

**LAWS AND RULES REVIEW COMMITTEE**  
Professional and Vocational Licensing Division  
Department of Commerce and Consumer Affairs  
State of Hawaii  
[www.state.hi.us/hirec](http://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, December 12, 2002

Time: 9:00 a.m.

Place: Kapuaiwa Room  
HRH Princess Victoria Kamamalu Building  
1010 Richards Street, Second Floor  
Honolulu, Hawaii

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

Calvin Kimura, Supervising Executive Officer  
Alan Taniguchi, Executive Officer  
Diane Choy Fujimura, Senior Real Estate Specialist  
Cynthia Yee, Senior Condominium Specialist  
Lorene Arata, Real Estate Specialist  
Russell Wong, Real Estate Specialist  
Cheryl Leong, Condominium Specialist  
David Grupen, Condominium Specialist  
Shari Wong, Deputy Attorney General  
Irene Kotaka, Secretary

Others: Merrily Leong, Hawaii Association of REALTORS  
Charles Aki  
Rodney S. Nishida, Esq., Ayabe Chong Nishimoto Sia & Nakamura

Excused: Marshall Chinen, Member

Call to Order: The Chair called the meeting to order at 9:02 a.m., at which time quorum was established.

Chair's Report: REC Chair Ohama presented a plaque on behalf of the Commission to Merrily Leong in recognition of the contributions she has made to the Commission and to the real estate industry.

Ms. Leong thanked the Commissioners and staff for their support. She stated that she has really enjoyed working with the Commission, and it made her job very easy. Her last day of work will be January 10, 2003.

REC Chair Ohama also shared with the Commissioners a letter that he had received from Scott Sherley commending Senior Real Estate Specialist Diane Choy Fujimura and Clerk-Typist Toalua Lavatai for their professionalism and helpfulness.

Chair Okawa welcomed Russell Wong back as the Real Estate Specialist. She also welcomed former Commissioner Charles Aki to the meeting.

Chair Okawa also wished everyone present "Happy Holidays!"

SEO's Report:

**Announcements, Introduction, Correspondence, Additional Distribution**

**Additional Distribution**

The following materials were distributed prior to the start of the meeting:

4. Program of Work, FY03
  - j. Licensing Renewal
    - 2) Statistics
  - p. Commissioners' Education Program  
– OpenLine, November 2002

**Minutes of Previous Meetings**

Upon a motion by Commissioner Abrams, seconded by Commissioner Choi, it was voted on and unanimously carried to accept the minutes of the November 13, 2002 Laws and Rules Review Committee meeting as circulated.

Program of Work, FY03:

**Real Estate Recovery Fund – Report on Proposed Amendments**

Rodney S. Nishida, Real Estate Recovery Fund Counsel, was present to discuss proposed amendments to the Real Estate Recovery Fund ("RERF") statutes.

Mr. Nishida provided an overview of the statutes. The statute was enacted in 1967 and provides a form of compensation to aggrieved persons arising from real estate transactions. When the recovery fund was set up, private counsel was engaged because the Commission and the Department realized that the interests of the fund would conflict with public interest. Both the RERF and the Contractors Recovery Fund are represented by independent counsel. The RERF statute has requirements to meet before the court orders payment of \$25,000 per transaction, \$50,000 per real estate licensee.

The claimant must give notice of a claim against the fund. The complaint must be filed within two years of the cause of action. Once the complaint is filed, the plaintiff must obtain a valid judgment and must have findings of fraud, misrepresentation or deceit. The plaintiff must exhaust all claims against the licensee named in the lawsuit. The aggrieved person must show that they are not related to the licensee and that they have done everything to exhaust the judgment. After they file a verified claim, they

must file an application for order directing payment out of the recovery fund. When the recovery fund counsel receives the motion, they make sure that all of the requirements have been met. The plaintiff's attorney is notified that the RERF counsel is entitled to receive copies of all pleadings and that RERF counsel may intervene if they wish to do so. RERF counsel monitors the case and rarely intervenes. If the requirements are not met, RERF counsel will file a motion in opposition. If all remedies are exhausted and an order is issued, the affected real estate license is terminated upon payment of the order directing payment from the RERF. If the licensee pays back the funds that were paid out, they may request reinstatement of the license.

Mr. Nishida's memo, dated November 27, 2002, raises several issues which need to be addressed.

His first recommendation is that the statute be amended to apply only to individual real estate brokers. If the licensees have errors and omissions insurance, RERF counsel will monitor the situation.

A licensee was contacted by people who owned a condo and wanted to buy a house. The licensee helped them to sell the condo and buy a house. The licensee sold the condo to one of his friends. The transaction on the condo collapsed because the buyer was unable to make the payments. In that particular situation, there was an individual real estate broker's license and a corporate broker's license.

Mr. Nishida's second recommendation is that the RERF should cover only situations in which the real estate license was active at the time of the alleged conduct. The statute does not currently define that the license has to be active. The Contractors License Board amended their statute to say that it is limited to active licensees. Active means that the license is not suspended, forfeited or revoked.

Mr. Nishida's third recommendation is that the sum of \$25,000 should be the aggregate amount which can be recovered by the aggrieved persons "per transaction." Five years ago, the Contractors License Board amended the statute to pay, regardless of the number of persons aggrieved. Amendments were proposed in 1986, but the Administration was not in favor of the amendments.

The fourth recommendation raised by Mr. Nishida was that aggrieved persons should be limited to economic distress rather than non-economic damages. The Contractors License Board limits the damages to only actual damages. They were concerned about paying for punitive damages. In the Kuhnert case, the court ordered emotional distress damages. Mr. Nishida stated that they are recommending that the Commission limit the damages to economic damages. In 1986, Hawaii amended the joint and several statutes. The Legislature carved out non-economic damages for certain cases. For anything not involving product liability, you can recover damages. If it is for property damage, you cannot.

Commissioner Rice stated that he agreed with all of the recommended amendments except the first one. Commissioner Rice asked if Mr.

Nishida was suggesting that the pay out be limited to individuals because it is their opinion that the corporate entity may not have any value. Mr. Nishida answered that it was correct in a situation where the real estate broker corporation is not insured.

The current balance of the RERF is \$600,000. Two or three cases could deplete the RERF balance to \$350,000.

Commissioner Rice asked if the aggrieved party has to exhaust all measures, in many cases, the corporation has the wealth. Mr. Nishida stated that the corporation does not normally hold title to property; usually it is the individual that holds title to the property. If the husband and wife hold title to property as tenancy by the entirety, unless both parties are licensed, the property cannot be used.

Mr. Nishida stated that in some situations, the plaintiff's attorney would sue the corporation and not the licensee although the individual may have assets. They could negotiate with the parties to go after the corporation and leave the individual licensee alone. The purpose of the statute was to address the conduct of the individual real estate broker or salesperson. If the licensee makes a misrepresentation, they could get sued. If the aggrieved party is allowed to sue both the corporation and the licensee, there may be more strategizing on the plaintiff's part on who they will sue.

Mr. Nishida informed the Commissioners that there is a case that has a potential exposure to the RERF of \$100,000. The Commission has already taken disciplinary action against the licensee.

Commissioner Rice stated that it was the incentive for individuals to put value into the corporation as the plaintiff would have the right to sue the corporation any way.

Chair Okawa suggested putting in an alternative form per licensee, individual or corporate broker.

Commissioner Choi stated that the intent of the statute was to get the licensee, who is causing the problem, out of the market.

By not allowing claims to be filed against corporate brokers to be filed against the RERF, the Commission would be losing a one time payment of \$50 to the RERF.

Commissioner Abrams questioned why the Commission would choose to exclude the corporate broker and why it could not include both.

Mr. Nishida stated that he could draft language to say that the claim against the individual and the corporation shall not exceed \$50,000.

Chair Okawa stated that this would not preclude RICO from pursuing disciplinary sanctions.

Mr. Nishida stated that he could draft language to say that the liability of the individual and the corporate broker shall be limited to \$50,000 if they

are from the same company. He also stated that he has not thought through the language completely, but he understands what the Commission is saying.

The SEO pointed out that the aggrieved parties are not usually able to recover their actual losses. The Department is concerned with protecting the consumer. Amendments that are identical to what is in the Contractors License Board statutes stand a better chance of passing. The Commission may have problems with trying to limit the amount that the consumer is able to obtain.

In 1967, the RERF statute was enacted and the maximum pay out was \$8,000 to \$10,000 per licensee. In 1983, the statute was amended to \$25,000 per licensee.

Mr. Nishida stated that the Contractors Recovery Fund limit is \$12,500 per contract. The RERF statute cannot use per contract. The RERF statute uses the phrase "per transaction."

Commissioner Ohama stated that there could be an endless debate over what would be considered a contract as there are many forms of contracts, such as listing agreements, offers, DROAs, etc.

Commissioner Yamanaka questioned if the amount should be raised. Mr. Nishida stated that it would be up to the Commission to decide whether or not to raise the amount.

The SEO informed the Commissioners that if they wanted the bill to be considered as a non-administration bill, a decision would have to be made today. The Commission is also hindered by the fact that the Director has not been appointed as yet and any non-administration bill will require Administration's approval. If no decision is made today, there will be no time for submission to the 2003 Legislature.

Commissioner Rice moved to recommend acceptance of the RERF counsel's proposed amendments as set forth in items 2, 3 and 4, and amending item 1 to limit the total liability per transaction to \$50,000 aggregate for the individual licensee and the corporate broker; recommend that the Commission develop a consumer education program to heighten the consumers' awareness of the benefits of using a licensed individual; and further recommend that the RERF counsel draft the proposed legislation and that the Commission submit proposed legislation to the 2003 Legislature. Commissioner Imanaka seconded the motion.

A question was raised as to what would happen if a consumer saw a license number and assumed that the licensee was active and current. However, it was later discovered that the license had been inactive or forfeited for ten days. Or another situation would be where the licensee was properly licensed in the middle of the transaction but then sometime during the transaction, the license became forfeited.

Chair Okawa suggested that the Commission work with PVL and the Hawaii Association of REALTORS to develop a consumer protection

campaign. The campaign would focus on the licensees' responsibilities so that consumers would be aware of this beforehand, lessening the Commission's remedial role.

The Contractors License Board has a heavy duty education program with industry to use only licensed contractors.

Commissioner Yamanaka stated that consumers could check the internet to see whether or not an individual is licensed. Commissioner Yamanaka agreed that the statute should cover only active licensees and that consumers should be educated.

The SEO informed the Commissioners that if licensees used unlicensed persons, they could be charged with aiding and abetting.

Commissioner Rice stated that given the limited amount of funds, he felt that the recommendation was a good one. If the Commission is concerned about the public, then the Commission should be looking at the penalties that are handed down by RICO as a way of protecting the public.

The motion was voted on and unanimously carried.

### **Neighbor Island Outreach**

The next neighbor island outreach is scheduled to be held on the island of Maui, on Friday, January 10, 2003, in the Conference Room of the REALTORS Association of Maui, located at 441 Ala Makani Place, Kahului, Maui. The meetings will be held as follows:

9:30 a.m.	Condominium Review Committee
10:30 a.m.	Laws and Rules Review Committee
11:00 a.m.	Education Review Committee

### **Licensing Renewal**

Workshops - Real estate license renewal workshops were held on the neighbor islands. A written report was distributed to the Commissioners for their information.

Real Estate Specialist Arata informed the Commissioners that REB staff received good participation from the workshop that was held on the island of Kauai.

Statistics – The Commissioners were updated on the real estate license renewal statistics. As of December 10, 2002, there were 7,376 licenses that were renewed, with 2,266 licenses renewed online.

Commissioners Abrams, Rice, and Kagawa renewed their licenses online.

### **Commissioners' Education Program**

A copy of the November 2002 issue of [OpenLine](#) was distributed to the Commissioners for their information.

### **Division and Department Programs**

The latest copy of the Professional and Vocational Licensing Act, Chapter 436B, Hawaii Revised Statutes, was distributed to the Commissioners for inclusion in their reference binders.

### ARELLO, Other Organizations and Jurisdictions:

#### **Colorado Real Estate Commission License Recognition Request**

A copy of the license recognition request from the Colorado Real Estate Commission was distributed to the Commissioners for their information. The SEO pointed out that the request states that the Commission agrees to provide service of process in any civil action. The Commission/ Department does not provide service of process for civil actions against Hawaii licensees. Under the proposed agreement, if a civil action is filed in Colorado against a Colorado licensee, who also has a Hawaii license under the proposed agreement, the Commission would have to provide service of process. This is a major roadblock unless negotiations remove the service of process.

Commissioner Ohama asked if the Commission would be resubmitting its previous 2002 administration bill to grant reciprocity. The SEO stated that the section of the 2002 administration bill that did not pass would have provided the Commission with the authority to negotiate and agree to a license recognition and/or reciprocity with another jurisdiction. Back in August or September 2002, the Commission agreed not to submit any legislative bill except the recodification bill and to concentrate its efforts on the CPR legislation. Again, as stated previously for the RERF legislation, a decision has to be made today for any proposed legislation for any chance of being considered by the Administration.

Upon a motion by Commissioner Ohama, seconded by Commissioner Rice, it was voted on and unanimously carried to recommend resubmission of the 2002 proposed legislation relating to reciprocity and license recognition to the 2003 Legislature, subject to Administration approval. REB Staff to draft proposed legislation and respond to the Colorado Real Estate Commission with the standard statement.

#### **Texas Real Estate Commission**

##### Licensing/Examination Process

Commissioner Yamanaka and Real Estate Specialist Wong will work together to discuss the issue of allowing applicants for a Hawaii real estate license to take the exam in another state. In the past, the Commission has had problems with applicants who did not meet the prelicensing requirements prior to taking the examination and their applications have had to come before the Commission.

Texas real estate license applicants are prescreened to insure that they have met the requirements for licensure prior to being allowed to take the real estate examination. Once they have met the requirements, they are

given a letter which allows them to take the real estate licensing examination.

Open Forum:

Ms. Leong reported that the Hawaii Association of REALTORS' Annual Legislative Day will be held on January 9, 2003. They have 50 REALTORS who have signed up and would like to have at least 70 to 100 of their members participate.

Ms. Leong informed the Commissioners that she will share the Commission's feedback on the proposed legislation with the members of the Legislative Action Committee.

Budget and Finance  
Report – RERF:

No report was presented.

Next Meeting:

Friday, January 10, 2003  
10:30 a.m.  
Conference Room  
REALTORS Association of Maui  
441 Ala Makani Place  
Kahului, Maui

Adjournment:

With no further business to discuss, the Chair adjourned the meeting at 9:57 a.m.

Reviewed and approved by:

/s/ Calvin Kimura  
Calvin Kimura  
Supervising Executive Officer

January 10, 2003  
Date

[ X ] Approved as is.

[ ] Approved with amendments. See minutes of \_\_\_\_\_ meeting.