



Hawaii Condominium Bulletin

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A Conflict of Circumstance by Rolf Crocker

In HOA World, the term “conflict of interest” is thrown around a lot, usually in the context of a Vendor-Manager, or Vendor-Board member relationship. I believe there is another type of conflict that goes unrecognized, something I call a “conflict of circumstance.” This type of conflict affects every interaction, every decision and every outcome of all community association decisions. From this conflict, there is no escape.

Let’s start with the premise that Board members are really trustees. It’s an important distinction. A trustee is “somebody who is given legal authority to manage money or property on behalf of someone else.” This term brings home the true gravity of the role of Board member. With that in mind, here are the basis points for the “conflict of circumstance”:

1) **The trustee is a procurer of services** and simultaneously a receiver of those services as an owner, manifesting the “conflict of circumstance.” If one is personally receiving benefit from the services, there is a cloud on objectivity in relation to the needs of the whole. This isn’t insidious or devious on face - it’s the position defined and delegated to them through the governing documents.

2) **The trustee is funder of those services.** It’s not just the receipt of services; the trustee also authorizes payment for those services. The level of subjectivity involved in this aspect cannot be overstated. However, this is not the most significant driver of subjective decision making with HOAs. See below.

3) **The trustee is a peer.** They are a member of the organization of which they are a trustee. They have to make the “big chair” decisions for the community, yet come home to explain to neighbor Jack at the mailbox why the budget must increase 15%. And they get to do this in the context of wanting to come home at night and have some modicum of a normal life.

This conflict cannot be eliminated, only managed. Here are a few steps that can help you walk your Boards and yourselves through this minefield:

Have EMPATHY for your Board Members. Put yourself in their shoes - a volunteer who is completely responsible for the outcome of an asset that typically represents the single most significant financial investment of the individual owners. Difficult at best for the most civic-minded among us.

Seek to have THEIR “eyes and ears.” This takes point # 1 from thought to action. Genuinely seek solutions which may be markedly different from what you would do if the outcome did not affect you directly. They may not be the best “objective” solutions but, as we’ve already discussed, this business is anything but objective from the perspective of the trustee.

Realize IT’S NOT ABOUT YOU. Community association professionals get to go home at night, away from the associations’ boiling pots of politics. Board Members do not. The pressure they feel is constant and unyielding. Keep this in mind when your Board reacts badly to you as the messenger, because they are almost always reacting to the circumstance, not you personally.

Board members are HOMEOWNERS first and foremost. Board service comes and goes but ownership

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Message from the Chair

Aloha,

While summer may not be officially over, with children back in school and UH back in session, things seem to ease a bit as we fall into a slower, familiar rhythm.

In July, new condominium legislation became law, including the total repeal of HRS Chapter 514A (you'll find a brief summary in this edition), to take effect January 1, 2019. Find out what bills were passed amending HRS Chapter 514B; "Legislative Wrap Up" summarizes the new laws and how they may affect you and your condominium association.

You'll also find articles here on understanding what board members do and pets and the Fair Housing Act.

Coming in early November, the Real Estate Commission along with CAI Hawaii will host another free Condorama event at the State Capitol Auditorium. The speakers will be Sue Savio, President, Insurance Associates, Inc., Lance Fujisaki, Esq., Partner, Anderson, Lahne and Fujisaki and Kanani Kaopua, Vice President and Senior Property Manager, Hawaiian Properties, Ltd. The moderator for this event will be Milton Motooka, Esq., Partner, Motooka and Rosenberg.

Further details about the educational program and registration information will be available closer to the date of the event at the CAI Hawaii website, <http://www.caihawaii.org/> or you can check out our Real Estate Branch website also.

See you at the next Condorama!

Laurie A. Lee, Condominium Review Committee Chair



A Conflict of Circumstance (cont. from page 1)

and everything it represents is for the duration. The first reaction of a trustee will always be as an owner. The key for Boards and managers alike is to recognize this, and provide the grace, place and space to process that knowledge and act as a trustee: What do we do in the best interest of the whole?

Someone once said that community associations are "an experiment that became an institution." I believe this to be the most accurate description of our industry I have ever heard. As a result, our industry has developed the exact same way. The technical aspects of our job are not necessarily arduous. The human aspect of our job is ALWAYS arduous. Therein lies the true Art of Management. The degree to which we can understand the nature of this "conflict of circumstance" will equal in every way the degree to which we will be successful. But more importantly, it will equal and even exceed the degree to which we will make a difference - a real, positive and lasting difference, a difference of incomparable value.

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2017 Legislative Wrap-Up

On January 18, 2017, the 29th legislature convened its regular session which adjourned on May 4, 2017. As previously noted, over 130 bills were introduced regarding some aspect of condominiums, and the Real Estate Branch was actively engaged in tracking, monitoring, and testifying on various proposed measures.

Most of the new laws enacted relate to condominium governance.

Act 71 amends section 514B-154.5 (association documents to be provided), Hawaii Revised Statutes (“HRS”), to make clear that a copy of any contract, written job description, and compensation between an association and any person or entity retained by the association to manage the operation of the property on-site must be made available to unit owners or their authorized agents with the proviso that personal information may be redacted. This Act also amends section 514B-110 (bylaws amendment permitted; mixed use property; representation on board), HRS, regarding removal of a director elected by a class of unit owners and section 514B-123 (association meetings; voting; proxies), HRS, regarding an association’s right to cast votes allocated to a nonresidential unit owned by the association in a mixed-use project. Finally, this Act amends section 514B-107 (board; limitations), HRS, by prohibiting tenants from serving on a board.

Act 73 also amends section 514B-123 (association meetings; voting; proxies), HRS, to clarify that if a standard proxy form authorized by the association is returned with no box or more than one box checked, then the proxy will be counted for quorum purposes only.

Act 81 amends section 514B-106 (board; powers and duties), HRS, clarifying that any violation by a board or its officers or members of the mandatory provisions of section 514B-161 (mediation), HRS, or section 514B-162 (arbitration), HRS, may constitute a violation of the fiduciary duty owed; however, a board member may avoid liability by indicating in writing the member’s disagreement with such board action or rescinding or withdrawing the violating conduct within 45 days of the initial violation. This Act also attempts to balance the right of association members to speak and participate in board deliberations and discussions by amending section 514B-125 (board meetings), HRS, to state that all members shall be permitted to participate in board meetings (other than executive sessions) subject to any board rules for owner participation about which owners must be notified. In addition, the amended section provides that the board meeting notice must include a list of business items expected to be on the meeting agenda. Finally, this Act amends section 514B-126 (board meetings; minutes), HRS, to require unapproved final drafts of minutes of a board meeting to be available within thirty days after the meeting.

Act 190 added an entirely new section to chapter 514B, HRS. This new section prohibits an association, board, managing agent, resident manager, unit owner, or their agents from retaliating against a unit owner, board member, managing agent, resident manager, or association employee who lawfully tries to address, prevent, or stop a violation of chapter 514B, HRS, or association governing documents, such as complain or report an alleged violation. This new law allows affected persons to bring a civil action in district court alleging retaliation and spells out possible legal outcomes.

Of special note for condominium developers, attorneys, unit owners, and associations is the passage of Act 181. The purpose of this Act is to end the confusion of having two condominium chapters in the HRS. Thus, effective January 1, 2019, chapter 514A (condominium property regimes), HRS, will be repealed. While the governance of chapter 514A, HRS, was superseded by chapter 514B, HRS, the development sections were still in effect. Accordingly, a safe harbor provision for chapter 514A, HRS, projects was included in Act 181. Condominiums created prior to July 1, 2006, that were issued an effective date may be sold on or after January 1, 2019, without revising any of the governing documents provided that the developer’s public report is active on January 1, 2019, and is accurate and not misleading. Basically, chapter 514A projects will become chapter 514B (condominium) projects through this safe harbor provision. If any pertinent or material changes, or both, have occurred to the project, the developer must file an amended public report superseding all prior reports prior to January 1, 2019. Chapter 514A projects without an effective date and filed notice of intent, however, will have to revise their governing documents and register under chapter 514B to offer for sale or sell condominiums. The Real Estate Commission will be providing additional guidance on this process.

Finally, Act 170 amends all references in both condominium statutes to “medical marijuana,” “medical use of marijuana,” and like terms to “medical cannabis,” “medical use of cannabis,” and like terms. This law amended all such references in the HRS, as well as the Hawaii Administrative Rules.

Ask the Condominium Specialist

Q: I live in a small condominium association consisting of 6 units. All owners pay a share of the water bill. One of the units is occupied by 10 persons. May we charge that unit a larger share of the water bill based upon the number of persons in one unit leading to higher water use?

A: Hawaii Revised Statutes § 514B-41 provides that the common expenses of a condominium association shall be charged to all unit owners “in proportion to the common interest appurtenant to their respective units”, except if a different formula is stated in an association’s declaration or bylaws.

From the plain reading of this provision, unless your project documents (declaration or bylaws) allow for a different method of sharing water costs, the unit in question pays its share of the water bill based upon the common interest ownership attached to their unit, not the number of persons residing in the unit. Confirm your current situation with an attorney familiar with the condominium law prior to taking any action regarding the water bill.

Q: I am considering purchasing a condominium unit in a foreclosure auction. In addition to the purchase price of the unit, will I be responsible for any delinquent fees accrued by the previous owner?

A: While HRS § 514B-146 (g), (h) and (i) offer some guidance in this matter, it would be wise to consult with an attorney familiar with the condominium law prior to any purchase.

In summary, a condominium board may assess against the purchaser of a delinquent unit the amount of unpaid **regular monthly common assessments only**, for the **six-month period** immediately preceding the completion of the foreclosure sale. Among other prohibited fees, the regular monthly assessment does not include any other special assessment, except for a special assessment adopted pursuant to HRS § 514B-148, or late charges, fines or penalties attached to the unit. Again, it is highly recommended that you consult with an attorney prior to the purchase of your unit in a foreclosure sale.

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.

The Repeal of Chapter 514A

SB 292 (Act 181) repeals chapter 514A, HRS, in its entirety. Previously, the recodification of the condominium law under chapter 514B, HRS, superseded most of the governance sections within chapter 514A, HRS, for all condominium projects in the state. Act 181 repeals the entire chapter on January 1, 2019, including the development sections while providing technical language on what happens to registered projects that still retain developer inventory, as well as projects created under chapter 514A, HRS, but never registered.

Developers with chapter 514A, HRS, projects may wish to consult their attorneys regarding the repeal and the Real Estate Branch will be providing outreach to developers informing them of the deadlines. For condominium owners, there should be no practical changes as chapter 514B, HRS, governance sections superseded chapter 514A, HRS, since 2007.

Mediation Case Summaries

From June 2017 through August 2017, the following condominium mediations were conducted pursuant to Hawai'i Revised Statutes § 514B-161, and subsidized by the Real Estate Commission. The Mediation Center of the Pacific conducted additional condominium mediations in the District Courts and mediation providers conducted community outreach in their respective communities as well.

Dispute Prevention and Resolution, Inc.

Owner vs. AOOU	Dispute regarding board rule prohibiting short-term rentals in the association.	Mediation; no agreement.
AOOU vs. Owner	Alleged non-payment by owners of maintenance fees.	Mediated to agreement.
Owner vs. AOOU	Dispute over board meeting procedures and meeting notices.	Mediated; no agreement.
Owner vs. AOOU	Dispute regarding the installation of a screen door.	Mediated to agreement.
Owner vs. AOOU	Issue of water damage from an upstairs unit and the responsibility for repairs.	Mediated; no agreement.

Maui Mediation Services

Owner vs. AOOU	Whether AOOU was responsible for repair costs due to structural damage from work done by a previous owner.	AOOU declined mediation.
Owner vs. AOOU	Dispute over assignment of a parking stall.	Owner declined mediation with MSM.
Owner vs. AOOU	Owner fined over alleged by-law violations.	Mediation; no agreement.
Owner vs. AOOU	Dispute over repairs to a unit originating from a roof leak.	AOOU declined mediation.

West Hawaii Mediation Center

Owner vs. AOOU	Dispute over use of common area tennis courts.	Mediated; no agreement.
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Mediation Center of the Pacific

Owner vs. AOOU	Dispute over payment of maintenance fees and foreclosure action.	Mediated to agreement.
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Expect requests for pets as accommodations under the Fair Housing Act to increase as the boomers age.

When board members of the Castillo Condominium Association in Puerto Rico discovered that Carlo Bianco had a dog in his unit, the no-pets association advised him to get rid of the dog or be fined. Bianco said the dog was an emotional support animal that alleviated the symptoms of his depression and anxiety, and he backed up his claim with a letter from his psychiatrist. He asked for a reasonable accommodation to the no-pets rule. The board said “no,” believing Bianco had failed to prove that he had a mental impairment.

Bianco complained to the U.S. Department of Housing and Urban Development (HUD) that the association had violated the Federal Fair Housing Act by denying him a reasonable accommodation.

HUD agreed and found that the association not only failed to grant Bianco a reasonable accommodation, it had failed even to discuss possible alternatives to a requested accommodation. Consequently, HUD hit the association with the maximum fine—\$16,000 for violating the FHA and \$20,000 for Bianco’s emotional distress.*

PEACEFUL CO-EXISTENCE

The number of residents requesting pets as accommodations for disabilities is likely to increase for some time to come as the boomers age and pet ownership numbers continue to soar. Processing these requests can be problematic for boards, but managers can encourage associations to establish procedures that work for both pet owners and non-owners alike by following a few basic steps:

- Pet-free associations should specify how to request a reasonable accommodation for service, therapy, or support animals. Include a list of required documents, such as physician statements and information about the animal.
- Take every request seriously regardless of how the situation appears. Remember that disability covers a surprising number of conditions—many that aren’t clearly apparent.
- Investigate each request using the same criteria, and grant temporary approval while you investigate.
- Conduct a hearing and apply the FHA’s criteria to each case. (See “Reasonable Accommodations Under the Fair Housing Act” at www.portal.hud.gov)
- Documentation from a physician need only state an animal is necessary to alleviate the symptoms of a disability. Accept the physician’s qualifications, statements, or opinions on face value.
- Make every effort to reach a reasonable accommodation.

Associations that proactively develop an “accommodation policy” based on these steps are likely to have greater success with community residents and their pets.

The pull-out poster on the following page explains the differences between service animals, therapy animals, and emotional support animals and—especially critical for association managers and boards—what pet restrictions may not apply to each animal’s category.

*Debra Lewin is senior director of CAI Press. *Castillo Condominium Association v. U.S. Dept. of Housing & Urban Dev., Case Nos. 14-2139, 15-1223 (1st cir. May 2, 2016)*

Pet or Service Animal?



service animal
dogs; in some cases,
miniature horses



therapy animal
any legal species



emotional support animal
any legal species

alternate names	certification	training	trainer	handler	socializing	function	legal status	subject to pet restrictions	documentation
Working, guide, signal, medical alert, psychiatric service animal.	None.*	Required. Rigorous, task-specific, individual.	Professional service-dog trainer.	Owner/ disabled partner.	Prohibited while on duty.	Works, provides assistance, performs specific tasks in partnership with one person with a disability.	Protected under the ADA and FHA.	No.	OK to request if the disability-related need isn't apparent. Health-care provider statement that the animal is trained to assist the resident with a disability. (see Function)
Assistance animal.	None.*	Not always required, but usually necessary.	Anyone.	Owner.	Essential while on duty.	Provides psychological or physiological benefit to individuals or groups in a clinical environment. May also provide benefits to an individual in the home. Example: Interacts with people in nursing homes, hospitals, special-needs schools, rehab facilities.	Reasonable accommodations are required.	No, if the handler/owner is receiving the benefit, and unless aggressive, destructive, uncontrolled, or unhygienic. Yes, if the handler/owner does not have a disability, but works with the animal outside the home.	OK to request if the disability-related need isn't apparent. Health-care provider statement that the animal is needed to alleviate the symptoms of a disability is sufficient.
Comfort animal, companion animal.	None.*	None.	N/A.	Owner.	N/A.	Exerts a positive effect on a person with a disability. Example: Proximity or contact alleviates depression or anxiety symptoms.	Reasonable accommodations are required.	No, unless aggressive, destructive, uncontrolled, or unhygienic.	OK to request if the disability-related need isn't apparent. Health-care provider statement that the animal is needed to alleviate the symptoms of a disability is sufficient.

*There is no nationally recognized certifying agency and no certification granted to service, therapy, emotional support, or other assistance-type animals. Neither the Federal Housing Administration nor the Americans with Disabilities Act require service animal "certification." A number of reputable agencies certify that an animal has participated in their programs, completed training courses, or otherwise meets the criteria for a service animal. These are legitimate, but not official, and they offer no guarantee of an animal's status. Beware of fraudulent service-animal certifications that are easily available for purchase online.

Information in this chart does not constitute a legal opinion. Some state and local statutes may differ from the information presented here. Questions regarding pet issues and service animals should always be referred to an attorney when legal advice is needed.

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2017 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, September 13, 2017

Wednesday, October 11, 2017*

Wednesday, November 08, 2017

Wednesday, December 06, 2017

Friday, September 29, 2017

Friday, October 27, 2017

Wednesday, November 22, 2017

Friday, December 15, 2017

*Meeting will be held on Kaua'i at the Grove Farm Building Conference Room, 3-1850 Kaumuali'i Hwy., Lihue, Kaua'i.

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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