



Hawaii Condominium Bulletin

Why Mediation? Why Not? By Tracey Wiltgen



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Across the country, mediation has become the first step in addressing conflicts of all types. Consumer complaints, employee grievances, construction disputes, corporate and family matters and more, are currently worked out in mediation.

No matter how simple or complex the issues, mediation is in the forefront as a tried and true process that enables disputing parties to negotiate customized solutions quickly and privately. It is far less formal, less intimidating and less confusing than going to court or a hearing. There are no strict rules of procedure and the people involved whether two or multiple, have the flexibility to find the best path to agreement. Additionally, the mediation process has proven to be exceptionally valuable for assisting participants with continuing relationships.

With all of its benefits and history of success, mediation is the perfect approach for addressing the myriad of conflicts that arise within condominium associations. In particular, because conflicts arising between owners and boards involve continuing relationships, mediation is a logical first step to address differences. If the participants come to the table prepared to invest the time, energy and commitment to reach a resolution, then the mediation will usually succeed.

For all of these reasons and more, the Hawai'i Revised Statutes (HRS 514B) requires mediation if a condominium owner or board of directors requests mediation of a dispute involving the interpretation or enforcement of an association's declaration, bylaws or house rules, or a dispute involving Part VI of HRS 514B. Unfortunately, the requirement to mediate is not always viewed as a positive step.

The different perspectives and responsibilities of the various players in condominium associations can lead them to believe that mediation is a "waste of time." For example, some Property Managers and Boards feel it is their responsibility to vehemently enforce house rules and bylaws. Some owners believe they are not required to follow house rules and bylaws when they paid such a high price to purchase their unit.

(continued page 3)

Message from the Chair



Aloha,

It's amazing how time flies; here we are at the end of 2015 already and 2016 is just around the corner.

In this issue of the Bulletin we revisit the Evaluative Mediation Program and give you updates to it in our Mediation Summaries section. Because it's the end of the year and these issues keep coming up, we also revisit the basic operations of a condominium association in "Maintaining the Basic Structure and Operation of a Condominium Association"; the importance of documenting all parking stall transactions; and wish The Hawaii Council of Associations of Apartment Owners a happy 40th anniversary. I had the pleasure of speaking to this group in November on the issue of Service and Emotional Support Animals.

The beginning of 2016 also heralds the season of annual meetings for many condominium associations in Hawaii. This means that much additional work goes into preparing for a successful meeting; and for all the owners out there, prepare to participate!

In closing, I would like to say "Mahalo" to the Real Estate Commission Condominium Staff and all those organizations that help promote condominium association education throughout the year. 2016 is going to be a busy year for the condominium community and for those who work to make it better, so enjoy the Holiday Season while you can.

Happy Holidays!

Scott A. Sherley

Maintaining the Basic Structure and Operation 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.

The operation of a condominium is carried out through its "association", made up of all persons owning units in the condominium project. (Older condominium projects may refer to the association as an "association of **apartment** owners" – the term "apartment" has been replaced by "unit" with the implementation of HRS Chapter 514B.) Condominium associations have legally established authority or duties to preserve and maintain common property; create and enforce rules affecting association living; and provide other services, such as security, trash pickup and the like.

The association has powers and responsibilities which are similar to those of local governments. Included in these powers is the power to create "laws" (provisions governing the project and its owners) through the association's bylaws and house rules; to "tax" through the collection of maintenance fees and assessments; and to impose penalties through late fees and interest for late payment of assessments, and fines for violations of the declaration, bylaws, and house rules (HRS § 514B-104 (a)).

The declaration, bylaws, condominium map, and HRS Chapters 514A and 514B form the legal basis for the "mini-government" of homeowners that is created. These documents are used to establish the framework for the operation of the association. Most associations delegate their powers for the day-to-day operation of the association to a board of directors.

Membership

Membership in the association is mandatory. When you take title to a condominium unit, you automatically become a voting member of the association and are responsible for your share of the common expenses of the association. Each member's share is determined by the percentage ownership of the common elements stated in the declaration, i.e. the owner's percentage of "common interest". Membership automatically terminates when title is transferred. Only owners (including lessees under recorded leases) can be association members, and all owners must be members (HRS §§ 514B-3, -95, and -107 (a)).

Why Mediation? Why Not? (cont. from page 1)

People often get stuck in mind-sets such as “I’m right and they’re wrong”, “I don’t want to listen to him/her/them anymore”, “we just need someone to decide so we can get this over with.” These attitudes not only create barriers to a successful mediation, they also fail to accept the reality that a “win” in a hearing is never guaranteed. Even when the ruling is in favor of one side, the lasting bad feelings created by the adversarial nature of the hearings process can result in continued discord within an association.

Mediation on the other hand, can provide the participants with the opportunity to “clear the air” as well as problem solve in a way that focuses on everyone’s needs and concerns. To achieve positive outcomes, mediation participants must come to the table: 1) prepared with the information they need to address the issues; 2) committed to “listen” to the other participants (even if they feel they’ve heard it all before), and 3) open to discuss potential creative solutions.

It is also helpful for participants to consider how to best use the mediation process to work towards a resolution. For example:

- If there are multiple issues to be addressed, then consider prioritizing the issues and setting timelines regarding how much discussion is needed to address each one.
- If emotions are exceptionally high, then plan to spend more time in private meetings with the mediator to vent and de-escalate, before focusing on the substantive issues.
- If an impasse is reached, then ask the mediator for suggestions or even an evaluation of the strengths of each participants view to encourage more brainstorming and creative problem solving.
- If the issues being discussed impact other owners in the association, then discuss and agree on what information if any, will be shared with the other owners.

Committing a sufficient amount of time at the end of the mediation to craft a clear durable agreement is as important as preparing to participate in the mediation. It is also helpful to discuss and include in the agreement how the owner and board want to address potential differences in the future to avoiding misunderstandings and escalated battles again.

The mediation process is designed to provide people in almost any type of conflict with a private, flexible forum for talking and negotiating creative solutions. It is an ideal process for condominium owners and boards because of their ongoing relationship within the condo community. If approached with the right attitude, owners and boards can not only resolve the immediate issues that lead to the dispute, they can also pave the way for working and living together more harmoniously in the future.

Tracey Wiltgen is the Executive Director of The Mediation Center of the Pacific, Inc.

In July 2015, the Evaluative Mediation program subsidized by the Real Estate Branch was commenced. The evaluative mediation providers and their contact telephone numbers are: The Mediation Center of the Pacific, 521-6767; Lou Chang, A Law Corporation, 384-2468; Charles Crumpton (Crumpton Collaborative Solutions LLC), 439-8600; and Dispute Prevention and Resolution, 523-1234.

The Hawaii Council of Community Associations

The Hawaii Council of Community Associations celebrated its 40th anniversary in October. This article tells of the creation of the group and its highlights through the years. It was contributed for printing by Jane Sugimura, Esq.

The Hawaii Council of Associations of Apartment Owners (HCAAO) was registered as a non-profit Hawaii corporation on October 24, 1975. Aaron Chaney, a founder of Chaney Brooks & Company, who helped develop the condominium/cooperative housing management industry in Hawaii, was part of the group that established HCAAO and he was a leading force in the early days of the organization. HCAAO is a Section 503(c) (6) entity. In 2010, the Council adopted a policy to include community associations so that it is now known as Hawaii Council of Community Associations (HCCA) and it serves condominium, cooperative housing and planned community associations by providing and promoting educational services (quarterly seminars), including the collection and dissemination of information and data relating to the ownership, operation, maintenance and management of community associations; and by advocating for legislative changes to issues that affect the community association members and their boards of directors.

Over the years, HCCA has been involved in the following issues:

- HCCA lobbied for years to obtain lease to fee conversion legislation in the State Legislature and its efforts resulted in the first right of refusal law in favor of lessees. HCCA was also appointed by the State Senate to represent the lessee group in a mediation process with the large landowners in order to determine an equitable resolution of the lease-to-fee dispute. Although the mediation resulted in an impasse, both sides agreed that one of the problems was a lack of information regarding leasehold property and the law requiring leasehold disclosures was enacted in 1989 (HRS 516D-11 et seq.).
- HCCA was also a leader in the effort to enact Chapter 38 in the City & County of Honolulu in 1991, which was eventually upheld by the U.S. Supreme Court, which allowed lessees to initiate a mandatory lease-to-fee conversion process. Until the law was repealed in 2005, over 20,000 lessees on Oahu were able to convert from lease to fee either directly or indirectly as a result of Chapter 38. HCCA was also actively involved in opposing the 3-year campaign that resulted in the repeal of Chapter 38 in 2005.
- From the 1980's to the current time, HCCA was appointed to serve on several Blue Ribbon Panels established by the State of Hawaii Real Estate Commission to review and comment on proposed legislation affecting condominiums, co-ops and planned community developments. HCCA was on the panel that drafted the recodification of HRS 514B that was adopted by the State Legislature in 2005. Most recently, HCCA served on a Blue Ribbon Panel that reviewed and commented on proposed changes to the Hawaii Administrative Rules for Chapter 514B.
- For three years in the mid-1990's, HCCA served on a City Task Force investigating the Fire Department's proposal to retro-fit older condominiums with fire sprinklers. HCCA was able to persuade the City that it would be cost-prohibitive to unit owners to require retro-fitting. During that process, HCCA was able to include fire-safety and emergency services information in its educational programs so that the 3-year interaction with the Fire Department resulted in many benefits to our members.
- HCCA was pro-active in the establishment of aging-in place laws in HRS 514A and 514B (514B-142). We were able to get enacted a limitation on liability for association employees who assisted elderly and disabled residents and to establish a process where the association could obtain social services for aged and disabled residents so that they could remain independent and remain in their homes.
- Other issues where HCCA has been involved:
 - o In 2015, we opposed the City's action to stop rubbish removal services to condos;
 - o Fought for reduction in property taxes when Mayor Harris' "revenue neutral" policy resulted in higher property taxes for condos;
 - o Opposed the State Legislature's several attempts to pass a law that would have resulted in GET tax on maintenance fees;
 - o Participated in the task force that established the rules and regulations for the registration and licensing of security guards;
 - o Was instrumental in the passage of state law relating to the installation of solar panels on the rooftops of townhouse units that required the unit owner and its successors to provide insurance to the Association and to assume liability for any damage resulting from the installation of the solar system;

- o Was instrumental in the passage of state law limiting the operation of a childcare operation to the ground-floor unit of a townhouse project (and not in a high-rise building) and requiring the operator to provide insurance coverage in favor of the Association;
- o Several times opposed the City's attempt to increase the rate (i.e., lower than the rate charged to single-family homeowners) for water and sewer charged to condominiums;
- o Was instrumental in the passage of state law that requires condominiums/co-ops and gated-communities to allow access to process servers to enter the building or community to effect service of process;
- o In 2011 and 2012, was appointed to the State Mortgage Foreclosure Task Force that allowed condominiums/co-ops and community associations to continue to do non-judicial foreclosure and established a web-site at the DCCA for the publication of foreclosure notices at a cost substantially less than the cost charged by the local newspaper.

HCCA has been fortunate in that it has had the support of so many community members and volunteers over the years and we are and will continue to be the "go to" organization for advocacy on state and local issues relating to the welfare of condominiums, co-ops and community associations, their members and their boards of directors.

Jane Sugimura has been licensed to practice law since 1978 and is a partner at Bendet Fidell Sugimura, AAL, ALC. She has served as the President of the Hawaii Council of Associations of Apartment Owners since 1994, serves on two condominium association boards of directors and is the current First Vice-Chair on the Aiea Neighborhood Board #20.

When Selling or Buying a Condo Unit, Careful About that Parking Stall

This article was originally published in the November 2010 issue of the Hawaii Condominium Bulletin. It remains imperative when changing parking stalls to amend the declaration and to record the change at the Bureau of Conveyances; and don't forget to provide a copy of the executed amendment to your association!

When purchasing or selling a condominium unit, make sure you know which parking stall, if any, is attached to the condominium unit in question. A prospective purchaser and/or their real estate sales agent may rely on the property manager, or an onsite resident manager of a condominium association to advise them of which parking stall comes with a particular unit. The only positive way of determining what parking stall is legally attached to a unit is to review the Declaration of Condominium Property Regime (or in older buildings Horizontal Property Regime) and any amendments thereof.

Section 514B-40, Hawaii Revised Statutes, allows a unit owner, subject to the consent of any mortgagees or lessors of that unit, to transfer or exchange a limited common element (in this instance, a parking stall) that is assigned to the unit, to another unit. Any transfer shall be executed and recorded as an amendment to the Declaration. The amendment must be executed only by the owner of the unit whose limited common element is being transferred and the owner of the unit receiving the limited common element. Moreover, a copy of the executed amendment shall be delivered to the association.

Unit owners, however, occasionally enter into informal agreements among themselves to use another's parking stall because it is convenient to one or the other. These informal agreements become ingrained in the life of the association, i.e., association staff or other owners get used to seeing someone park in a particular stall and wrongly assume that the stall is attached to the unit. Owners may forget, or neglect to pass on critical information regarding the informal parking arrangements. It is not enough to rely on others for information concerning parking; a prospective purchaser should follow up with a review of the condominium documents. Confusion reigns when a buyer discovers that the stall he thought was his, and indeed considered before purchasing the unit, is not. Maybe he can't get the SUV into the stall or has physical requirements which are not met by the legal parking stall.

To avoid these potential problems, and the potential for litigation, always consult the Declaration and any current amendments to it beforehand to determine which parking stall is attached to a particular condominium unit. If unsure, seek advice from your real estate agent or an attorney.

Mediation Case Summaries

From September 2015 through November 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; MCP continues to mediate condominium disputes referred from the Honolulu District Court.

Owner vs. Board	Owner alleges improper foreclosure proceeding based upon maintenance fee delinquency.	Board declined mediation.
Owner vs. Board	Alleged improper use of proxies.	Owner declined to mediate.
Board vs. Owner	Issue of cost to repair common element.	Mediated to agreement.
Board vs. Owner	Noise issue between unit owners.	Board w/drew request for mediation.
Owner vs. Board	Issue regarding maintenance of common area.	Board declined mediation.

Mediation Services of Maui

Owner vs. Board	Owner argues association responsible for damages to unit; association denies responsibility.	Mediated; no agreement.
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Lou Chang, A Law Corporation

Owner vs. Board	Owner disagreed with board's adoption of a facility usage fee pursuant to the project documents.	Mediated; no agreement.
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Dispute Prevention & Resolution, Inc.

Owner vs. Board	Issue of parking stalls size reduced for construction of a gardening shed.	Mediated to agreement.
Owner vs. Board	Whether alterations made to unit were in compliance with project documents.	Mediated to agreement.

Ku'ikahi Mediation Center, West Hawaii Mediation Center and Kaua'i Economic Opportunity did not report any completed 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.

2016 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, January 13, 2016*
Wednesday, February 10, 2016
Wednesday, March 09, 2016
Wednesday, April 06, 2016
Wednesday, May 11, 2016
Wednesday, June 08, 2016
Wednesday, July 13, 2016
Wednesday, August 10, 2016
Wednesday, September 14, 2016
Wednesday, October 12, 2016
Wednesday, November 09, 2016
Wednesday, December 07, 2016

*Maui REALTORS® Association of Maui,
441 Ala Makani Place, Kahului, Maui, 9:30 a.m.

Real Estate Commission – 9:00 a.m.

Friday, January 29, 2016
Friday, February 26, 2016
Thursday, March 24, 2016
Friday, April 29, 2016
Friday, May 27, 2016
Friday, June 24, 2016
Friday, July 29, 2016
Friday, August 26, 2016
Friday, September 30, 2016
Friday, October 28, 2016
Wednesday, November 23, 2016
Friday, December 16, 2016

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 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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