

LAWS AND RULES REVIEW COMMITTEE
Professional and Vocational Licensing Division
Department of Commerce and Consumer Affairs
State of Hawaii
www.hawaii.gov/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: Wednesday, November 10, 2004

Time: 9:30 a.m.

Place: REALTORS Association of Maui
441 Ala Makani Place
Kahului, Maui

Present: Iris Okawa, Chair, Public/Honolulu Commissioner
Louis Abrams, Vice Chair, Broker/Kauai Commissioner
Carol Ball, Broker/Maui Commissioner
Mitchell Imanaka, Broker/Honolulu Commissioner
Kathleen Kagawa, PhD, Broker/Honolulu Commissioner
Michele Sunahara Loudermilk, Public/Honolulu Commissioner
Trudy Nishihara, Broker/Honolulu Commissioner
John Ohama, Broker/Honolulu Commissioner
Vern Yamanaka, Broker/Hawaii Island Commissioner

Calvin Kimura, Supervising Executive Officer
Shari Wong, Deputy Attorney General
Tammy Norton, Secretary

Others: Lois Janis, Condominium Council of Maui / Lauhoa Condominium
Harvey Janis, Condominium Council of Maui / Lauhoa Condominium
John Dunning, Papakoa AOA
Tracy Stice, Hawaii Association of Realtors
Karen Iwamoto, Hawaii Association of Realtors
Myoung Oh, Hawaii Association of Realtors
Bernice Littman, Cades Schutte
Colin W. Dunlop, Realtors Association of Maui.
Mike Grossi, Atlas Construction Insurance
Nikki Senter, Iwamoto, Kudo & Fujimoto
Christine Holguin, Centex Homes
Michael Rosmin, Centex Homes
Peter Rice, Classic Resorts, Ltd., former Commissioner
Sylvia Cabral
Mary Wong, HAR Legal Counsel (via telephone conferencing)

Absent: None

Call to Order: The Chair called the meeting to order at 9:35 a.m., at which time quorum was established.

Chair's Report: Chair Okawa thanked host Commissioner Ball, the Realtors Association of Maui and everyone present for their attendance at today's meetings.

Chair Okawa noted for the record that Mary Wong, HAR Legal Counsel, was listening in on the meeting via telephone conferencing. Ms. Wong acknowledged her presence via telephone.

SEO's Report:

Minutes of Previous Meetings

Upon a motion by Commissioner Imanaka, seconded by Commissioner Abrams, it was voted on and unanimously carried to accept the minutes of the October 13, 2004 Laws and Rules Review Committee meeting.

Program of Work, FY05:

Licensing Renewal

License Renewal Workshops are being held in conjunction with the Commission's Specialists' Office of the Day program on the neighbor islands and Oahu, from 9:30 a.m. to 12:30 p.m., as follows:

Maui – Wednesday, November 10, 2004
REALTORS Association of Maui, Inc., 441 Ala Makani Place, Kahului

Kauai – Monday, November 15, 2004
Kauai Board of REALTORS, 4359 Kukui Grove, Suite 103, Lihue

Kona – Tuesday, November 16, 2004
Kona Board of REALTORS, 74-5620 Palani Court, # 106, Kailua-Kona

Oahu – Thursday, November 18, 2004
Honolulu Board of REALTORS, 1136 12th Avenue, Holomua Room,
Honolulu

Hilo – Tuesday, November 23, 2004
Hawaii Island Board of REALTORS, 26 Waianuenue Avenue, Hilo

It was reported that 4000 licenses have been renewed so far. The online renewals have had several glitches that have been worked on.

Commissioner's Education Program

A handout explaining the Sunshine Law was distributed to the Commissioners for their information. SEO Kimura reported that OIP frowns on broad open agenda items and open forum sections of the agenda. If the issue is not on the agenda a motion must be made to add the issue to the agenda.

Subcommittee on Agency

Commissioner Abrams reported that the subcommittee was created to review the agency issue in light of the Hawaii Association of Realtors (HAR) intention of submitting proposed legislation on amending the law and/or rules on agency.

Commissioners have been provided a copy by email of the proposed HAR draft of the legislative bill on agency.

Commissioner Abrams reported that his participation at the ARELLO annual conference resulted in a tremendous amount of information on agency, especially from the Canadian regulators. Commissioner Abrams felt that this information was particularly relevant to future discussions by the commission and was able to obtain a copy of the Canadian Agency Task Force Report. Subsequent to obtaining the report, Commissioner Abrams was able to locate 3 other reports done for the task force addressing this issue, all of which have been distributed to the Commissioners.

In addressing the agency issue, the regulators from all the Canadian Provinces created a national task force and spent an enormous amount of resources and time to study the issues of agency and recently issued its report, findings, and recommendations. Since real estate licensing and the handling of real estate transactions are identical to the fifty states, the national task force had consulted and worked with a number of experts from the United States. We have provided access or a copy of the "Canadian Legislators Group – Report of the Agency Task Force" and Professor William Foster's Reports, which is considered one of the best reports when considering consumer protection.

Commissioner Abrams introduced representatives of HAR who were there to present HAR's proposed bill on agency to the commissioners.

Tracy Stice, Karen Iwamoto and Myoung Oh of the Hawaii Association of Realtors, were present along with HAR Counsel Mary Wong (via teleconference).

Mr. Stice reported that in June 2003 the HAR task force on Agency convened and studied NAR's proposed legislation from the mid 1990's. The task force then drafted legislation to create statutory agency and non-agency brokerage relationships and made nine specific recommendations. The task force further broke down the issues into areas of specialty and did further research. This is now the 16th revision of the proposed legislation which has been worked on with HAR's legal counsel and input from its membership. The proposed legislation is intended to include written duties and be very consumer friendly.

Mr. Stice informed the committee that the proposed legislation has four goals which are: 1) enhance consumer protection, 2) clarify brokerage relationships, 3) limit consumer liability, and 4) mandate uniform standards. He further went over HAR's Executive Summary.

Mr. Stice further noted that between transaction brokerage and agency brokerage, transaction brokerage would be the default in absence of a written agreement. The duties of the two are similar, but the agency brokerage relationship would need to be in writing and prior to a transaction.

Commissioner Ball questioned if the default is transaction brokerage, how is one to disclose that the individual is not your client without a written agreement

Mr. Stice replied that a written agreement would need to be made at the earliest possible time.

Ms. Mary Wong further noted that oral disclosure as soon as possible is required. Disclosure works for any kind of relationship. If a written agreement cannot be followed up with as soon as possible, a written agreement will need to be provided within 2 days. Ms. Wong referred to section XX-4(c), Written disclosure required. Section XX-4(c) states "At the earliest reasonable opportunity and in any event prior to submitting or accepting any listing agreement, offer or contract for the sale, purchase, rental or lease of property, the licensee shall provide a written disclosure to the customer. The disclosure shall be provided in the written agreement (by itself or in documents incorporated therein) or by separate document if there is no written agreement..."

Commissioner Abrams stated that in the draft proposed legislation, there is no period of time for the consumer to decide whether he wants to enter into that type of agreement.

Ms. Mary Wong replied that on page 10, XX-6, Change of type of brokerage, it states that the type of brokerage may be changed by written agreement that shall contain the provisions and disclosures required by section XX-3(c) and XX-4(c), as applicable and all other disclosures required with respect to the revised relationship.

Commissioner Yamanaka stated that as a transaction brokerage, if you choose to not have a transaction brokerage you could choose to have none.

Ms. Mary Wong replied that it would then be termination.

Commissioner Loudermilk questioned if the default is transaction brokerage with no written agreement, what if the licensee takes on the duties?

Ms. Mary Wong replied that it would be at the licensee's peril as the burden to prove a brokerage relationship is on the party trying to show a relationship exists. In the absence of a written agreement, the relationship is presumed to be for transaction brokerage services only. She further stated if someone was going to be her agent, she would want that agreement in writing.

Commissioner Nishihara questioned if during an open house an individual wants the licensee to write an offer at that moment, what then would happen? Would the licensee then need to explain the agency issue then write the offer, but in fact by default the individual is a customer due transaction brokerage? Commissioner Nishihara further stated that she is a full-service agent by habit and provides all of the information and research for her clients. With transaction brokerage as the default and the services that Commissioner Nishihara normally provides, the individual may think that Commissioner Nishihara is their full service agent.

Ms. Mary Wong replied that section XX-3(a), Agency services should address this area. Section XX-3(a) states that a real estate licensee serving in an agency brokerage relationship may: (1) provide services to the client in a fiduciary or agency capacity; (2) advocate for the client;

(3) promote the client's interest over the interests of other parties to the transaction; and (4) provide other real estate services ancillary thereto, in compliance with all applicable law including but not limited to licensing requirements.

Commissioner Loudermilk questioned what would happen if the consumer wants to prove the broker relationship.

Ms. Mary Wong replied that the burden of proof falls under section XX-20 which states "Nothing contained in this chapter shall be deemed to shift the burden of proof in any action or proceeding in which a person is alleged to have engaged in fraud, fraudulent misrepresentation, intentional misconduct, or violation of law."

Ms. Mary Wong further noted that the disclosure duties are almost the same between a transaction and agency brokerage.

Mr. Stice reported that HAR is seeking the Commission's support or to be made aware of any opposition to the proposed bill.

Commissioner Ohama stated that the LRRRC would need more time to review the proposed legislation provided by HAR. He further noted that the intent is good, but whether the actual provisions or facts would cause stumbling blocks would need to be further researched on the Commission's side prior to making its comments.

Mr. Stice replied that HAR has viewed the proposed legislation as an educational tool and would like to receive the Commission's comments to take back to HAR's subcommittee on Agency.

Commissioner Ohama replied that the Commission's subcommittee on Agency headed by Commissioner Abrams will be the Commission's liaison to HAR's subcommittee on Agency. Today is not the correct forum to go over every area of the proposed bill. Commissioner Ohama suggested that the Commission be given more time to review the proposed legislation provided by HAR and provide its comments to its subcommittee on Agency.

Commissioner Yamanaka thanked HAR's committee and Commissioner Abrams for providing all of the information and research on the agency issue and noted that it is very important review all the information provided on this important issue.

Ms. Mary Wong informed the committee that HAR is willing to make additional changes, but will need to do so in a timely fashion.

Mr. Stice stated that HAR has already incorporated a lot of the comments received following its meeting with Commissioner Abrams, Commissioner Okawa, SEO Kimura, Deputy Attorney General Shari Wong and Jo Ann Uchida, RICO.

Commissioner Abrams questioned whether the commission members would like to keep this issue discussed as a subcommittee or to have the entire committee go over the issue.

Commissioner Imanaka replied that he is in favor of the subcommittee format and that any commissioner should be able to participate and provide its thoughts to the Commission's subcommittee.

Commissioner Okawa further noted that Commissioner Abrams should continue to spearhead the Agency subcommittee and provide a summary to the rest of the Commissioners for review.

SEO Kimura noted that it seems that all the Commissioners have raised questions on the proposed bill and a good exchange has developed. More time is needed to study the issues and to continue the exchange with HAR.

Commissioner Ohama suggested using a format as was done during the SWAT changes in setting up a meeting for all to discuss the issue. The meeting should include REC, RICO, HAR, and the deputy attorney general.

Mr. Stice informed the Commission that HAR would be willing to meet with the Commission again, but also informed the committee that HAR will be introducing a bill this session and needs to keep on track with its timetable.

It was noted that Commissioner Abrams will be out of town from December 9 through 16. Staff to look into the availability of proposed meeting dates. The Commission to file an agenda with the topic of agency to be discussed.

Commissioner Abrams questioned when HAR was made aware of the Canadian Studies on agency.

Mr. Stice replied that it was not until the 14th draft of the proposed legislation that they were made aware of the Canadian studies. The Canadian laws have some differences, but in general very similar.

Commissioner Abrams informed the committee that should the law on agency pass this session, the Commission will need to look into revising chapter 99.

ARELLO, Other
Organizations and
Jurisdictions:

State of Colorado

The State of Colorado has requested that Hawaii enter into a license recognition agreement with them.

Commissioner Yamanaka voiced his concern that the State portion of the exam should be required.

SEO Kimura reported that a past decision of the committee was to form a subcommittee to set guidelines on license recognition agreements, but have since not been done. RICO would also need to be included when setting guidelines. The past concerns of the committee were also based on the requirement of taking the state portion of the exam

Upon a motion by Commissioner Imanaka, seconded by Commissioner Yamanaka, it was voted on and unanimously carried to recommend that

staff inform the Colorado Real Estate Commission that the Commission is looking into this matter and will not be entering into an agreement at this time.

Special Issues:

No discussion presented.

Open Forum:

Peter Rice stated that he renewed his real estate license online and found the procedure to be very user friendly. He suggested that the Board of Realtors poll their memberships to see how many members are renewing online and if they are not renewing online, then why. With the systems ease of use, majority of licensees should be renewing their licenses online.

Mr. Rice further commented on the Agency discussion. He questioned, is not disclosure currently required and the problem is actually a lack of disclosure?

Budget and Finance Report:

No report presented.

Next Meeting:

Thursday, December 9, 2004 (subject to change)
9:00 a.m.
Queen Liliuokalani Conference Room
King Kalakaua Building
335 Merchant Street, Room 333
Honolulu, Hawaii

Adjournment:

With no further business to discuss, the Chair adjourned the meeting at 10:40 a.m.

Reviewed and approved by:

/s/ Calvin Kimura
Calvin Kimura
Supervising Executive Officer

December 8, 2004

Date

[X] Approved as is.
[] Approved with amendments. See minutes of _____ meeting.

CK/tn 041129