

INTERNATIONAL RIGHT OF WAY ASSOCIATION



Kachina Chapter 28

Newsletter

www.irwaaz.com

DECEMBER, 2006

2007 Kachina Chapter Executive Board

President:

Caroline Tillman, R/W-RAC
623.516.1052
carolint@acqsl.com

President Elect:

Cate Chamberlain
catechamberlain@cox.net
602.367.9322

Secretary:

Doug Estes, MAI
480.345.4111
dougst@hotmail.com

Treasurer:

Kathie Sholly, SR/WA
623.930.3652
ksholly@glendaleaz.com

International Director:

Michael "Doc" Sterling
623.546.8266 X211
doc51s.ent@cox.net

PDC Chair

Mark Keller, SR/WA
602.236.8164
makeller@srpnet.com

Region 1 Vice Chair:

Chris Banks, SR/WA
602.236.8175
cdbanks@srpnet.com

JANUARY BOARD MEETING

★ Wednesday, January 10, 2007

★ 4:45pm

★ 3rd Floor Conference Room

★ Az State Land

Confirm your attendance with
Caroline at carolint@acqsl.com

ANDREA'S CLOSET

On behalf of Kachina Chapter 28, we presented \$810.00 to Kenny Brunk, the President of Andrea's Closet. Photos of the presentation will be available soon and will be posted to the Chapter Web-site.

A very big **Thank You** to all who contributed to this worthy cause.

Melita Hillman-Potter, SR/WA

And a big thank you to Melita for coordinating this effort again this year.

2007 Executive Board

L-R:
Caroline Tillman, R/W-RAC,
President

Cate Chamberlain, President-Elect

Doug Estes, MAI, Secretary

Kathie Sholly, SR/WA,
Treasurer

Michael 'Doc' Sterling, 1 Year
Int'l Director

Lisa Amos, SR/WA, 3 year
PDC



More photos will be posted to the Chapter website.

PRESIDENT'S MESSAGE

Michael "Doc" Sterling, Chapter President

BEFORE I deliver my final President's Message, I feel compelled to address an item of serious Chapter concern and need: the position of Chapter Education Committee Chairperson is open and needs to be filled as soon as possible by a Chapter Member who is interested in the subject and has the time necessary to complete related tasks. The scheduling and management of IRWA Education Courses is of great importance to the fundamental purpose of the Chapter's Mission and the main source of income from which all other Chapter obligations and activities are subsidized, whether the scope of such activities is geared to local, Regional, National and/or International activities. If any members have a desire to serve as the Education Committee Chair and would like to know more about the responsibilities that go with the position, please contact one of your Chapter Officers at your earliest convenience!

What a great year this has been for the Chapter!

We continue to provide leadership at the Region 1 level with Chris Banks having been elected as the Region Vice-Chairperson. One of her responsibilities will be to coordinate the presentation of IRWA Courses throughout the Region! She will serve in that capacity for 3 years and then move up to Chairperson for an additional 2 years. Mark Keller of Chapter 28 served in those capacities for the 4 years prior to Chris's induction at the Fall Forum in Sacramento. Thus, Chapter 28 is in the middle of a 9 year span of service and leadership at the Regional level. Chapter 28 also continues to be the custodian of the Region 1 website.

Chapter 28 amply and effectively continued its Mission with the successful September Annual Educational Seminar presentations, classes and networking opportunities, as well as great camaraderie.

Our membership continues to grow, which is a reflection of the continued growth of our metropolitan community and the need for greater public infrastructure facilities, which in turn, require the skills possessed by our members – the same skills that are further enhanced by our Educational Mission.

On another note, this past year saw the passing of the following Chapter Members:

Fritz Fiedler, former Chapter President & ADOT Retiree
John McCoy, SRP Retiree
Bill Snedeker, SRP Retiree

It has been a pleasure to serve you these past 12 months; not as a leader, but as your servant and hopefully as a friend. But I must say that I could have done none of this without the help and guidance of your Chapter's Executive Board of Directors and Committee Chairpersons and Vice-Chairpersons.

I can heartily recommend such service to each and every member of this Chapter. The professional, social, educational and fraternal rewards far exceed the amount of time and effort put into serving the present and the future needs of the Chapter and recognizing the accomplishments of all those members and sponsors who have helped make all of this possible not only this past year, but for the past 2 generations!

Thanks again for this opportunity!

REGION 1 REPORT
Chris Banks, SR/WA, Region 1 Vice-Chair



I received an email announcing the future resignation of Dennis Stork. This is the announcement:

“The International Executive Committee announced that that IRWA will open the executive search process to recruit a successor to IRWA Executive Vice President Dennis G. Stork. Stork recently announced his retirement effective November 19, 2007. Stork has served as IRWA executive vice president since March 25, 2003.

IRWA President Jim Finnegan, SR/WA, indicated that the IEC will select a search firm to seek Stork’s successor by early January 2007 and will begin interviewing candidates in July 2007. The tentative timetable calls for the new executive vice president to be in the Torrance, CA office as of October 1, 2007.

“While the IEC has reluctantly accepted Dennis’ decision to retire next year, we appreciate the leadership and focus that he has brought to IRWA since assuming the position of executive vice president. The Association has made remarkable strides in the past three-and-half years in defining our core purpose and making the organizational structure, both volunteer and staff, more responsive to the needs of our members as well as other stakeholders in the right of way profession,” observed Finnegan.

As part of the process, the IEC has begun revising the executive vice president job description and defining the qualifications and attributes desired in the Association’s chief staff position to be consistent with its strategic plan and organizational values.”

I will keep you updated.

Have a safe and happy holiday!

Chris

Proposition 207—Where Do We Go From Here?

Douglas G. Zimmerman, Attorney at Law
Jennings, Strouss & Salmon, P.L.C.

Mr. Zimmerman was one of the lead attorneys who handled the Tempe Marketplace (Valentine case) for two property owners. They successfully defended the taking by the City of Tempe resulting in a Superior Court ruling that the City could not take the property as it was not for a public use. The case was appealed by the City to the Supreme Court by Special Action. The Supreme Court denied the petition and would not hear the case. Mr. Zimmerman has practiced condemnation law for over 36 years and has represented both property owners and condemners such as the Flood Control District, City of Phoenix, City of Flagstaff, City of Chandler, numerous school districts, Maricopa County Community College District and SRP.

As most of the readers of this article are aware, Proposition 207 dealt with a restriction upon the powers of municipalities to acquire property in slum and blighted areas and to acquire property for solely economic development purposes. The Arizona Legislature sent this issue to the voters as a direct result of the now famous, or infamous, *Kelo v. City of New London* case out of the State of Connecticut. The *Kelo* case allowed the acquisition of properties for purely economic reasons. In other words, if the municipality could show that greater tax revenues were generated by the proposed redevelopment, the acquisition of properties which were generating less of a tax revenue could be justified consistent with the Fifth and Fourteenth Amendments to the Federal Constitution. Proposition 207 was titled "Private Property Right Protection Act Initiative" ("Act").

Several years ago the Arizona Court of Appeals decided the *Bailey v. City of Mesa* case and basically indicated that acquisition of properties for purely economic reasons would not be permitted under the Arizona Constitution. The Court of Appeals developed 18 separate items to be considered by the court in determining whether or not the acquisition was truly for a public use. The City of Mesa did not appeal the decision and therefore there is no final decision from our Supreme Court.

Primarily because of the *Bailey* case, the Arizona Legislature revised the statutory framework of acquisitions by municipalities which had allowed acquisitions for solely economic development purposes. This new law applied at the time the *Valentine* case was argued and Judge Fields found that the new law was applicable. In August of 2005, in the *City of Tempe v. Valentine* case in the Superior Court, Maricopa County, Judge Kenneth Fields also found that the acquisition of property by the City of Tempe was not for a public use. The reasons for that decision by Judge Fields were founded on several legal and factual bases, one of which was the precedence of the *Bailey* case. The judge also found that the property was not really slum and blighted although it appeared to satisfy some of the statutory requirements. The area was zoned heavy industrial and the uses within that area were consistent with what you would normally expect to find if you were looking for slum and blight conditions in residential or other commercial areas. What did exist were older buildings used for manufacturing or other heavy industrial activities. There was no other heavy industrial zoned property in Tempe. In fact, the area had been a "county island" annexed into the city. The annexation process misrepresentation was a separate focus of challenge.

A Special Action was taken to the Arizona Supreme Court, in the *Valentine* case, vigorously attacking the *Bailey* decision and citing that a long history of taking cases in the State of Arizona indicated that public benefits equal public use and that once a municipality had made a decision that there were public benefits, the courts were to give complete deference to that decision. Although the Arizona Constitution required that a public use be determined by the court and not by the legislative body, the argument that was made was that if such a use, determined by the legislative body fit with any scheme of a public benefit, it was a public use and therefore not subject to further review by the courts.

Now where do we go from here? Proposition 207 has impact in the two different areas of eminent domain and land use regulation. First of all the whole slum and blight redevelopment statutory framework has had some significant change by the Act.

1. The Act provided that the definition of "slum condition" applied only to legitimately dilapidated and deteriorated buildings or those buildings beyond repair. Condemnation could not be exercised if the slum conditions could be corrected by regulatory processes or by private enterprise. In other words, if code enforcement would correct the problem then eminent domain could not be used. That was the situation which Judge Fields found in the *Valentine* case. Those conditions for which the City of Tempe justified the taking could all have been corrected by the enforcement of existing environmental laws and city codes.
2. It previously was established law that the legislative body (City Council) could determine the necessity for the project and their determination was nearly conclusive. Under the new Act, the determination of necessity is a judicial question that must be determined by the court.
3. Under the prior legislation, if a municipality were to determine an area to have slum or blight conditions, any size area containing those conditions could be designated as a redevelopment area. Even if there were substantial areas within that larger area that were not showing slum or blight conditions, that area could be included within the boundaries. The determination of the boundaries was a legislative decision which was nearly conclusive upon the courts. This slum and blight redevelopment procedure was, in reality, nothing but a veiled justification for purely economic development. If one were to look at the conditions that were set forth in the statute as being slum or blight conditions, most of our own neighborhoods could reasonably meet that criteria because within those neighborhoods there are buildings that are old and run down, street layouts are not completely adequate and other such conditions exist.

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Proposition 207—Where Do We Go From Here?

Douglas G. Zimmerman, Attorney at Law
Jennings, Strouss & Salmon, P.L.C.

Under the new Act, redevelopment will occur on a much narrower basis than large land tracts. Areas will be developed on a case-by-case basis or on a building-by-building basis. Redevelopment will more probably be the result of economic or normal market forces than the desire by a municipality to “clean up” an area and establish business ventures that will generate large tax revenues to the municipality.

The second, and more controversial section of the Act deals with compensation being required to be paid for any enactment of a land use law that reduces the fair market value of real property. Much has been argued about the devastating affect of this provision in the Act but much of it has been somewhat of a hysterical reaction by the developers and the cities who have wanted to severely regulate and down zone properties without paying compensation for significant losses in the fair market value of owners’ property.

The complete applicability of the Act and its ramifications are yet to be seen but a closer reading of the Act indicates that there are several substantial exemptions or exclusions that would deal with most of the things the municipalities would want to do in protecting the public health, safety and welfare. The Act does not apply to land use laws that limit or prohibit the use or division of real property for the protection of the public’s health and safety including rules and regulations relating to fire and building codes, health and sanitation, transportation or traffic control, solid or hazardous waste, and pollution control. It does not limit the restrictions on property by a land use law that regulates a public nuisance which is recognized as a public nuisance under common law or those actions which are required to be taken by a municipality under federal law.

The Act also does not apply to any land use laws that do not directly regulate an owner’s land. It has been argued that if a land use law regulates one piece of property on a street, which causes the decrease in value from the regulation of that specific property to all of the rest of the properties on the street, then all of those other property owners have a claim for just compensation. It would appear from a reading of the new Act that only the owner of the property that is directly regulated, has any claim for just compensation.

The burden is upon the municipality to establish that any land use law falls within the category of the enumerated exemptions in any case brought by an owner to recover just compensation for the decrease in the fair market value of the property as a result of a land use law. Under the Act an owner who prevails on its claim for just compensation is entitled to recover costs, expenses and reasonable attorneys’ fees. Likewise, cost, expenses and reasonable attorneys’ fees can be recovered in a slum clearance and redevelopment action where the final amount offered by the municipality was less than the amount ascertained by a jury or the court.

Generally, most of the readers of this article will not be affected by the new Act. The Act specifically applies to condemnation actions for the clearance of slum and blight conditions. It also applies to actions filed by property owners claiming just compensation for municipalities or other governmental bodies enacting a land use law that reduces the fair market value of the property. Those of you from the municipalities or perhaps from the counties will no doubt have some exposure to this new law. However, acquisitions for school sites, fire stations, police stations, health facilities, roads, flood control channels and the like, will not be impacted by this Act. No provisions of this Act that deal with attorneys’ fees deal with those types of acquisitions.

The reason for this Act being presented to the public is, I believe, a direct backlash to what happened in the *Kelo v. City of New London* case that was so well publicized across this nation on public television and other media. The *Kelo* case was brought to a local level when the City of Mesa and the City of Tempe, through the *Bailey* case and the *Valentine* case, developed two condemnation cases against property owners that set up poster children showing the abuses of eminent domain. Many from municipalities would cry that the acquisitions were only for the betterment of the citizens of the municipality. To some degree there were benefits that would flow from such redevelopments. The problem that such a posture takes is that it totally ignores the property owners whose properties are being acquired. It should be observed that in such cases of slum and blight clearance and those types of redevelopment projects, the property owners are only given fair market value of the property in its depressed, deteriorated condition. Those properties are fully capable of developing economic return for the owners of the buildings who are conducting business therein. Those properties are fully adequate for housing a family at rental rates or for mortgage payments that the owners are fully able to make because the buildings are older and substantially depreciated.

What has been the biggest problem is that when all of these properties are put together, there comes from it an assemblage value that is many times greater than what is paid by the developers for the property that is being acquired. The assembled property in many cases is four to five times the value once the buildings are removed and the land is cleared. In the *Valentine* case the petition to the Supreme Court for special action was opposed in *amicus curiae* briefs by the NAACP and the Manufactured Housing Association. This is just some indication of those persons who are more substantially impacted by redevelopment projects. Rarely an upscale neighborhood is impacted. It is usually a neighborhood that contains low income families and small businesses that have been in that location for considerable periods of time. Those businesses can make an income and return only because the improvements are depreciated and in many cases paid for.

Putting aside all of the legal analysis, discussions and complexities of acquisitions and the nuances of the loss of some of the power of eminent domain, it may be that the ultimate answer to the acquisitions of properties and for the future development of municipalities comes in a meaningful exchange between the municipalities and the property owners of a project. This would include recognition that if a property is to be acquired the property owner needs to go somewhere else and find a suitable equivalent housing or business location. The amount of money to accomplish this is rarely what has been determined to be the just compensation for the property being taken. Sometimes just compensation requires the payment of more than constitutionally mandated just compensation which the courts have declared to be the fair market value of the property taken. Legislative amendments to the Act should be anticipated. Court cases interpreting the land use law are a certainty. It appears that for the time being, the redevelopment of areas will be dictated by market forces. Developers will determine the actual cost to acquire property and then determine if the project is feasible. The law of supply and demand focusing on demand for these types of improvements, the cost to provide them, and the profit that may be realized by developing the property. The large profits realized in the increased value of the land, after assembly, will no longer be a major factor driving the redevelopment. On the other hand, developers may find many owners ready to sell at prices below the assemblage value of the land. Perhaps at the end of the day fairness to all will be the result.

WHY DID WE NEED A LUNCHEON SURVEY?

At the December Executive Board meeting, several Members expressed opinions that they could not attend our lunches as easily on the current schedule. They said they had difficulty remembering when the lunches were being held, difficulty in “calendar” the luncheons, and they wanted the ability to choose which months were more convenient for them to attend since they couldn’t make it every month. So, at the December Installation Luncheon we had a survey to see how many members would like to go back to having a luncheon every month. The results indicated overwhelmingly that the every-other-month format works best for most of the respondents.

The survey results were:

53 (No) – leave the lunches as every other month

12 (Yes) – have the lunches every month

Questions and Answers:

1. Why did our Chapter change to an “every-other-month” luncheon meeting schedule?

Answer: Deciding to have the lunches every other month was actually a very tough decision. It was researched by a committee of Members, voted on and approved by the Chapter’s Executive Board.

2. What was considered when making the decision?

Answer: The Board looked at the finances, the difficulty of getting quality speakers every month, and the luncheon attendance records. The Board also looked at *other* Chapter’s experiences with the every-other-month meetings.

3. Does the Chapter make money on the luncheon meetings?

Answer: No – the Chapter has to subsidize the cost of the luncheons. The Member is charged exactly what the hotel/restaurant charges for the lunch per person. In addition, the restaurants/hotels charge us for the use of the audio/visual equipment. When the prices being charged for the lunch go above a certain amount, the Chapter has usually picked up the difference to keep the Member’s cost the same. The Speakers’ lunches are paid for by the Chapter, as well as any new Member’s first lunch.

4. Did we lose attendance when we switched?

Answer: No, attendance increased.

5. How is the restaurant/hotel chosen and by whom?

Answer: The Luncheon Chair submits requests to each hotel or restaurant for menus and prices. After eliminating the most expensive alternatives, the Chair then presents the remaining candidates to the Executive Board for the final decision.

6. Why are the lunches so expensive?

Answer: Everyone knows they could buy the same lunch for less money but the real charge comes from the reserved space and service requirements. Restaurants and hotels are “renting” us the room and the servers – the food is included in the price.

7. How can we find out when and where the luncheons will be held?

Answer: At the December luncheon a flyer was passed out to all attendees. This same announcement was emailed to all Chapter members and the information is posted on the website.

8. How are the Speakers and Programs chosen?

Answer: We depend on the Chapter Members for suggestions. One thing the Chapter tries hard to avoid is subjecting the Members to a Presenter’s sales pitch. If a vendor has valid information that we can use (no purchase necessary, etc.), we welcome their “advertising” after the presentation and on our website. We have been “fooled” by a few but that doesn’t happen often.

9. How can the Members help?

Answer: **ATTEND AS MANY LUNCHEONS AS POSSIBLE.** Let the Board know what you think about the luncheon speakers. And keep the Chapter in mind when you attend presentations that you think would benefit our Membership. The Chapter doesn’t pay for Speakers (other than the free lunch). The presentation can be about 30 to 45 minutes at the most. Let someone on the Board know about the presentation and provide the speaker’s contact information.



Gregg Tuttle, Manager
SRP Land Department
Surveys Division

Surveyor's Corner

Question:

Gregg, we do some work on some of the local Native America Communities' lands. Recently we were made aware of something called "CFedS". What is CFedS? And, how will affect our on-going field and office surveying operations within the confines of local Indian Communities' lands?

"CFedS" is the chosen acronym for the CERTIFIED FEDERAL SURVEYOR Program.

The Certified Federal Surveyor program (CFedS) has been approved by the Secretary of the Interior and the Special Trustee in the Office of the Special Trustee (OST). It is one component of the "DOI Indian Trust Lands Boundary Standards" which were created by BLM Cadastral Survey and BIA Realty in response to the DOI Fiduciary Trust Model (FTM). The FTM was designed to respond to deficiencies in DOI Trust Responsibilities, and outline a plan for Indian Trust reform.

The Tribes, BIA, and other federal agencies with land management responsibilities adjoining Indian Trust lands will be strongly encouraged to select surveyors from the CFedS roster.

The program consists of a comprehensive training and testing package to be offered to private professional land surveyors, BIA Surveyors, and Tribal Surveyors.

The general themes of these program recommendations are as follows:

- ✦ Establishment of a Certification Panel to administer and oversee the program on a permanent basis.
- ✦ Creation of a training program which will impact applicants no greater than a 3 credit college night course.
- ✦ Utilization of web-based and other distance learning technologies as much as possible, reducing actual "live" course expenses and time.
- ✦ Design of a comprehensive test, produced by a diversity of subject matter experts under the direction of consultant psychometricians.
- ✦ Implementation of a cost-recovery system and an administrative system capable of being passed on to ACSM, the National Society of Professional Surveyors (a non-profit professional organization), once the program has been designed, tested, and successfully implemented.
- ✦ Creation of a continuing education system for renewal of certification.

Drafting of regulations for the conduct of the program participants, de-certification process, and other anticipated issues.

The Certified Federal Surveyor program will:

- Increase the pool of qualified surveyors to complete the backlog of surveys in Indian Country
 - Ensure surveys on Indian lands comply with regulations and policies decreasing the chance and expense of rework
 - Offer Tribal surveyors the ability to better serve their Tribe with enhanced skills and knowledge
- Provide opportunities to increase self-determination

Continued on next page....

Surveyor's Corner continued

The Certified Federal Surveyor (CFedS) program is a voluntary program to train and certify licensed land surveyors to perform the commercial activities of boundary surveying and related services to basic federal surveying standards as established by BLM. The BIA, Tribes, and individual allottees, along with other federal agencies will be encouraged to select surveyors from the CFedS roster when contracting for boundary surveys or other cadastral services.

The CFedS program is open to all state licensed surveyors, with an emphasis on Tribal and BIA surveyors. CFedS certification will be a significant addition to the resume and credentials of the private professional land surveyor and Tribal surveyors.

Registration for the first (beta-testing) CFedS program began in late summer of 2006.

In the past, the BLM has offered similar training to the private sector on a very limited basis, but for the first time the training will be designed specifically for the professional surveyor executing boundary surveys of federal-interest lands, with an emphasis on trust lands. The initial training is designed to provide a basic understanding of the Public Land Survey System, metes and bounds surveys, the effects of case law, interpretation of the Manual of Instruction for the Survey of the Public Lands of the United States, accepted field procedures, and proper documentation.

The continuing education modules will examine more complex issues.

The CFedS roster, comprising those surveyors who successfully complete the initial training and certification examination, will report state registrations and contact information and provide a listing of completed advanced continuing education modules.

The CFedS certification is intended to be a significant addition to the resume and credentials of the Registered Professional Land Surveyor and Tribal Surveyor. Upon completion of the program, the surveyor's name will be placed on the CFedS Roster. Individuals, Tribes and the BIA will be encouraged to select surveyors from the CFedS Roster when contracting for cadastral services in Indian Country. BLM cadastral survey contracts will include credit for those who have completed the CFedS program.

For more information go to the CFedS web site at: www.blm.gov/cadastral/cfeds/cfeds.htm

The short term effect (until about April 2007) on currently surveying contracts and opportunities within "Indian Country" will be minimal to none. However, once the CFedS Roster begins to contain names of local professional land surveyors (and by connection, their employers / firms) then there will be pressure to only contract with those firms who have responsible registrants who are also CFedSs. If your firm is planning to perform land boundary surveying activities (such as, for example, for utility easements) you need to start planning now on using firms and individuals who have successfully acquired the CFedS designation.

Also, note, that to maintain the CFedS designation, those certified individual will need to participate in annual continuing education and professional development requirements, (similar to maintaining an IRWA SR/WA designation).

It will be several years before the number of CFedS obtain "critical-mass" but once that happens, then other Federal Agencies (such as: BLM, USFS, NPS, USACE, and, USBR, among others) will also make a CFedS a contractual requirement as related to any boundary surveying of or on Federal properties (public lands, acquired lands, etc.) that are within the Public Land Survey System (PLSS) states (33 of the 50 states), primarily in the Western U.S.

Well, that's it for this article from the "*Surveyor's Corner*."

If anyone has feedback or comments, please feel free to share them.

As always, I am interested in the opinions from, the readers of the Kachina Chapter 28 Newsletter.

Please keep sending in those questions.

*Until next time, Thanks for reading about land surveying & land surveyors. –
Gregg Tuttle, AZ/RLS # 11121; Manager, SRP LAND-Surveys Division*