

EXHIBIT A

Minutes

Regular Meeting

Standard Forms Committee

9:30 a.m.-3:30 p.m., Thursday, July 7, 2022

Via Zoom



A regular meeting of the Standard Forms Committee of the Hawai'i Association of REALTORS® (HAR) was convened on Thursday, July 7, 2022 at 9:33 a.m. The following voting members were in attendance when the meeting convened: Chair Dusty Woodstock, Ayako Ancheta, Carol Cummings, Frank Goodale, Berton Hamamoto, Laura Awana Lewis, Lovette Llantos, Phoebe Nikolakakis, and Patrick W O'Neill.

Call to Order

Also present when the meeting convened were: Julie Meier, leadership team liaison to the association's board of directors, Nancy Donahue-Jones, HAR's executive director, Ethel Keyes, HAR's director of member services, and Jason E. Korta, HAR's staff attorney.

A. Prior Meeting Minutes

The committee reviewed draft minutes of its regular meeting on June 23, 2022. After discussing the draft, the committee offered a motion to adopt it.

The committee adopted a motion approving the minutes of its regular meeting on June 23, 2022 (Exhibit A).

Administrative Matters

B. Supporting Documents

Committee members were directed to the Standard Form Revision Schedule. They learned that the revision schedule had been revised to reflect the committee's decisions and conduct at

its last meeting and that it would be revised, again, to reflect the decisions made and conduct undertaken at this meeting.

Referring to section 3.2 of the association's *Drafting and Editing Standard Form Contracts* (HAR 2022), the committee weighed its use of the word *shall*. The committee noted that Black's Law Dictionary, the legal world's canonical definitional text, finds that *shall* has five different meanings:

1. Has a duty to . . . <the requester shall send notice> . . .
- . . . 2. Should . . . <all claimants shall request mediation>.
3. May <no person shall enter the building without first signing the roster> . . .
- .4. Will <the corporation shall then have a period of 30 days to object>.
5. Is entitled to <the secretary shall be reimbursed for all expenses>.

The term's shaky meaning has given rise to at least 1,488 lawsuits and, as the committee noted, the United States Supreme Court has recognized that the term lacks a fixed meaning (*see Guiterrez de Martinez v. Lamagno*, 515 U.S. 417, 432 n.9 (1995)).

To improve the reliability and predictability of the association's standard forms, the committee committed to systematically removing and replacing the term with less fungible, more certain terminology.

The committee adopted a motion agreeing to review and replace the word shall with appropriate and more definitive terminology (e.g., will or must) as forms come up for revision.

Having agreed to systematically replace *shall*, the committee switched its attention to recently enacted state legislation. Committee members agreed that each of the following bills that the governor recently signed into law could affect member practice and induce a change in the association's standard forms:

- 2022 Haw. Laws Act 62 (H.B. 2272) (effective Jan. 1, 2023) (relating to condominium reserve studies and cash flow plans).

- 2022 Haw. Laws Act 133 (H.B. 2280) (effective June 27, 2022) (prohibiting unreasonable restrictions on agriculture at planned community associations).
- 2022 Haw. Laws Act 154 (S.B. 2002) (effective Nov. 1, 2022) (clarifying assistance animal/service animal dichotomy and excluding certain verification invalid).
- 2022 Haw. Laws Act 213 (S.B. 2752) (effective June 27, 2022) (defining *abandoned well* and requiring abandoned well owners to seal their well at their expense).

In the committee's estimation, Act 154 could propel changes to any one or more of the following standard forms:

- Rental Agreement,
- Rental Application,
- Pet Addendum,
- Service and or Support Animal Addendum,
- Post Closing Occupancy Agreement,
- Early Occupancy Agreement,

The association's staff attorney agreed to set his wit to work on proposing changes to the affected forms arising from Act 154. The chair of the relevant subcommittee confirmed that her subcommittee would meet on July 18, 2022 to evaluate the staff attorney's proposals.

The full committee also recognized that Act 213 could instigate changes to the association's standard form Seller's Real Property Disclosure Agreement. The chair of the subcommittee for the SRPDS agreed to convene his committee to discuss those possible changes, and the association's staff attorney agreed to support his subcommittee's meeting by supplying it with proposed revisions on or before July 18, 2022.

The full committee agreed to schedule a special meeting to consider the subcommittee recommendations.

The committee adopted a motion scheduling a special meeting for July 21, 2022 at 10:00 a.m. via Zoom to discuss possible revisions arising from Act 154 (S.B. 2002) and Act 213 (S.B. 2752).

Believing it unlikely that Act 133 would propel a material change to a standard form, the committee deferred its consideration of its provisions and potential applicability to the association's standard forms until the committee's next regular meeting.

The committee also deferred discussion of possible changes arising from Act 62 or Senate Bill 206 (prohibiting discrimination in rental transactions arising from section 8 housing choice program), as neither piece of legislation will become effective until next year. The committee recognized that the governor's deadline for issuing his intent to veto Senate Bill 206 had passed, but noted that its relevant provisions would not be effective until May 1, 2023. Likewise, the committee recognized that Act 62 had become law, but noted that it would not be effective until January 1, 2023. So the committee deferred discussion of both Act 62 and Senate Bill 206 until its next regular meeting.

C. Unauthorized Use of Standard Forms

Committee members searched the Internet for instances of unauthorized use of the association's standard forms. Committee members identified use of the association's forms at:

- www.asapcashhomebuyers.com.
- www.TheCEshop.com.
- www.eforms.com.
- www.deviegalsimpli.blob.core.windows.net.
- www.legalforms.org.
- www.waltfloodrealty.com.
- www.irp.cdn-website.com.
- www.OahuRE.com.

- www.napuapoint.com.

The association's staff attorney promised to investigate each identified unauthorized use and to take appropriate action.

A. Sight Unseen Addendum (Proposed New Form)

Updates

The committee was reminded that, at its last meeting, it had approved a draft standard form Sight Unseen Addendum and recommended that it be offered to the membership for their review and comment. That review and comment period had opened on June 3, 2022 and closed on July 3, 2022, yielding 40 comments and a redline draft from a former committee member.

Most comments the association received indicated a general approval of the committee's draft. Other comments, however, proposed revisions to the form's title or signature fields or recommended new language intended to help members meet their fiduciary obligations and protect their clients.

Regarding the form's title, the committee entertained member comments that the form should be retitled from *Sight Unseen Addendum* to *Site Unseen Addendum*. Although the committee understood the semantical argument buttressing the argument for a name change, the committee ultimately decided that the broad-based and well understood colloquial use of the term *Sight* in *Sight Unseen Addendum* weighed in favor of preserving the original title. The form's name would remain as the *Sight Unseen Addendum*.

Some members argued that the form should segregate party signatures: all buyer signatures to the left, and all seller signatures to the right. The committee agreed and revised the form accordingly.

The committee also agreed that new language should be added to help brokers involved in Sight Unseen transactions meet their fiduciary obligations and their protect clients. Accordingly, the committee amended their draft to include language

recommending that buyers seek legal counsel and arrange for someone other than their broker to physically visit the property.

Finally, the committee reviewed member requests that the form be amended so that they, the members, could adapt it for use in leasing transactions. There was consensus among the committee members that an appreciable number of the association's members would value a Sight Unseen Addendum for leasing transactions. But the committee members did not believe that they could reengineer the proposed form so that it could be equally suitable for leasing transactions. Because the committee supported a form for leasing transactions but found a transformer form unrealistic, the committee recommend introducing a new stand-alone sight unseen addendum, one specifically for use in leasing transactions.

The committee adopted a motion recommending that HAR's board of directors approve the Sight Unseen Addendum (Exhibit B) and publish it to the membership as part of the regular biannual release of forms on November 1, 2022.

The committee adopted a motion requesting that HAR's board of directors direct the committee to create a Sight Unseen Addendum for leasing transactions.

B. Notice of Termination (Proposed New Form)

The committee noted that the review and comment period for its proposed standard form Notice of Termination opened on June 3, 2022 and closed on July 3, 2022. Committee members reviewed and debated the member comments, incorporating new language into the proposed form. The committee could not agree, however, on a final draft and, therefore, deferred its final consideration and approval until its next regular meeting.

C. Seller's Real Property Disclosure Statement (RR109)

Committee members were pleased to hear that ZipForms (Lone Wolf) could—and would—create an electronically fillable version of the Seller's Real Property Disclosure Statement. The electronically fillable version would be, as the committee learned,

available in both e-Signature and DocUSign formats. Pleased with ZipForms offer to create an electronically fillable version of the SRPDS, the committee asked the association's staff attorney to investigate whether ZipForms would be equally amenable to creating an electronically fillable version of the association's standard form Blank Addendum.

The committee was displeased, however, that ZipForms had recently modified its transaction management platform to include an electronic notice to users downloading the SRPDS—one that incorrectly stated that the Receipt of the SRPDS was attached. Committee members agreed that the SRPDS and the Receipt of the SRPDS were two separate documents and that the ZipForms transaction management platform delivered documents independently. Despite the notice to users downloading the SRPDS on ZipForms's platform; the Receipt of the SRPDS was not attached

The committee discussed whether ZipForms should remove the notice or whether the committee should recommend that the disclosure statement and receipt be combined. In discussing this topic, the committee noted that the SRPDS and the Receipt of the SRPDS was once a unified document. Both the buyer and seller would sign the unified document.

But a law change in 1996 made clear that only the buyer had to sign the receipt (*see* Act 161, 1996 Haw. Sess. Laws 361, sec. 10 (codified as Haw. Rev. Stat. § 508D-12)). So, at or around that time, the association dichotomized the forms.

There being no change in the 1996 law, the committee found inadequate justification to recombine the disclosure statement with its receipt.

Committee members acknowledged, however, that the receipt could be difficult to locate on ZipForms's transaction management platform because the disclosure statement was not juxtaposed next to the receipt, owing to the forms title on that platform (*Receipt of Seller's Real Property Disclosure Statement* rather than *Seller's Real Property Disclosure Statement Receipt*). But retitling receipt so that it, too, is indexed under *S* and adjacent to the

Seller's Real Property Disclosure Statement could, as the committee feared, confuse other members who would question why the form's title changed. So the committee recommend that: (a) ZipForms remove the notice that the receipt is attached to the disclosure and (b) ZipForms change the form's title on its platform from *Receipt of Seller's Real Property Disclosure Statement* to *Real Property Disclosure Statement Receipt*; but (c) preserve the original name of the disclosure statement in other mediums and on the form itself.

Turning to the uncertainty that some members have expressed as to the effective date of the disclosure statement, the committee discussed whether they should recommend that the seller's signature and initials date be removed and replaced with an effective date. Committee members agreed that the disclosure statement was effective upon delivery (*see* Haw. Rev. Stat. § 508D-5) and expressed concern that an effective date could conflict with the delivery date, thereby augmenting uncertainty as when the form was delivered, as that term is understood under the Chapter 508D of the Hawai'i Revised Statutes and the association's standard form Purchase Contract. So the committee rejected the proposal to incorporate an effective date.

The committee then redirected its efforts to the form's substantive disclosures. At least one of the association's members requested that the disclosure statement be amended to include a submetering disclosure. Finding that the additional disclosure would likely have applicability to sales on O'ahu, only, and that some sellers would rebuff disclosures requiring disclosure of their private utility use, the committee rejected amending the form to include a submetering disclosure.

But the committee did amend the form to include a gas disclosure option. It also made various other revisions to the form's disclosure sections that, like the gas disclosure, is set forth in the attached and incorporated exhibit. After completing its revisions to the SRPDS, the committee decided to offer it for the membership's review and comment.

The committee adopted a motion approving the Seller's Real Property Disclosure Statement (Exhibit C) and recommending that it be offered for the membership's review and comment.

D. As Is Condition Addendum (RR213)

The committee noted that the association had received member comments to the committee's proposed revisions to the association's standard form *As Is* Condition Addendum, as well as comments and proposed revisions submitted by the association's staff attorney. Although the committee discussed the member comments and made appropriate attendant revisions, it did not have time to discuss the staff attorney's recommendations. Because the committee wanted to consider the staff attorney's recommendations before recommending that the form be published this November, the committee agreed to amend the agenda for its special meeting on July 21, 2022 to include the staff attorney's proposals and the committee's final recommendation on the proposed form.

E. Cooperating Brokerage Firm's Separate Contract (RR214)

The committee was advised that the association had received an opinion from its outside counsel regarding a listing brokerage firm's obligation to report commission payments to their cooperating brokerage firm, as well as a listing broker's right to withhold certain payments to their cooperating broker. In support of that opinion, the association's outside counsel furnished redline edits to section 6 of the association's standard form Cooperating Brokerage Firm's Separate Contract. The committee reviewed, discussed, and approved those edits.

The committee ultimately withheld their final approval of the entire draft form, however, until they could interpret and apply certain GET guidance. So the committee amended its agenda for its Special Meeting on July 21, 2022 to include a discussion of GET obligations vis-à-vis the Cooperating Brokerage Firm's Separate Contract.

F. Project Information Form (RR105c)

The committee deferred consideration of the association's standard form Project Information Form until the committee's next regular meeting.

A. Extension of Scheduled Closing Date (RR207)

New Business

The committee noted that its revisions to the association's standard form Extension of Scheduled Closing Date would open for membership review and comment on July 8, 2022 and close on August 8, 2022.

B. Early Occupancy Contract (RR202)

The committee noted that its revisions to the association's standard form Early Occupancy Contract would open for membership review and comment on July 8, 2022 and close on August 8, 2022.

C. Counter Offer (RR204)

The committee deferred consideration of the association's standard form Counter Offer until the committee's next regular meeting.

D. Post Closing Occupancy Contract (RR227)

The committee deferred consideration of the association's standard form Post Closing Occupancy Contract until the committee's next regular meeting.

E. Purchase Money Mortgage Addendum (RR205)

The committee deferred consideration of the association's standard form Purchase Money Mortgage Addendum until the committee's next regular meeting.

F. Agreement of Sale Addendum (RR203)

The committee deferred consideration of the association's standard form Agreement of Sale Addendum until the committee's next regular meeting.

G. Upcoming Deadlines

The committee noted subcommittee deadlines for the standard form Purchase Contract and Buyer Representation Contract, each as set forth on the agenda for this meeting.

The committee noted that its next meeting would be a special meeting held via Zoom on Thursday, July 21, 2022 at 10:00 a.m. Its next regular meeting would occur via Zoom on Thursday, August 25, 2022 from 9:30 a.m. until 3:30 p.m.

Next Meeting

There being no further business, the committee stood adjourned at 3:27 p.m.

Adjournment

Jason E. Korta
Staff Attorney
Hawai'i Association of Realtors