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6/12/18


REPUBLIC OF KENYA



NATIONAL ASSEMBLY

12TH PARLIAMENT – SECOND SESSION - 2018

THE REPORT OF THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS AND HOUSING ON THE NATIONAL ASSOCIATION OF STATE CONTRACTORS LICENSING AGENCIES' (NASCLA) 56TH ANNUAL CONFERENCE HELD IN NASHVILLE, TENNESSEE, USA FROM 27TH TO 30TH AUGUST 2018

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 06 DEC 2018	DAY: THUR
TABLED BY:	Chair, Hon David Prossing
CLERK-AT-TABLE:	Mr. Lemura

DIRECTORATE OF COMMITTEE SERVICES
CLERK'S CHAMBERS,
PARLIAMENT BUILDINGS,
NAIROBI

DECEMBER, 2018

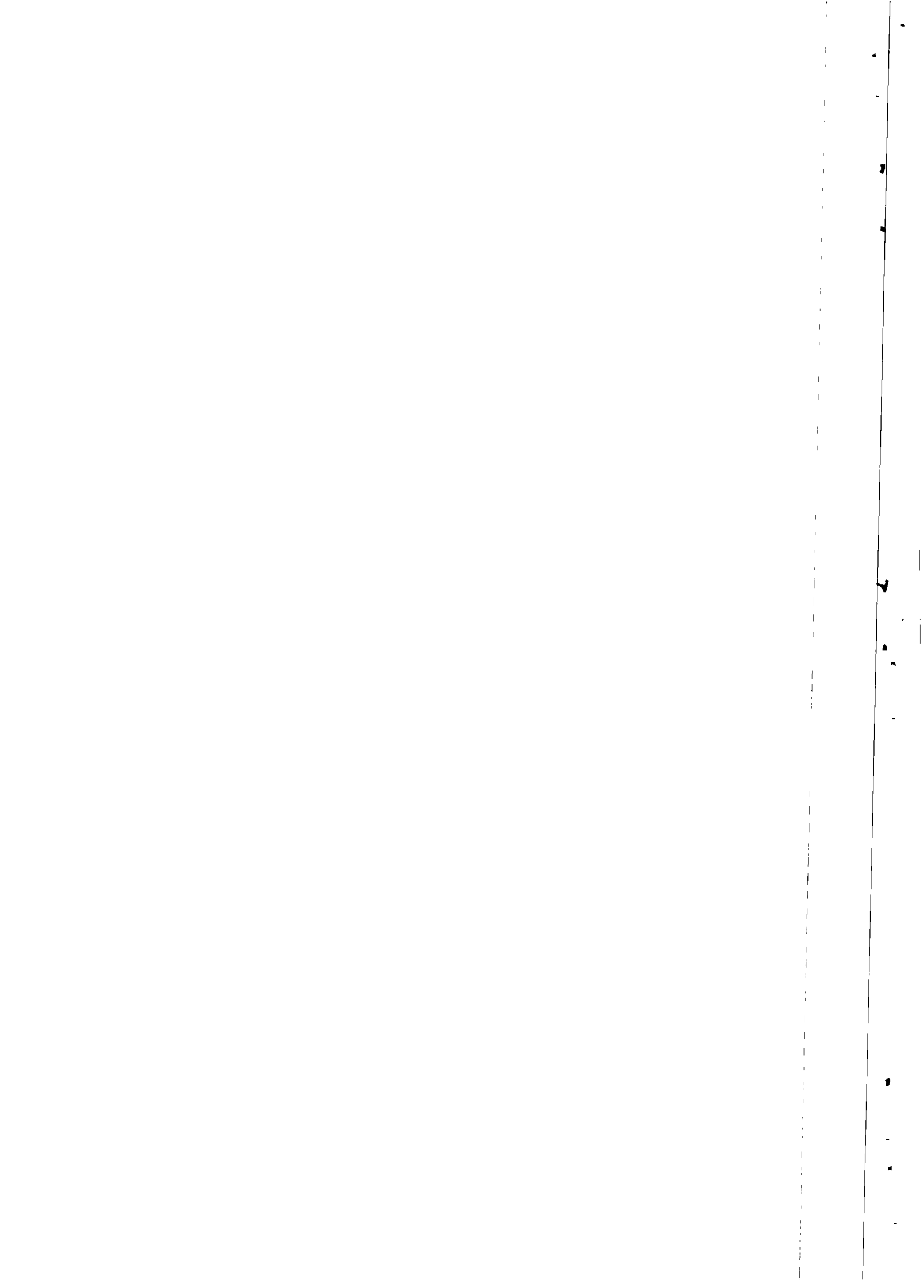


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LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CSLB	California Contractor State License Board
CLARB	Council of Landscape Architectural Registration Boards
MP	Member of Parliament
NASCLA	National Association of State Contractors Licencing Agencies'
USA	United States of America
NCA	National Construction Authority

1.0 PREFACE

1.1 Introduction

1.2 Establishment of the Committee

a) Mandate

The Departmental Committee on Transport, Public Works and Housing is established under Standing Order 216(1) whose mandate, pursuant to the Standing Order 216 (5), is as follows;

- a. investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
- b. study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
- c. study and review all legislation referred to it;
- d. study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- e. investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
- f. to vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (*Committee on Appointments*);
- g. examine treaties, agreements and conventions;
- h. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- i. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- j. consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
- k. examine any questions raised by Members on a matter within its mandate.

Further, the Second Schedule to the Standing Orders mandates the Committee to consider matters relating to the following subjects:-

- a) Transport;

- b) Roads;
- c) Public works;
- d) Construction and maintenance of roads, rails and buildings;
- e) Air and seaports; and
- f) Housing.

In executing this mandate, the Committee oversees various State Departments, namely:

- i. The State Department of Transport;
- ii. The State Department of Infrastructure;
- iii. The State Department of Housing and Urban Development;
- iv. The State Department of Public Works; and
- v. The State Department of Shipping and Maritime Affairs.

1.3 Committee Membership

The Departmental Committee on Transport, Public Works and Housing was constituted by the House in December, 2017 and comprises of the following Members: -

- 1. Hon. David Pkosing, M.P. **Chairperson**
- 2. Hon. Moses Kuria, M.P. **Vice Chairperson**
- 3. Hon. Johnson Many Naicca, M.P.
- 4. Hon. David Njuguna Kiaraho, M.P.
- 5. Hon. Peris Pesi Tobiko, M.P.
- 6. Hon. Savula Ayub Angatia, M.P.
- 7. Hon. Samuel Arama, M.P.
- 8. Hon. Suleiman Dori Ramadhani, M.P.
- 9. Hon. Rigathi Gachagua, M.P.
- 10. Hon. Ahmed Bashane Gaal, M.P.
- 11. Hon. Ahmed Abdisalan Ibrahim, M.P.
- 12. Hon. Dominic Kipkoech Koskei, M.P.
- 13. Hon. Gideon Mutemi Mulyungi, M.P.
- 14. Hon. Kulow Maalim Hassan, M.P.
- 15. Hon. Mugambi Murwithania Rindikiri, M.P.

16. Hon. Rehema Dida Jaldesa, M.P.
17. Hon. Shadrack John Mose, M.P.
18. Hon. Tom Mboya Odege, M.P.
19. Hon. Vincent Kemosi Mogaka, M.P.

1.4 Committee Secretariat:

- | | | |
|----|--------------------------|-----------------------|
| 1. | Ms. Chelagat Tungo Aaron | First Clerk Assistant |
| 2. | Mr. Ahmed Salim Abdalla | Third Clerk Assistant |
| 3. | Ms. Mercy Wanyonyi | Legal Counsel |
| 4. | Mr. James Muguna | Research Officer |
| 5. | Mr. Abdinasir Moge Yusuf | Fiscal Analyst |
| 7. | Mr. Eugene Luteshi | Audio Officer |

1.5 NASCLA Conference Delegation

A delegation from the Departmental Committee on Transport, Public Works and Housing attended the National Association of State Contractors Licencing Agencies' (NASCLA) 56th Annual Conference that was held in Nashville, Tennessee, USA, from August 27 to August 30, 2018.

1.6 Composition of the Delegation

The President of the NASCLA, Melissa McBride, had invited the National Assembly to participate in the NASCLA 56th Annual Conference. The Departmental Committee on Transport, Public Works and Housing nominated the following four members of the Committee to attend the Forum:

1. The Hon. Moses Kuria, M.P. – **Leader of Delegation**
2. Hon. Ahmed Abdisalan Ibrahim, M.P.
3. Hon. Samuel Arama, M.P.
4. Hon. Rigathi Gachagua, M.P.
5. Ms. Mercy Wanyonyi- Delegation Secretary

1.7 Committee Observations

The delegation made the following observations:

- i) The National Association of State Contractors Licencing Agencies' (NASCLA) 57th Annual Conference will be held on August 26th -29th, 2019 at the Hyatt Regency Baltimore Inner Harbor in Baltimore, Maryland, USA.
- ii) The construction industry in Kenya is only regulated by the National Construction Authority (NCA) which is established by statute.
- iii) The legislative and regulatory bodies in the construction industry in Kenya have not had a common approach and effective collaboration amongst them has been missing.
- iv) The use of Alternative Dispute Resolution (ADR) mechanisms has not been fully embraced in the construction industry in Kenya, despite it being anchored in the Constitution.
- v) Kenya does not have an adequate and effective regulatory framework in the construction industry as compared to the USA.
- vi) There has been a lack of public participation in the construction industry in Kenya between the regulator and the stakeholders including the licensees with respect to the licensure framework.
- vii) Parliament enacted the National Construction Authority Act in 2011 and the same has not been amended with respect to the regulatory framework and the dynamics in the construction industry.

1.8 Committee Recommendations

The delegation makes the following recommendations:

- i) That Kenya takes note of the National Association of State Contractors Licencing Agencies' (NASCLA) 57th Annual Conference to be held on August 26th -29th,2019 at the Hyatt Regency Baltimore Inner Harbor in Baltimore, Maryland, USA.
- ii) That the National Construction Authority ensures that contractors adhere to the regulatory framework in order to protect public health and safety.
- iii) The legislative, executive and regulatory bodies in the construction industry in Kenya including the National Construction Authority, should work in collaboration and have a

common approach in ensuring that the construction industry in Kenya is effectively regulated so as to promote public health and safety.

- iv) The use of Alternative Dispute Resolution (ADR) mechanisms should be fully embraced in the construction industry in Kenya.
- v) There is need for all the relevant stakeholders in the construction industry including the executive and the legislature to foster collaboration amongst themselves to solve problems related to the construction industry, exchange best legislative practices, as well as initiating and refining legislative proposals concerning the construction industry.
- vi) The National Assembly should review the National Construction Authority Act, 2011 with a view of amending it so as to ensure that the construction industry is effectively regulated.
- vii) The National Construction Authority should promote public participation in the construction industry in order to solve problems related to the construction industry in Kenya and to develop a friction-free regulatory framework.

1.9 Acknowledgement

The Committee wishes to record its appreciation to the Office of the Speaker and the Clerk of the National Assembly for facilitation. The Committee is grateful to NASCLA for making the Conference a success.

On behalf of the Members of the Departmental Committee on Transport, Public Works and Housing, I beg to table the report of the Committee on the Conference attended on 27th to 30th August 2018 in Nashville, Tennessee, USA.

SIGNED *DAVID PKOSING* DATE *06/12/2018*

HON. DAVID PKOSING, CBS, M.P
CHAIRPERSON,
DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS & HOUSING

2.0 NASCLA 56TH ANNUAL CONFERENCE

2.1 Background

ASCLA's Annual Conference is the association's premier annual event. The conference draws nearly 100 attendees including regulators, construction industry representatives and decision-makers from more than 40 state licensing boards, testing companies and associations across the United States. The conference offers an opportunity to network with others in the profession along with providing a forum for participants to interact, exchange ideas and information on licensing and construction issues.

NASCLA 56th Annual Conference was held at the Sheraton Grand Nashville Downtown. Sessions were designed for both Regulators and Contractors and featured some of the industry's top experts. Highlights of the general sessions will included how to Partner with Legislators, Board Member Immunity and a panel discussion on how to Recruit People into the Construction Industry among other informative topics.

The previous NASCLA annual conferences were all held in different states in the USA.

2.2 United States of America (USA)

The United States of America (USA), is a federal republic composed of 50 states, a federal district, five major self-governing territories, and various possessions. At 3.8 million square miles (9.8 million km²), the United States is the world's third largest country by total area and just fractionally smaller than the entire continent of Europe's 3.9 million square miles. With a population of over 325 million people, the U.S. is the third-most populous country. The capital is Washington, D.C., and the largest city by population is New York City.

In the American federalist system, citizens are usually subject to three levels of government: federal, state, and local. The local government's duties are commonly split between county and municipal governments. In almost all cases, executive and legislative officials are elected by a plurality vote of citizens by district. The President serves a four-year term and may be elected to the office no more than twice. The current President is Donald Trump and was elected into office in 2016 via the Republican Party.

3.0 CONFERENCE PARTICIPATION

3.1 Welcome Reception

The welcome reception was held on 27th of August and was attended by approximately one hundred participants mostly members of NASCLA and participants from the National Construction Authority (NCA), Kenya among others.

3.2 The NASCLA Conference

3.3. Presentation: The Positive Side of Regulation

The Deputy District Attorney, Head of Elder Abuse Prosecution Unit, San Diego District Attorney's Office. Mr. Paul Greenwood made a presentation on the positive side of regulation. Some of the highlights of his presentation were that with respect to:

a) Consumer Protection

- Licensing agencies protect public health and safety by ensuring that contractors meet minimum standards and are up to date on code requirements.
- Licensing agencies protect public welfare by requiring that contractors be properly insured to cover liability and worker's compensation.
- Many licensing agencies offer additional financial protection for homeowners in the form of recovery funds that provide compensation in case a licensed contractor improperly performs or does not complete work on a project.
- Licensing agencies are an important resource for consumers, maintaining databases that consumers can access to verify contractor credentials.
- Licensing agencies allow for a more efficient and a cost-effective process of resolving disputes by investigating and mediating disputes between consumers and licensed contractors, and helps keep many disputes out of the lengthy and costly court system.
- A "buyer beware" approach does not provide adequate deterrent for misconduct on behalf of subpar contractors.
- Licensing agencies protect society's most vulnerable citizens, such as elderly, disabled and dependent homeowners.
- A recent study by BuildZoom.com analysed licensing standards across all 50 states and compared them with over 60,000 consumer reviews. The results

showed that the states with the highest licensing standards also have the highest positive consumer reviews of contractors. States with no licensing requirements at all have the lowest levels of customer satisfaction.

b) Industry Integrity

- By setting common-sense standards, licensing agencies provide consistency and help the industry maintain credibility with consumers at minimal cost.
- Minimum standards help ensure the health and wellbeing of the workers themselves.
- Licensing agencies ensure the continued quality of the profession through testing and continuing education.
- Licensing agencies provide valuable educational opportunities that allow licensed professionals to build new skills ,gain experience and grow in their profession
- By applying consistent standards licensing agencies establish a more efficient process to resolve issues and reduce the need for court action.
- Licensing agencies provide for enforcement services by investigating and citing contractors practicing without a license, maintaining consistency in the industry.
- Licensing agencies are a valuable resource for the industry, maintaining contractor databases, data on violations and mediation, and testing and educational materials.
- Licensing agencies provide an important voice for the industry, advocating for benefits such as portability to allow contractors greater opportunities.

c) Market benefits

- Licensing agencies help create a fair marketplace by establishing uniform standards across the industry.
- Licensing agencies support market stability through consistent and uniform policies and oversight.
- Licensing agencies fuel the economy by ensuring that money stays in the legal market and out of the underground economy.

- Licensing agencies help keep costs down through efficient investigation and resolution of disputes.
- By supporting policies such as portability and reciprocity, licensing agencies support market growth.

3.4 Presentation: How to Partner with Legislators

Mr. Amigo R. Wade, Deputy Director, Virginia Division of Legislative Service made a presentation on how to partner with legislators. According to him, some of the critical issues for consideration when dealing with legislators are the political landscape of the legislators. He emphasized on the fact that legislators are representative of democracy since they represent a constituency.

He noted that for a legislator, time is a commodity since they are often very busy hence any opportunity to interact with a legislator should be fully maximized in order to yield effective results. Further, when dealing with legislators there is always need of being alive to the politics realities especially with regards to Party hierarchy and affiliations and positions on issues at hand, seniority in the House and regional positions.

He proposed to the participants some of the strategies of dealing with legislators in order to produce effective results as:

- a) Developing human relations with the legislators by being cooperative, non-adversarial, sincere, appropriately firm, and trustworthy with them and proper deference if there's a disagreement on any issue.
- b) Positive name recognition is a key component, never shade facts since truth equals credibility and integrity, maintaining a positive attitude towards opposition and not take anything personal.
- c) With respect to proposed legislative measures, they should be clear as to whether in support or opposition of the same. That there is need to thoroughly prepare and research on the issues at hand supported by facts, figures, and outcomes. Always need to include and address opposition on the proposed legislative measures and avoid information overload.

- d) Have a point sheet which details the position on the issue at hand with a consistent message. The point sheet should be visually pleasing with bullets rather than paragraphs and should be left behind for reference by the legislators when deliberating on the issue. The point sheet should contain the message with an introduction, background, analysis and conclusion.
- e) With respect to supporting or opposing legislation, one should know the legislator, understand the fiscal impact of the legislation, acknowledge opposition and know other role players like the legislative aides, clerks, Legal Counsel and Lobbyist and Advocacy Groups.
- f) When meeting with the legislators, establish rapport, set the stage, be short and to the point, encourage specific action and end by re-establishing rapport.
- g) When presenting to a Committee, follow procedure, make your point quickly, expect questions and display proper deference.

3.5 Presentation: Board Member Immunity

The presentation on Board Member Immunity was made by Judge Toni Boone, Administrative Law Judge, State of Nevada (ret'd) and Justice W. Michael Gillette, Oregon Supreme Court (ret'd). Some of the highlights of their presentation with a focus on court cases with respect to board member immunity were as follows:

- a) That pertinent Federal Regulations 42 USC § 1983 is one of the two pivotal sections of the Civil Rights Act. It provides, in part:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.” 42

USC § 1988 provides for award of attorney fees to those successful in actions under §1983:

- b) With respect to analyzing the Extent of 11th Amendment Immunity from 1983 Suits, amendment XI on suits against States provides that “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”
- c) In *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir.1969), cert. denied, 397 U.S. 948, 90 S.Ct. 967, 25 L.Ed.2d 129 (1970) the court devised a comprehensive, nine- factor test to determine whether an agency of the state was entitled to immunity from suit, including 1983 actions. The court used the factors to determine if railway workers who were injured in a crash could prevail in a personal injury action against a transportation corporation created by the state.
- d) The nine factors, none of which is conclusive, consisted of
 - (i) The local law and decisions defining the status and nature of the agency involved and its relation to the sovereign;
 - (ii) Whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury;
 - (iii) Whether the agency has the funds or the power to satisfy the judgment;
 - (iv) Whether the agency is performing a governmental or proprietary function;
 - (v) Whether the agency has been separately incorporated;
 - (vi) The degree of autonomy the agency has over its operations;
 - (vii) Whether the agency has the power to sue and be sued and to enter into contracts;
 - (viii) Whether its property is immune from state taxation; and
 - (ix) Whether the sovereign has immunized itself from responsibility for the agency's operations.

The presenters informed the participants that it had been long understood that, as a general matter, a state’s choice to regulate particular forms of economic activity within the state, even in

situations in which that regulation was anticompetitive, was immune from federal government restrictions on private parties doing the same thing.

Further, that limits on state-action immunity are most essential when the State seeks to delegate its regulatory powers to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.

It was further emphasized that if Board members are performing the duties of the Board as defined by statute and regulations, they're acting as "arms of the state" and are protected from 1983 suits by 11th Amendment immunity unless their actions violate clearly established statutory or constitutional rights. Those Board members are entitled to discretionary-function immunity for functions not specified by statute or regulation if they meet two criteria:

- a) Disputed act must be discretionary (involves an element of judgment or choice); and
- b) The judgment or choice is of the kind that the discretionary function of the exception was designed to shield (i.e., actions based on considerations of social, economic, or political policy).

3.6 Presentation: Top Regulatory Cases (with a Splash of Regulation in the News)

The Executive Director of the Federation of Associations of Regulatory Boards (FARB) Mr. Dale Atkinson, Esq., made a presentation on top regulatory cases. These were the highlights of his presentation with respect to the specific regulatory issues:

a) Due process and revocation

- Court of Appeal for the Seventh Circuit reversed an Indiana District Court that had dismissed a septic contractor's complaint alleging his license was revoked without due process in this "classic test of procedural due process." District Court had held the post-deprivation proceedings were adequate to satisfy due process.
- The County sent the contractor a corrective action letter and two weeks later notified the contractor his license had been revoked and he could reapply after one year. The Court of Appeals, after reviewing US Supreme Court precedent, held the district court

improperly found that the contractor had an adequate post- deprivation remedy and the license had been revoked without prior notice or an opportunity to be heard.

- Court noted that while the county ordinance at issue was not specific in the procedures to be followed, providing notice and an opportunity to be heard would not be unduly burdensome.
- Court also held that while there is a government interest in preventing unqualified individuals from performing septic repairs, there was no evidence of any serious or urgent situation to justify summary action by the county. Finally, while judicial review might have restored the license, it would not have entitled the contractor to damages for lost income, etc. and there was no alternate state remedy that would redress the injury. Thus, complaint should not have been dismissed.

b)Copyright

- California district court denied a motion for a preliminary injunction sought by an exam prep company against a contractor education school for violation of its copyright in the exam prep materials. Prep company claimed the school was copying and selling knock-offs of its licensure exam prep courses. Court denied injunction, finding the school's materials were "very close paraphrasing" and the vast majority of materials were facts, mathematical formulas, and scientific theories, which are not copyrightable. Court also noted that 13-month delay in seeking preliminary injunction after discovering infringement demonstrated a lack of urgency.

c) Unlicensed Practice

- U.S. District Court in Nevada dismissed a suit filed by an unlicensed contractor alleging violations of his rights during the criminal proceeding for unlicensed contracting. Suit filed against the State of Nevada, the County, various district attorneys and judges, and a member of the Board. Unlicensed contractor claimed the criminal court was not a "court of record" but a "corporation for profit" and a "Military Court" with no power to imprison people. He alleged the defendants were "foreign agents" attempting to deprive him of his rights and that because the judges and

attorneys did not credit his jurisdictional arguments and continued prosecuting, they were all guilty of “trespass and treason.”

- Court held there was no subject matter jurisdiction either under federal question or on diversity grounds and did not address the other arguments for dismissal (lack of personal jurisdiction, insufficient service of process, Younger abstention, and failure to state a claim).

d) Declaratory Judgment

- Court of Appeal granted a writ of mandate to stay and prevent the deposition of the Board’s Registrar (secretary and chief executive officer). Deposition was sought by an electric company that had filed a declaratory judgment action against the Board. Court of Appeal held that the head of a government agency generally is not subject to deposition. An exception to this rule exists only when the official has direct personal, factual information pertaining to material issues in the action and the information cannot be gained through another source. Court found that the exception did not apply.

e) Civil penalty for violation of a consent order

- Court of Appeals affirmed a \$15,000 penalty against a contractor for violations of a consent order. The 2010 order prohibited the contractor (and his company) from acting as a residential contractor, remodeler and roofer. Contractor’s uncle also owned a residential contracting company and entered a residential remodeling contract with a homeowner. The contractor separately entered into an oral contract with that same homeowner for application of spray foam insulation. Ultimately, mechanic’s liens were filed against the homeowner by the uncle and the contractor with the contractor claiming his lien was for work performed as an employee of the homeowner.

f) Unlicensed practice-Lien

- The homeowner subsequently filed a complaint with the Minnesota Dept. of Labor alleging violation of the 2010 consent order. The Department investigated and in 2015 issued an order against the contractor imposing a penalty of \$15,000. The contractor sought a hearing, which was continued multiple times pending resolution

of the lien proceeding. The mechanic's lien proceeding was ultimately resolved with a finding that the contractor's lien was invalid because the contractor engaged in unlicensed residential building contractor activities.

- The Department then moved for summary disposition of the 2015 order on the grounds of collateral estoppel on the previously litigated issue that the contractor was acting as a residential building contractor in violation of the 2010 consent order.

g) Collateral Estoppel

- The contractor appealed, challenging the application of collateral estoppel. After reviewing the requirements for collateral estoppel to apply (issue identical to prior adjudication, final judgment on the merits, estopped party was party in prior proceeding, estopped party given opportunity to be heard), the court found collateral estoppel was properly applied. The court also found that it was not error for the ALJ to decline to consider evidence of W-4 and checks issued to demonstrate the contractor was an employee.

h) Condition of Bail

- Court of Appeal granted a petition for mandamus, finding the trial court violated procedural due process under the 14th Amendment when it ordered contractor licenses suspended as a condition of bail without requiring evidence of danger to the public.
- Petitioners allegedly sold one of their licenses to an individual whose own contracting license was suspended and then failed to supervise that individual. The Board initiated an administrative proceeding to suspend or revoke the petitioners' licenses. Subsequently, petitioners were also defendants in a criminal action alleging fraudulent use of a contractor's license and conspiracy. Prior to the arraignment, the Board filed a request to suspend the contracting licenses as a condition of bail.
- The trial court released the petitioners on their own recognizance (OR), but ordered their contracting licenses suspended until resolution of criminal proceeding, or while on pretrial release, or as a condition of probation and until any Board disciplinary proceeding is final, *whichever concludes last*.
- Petitioners argued the trial court had no authority to suspend their licenses a condition of OR release as that infringed on their due process rights, and the scope of the order was

cruel and unusual punishment because the suspension could last beyond the conclusion of any criminal proceeding, even if petitioners were acquitted.

i) Criminal Suspension.

- The court agreed, rejecting the Board’s contention that statutory authority for licensing agencies to recommend terms of probation for convicted persons permits the Board to recommend terms of bail (persons not yet convicted).
- The court also held that although there is a public interest in imposing reasonable conditions to protect safety, this interest did not justify the lack of hearing to establish the need for such protection. A hearing would not be unduly burdensome in light of the due process concerns at issue.
- Finally, the court rejected the contention the mere filing of a felony complaint prior to any probable cause finding (vs. a misdemeanor complaint) did not provide justify the suspension of the license without a hearing.

j) Criminal Conviction: State Specific

- Applicant for concealed carry license in Ohio denied based on misdemeanor conviction in Georgia .Underlying conduct would be “minor misdemeanor” in Ohio and ok for licensure .The Ohio Court of Appeals determined statutory intent - consistent with the national instant criminal background check system which favors the "fundamental right to possess a firearm". Mere fact that another state might classify an offense as a more serious crime than Ohio does not justify the denial of Ohio licensure.

k)Criminal Convictions: Restrictions on use

- In **Illinois - HB 5973**, Occupational Licensing and Criminal Convictions prohibits the Illinois Department of Financial and Professional Regulation from barring former offenders from working in a variety of fields unless they’ve been convicted of a crime “directly related to the occupation.” Applies to barbers, cosmetologists, hair braiders, estheticians, nail technicians, roofing business owners and funeral directors.
- In **Kentucky SB 120** signed by Governor April 2017, the bill allows occupational licensing boards the freedom to decide whether a prior offense should preclude an individual from obtaining a license. Denials no longer automatic and a fair appeals

process established.

- In **Nebraska LB 299**, Occupational Board Reform Act (follows Governor Ricketts' Executive Order) is still pending in Govt., Military, & Veterans Affairs Committee

3.7 Presentation: Pros and Cons of Mediating Contractor Board/Licensee Disputes

The presentation was made by David K. Taylor, Partner, Bradley Arant Boult Cummings LLP and Kyle Dorian, Associate, Bradley Arant Boult Cummings LLP. The presenters started by defining mediation as a process that, together with a number of other processes is collectively known as alternative dispute resolution. Some of the benefits of mediation are it's informal, quick, flexible, cost effective, confidential, preserves relationships, control remains with parties, allows for creative solutions; and has a success rate of eighty percent (80%)

They further indicated that mediation is not meditation and that almost all civil cases now go through mediation prior to trial. In the construction field, many form contracts require mediation or ADR process that includes mediation. These were the highlights of their presentation:

The mediator's roles are-

- a) Serves as a neutral facilitator
- b) Summarizes, restates and prioritizes issues in a non-judgmental manner
- c) Assists in the generation or clarification of options
- d) Evaluates options and possible consequences
- e) Enforces the ground rules
- f) Identifies areas of mutual interest

Pros of mediating Board Licensing Disputes

- a) A settlement saves everyone time and money
- b) There's flexibility i.e. possible to get results in a mediation that both the Board and licensee cannot get in a hearing.
- c) Costs are minimal since they are usually split
- d) Even if not settled, parties learn something about the other side's position
- e) Even if not settled, parties learn something about the other side's position
- f) Even if not settled, parties learn something about weaknesses of their position
- g) A good mediator can help diffuse emotions and focus the parties on the issues and benefits of settlement.

Cons of mediating Board Licensing Disputes

- a) It's not clear who pays and a private mediator is not for free
- b) Mediation is non-binding and the mediator has no power to make a deal thus either side can walk out without consequences
- c) It's not clear who attends for the Board. It being a public entity, one cannot sign off on any agreement since it has to be approved at a later meeting and issues might arise
- d) Process may be abused to delay the inevitable when there are really no defenses to the claimed violation
- e) It is not clear whether the Board discloses strategy to the other side; and
- f) Bad mediators can make matters worse and not better

3.8 Presentation: Model Consent Agreements and Settlements-Content and Consistency

The presentation was made by Mark. R. Brengelman, JD, MA, Attorney at Law PLLC. He started by informing the participants that taking disciplinary action is one of the most important board functions: That in addition to its educational conferences, FARB develops and distributes model documents intended to provide direction and uniformity to the regulatory community

He also indicated that conversations culminated in dialogue during FARB conferences about the development of a document to serve as a model in situations involving a stipulated settlement or consent to entry of discipline .That attorney participants, are keenly aware of the issues and potential liabilities that flow from these agreements.

The presenter highlighted the objectives of the presentation as being-

- a) To draft sufficient documents providing for disciplinary action;
- b) To include thorough and consistent language;
- c) To take advantage of the lessons learned through relevant jurisprudence and experience; and
- d) To ensure uniformity which benefits the regulatory community and the public served, and in turn, facilitates accurate reporting to practitioner databases and facilitates license transfer, portability, or mobility decisions by other states based upon current, relevant information, as well as documentation and decisions in your own state

He further indicated that the main goal is to ensure uniformity, which benefits the regulatory community and the public served, and in turn, facilitates accurate reporting to practitioner databases and facilitates license transfer, portability, or mobility decisions by other states based upon current, relevant information. That this would help current boards, and future boards, and their staff when implementing, enforcing, and reviewing the document at any time in the future

Some of the highlights of his presentation are:

- a) Need of being aware of the need for extensive documentation when there is the passage of time and the Respondent may petition the board for something in the future There are common and necessary elements any state agency may include in a Consent Agreement or Settlement Agreement taking disciplinary action against a licensee or applicant in a contested case
- b) sharp focus must be brought to these crucial legal documents, which become part of the permanent record of the licensee or applicant and of the state agency
- c) The seventh section always contains Miscellaneous provisions, which may include: an Order of the Board reflecting the consideration, voting, majority approval, and entry of the consent/settlement agreement as an order of the board .This may be a boilerplate cover sheet showing the above, to which is attached the underlying consent/settlement agreement
- d) Presentation of the agreement to the board, includes:
 - (i) The consent/settlement agreement at the next regularly scheduled meeting;
 - (ii) The board may accept or reject it, and if so, it is of no evidentiary value either for the Respondent or against the Respondent since this is like a criminal plea agreement; and
 - (iii)The Respondent may still challenge the objectivity of the board on any other ground.
- e) The sixth section contains provisions on presentation of the agreement to the board, which includes:
 - (i) The consent/settlement agreement which is not effective until approved by the board by majority vote and signed by its chair ;
 - (ii) Information that the Respondent shall not seek to rescind, revoke, withdraw, or modify the consent/settlement agreement prior to, or during, the board meeting i.e

- “anti-reneging” clause once signed by the Respondent designed to bind the Respondent; and
- (iii) The parties may modify the consent/settlement agreement only in writing signed by both parties.
- f) The fifth section contains provisions on violation of the agreement, which includes:
- (i) The board may impose fines and costs if it proves a violation of the settlement agreement;
- (ii) Whether it includes attorneys’ fees; and
- (iii) provisions on violation of the agreement, which includes:
- That the document is a binding contract, subject only to the approval of the board by majority vote;
 - The violation of its terms is a violation of board statute for “violating an order of the board,” ; and
 - A provision for enforcement and the circumstances.
- g) The fourth section contains provisions on agreed upon penalties and discipline, which includes:
- (i) Terms and conditions of probation, if probation is issued (probation should have terms and conditions more than “you have to follow the law” while on probation)
- (ii) Reinstatement provisions post-suspension or revocation, if applicable or statutorily mandated open-ended or self-implementing; That time limit imposed in all cases.
- (iii) Statutorily authorized action against the license, i.e., “revoke, suspend, reprimand”
- (iv) Other, non-statutorily authorized action against the license, i.e., “voluntarily surrendered as if revoked”, or “permanently revoked” vs. just “revoked?”
- h) The third section contains provisions on procedural rights addressed and waived, which includes:
- (i) Acknowledgment and wavier of procedural rights;
- (ii) Statement that the Respondent has read/understood/freely signs (and has had counsel of record, if applicable) ;
- (iii) Understanding the Respondent waives rights to an administrative hearing, including all named rights under the administrative procedures act, and will not make a collateral attack or other judicial appeal i.e the “anti-reneging” clause once signed by

the Respondent;

- (iv) Other, non-statutorily authorized action against the license, perhaps with contractual consideration, i.e., “the Respondent’s license is suspended for one year and the Respondent shall not work in any professional setting during the period of suspension, in lieu of additional fines as authorized by” anything required to be done shall also be filed with the board to show proof of its being done, i.e., additional continuing education or restitution to client Procedural rights addressed and waived, which includes;
 - (v) Acknowledgment that the board shall impose disciplinary action;
 - (vi) Understanding the disciplinary action shall be a public record, reportable to any state or national organization, like the National Practitioner’s Data Bank for health care professionals; and
 - (vii) the entire agreement between the parties.
- i) The second section contains provisions on applicable law and facts of the particular case, and possibly includes:
- (i) Jurisdiction and stipulated facts for the unlicensed practice;
 - (ii) Power of the board over that specific practice act if there is unlicensed practice; and
 - (iii) Recognition that the unlicensed Respondent is subject to the board’s practice act regarding unlicensed practice.
- j) The first section includes provisions on style of the case and introductions, and includes:
- (i) Identification of the board and the licensed professional (a “Respondent”);
 - (ii) Recitation that it’s an agreement between the parties who wish to settle and the same should be drafted and interpreted and enforced as a contract between parties;
 - (iii) Statement that the agreement avoids an administrative hearing which is otherwise allowed by an agency’s statutory authority and administrative procedures act; and
 - (iv) Style of the case and introductions, and includes:
 - Pleading caption, including agency case number and administrative action number;
 - “Whereas clauses” which recite the administrative history of the case (initiating complaint, investigation, finding of probable cause);

- Other background tailored to the individual aspects of each case e.g some cases will result in a Notice of Hearing being issued, or may be settled prior to the start of a contested, administrative action

In his concluding remarks, the presenter emphasized on the fact that disciplinary action is important because it implements common concepts with different names; “Consent decree” vs. "settlement agreement” vs. “agreed order”. That all such documents are designed to accomplish disciplinary action that is part of the licensure record with a state agency of a regulated professional. Further, that the model Consent/Settlement Agreement is a guide for adoption or adaptation by individual regulatory boards, departments, or agencies

3.9 Presentation: Think Differently: Developing Friction-Free Licensure Framework

The presentation was made by Veronica L. Meadows, Senior Director of Strategy, The Council of Landscape Architectural Registration Boards (CLARB). She informed the participants that the purpose of the presentation was to review the regulatory environment and how the regulatory community is responding, to explore friction points in the licensure process with CLARB as a case study and to identify opportunities to reduce or eliminate friction .The highlights of her presentation are :

- a) Some of the causes of friction in the licensure framework include the narrative worker shortage, unreasonable experience requirements and barrier to mobility. The response has always been that the licensure community is becoming more active, engaged and coordinated Licensure community. There is need to explore options by:
 - (i) Selecting friction points and brainstorming ways to reduce or eliminate them;
 - (ii) Not being bound by today’s realities, but thinking as if one is creating the process afresh from scratch;
 - (iii) Considering the amount of friction and impact to public protection for each friction point; and
 - (iv) Identifying opportunities to reduce unnecessary friction.
- b) Solution Development
 - (i) Embraces outcome focused non-sequential requirements;
 - (ii) Celebrates interdependence of the member boards;

- (iii) Leverages advanced tools for performance verification; and
 - (iv) Uses a national standard of evaluation.
- c) Some of the anticipated outcomes include-
- (i) Harmonization i.e simplification of the process promotes continuity for stakeholders;
 - (ii) Engagement of more member boards involved in policy making at the national level;
 - (iii) Increased trust in the regulatory model;
 - (iv) Increased positive perception of CLARB as a hub of activity promoting low friction;
 - (v) Adaptability i.e being future ready and anticipating changes in technology as well as regulation; and
 - (vi) Designing a simpler, more frictionless framework and complementary process for licensure resulting in enhanced experience, improved credibility and confidence of the stakeholders of landscape architecture licensure.
- d) CLARB is working to reduce unnecessary friction by balancing needs of boards and licensees and managing multiple processes. Some of the causes of friction for boards include lack of resources, use of manual processes, restrictive laws, rules and regulations and limitations on ability to educate policy makers. Some of the causes of friction for licensees include confusion, complexity, variation, redundancy, time and cost.

4.0 Farewell Breakfast.

A farewell breakfast was held for the participants on Thursday, August 30th, 2018 at the Sheraton Grand Nashville Hotel. The participants were all appreciated for attending the 56th NASCLA Conference and informed that the NASCLA 57th Annual Conference will be held on August 26th -29th, 2019 at the Hyatt Regency Baltimore Inner Harbor in Baltimore, Maryland, USA.

5.0 Committee Observations

The delegation made the following observations:

- i) The National Association of State Contractors Licencing Agencies' (NASCLA) 57th Annual Conference will be held on August 26th -29th, 2019 at the Hyatt Regency Baltimore Inner Harbor in Baltimore, Maryland, USA.

- ii) The construction industry in Kenya is only regulated by the National Construction Authority (NCA) which is established by statute.
- iii) The legislative and regulatory bodies in the construction industry in Kenya have not had a common approach and effective collaboration amongst them has been missing.
- iv) The use of Alternative Dispute Resolution (ADR) mechanisms has not been fully embraced in the construction industry in Kenya, despite it being anchored in the Constitution.
- v) Kenya does not have an adequate and effective regulatory framework in the construction industry as compared to the USA.
- vi) There has been a lack of public participation in the construction industry in Kenya between the regulator and the stakeholders including the licensees with respect to the licensure framework.
- vii) Parliament enacted the National Construction Authority Act in 2011 and the same has not been amended with respect to the regulatory framework and the dynamics in the construction industry.

5.1 Committee Recommendations

The delegation makes the following recommendations:

- i) That Kenya takes note of the National Association of State Contractors Licencing Agencies' (NASCLA) 57th Annual Conference to be held on August 26th -29th,2019 at the Hyatt Regency Baltimore Inner Harbor in Baltimore, Maryland, USA.
- ii) That the National Construction Authority ensures that contractors adhere to the regulatory framework in order to protect public health and safety.
- iii) The legislative, executive and regulatory bodies in the construction industry in Kenya including the National Construction Authority, should work in collaboration and have a common approach in ensuring that the construction industry in Kenya is effectively regulated so as to promote public health and safety.
- iv) The use of Alternative Dispute Resolution (ADR) mechanisms should be fully embraced in the construction industry in Kenya.
- v) There is need for all the relevant stakeholders in the construction industry including the executive and the legislature to foster collaboration amongst themselves to solve

problems related to the construction industry, exchange best legislative practices, as well as initiating and refining legislative proposals concerning the construction industry.

- vi) The National Assembly should review the National Construction Authority Act, 2011 with a view of amending it so as to ensure that the construction industry is effectively regulated.
- vii) The National Construction Authority should promote public participation in the construction industry in order to solve problems related to the construction industry in Kenya and to develop a friction-free regulatory framework.