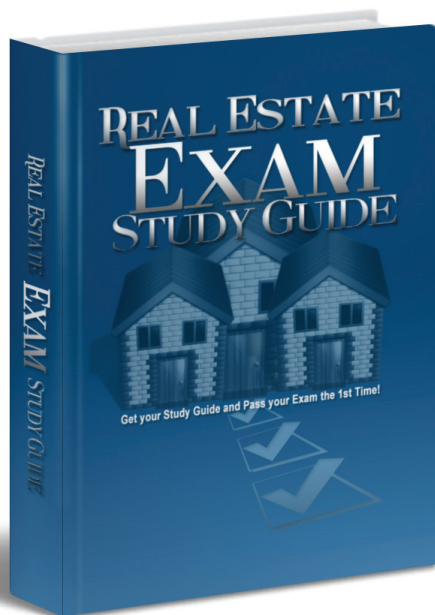
of a licensed broker found in a state’s real estate license law. This definition does not differ greatly from state to state, although it is drafted to broadly include right of way professionals in the opinion of the state’s Real Estate Commission (REC).

North Carolina’s REC defines a real estate broker as “...any person, partnership, corporation, limited liability company, association, or other business entity who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others.”

In North Carolina, an easement, compressor station, substation or highway right of way purchased by a contract agent on behalf of a client company meets the state's established parameters to sufficiently categorize the contract agent as a practicing broker, thereby requiring licensure. However, in the state's list of exemptions, there is no mention of right of way professionals, easements or persons contracted to acquire such rights.

By contrast, Colorado has a similar definition for a broker, yet the state included language to exempt right of way professionals and landmen from being licensed as brokers. An excerpt from Colorado's Real Estate Broker's Law covering oil and gas land professionals states, "Any person, firm, partnership, limited liability company, association, or corporation, or any employee or authorized agent thereof, engaged in the act of negotiating, acquiring, purchasing, assigning, exchanging, selling, leasing, or dealing in oil and gas or other mineral leases or interests therein or other severed mineral or royalty interests in real property, including easements, rights of way, permits, licenses, and any other interests in real property for or on behalf of a third party, for the purpose of, or facilities related to, intrastate and interstate pipelines for oil, gas, and other petroleum products, flow lines, gas gathering systems, and natural gas storage and distribution."

Colorado provides similar exemptions for land professionals working in telecommunications, wireless, electric and transportation. These exemptions were lobbied for by industry professionals and reflect the state's approach to addressing the disparities in the qualifications required to be a right of way professional compared to those required to be a real estate broker.



In states like North Carolina, 75 hours of classroom training are required before the real estate exam can be taken.

The Driving Factors

While most states do not currently require right of way professionals to be licensed brokers, North Carolina is not alone, nor was it the first. Florida required licensing for right of way professionals practicing in their state prior to North Carolina. Texas does not require a broker's license, however the state does require right of way agents to register with the state's REC, undergo a criminal background check, submit fingerprints and pay an annual registration fee. In Kentucky, the REC required at least one right of way firm to use licensed agents following a landowner's complaint.

One byproduct of these requirements has been the emergence of smaller, state-specific right of way/real estate firms with dual functionality. Many of the professionals staffing these firms have prior experience in the municipal, pipeline, transportation or telecommunications industries and are now competing in the contract sector. In this role, they serve as active brokers for residential and commercial real estate, as well as contract brokers performing right of way acquisition for regional utilities, municipalities and departments of transportation. A common concern has become the competing loyalties between project priorities and their listings, showings and closings. That being said, these firms can play a vital role in providing a more competent and qualified local agent pool from which to staff a project. They also bring a familiarity with the region as well as some of the key players who can add value to the project.

The Firm Must Qualify

So you may be thinking, "Okay, for my next project I'll just hire some real estate brokers." While that may be inevitable, it will not be possible until the firm itself qualifies as a real estate firm within their state. According to the North Carolina REC, "Every business entity other than a sole proprietorship shall apply for and obtain from the Commission a firm license prior to engaging in business as a real estate broker."

Applying for a firm license requires that the firm make some strategic planning decisions, which should likely involve their corporate counsel. Possibly the most critical decision involves that of choosing a qualifying broker. North Carolina's REC states, "The qualifying broker of a partnership of any kind must be a general partner of the partnership; the qualifying broker of a limited liability company must be a manager of the company; and the qualifying broker of a corporation must be an officer of the corporation."

If the firm does not employ a qualifying broker, it will have to look for a suitable candidate who can serve in this capacity. Rather than hire a real estate industry professional who lacks right of way expertise, your ideal candidate should have right of way expertise across multiple disciplines. This kind of strategic

staffing decision enables the firm to position themselves for continued business opportunities in the respective state.

Once a firm designates its qualifying broker and meets the remaining firm licensure requirements, the qualifying broker will be held responsible for complying with all applicable state real estate laws and REC rules. In this role, they will also be responsible for reporting on behalf of the different brokers employed by the firm. Since many firms compete nationally, the qualifying broker may be called on to be credentialed in multiple states. This requires familiarity with those state's laws, as well as annual continuing education, passing state specific real estate law exams and annual licensing fees at a minimum. The firm will likely also be required to acquire firm real estate licenses for those states.

A final hurdle for any firm to overcome is the tendency to look at the qualifying broker as an anomaly of sorts. In essence, an inconvenient necessity. The statutory responsibilities of the qualifying broker are real and carry the full weight of law. Failure to comply can affect the company's bottom line and its right to practice in a given state. The firm will want to be especially sensitive to the qualifying broker's concerns as they relate to compliance and reinforce the importance of their role.

Finding a Broker-in-Charge

A broker-in-charge (BIC) is the term North Carolina uses for the managing broker within a local real estate office. For example, your project field office would be your local real estate office and each would require a BIC. North Carolina's REC states, "To be qualified to serve as a broker-in-charge of a real estate office, a real estate broker shall possess at least two years of full-time real estate brokerage experience or equivalent part-time real estate brokerage experience within the previous five years or real estate education or experience in real estate transactions that the Commission finds equivalent to such experience and shall complete, within a time prescribed by the Commission, a course of study prescribed by the Commission for brokers-in-charge not to exceed 12 classroom hours of instruction."

The difficulty in finding individuals who already meet this requirement and are competent in the right of way profession is challenging. The BIC is not required to be the right of way supervisor managing the project, but they are legally responsible for the activities of the brokers assigned to that office and its compliance with REC laws, rules and guidelines. In matters regarding compliance, this person will report directly to the qualifying broker.

In a state like North Carolina, if your right of way supervisor or manager is not licensed, they cannot directly negotiate with a landowner for property rights. Negotiations must be conducted

"State licensure is a personal commitment with individual responsibilities.."

by a licensed broker. This requires a unique level of cooperation and understanding between the unlicensed supervisor and the BIC. The supervisor may be responsible for the overall project completion, but it is the BIC who has the legal responsibility for ensuring compliance.

An unlicensed supervisor will require orientation to and familiarization with the state's real estate laws as they affect agent activities. As with the firm, in order for the relationship to be successful, there must be buy-in to both the importance of and the commitment to compliance. Anything less could create an adversarial relationship between the supervisor and the BIC.

Hiring Licensed Brokers

In many cases the client is unaware of what a firm must do to comply with the law. Since in-house employees are exempt and rarely licensed themselves, they may assume compliance is something that can be achieved quickly and with relative ease. The fact that they have called a major provider typically indicates that the project is too large or complex for their regional resources to handle. Project scheduling is typically already tight and right of way firms will need to develop mobilization plans to get a project started while they continue with measures to ensure staffing compliance.

There are generally three approaches adopted for hiring licensed brokers:

1. Hire licensed brokers with right of way experience.
2. Hire licensed brokers without right of way experience who will commit to the project over competing real estate opportunities and provide them with right of way training.
3. Train and pay for experienced agents' broker licensing. North Carolina requires 75 hours of classroom training (not online) plus successfully passing the state's real estate exam to become a provisional broker. A provisional broker must work under a BIC until he/she completes 90 additional hours of commission approved training.

The project size and scope will determine whether you employ one or all of these approaches. While a small project could be handled by one agent, there are times when it makes sense to hire a sole proprietor and sub-contract their services for the acquisition portion of your project. You might also investigate the possibility of identifying and sub-contracting a regional firm, which helps alleviate the need for firm licensure. Again, it is recommended that you consult legal counsel and your respective state's REC to ensure compliance with state law.

Agent Accountability

Beyond the requirement for additional education and testing is the agent's accountability. State licensure is a personal commitment with individual responsibilities extending beyond the typical status of a field agent. Every licensed broker is held accountable for their professional behavior and must answer to their state's REC. The consequences of misconduct reach beyond a single project and can now affect their ability to work within the state. This is another reason for total buy-in by the firm, the client and any unlicensed project stakeholders who might want their agents to perform tasks in a manner that does not align with real estate law.

An agent can rightfully refuse to perform tasks that are in violation of the law. Firms should consult their qualifying broker and/or the REC when in doubt and communicate their findings to all brokers across the project. Your agent may be an at-will employee, but as a licensed broker they may feel an ethical responsibility to report unresolved misconduct by the firm, its BIC or other brokers directly to the REC.

Landowner Rights

There are at least two substantial effects on the landowner. The first is found in the state's agency disclosure requirement. North Carolina requires all brokers to provide landowners with a copy of the "Working with Real Estate Agents" brochure and obtain their acknowledgement of its receipt and explanation. This document informs the landowner that the broker is licensed and represents the client and not the landowner. It suggests to the landowner that they may find it helpful to have a real estate agent assist them. This notification may lead a landowner to seek supplemental counsel prior to proceeding with negotiations.

Secondly, the landowner may register a complaint with the REC regarding unfair or perceived improper actions. These complaints are dealt with seriously and swiftly and can result in a cease and desist letter. In some cases, this may result in

losing the right to practice in the state either for a term or permanently at the discretion of the REC and based on the offense. Additional continued education is also a common component of the REC's response. North Carolina offenders appear in the commission's monthly newsletter with a summary of their offense and the commission's response.

Industry Oversight

There can be advantages to having licensed brokers in your firm. In fact, once you've complied in one state, you may want to explore reciprocity or licensing in other states. Being a real estate broker offers valuable benefits, and works to enhance our overall industry standing. Right of way professionals work alongside multiple disciplines where licensure is required, and associated standards and regulations are part of our daily routine. With real estate licensure, right of way professionals join these disciplines in providing a new level of land competency.

As major projects continue to garner public attention and industry professionals continue to be subjected to greater scrutiny by landowners and lawmakers, it is likely that greater regulatory oversight will occur. Real estate licensure offers some states a method of providing industry oversight, licensure and minimum education requirements. The real estate industry is diverse and offers multiple specialized certifications. Perhaps one day we may see states add right of way to this list of certifications.

References

Colorado Department of Regulatory Agencies, Division of Real Estate, Chapter 1: Real Estate Broker's

License Law, para. IV,A,2(b),(VI)

North Carolina Real Estate Commission Rules, Chapter 58A, A.0502(a)

North Carolina Real Estate Law, Chapter 93A, §93A-2(a); §93A-4.2.

Working with Real Estate Agents, The North Carolina Real Estate Commission, REC 3.45, 3/1/11.



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