

**Special Report**

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**Real Estate Commission**

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**The Real Estate Commission Has in a Few Incidences Violated §30-40-20 by not Allowing Licensees the Opportunity to First Respond to Complaints Filed Against Them Before Probable Cause Is Determined and a Consent Decree Is Issued**



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John Sylvia  
Director

November 14, 2006

The Honorable Edwin J. Bowman  
State Senate  
129 West Circle Drive  
Weirton, West Virginia 26062

The Honorable J.D. Beane  
House of Delegates  
Building 1, Room E-213  
1900 Kanawha Boulevard, East  
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Special Report on the Real Estate Commission, which will be presented to the Joint Committee on Government Operations on Tuesday, November 14, 2006. The issue covered herein is "The Real Estate Commission Has in a Few Incidences Violated §30-40-20 by not Allowing Licenses the Opportunity to First Respond to Complaints Filed Against Them Before Probable Cause Is Determined and a Consent Decree Is Issued."

We transmitted a draft copy of the report to the Real Estate Commission on October 25, 2006. We had an exit conference with the Real Estate Commission on October 31, 2006. We received the agency response on October 31, 2006.

Let me know if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "John Sylvia".

John Sylvia

JS/tlc

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*Joint Committee on Government and Finance*

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# Contents

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<b>Executive Summary</b> .....	5
<b>Review Objective, Scope and Methodology</b> .....	7
<b>Issue 1:</b> The Real Estate Commission Has in a Few Incidences Violated §30-40-20 by not Allowing Licensees the Opportunity to First Respond to Complaints Filed Against Them Before Probable Cause Is Determined and a Consent Decree Is Issued.....	9
<b>List Of Appendices</b>	
<b>Appendix A:</b> Transmittal Letter to Agency.....	13
<b>Appendix B:</b> Agency Response.....	15



# Executive Summary

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## **Issue 1: The Real Estate Commission Has in a Few Incidences Violated §30-40-20 by not Allowing Licensees the Opportunity to First Respond to Complaints Filed Against Them Before Probable Cause Is Determined and a Consent Decree Is Issued.**

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*In these cases, the Commission submitted to some licensees consent decrees before it had provided licensees with the opportunity to first respond to the initial complaint against them. The consent decrees essentially indicated that the Commission had already determined probable cause of licensure violations before the licensees were aware of the complaints against them.*

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The Legislative Auditor had a concern that the Real Estate Commission may have violated its enabling statute in its resolution of complaints. Upon review of the Commission's complaint process, the Legislative Auditor found that in four incidences, the Commission had violated West Virginia Code §30-40-20 that requires the Commission to allow licensees 20 days to respond to a complaint before it determines probable cause against licensees. In these cases, the Commission submitted to some licensees consent decrees before it had provided licensees with the opportunity to first respond to the initial complaint against them. The consent decrees essentially indicated that the Commission had already determined probable cause of licensure violations before the licensees were aware of the complaints against them. The consent decrees informed licensees of the violations, the disciplinary actions that would be taken if the licensees signed the consent decrees. If the consent decrees were not signed, the Commission indicated that a formal hearing would be held. In addition, the Legislative Auditor found that, contrary to his earlier performance report on the Real Estate Commission, the Commission has not promulgated procedural rules that specify its procedure for investigating and resolving all complaints against licensees, as required by the general provisions of Chapter 30 (§30-1-8).

## **Recommendations**

1. *The Real Estate Commission should comply with its enabling statute §30-40-20 in the investigation and resolution of all complaints against licensees which requires that licensees receive a copy of allegations against them and be given 20 days to respond to the allegations prior to probable cause being determined by the Commission.*
2. *The Real Estate Commission should comply with the general provisions of Chapter 30, Article 1, Section 8 that requires procedural rules be adopted that describe the Commission's complaint investigation and resolution process for all complaints.*





# Review Objective, Scope and Methodology

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This Special Report on the Real Estate Commission is authorized by West Virginia Code §4-2-5, as amended. This review was initiated by the Legislative Auditor out of a concern that the Real Estate Commission was violating West Virginia Code §30-40-20 during the resolution process of complaints against some licensees. This statute requires that the Commission forward complaints to licensees and give them 20 days to respond before the Commission determines probable cause. The Legislative Auditor had information that suggested that in certain cases the Commission was determining probable cause before licensees knew that a complaint had been filed against them.

## Objective

The objective of this review was to determine if the Real Estate Commission is in violation of West Virginia Code §30-40-20 as it pertains to resolving complaints against licensees.

## Scope

The scope of this review is strictly on the complaint resolution process. The scope was not restricted to any particular year. Complaints that were resolved in violation of §30-40-20 were reviewed regardless of the year of the complaint.

## Methodology

The methodology for this review involved an examination of complaints that the Commission identified as being conducted in a manner to expedite the complaint process. The Legislative Auditor reviewed these cases to determine if they were resolved in violation of §30-40-20. The Commission's enabling statute and its rules were also reviewed. The executive director of the Real Estate Commission was interviewed during this review as well. The only component of the Generally Accepted Government Auditing Standards that was not complied with was referencing the draft report (GAS 8.45), which is a quality control measure. The workload of the auditing staff precluded the availability of an independent auditor to review the accuracy of the report. The affect of not following this standard likely had minimal affect on the audit, given that the Commission acknowledged the accuracy of the report.



# Issue 1

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## **The Real Estate Commission Has in a Few Incidences Violated §30-40-20 by not Allowing Licensees the Opportunity to First Respond to Complaints Filed Against Them Before Probable Cause Is Determined and a Consent Decree Is Issued.**

### **Issue Summary**

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*This review found that in a few incidences, the Commission submitted to some licensees consent decrees before it had provided licensees with the opportunity to first respond to the initial complaint against them. The consent decrees essentially informed the licensees that the Commission had determined that licensure violations had occurred before the licensees were aware of the complaint and before they were given the opportunity to respond to the allegations.*

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The Legislative Auditor initiated a review of the complaint process of the Real Estate Commission in response to a concern that the Commission may have violated its enabling statute in its investigation of complaints. This review found that in a few incidences, the Commission submitted to some licensees consent decrees before it had provided licensees with the opportunity to first respond to the initial complaint against them. The consent decrees essentially informed the licensees that the Commission had determined that licensure violations had occurred before the licensees were aware of the complaint and before they were given the opportunity to respond to the allegations. This practice is in clear violation of the Commission's statute (§30-40-20) that indicates the Commission is to send a copy of the complaint to licensees for their response. In addition, the Legislative Auditor found that, contrary to his earlier performance report on the Real Estate Commission, the Commission has not promulgated procedural rules that specify its procedure for investigating and resolving all complaints against licensees, as required by the general provisions of Chapter 30 (§30-1-8).

### **In Its Attempt to Expedite the Complaint Resolution Process, the Commission Violated Statutory Provisions for Certain Licensees.**

The Real Estate Commission's enabling statute (§30-40-20) specifies how licensees are to be notified of complaints filed against them:

*Upon initiation or receipt of the complaint, the commission shall provide a copy of the complaint to the licensee for his or her response to the allegations contained in the complaint. The accused party shall file an answer within twenty days of the date of service. . . . After receiving the licensee's response and reviewing any information obtained through*

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*investigation, the commission shall determine if probable cause exists that the licensee has violated any provision of this article or the rules.*

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*The law clearly indicates that the Commission is to forward the complaint to the licensee and give the licensee 20 days of the date of service to respond to the allegations. The Legislative Auditor found four cases in which the Commission sent consent decrees to licensees as the first point of communication.*

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The law clearly indicates that the Commission is to forward the complaint to the licensee and give the licensee 20 days of the date of service to respond to the allegations. The Legislative Auditor found four cases in which the Commission sent consent decrees to licensees as the first point of communication. One was sent in 2003, two were sent in 2004, and another in 2006. In the proposed consent decrees, the allegations are presented as having been completely investigated, found to be true, with orders to the licensees and the offer to sign the consent decree as an acknowledgment of the violation and as a means to resolve the matter. In each case, the licensee is given the choice to execute or not execute the consent decree. If the consent decree is not executed, the licensee was informed that a formal hearing process would be initiated. The language in the attached letter to the consent decrees suggests that the Commission followed this course of action in order to expedite the complaint resolution process.

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*In essence, licensees were treated as guilty of licensure violations prior to the opportunity to respond to the allegations.*

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The allegations in these cases involved serious violations and the Commission's proposed consent decrees involved disciplinary action such as fines and suspension of licenses. However, by law, the licensee is to be given the opportunity to first respond to the allegations. The Commission is to then determine probable cause upon receipt of the licensee's response to the allegations. In the above four cases, the Commission had determined probable cause prior to the licensees receiving the allegations and responding to the allegations. In all four cases, the Real Estate Commission violated its statutory responsibilities under §30-40-20. In essence, licensees were treated as guilty of licensure violations prior to the opportunity to respond to the allegations.

In addition, the Real Estate Commission has not adopted procedural rules that specify the Commission's procedure for investigating and resolving all complaints against licensees. Chapter 30, Article 1, Section 8 requires that such procedural rules be filed on or before July 1, 2001. The Real Estate Commission became subject to the general provisions of Chapter 30 in 2002. Nevertheless, the Commission has had ample time to comply with §30-1-8.

The Legislative Auditor's Office conducted a performance audit on the Commission in 2005. The audit determined that the Commission

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had procedural rules in place that described its process of complaint investigation and resolution. However, upon reviewing this current issue, it was noticed that the Commission's legislative rules (§174-1-15.1) were mistaken by the Legislative Auditor's Office as a description of the Commission's complaint resolution process, when in fact it is actually a description of how a complaint is to be filed with the Commission. The Commission needs to come into compliance with §30-1-8 by filing procedural rules that describe how the Commission will investigate and resolve all complaints when they have been received.

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*The Commission needs to come into compliance with §30-1-8 by filing procedural rules that describe how the Commission will investigate and resolve all complaints when they have been received.*

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## **Conclusions**

The Legislative Auditor had concerns that the Commission may have violated its enabling statute (§30-40-20) with respect to its investigation and resolution of complaints against licensees. Upon review of this issue, the Legislative Auditor found four cases in which the Commission did not give licensees an opportunity to first respond to allegations against them before probable cause was determined and consent decrees were issued by the Commission. Instead, the Commission provided consent decrees as the first point of contact with these licensees. The attached letters to the consent decrees make statements that indicate that the Commission had already determined probable cause and suggested to the licensees that signing the consent decree would resolve the complaint. This procedure is in clear violation of West Virginia Code §30-40-20, which indicates that probable cause should be determined after a copy of the complaint has been forwarded to the licensee and the licensee has had 20 days to respond to the allegations. The manner in which the Commission resolved these four complaints comes across as determining the licensees guilty of licensure violations before the licensees had the opportunity to respond to the allegations. One of the four cases was as recently as of March 2006. Furthermore, the Commission does not have procedural rules in place that describe the complaint investigation and resolution process as required by §30-1-8.

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*Upon review of this issue, the Legislative Auditor found four cases in which the Commission did not give licensees an opportunity to first respond to allegations against them before probable cause was determined and consent decrees were issued by the Commission. Instead, the Commission provided consent decrees as the first point of contact with these licensees.*

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## Recommendations

1. *The Real Estate Commission should comply with its enabling statute §30-40-20 in the investigation and resolution of all complaints against licensees which requires that licensees receive a copy of allegations against them and be given 20 days to respond to the allegations prior to probable cause being determined by the Commission.*
2. *The Real Estate Commission should comply with the general provisions of Chapter 30, Article 1, Section 8 that requires procedural rules be adopted that describe the Commission's complaint investigation and resolution process for all complaints.*

# Appendix A: Transmittal Letter

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John Sylvia  
Director

October 25, 2006

Richard E. Strader, CPA, Executive Director  
Real Estate Commission  
1033 Quarrier Street, Suite 400  
Charleston, WV 25301-2315

Dear Mr. Strader:

This is to transmit a draft copy of the Special Report of the Real Estate Commission. This report is scheduled to be presented during the November 13-15, 2006 interim meeting of the Joint Committee on Government Operations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committee may have.

We need to schedule an exit conference to discuss any concerns you may have with the report. We would like to have the meeting on Monday, October 30, 2006. Please notify us to schedule an exact time. In addition, we need your written response by noon on Thursday, November 2, 2006 in order for it to be included in the final report. If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Thursday, November 9, 2006 to make arrangements.

We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script that reads "John Sylvia".

John Sylvia

Enclosure

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*Joint Committee on Government and Finance*

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## Appendix B: Agency Response

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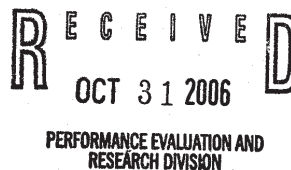
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ROBERT R. VITELLO  
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EXECUTIVE DIRECTOR

October 31, 2006

John Sylvia, Director  
Performance Evaluation and Research Division  
Legislative Auditor's Office  
Building 1, Room W-314  
Charleston, WV 25305



Re: Special Report - Real Estate Commission

Dear Mr. Sylvia:

I have reviewed the draft copy of the Special Report of the Real Estate Commission, that you transmitted to me on October 25, 2006.

I wish to thank you and your staff for identifying these two issues, and to offer you assurance that the Real Estate Commission will comply with the recommendations included in your report.

Recommendation #1 states that the Real Estate Commission should comply with WV Code §30-40-20, which requires that licensees receive a copy of allegations against them and be given 20 days to respond to the allegations.

The Real Estate Commission has complied with this recommendation.

Recommendation #2 states that Real Estate Commission should comply with WV Code §30-1-8, which requires the adoption of procedural rules that describe the Commission's complaint investigation and resolution process.

The Real Estate Commission is in the process of complying with this recommendation.

Sincerely,

A handwritten signature in cursive script that reads "Richard E. Strader".

Richard E. Strader  
Executive Director

Member - Association of Real Estate License Law Officials  
E.E.O./Affirmative Action Employer

