ILLINOIS ASSOCIATION OF REALTORS®

D.R. Legal News

The Illinois real estate managing broker's trusted source for current legal, management and housing market issues

May 2013

Tax Appeals before a Board of Review

By Steve Bochenek, IAR Chief Legal Counsel

Recently there has been much discussion among members of the Association regarding the role of a real estate licensee in a tax appeal before a Board of Review. Part of the recent conversation was due to a debate before the Lake County Board of Review and a decision by the Lake County Board of Review to provide that during the appeal of taxes before the Board of Review the homeowner could either represent themself or be represented by an Illinois licensed attorney. Members of the Illinois Association of REALTORS® ("IAR") have been vocal in regards to the role of a REALTOR® in the tax appeal process before the Board of Review. This article is intended to address some of those issues that have been the subject of much discussion.

Any analysis of the right of a REALTOR® to appear before a Board of Review in connection with a tax appeal begins with the Illinois Supreme Court decision of *In Re Yamaguchi.* This was a decision of the Illinois Supreme Court in 1987. This particular case is a bit convoluted from the factual standpoint. In fact, the case involves consideration by the Illinois Supreme Court of the question of whether an attorney should be disciplined for aiding a non-lawyer in the unauthorized practice of law. In fact, the court ultimately did discipline the lawyer for aiding a non-lawyer, a real estate brokerage licensee, in the unauthorized practice of law.

The particular language of the decision which is relevant to the consideration of a real estate brokerage licensee's participation in an appeal before the Board of Review is as follows:

> *"There can be no doubt that Ebert's conduct (which respondent condoned and furthered) was, in fact, the unauthorized practice of law. Although we have previously permitted, in Chicago Bar Association v. Quinlan & Tyson, Inc. (1966) (citation omitted), a real estate broker to fill in factual data on certain form contracts, the completion of a valuation complaint is quite unlike the completion of a form contract. The insertions which Ebert was making on the form valuation complaints did not involve mere factual data. Rather, Ebert, without the supervision of an attorney, was setting forth on the valuation complaints the results of his legal analysis of the facts which he deemed justified a tax reevaluation. Further, after Ebert or his secretary filed those valuation complaints, Ebert was appearing for oral argument before the tax board. Both the*

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unsupervised completion of the complaint and the appearance before the administrative tribunal constitute the unauthorized practice of law."

This decision of the Illinois Supreme Court seems straightforward in terms of indicating that certain practices before the Board of Review by a real estate brokerage licensee constitute the unauthorized practice of law. However, some refer to a United States District Court decision in 2010 entitled *Santana v. Cook County Board of Review* as a case indicating to the contrary. However, upon review of the Santana decision, that decision does not appear to be inconsistent with the Yamaguchi decision. The Santana case involved a matter in which a prior employee of the Cook County Board of Review was suing the Board of Review. One of the defenses raised by the Board of Review was that Santana could not pursue his claim because as a matter of law he was engaged in activities that constituted the unauthorized practice of law and that Santana was a non-attorney. However, as the court pointed out in that case, Santana was only a consultant assisting taxpayers with property tax review paperwork. Santana never assisted taxpayers on the Board of Review premises nor did he appear on behalf of a taxpayer before the Board of Review. In fact, the court in the Santana decision finds that the conduct of Santana, which is described as "advising and assisting taxpayers with Board appeals" was distinguishable from that conduct which the Yamaguchi court found to be a problem which is described as "a non-attorney's completion and submission of appeal complaints on taxpayers' behalf." In analyzing and comparing these two cases it seems clear that the Illinois Supreme Court has determined certain conduct constitutes the unauthorized practice of law. That conduct is appearing before the Board of Review to advocate on a taxpayer's behalf and preparation of a valuation complaint on behalf of the taxpayer. However, the Yamaguchi court certainly did not indicate that a non-attorney had no role before the Board of Review. The Santana case tends to describe the kind of role that a non-attorney could have before a Board of Review or in assisting taxpayers. That role is one of a consultant and potentially that of a witness on behalf of a taxpayer.

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Members of IAR have, by virtue of their training and experience, a skill set that allows them to provide information and opinions concerning the value of property and whether real estate taxes are too high compared to that value or the real estate taxes on similar types of property. This places the licensee in a position of being able to assist taxpayers by providing information regarding values of comparable properties, providing information concerning the real estate taxes of comparable properties and providing general information to real estate taxpayers about how the real estate tax appeal process works.

The licensee is also in a position to be able to testify before a Board of Review, should the real estate taxpayer choose to have the licensee testify. This role is different from representing a real estate taxpayer before the Board of Review or advocating on behalf of the taxpayer before the Board of Review. Providing this type of information as a consultant or appearing as an expert witness would not appear to

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constitute the practice of law under existing Illinois case law. In addition, these are services for which a licensee can charge a fee for their expertise. The key is not to participate in those activities which have been prescribed as constituting the practice of law.

The role of the real estate brokerage licensee in the tax appeal process before the Board of Review is necessarily limited by existing case law in Illinois regarding what constitutes the unauthorized practice of law. However, this does not preclude a member of IAR from participating in the tax appeal process, albeit in a somewhat limited fashion, and to benefit economically from that assistance while providing a service to their clients and members of the community. ●

NEW! IDFPR Compliance Guide

The compliance guide from the Illinois Department of Financial and Professional Regulation (IDFPR) is now available from the IDFPR website "Real Estate Office Examination Program." It includes two downloads to assist the licensee in the compliance process: 1) Sponsoring Broker Responsibilities Pamphlet, and 2) Escrow Account and Record Keeping Requirements. http://www.idfpr.com/dpr/re/realest.asp

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Each month IAR legal counsel presents a one-hour webinar on hot topics of the day. IAR members can download the programs at http://www.illinoisrealtor.org/legal/webinars. (Note: Member login required for this exclusive IAR member benefit.)

- **Will I Look Good in Horizontal Stripes?** (April 25, 2013) This IAR Legal Webinar features Chief Legal Counsel Steve Bochenek and Legal Hotline Attorney Betsy Urbance discussing the scope of the brokerage license and potential consequences for crossing the line including the topic of the tax appeal process.
- **New Fair Housing Rule** (3/28/13)
- **Who's My Sponsoring Broker or Which Team am I on?** (2/28/13))
- **License Law Compliance Issues** (1/17/13)

LegalCase Studies

Illinois Appellate Court finds unconscionable a contract to obtain mortgage foreclosure surplus and explains new procedures to protect mortgagors. *Crown Mortgage Company v. Young, 2013 IL App (1st) 122363.* In this case, the mortgage on a widow's home was foreclosed in 2004, yielding a $14,000 surplus that was not claimed. Eight years later, a company called Unclaimed Funds Unit, LLC ("Unclaimed") notified the widow that she may be entitled to money that it had located. It offered to do further research and determine the best method for obtaining the money in exchange for $50 and one-half of any money recovered. Unclaimed sent a notary to the widow's home with a contract to that effect, which she signed. When Unclaimed appeared in court on a petition for turnover of the surplus funds, the judge declared the contract "procedurally unconscionable." First, there was an obvious inequality in the parties' abilities to understand the transaction; the widow had limited reading skills and no knowledge of the simple procedures to obtain surplus money. Second, there was a vast discrepancy in bargaining power between a widow of limited education and limited means and Unclaimed, a company with enough resources to send a notary to the widow's home with a contract it devised. Third, there was no opportunity to bargain for or change the terms of the contract. The court also held the contract to be "substantively unconscionable" because of the gaping cost-price disparity, evidenced by a fee of $7,000 for a service that the widow could have obtained for free.

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The concurring opinion in the case noted that distribution of surplus funds in mortgage foreclosures arose infrequently, but often enough that the Cook County courts became concerned that unscrupulous people were combing court files to find surplus cases, impersonating mortgagors, and then trying to claim the surplus or, as in this case, companies tracking down the mortgagor and entering into contingency fee contracts to return the mortgagor's own money. The Cook County court rules require foreclosure orders confirming surplus sales to specifically command the lender's attorney to send a simple notice to the mortgagors, advising them of their right to claim the surplus and enclosing a fill-in-the-blank motion for them to claim their money. A mortgagor must also appear in person at the hearing to claim surplus funds. The Illinois Supreme Court recently adopted similar rules, applicable statewide, which are effective May 1, 2013.

Failure to repair common areas may be an affirmative defense to eviction for failure to pay condominium assessments—but possibly not for long. As Legal Case Studies reported in the last issue, the Second District Illinois Appellate Court held in November of 2012 that if a condominium association failed to properly maintain and repair common areas, which is the purpose of condominium assessments, then the resident could raise such failure as an affirmative defense to an eviction action for failure to pay assessments. This decision is being appealed to the Illinois Supreme Court. *Spanish Court Two Condominium Association v. Carlson, 982 N.E.2d 775* (appeal allowed January 30, 2013). In February, 2013, Representatives Burke, Durkin and Sacia introduced a bill (HB2360) in the Illinois House to provide that the failure of a condominium association to maintain, repair, or replace the common elements or areas "is not a defense to a forcible entry and detainer action." However, a House floor amendment was recently made that changes the bill so that the statute will codify the case, i.e., the bill now specifically states that a resident does have the affirmative defense in an eviction action. This bill has been not been passed and is currently in committee.

Shutting your eyes for fear of what you might learn may be evidence of intent to defraud. *United States of America v. Westerfield, 2013 WL 1405881 (7th Cir., No. 12 1599, April 9, 2013).* The U.S. Seventh Circuit Court of Appeals recently reviewed a case in which a lawyer working for a title insurance company in Illinois was convicted for facilitating fraudulent real estate transfers in a mortgage fraud scheme. The scheme used stolen identities of homeowners to "sell" houses that were not for sale to fake buyers, and then collect the mortgage proceeds from lenders who were unaware of the fraud. The defendant, who prepared title insurance policies and conducted closings, argued that the government did not present any direct evidence that she knew the scheme was illegal. A jury, however, may "infer knowledge from a combination of suspicion and indifference to the truth." Such inference may be found if the defendant had a strong suspicion that things were not what they seemed or that someone had withheld some important facts yet she shut her eyes for fear of what she would learn. In this case, the circumstantial evidence was adequate for the jury to conclude that the defendant had knowledge of the scheme. First, the defendant helped two individuals purchase five homes in a short period of time with

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financing from different lenders at high loan-to-value ratios. Borrowing from multiple lenders was a "red flag issue." Second, the buyers and sellers presented at the closings were clearly fake—they were often people picked up at homeless shelters or, literally, off the street by the ringleader of the scheme. Third, the defendant rushed through the closings without any explanations of the paperwork involved. Finally, the defendant arranged to have all of the proceeds of each sale directed to a third party not involved in the transaction, a rarity in a residential closing. The court determined that the evidence was adequate for the jury to conclude that if the defendant was unaware of the illegal scheme, it was only because she was deliberately ignorant. The court upheld her conviction, her sentence of six years, and the order for restitution of nearly $1 million.

Offer must be accepted as required by offeror; contract will not be binding with unspecified material term. *Host v. Gray, 2013 WL 1319609 (Mass. Land Ct., April 2, 2013).* In this case the plaintiff made a written offer on the Massachusetts Association of REALTORS® Contract to Purchase Real Estate form to buy two lots, with Lot 18 needed for access to Lot 19. The offer recited that it would remain valid until a certain time, by which time it "shall" be signed by the seller and returned or the offer "shall" be deemed rejected. The listing broker responded on behalf of the seller, noting that the seller needed a portion of one lot for parking at an adjacent cottage. By email, she stated, "This is a conditional response until further items can be worked out to your and her benefit. She is accepting the offer for $2,450,000 but proposes working out a solution to Lot 18 that is mutually agreeable to both parties." This language was not acceptance and created no binding contract for two reasons. First, the court explained that the offeror (in this case the buyer) has full control over the offer and may require a particular and exclusive mode of acceptance which must be used or the acceptance will be ineffective. In this case, it was undisputed that the offer was never signed as required. Second, no contract was formed because clearly there was never a meeting of the minds about a material term. Material terms of a contract for the purchase and sale of real property include: (1) an adequate description of the property; (2) the purchase price; and (3) the closing date. Although all terms need not be precisely specified, the parties must describe a formula or a procedure by which uncertainties are narrowed to rights and obligations. Here, the seller's e-mail response constituted rejection of buyer's offer. Seller's response was "conditional", and there was no procedure to determine what "conditional" contract would consist of except by conducting further negotiations.

Buyer Beware Clause does not extend to defects not discovered by buyer's reasonable inspection. *Kincaid v. Dess, 2013 WL 856463 (Ct. App. Kan., March 8, 2013).* In this case out of Kansas, the buyers contracted to purchase an expensive home. After an inspection revealed some deficiencies, the seller corrected those problems and the buyers proceeded to close on the house. The buyers executed a rider containing a "Buyer Beware Clause" in which they agreed to fully rely on their inspections and acknowledged that the seller made no representations or warranties of any kind. They also signed an amendment titled "Resolution of Unacceptable Conditions" which contained an "as is"

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provision under which the buyers agreed to accept the house without correction or other action by the seller. A month after they closed, the buyers discovered numerous defects that had not been disclosed by the seller, including the type of exterior siding used on the home, water damage, defective and rotten windows, and mold contamination. The buyers could not live in the house for one year while these defects were corrected at a total cost of over $335,000. The buyers sued the seller and the real estate agent for fraud and misrepresentation. The seller argued that the buyers waived their right to rely on the seller's representations on the condition of the house by signing the rider containing the "Buyer Beware Clause" and the "as is" amendment. The court disagreed. First, it found that the law was clear in Kansas that a contractual waiver does not bar breach of contract or fraudulent misrepresentation claims as a matter of law where a buyer's reasonable inspection before purchasing the house did not reveal a seller's false representations and later defects are discovered. Whether a reasonable inspection would have revealed the defects, however, was a question of fact that had to be answered by the trial court below. The court also narrowly interpreted the "as is" amendment as applying only to those defects that had been found and corrected or otherwise satisfactorily addressed by the seller. It could not extend to the defects that were not discovered during the buyers' inspection and did not preclude the buyers' claim against the seller for fraud and misrepresentation. This case from Kansas is not binding on Illinois courts; a decision in a case with similar facts in Illinois could well be different.

Chicago tenant need not terminate lease prior to recovering one month's rent for landlord's failure to disclose code violations. *Ranjha v. BJBP Properties, Inc., 2013 IL App (1st) 122155 (March 27, 2013).* The tenant filed a class action complaint alleging that defendant landlord violated the Chicago Residential Landlord Tenant Ordinance ("RLTO") by failing to disclose building code citations after the tenant requested them in a written notice. The landlord asserted that RLTO required the tenant to terminate his lease and vacate the premises before he was entitled to a month's rent or actual damages. The tenant disagreed. Both parties presented the court with reasonable interpretations of RLTO supporting their respective positions. The court concluded that the relevant sections of RLTO were ambiguous, but sided with the tenant in order to avoid absurd results that might arise from minor code violations not worth a tenant's terminating a lease and moving. The court concluded that its interpretation would improve rental housing in Chicago because either a landlord will cure material noncompliance or compensate a tenant if the tenant does not wish to or cannot afford to move. ●

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Real Estate Disciplines

Following are recent disciplinary actions taken by the Real Estate Division of the Illinois Department of Financial and Professional Regulation, http://www.idfpr.com/News/Disciplines/DiscReports.asp

- A managing real estate broker license was suspended for one year, followed by being placed on probation for four years and fined $5,000 for aiding and abetting the unlicensed practice of real estate and failing to supervise subordinate employees.
- A real estate managing broker license and real estate broker corporation license were indefinitely suspended for a minimum of two years and jointly fined $5,000 after failed to return $2,000 of escrow money on one transaction, and $5,000 and $4,000 in marketing money in three separate transactions, all of which failed; and failed to provide the Department with business, escrow, marketing and advertising records requested by the brokerage examiner, and two investigators on the various complaints against Respondents.
- A real estate leasing agent student license was reprimanded and ordered to cease and desist the unlicensed practice of real estate for advertising rental properties after her license had expired.
- A real estate salesperson license was indefinitely suspended and is barred from licensure as a real estate broker for a minimum of two years for allegations that they made substantial misrepresentations, engaged in unethical conduct, and engaged in dishonest dealings by proposing that closing documents in a real estate transaction, including the HUD-1, reflect a sales price of $430,000, that an additional $55,000 be paid to their company for short sale negotiations, and that the $55,000 not be disclosed on the closing document.
- A real estate salesperson license was placed in refuse to renew status for failure to adhere to the terms of a sales contract and mishandling of earnest money.
- A real estate salesperson license was placed in refuse to renew status for her engaging in unprofessional conduct by advising a client to default on his mortgage and by failing to provide the client copies of written agreements.
- Several unlicensed persons were ordered to cease and desist the unlicensed practice of real estate brokerage and assessed fines and penalties for engaging in the unlicensed practice of real estate brokerage.
- An unlicensed person was ordered to cease and desist the unlicensed practice of community association management.●

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RVOICE – REALTOR® Involvement in Local Elections Makes a Big Difference!

http://www.illinoisrealtor.org/rvoice

By Mike Scobey, Assistant Director - Advocacy and Local Issues

- The Illinois REALTORS® Political Action Committee (RPAC) provided both direct contributions and extra grassroots support to a total of 69 local candidates in the April 9th Consolidated Election in Illinois. Fifty of the 69 candidates emerged as victors in their respective races. Most of the 69 candidates received a direct RPAC contribution.
- The grassroots program, known as an "Opportunity Race," entailed 19 races - 13 were won by RPAC-supported candidates (68% win rate). In an Opportunity Race, RPAC funds a mail piece (directed to REALTORS®) and urges a vote for the RPAC-supported candidate.
- In addition to supporting candidates in the Opportunity Races, resources were also made available to REALTOR® associations through the NAR "My REALTOR® Party" Program which allowed IAR to provide additional support in the form of direct mail and robo-calls in key races. The candidate support was determined by an Independent Expenditure (IE) Political Action Committee of IAR. This activity was done independently of the candidate and his/her campaign and without any coordination with the campaign or the candidate. The direct mail and robo-calls were directed to likely voters. The decision to support these candidates was made by a committee of the IAR. Thirteen of 19 IE-supported candidates won their races (68% win rate).
- REALTORS® support state and local candidates who are supportive of homeownership, private property rights and the real estate industry.

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- In addition to the candidate support, the RVOICE program was successful in its advocacy of two referenda issues in South Chicago Heights and Boone County. In South Chicago Heights, voters were urged to vote NO on making the Village a home rule unit. The home rule measure was narrowly defeated. In Boone County, RVOICE provided funds to a successful campaign to pass a referendum for a county sales tax. The new revenue will help pay off more than $70 million worth of bonds held by the Belvidere School District, debt payments that would have required much higher property tax rates if the sales tax question failed on April 9.
- IAR's RVOICE Program works on referenda, grassroots mobilization and other advocacy activities to support the REALTOR® position in public policy throughout the State. ●

Illinois REALTORS® Political Action Committee
Your Best Investment In Real Estate

RPAC Minute

At your next office meeting, include an "RPAC Minute" to help your agents better understand how our REALTOR® PAC works to stop bad legislation and local ordinances before they get enacted – an insurance policy for the real estate business. Below are a couple examples. You can find more at "What Is, What Isn't Law Because of RPAC" http://www.illinoisrealtor.org/RPAC/what_is_law

- **RPAC helps stop hits to the Mortgage Interest Deduction for American homeowners.** According to NAR research, more than 3/4 of homeowners utilize the deduction over the period they own their home and eliminating the MID would cause a 15% decline in the value of homes across the nation.
- **RPAC helps protect landlord rights.** Many bills have been proposed – and STOPPED - that affect landlords in Illinois including legislation related to landlord licensing and crime on rental property that would permit all non-home rule municipalities to license and regulate landlords. ●

RPAC Always Has Your Business Interests in Mind

RPAC supports pro-business, pro-REALTOR® candidates for public office who understand and support real estate issues. Who gets RPAC support is determined by REALTORS®. They are vetted for their pro-business, pro-private property rights, low tax, pro-growth position on issues that affect the business of real estate. Learn more about RPAC at work during elections for IAR members and their clients: http://www.illinoisrealtor.org/RPACElections

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What to Do After April 30

The April 30 deadline for the Managing Broker license renewal has passed. Here is a link to IAR Q&A on the topic: http://www.illinoisrealtor.org/node/3218 including these two:

Q: Can I still practice real estate as a Managing Broker after April 30 if I have not completed all the required CE and/or completed the renewal application and paid the fee to the Illinois Department of Financial and Professional Regulation? No. Contact the Illinois Department of Financial & Professional Regulation to learn your options: IDFPR 1-800-560-6420 or FPR.realestate@illinois.gov.

Q: If I have completed my CE, my Broker Management CE, paid the fee and submitted the renewal form on or before April 30 but have not received my renewed license, may I practice now? Yes. Make sure you keep records of your CE, renewal application and payment for proof purposes in the case of an audit.

What IAR members are saying about the new interactive webinars for the 12-Hour Broker Management CE:

"Webex is the way to go. I could be so much more productive on breaks and lunch. I was confident and felt well-prepared when taking the exam." – Elona Hamilton, Lake Villa

"Excellent webinar, easy to follow and super convenient!" – Shelby Hoyt, Chicago

"Very good class. Webinar was as good as being present." – John A. Clarke, Olive Branch

"Easy method of course-taking, well-organize presentations. I took the exam and scored high." – John McEnroe, Aurora

"Instructor was great!" – LaShandria Sanderson, Evergreen Park

The IAR Licensing & Training Center is your trusted source for state-approved real estate licensing and continuing education - www.illinoisrealtor.org/education

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MEMBERS ONLY IAR MarketStats

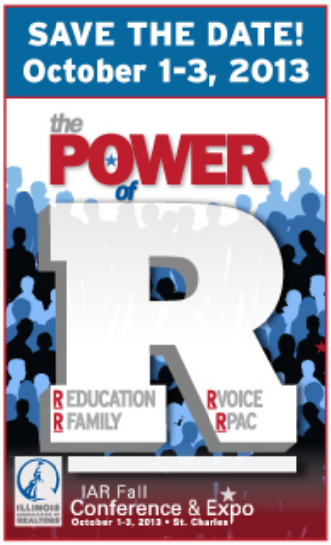
On April 22, the Illinois Association of REALTORS® released its March housing data report. Statewide home sales (including single-family homes and condominiums) in March 2013 totaled 10,992 homes sold, up 3.6 percent from 9,679 in March 2012. Statewide sales have posted monthly year-over-year gains since July 2011. The statewide median price in March was $135,000, up 3.6 percent from March 2012. In the latest forecast prepared by economist Dr. Geoffrey J.D. Hewings, Director of the Regional Economics Applications Laboratory (REAL) of the University of Illinois: *"The inventory in both the state and Chicago markets suggest that demand has begun to return to the housing market. However, foreclosed properties are accounting for a sizeable portion of these sales. The good news is that foreclosed sales are outpacing new additions to the foreclosure inventory but at a cost of dampening median price increases."*

- Find the latest REAL forecast and IAR home sales report, plus the FastStats clickable state map with data by county/state/PMSA in Members Only Market Stats (member login required) http://www.illinoisrealtor.org/membermarketstats. The next report will be released May 22.

IAR Calendar

Find event details at http://www.illinoisrealtor.org/events

- May 8-9 - IAR Spring Conference & Expo, Collinsville
- May 13-14 – Broker Management CE 1801 Makeup Class, Arlington Heights and Downers Grove
- May 13-18 - NAR Midyear Legislative Meetings, Washington, D.C.
- October 1-3 - IAR Fall Conference & Expo, St. Charles
- December 2-5 - GRI (Course 2-3), Westin Chicago Northwest, Itasca
- December 4-5 - GRI (Grad), Westin Chicago Northwest, Itasca



www.illinoisrealtor.org/fallconference

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