

**Shall the Authority Authorize the Executive Director to Accept Payment of  
Shared Equity Without Transfer of Title and Execute a Release of  
Unilateral Agreement for Pacifica Honolulu Unit No. 1205?**

***Staff Report***

July 22, 2015

**Background:** In the fourth quarter of 2011, Oliver McMillan Pacifica, LLC ("OMP") completed development of the Pacifica Honolulu condominium project in the Kakaako Community Development District. Pursuant to the Hawaii Community Development Authority ("HCDA") Mauka Area Rules in effect at the time of the development, OMP was required to provide at least one hundred twenty-four (124) two (2) bedroom reserved housing units within the project. Mr. Lance Morita qualified to purchase a reserved housing unit and subsequently acquired Unit No. 1205 on December 20, 2011.

In 2011, Mr. Morita purchased Unit No. 1205 as a reserved housing unit for FOUR HUNDRED THIRTY-SEVEN THOUSAND DOLLARS (\$437,000) and with the fair market value at the time being FOUR HUNDRED FORTY-FIVE THOUSAND DOLLARS (\$445,000), the Authority's Shared Equity encumbrance is at least EIGHT THOUSAND DOLLARS (\$8,000). The unit is currently appraised at SIX HUNDRED THIRTY-SIX THOUSAND TWO HUNDRED DOLLARS (\$636,200.00). The Regulated term for the Morita's two (2) year buy-back encumbrance expired on December 2013.

According to Mr. Lance Morita letter to Executive Director Anthony Ching dated May 26, 2015 requesting to release Mr. Morita from the HCDA Reserved Housing Restrictions and allow Mr. Morita advance pay his equity share of EIGHT THOUSAND DOLLARS (\$8,000) without transfer of title (15-22-186(d)). Mr. Morita notes this request in accordance to the terms of Mr. Morita's Deed and Unilateral Declaration of Restrictive Covenants of his Pacifica Honolulu, Unit No. 1205. Attached as Exhibit A.

On June 16, 2015, Executive Director Anthony Ching provided his interpretation of rules in accordance to 15-22-20 "Interpretations by the Executive Director" in response to Mr. Morita's May 26, 2015 request. Attached as Exhibit B.

Subsequently on June 26, 2015, the HCDA received Mr. Morita's petition requesting an appeal pursuant to Hawaii Administrative Rules ("HAR") §15-219-34, from action of the Executive Director seeking execution of a written release of Unilateral Declaration of Restrictive Covenants. In accordance to HAR§15-219-34(c) "Upon filing of a petition, appellant shall be entitled to a contested case hearing, as provided for in subchapter 2. HAR§15-219-46, Initiation of contested case by petition. The Authority has thirty (30) days of the action or decision for which the contested case hearing is sought. Based on Mr. Morita's Petition request, the Authority has until July 26, 2015 to notify him of the action or

Pursuant to Hawaii Administrative Rules §15-22-186(d) “After the end of the regulated term, the owner may sell the unit or assign the property free from any transfer or price restrictions except for applicable equity sharing requirements set forth in §15-22-187 of this chapter.” In theory, once a reserved housing unit owner sells his or her unit to a third party and pays the Authority the shared equity amount due upon closing, the unit is no longer a reserved housing unit.

Attachment: Exhibit A - May 26, 2015 Letter from Mr. Lance Morita  
Exhibit B - June 16, 2015 Interpretation by the Executive Director  
Exhibit C - June 26, 2015 Mr. Lance Morita Petition for Appeal  
Exhibit D - Hawaii Administrative Rules Title 15, Department of  
Planning and Economic Development, Subtitle 4, Hawaii  
Community Development Authority Chapter 16, Rules of  
Practice and Procedure.  
Exhibit E - Hawaii Administrative Rules §91-9

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May 26, 2015

Anthony Ching,  
Executive Director  
Hawaii Community Development Authority (HCDA)  
547 Queen Street  
Honolulu, Hawaii 96813

HAWAII COMMUNITY  
DEVELOPMENT  
AUTHORITY

Executive Director Ching:

RE: Reserved Housing Unit Shared Equity Payment, Completed Fulfillment of Obligations, and Request for Release from the Unilateral Declaration of Restrictive Covenants for Unit Designated as Reserved Housing Unit.

My name is Lance T. Morita and I am the owner of the Reserved Housing Unit in the Pacifica Honolulu, 1009 Kapiolani Boulevard, Unit #1205, Honolulu, Hawaii 96813.

I am writing to request that the HCDA submit the necessary documents to release me from any further obligations under the HCDA Reserved Housing Rules as set forth in my Deed of Title and Unilateral Declaration of Restrictive Covenants for Unit Designated as Reserved Housing Unit.

I purchased my Reserved Housing Unit subject to a two (2) year Regulated Term as defined in the applicable Reserved Housing Rules. I have been the owner occupant of my Reserved Housing Unit at the Pacifica Honolulu for a period of over two (2) years and as such, I am currently outside of the specified two (2) year Regulated Term.

Therefore, in accordance with the terms of the Deed of Title, Unilateral Declaration of Restrictive Covenants, and applicable HCDA Reserved Housing Rules, I hereby submit the Shared Equity Payment in the amount of EIGHT THOUSAND DOLLARS (US \$8,000) as payment in full. This Shared Equity Payment satisfies the requirements of the HCDA Reserved Housing Rules.

**15-22-187(b) Shared Equity Requirements:**

The authority's share of the equity in the reserved housing unit shall be the higher of:

- (1) An amount equal to the difference between the original fair market price of the unit as determined by the authority and its original sales contract price; or
- (2) An amount equivalent to the percentage of net appreciation calculated as the difference between the original fair market price of the unit as determined by the authority and its original contract price divided by the original fair market price of the unit.

Market Value at Time of Purchase:	\$445,000
Reserved Housing Unit Sale Price:	<u><del>\$437,000</del></u>
Shared Equity Amount:	\$8,000

Shared Equity Percentage of Net Appreciation:	1.79%
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In accordance with 15-22-187(b), the Hawaii Community Development Authority's share of the equity in my Reserved Housing Unit is \$8,000 and the payment of this amount satisfies my HCDA Shared Equity obligation.

Upon receipt of my Shared Equity payment, I am hereby requesting that the HCDA complete the necessary Release from the Unilateral Declaration of Restrictive Covenants and release my unit from further Obligations under the terms of the Hawaii Community Development Authority's Reserved Housing Rules.

In accordance with the terms of the Deed of Title, Unilateral Declaration of Restrictive Covenants, and HCDA Reserved Housing Rules, upon payment of the Shared Equity amount, the Unilateral Declaration of Restrictive Covenants for Unit Designated as Reserved Housing Unit must be released by written instrument executed by the HCDA and filed in the Land Court and Recorded in the Bureau of Conveyances.

Sincerely,

Lance T. Morita  
Reserved Housing Unit Owner  
1009 Kapiolani Boulevard, Unit #1205  
Honolulu, Hawaii 96813



To:  
Cc:  
Bcc:  
Subject: Fw: Meeting Request RE: Shared Equity

From: Anthony Ching/DBEDT  
To: Lance Morita <lancemorita@gmail.com>,  
Cc: Aedward O LosBanos/HCDA/DBEDT@DBEDT, Lindsey Doi/HCDA/DBEDT@DBEDT  
Date: 06/16/2015 08:44 AM  
Subject: Re: Meeting Request RE: Shared Equity

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Mr. Morita

Please accept my apology for my tardy reply. However, I believe that you have already been advised on a number of occasions that staff or the Executive Director does not have the authority to issue the "release of Unilateral Declaration of Restrictive Covenant" that you request. I am obliged to echo those declaration of my staff as my own.

I provide the following notes from statute and rule in support.

1. 206E-3 (a) which established the Authority provides that "There is established the Hawaii community development authority, which shall be a body corporate and a public instrumentality of the State, for purposes of implementing this chapter". Statute clearly establishes that it is the Authority and not the Executive Director that implements the chapter.
2. 206E-3(c) provides that it is the Authority that appoints the executive director who shall be the chief executive officer. The statute does not otherwise confer on the executive director powers that otherwise accrue to the Authority.
3. Subchapter 7 of Title 15 Chapter 22 (Mauka Area Rules) Sale and Rental of Reserved Housing Units govern the sale, rental or transfer of reserved housing units under the planned development provisions of subchapter 4 of Chapter 22. It is instructive to note that the subchapter is replete with references to the "Authority" which must issue discretionary orders or render judgement or to approve actions of individuals or organizations subject to provisions of the rule. It is also noteworthy that only in very specific cases such as 15-22-182(c) that prescribes that "subject to the approval of the executive director" that a current owner of a reserved housing unit may apply to purchase a larger reserved housing unit subject to three qualifications.
4. In 15-22-187 Equity Sharing Requirements, the section specifically attributes to the Authority and not the Executive Director, any option to consider or wield discretionary powers to manage this part of the Reserved Housing Program.

Given my reading of the powers attributable to the Executive Director (in statute and rule) and there being no delegation of power by the Authority to the Executive Director in this matter, it is my belief that any petition that you choose to bring is appropriately brought only before the Authority.

Please assemble any information that you believe pertinent to your application for action and submit them to this office at your convenience. If your application is deemed complete and ripe for review by the Authority, in consultation with the Chair of the Authority, I will appropriately cause the item to appear on a future agenda of the Authority. I note that the earliest date that this matter might be entertained is the Authority's regular meeting of July 8, 2015.

I understand that you have provided a check in an amount that you believe to represent the shared equity value in your reserved housing unit. Staff will hold this item until such time that the Authority has rendered its decision. You may also request the return of this check.

Please do not hesitate to contact me or my staff should you require further assistance .

Anthony J.H. Ching  
Executive Director  
Hawaii Community Development Authority  
(808) 594-0300

**HCDA has completed its move and is now located at 547 Queen Street (the old brick Brewery Building). All contact numbers remain the same . Parking is available at the Makai Garage on Halekauwila and at metered stalls along Punchbowl and South Streets .**

Lance Morita

June 12, 2015 Dear Executive Director Anthony...

06/12/2015 04:16:00 PM



LANCE T. MORITA  
1009 Kapiolani Boulevard, #1205  
Honolulu, Hawaii 96813  
Telephone: (808) 388-4611

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HAWAII COMMUNITY  
DEVELOPMENT  
AUTHORITY

BEFORE THE HAWAII COMMUNITY DEVELOPMENT AUTHORITY  
HCDA  
OF THE STATE OF HAWAII

In re Petition of	)	
	)	
	)	
LANCE T. MORITA, OWNER	)	LANCE T. MORITA, PETITION
RESERVED HOUSING UNIT	)	FOR APPEAL FROM ACTION
	)	OF EXECUTIVE DIRECTOR
	)	RE: PAYMENT OF THE HCDA'S
For Appeal from Action of Executive Director	)	SHARED EQUITY INTEREST AND
Pursuant to HAR §15-219-34	)	REQUEST FOR RELEASE FROM THE
RE: Payment of the HCDA's Shared Equity	)	UNILATERAL DECLARATION OF
Interest and Request for Release from the	)	RESTRICTIVE COVENANTS
Unilateral Declaration of Restrictive Covenants	)	

**LANCE T. MORITA, RESERVED HOUSING UNIT OWNER'S PETITION FOR**  
**APPEAL FROM ACTION OF EXECUTIVE DIRECTOR**  
**RE: PAYMENT OF THE HCDA'S SHARED EQUITY INTEREST AND**  
**REQUEST FOR RELEASE FROM THE UNILATERAL DECLARATION OF RESTRICTIVE COVENANTS**

COMES NOW, LANCE T. MORITA, OWNER OF A RESERVED HOUSING UNIT ("Petitioner") pursuant to Hawaii Administrative Rules ("HAR") §15-219-34, hereby submits this Petition for Appeal from Action of Executive Director ("Petition") seeking execution of a written release of the Unilateral Declaration of Restrictive Covenants.

After the Regulated Term has ended, payment of the HCDA's Shared Equity interest may be submitted without a resale or transfer of title transaction. This is consistent with the applicable Reserved Housing Rules<sup>1</sup> as well as the terms contained within the Unilateral Declaration of Restrictive Covenants, Deed of Title, and other legally executed and recorded purchase documents.

On May 26, 2015, I submitted a payment check to the HCDA in the amount of EIGHT THOUSAND DOLLARS (US \$8,000) as payment in full of the HCDA's Shared Equity interest in my Reserved Housing Unit. Upon submitting payment of the HCDA's Shared Equity, I requested that the HCDA Executive Director execute a written release from the Unilateral Declaration of Restrictive Covenants.

<sup>1</sup> The applicable Reserved Housing Rules are part of the Hawaii Administrative Rules (HAR): Title 15, Department of Business Economic Development & Tourism (DBEDT); Subtitle 4, Hawaii Community Development Authority (HCDA); Chapter 22, Mauka Area in the Kakaako Community Development District ("Mauka Area Rules"); Subchapter 7, Sale and Rental of Reserved Housing Units ("Reserved Housing Rules") contained within HAR §§15-22-180 to 15-22-192.

No release of the Unilateral Declaration of Restrictive Covenants has been executed. HCDA Executive Director, Anthony J.H. Ching, has refused to execute a release of the Unilateral Declaration of Restrictive Covenants even though I have submitted payment of the HCDA's Shared Equity amount outside of the established Regulated Term.

I am submitting this Petition from Action of HCDA Executive Director, Anthony J.H. Ching, because he has refused to execute a release while claiming that he does not possess the authority to do so even though he has been legally delegated the authority to execute the release.

It is clear from a review of the relevant public record of the HCDA's official decision on November 7, 2012 that the HCDA explicitly delegated the authority to its Executive Director to execute and record a release of the Unilateral Declaration of Restrictive Covenants. This legal delegation of authority to the Executive Director was meant to avoid the need for a HCDA vote on each individual release. Furthermore, the record indicates that it was the Executive Director who requested the authority to execute such releases when Reserved Housing Unit Owners submit payment of the HCDA's Shared Equity amount.

By this Petition, I am requesting the HCDA to apply a fair interpretation of the applicable Reserved Housing Rules that is consistent with the clear and unambiguous terms contained in the purchase documents.

There is a significant public interest in ensuring that the restrictions specified in legally executed and recorded purchase documents for reserved housing units are not arbitrarily changed by the HCDA after the relevant purchase documents are duly executed. Reserved Housing Unit Owners have a vested right to use their respective condominium property in accordance with the terms that were agreed upon by the Owners at the time of purchase.

I am seeking a decision by the HCDA that after the Regulated Term has ended and payment of the HCDA's Shared Equity; a release from the Unilateral Declaration of Restrictive Covenants should be executed. The HCDA's lien on a Reserved Housing Unit's Title is meant to ensure payment of the HCDA's Shared Equity. Therefore, after the Regulated Term has ended and upon payment of the HCDA's Shared Equity amount, the legal basis for maintaining the lien is removed and the lien should be extinguished. The release from the Unilateral Declaration of Restrictive Covenants is meant to clear the HCDA's lien on Title once a payment of the HCDA's Shared Equity has been submitted by the respective Reserved Housing Unit owner.



**I. PETITIONER**

Lance T. Morita,  
Reserved Housing Unit Owner  
1009 Kapiolani Boulevard, #1205  
Honolulu, Hawaii 96813  
Telephone: (808) 388-4611

**II. BACKGROUND**

My name is LANCE T. MORITA, and I am the Owner of a Reserved Housing Unit with address 1009 Kapiolani Boulevard, #1205, Honolulu, Hawaii 96813.

As a Reserved Housing Unit Owner, I have complied with the applicable Reserved Housing Rules as well as the terms contained in the Deed of Title, Unilateral Declaration of Restrictive Covenants, and other legally executed purchase documents.

**A. The HCDA's Shared Equity is calculated pursuant to HAR §15-22-187(b). On May 26, 2015, I submitted to the HCDA my payment in the amount of \$8,000 to fulfill the Shared Equity requirements.**

**HAR §15-22-187(b) Shared Equity Requirements:**

The authority's share of the equity in the reserved housing unit shall be the higher of:

- (1) An amount equal to the difference between the original fair market price of the unit as determined by the authority and its original sales contract price; or
- (2) An amount equivalent to the percentage of net appreciation calculated as the difference between the original fair market price of the unit as determined by the authority and its original contract price divided by the original fair market price of the unit.

Therefore, the HCDA Shared Equity for my Reserved Housing Unit is determined as follows:

Market Value at Time of Purchase:	\$445,000
Reserved Housing Unit Sale Price:	<del>-\$437,000</del>
Shared Equity Amount:	\$8,000
Shared Equity Percentage at Purchase:	1.79%

At the time of purchase, the difference between the regular Market price and the Reserved Housing Unit price for my unit was only \$8,000. That fact established a 1.79% HCDA Shared Equity interest. Based on current property assessments and valuations, 1.79% of Shared Equity would result in a current payment of only \$3,600. The HCDA's current Shared Equity interest is less than half of the \$8,000 payment that I have submitted. Therefore, pursuant to HAR §15-22-187(b), the HCDA's Shared Equity in my Reserved Housing Unit is \$8,000.

**B. The established Regulated Term for my Reserved Housing Unit was Two Years.**

My Reserved Housing Unit was sold with unit affordability expressed as a percentage of median income between 120% and 140% of median income. Pursuant to HAR §15-22-186(b)(3), Reserved Housing Units sold to qualified buyers with “one hundred and twenty to one hundred forty percent of the median income shall be regulated for two years.” Therefore, the Regulated Term applicable to my Reserved Housing Unit was two years.

**C. I am currently outside of the established Regulated Term.**

Because I have lived as an owner occupant of my Reserved Housing Unit for an extended period beyond two years, I am outside of the HCDA’s established two year Regulated Term.

**D. After the end of the Two Year Regulated Term, the HCDA’s interest in transactions occurring outside of the Regulated Term is limited to the HCDA’s Shared Equity interest.**

HCDA Reserved Housing Rule HAR §15-22-186(a) establishes the conditions on transfer of Reserved Housing Units and states that the “transfer of reserved housing units shall be regulated in accordance with the conditions set forth in [HAR §15-22-186(c)].” During the regulated term, “[i]f an owner wishes to transfer title to the reserved housing unit, the authority or a governmental agency approved by the authority shall have the first option to purchase the unit.” HAR §§15-22-186(c)(1)(A)-(B). However, the authority’s first option to purchase is expressly limited to the Regulated Term. HAR §15-22-186(d).

After the Regulated Term has ended, Reserved Housing Unit owners may “sell the unit or assign the property free from any transfer or price restrictions except for applicable equity sharing requirements” HAR §15-22-186(d).

**E. The right of Reserved Housing Unit owners to fulfill their final obligation by submitting payment of the HCDA’s Shared Equity is established by the HCDA Reserved Housing Rules and supported by the language of the Unilateral Declaration of Restrictive Covenants and recorded purchase documents.**

HAR §15-22-186(d) explicitly states:

**“After the end of the Regulated Term, the owner *may sell the unit or assign* the property free from any transfer or price restrictions except for applicable equity sharing requirements”**

Reserved Housing Unit owners fulfill the HCDA Shared Equity Requirement by submitting a payment in the amount equivalent to the Shared Equity as determined by HAR §15-22-187(b). Payment of the HCDA’s Shared Equity interest by a Reserved Housing Unit owner ***does not require a resale or a transaction to transfer Title***. Any statement or argument to the contrary represents a misinterpretation of the HCDA Reserved Housing Rules and is unsupported by the language of the Deed of Title, Unilateral Declaration of Restrictive Covenants, and recorded purchase documents.

Interpreting the language of the Reserved Housing Rules to mean that an owner cannot pay off the HCDA’s Shared Equity amount without a resale or transaction to transfer of title would represent a

significant material change to the applicable use restrictions. For example, based upon the provisions contained in the relevant purchase documents, as a Reserved Housing Unit owner, I purchased my unit with the understanding that, ***after the end two year Regulated Term and payment to the HCDA of the equity sharing amount***, I may rent the reserved housing unit to any household at any rent.

As a Reserved Housing Unit purchaser, I have a justifiable reliance on the terms of the legally executed purchase documents. I reviewed this language during the thirty (30) day right to cancel period that is mandated by State law, which provides all new condominium unit purchasers with the right to review the public report as well as any other relevant documents, and cancel the purchase contract. HRS §514B-86(b)(1).

My understanding of my rights as a Reserved Housing Unit owner is based upon the ***clear and unambiguous language*** that was included within the relevant purchase documents:

**AFFIDAVIT OF ELIGIBILITY TO PURCHASE A RESERVED HOUSING UNIT**

Page 2 Section 4 provides in relevant part:

***“After the end of the Regulated Term*** applicable to the reserved housing unit and ***payment to HCDA of the equity sharing amount*** as determined by the Mauka Area Rules, I may rent the reserved housing unit to any household at any rent.”

**UNILATERAL DECLARATION OF RESTRICTIVE COVENANTS FOR UNIT DESIGNATED AS RESERVED HOUSING UNIT**

Page 3 Section IIC(2) provides in relevant part:

***“After the end of the Regulated Term*** and Declarant’s ***payment to the HCDA of the Equity Sharing Amount*** as determined by the Equity Sharing Requirements, Declarant may rent the Unit to any household at any rent that Declarant so determines.”

**RESERVED HOUSING UNIT DEED WITH RESERVATIONS AND CONDITIONS**

Exhibit B: Page 2. Section IIIC(2) provides in relevant part:

***“After the end of the Regulated Term*** and the Grantee’s ***payment to the HCDA of the Equity Sharing amount*** as determined by the Equity Sharing Requirements the Grantee may rent the Unit to any household at any rent.”

The above cited language evidences the fact that after the Regulated Term has ended, Reserved Housing Unit owners are supposed to be able to submit payment to the HCDA of the Equity Sharing amount. This also makes it clear that after the end of the Regulated Term, there is no requirement that a resale or transaction to transfer title must occur prior to submitting payment of the Equity Sharing amount. The explicit plain language within the Affidavit of Eligibility to Purchase, Unilateral Declaration of Restrictive Covenants, and Deed of Title sets forth that a Reserved Housing Unit owner outside of the Regulated Term may submit payment of the Shared Equity amount and subsequently proceed to rent the unit “to any household at any rent.”

The ability of Reserved Housing Unit owners who submit payment of the Shared Equity amount to rent their respective units without restrictions after the end of the Regulated Term is further supported by the Occupancy Restrictions as set forth in the applicable Reserved Housing Rules. HAR §15-22-190(d) states that the occupancy restriction prescribed in HAR §15-22-186(a) ***shall not apply***

“subsequent to the expiration of the option to purchase period.” This expressly sets forth that Reserved Housing Unit owners are not required to occupy their respective units after the end of the option to purchase period, which is limited to the Regulated Term. HAR §15-22-186(c).

Any decision that overlooks the aforementioned facts or ignores the logical analysis that follows must be reasonably viewed as an **arbitrary** or **capricious act**. The language of the Reserved Housing Rules cannot be interpreted to mean that a Reserved Housing Unit owner would have to sell the Reserved Housing Unit, submit payment of the HCDA Shared Equity at the time of sale, obtain a release from the Unilateral Declaration of Restrictive Covenants, transfer title to another owner, and then repurchase the unit prior to being able to rent the unit to any household at any rent. Such an inaccurate interpretation would truly be unreasonable as well as unpredictable and would therefore by definition be undeniably **arbitrary** and **capricious** in nature.

- F. **The fact is that as a Reserved Housing Unit owner, I did not agree to allow the HCDA to arbitrarily change the restrictions or conditions on use and sale after the point of purchase. The applicable Reserved Housing Rules clearly states that if there are subsequent changes to the HCDA rules, then the Owner may elect to receive treatment in accordance with the restrictions that were applicable at the time of purchase.**

**HAR §15-22-191** Restrictions or conditions on use and sale of a reserved housing unit; effects of amendment or repeal sets forth in relevant part:

Reserved Housing Unit Owners shall be permitted **at their election** to sell or transfer units **subject to restrictions in effect at the time of their sale** or transfer.

This language is consistent with the subsequent language of HAR §15-218-43 pertaining to the Effects of Subsequent Rule Amendments:

**HAR §15-218-43** Effects of Subsequent Rule Amendments:

- (a) In the case of subsequent rule amendments, reserved housing unit owners shall be permitted at their **election** to:
  - (1) **Remain subject to the rules in effect at the time of the purchase** of the unit, or
  - (2) Be governed by the amended rules.

The language of both HAR §15-22-191 as well as the subsequent HAR §15-218-43 clearly establishes that Reserved Housing Unit owners shall be permitted at their election to remain subject to the restrictions that were in place at the time of purchase. Therefore, any interpretation of the applicable Reserved Housing Rules should be made with reference to the restrictions in effect at the time the purchase contract was legally executed and within the context of existing provisions in the purchase documents

III. **APPEAL FROM ACTION OF EXECUTIVE DIRECTOR AND REQUEST FOR A RELEASE OF THE UNILATERAL DECLARATION OF RESTRICTIVE COVENANTS FOR APARTMENT DESIGNATED AS A RESERVED HOUSING UNIT WHEN A RESERVED HOUSING UNIT OWNER PAYS TO THE AUTHORITY THE SHARED EQUITY AMOUNT ENCUMBERING THE RESERVED HOUSING UNIT.**

HAR §15-219-34 provides that, “[a]ny party may appeal from an action or decision of the executive director to the authority by filing a petition within thirty days of the effective date of the executive director’s action or decision.” See also HRS §91.

The Executive Director’s refusal to execute a release of the Unilateral Declaration of Restrictive Covenants was based upon an ***erroneous finding of material fact***.<sup>2</sup> The HCDA has explicitly authorized the Executive Director to execute and record a release from the Unilateral Declaration of Restrictive Covenants for apartments designated as Reserved Housing Unit when a reserved housing unit owner pays the authority the shared equity amount encumbering the reserved housing unit. Despite this fact, the Executive Director refused to execute a release and stated that he did not possess the authority to execute a written release. This decision of the Executive Director appears to have been made in both an ***arbitrary and capricious manner***<sup>3</sup> because in light of the HCDA’s legal delegation of authority, the Executive Director’s refusal to execute a release was neither reasonable nor predictable.

The HCDA has the authority and jurisdiction to review, consider, and take action on the subject matter of this Appeal. See HRS §§206E-4.

Pursuant to HAR §15-219-34, as an individual Reserved Housing Unit Owner, LANCE T. MORITA, hereby petitions for an Appeal from Action of the Executive Director and requests that the HCDA execute a release of the Unilateral Declaration of Restrictive Covenants.

The HCDA legally delegated to its Executive Director the authority to execute a Release of the Unilateral Declaration of Restrictive Covenants to provide the means for extinguishing the HCDA’s lien on the Title of Reserved Housing Units after the payment of the HCDA’s Shared Equity amount. Any lien placed on the Title of a Reserved Housing Unit is meant to secure payment of the HCDA’s Shared Equity interest. The HCDA’s Shared Equity interest was never intended to create a perpetual and inextinguishable cloud on title as such an act would be impermissible under the laws of the State of Hawaii.

This Petition to the HCDA for Appeal from Action of Executive Director was necessitated by the Executive Director’s refusal to execute a written release to the Unilateral Declaration of Restrictive Covenants even though the HCDA has legally delegated such authority to the Executive Director and despite the fact that he requested to be delegated that specific authority himself.

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<sup>2</sup> HAR §15-219-34(b)(5) provides for an appeal when the appellant believes that the executive director’s action was based on an erroneous finding of a material fact

<sup>3</sup> HAR §15-219-34(b)(5) also enables an appellant to appeal if the executive director acted in an arbitrary or capricious manner. The fact that the executive director’s refusal to execute a release was both unreasonable and unpredictable made the decision by definition arbitrary and capricious in nature.



- A. **Executive Director, Anthony J.H. Ching, refused to execute a release of the Unilateral Declaration of Restrictive Covenants and claimed that he did not possess the authority to execute a release.**

On June 16, 2015, HCDA Executive Director, Anthony J.H. Ching, transmitted an email message stating the following:

I believe that you have already been advised on a number of occasions that staff or the Executive Director **does not have the authority to issue the "release of Unilateral Declaration of Restrictive Covenant" that you request.** I am obliged to echo those declaration of my staff as my own.

Anthony J.H. Ching  
Executive Director  
Hawaii Community Development Authority

Directly Quoted as Received via Email on Tuesday, June 16, 2015 (emphasis added)

The Executive Director of the HCDA, Anthony J.H. Ching, stated that he was not executing a release of the Unilateral Declaration of Restrictive Covenants because the HCDA had not delegated to him the power to do so. Executive Director Anthony J.H. Ching stated in relevant part:

Given my reading of the powers attributable to the Executive Director (in statute and rule) and **there being no delegation of power by the Authority to the Executive Director in this matter,** it is my belief that any petition that you choose to bring is appropriately brought only before the Authority.

Anthony J.H. Ching  
Executive Director  
Hawaii Community Development Authority

Directly Quoted as Received via Email on Tuesday, June 16, 2015 (emphasis added)

I submitted my payment of the HCDA's Shared Equity amount on May 26, 2015. Therefore, for twenty-one (21) days, the Executive Director, Anthony J.H. Ching, did not respond to my inquiries and he had a sufficient amount of time to review my payment and request for a release. I was specifically requesting that the Executive Director execute and record a release of unilateral declaration of restrictive covenants for apartment designated as a reserved housing unit when a reserved housing unit owner pays the Authority the shared equity amount encumbering the reserved housing unit.

Executive Director, Anthony J.H. Ching, and his staff stated that the HCDA had not delegated to him the authority to execute the written release.

However, the fact is that the HCDA has delegated the authority to its Executive Director to execute the release document that I was requesting.



- B. On November 7, 2012, the HCDA's delegated to its Executive Director the authority to "execute releases from the Unilateral Declaration of Restrictive Covenants for Apartment Unit designated as a Reserved Housing Unit after payment of the Shared Equity amount." This delegation of authority by the HCDA was entirely legal and provided for by law.

During its Regular Meeting on November 7, 2012, the HCDA authorized "the Executive Director to execute and record a release of unilateral declaration of restrictive covenants for apartment designated as a reserved housing unit when a reserved housing unit owner pays the Authority the shared equity amount encumbering the reserved housing unit." (Meeting Minutes HCDA Regular Meeting, November 7, 2012, Decision #3, Page 4). This legal delegation of power by the HCDA provided the Executive Director with the authority to execute the written release that I requested after payment of the HCDA's Shared Equity amount.

The following provides the legal basis for the HCDA's delegation of authority to its Executive Director and details how the HCDA reached the decision to officially delegate a "blanket authority" to its Executive Director to "execute and record a release of the Unilateral Declaration of Restrictive Covenants."

Pursuant to HRS Chapters 91 and 92, the HCDA adopted HAR Chapter 219<sup>4</sup>, which implements HRS Chapter 206E: Hawaii Community Development Authority. "[Chapter 219] governs practice and procedure before the Hawaii Community Development Authority," and is meant to be "construed to secure the just and efficient determination of every proceeding." HAR §15-219-1.

HAR §15-219-5 provides for the *legal delegation* of "power or authority" by the HCDA to its Executive Director. HAR §15-219-5 was adopted by the HCDA pursuant to HRS 206E-4 and in conformance with HRS Chapter 91.

**HAR §15-219-5**

**Delegation to the executive director**

The authority may delegate to the executive director such power or authority vested in the authority as it deems reasonable and proper for the effective administration of chapter 206E, HRS, except the power to adopt, amend, or repeal rules, and any power or authority expressly reserved to the authority by statute or rule.

With sufficient Quorum at its Regular Meeting on November 7, 2012, the HCDA conducted an official decision making vote in accordance with HCDA Bylaws, Article IV, §§7, 9.

[HCDA Chairperson], Brian Lee, entertained a motion for the Authority to authorize the Executive Director to execute and record a release of unilateral declaration of restrictive covenants for apartment designated as a reserved housing unit when a reserved housing unit owner pays the Authority the shared equity amount encumbering the reserved housing unit.

Meeting Minutes HCDA Regular Meeting, November 7, 2012, Decision #3, Page 4.

<sup>4</sup> HAR Title 15 Department of Business Economic Development & Tourism (DBEDT), Subtitle 4 Hawaii Community Development Authority (HCDA), Chapter 219 Rules of Practice and Procedure, Subchapter 1 Rules of General Applicability ("Chapter 219")

Following the parliamentary procedure prescribed in the HCDA Bylaws, Article IV, Section 11, a motion was made and seconded by members of the HCDA. "A roll call vote was conducted. The motion passed 6 to 0." (Meeting Minutes HCDA Regular Meeting, November 7, 2012, Decision #3, Page 5).

Therefore, by an official decision making vote on November 7, 2012, the HCDA voted 6-0 "to authorize the Executive Director to execute and record a release of unilateral declaration of restrictive covenants for apartment designated as a reserved housing unit when a reserved housing unit owner pays the Authority the shared equity amount encumbering the reserved housing unit." (Meeting Minutes HCDA Regular Meeting, November 7, 2012, Decision #3, Page 4-5).

Being within the power granted to it by HRS Chapter 206E, the HCDA adopted HAR §15-219-5. Pursuant to HAR §15-219-5, the HCDA legally delegated to its Executive Director the authority to "execute and record a release of the unilateral declaration of restrictive covenants." The HCDA legally permitted such release to be executed and recorded "when a reserved housing unit owner pays the Authority the shared equity amount encumbering the reserved housing unit." This official decision of the HCDA was made in accordance with the HCDA's Bylaws and represents a legal delegation of the HCDA's authority to its Executive Director.

**C. The HCDA's delegation of authority to its Executive Director to execute a release of the Unilateral Declaration of Restrictive Covenants is not restricted by HRS §206E-4.1.**

HRS 206E-4.1 ("assignment of duties and powers prohibited") does not restrict the delegation of the HCDA's authority to execute a release of the Unilateral Declaration of Restrictive Covenants. Since July 1, 2014, HRS 206E-4.1 prohibits the HCDA's delegation of authority "related to the approval of any variance, exemption, or modification of any provision of a community development plan or community development rules." However, the authority to execute a release to clear a lien from the Title of Reserved Housing Units does not fall within that limited prohibition of HRS §206E-4.1.

Furthermore, during the 2014 Legislative Session HRS 206E-4.1 was implemented by Act 61, which explicitly limited the prohibition set forth in HRS 206E-4.1 to future assignments of the HCDA's authority that occur after Act 61's effective date.

Act 61, Section 14 explicitly provided that with regard to the HCDA:

**[Act 61] "does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date."** (emphasis added)

H.B. 1866, SD2 HD2 (2014) set forth that "[Act 61] shall take effect on July 1, 2014." Because HRS 206E-4.1 clearly pertains to the assignment of HCDA authority after the effective date of its implementing Act, HRS 206E-4.1 cannot be read to apply to an HCDA act, assignment of authority, or decision during an official HCDA proceeding that occurred prior to the effective date of Act 61. This is significant because it establishes a clear and unambiguous effective date for HRS 206E-4.1.

The HCDA delegated the authority to its Executive Director to execute a release of the Unilateral Declaration of Restrictive Covenants during an official regular proceeding on November 7, 2012. Therefore, regardless of the extent of limited prohibitions set forth in HRS §206E-4.1, the HCDA's decision on November 7, 2012 to delegate its authority in this matter is not restricted.

- D. The HCDA delegated to its Executive Director a ***“blanket authority”*** to execute and record written releases of Unilateral Declaration of Restrictive Covenants. It is significant to note that Executive Director, Anthony J.H. Ching, requested this ***“blanket authority.”***

The HCDA’s delegation of a ***“blanket authority”*** to its Executive Director is explicitly clear from the Transcript of the Regular Meeting of the Kakaako Members of the Hawaii Community Development Authority, Meeting No. 379, November 7, 2012 that was reported by Holly M. Hackett (CSR, RPR, Certified Shorthand Reporter).

During a discussion that occurred prior to the HCDA’s vote, the HCDA consulted with Deputy Attorney General, Lori Tanigawa, regarding the HCDA’s blanket authorization. Deputy Attorney General, Lori Tanigawa, explained the reason why a blanket authorization to execute a release of the Unilateral Declaration of Restrictive Covenants was necessary:

[The HCDA] requires the developers to put these restrictions on [reserved housing] units. And they’re reflected in the documents that are often recorded in the Bureau [of Conveyances]. And while we do review forms, over time some of the forms say ‘this restriction shall not be released unless released by the Authority.’ So while the restriction may no longer be there, that deed with that encumbrance is still on title. The title companies say, ‘Well, where’s the subsequent document that releases it?’ even though a shared equity has been paid. It’s those [written release] instruments we want to make sure that Tony [Executive Director, Anthony J.H. Ching] has gotten the authority to sign those types of instruments. So it’s really kind of a housekeeping matter, if you will, but the title companies have requested that of us.

HCDA Member, Mary Alice Evans, inquired, “Is [the power to execute a release] something that the Authority can grant as a general rule so that each item doesn’t have to come to the Authority, and will that satisfy the title companies?” State Deputy Attorney General, Lori Tanigawa, responded: “I think that’s what Tony [Executive Director, Anthony J.H. Ching] and his staff are requesting right now is a blanket authority...”

A review of the Transcript from the HCDA’s Regular Meeting on November 7, 2012 reveals that the HCDA intended to delegate to its Executive Director the blanket authority to execute a release of the Unilateral Declaration of Restrictive Covenants to allow for the extinguishment of the HCDA’s lien on Title without necessitating a vote by the HCDA to execute each individual release.

It is clear from the relevant discussion that the HCDA anticipated that Reserved Housing Unit owners would be submitting payments of the HCDA’s Shared Equity after the end of their respective Regulated Terms. The HCDA members also understood that they were voting to provide the Executive Director with a ***“blanket authority”*** to execute the written release of Unilateral Declarations of Restrictive Covenants in order to clear the HCDA’s liens on Title.

The Executive Director clarified that he was specifically “asking for a **blanket authorization** to use, conduct ourselves, or execute the author of the release.”

-- Anthony J.H. Ching, HCDA Executive Director

Transcript of a Regular Meeting of the Kakaako Members of the Hawaii Community Development Authority, Meeting No. 379, November 7, 2012, Page 74.

Executive Director, Anthony J.H. Ching explained his request for a “blanket approval” and detailed what it would authorize him to do.

“I’m asking for **blanket approval**, essentially, from the Authority to allow me to record that once upon payment of the Shared Equity Amount, that unit should no longer be designated or encumbered as a reserved housing unit.” -- Anthony J.H. Ching, HCDA Executive Director

Transcript of a Regular Meeting of the Kakaako Members of the Hawaii Community Development Authority, Meeting No. 379, November 7, 2012, Page 71.

The HCDA clarified that it was providing a “***blanket authority***” to the Executive Director to execute a release of the Unilateral Declaration of Restrictive covenants after a Reserved Housing Unit owner submits payment of the Shared Equity amount. Therefore, it is clear that when the Owner of a Reserved Housing Unit submits payment of the HCDA’s Shared Equity amount, the Executive Director possesses the authority to execute a release of the Unilateral Declaration of Restrictive Covenants.

By an official vote on November 7, 2012, the HCDA authorized:

**"...the Executive Director to execute and record a release of the unilateral declaration of restrictive covenants for apartment designated as a reserved housing unit when a reserved housing unit owner pays the Authority the shared equity amount encumbering the reserved housing unit."**

Minutes of a Regular Meeting of the Kakaako Members of the Hawaii Community Development Authority, Meeting No. 379, November 7, 2012, Page 4. (Decision #3, Approved by an Official HCDA Vote 6-0).

This "blanket authority" to execute the written release means that when a Reserved Housing Unit Owner submits payment of the HCDA Shared Equity amount, a release of the Unilateral Declaration of Restrictive Covenants is supposed to be executed by the Executive Director. Furthermore, this "blanket authority" to execute the release means that after a Reserved Housing Unit owner pays the HCDA's Shared Equity amount, the release does not require a hearing or approval vote of the HCDA for each individual release.

Based upon the language of the applicable Reserved Housing Rules and the Unilateral Declaration of Restrictive Covenants, the Executive Director's execution of a written release form is supposed to occur upon payment of the HCDA's Shared Equity amount encumbering the Reserved Housing Unit.

Pursuant to HAR §15-219-34, as an individual Reserved Housing Unit Owner, I am petitioning the HCDA for an Appeal from Action of the Executive Director, Anthony J.H. Ching, who has refused to execute a release of the Unilateral Declaration of Restrictive Covenants. It is evident from the preceding discussion and analysis that Executive Director, Anthony J.H. Ching, has refused to execute the release even though he requested and received a blanket authority to do so.

#### **IV. HEARING**

Through this Petition, I hereby request a HCDA hearing to address the issues contained in this Petition for Appeal from Action of the Executive Director.



**V. CONCLUSION**

One of the most significant public interests is in the integrity of written agreements and purchase documents that are duly executed and recorded. In fact, the Hawaii State Legislature has mandated that it is a basic right of new condominium property purchasers to have the opportunity to review their respective purchase documents for a mandatory period of thirty (30) days. HRS §514B-86(b)(1). If the HCDA ignores the clear and unambiguous terms contained within the legally executed and recorded purchase documents, then it will render the State mandated opportunity to review purchase documents meaningless.

The basic and foundational purpose of contracts is to provide for certainty in transactions between parties. The applicable Reserved Housing Rules provides that Reserved Housing Unit owners may elect to be treated in accordance with the restrictions that were applicable at the time when the purchase contract was executed. HRS §15-22-191.

Therefore, a State agency such as the HCDA should not ignore the plain language meaning of terms within legally executed purchase documents by imposing restrictions that were non-existent at the time of contracting.

If the HCDA does not honor the unambiguous written terms of purchase documents and attempts to apply additional restrictions that were not contained in the Unilateral Declaration of Restrictive Covenants or the Deed of Title, then its arbitrary interpretation of the Reserved Housing Rules will create uncertainty and discourage the future purchase of Reserved Housing Units. Such an act would undermine the credibility of the HCDA and potentially jeopardize the authority granted to it by the Hawaii State Legislature. The reason is that such an unpredictable, arbitrary, and capricious act would demonstrate that the HCDA is willing to ignore the clear and unambiguous terms within related purchase documents.

As a Reserved Housing Unit Owner, I have complied with the applicable Reserved Housing Rules and fulfilled all of my obligations. The clear and unambiguous language contained in the legally executed and recorded purchase documents support the conclusion that after the Regulated Term has ended, Reserved Housing Unit Owners should be able to submit payment of the HCDA Shared Equity without a resale or transaction to transfer Title. Upon payment of the HCDA's Shared Equity amount, the Executive Director of the HCDA should execute a written release of the Unilateral Declaration of Restrictive Covenants to be filed in the Land Court and recorded in the Bureau of Conveyances.

Based upon all of the reasons asserted herein and any reasons appearing of record, I respectfully request that the HCDA execute a release of the Unilateral Declaration of Restrictive Covenants for my Reserved Housing Unit.

DATED: Honolulu, Hawaii, June 26, 2015.



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LANCE T. MORITA, Petitioner  
RESERVED HOUSING UNIT OWNER



**V. CONCLUSION**

One of the most significant public interests is in the integrity of written agreements and purchase documents that are duly executed and recorded. In fact, the Hawaii State Legislature has mandated that it is a basic right of new condominium property purchasers to have the opportunity to review their respective purchase documents for a mandatory period of thirty (30) days. HRS §514B-86(b)(1). If the HCDA ignores the clear and unambiguous terms contained within the legally executed and recorded purchase documents, then it will render the State mandated opportunity to review purchase documents meaningless.

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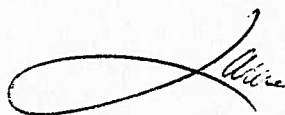
Therefore, a State agency such as the HCDA should not ignore the plain language meaning of terms within legally executed purchase documents by imposing restrictions that were non-existent at the time of contracting.

If the HCDA does not honor the unambiguous written terms of purchase documents and attempts to apply additional restrictions that were not contained in the Unilateral Declaration of Restrictive Covenants or the Deed of Title, then its arbitrary interpretation of the Reserved Housing Rules will create uncertainty and discourage the future purchase of Reserved Housing Units. Such an act would undermine the credibility of the HCDA and potentially jeopardize the authority granted to it by the Hawaii State Legislature. The reason is that such an unpredictable, arbitrary, and capricious act would demonstrate that the HCDA is willing to ignore the clear and unambiguous terms within related purchase documents.

As a Reserved Housing Unit Owner, I have complied with the applicable Reserved Housing Rules and fulfilled all of my obligations. The clear and unambiguous language contained in the legally executed and recorded purchase documents support the conclusion that after the Regulated Term has ended, Reserved Housing Unit Owners should be able to submit payment of the HCDA Shared Equity without a resale or transaction to transfer Title. Upon payment of the HCDA's Shared Equity amount, the Executive Director of the HCDA should execute a written release of the Unilateral Declaration of Restrictive Covenants to be filed in the Land Court and recorded in the Bureau of Conveyances.

Based upon all of the reasons asserted herein and any reasons appearing of record, I respectfully request that the HCDA execute a release of the Unilateral Declaration of Restrictive Covenants for my Reserved Housing Unit.

DATED: Honolulu, Hawaii, June 26, 2015.



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LANCE T. MORITA, Petitioner  
RESERVED HOUSING UNIT OWNER

(f) Failure to serve or file a memorandum in opposition to a motion or failure to appear at the hearing may be deemed a waiver of objection to the granting or denial of the motion.

(g) Motions that do not involve the final determination of a proceeding may be heard and determined by the presiding officer.

(h) If a hearing on the motion is requested, the presiding officer shall set a date and time for hearing on the motion.

(i) If a hearing on the motion is not requested, the authority or presiding officer, if the motion does not involve the final determination of the proceeding, may decide the matter upon the pleadings, memoranda, and other documents filed with the authority.

[Eff MAR 02 2012 ] (Auth: HRS §§91-9, 206E-4) (Imp: HRS §§91-9, 206E-4)

§15-219-33 Authority decision. (a) Official copies of authority decisions, orders, and other papers issued by it shall be effectuated under the signature of the chairperson or by such other person as may be authorized by the authority.

(b) Unless otherwise indicated in the decision, order or other paper issued by the authority, the effective date shall be the date of filing with the authority.

(c) Copies of authority decisions, orders, and other papers issued by it shall be available for public inspection in the office of the authority during business hours, or may be obtained upon request and upon the payment of a reasonable charge, if any.

[Eff MAR 02 2012 ] (Auth: HRS §§91-2, 206E-4) (Imp: HRS §§91-2, 206E-4)

§15-219-34 Appeal from action of executive director. (a) Any party may appeal from an action or decision of the executive director to the authority by filing a petition within thirty days of the effective date of the executive director's action or decision.

(b) The petition shall be in writing and shall:

- (1) State appellant's name, mailing address, telephone number;
- (2) Identify the property subject to the executive director's action or decision, and the appellant's interest therein;
- (3) Identify the action or decision of the executive director that is being appealed;
- (4) State all pertinent facts; and
- (5) State the reasons for the appeal, including a statement as to why the appellant believes that the executive director's action was based on an erroneous finding of a material fact, or that the executive director acted in an arbitrary or capricious manner, or engaged in an abuse of discretion.

(c) Upon filing of the petition, appellant shall be entitled to a contested case hearing, as provided for in subchapter 3. [Eff MAR 02 2012 ] Auth: HRS §§91-2, 206E-4) (Imp: HRS §§91-2, 206E-4)

§§15-219-35 to 15-219-44 (Reserved).

### SUBCHAPTER 3

#### CONTESTED CASES

§15-219-45 Contested cases; applicability. The right to a contested case hearing shall exist where provided for by an administrative rule of the authority or where required by law. [Eff MAR 02 2012 ] (Auth: HRS §§91-9, 206E-4) (Imp: HRS §§91-9, 206E-4)

§15-219-46 Initiation of contested case by petition. A contested case shall commence upon the filing of a petition for permitted relief with the authority within thirty days of the action or decision for which the contested case hearing is sought. [Eff MAR 02 2012 ] (Auth: HRS §§91-9, 206E-4) (Imp: HRS §§91-9, 206E-4)

§15-219-47 Contents of contested case petition.

(a) The petition shall state the following:

- (1) Name, address, and telephone number of the petitioner and the petitioner's legal counsel, if any, which shall be updated by the petitioner at all times;
- (2) A brief and concise factual statement of the petitioner's claim;
- (3) The law or rule which affords petitioner the right to a contested case hearing;
- (4) The names of all respondents or identities against whom the petition is brought; and
- (5) A brief statement of the relief sought by the petitioner.

(b) If the petition is not in substantial compliance with subsection (a), the authority may request that the petitioner submit an amended petition in compliance thereto. [Eff MAR 02 2012 ] (Auth: HRS §§91-9, 206E-4) (Imp: HRS §§91-9, 206E-4)

§15-219-48 Action by authority. Upon the commencement of a contested case proceeding, the authority shall assign the contested case for further proceedings before the authority or appoint a hearings officer as provided in section 15-219-26.

[Eff MAR 02 2012 ] (Auth: HRS §§91-9, 206E-4) (Imp: HRS §§91-9, 206E-4)

§15-219-49 Intervention in contested case.

(a) A person or governmental agency may move to intervene and become a party to a contested case proceeding by filing a timely written motion in accordance with section 15-219-32.

(b) The motion to intervene shall state the following:

- (1) Name, address, and telephone number of the applicant and the applicant's legal counsel, if any, which shall be updated by the applicant at all times;



- (2) The nature of the applicant's statutory or other right to participate in the contested case proceeding;
  - (3) The nature and extent of the applicant's property, financial, or other interest in the pending contested case proceeding;
  - (4) The other means by which applicant's interest may be protected;
  - (5) The extent to which applicant's interest will not be represented by existing parties to the contested case proceeding;
  - (6) The extent to which applicant's participation can assist in the development of a sound record;
  - (7) The extent to which applicant's participation will broaden the issues or delay the proceeding; and
  - (8) Whether applicant's position is in support of or in opposition to the relief sought.
- (c) Where the contested case proceeding is to be conducted as a public hearing, a motion to intervene shall be filed by the deadline indicated in the published notice of public hearing.
- (d) Where the contested case proceeding is initiated by petition pursuant to section 15-219-46, a motion to intervene shall be filed no later than twenty days after the petition is filed.
- (e) Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.
- [Eff MAR 02 2012 ] (Auth: HRS §§91-9, 206E-4) (Imp: HRS §§91-9, 206E-4)

§15-219-50 Notice of contested case hearing.

- (a) Where the contested case proceeding is to be conducted as a public hearing, the presiding officer shall provide notice of the contested case hearing in accordance with section 15-219-27.
- (b) Where the contested case proceeding is initiated by petition pursuant to section 15-219-46, the presiding officer shall provide notice of the contested case hearing to the petitioner and any other parties of record in accordance with sections 91-9 and

91-9.5, HRS. [Eff MAR 02 2012 ] (Auth: HRS §§91-9, 91-9.5, 206E-4) (Imp: HRS §§91-9, 91-9.5, 206E-4)

§15-219-51 Response; contested case. By the time specified by the presiding officer, each respondent shall file and serve upon each party a written response stating briefly therein a counterstatement of the facts, circumstances, laws, rules, or reasons in defense thereof, and shall specifically admit or deny the allegations of the petition. The response shall be filed at least ten days prior to the contested case hearing. [Eff MAR 02 2012 ] (Auth: HRS §§91-9, 206E-4) (Imp: HRS §§91-9, 206E-4)

§15-219-52 Procedure at contested case hearing.

(a) Proceedings shall be held as provided in section 15-219-28 and in accordance with the requirements of sections 91-9 and 91-10, HRS.

(b) The hearing shall be deemed closed the end of the presentation of the evidence or upon completion of final arguments or upon the filing of post-hearing memoranda, whichever occurs later.

(c) The authority may re-open a contested case hearing which has been declared closed but before it renders its decision for the sole purpose of admitting new evidence relevant to the issues in the contested case with notice to all parties. The parties shall be allowed reasonable time in which to submit rebuttal evidence and arguments.

(d) Any procedure may be modified or waived by stipulation of the parties, and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

[Eff MAR 02 2012 ] (Auth: HRS §§91-9, 206E-4) (Imp: HRS §§91-9, 206E-4)

§15-219-53 Proposed decision and order; contested case. (a) Where a decision is adverse to a party to the proceeding other than the authority itself and:



herein by bringing an action against the agency in the circuit court of the county in which petitioner resides or has its principal place of business. The action may be maintained whether or not petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures. [L 1961, c 103, §7; Supp, §6C-7; HRS §91-7]

**§91-8 Declaratory rulings by agencies.** Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders. [L 1961, c 103, §8; Supp, §6C-8; HRS §91-8]

**[§91-8.5] Mediation in contested cases.** (a) An agency may encourage parties to a contested case hearing under this chapter to participate in mediation prior to the hearing subject to conditions imposed by the agency in rules adopted in accordance with this chapter. The agency may suspend all further proceedings in the contested case pending the outcome of the mediation.

(b) No mediation period under this section shall exceed thirty days from the date the case is referred to mediation, unless otherwise extended by the agency.

(c) The parties may jointly select a person to conduct the mediation. If the parties are unable to jointly select a mediator within ten days of the referral to mediation, the agency shall select the mediator. All costs of the mediation shall be borne equally by the parties unless otherwise agreed, ordered by the agency, or provided by law.

(d) No mediation statements or settlement offers tendered shall be admitted into any subsequent proceedings involving the case, including the contested case hearing or a court proceeding.

(e) No preparatory meetings, briefings, or mediation sessions under this section shall constitute a meeting under section 92-2. Any mediator notes under this section shall be exempt from section 92-21 and chapter 92F. Section 91-10 shall not apply to mediation proceedings. [L 2003, c 76, §1]

**§91-9 Contested cases; notice; hearing; records.** (a) Subject to section 91-8.5, in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. (b) The notice shall include a statement of:

- (1) The date, time, place, and nature of hearing;
- (2) The legal authority under which the hearing is to be held;
- (3) The particular sections of the statutes and rules involved;

- (4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;
  - (5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.
- (c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.
- (d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.
- (e) For the purpose of agency decisions, the record shall include:
- (1) All pleadings, motions, intermediate rulings;
  - (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
  - (3) Offers of proof and rulings thereon;
  - (4) Proposed findings and exceptions;
  - (5) Report of the officer who presided at the hearing;
  - (6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.
- (f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.
- (g) No matters outside the record shall be considered by the agency in making its decision except as provided herein. [L 1961, c 103, §9; Supp, §6C-9; HRS §91-9; am L 1980, c 130, §1; gen ch 1985; am L 2003, c 76, §2]

**[\$91-9.5] Notification of hearing; service.** (a) Unless otherwise provided by law, all parties shall be given written notice of hearing by registered or certified mail with return receipt requested at least fifteen days before the hearing.

(b) Unless otherwise provided by law, if service by registered or certified mail is not made because of the refusal to accept service or the board or its agents have been unable to ascertain the address of the party after reasonable and diligent inquiry, the notice

of hearing may be given to the party by publication at least once in each of two successive weeks in a newspaper of general circulation. The last published notice shall appear at least fifteen days prior to the date of the hearing. [L 1976, c 100, §1]

**§91-10 Rules of evidence; official notice.** In contested cases:

- (1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law;
- (2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;
- (3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;
- (4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and
- (5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. [L 1961, c 103, §10; Supp, §6C-10; HRS §91-10; am L 1978, c 76, §1; am L 2003, c 76, §3]

**§91-11 Examination of evidence by agency.** Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. [L 1961, c 103, §11; Supp, §6C-11; HRS §91-11]

**§91-12 Decisions and orders.** Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its