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ACTING IN CONCERT UNDER THE ARIZONA SUBDIVIDED AND UNSUBDIVIDED LANDS ACTS

As real estate agents, investors and attorneys are commonly aware, a person or entity can ordinarily carry out a "five-split" (or fewer splits) in unincorporated areas[1] without worrying about the state subdivision statutes, formally known as the Subdivided Lands Act, A.R.S. §§ 32-2181 *et seq.*, and the Unsubdivided Lands Act, A.R.S. §§ 32-2195 *et seq.*[2]

As we are also commonly aware, however, depending upon the manner in which various individuals or entities collaborate in splitting and selling parcels of land, the transactions may be deemed to constitute a "common promotional plan" by the various individuals and entities by their "acting in concert." Where one individual's five-split is seen as a part of a larger group's twenty-split (or more), they are together treated as "subdividers" and subject to the subdivision requirements (platting, public report, water adequacy/assurance, etc.).

We are all far less commonly aware of what exactly constitutes "acting in concert." The official test as enunciated in Siler v. Dep't of Real Estate, 193 Ariz. 374, 380, 972 P.2d 1010, 1016 (App. 1998), is whether the individual or group of individuals is acting according to a plan to divide and offer lots for sale or lease in excess of the number permitted without complying with the notice and public report requirements. See id. Acting in concert occurs where the group *agrees to act together to divide their land*. See id.

What does this mean specifically? The Siler decision confirms that neither an intent nor knowledge of violating the subdivision laws are necessary for a finding of acting in concert to subdivide. Other state cases construing the standard for "acting in concert" in other real estate contexts have reached similar opinions. Following is a quote from a recent case by the Washington state supreme court, which offers the following in

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[1] Such sales are still subject to the land disclosure affidavit requirement under A.R.S. § 33-422, discussed in depth in one of our articles earlier this year.

[2] The Unsubdivided Lands Act, which receives less attention than the Subdivided Lands Act, requires notice and an unsubdivided lands public report prior to offering for sale or lease six or more lots, each of which is 36 acres or more and less than 160 acres. *See* A.R.S. §§ 32-2195, 32-2195.03, & 32-2101(58). Sales of parcels 160 acres or larger are subject to neither the Subdivided Lands Act nor the Unsubdivided Lands Act.

determining the meaning of "acting in concert," and specifically cites the Siler opinion in support:

> Real estate cases that have addressed the question of what constitutes concerted activity have not required that the activity be unlawful. . . [T]he following three elements must all exist: (1) A concert of action; (2) a unity of purpose or design; (3) two or more defendants working separately but to a common purpose and each acting with the knowledge and consent of the others. Other state courts have also declined to require unlawfulness as an element of acting in concert in the real property context. For example, an Arizona court interpreting a real estate subdivision statute specifically found that unlawful activity was not a requirement of "acting in concert," stating that "the undefined phrase, 'to act in concert,' means only that the parties must agree to act together to divide their land; they need not agree to violate the law." Siler v. Ariz. Dep't of Real Estate, 193 Ariz. 374, 972 P.2d 1010, 1016 (1998). Thus, in the real estate context, parties "act in concert" even if they do not purposefully engage in unlawful activities.

One Pacific Towers Homeowners' Ass'n v. HAL Real Estate Investments, Inc., 61 P.3d 1094, 1103 (Wash. 2002) (En Banc).

Given these broad pronouncements of what "acting in concert" might be, attorneys such as myself have spent some time in the past coming up with specific examples of "dos and don'ts." We have also occasionally referred to the regulations promulgated by HUD in enforcing the the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. § 1701, *et seq*. include specific factors. They include, among others, a thread of common ownership; common sales facilities; common advertising; and/or common inventory. See, e.g. Eaton v. Dorchester Development, Inc., 692 F.2d 727, 731 (11th Cir. 1982); United States v. Dacus, 634 F.2d 441, 444 (9th Cir. 1980).

The Arizona Department of Real Estate has not promulgated any administrative rules or substantive policy statements setting forth examples of factors or "badges" of illegal lot-splitting. Years ago (and many prior administrations ago), the Department circulated an informal statement listing factors that may be deemed "Red Flags" of illegal subdividing. The factors, which appear to be geared toward indications of "acting in concert," include:

> Monies paid out of escrow
> Double escrows
> Seller financing ("carrybacks")
> Extended time for repayment on notes
> Unusually low down payments
> Lot release provisions
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> Several splits in a short period of time involving one "mother"parcel
> Short time between transactions

Unrecorded conveyance documents (ie, agreements for sale)
Same last names of participants (or other family relationships)
Same parties in numerous transactions
Transfers from individuals to entities to individuals

Same notary in several transactions
Same surveyor for various splits
Same real estate agent for various sales
No escrow

Cooperation in creating easements, well-share agreements, septic approvals, etc.
CC&Rs or deed restrictions common to all lots involved

As a word of caution, these "Flags" are not part of a formal statement or policy by the Department with respect to illegal lot-splitting. I further expect that the Department would confirm that the factors are intended as examples, to be applied as appropriate on a case-by-case basis. And, of course, the existence of one or a few factors does not create an automatic presumption of illegal activity, nor does the absence thereof create an automatic "safe harbor." I would further point out that several of the "Flags" are as consistent with perfectly legitimate and legal lot splits, as with illegal lot splits.