



# Hawaii Condominium Bulletin

## Tips on Successfully Fulfilling Your Fiduciary Obligations

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Most board members understand that they serve as a fiduciary when they are elected to serve on their Association's Board of Directors. Board members, as fiduciaries, have a duty and responsibility for the decisions they make on behalf of their Association. They must be careful to assure that they serve in a manner that is consistent with their fiduciary duty. But what does it mean to be a fiduciary?

Under the law, when one person is entrusted with the responsibility to control the decisions, interests or property of another, a fiduciary responsibility arises out of this relationship. For our purposes, the board members as fiduciaries must subordinate their personal interests when taking action in connection with these matters and assuring that all of their actions are consistent with the best interest of the Association.

This fiduciary responsibility is based on the special relationship between the Board of Directors and the Association's membership. When directors exercise control over the Association's affairs, and thereby affect the lives and property of all its members, a fiduciary duty to the membership is created. The fiduciary responsibility implies a relationship of trust. In effect, the membership has decided to entrust the board with a certain amount of power to make decisions for the benefit of the entire community. The law does not diminish this responsibility simply because a member of the board is a volunteer serving without compensation.

The duties of a director or officer must be fulfilled in good faith, and in the best interest of the association, and with the kind of care, including reasonable inquiry, that a prudent person facing a similar situation would ordinarily use.

Board members owe an undivided duty of loyalty to the Association and its membership. A director breaches this duty when he or she acts in his or her own interest or with a conflicting interest. Acting in one's own interest does not only mean seeking a possible financial gain. It can include ego and other psychological benefits. If you believe that you cannot perform your responsibilities without an undivided loyalty to the Association, you are required by law to recuse yourself from any vote related to the issue in question. If you believe that there may be an appearance of impropriety, but no real conflict, you should disclose the circumstances of the situation on the record and then state why you believe your undivided loyalty to the Association won't be compromised.

Following are some tips on how you can be an effective board member, fulfilling your fiduciary responsibilities to your Association:

**Be informed:** Work hard to be informed, know your legal documents, and generally know the state and local laws. People are becoming increasingly aware that there are many laws that have been enacted to protect homeowners who live in Community Associations. The fact that complaints against Associations and their boards are on the rise has been well documented by insurance companies. There is now, more than ever, a need to be knowledgeable as a director. Your Community Association Manager is also required to have this knowledge and can guide you or suggest that a matter be referred to the Association's attorney. Courts have found boards negligent for making "unreasonable" decisions because the boards did not exercise due diligence to obtain the necessary information as part of the decision-making process.

(continued page 3)

# Message from the Chair



Aloha,

Here we are almost 3 months before the end of the year and the onslaught of the Holiday Season. Oh how the year seems to fly by.

In this issue of the Condominium Bulletin we are very proud to highlight our new online service to condominium owners and the public. Information about Condominiums, Condominium Law, Legislative Changes etc., is normally disseminated to the board of directors of a condominium, however a lot of that information never makes it to the condo owners. Our new email subscriber service first mentioned in the June 2015 Condominium Bulletin allows condo owners and the general public to register their email and receive condominium information, updates and educational offerings directly to your email account. Please take the time to read the article, get signed up and spread the word.

Technology in condominiums - it was recently brought to my attention that an AOOU (in which I happen to know a number of owners and the association's fiscal manager) avoided a financial scam that could have decimated their finances. The AOOU is a small complex that is self-managed by the board of directors, however they retain the services of a fiscal manager to handle the financial accounts. The fiscal manager received an email supposedly from the board in early July requesting that a very large sum of money be wire transferred to a maintenance company on the east coast with the wiring instructions and what looked like the signature of two board members. The fiscal manager was immediately suspicious as the letter indicated that the board recently had a meeting and hired the supposed maintenance company. The fiscal manager was not aware of a meeting and questioned whether the board would approve the release of nearly all their reserves to a company on the east coast. After contacting the president and secretary of the AOOU it was learned that there had been no board meeting, nor had the board approved the release of ANY funds. Apparently the email account of a board member was hacked, thus giving the hacker access to the AOOU's board minutes, financials, names and letterhead. The hacker photo-shopped signatures on the fund request and sent it off to the fiscal manager.

Fortunately the fiscal manager was extremely suspicious the minute he received the request, which was dated the 4th of July....his first clue that something was amiss. The letter and information has since been given to the FBI for follow up. What this scenario brings up is the ease that some hackers may have in getting information about your AOOU. It is important to have security protocols in place within the AOOU and the management team to prevent this type of situation from happening.

Even as I was writing this Chair's Message I was contacted by my bank regarding suspicious activity on one of my business accounts and failed attempts to make charges at a store in New York. It seems that it has become easier and easier for your information to be compromised, so setting up security policies and protocols to protect your association becomes more important than ever.

Stay safe!

Aloha,

Scott A. Sherley

# Tips on Successfully Fulfilling Your Fiduciary Obligations (cont. from page 1)

One of the great difficulties within the Community Association industry is the development of institutional knowledge. As board members transition from year to year, it is often difficult for the Association to establish sound operating procedures. Yet part of one's fiduciary responsibility includes becoming aware of past board activity by reading past minutes, as well as staying current on the affairs of the Association. It is a good idea for the "outgoing" board to meet with the "incoming" board at least once in order to review current issues, identify current contracts, and pass on important information.

**Get the facts:** The issues before the board are often complicated. Board members must take the time to find out the facts before they take action. If necessary, board members must seek information from qualified professionals before making decisions. While it is always valuable to have a board member with a particular area of expertise, it is generally not a good idea for the board to task board members with service functions of a professional nature, such as legal, insurance, accounting, or engineering services. It is generally a better practice to appoint that particular board member to serve as a liaison to the professional or service provider in order to manage the relationship.

**Make a decision:** Inaction can create liability exposure. A failure to act can create more liability exposure than a bad decision made with proper procedure. Courts tend not to second guess business decisions of boards, even when there is evidence that the board's decision was the best decision possible. When making a decision, be sure to comply with Association documents and try to make decisions that uniformly apply to all owners in similar situations.

**Maintain confidentiality:** Directors should presume that some materials and information they receive through his or her office are confidential. Beware especially of openly discussing with non-board members any strategic issues in connection with litigation that may be pending or in progress, salaries, employment matters, delinquencies, or other sensitive issues involving disputes with members of the Association.

**Read the minutes before approving them:** It is imperative that a board carefully review the draft minutes before approving them. It is those actions that are recorded in the approved minutes that will prove or disprove that you, as a board member, fulfilled your duty of care, exercised reasonableness and good business judgment in your decisions, and complied with the Association's documents and all applicable state laws and codes. It's also important that a board never admit liability in its minutes. If someone brings a safety hazard to the attention of the board (for example, a cracked walkway), it is irresponsible for the board to record in the minutes any acknowledgment of admission of liability. There is always a more appropriate way to phrase the underlying concern. Avoid making conclusions of law.

**Maintain open communication:** Adopt rules and regulations in an open and deliberate manner. Investigate what owners want and need. Send questionnaires. Educate committees about rules and regulations. Seek the opinions and carefully review information from experts. Before adopting rules, hold public meetings to discuss the proposed rules. Be sure to send out the new or revised rules and regulations to every owner and resident after they have been adopted.

**Remember to exercise due care and be neutral and informed:** Decide whether you are acting properly by asking yourself the following question: "Would a prudent person in a similar business, under similar circumstances, and after reasonable inquiry, make the same decision or take the same action as I am making?" If the answer is not a clear and convincing "yes" go back to the drawing board and consider all the information before moving forward.

Follow these tips to demonstrate a commitment to your fiduciary duties and show respect for your Association and its residents.

*NOTE: The information in this article has appeared in various CAI Chapter publications, including MN Community Living, Forum, and Quorum and a 2010 CAI Newsletter.*

## Confirming or vacating arbitration awards: be aware of a potential time trap

The Federal Arbitration Act (FAA) and state arbitration statutes can present different statutes of limitation for the confirmation of an arbitration award and different statutes of limitation for motions to vacate. For example, under the FAA, a party who is dissatisfied with an arbitration award must bring a motion to vacate within a short 90 day period of limitation. However, a party seeking to confirm an arbitration award under the FAA has a one year period within which to do so. Given the broad scope of the Federal interstate commerce clause, more arbitrations may be subject to the FAA than is realized by arbitration practitioners.

## Hawaii Supreme Court issues important decision addressing vacature of arbitration awards for alleged partiality of the arbitrator due to nondisclosure of potential conflicts.

The Hawaii Supreme Court overruled an ICA decision that had vacated a very large (nine million plus dollars) and hard fought (31 arbitration hearing days) construction industry arbitration award because of the arbitrator's alleged nondisclosure that he was one of several trustees of a prominent Hawaiian eleemosynary trust. The trust had many business interests and consequently was involved in extensive business and commercial transactions as well as involvement in many legal matters and disputes which required the engagement of many of Hawaii's top law firms.

In the underlying arbitration case, the losing party sought to vacate the arbitrator's award, asserting as one of its grounds that the arbitrator had not disclosed that attorneys in one of the large law firms representing the party who prevailed in the arbitration had represented the trust in several prior legal matters and that since the arbitrator was one of the trustees of the trust, the arbitrator's role as a trustee of a trust represented by the law firm involved as an advocate in the arbitration should have been disclosed. The arbitrator was a prominent and well respected retired Circuit Court Judge who served as a neutral arbitrator and/or mediator on other matters involving all of the law firms involved as advocates in the underlying arbitration and whose role and participation as a trustee of the prominent Hawaiian trust may well have been a matter of public knowledge in the local business and legal community. Complicating the circumstances, one of the name partners of the law firm that represented the party that was seeking to vacate the arbitration award reportedly had a brother in law who worked as a vice president for the same Hawaiian trust thus raising the prospect that the arbitrator's role as a trustee of the trust might have been known to the law firm or its client who lost in the underlying arbitration as a factual or legal matter. The Hawaii ICA in *Nordic PCL Construction, Inc. v. LPIHGC, LLC*, (No. CAAP-11-0000350), (ICA, Feb. 14, 2014) applied the "reasonable impression of partiality" standard and issued a decision vacating the arbitrator's award due to insufficient and non-disclosure of past and ongoing connections and relationships with Counsels and their law firms.

In *NORDIC PCL CONSTRUCTION, INC., fka NORDIC CONSTRUCTION, LTD., vs. LPIHGC, LLC*, (SCWC-11-0000350, July 23, 2015), the Hawaii Supreme Court reversed the ICA and remanded the matter for further proceedings. The case presents very complex factual circumstances and raises multiple legal issues regarding an arbitrator's duty of disclosure under Hawaii's Revised Uniform arbitration Act (HRS Ch. 658A), the effect of the arbitrator's partial disclosure, party and counsel knowledge of facts that may raise a duty to inquire or to service by the arbitrator and whether the failure to inquire constitutes a waiver of the right to later challenge the decision.

Among its rulings, the Supreme Court stated that:

- "...a party who has actual or constructive knowledge of a relationship of the arbitrator requiring disclosure but "fails to raise a claim of partiality . . . prior to or during the arbitration proceeding is deemed to have waived the right to challenge the decision based on 'evident partiality.'" Daiichi, 103 Hawaii at 345-46, 82 P.3d at 431-32 ("In the arbitration context, waiver has been defined as consisting of knowledge, actual or constructive, in the complaining party of the tainted relationship or interest of the arbitrator and the failure to act on that knowledge.")
- "...courts do not endorse the "wait and see approach." 103 Hawaii at 348, 82 P.3d at 434 (citing *Hobet Mining, Inc. v. Int'l Union, United Mine Workers of Am.*, 877 F. Supp. 1011, 1019 (S.D.W.Va. 1994) ("[W]here information about an arbitrator is not known in advance, but could have been ascertained by more thorough inquiry or investigation, a post-award challenge suggests that nondisclosure is being raised merely as a 'tactical response to having lost the arbitration' or an inappropriate attempt to seek a 'second bite at the apple' because of dissatisfaction with the outcome."))

- Due to the lack of an evidentiary hearing, there are no findings regarding the actual or constructive knowledge of Nordic's representatives or counsel, including when Nordic's representatives or other counsel actually discovered the Arbitrator's position as a trustee of the QLT, and Carlsmith Ball's representation of him in that capacity, assuming the Arbitrator's duty of reasonable inquiry required disclosure of such facts, as discussed previously. There are also no findings as to when Nordic or its other attorneys learned of the Arbitrator's additional retention as a neutral by other attorneys in LPIHGC's counsel's law firms. Therefore, on remand, if necessary, the circuit court can determine the sufficiency of the initial disclosure, Nordic's actual or constructive knowledge, and the timeliness of Nordic's motion to determine whether Nordic waived its right to claim evident partiality.

Mr. Chang, along with Charles "Chuck" Crumpton, the Mediation Center of the Pacific and Dispute Prevention and Resolution, is an evaluative mediation provider available to mediate condominium-related disputes between owners.

## Maintaining The Common Elements of a Condominium Association

*The following is an excerpt from Condominium Property Regimes: Owner Rights and Responsibilities. The full document may be found at the REB website [www.hawaii.gov/hirec](http://www.hawaii.gov/hirec).*

One of the most important duties of the condominium association is the maintenance of the common elements. Common elements as described in the declaration or bylaws typically include the landscaping; recreational facilities; private streets and driveways; hallways; lobby areas; load-bearing members; water and electrical systems; roofs; fences and any other common areas. Many condominium associations hire a managing agent to arrange for this maintenance work; however this is not required by the condominium law.

The cost of operating and maintaining the condominium is funded through budgeting and assessing procedures carried out by the association. The sole source of income for many associations is regular periodic assessments, often called "maintenance fees", levied on all owners in the project.

The amount of a unit owner's fee is determined by the owner's interest in the common elements (the "common interest") as set forth in the declaration (HRS § 514B-41 (a)). All owners MUST pay the assessments (HRS § 514B-146 (a)); they cannot be avoided simply by not utilizing various common facilities (HRS § 514B-144 (g)). Assessments cannot be withheld or put into escrow because owners think they do not owe them or disagree with board policies. The board of directors is responsible for notifying the owners in writing of any maintenance fee increases at least 30 days in advance (HRS § 514B-144 (h)).

In addition to assessments for common expenses, owners can be assessed the cost of repair and maintenance of the limited common elements assigned to their unit in an equitable manner as set forth in the declaration (HRS § 514B-41 (a)). The board can choose to forego allocation of the limited common expense to the owners of the unit to which the limited common element is assigned, under certain circumstances. The board must reasonably determine that the extra cost incurred to separately account for and charge the costs is not justified, and adopt a resolution to that effect (HRS § 514B-41 (c)).

# Ask the Condominium Specialist

**Q:** I requested association documents from my condominium managing agent. While I expected to pay a fee, I was not prepared for what I thought was an exorbitant amount. Are there guidelines for charging owners for documents? If it turns out that I was overcharged, is there somewhere I may file a complaint against the managing agent?

**A:** Generally, a “reasonable fee” may be charged to obtain copies of an association’s documents, records and information, pursuant to HRS §§ 514B-152 -154.5. Pursuant to HRS § 514B-154.5 (f), this fee may not exceed \$1 per page, or portion thereof. A fee for pages exceeding eight and one-half inches by fourteen inches may exceed \$1 per page. If you believe you were overcharged for your documents, the Regulated Industries Complaints Office has jurisdiction to investigate this matter. (Your managing agent, as a real estate broker, may also have violated portions of the real estate licensing law; RICO can make this determination.) You may complete a complaint form online at [www.cca.hawaii.gov/rico](http://www.cca.hawaii.gov/rico), or telephone the complaint line at 586-2653.

**Q:** What is the difference between the common elements and the limited common elements in a condominium association? And where may I look to determine these areas in my condominium association?

**A:** “Common element” is defined in HRS § 514B-3 as “(1) all portions of a condominium other than the units; and (2) [a]ny other interests in real estate for the benefit of unit owners that are subject to the declaration”. Common elements must be described in the association’s declaration, pursuant to HRS § 514B-32 (a) (8).

Every owner owns an undivided interest in the common elements; common expenses of the association are allocated based upon each unit’s common interest ownership as set forth in the declaration.

A “limited common element”, also defined in HRS § 514B-3, “means a portion of the common elements designated by the declaration or by operation of 514B-35 for the exclusive use of one or more but fewer than all of the units”. A limited common element is best thought of as owned by all the owners, but restricted in use to a certain owner or owners. Limited common elements must also be described in the association’s declaration pursuant to HRS § 514B-32 (a) (9).

Expenses pertaining to limited common elements are as a general rule charged to the units having the right to use the limited common elements, except if the declaration or bylaws indicate otherwise or if the board reasonably determines that the cost may be charged to all owners as a common expense (HRS § 514B-41 (c)).

Review your condominium association’s declaration, and any amendments to the declaration, to determine the areas in your association designated “common elements” and “limited common elements” and also to see whether any limited common element has been allocated to your unit.

*The information provided herein is informal and intended for general informational purposes only. Consult with an attorney familiar with the Hawaii condominium law for specific legal advice regarding a particular situation.*

# Mediation Case Summaries

From June 2015 through August 2015, the following condominium mediations were conducted pursuant to Hawai'i Revised Statutes § 514B-161, and subsidized by the Real Estate Commission. The mediation providers also conducted additional condominium mediations in their respective District Courts.

## Mediation Center of the Pacific

Through Skype video conferencing capabilities, MCP has been conducting additional mediations with condominium owners who live part-time in Hawaii and are currently residing out of the state.

Owner vs. Board	Water damage caused by the alleged malfunction of a common element.	Mediated to agreement
Owner vs. Board	Alleged improper board action in rental of common element.	Board declined mediation

## Mediation Services of Maui

Owner vs. Owner	Owner alleges violation of bylaws in attempt to force owner from the board and from the condominium association.	Mediated; no agreement
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Ku'ikahi Mediation Center, West Hawaii Mediation Center and Kaua'i Economic Opportunity did not report any condominium mediations for this period. They continue to reach out to the condominium communities to educate owners about the benefits of mediation as a dispute resolution tool, including maintaining a presence at District Court to conduct court-referred condominium mediations on site.

# Email Subscription

The Real Estate Commission and Real Estate Branch have become aware that many owners are not receiving information regarding various condominium issues for a variety of reasons. The Commission and Branch are also aware that many people are looking to purchase condominiums. As the Commission and Branch are mandated by the Legislature to make educational materials regarding condominium living available to all owners, a new online service was launched at the end of June 2015 to help spread information to unit owners and the general public regarding condominium issues. Interested parties can sign up to receive direct emails at the address below.

In July, the first direct email discussed the June 2015 Condominium Bulletin, the new condominium document complaint form from the Regulated Industries Complaint Office, the rights and responsibilities of owners and board members and the newly signed evaluative mediation contracts with providers statewide.

The August email detailed Act 242 which relates to medical marijuana, the newly updated electronically available Hawaii Revised Statutes Chapters 514A and 514B, a September Hawaii Community Association Institute's educational event and a helpful condominium tip.

The Commission strongly recommends any interested parties to subscribe to the email list at: [cca.hawaii.gov/reb/subscribe/](http://cca.hawaii.gov/reb/subscribe/).

The Commission also appreciates such interested parties in spreading the word about this and other educational opportunities offered by the Commission.

# 2015 Real Estate Commission Meeting Schedule

**Laws & Rules Review Committee – 9:00 a.m.**

**Condominium Review Committee – Upon adjournment of  
the Laws & Rules Review Committee Meeting**

**Education Review Committee – Upon adjournment of the  
Condominium Review Committee Meeting**

Wednesday, October 07, 2015  
Tuesday, November 10, 2015  
Wednesday, December 02, 2015

**Real Estate Commission – 9:00 a.m.**

Friday, October 23, 2015  
Wednesday, November 25, 2015  
Friday, December 18, 2015

All meetings will be held in the Queen Liliuokalani Conference Room of the King Kalakaua Building, 335 Merchant Street, First Floor.

Meeting dates, locations and times are subject to change without notice. Please visit the Commission's website at [www.hawaii.gov/hirec](http://www.hawaii.gov/hirec) or call the Real Estate Commission Office at (808) 586-2643 to confirm the dates, times and locations of the meetings. This material can be made available to individuals with special needs. Please contact the Executive Officer at (808) 586-2643 to submit your request.

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