



# Hawaii Condominium Bulletin

Pay First, Dispute Later – It's the Law By John A. Morris

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Sometimes, condominium owners withhold payment of their maintenance fees because of a dispute with the board over policies, maintenance of the property, or other reasons. Not only is that against the law; it also exposes the owners to significant risk, including large bills for legal fees.

For more than 20 years, Hawaii's condominium law has imposed a "pay first, dispute later" policy. Moreover, several years ago, in 2012, the legislature incorporated the same policy into the law for non-condominium planned communities. That policy is currently found in section 514B-146 (c) and (d) for condominiums and section 421J-10.5 (c) and (d) for other associations.

Under the pay first, dispute later policy, an owner who disputes his (or her) liability for assessments imposed by the association is required to first pay the assessments. Then, the owner can demand mediation or file in small claims court to resolve the dispute. Condominium owners also have the option of arbitration.

Courts have ruled that an owner's obligation to pay assessments to the association is completely independent of any other claims the owner may have against the association. In other words, an owner cannot withhold association assessments as an offset against any claims the owner has against the association. The courts have recognized that associations cannot function without the necessary funds. Therefore, an owner's obligation to pay association assessments overrides any other claims of the owner against the association.

Some owners perceive the "pay first, dispute later" policy as unfair. In fact, the policy protects both the association and the owner.

Owners benefit from following the policy because it allows them to avoid unnecessary legal fees by moving their dispute into a low-cost dispute resolution process, such as mediation. In that way, the owner can seek an independent evaluation of the owner's claim without putting the owner at risk of having to pay large legal fees if the owner does not prevail in court.

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## Message from the Chair



Aloha,

Here we are in the middle of the current legislative session, and there is some Legislation regarding/affecting Condominiums. In this issue we highlight those pieces of legislation; however it is too soon to predict what will happen with the proposed legislation or how they may change as the process moves along.

We are also very pleased to introduce the newest member of the Real Estate Branch Team, Dathan Choy.

Also in this bulletin is information on Evaluative Mediation which was part of Legislation passed in 2013. And a terrific article on Pay First, Dispute Later from John A Morris.

We are barely into 2015 and already condo activity is on the move.

Until Next Time, Aloha

Scott A. Sherley

## We Welcome a New Condominium Specialist

In January, the Real Estate Branch welcomed Dathan Choy as a Condominium Specialist. Dathan comes to us most recently from Deloitte & Touche where he was employed as a tax consultant. For the 2013-2014 legislative session he worked at the Hawaii State Capitol as a Budget Analyst for the Ways and Means Committee.

Dathan received his Bachelors of Science degree from the University of Oregon in 2008 and a Masters of Accounting degree from the University of Hawaii in 2009. Dathan also acts as a free-lance consultant for clients, including a condominium association.

Welcome Dathan!



## Evaluative Mediation Being Offered to Condominium Owners

Since 1992, the Real Estate Branch has been subsidizing facilitative mediation for resolving disputes between condominium owners and board members. The subsidy for mediation comes from the Condominium Education Trust Fund; the law requires that the funds of the CETF be used for educational purposes, including mediation.

Beginning in July of this year the REB will also subsidize evaluative mediation through the organizations Mediation Center of the Pacific and Dispute Prevention and Resolution, Inc. and with two private providers as an additional dispute resolution option for condominium owners and board members.

Evaluative mediation is a form of mediation conducted by trained mediators who possess subject matter expertise in the Hawaii condominium law and extensive experience mediating disputes. Evaluative mediators are familiar with and understand the relevant case law; mediators provide candid and informed assessments regarding the strength and weaknesses of each party's position and the likelihood of either party prevailing in court or in a hearing. Evaluative mediators facilitate discussion between the parties and assist in the parties' attempts to reach agreement by giving objective feedback and suggestions on options for resolution.

Look for more information on evaluative mediation and the providers in the June Condo Bulletin.

# Pay First, Dispute Later – It's the Law (cont. from page 1)

(The legislature adopted the pay first, dispute later policy, in part, after hearing of a case in which an owner's dispute over a \$400 debt ballooned into a debt of over \$50,000, mainly as a result of the legal fees incurred by the association in defending the owner's claim. The owner even appealed the case to an appellate court but lost at every level of the judicial system. Had the owner been able to take advantage of the pay first, dispute later policy found in the current law, she could have saved thousands of dollars.)

In summary, the pay first, dispute later policy serves a valuable purpose for both associations and owners. Therefore, boards faced with the real or imagined claim of a recalcitrant owner should take every opportunity to explain the benefits of the policy to that owner, to try to resolve the dispute.

*JOHN A. MORRIS first became involved with condominiums and homeowner associations when he served for three years (1988-1991) as the first condominium specialist for the Hawaii Real Estate Commission. Mr. Morris is currently co-manager of Ekimoto & Morris LLLC, which represents over 600 condominiums and other types of homeowner associations. He has spoken and written articles about homeowner associations and legislation affecting them. Each year, he helps the firm publish a 370 page "Director's Guide to Hawaii Community Association Law", a handbook for directors which includes the condominium law and other relevant statutes, as well as an analysis of the legal requirements relating to the management and operation of homeowner associations in Hawaii.*

## 2015 Legislative News

*These are some of the condominium related bills that the Real Estate Commission is following this legislative session. Not all will survive the session; in our June Condominium Bulletin, we will present the bills that remain and that await the Governor's signature.*

HB 571 – Would require a condominium hotel developer's public report to disclose the past years' general excise taxes and transient accommodations taxes for converted condominium hotels. Requires that each condominium hotel operator file an annual report with the Real Estate Commission. This measure has been deferred. (This bill's Senate counterpart, SB 541 was also deferred indefinitely by Senator Roz Baker.)

HB 575 – Would require resident managers, managing agents and association boards to keep a record of email addresses of condominium association members. This measure has been deferred.

HB 670 – Establishes term limits on board of director members for planned community associations and condominium associations. This measure has been deferred.

SB 687 - Restricts management fees to an amount that reflects a reasonable value for services rendered. Requires that condominium property managers, associations of apartment owners, and planned community associations make association documents available to owners under reasonable terms, including through a property management company's or association's website, if one exists, and for reasonable costs.

SB 826 - Establishes provisions for condominium association annual meetings and quorum requirements. Permits the board of an association to employ and discharge the managing agent of an association, subject to a vote of a majority of the unit owners at an association meeting. Provides an exemption for a condominium project in which a majority of the units have been submitted to one or more vacation plans, or in which one or more units has been submitted to a vacation plan established by the developer of the project or by an affiliate of the developers. As of the date this bulletin is posted online, this bill has been amended and survives as SB 826 SD1.

# Ask the Condominium Specialist

**Q:** I am a director in a condominium association that is also incorporated as a non-profit corporation under Hawaii law, HRS Chapter 414D. There is a provision in the non-profit corporation law that allows us to take action via “written consent” without actually having a meeting. As a condominium association, is this something that we may do and stay also within the Hawaii condominium law?

**A:** The Hawaii Nonprofit Corporations Act, HRS Chapter 414D contains a provision that states that “unless the bylaws provide otherwise” a vote may be taken by members of a board via written consents describing the action taken, signed by each director, and included in the minutes filed with the corporate records reflecting the action taken. (HRS § 414D-144)

However, this same chapter also contains a provision for situations where Chapter 414D conflicts with other laws, including the condominium law, Chapter 514B. This section states that where there is a conflict between the provisions of 414D and 514B, the provisions of 514B shall supersede and control the provisions of Chapter 414D. (HRS § 414D-311)

The condominium law, HRS Chapter 514B does not contain any “written consent” provision. Chapter 514B errs on the side of openness in meetings. HRS § 514B-125 (c) states, for example, that all board meetings shall be conducted in accordance with Robert’s Rules of Order newly Revised. HRS § 514B-125 (a) provides that all association members may attend a board meeting and participate in any deliberation or discussion. This preference for openness in meetings would preclude board members from voting without a meeting.

The preference for openness in meetings in Chapter 514B may be viewed as a conflict between the two chapters and if so, Chapter 514B supersedes and prevails over the written consent provision of Chapter 414D. Therefore, prior to taking any such action based upon the nonprofit corporations law, it would be prudent to consult with an attorney to assure that all actions taken by a board are allowable, valid and legally sound.

**Q:** When should my condominium association begin collecting reserves set aside for future maintenance? How often should we collect for reserves from our owners?

**A:** Condominium association reserves are governed by HRS § 514B-148 and the rules set forth in Hawaii Administrative Rules Chapter 107, Subchapter 6. HRS § 514B-148, dealing with budgets and reserves requires that “**each fiscal year**, the association shall collect the amount assessed to fund the estimated replacement” reserves as determined by the association’s reserve plan. (Emphasis added.) The exception to the law is for new associations that have not held a first annual meeting. Such associations may legally defer collecting reserves “until the fiscal year which begins after the association’s first annual meeting”. In addition, the administrative rules require that the **annual** operating budget of a condominium association “shall include assessments sufficient to fund the association’s statutory replacement reserves” (HAR § 16-107-63). The short answer therefor, is that reserves must be collected every year, once the first annual meeting has been held.

*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.*

## Insurance Smarts By Sue Savio, Insurance Associates

**What are the repercussions in a real estate transaction to a buyer of a property that has had a major event under ownership of the seller, such as a fire, with respect to insurance premiums and coverage of an HO-6 policy offered to the buyer? Will the buyer be charged additional premiums and reduced coverage for the new HO-6 insurance coverage? If so, how long will these limitations be in place?**

There are no repercussions for buying a unit that has had damage if the damage has been repaired. The insurance company will not discriminate in price or coverage for a unit that has suffered a prior loss under the prior owner. There will be no surcharge or reduction of coverage.

# Mediation Case Summaries

From December 2014 through February 2015, the following condominium mediations were conducted pursuant to Hawai'i Revised Statutes § 514B-161, and subsidized by the Real Estate Commission. Mediation Center of the Pacific conducted additional condominium mediations in Honolulu District Court.

## 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	Regarding repairs to the common elements	Board declined mediation; case closed.
Owner vs. Board	Building access to/from parking area pursuant to the house rules.	Mediated to agreement.
Owner vs. Board	Allocating costs for the replacement of fixtures within a unit.	Mediated; no agreement.
Owner vs. Board	Replacement of limited common elements and cost to owners.	Mediated; no agreement.
Owner vs. Board	Alleged unequal enforcement of house rules.	Mediated to agreement.
Owner vs. Board	Limiting number of elevator fobs for owners; alleged improper meeting notice re: the use of proxies.	Board declined mediation.
Board vs. Owner	Alleged non-compliance by owner with project documents.	Mediated to agreement.
Owner vs. Board	Noise from the repair of common area; access to documents.	Mediated; no agreement.

## Mediation Services of Maui

Owner vs. Board	Owners' voting rights as they pertain to hiring a contractor to do work in the association.	Mediated to agreement.
Owner vs. Board	Issue of alleged disparate treatment of owners not participating in the short term rental pool.	Mediated to agreement.
Owner vs. Board	Owner disputes charges for common area repairs.	Mediated to agreement.
Owner vs. Board	Owner unhappy with the installation of doors on all of the units.	Mediated; no agreement.

## West Hawaii Mediation

Owner vs. Board	Owner questioned the accuracy of the association's reserves.	Mediated to agreement.
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## Kaua'i Economic Opportunity

Owner vs. Board	Owner challenged the issue of replacing vacancies on the board. to do work in the association.	Owner declined mediation.
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Ku'ikahi Mediation Center did not report any condominium mediations for this period. It continues to reach out to the condominium communities to educate owners about the benefits of mediation as a dispute resolution tool.

# 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**

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

Wednesday, March 11, 2015  
Wednesday, April 08, 2015  
Wednesday, May 13, 2015  
Wednesday, June 10, 2015  
Wednesday, July 08, 2015  
Wednesday, August 12, 2015  
Wednesday, September 09, 2015  
Wednesday, October 07, 2015  
Tuesday, November 10, 2015  
Wednesday, December 02, 2015

Friday, March 27, 2015  
Friday, April 24, 2015  
Friday, May 29, 2015  
Friday, June 26, 2015  
Friday, July 24, 2015  
Friday, August 28, 2015  
Friday, September 25, 2015  
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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