

MINUTES

Texas Real Estate Commission

April 25, 2005

Texas Real Estate Commission

Room 235, 1101 Camino La Costa

Austin, Texas

Chairman John Walton called the regularly scheduled meeting of the Texas Real Estate Commission to order at 9:00 a.m., Monday, April 25, 2005. In addition to Chairman Walton, members present were Larry Jokl, Louise Hull, Mary Frances Burleson, James Austin, and Elizabeth Leal. William Flores arrived at 9:12 a.m. and Paul Jordan arrived at 9:25 a.m. Ramon Cantu was absent.

Staff present were: Wayne Thorburn, Administrator; Sabrina Hassumani, Assistant Administrator; Loretta DeHay, General Counsel; Linda Bayless, Director of Enforcement; Alan Waters, Director of Staff Services; and Tom Watson, Director of Information Services.

Commissioner Hull led the attendees in the pledge of allegiance.

Chairman Walton called for agenda item two, minutes of February 21, 2005, Commission meeting. Mr. Jokl, seconded by Ms. Leal, moved to approve the minutes as written. The motion was adopted by unanimous vote.

The Chairman moved to agenda item three, recognition of and moment of silence for former Commissioner Pete Cantu who passed away recently.

Mr. Walton moved to agenda item four, recognition of Austin area licensees with 50 or more years of licensure. Resolutions from TREC and a congratulatory letter from State Senator Gonzalo Barrientos were presented to Odie Edward Ainsworth, Donald Hugh Cummins, Edward Francis Hamel, Nelson Oliver Roberts, and Sterling Joseph Sasser. Sidney Stewart Smith was not present.

The Chairman moved to agenda item five, executive session to discuss pending litigation pursuant to Texas Government Code §551.071: and, if necessary, to receive legal advice from general counsel on posted agenda items under Texas Government Code, §551.071. Executive session began at 9:14 a.m. The meeting was called to order at 10:15 a.m.

Chairman Walton moved to agenda item six(a), discussion and possible action on 22 TAC §535.2, concerning broker responsibility. Ms. DeHay presented the proposed rule and explained what each subsection would do. Approximately three hundred

eighty comments have been received. Subsection (d) of the amendments further defines the term "negotiate" used in subsection (b) of the existing rule which provides that a "broker is obligated under a listing contract to negotiate the best possible transaction for the principal, the person the broker has agreed to represent." Under subsection (d), in negotiating for a client, a licensee is required to accept and present offers, answer the client's questions, and help the client fill out forms, contracts, and notices.

Subsection (e) provides clarification regarding §1101.652(b)(22) of the Government Code, which prohibits a licensee from negotiating or attempting to negotiate a real estate transaction with a person with knowledge that the person is a party to an outstanding exclusive agency agreement with another broker in connection with the transaction, and §1101.652(b)(27), which prohibits a licensee from aiding or abetting in a violation of the Act. Subsection (e) clarifies that a licensee may not instruct a licensee who represents another client to negotiate with a represented client directly and restates the statutory provisions.

Subsection (f) provides an exception to negotiation for delivery of an offer or counter offer. Delivery of an offer or counter offer is not considered negotiation if the party's broker consents to the delivery and the other broker does not attempt to discuss the terms of the offer or counter offer with the other party.

In 2002, the Texas Association of REALTORS® recommended that TREC adopt a rule which required that a broker must provide at a minimum, the three services described above. TREC adopted a rule, but repealed it after a lawsuit was filed which challenged, among other things, TREC's statutory authority to adopt the rule.

The Chairman asked for comments from the audience.

Lance Lacy, Chairman of the Texas Association of Realtors, spoke in favor of adopting the rule. Mr. Lacy introduced Daryl Anderson of Fulbright and Jaworski, who had been retained by TAR to look at the proposed amendment from an anti-trust point of view. Mr. Anderson explained why he and his firm did not consider the rule amendment to be anti-competitive or in violation of Federal law. He spoke concerning the letter that TREC had received from the Federal Trade Commission and the Department of Justice urging TREC to withdraw the amendment. Mr. Lacy spoke again, concerning TAR's reasons for urging the Commissioners to vote to adopt the rule.

Don Walden, attorney for Aaron Farmer of Texas Discount Realty, spoke concerning his client's position against adopting the rule amendment.

Bob Hale, CEO of the Houston Association of Realtors, stated why HAR endorsed adopting the amendments to §535.2.

Earl Hoppenrath, Intown Properties-Dallas, and Tom Terrell, a broker and real estate instructor from Grapevine, spoke against adopting the amendment. Peter Squier, a real estate investor, spoke against adopting the amendment.

Comments were offered by Don Walden concerning the rule compared to the law.

Michelle Angelides, Lock & Key Realty; Jack McLamore, and Aaron Farmer offered comments against adopting the amendment.

Ron Walker, legal counsel for the Texas Association of Realtors, spoke in favor of adopting the amendment.

Tom Terrell offered comments concerning a seller's right to contract and that he saw this rule as interference to that right.

Alan Austin asked the Commission to remember the consumer and whether this rule serves the consumer.

After discussion, Ms. Leal, seconded by Mr. Jokl, moved to postpone any further action on the rule until the June meeting.

Mr. Flores, seconded by Mr. Jordan, proposed an amendment to the motion which would change "postpone" to "withdraw." Mr. Jordan stated that he was concerned about the amount of time that would pass if the Commission requested an Attorney General's Opinion on the anti-trust issues. He felt that it may be more prudent to withdraw the rule because of the timing issues. There was discussion concerning whether or not there had to be a set date on the motion to postpone. Ms. Leal and Ms. Hull both spoke against the amendment to the motion. Mr. Flores spoke in favor of his amendment. Mr. Walton called for a vote on the amendment to the motion. Mr. Flores and Mr. Jordan voted in favor of the amendment. Mr. Jokl, Mr. Austin, Ms. Burleson, Ms. Hull and Ms. Leal voted against the amendment. The amendment to the motion failed.

Chairman Walton called for a vote on the motion to postpone action on §535.2 to the June meeting. Ms. Hull spoke against the motion to postpone. Mr. Jordan spoke for the motion to postpone. Ms. Leal spoke in favor of the motion. Mr. Austin stated that he would support postponing further action. Mr. Flores spoke about the rule-making process. After discussion, Ms. Hull and Ms. Burleson voted against the motion. Mr. Jokl, Mr. Austin, Mr. Jordan, Ms. Leal and Mr. Flores voted for the motion to postpone further action on 22 TAC §535.2 until the June meeting. The motion was adopted.

Mr. Jokl, seconded by Mr. Flores, moved to ask the Chairman to appoint a committee to further study this issue. It would be chaired by a member of the commission and would include the general counsel for TREC and other persons interested in the issue with no more than seven members. He moved that members of the committee include TAR legal counsel, a representative from the Federal Trade Commission, a representative from the Texas AG's Office, a limited service broker, and members from the public sector. This committee would be asked to report to the Chairman by the June meeting.

Ms. Hull and Ms. Leal spoke against the motion. Mr. Jokl, Mr. Jordan and Mr. Flores voted for the motion. Mr. Austin, Ms. Burleson, Ms. Hull and Ms. Leal voted against the motion. The motion failed.

Mr. Flores, seconded by Mr. Jordan, moved to pass a resolution to urge the Legislature to consider taking action to revise §1101.652(b), Texas Occupations Code, to clarify it in light of the new real estate business models in operation today.

After discussion, Mr. Flores, Ms. Hull, Ms. Burleson, Mr. Jordan, Mr. Austin and Mr. Jokl voted for the motion. Ms. Leal voted against the motion. The motion was adopted.

Mr. Flores, seconded by Mr. Jordan, moved to direct staff to draft a disclosure notice that would make the consumer aware of what services they were receiving under a limited service listing agreement. Ms. DeHay stated that such a document could be drafted, but until 22 TAC §535.2 is adopted or withdrawn no action can be taken to make this a part of the rule. Mr. Flores, Ms. Burleson, Mr. Jordan, Mr. Austin and Mr. Jokl voted for the motion. Ms. Hull and Ms. Leal voted against the motion. The motion was adopted.

Mr. Jordan, seconded by Mr. Flores, moved to request a Texas Attorney General's Opinion responding to all the points in the Department of Justice's letter. The motion was adopted by unanimous vote.

Chairman Walton announced a break from 12:20 p.m.-12:34 p.m.

Mr. Walton called for agenda item 6(b)-(f). Ms. DeHay presented agenda item 6(b) for discussion and possible action to adopt amendments to 22 TAC Chapter 534 by adding §534.3 concerning employee training and education. The purpose of the rule is to comply with Texas Government Code §§656.041-656.049, which requires that state agencies adopt rules addressing employee training and education. Mr. Jokl, seconded by Mr. Jordan, moved to adopt the amendment as proposed. The motion was adopted by unanimous vote.

Ms. DeHay presented agenda item 6(c) for discussion and possible action to adopt amendments to 22 TAC Chapter 534 by adding §534.4 concerning historically underutilized businesses. The purpose of the rule is to comply with Texas Government Code §2161.003. Section 2161.003 of the Government Code requires the Commission to adopt the Building and Procurement Commission's rules on Historically Underutilized Businesses. Mr. Jordan, seconded by Mr. Flores, moved to adopt the amendment as proposed. The motion was adopted by unanimous vote.

Ms. DeHay presented agenda item 6(d) for discussion and possible action to adopt amendments to 22 TAC Chapter 534 by adding §534.5 concerning bid opening and tabulation. The purpose of the rule is to comply with Texas Government Code §2156.005. Section 2156.005 of the Government Code requires the Commission to adopt the Building and Procurement Commission's rules on Bid Opening and Tabulation. Mr. Jokl, seconded by Mr. Flores, moved to adopt the amendment as proposed. The motion was adopted by unanimous vote.

Ms. DeHay presented agenda item 6(e) for discussion and possible action to adopt amendments to 22 TAC Chapter 534 by adding §534.6 concerning negotiation and mediation of certain contract disputes. The purpose of the rule is to comply with Texas Government Code §2260.052. Section 2260.052 of the Government Code authorizes the Commission to adopt the Office of the Attorney General's rules on negotiation and mediation of certain contracts. Ms. Burleson, seconded by Mr. Flores, moved to adopt the amendment as proposed. The motion was adopted by unanimous vote.

Ms. DeHay presented agenda item 6(f) for discussion and possible action to adopt amendments to 22 TAC Chapter 534 by adding §534.7 concerning vendor protest procedures. The purpose of the rule is to comply with Texas Government Code §2155.076. Section 2155.076 of the Government Code requires that the agency's rules for vendor protest procedures must be consistent with rules adopted by the Building and Procurement Commission. Mr. Flores, seconded by Mr. Jokl, moved to adopt the amendment as proposed. The motion was adopted by unanimous vote.

Mr. Walton moved to agenda item seven(a)-(d).

Ms. DeHay presented agenda item 7(a) for discussion and possible action to propose amendments to 22 TAC §535.51 regarding general requirements. The amendment revises subsection (c)(6) of the rule to clarify that an education evaluation must be obtained within one year of the date of application for a license.

Ms. Leal, seconded by Mr. Flores, moved to propose the amendment as submitted by staff. The motion was adopted by unanimous vote.

Ms. DeHay presented agenda item 7(b) for discussion and possible action to propose amendments to 22 TAC §535.71 concerning mandatory continuing education: approval of providers, courses and instructors. The amendment revises subsection (d)(11) of §535.71 which adopts by reference MCE Form 14- 1, Individual MCE Partial Credit Request Form. The Commission proposes to revise the verification on the form to parallel existing language in §535.72(b)(1)(E). Under this subsection, an education provider must sign the partial credit request form as evidence that the provider has no reason to believe the amount of credit claimed is inaccurate. In addition, the amendment adds new subsection (hh) to allow accredited colleges and universities, and professional trade associations that are otherwise approved MCE providers, to use experts from other related fields, including those from outside Texas, to teach an MCE elective course without first registering as a commission-approved instructor. At the same time, the MCE elective course must be approved in advance by the Commission before any MCE elective credit would be authorized. Finally, a commission-approved instructor would be responsible for supervising and coordinating the course, and would also be responsible for verifying the attendance of those who request MCE elective credit. Ms. Leal, seconded by Mr. Flores, moved to propose the amendment as submitted by staff. The motion was adopted by unanimous vote.

Ms. DeHay presented agenda item 7(c) for discussion and possible action to propose amendments to 22 TAC §535.121 regarding inactive licenses. The amendment revises subsection (b) to clarify that a broker may notify the Commission that sponsorship of a salesperson has ended by either sending the license or a copy of the license to the Commission, or otherwise notifying the Commission that sponsorship has ended. Brokers may use an existing TREC form, Notice of Salesperson Sponsorship Termination, to notify the Commission that sponsorship has terminated. Mr. Austin, seconded by Ms. Leal, moved to propose the amendment as submitted by staff. The motion was adopted by unanimous vote.

Ms. DeHay presented agenda item 7(d) for discussion and possible action to propose amendments to 22 TAC §535.220 concerning professional conduct and ethics for inspectors. The Real Estate Inspector Committee recommended that the Commission revise the real estate inspector professional conduct and ethics provisions to prohibit contingency arrangements in cases where compensation

depends on specific findings or on closing or settlement; to prohibit an inspector from paying a fee to any person for referral of inspections; to prohibit an inspector from receiving an undisclosed fee for an inspection from more than one party without the consent of the inspector's client; to prohibit an inspector from accepting a fee for recommending services or products to the inspector's client or other parties with an interest in the inspected property; to prohibit an inspector from conducting repair for a fee of any systems or components of property covered by the Standards of Practice on which the inspector has performed an inspection under an earnest money contract, lease, or exchange of real property within 12 months of the date of the inspection; to require that inspectors perform services and provide opinions based only on areas in which they are educated, trained, or have experience; and to prohibit an inspector from disclosing inspection results or client information without prior approval from the client, except for observed immediate safety hazards to occupants exposed to such hazards. Mr. Walton asked for comments on this rule.

John Cahill, Texas Real Estate Inspector Committee and Chairman of the Ethics Subcommittee, spoke concerning the background of the rule amendments. There was discussion concerning the posting schedule for the rules. Mr. Cahill answered questions from the Commissioners.

Andrew Kasznay, American Society of Home Inspectors (ASHI), spoke in favor of proposing the rule.

David Poisson, executive director and general counsel of the American Home Inspection Association (AHIA), spoke against subsections (e)(2)-(5), but said he had no objections to the other sections of the amendment. There was discussion concerning Mr. Poisson's comment.

Brian Murphy, president of the Texas Association of Real Estate Inspectors, stated that TAREI proposed the similar rules to its membership and the proposal was voted down in a general election. After discussion, he suggested that subsections (e)(2)-(4) be removed from the proposal.

Everett Rawlings, National Association of Home Inspectors, spoke concerning NAHI's code of ethics as they compared to the proposed rules.

Larry Foster, Texas Real Estate Inspector Committee (TREIC), spoke in favor of posting the proposed rule for comment.

Mike Crow, a former member of TREIC, spoke against the need for the amendments to §535.220.

Alan Austin, Diligent Inspections, spoke in favor of proposing the amendments. Fred Wilcox and Fred Buck, former members of the Texas TREIC, spoke in favor of proposing the amendments. John Cahill, TREIC member, spoke in favor of proposing the amendments and commented on various comments received from others. Mr. Flores, seconded by Mr. Austin, moved to propose the amendment as submitted by staff. The motion was adopted by unanimous vote.

The Chairman moved to agenda item eight, discussion and possible action to propose the repeal of §535.217 concerning dishonest conduct as grounds for disciplinary action. Ms. DeHay presented the item for discussion and possible action. The repeal is proposed because the subjects addressed in these sections will be covered in the new proposed revisions to §535.220 TREC is simultaneously proposing as part of the Real Estate Inspector Committee recommendations regarding Professional Conduct and Ethics. As the new subsections will comprehensively address the subjects of the proposed repealed rules as well as implement the recommendations, repeal of the rules is necessary to avoid confusion and repetition. Mr. Flores, seconded by Ms. Hull, moved to propose the repeal of §535.217 as submitted by staff. The motion was adopted by unanimous vote.

Mr. Walton moved to agenda item nine, discussion and possible action to propose review of Chapter 539 concerning provisions of The Residential Service Company Act (§§539.31-53.231). Mr. Jokl, seconded by Mr. Jordan, moved to propose the review of Chapter 539 as submitted by staff. The motion was adopted by unanimous vote. Mr. Austin left the meeting at 1:15 p.m.

The Chairman moved to agenda item ten, discussion and possible action to appoint three members of the Texas Real Estate Inspector Committee. Mr. Jokl, the selection committee chair, stated that the committee had selected three nominees: Phillip Stojanik, Russell Strahan, and Richard Alan Whitsitt.

Mr. Jokl nominated Phillip Stojanik for position number one. Mr. Stojanik was elected to fill position one by unanimous vote.

Mr. Jokl nominated Russell Strahan for position two. Mr. Flores nominated Curtis Carr for position two. Ms. Burleson, Ms. Hull, Mr. Jokl, Mr. Jordan and Ms. Leal voted for Russell Strahan. Mr. Flores voted for Curtis Carr. Mr. Strahan was elected to fill position two.

Mr. Jokl nominated Richard Whitsitt, Mr. Flores nominated Curtis Carr and Ms. Leal nominated Mark Eberwine for position three. Mr. Jokl abstained. Ms. Hull voted for Mr. Whitsitt. Mr. Jordan, Mr. Flores and Ms. Burleson voted for Mr. Carr. Mr. Carr was

elected by a majority vote.

Chairman Walton moved to agenda item eleven, discussion about requiring a disclosure statement to implement amendments to §535.2 requiring broker minimum services. Ms. DeHay explained that since this item had been discussed during the discussion on agenda item 6(a), no further action was needed. Mr. Farmer spoke concerning a possible disclosure form. No action was taken on this item.

The Chairman moved to agenda item twelve, legislative update. Mr. Thorburn stated that the housekeeping bill has passed the Senate and was in the Licensing and Administrative Procedures subcommittee in the House. The Timeshare bill has passed the House and is in the Business and Commerce subcommittee in the Senate. The Appropriations Conference Committee would be holding a hearing on Article VIII (Regulatory Agencies) on April 26 and he and Ms. Hassumani would be attending that meeting.

Mr. Walton moved to agenda item thirteen, discussion and possible action to approve training for investment officers pursuant to Public Funds Investment Act, Texas Government Code, §2256.007 (d). Mr. Waters presented the item for discussion and possible action. Mr. Flores, seconded by Ms. Leal, moved to approve the training source as requested. The motion was adopted by unanimous vote.

Chairman Walton moved to agenda item fourteen, discussion and possible action to authorize payments from recovery funds or other action on items considered in executive session. Ms. DeHay presented the following recovery fund claims for possible action:

RF05-003, Diane Henry v. Mark Frakes, in the amount of \$3,000 in actual damages and \$10,000 in attorney fees. Mr. Jordan, seconded by Ms. Hull, moved to approve payment. The motion was adopted by unanimous vote.

RF04-002, Alicia Reyes v. Audrey Hairston, in the amount of \$5,000 in actual damages. Ms. Hull, seconded by Ms. Leal, moved to approve payment. The motion was adopted by unanimous vote.

RF05-007, Alan McKeown v. Cynthia Callaway, in the amount of \$21,000 in actual damages and \$11,000 in attorney fees. Ms. Hull, seconded by Ms. Leal, moved to approve payment. The motion was adopted by unanimous vote.

IRF05-001, Rachel Hackett v. Joseph Holmes, in the amount of \$8,000 in actual damages and \$4,500 in attorney fees. Mr. Jokl, seconded by Ms. Hull, moved to approve payment. The motion was adopted by unanimous vote.

IRF05-002, Lex Gillian v. Russell Sykes, in the amount of \$7,500 in actual damages. Mr. Jokl, seconded by Ms. Hull, moved to approve payment. The motion was adopted by unanimous vote.

The Chairman moved to agenda item fifteen, staff reports; committee reports. Sabrina Hassumani, Assistant Administrator, presented the reports for the education, licensing and communications departments. She referred to the L1 report which showed increases of eighteen percent in original applications. She reported that the number of education evaluations had increased to over double the amount at this time last year and that the L2 report showed a total of over 136,000 licensees and registrants. On the L3, 20,621 exams have been administered since September 2004.

Linda Bayless, Director of Enforcement, presented the reports for the Enforcement Division. She reported that at the end of February there was a total of 870 complaints open.

Mr. Thorburn asked Ms. Hassumani to introduce her two new employees, Elisa Macias in Education and Stephanie McClinton in Communications.

Tom Watson, Director of Information Services, reported that online applications were at 62.8% and online renewals were at 28%.

Alan Waters, Director of Staff Services, reported on the Recovery Trust Fund Accounts. There was discussion concerning how encumbered expenses were shown on the reports.

Mr. Thorburn, Administrator, reported on the RSC Status Report, the Timeshare Status Report and the new Approved Instructors Report.

The Chairman moved to agenda item seventeen, consideration of complaint information.

Ms. Bayless requested authorization to initiate an investigation on Shaun Keely Wilson for failure to provide information requested by the Commission in connection with the renewal of a real estate salesperson license in violation of Section 1101.656

of the Texas Occupations Code. Ms. Leal, seconded by Ms. Burleson, moved to authorize the investigation as requested. The motion was granted by unanimous vote.

Ms. Bayless requested authorization to initiate investigations on Gregory Alvis Williams, Denise Cox Delay, Gregory Dean Parker and Kenneth Dale Young for failing to complete their Mandatory Continuing Education (MCE) hours and pay the \$200 fee needed to renew a license within the time required by 22 TAC §535.92(f). Ms. Burleson, seconded by Mr. Jokl, moved to authorize the investigations as requested. The motion was granted by unanimous vote.

Chairman Walton moved to agenda item eighteen, motion for rehearing, modification or probation in the matter of Debra J. Lauhon, Hearing No. 05-142-050621. Ms. Bayless stated that Ms. Lauhon had withdrawn her motion.

Mr. Walton moved to agenda item nineteen, entry of orders in contested cases. No orders were presented.

The Chairman moved to agenda item twenty, scheduling future meetings and adjournment. The next meetings were scheduled for June 13, 2005 and tentatively for August 15, 2005 in Austin. The Chairman adjourned the meeting at 2:35 p.m.

APPROVED this the 13th day of June, A.D. 2005.

John Walton
Chairman

ATTEST: _____

Wayne Thorburn
Administrator