

LAWS AND RULES REVIEW COMMITTEE
Professional and Vocational Licensing Division
Department of Commerce and Consumer Affairs
State of Hawaii
www.state.hi.us/hirec

MINUTES OF MEETING

The agenda for this meeting was filed with the Office of the Lieutenant Governor, as required by Section 92-7(b), Hawaii Revised Statutes.

Date: Thursday, May 8, 2003

Time: 10:30 a.m.

Place: Conference Room
Kona Board of REALTORS®
75-240 Nani Kailua Drive, Suite 157
Kailua-Kona, Hawaii

Present: Iris Okawa, Chair
Louis Abrams, Vice Chair
Mitchell Imanaka, Member
Kathleen Kagawa, Ph.D., Member
John Ohama, Member
Peter Rice, Member
Vern Yamanaka, Member

Calvin Kimura, Supervising Executive Officer
Diane Choy Fujimura, Senior Real Estate Specialist
Shari Wong, Deputy Attorney General
Irene Kotaka, Secretary

Others: Charles Aki
Kris Johnson, CMI
Rick Wilson
Representative Mark Jernigan
Sharly Ward
Beau Springer, HAR Legislative Committee
Brian Thomas
Rick Rocker

Excused: Marshall Chinen, Member
Patricia Choi, Member

Call to Order: The Chair called the meeting to order at 10:40 a.m., at which time quorum was established.

Chair's Report: The Chair thanked Nalani Finsand of the Kona Board of REALTORS® and Commissioner Yamanaka for arranging the meetings in Kona. The Chair also recognized Charles Aki, who was a former Commission member. No formal report was presented.

The Chair introduced herself to those present and recognized Commissioner Abrams as the Vice Chair of the Laws and Rules Review

Committee and Commissioner Ohama was the Chair of the Real Estate Commission. She also thanked those in the audience for attending the meeting.

SEO's Report:

Announcements, Introduction, Correspondence, and Additional Distributions

Minutes of Previous Meetings

Upon a motion by Commissioner Abrams, seconded by Commissioner Rice, it was voted on and unanimously carried to accept the minutes of the April 7, 2003 Laws and Rules Review Committee meeting as circulated.

Program of Work, FY03:

Licensing, Registration and Certification Administration

A copy of the geographic report of current real estate licenses, as of March 2003, was distributed to the Commissioners for their information. There was a seven percent decrease in the total number of licensees. The Commission has received requests in the past for a copy of the geographic report. The geographic report is now available on the P&VLD's website.

On April 28, 2003, a list of the current licensees associated with the real estate brokers were mailed out to principal brokers and the brokers-in-charge. They were informed that they should submit a change form to report any changes. In some cases, the licensees' names do not appear on the roster because they did not renew their license, or they did not complete the required CE courses. It is the PB's responsibility to ensure that all licensees associated with the firm are properly licensed. If they are not properly licensed, they may be subject to disciplinary action.

Interaction Participation With Organizations

The next neighbor island outreach will be on the island of Kauai in the Fall of 2003. REB staff will coordinate the dates and times with Commissioner Abrams and the Kauai Board of REALTORS.

FY 04

The SEO asked the Commissioners to review the current program of work and propose revisions to the program of work for fiscal year 2004. Depending on fiscal constraints, the Commission may not be able to take on big projects. Some of the Commission's current program of work items is still incomplete. REB staff is hoping to finalize the program of work and budget by the June meetings. Members of the real estate industry were invited to submit their comments and recommendations to REB staff for consideration. An invitation was also extended to the Hawaii Association of REALTORS inviting their participation.

ARELLO, Other
Organizations and
Jurisdictions:

ARELLO

A copy of the summary provided by Teresa Hoffman regarding digitally enhanced photos was distributed to the Commissioners for their information.

Special Issues:

NAR Proposed Policy on Virtual Office Websites (“VOWs”)

A copy of the National Association of REALTORS® (“NAR”) proposed policy regarding VOWs and a copy of the Montana Real Estate Commission’s rules relating to internet advertising rules were distributed to the Commissioners for their information.

The Vice Chair announced that ARELLO will be meeting to discuss the NAR’s policy on VOWs. NAR will also be discussing this at their May 2003 meeting.

Once ARELLO and NAR accept the policy, the Commission will have to address the issue of VOWs. Any listing displayed on a VOW shall identify the listing firm.

It was recommended that the Commission wait until after ARELLO and NAR have met to determine its position on VOWs.

\$150,000 from REEF to General Fund (House Bill No. 1152, H.D. 1, S.D. 1, C.D. 1)

A copy of the pertinent sections of House Bill No. 1152, H.D. 1, S.D. 1, C.D. 1 was distributed to the Commissioners for their information. Commissioner Rice read section 43 of the bill to those present and then questioned how the excess was determined.

The SEO stated that the Finance Committee staff works with the Department of Budget and Finance to determine if there are any excess funds.

Real estate licensees are unlike doctors or contractors as the number of licensees fluctuates and revenues go up and down based on the economy. There will be a point where the Real Estate Education Fund (“REEF”) will decrease. There will be a drop in the number of licensees. These factors were not taken into consideration by those determining the excess. Instead, they are projecting the same number of licensees and a slight increase.

The Commissioners questioned if there were a distinction between the types of funding, such as special funds, trust funds and revolving funds. Special funds were created for a special purpose. Trust funds are the most protected because of the trustee relationship. The Commissioners believe that they have a fiduciary duty to protect the fund. Other states

have had their funds confiscated. Some states have Attorney General opinions or court decisions stating that they cannot do this.

Commissioner Ohama stated that he would defer to the Deputy Attorney General.

Shari Wong, Deputy Attorney General, was introduced to those present.

Ms. Wong stated that one legislature can give and another can take it away. As long as the purpose of the fund is able to be carried out, they do not have any problems. There does not appear to be any legal or constitutional objections.

A lawsuit was filed in court by an insurance company because funds were to be confiscated from an insurance-related trust fund. The litigation is pending.

Commissioner Rice stated that the licensees were charged the fees. The Deputy Attorney General stated that it was only through the Legislature that the Commission was able to charge the fees.

Commissioner Rice also stated that logic says that the moneys charged should be used up completely. The public or the Department should voice their concerns. They may have to write letters on behalf of the Commission stating that they take issue with the taking of the moneys. He also questioned what the trustees' duties or liabilities are if the moneys were taken. If the Commission has charge of protecting the trust fund moneys, and through no act of their own, the money is taken away from the Commission, is the Commission absolved of their liability?

The Commission also asked if further action could be pursued after July 1, 2003. The Governor needs to know that the Department of Budget and Finance's opinion is only one opinion, and it is not the voice of the community.

The SEO reported that the administration is recommending a line item veto on the bill. The Commission would have to build its case that they are going beyond the norm in trying to protect the fund. The Attorney General's Office in the past has issued oral opinions, but has not put its opinions in writing. If a request for a formal Attorney General's opinion is made, it may impress upon those in authority that the Commission takes what is happening seriously. The community and the Commission's comments could be forwarded to the Governor's Office and the Commission could seek a written opinion from the Attorney General's Office.

The Deputy Attorney General informed the Commissioners that the Commission is not the first agency that was subject to the confiscating of the funds and it will not be the last.

Commissioner Abrams commented that the Commission might consider changing the way that information is presented to the Legislature. He stated that if the Legislature feels that we are collecting more than we need, he is in favor of lowering the fees.

There are issues that may require funding in the near future, such as internet advertising and VOWs.

Commissioner Ohama stated that the consumer will end up paying for the licensee's education programs after the money is taken. If there are no funds to tap, the ultimate one who will be penalized is the consumer.

Commissioner Ohama stated that the Commission could request an opinion from the Attorney General's Office and it could also write a letter to the Governor explaining the Commission's position.

Commissioner Rice stated that he agreed with half of Commissioner Ohama's statements. The funds are designated as trust funds. He stated that the Commission should write a letter to the Governor informing her that the funds to be taken are held in trust by the Commission for the real estate licensees. The Commission has a fiduciary duty and the taking of the funds breaches the Commission's fiduciary responsibilities. He also stated that to take the funds that are contributed by a small population of people in order to benefit the general population is unfair. He suggested that the Commission send a letter to the Governor within the next week stating that they oppose the taking of the \$150,000 from the Real Estate Education Fund.

Commissioner Yamanaka stated that he agreed with Commissioner Rice. Commissioner Imanaka asked what the Commission's objective was. Was it to protect the Commission's position or was it to stop the administration from taking the money?

Commissioner Yamanaka stated that the goal was to stop the administration from taking the money.

Commissioner Imanaka suggested that the Commission look at other alternative strategies, including looking at independent counsel to advise and be an advocate for the Commission's position. He felt that a good legal case could be made regarding the constitutional aspect of the taking of the funds and it would provide the best opportunity for success.

Chair Okawa suggested that the Commission immediately write a letter to the Governor urging her to veto the portion relating to the taking of the Real Estate Education Funds. Chair Okawa stated that she did not feel that this action would be mutually exclusive. She also suggested that the Commission consider engaging outside legal counsel.

Commissioner Okawa outlined her thoughts as follows:

1. The Commission immediately sends a letter to the Governor, recommending that she veto the taking of the Real Estate Education Trust Funds as it is a breach of the Commission's fiduciary responsibility.
2. The Commission should seek independent counsel to review the matter and to advise the Commission.
3. The Commission considers further action, going forward to see if the funds could be recovered in any way after the effective date of the bill.

Commissioner Rice stated that he felt that the letter should be sent right away so that the Commission's position would be known within a week.

Commissioner Ohama stated that he felt that retaining outside counsel would be a good idea but questioned whether or not the Commission would want to be adversarial at this point.

The SEO informed the Commissioners that the selection of outside counsel would be handled by the Attorney General's Office. Any attorney hired by the Commission would have to be approved by the Attorney General's Office, unless it is within the parameters of an existing contract.

Commissioner Imanaka stated that he understands that it may be a long and drawn out problem, but he is looking at it as an on-going issue. Retaining independent counsel may be useful down the road.

Commissioner Rice stated that the issue of raiding funds will continue to keep coming up and the Commission has an obligation to address this issue.

The Hawaii Hurricane Relief Fund statute states that after the termination of the fund, the moneys would go back into the General fund. One segment of the population is supporting the General fund.

Commissioner Okawa stated that she recognizes that we have dire economic issues that is deserving of funding, however, the Commission does not want it to be perceived that the real estate industry and the Commission are hoarding the funds. The funds paid in are to benefit the consumer and the licensees.

Upon a motion by Commissioner Rice, seconded by Commissioner Yamanaka, it was voted on and unanimously carried to recommend the following:

1. That the Commission send a letter to the Governor within a week, expressing their concerns over the taking of the moneys from the REEF trust fund, such as how it would impact their fiduciary obligation to the funds, and noting that the funds are collected

- specifically from the real estate licensees and should not be deposited back into the General fund.
2. That the Commission seek the engagement of private counsel, subject to the review of the funding requirements from all three trust funds.
 3. That the Commission consider prospective action to be taken.
 4. That a letter be sent to industry members urging them to support the Commission in its efforts.

Open Forum:

Beau Springer stated that the pending legislation was a form of hidden taxation. He stated that since the real estate licensees pay into the REEF, he would like to see the moneys spent on the education of real estate licensees. The raiding of the funds is a means of taxing unfairly. Mr. Springer stated that he would like to see the Commission take a proactive position for next year. He would also like to see education benefits derived from the payment of the funds.

Rick Wilson stated that he approaches the issue from a totally different standpoint. He stated that the moneys are in the REEF and it is a target. He would like to look at reducing the fees that are charged to licensees and increasing the cost of continuing education courses. He felt that the people should be made to pay as they go and it will eliminate the issue of having substantial moneys taken away from the REEF. He suggested that the Commission keep the funding that is required to fund the program and at the same time, the licensee will have to pay in one way or another.

Mr. Wilson also voiced his concerns about the ten hours of mandatory continuing education that real estate licensees had to complete every two years. He stated that real estate is a profession; it is not for the average person who just wants to get a license. He wants the educational courses to be what they were supposed to be. The licensee should be able to pass a test at the end of the course instead of just attending the course.

Sharly Ward asked the Commissioners how much moneys are in the REEF. She was informed that there is 1.3 million dollars currently in the REEF. She was also informed that since the real estate licensing fees are collected every two years, the balance remaining in the REEF at this time next year, will be down. The funds will have to last for the next two years and some moneys will also need to be set aside for upcoming programs, such as the broker curriculum and continuing education. If the fund is depleted, the Commission will not have extra moneys to fund programs.

Representative Mark Jernigan stated that he had voted in favor of taking the funds outlined in the bill. He also stated that the Department of Budget and Finance had testified extensively on the bill. He did not recall any testimony being submitted by the Real Estate Commission. Representative Jernigan was informed that the Commission did provide testimony at the hearings.

He suggested that the Commission needs to justify why they need to have the money. He stated that the justification that the moneys from a small segment of the population are being used for the general population is not fair. He stated that the Governor needs to know more reasons as to why she should not take the money.

Jackie Parkinson, Executive Officer of the Kona Board of REALTORS, stated that she was in total support of the motion and would be glad to help get the word out. Ms. Parkinson stated that they are the smallest board in the State. They have a staff of three and she was present at the meeting to request assistance in developing the core courses. She said that they were told that they would have to come up with their own core courses but they have no funds to develop the core course.

Commissioner Rice stated that the Commission does not think that it is on a pedestal, but they do take their fiduciary obligation to protect the funds seriously.

Had there not been a freeze on spending, the Commission would have used the moneys during the last eight or so years. The Commission had requested permission to increase the budgetary ceiling to provide more programs, but their requests were denied.

Chair Okawa thanked Representative Jernigan for being present and also thanked those in the audience for the animated discussion.

Budget and Finance Report:

Upon a motion by Commissioner Abrams, seconded by Commissioner Rice, it was voted on and unanimously carried to recommend acceptance of the Real Estate Recovery Fund Report, dated February 28, 2003.

Next Meeting:

Tuesday, June 10, 2003
9:00 a.m.
Kapuaiwa Room
HRH Princess Victoria Kamamalu Building
1010 Richards Street, Second Floor
Honolulu, Hawaii

Adjournment: With no further business to discuss, the Vice Chair adjourned the meeting at 11:38 a.m.

Reviewed and approved by:

/s/ Calvin Kimura
Calvin Kimura
Supervising Executive Officer

June 10, 2003
Date

[X] Approved as is.

[] Approved with amendments. See minutes of _____ meeting.