

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, January 12, 2005

Time: 9:00 a.m.

Place: Queen Liliuokalani Conference Room
King Kalakaua Building
335 Merchant Street, First Floor
Honolulu, Hawaii

Present: Iris Okawa, Chair, Public/Honolulu Commissioner
Louis Abrams, Vice Chair, Broker/Kauai Commissioner
Kathleen Kagawa, PhD, Broker/Honolulu Commissioner
Michele Sunahara Loudermilk, Public/Honolulu Commissioner
Trudy Nishihara, Broker/Honolulu Commissioner

Calvin Kimura, Supervising Executive Officer
Neil Fujitani, Executive Officer
Diane Choy Fujimura, Senior Real Estate Specialist
Cynthia Yee, Senior Condominium Specialist
Lorene Kimura, Real Estate Specialist
Ryan Yamashiro, Real Estate Specialist
Cheryl Leong, Condominium Specialist
David Grupen, Condominium Specialist
Shari Wong, Deputy Attorney General
Irene Kotaka, Secretary

Others: Karen Iwamoto, Hawaii Association of REALTORS®
Tom Gill, Hawaii Association of REALTORS®
Jerry Bangerter, Hawaii Association of REALTORS®
Mary Wong, Hawaii Association of REALTORS®
Stephanie Ripple, Honolulu Board of REALTORS®
Marsha Shimizu, Hawaii Association of REALTORS®
Loretta Toyama
James S. Dixon, Real Estate Recovery Fund Attorney

Absent: Carol Ball, Broker/Maui Commissioner
Mitchell Imanaka, Broker/Honolulu Commissioner
John Ohama, Broker/Honolulu Commissioner
Vern Yamanaka, Broker/Hawaii Island Commissioner

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

Chair's Report: The Chair wished everyone a "Happy New Year!" She expressed her hopes that this year would be even more productive than the last and

that the Commission continues to work in a cooperative spirit with those present.

SEO's Report:

The SEO reminded the Commissioners that since there were only five Commissioners present at the meeting, any vote that was not unanimous would not pass and would be deferred to the next meeting.

Additional Distribution

The following material was distributed to the Commissioners prior to the start of the meeting:

4. Program of Work, FY05
 - f. Legislative and Government Participation Report – News Release on the Governor's Legislative Proposals

Minutes of Previous Meetings

The Chair thanked Vice Chair Abrams for conducting a spirited discussion at the last meeting.

Upon a motion by Commissioner Abrams, seconded by Commissioner Kagawa, it was voted on and unanimously carried to accept the minutes of the December 8, 2004 Laws and Rules Review Committee meeting.

Program of Work, FY05:

Legislative and Government Participation Report

A copy of the news release relating to Governor Lingle's legislative proposals to support Hawaii's citizen soldiers was distributed to the Commissioners for their information.

A copy of the legislative timetable for 2005 was also distributed to the Commissioners for their information. A number of Commissioners will be testifying on the bills, and staff will need to be aware of their availability.

Discussion on the recodification of Chapter 514A, HRS, will continue during this legislative session.

The SEO also provided a brief summary of possible legislation that will be submitted for consideration.

License Renewal

Specialist Kimura reported that as of January 10, 2005, there were a total of 15,621 real estate licensees, 10,267 real estate salespersons and 5,354 real estate brokers, who have renewed their license. Approximately 18,000 renewal applications were mailed out.

There were 1,982 real estate brokers (37.02%) online and 4,441 real estate salespersons (43.26%) who renewed online. This is higher than the last renewal period.

Program of Work, FY05:

Subcommittee on Agency

Subcommittee Chair Abrams stated that after the last meeting, he had asked staff to look into the history of the original passing of the agency law. In a report on agency which was completed by John Reilly, consultant to the Commission on agency, in 1985, the issues were discussed and Mr. Reilly made a series of recommendations. A copy of Mr. Reilly's report was distributed to the Commissioners for their information. At that time, the Commission accepted some of Mr. Reilly's recommendations. Chapter 467, HRS, and Chapter 99, HAR, were amended based on those recommendations. In conjunction with the Hawaii Association of REALTORS® ("HAR"), educational programs and information were provided to the licensees.

Subcommittee Chair Abrams also asked staff for copies of other documents, reports and background information, which was provided to him on disk. The Commission has the following reports on agency:

- "Agency, Dual Agency, and Sub-Agency in Hawaii Real Estate Practice," October 1984, Research Marketing Systems, International
- "Agency Update," 1985, The National Association of Real Estate License Law Officials
- "Preliminary Report and Appendices," October 1984, The Agency/Subagency Study Committee of the National Association of Real Estate License Law Officials
- "FTC Staff Report on Residential Real Estate Brokerage," January 1981, Federal Trade Commission

In 1985, the Commission decided to partner with HAR in developing forms and standards for implementing the agency law.

Subcommittee Chair Abrams noted that at the last meeting, representatives from HAR had stated that the Commission did not have consultants to study the agency issue. Subcommittee Chair Abrams requested that copies of the reports be sent to HAR.

Mr. Reilly's report had included more than one option on how the Commission could proceed. Twenty years later, HAR is coming back and saying that the agency laws are not working and HAR is proposing a new agency structure. The Commission could consider the other options proposed by Mr. Reilly in his report, or if it felt that further examination into this issue was warranted, it could hire a consultant.

The Commission had directed staff to obtain comments from other individuals/organizations that may be affected by the changes to the law to see if they had any concerns. The Real Estate Recovery Fund attorney submitted his comments.

HAR has asked the Commission to provide comments on their proposed bill and are asking for the Commission's support. However, in its present form, the Commission may not be able to support the bill.

Chair Okawa stated that she would like to continue to work with HAR on this and continue to move forward.

Executive Session:

Upon a motion by Commissioner Nishihara, seconded by Commissioner Abrams, it was voted on and unanimously carried to enter into executive session, pursuant to Section 92-5(a) (4), HRS, "To consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities."

Upon a motion by Commissioner Kagawa, seconded by Commissioner Nishihara, it was voted on and unanimously carried to move out of executive session.

Program of Work, FY05:

Subcommittee on Agency

A copy of Colorado's law on brokerage relationships was distributed to the Commissioners for their information.

Commissioner Nishihara stated that she had attended a national job analysis meeting and had an opportunity to talk with Commissioners and educators from the State of Colorado, which was the first state to introduce the agency law. They are currently revisiting the issue because they are not sure that what was passed is working.

Chair Okawa also noted that the State of Colorado has single licensing.

As reported earlier this morning, there are approximately 15,600 licensees who have successfully renewed their license. Commissioner Loudermilk asked the representatives from HAR what percentage of the total licensee population was represented in the survey that allowed HAR to conclude that changes in the agency law were necessary.

Mr. Bangerter stated that HAR represents 8,400 licensees. They received input from their membership. When asked how many of its 8,400 members were concerned about the agency issue, Ms. Iwamoto and Mr. Bangerter both replied that they did not have that information available and they would get back to the Commission with the information.

Subcommittee Chair Abrams asked for a copy of the HAR survey. He was informed by Mr. Bangerter that if it were available, he could send a copy to the Commission. Subcommittee Chair Abrams also asked for copies of the current and proposed forms that discuss agency. Mr. Bangerter said that they have not proposed any new forms. Ms. Iwamoto stated that she had not forwarded any of the forms to the Commission as yet but could get it to the staff today. Ms. Shimizu stated that the forms could be downloaded from their website. Mr. Bangerter said that they will get the forms to the Commission.

Mr. Gill asked for clarification on whether or not the Commission was requesting HAR's forms only or if they wanted copies of the forms that some of the other real estate companies were using. Subcommittee Chair Abrams asked if they could provide the forms that the other companies use in addition to HAR's forms.

Subcommittee Chair Abrams stated that the information would be relevant in deciding if there is a need to change the law. The Commission needs to build a foundation to rationalize that it is a problem. RICO has said that agency issue is not a problem. However, HAR has talked about it being a prevalent problem at the grievance level but has not provided statistics to support their claims.

At the December 8th meeting, the Commission was informed that HAR was anticipating unveiling the proposed legislation to its members in a week. Chair Okawa asked if the bill had been circulated to their members. Mr. Bangerter stated that they had not gone out to their membership at this time. They will be disseminating the information to their members before the end of the month. The bill will be presented to the Legislature before receiving feedback from their members. Mr. Bangerter stated that HAR is still moving forward with changes and there will be many changes to the bill once the hearings are scheduled. The forms will be revised once the legislation has passed.

Subcommittee Chair Abrams reported that forms were prepared after the passage of the initial laws and rules on agency were adopted but there still appears to be a problem. He asked HAR if that meant that the practice was at fault.

Subcommittee Chair Abrams stated that the Commission needs to be convinced that if HAR is or will be working on more forms that it will do the job. Mr. Bangerter said that he didn't feel that the forms were at fault but that it was the de facto practice that was at fault.

The Commission wants to ensure that there is a practice that both parties understand. They do not feel that dual agency is communicated throughout the industry in a manner that is fair.

Mr. Bangerter was asked why HAR did not come up with a dual agency form in the past if they felt that it was a problem. Mr. Bangerter stated that he could not comment on the rationale or if there was any discussion on the issue.

Ms. Iwamoto stated that she did not recall a specific form on dual agency. They had asked individual companies to provide copies of their dual agency forms to them.

When asked if the discussion would have occurred in the Standard Forms Committee, the answer was "Yes."

Commissioner Loudermilk expressed her concerns that she was still not sure who the "we" was that made the decision that this was an issue that needed to be addressed. Is the "we" referring to the industry? To HAR? A smaller section of HAR? The Commission must look out for the licensees as a whole.

Mr. Bangerter said that HAR proposed the changes based on the survey that it conducted and information received from individuals throughout the industry. Mr. Bangerter also said that they do have people who are opposed to what was done. They have tried to come up with something that is fair to everyone. They lagged on getting the information out to their members.

Ms. Iwamoto added that the direction from the proposed legislation also came from HAR's Board of Directors. The results from the survey were that they should go ahead and make changes under the direction of the Board of Directors.

When asked how many people participated in the survey, it was reported that there were more than 200 but less than 1,000.

Mr. Bangerter said that the industry is undergoing tremendous changes. There are many licensees who are not members and who are participating in discount brokerage. They believe that since there have been so many changes, they have a responsibility to the clients and to the agents to get something tied down. There is a definite responsibility to perform the services for their clients so that both parties are aware of the situation. They do realize that the proposed bill is a difficult and comprehensive one. If the bill is scheduled for hearing, they hope to refine the bill along the way.

Commissioner Loudermilk said that she understands that it has been twenty years since the agency law was passed and that due to changes in practices HAR felt a need to address this issue before problems arose but it would not be beneficial to rush into making changes which would result in a complicated bill. She was concerned that the licensees, who may also be members of HAR, have not had an opportunity to review the bill.

Mr. Bangerter said that HAR researched this issue for three years before presenting the bill.

Ms. Wong stated that at the last meeting there was discussion on transaction brokerages. She said that she continues to believe that the Commission should not be establishing a principal/agent relationship by default. If the Commission desires to add a provision on the buyer/seller disclosure that is similar to the State of California, they would be willing to do so.

Ms. Wong pointed out that in Draft 3, a fiduciary relationship arises when the principal manifests consent to agency and the agent acts on the

principal's behalf. In consideration of this and case law, it would be a mistake to say that the relationship can be entered into by default.

Commissioner Nishihara asked if there were any hard facts to support justifying a law change on agency. Is the number of complaints filed with RICO increasing in this area? Is the number of standards of conduct violations increasing? Is there an increasing trend of violations that would justify a law change?

Ms. Iwamoto stated that when the original meeting with Jo Ann Uchida of RICO and the Commission was held, Ms. Uchida indicated that they did not have enough information to indicate that there is a problem. However, the Honolulu Board of REALTORS has a Mediation/Grievance Committee in which the cases may be settled before it rises to the level of a RICO complaint.

Subcommittee Chair Abrams stated that until more information is received to justify the need for the proposed changes, he does not feel that the Commission is able to support the bill at this time. However, he would like to continue to work on this issue to see if they can come up with something that can benefit the consumer and the licensees.

Upon a motion by Commissioner Abrams, seconded by Commissioner Loudermilk, it was voted on and unanimously carried to recommend that the Commission not support the Hawaii Association of REALTORS[®] proposed legislation in its present form. However, the Commission is supportive in its efforts to continue discussion on this important topic and its efforts to protect the consumers.

Chair Okawa stated that she appreciates the many years of work that was put into this issue. She stated that there are many who have been touched by the agency issue and she would like to receive the answers to the questions that were raised at the December meeting and at today's meeting. She would also like to continue to work with HAR in resolving this issue.

Mr. Bangerter thanked the Commission and stated that they will continue to work with the Commission on this. They will get the information that was requested by the Commission to the staff by today. He also requested that Ms. Iwamoto be contacted if more information was needed.

Chair Okawa stated that this year the Commission would like to see the condominium recodification bill to its conclusion. She also hopes to be able to continue to work with HAR on the recodification bill.

Subcommittee Chair Abrams asked if HAR had an opportunity to review Mr. Reilly's report. Mr. Bangerter responded that he had not, but he would be happy to accept the offer to review the report.

Chair Okawa also noted that the Commission needs to consider what impact any changes would have on the Real Estate Recovery fund.

Mr. Bangerter stated that they recognize that laws have unintended consequences. He also stated that HAR supports the Commission in the recodification of Chapter 514A, HRS.

Budget and
Finance Report:

Real Estate Recovery Fund Report

Upon a motion by Commissioner Nishihara, seconded by Commissioner Abrams, it was voted on and unanimously carried to recommend acceptance of the Real Estate Recovery Fund Report, dated December 16, 2004, for the period ending September 30, 2004.

Open Forum:

There were no participants for the Open Forum.

Next Meeting:

Wednesday, February 9, 2005
9:00 a.m.
Queen Liliuokalani Conference Room
King Kalakaua Building
335 Merchant Street, First Floor
Honolulu, Hawaii

Adjournment:

With no further business to discuss, the Chair adjourned the meeting at 10:48 a.m.

Reviewed and approved by:

/s/ Calvin Kimura
Calvin Kimura
Supervising Executive Officer

February 9, 2005
Date

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