

LAWS AND RULES REVIEW COMMITTEE
REAL ESTATE COMMISSION
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, October 7, 2015

Time: 9:00 a.m.

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

Present: Scott Arakaki, Chair, Public / Honolulu Commissioner
Laurie Lee, Vice Chair, Broker / Honolulu Commissioner
Rowena Cobb, Broker / Kauai Commissioner
Nikki Senter, Public / Honolulu Commissioner
Aleta Klein, Broker / Honolulu Commissioner
Bruce Faulkner, Broker / Maui Commissioner – late arrival
Scott Sherley, Broker / Hawaii Commissioner – late arrival
Aileen Wada, Broker / Honolulu Commissioner – late arrival

Neil Fujitani, Supervising Executive Officer
Miles Ino, Executive Officer
Diane Choy Fujimura, Senior Real Estate Specialist
Amy Endo, Real Estate Specialist
David Grupen, Real Estate Specialist
Cynthia Yee, Senior Condominium Specialist
Dathan Choy, Condominium Specialist
Shari Wong, Deputy Attorney General
Tammy Norton, Recording Secretary

Others: John Dotten, Lowell D. Funk, Inc.
Myoung Oh, Hawaii Association of REALTORS®
Marsha Shimizu, Hawaii Association of REALTORS®
Harold Berman

Absent: Michael Pang, Broker / Honolulu Commissioner

Call to Order: The Chair called the meeting to order at 9:11 a.m., at which time quorum was established. The Chair noted that due to the freeway closure this morning, traffic is bad and commissioners not yet present have notified staff that they are en route to the meeting.

Chair's Report: The Chair announced that the Commission may move into executive session to consider and evaluate personal information relating to individuals applying for licensure in accordance with Section 92-5(a)(1), HRS, and/or to consult with the Commission's attorney on questions and issues pertaining to the Commission's powers, duties, privileges, immunities, and liabilities in accordance with Section 92-5(a)(4), HRS.

Commissioner Pang was excused from today's meeting. Prior notice of his non-attendance was received.

SEO's Report: **Minutes of Previous Meetings**

Upon a motion by Commissioner Klein, seconded by Commissioner Lee, it was voted on and unanimously carried to accept the minutes of the September 4, 2015, Laws and Rules Review Committee meeting as circulated.

Program of Work: **Rulemaking, Chapter 99, HAR, Real Estate Brokers and Salespersons**

SEO Fujitani provided an update on the status of the rules. The rules were sent to the Directors Office through the Division. REB staff was notified that the Director's Office staff walked the rules over to the Governor's Office last week and it is currently awaiting his signature. The Governor is currently on a trip to China and is expected to return on October 14th.

Myoung Oh of the Hawaii Association of REALTORS® was present. Mr. Oh stated that HAR was informed that the rules were delivered to the Governor's Office on Friday, October 2. HAR did submit a letter to the Governor dated October 1, 2015 requesting that the rules be held. HAR is not trying to stifle or kill the rules, but to hold them to get more guidance from the Real Estate Commission on advertising regulations. HAR has researched 15 other random jurisdictions and of the 15, only California requires license numbers on advertising. HAR feels that it is an over expansive implication on what is and is not required.

Commissioner Faulkner arrives at 9:15 a.m.

Mr. Oh stated that HAR would like the Commission to come out with an advisory bulletin or notice that is not too onerous.

EO Ino informed Mr. Oh that any change to the proposed rules at this step would require the Commission to start from step one again. He further noted that the Commission held two public hearings and had a hearing with the Small Business Regulatory Review Board, at which time none of the issues were raised and that HAR appeared at the hearing in support.

Deputy Attorney General Wong questioned what HAR means by to "hold" the rules?

Mr. Oh responded that HAR has requested a meeting with the Governor before he signs the rules to express their concerns.

Chair Arakaki questioned when HAR discovered the issue.

Mr. Oh responded that approximately 1-1/2 to 2 months ago the issue was raised to HAR by a principal broker. It was an oversight on HAR's part.

Commissioner Cobb noted that the rules have been in the making for approximately 3 years, why is this issue only being raised now.

Again, Mr. Oh responded, that it was an oversight on HAR's part.

Deputy Attorney General Wong questioned Mr. Oh that once HAR meets with the Governor to express their concerns, they will then not hold up the signing of the rules?

Mr. Oh responded that it is not HAR's intent to kill the rules.

Commissioner Wada arrives at 9:24 a.m.

Commissioner Klein noted that the letter which HAR sent to the Governor states in part, "the current proposed rules are overly broad and have created several harmful consequences . . ." Commissioner Klein asked Mr. Oh to explain what was meant by the words "harmful consequences" as stated in the HAR letter.

Mr. Oh responded that to his knowledge, in all advertising, the license number is required to be included on practically everything which could include marketing and branding.

Commissioner Klein inquired if "harmful consequences" meant financially harmful as opposed to physically harmful.

Mr. Oh responded primarily financially harmful consequences.

Commissioner Klein asked if the "primarily financial consequences" Mr. Oh was referring to was the addition of 7 digits to forms of advertising.

Mr. Oh responded that there are no clear guidelines on what license numbers will be required to be placed on. If the Commission wants it to be on everything relating to advertising, then they should say so.

Commissioner Klein sympathized with the frustration over changes to the rules and acknowledged that sometimes adjusting to change can be difficult.

Commissioner Faulkner noted that on page 2, paragraph 4 of the October 1st letter to the Governor, it states in part that "Imposing a license number upon such an office sign may violate the integrity of the service mark . . .", how does it violate the integrity of the service mark?

Commissioner Sherley arrives at 9:27 a.m.

Mr. Oh responded as an example, larger brokerage companies have special regulated logos, altering them could be an issue and could possibly raise legal issues.

Commissioner Faulkner questioned how other jurisdictions handle this issue.

Mr. Oh responded that of the 15 random jurisdictions researched, California defines solicitation materials. The current proposed rules have no clear guidance if it applies to everything. HAR is seeking the Commission's direction.

EO Ino questioned how many members raised the complaint.

Mr. Oh responded that HAR's Governance and Executive Committee voted unanimously on behalf of its members to send the request to the Governor to hold the proposed rules.

Commissioner Senter stated that she is unclear what HAR is requesting from the Commission if not to completely hold and revise the current proposed rules. The Commission is really getting mixed messages. If the Commission were to amend the current proposed rules at this point, we would need to start again from step 1 after 3 years of work for the whole set of rules. She further noted that the Commission did not deny HAR's request for a non-binding interpretation of the proposed rules Chapter 99, which is pending and while that is still in process, HAR is now stating that the informal non-binding interpretation would hold no weight. She further questioned, what is an advisory opinion? HAR came in for an informal non-binding interpretation and the Commission was doing its due diligence on the issue before responding and cooperating with the request, then HAR took its issue to the Governor in a request to hold the rules.

SEO Fujitani questioned if HAR's intent to meet with the Governor is to have the Commission come out with an amendment to the proposed rules?

Mr. Oh responded that the Governor could sign the rules any day, HAR wants the opportunity to express their concern and bring clarity to the issue. HAR would ask for an advisory or something to address a more fair and balanced issue with advertising, no matter what the form.

Commissioner Cobb informed Mr. Oh that the Governor has no power at this time to make any changes to the proposed rules before him. The Governor's option if choosing not to sign the rules would be to send it back to the Commission, which would require the Commission to start from step 1 in making any amendments.

Deputy Attorney General Wong asked Mr. Oh if HAR's "hold" of the rules is only until HAR has the opportunity to express its concerns with the Governor and that their intent is not to stifle the rules and that the rules will proceed to signing. And that HAR is looking for a middle ground or guidance that can occur after the rules go into effect?

Mr. Oh responded in the affirmative, and noted that HAR is generally hoping that the two can be accomplished simultaneously.

Commissioner Klein stated that to her knowledge the Rules need to be enacted first before the REC can review various requests for clarification and or elaboration.

Commissioner Senter stated that she is unsure what HAR's objective is. The informal non-binding interpretation would be appropriate and is in process. She is unsure what an advisory bulletin is.

Commissioner Arakaki noted that HAR plays an important role with the Real Estate Commission and its rulemaking efforts. The October 1st letter to the Governor lacks context that HAR was working with the Commission. It seems to suggest that the Commission is pushing administrative rules against the industry which it is not.

The Committee acknowledged Mr. Oh as the representative of HAR and thanked him for his willingness to speak to the Committee on the issue raised by HAR in their letter to the Governor.

ARELLO, Other Organizations And Jurisdictions: The following articles from the August 2015 issue of ARELLO Boundaries were distributed for informational purposes: "California Supreme Court to Consider Scope of Dual Agency;" and "Montana Bill Defines 'Property Manager', Clarifies Scope of Licensing Laws."

Special Issues: None raised.

Budget and Finance Report: Upon a motion by Commissioner Faulkner, seconded by Commissioner Wada, it was voted on and unanimously carried to accept the Real Estate Recovery Fund Financial Report for the period ending June 30, 2015.

Executive Session: Upon a motion by Commissioner Klein, seconded by Commissioner Wada, 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 Sherley, seconded by Commissioner Cobb, it was voted on and unanimously carried to move out of executive session.

Program of Work: **Rulemaking, Chapter 99, HAR, Real Estate Brokers and Salespersons**

Chair Arakaki called for a motion to write a letter to the Governor in response to the Hawaii Association of REALTORS® letter dated October 1, 2015 to hold the present amended rules. The letter should include a factual background of the department's rulemaking process followed, its work with HAR on the rules, HAR's pending request for an informal non-binding interpretation and that the rules in general protect the consumer. Commissioner Faulkner made the motion, Commissioner Klein seconded the motion. The motion was voted on and unanimously carried.

Next Meeting: Tuesday, November 10, 2015
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 10:40 a.m.

Reviewed and approved by:

/s/ Neil K. Fujitani

Neil K. Fujitani
Supervising Executive Officer

October 14, 2015

Date

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