



# Hawaii Condominium Bulletin

## CONDORAMA!

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special needs. Please call the  
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submit your request.

On November 4, 2017, in conjunction with Community Associations Institute Hawaii, the Real Estate Branch co-sponsored a free educational event, Condorama, for condominium unit owners residing in registered condominium associations.

The event was held at the State Capitol Auditorium. CAI Hawaii, the procured vendor for this event, organized the program.

Lance Fujisaki, Esq., Kanani Kaopua, PCAM, and Sue Savio each spoke on their respective topics. Milton Motooka, Esq., moderated the discussion. Mr. Fujisaki discussed contracts in “Do’s & Don’ts of Association Contracts”; Ms. Kaopua spoke on keeping the lines of communication open in “Communications, Meetings & Volunteerism” (and not alienating owners); and Ms. Savio spoke on “Insurance – How Much is Enough”. A 15-minute question and answer period concluded the formal portion of the program. Informally, attendees were able to ask questions of the speakers after the event.

Another free of charge event is scheduled for some time next year. The event and registration information will be posted at the Real Estate Branch website, <http://cca.hawaii.gov/reb/>, or at CAI Hawaii, <http://www.caihawaii.org/>.

In the meantime, a video link of the November Condorama is posted on the Real Estate Branch website for viewing.



(l-r - Milton Motooka, Lance Fujisaki, Sue Savio and Kanani Kaopua)

# Message from the Chair

## Season's Greetings!

Mahalo for taking the time to read this issue of the Condominium Bulletin in the midst of your busy holiday season!

In this edition, you'll find a brief description of the November Condorama held at the State Capitol Auditorium along with a link to watch the video. It was the Real Estate Commission's second co-sponsoring of this no-cost event together with CAI Hawaii. Three speakers each spoke for a half-hour on condominium issues with another half-hour at the end devoted to questions from the audience.

House Bill 832 took effect on July 1, 2017 as Act 81. Act 81 reinforces the fiduciary duty of condominium association directors and officers. A reprinted article from CAI Hawaii gives practical examples of how the change in the law will affect the actions of board members. Find out how Act 81 is especially relevant where condominium owners request mediation for resolving disputes.

Also in this edition, read about the repeal of HRS Chapter 514A forthcoming January 1, 2019, and learn what effects this may have on you.

The next Condominium Bulletin will find us well into the new legislative session, reviewing new (and not so new) proposed condominium legislation. On behalf of the Real Estate Commission, we wish all of you the peace that this season will bring.

Aloha,

Laurie A. Lee  
Condominium Review  
Committee Chair



## Condominium Governance - Reminder

The Commission has received complaints of board of directors conducting meetings via email. Section 514B-125 (d), HRS, notes the following:

"All board meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. Unless otherwise provided in the declaration or bylaws, a board may permit any meeting to be conducted by any means of communication through which **all directors participating may simultaneously hear each other during the meeting.**" [Emphasis added].

Furthermore, such meetings are required to follow the three-day notice, agenda, minutes, and owner participation requirements pursuant to § 514B-125, HRS. The Commission is unaware of any email meeting that would meet the statutory requirements of § 514-125, HRS, and in light of case law in Palm vs 2800 Lake Shore Drive Condominium Association, strongly recommends against conducting meetings via email.

The Commission has also heard of complaints of board members secret "meetings of the whole" or "work meetings" where board members deliberate, discuss and otherwise decide association matters without notice, minutes, or owner participation. The Commission strongly advises against such practices as all meetings of the board are governed by Part VI of Chapter 514B, HRS. Pursuant to §514B-125, HRS, "all meetings of the board other than executive sessions, shall be open to all members of the association, and association members not on the board shall be permitted to participate in any deliberate or discussions, other than executive sessions, pursuant to owner participation rules adopted by the board." [Emphasis added]

Additionally, the Palm vs 2800 Lake Shore Drive Condominium Association case found that the Association violated the declaration and Illinois's Condominium Act by "holding board meetings in closed working or executive sessions" and barred the board from continuing such a practice. Transparent condominium governance is good condominium governance.

# Upcoming Major Change in Law on Directors' and Officers' Fiduciary Duties

Na Lan, Esq.

*This article was originally published in the June 2017 CAI Hawaii Newsletter. Since that time, HB832 has become law as Act 81, effective July 1, 2017. This reprinted article by Na Lan, Esq. is a good reminder of the fiduciary duty owed by every director and officer of a condominium association.*

HB832 introduced in the 2017 legislative session is likely to become law and will significantly modify the fiduciary duties owed by directors and officers of condominium associations in Hawaii.

HB832 proposes among other things that any violation by a board or its officers or members of the mandatory provisions regarding mediation or arbitration in the condominium statutes may constitute a violation of the fiduciary duty; provided that a board member may avoid liability arising from such violation by indicating in writing the board member's disagreement with such board action or rescinding or withdrawing the violating conduct within 45 days of the occurrence of the initial violation.

HB832 undermines the business judgment rule that provides a safe harbor for directors and officers who act in good faith but make an honest mistake on their votes for the Association.

Under existing law, officers and directors of the board shall owe the association a fiduciary duty and exercise the degree of care and loyalty required of an officer or director of a nonprofit corporation organized under Chapter 414D, which provides that a director or officer shall discharge his or her duties as a director or officer in good faith, with the care of an ordinarily prudent person in a like position would exercise under similar circumstances; and in a manner the director reasonably believes to be in the best interest of the association. In discharging the director's or officer's duties, a director or officer is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by officers, employees, professionals or a committee, unless the director or officer has knowledge concerning the matter in question that makes reliance otherwise permitted unwarranted.

Under existing law, a director or officer is not liable to the association, any unit owner, or any other person if the director or officer acts in compliance with HRS § 414D-149 or HRS § 414D-155. In other words, a director or officer may be personally liable for damage, injury, or loss caused by or resulting from his or her gross negligence in performance or breach of fiduciary duties. "Personally liable" means you, as a director officer for the association, may

be excluded from coverage by the D&O insurance and need to pay defense costs and judgment out of your own pocket if a unit owner brings a claim against you and prevails.

The legislators intend to raise the bar for volunteer homeowners serving as directors and officers for their condominium projects. If HB832 becomes law, effective July 1, 2017, there will be zero tolerance for a director or officer who makes a mistake either intentionally or unintentionally on issues involving a unit owner's mediation or arbitration demand.

More specifically, if a unit owner requests mediation of a dispute involving the interpretation or enforcement of the condominium statutes or the association's declaration, bylaws or house rules, the association shall be required to participate in mediation. If the association refuses to mediate, the association's officers or directors may be found in violation of their fiduciary duties, exposing themselves to personal liabilities, unless the association withdraws such refusal within 45 days or any board member may be exempted from such violation by documenting his or her disagreement with the majority's vote in writing.

However, if any mediation is not completed within two months from the commence date, the Association is not required to agree to any further mediation. It should also be noted that certain disputes are not subject to mandatory mediation under HRS § 514B-161, and thus the Association may legally reject a mediation request on the following:

- (1) Actions seeking equitable relief involving threatened property damage or the health or safety of association members or any other person;
- (2) Actions to collect assessments;
- (3) Personal injury claims; or
- (4) Actions against an association, a board, or one or more directors, officers, agents, employees, or other persons for amounts in excess of \$2,500 if insurance coverage under a policy of insurance procured by the association or its board would be unavailable for defense or judgment because mediation was pursued.

# Upcoming Major Change in Law on Directors' and Officers' Fiduciary Duties (cont. from page 3)

Similarly, directors and officers of condominium associations should also carefully consider and timely respond to any unit owner's request for non-binding arbitration on any dispute concerning or involving one or more unit owners and an association, its board, managing agent, or one or more unit owners relating to the interpretation, application, or enforcement of the condominium statutes or the association's declaration, bylaws, or house rules. Directors and Officers incorrectly refusing to authorize the Association to participate in such non-binding arbitration mandated by HRS § 514B-162 may be considered in violation of their fiduciary duties and expose themselves to personal liabilities. The above itemized disputes are also exempted from the mandatory arbitration provision, along with disputes involving the real estate commission, the mortgagee of a mortgage of record, the developer, general contractor, subcontractors, or design professionals for the project; provided that when any person exempted by this paragraph is also a unit owner, a director, or managing agent, such person in those capacities, shall be subject to the mandatory arbitration provision.

Therefore, the bottom line is, effective July 1, 2017, all condominium associations should carefully review and timely respond to any unit owner's mediation or arbitration request, and when you are unsure whether the Association is legally bound to participate or not, Board directors should request for extension of deadline to respond and consult with your association counsel immediately. The negative consequence of ignoring or wrongfully denying a mediation or arbitration demand can be very serious for directors and officers voting for such denial.

*About the Author: Na Lan, Vice President of CAI Hawaii's Legislative Action Committee is an attorney with Motooka & Rosenberg, LLC, specializing in condominium law, including delinquency collections since 2008. She can be reached at nalan@myhawaiiaw.com; phone 532-7261.*

## Ask the Condominium Specialist

**Q:** I am considering mediating a problem I am having with my condominium board. May I have my attorney participate in my place?

**A:** The point of mediating a dispute is to bring the disputing owners together to come to an agreement regarding resolving the dispute. If one party to the dispute is represented by another person, the direct contact between the two disputing parties is missing. Additionally, the mediation process is guided by the professional mediator whose role is to reach an agreement between the parties. While the ultimate decision will be made by the mediator, if one of the parties is absent for the mediation, any agreement reached will be missing a key ingredient – a disputing party.

**Q:** What entity is responsible for providing documents requested by an owner?

**A:** It depends. If an association is self-managed, then board members are generally responsible for responding to requests for documents from unit owners. If an association is managed by a condominium managing agent, the managing agent may be responsible for producing documents, depending upon whether its agreement with the board includes responding to requests from owners for documents. If your condo association has a managing agent, check with a board member or managing agent representative whether the managing agent duties include responding to owners' requests for documents.

*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 situation.*

# Chapter 514A Repeal - Frequently Asked Questions

We at the Real Estate Commission (“Commission”) understand that the repeal of HRS, Chapter 514A, can be a confusing topic. Thus, we’ve created a frequently asked question list to help condominium developers and owners understand how they may be impacted by the repeal.

## **What are HRS Chapter 514A and Chapter 514B?**

They are the two Hawaii state laws that govern condominium projects in their registration and governance. Chapter 514A is being repealed. Chapter 514A governs the registration of condominium projects created prior to July 1, 2006, and Chapter 514B governs the registration of condominium projects created after July 1, 2006, and governance for all condominium projects.

## **I’m an owner in a condominium which voted to adopt HRS Chapter 514B. Does this concern me?**

**DEPENDS:** Your association’s vote to adopt Chapter 514B impacts the governance of your condominium, not the legal creation and development and thus the repeal may concern you. Please see the following questions to determine if this impacts you.

## **I’m a condominium owner who bought my Commission registered Chapter 514A unit from another owner or a developer in a regular sale. Does this repeal affect me?**

**NO:** The repeal of Chapter 514A does not impact your unit or your ability to sell your unit. Furthermore, since 2007, condominium governance has been under Chapter 514B for all condominium projects. You should not be affected by the repeal.

## **I’m a condominium owner who inherited or was gifted my Chapter 514A unit from a developer (such as a parent or grandparent) who previously registered the project. Does this impact me?**

**DEPENDS:** Check with the person from whom you received the property as a gift or inheritance to see whether your condominium developer’s public report is active (and will be active on January 1, 2019) and is accurate. Owners who received their unit in such a manner are not generally considered to have engaged in a first or regular sale. If the report is active, the project will automatically transfer to HRS Chapter 514B and you should not be affected. If it has expired, will expire before January 1, 2019, or material changes have occurred, seek advice from the attorney who prepared your project’s report or contact the Commission as soon as possible. Please check the Commission’s database at [http://hawaii.gov/dcca\\_condo/index.html](http://hawaii.gov/dcca_condo/index.html) to determine the status of your project’s developer’s public report.

## **I’m a developer of a registered Chapter 514A project with units remaining to be sold. Does this affect me?**

**YES:** You have two options, keep your Chapter 514A developer’s public report active and accurate on January 1, 2019, to make certain that your project meets the requirements for an automatic transfer to Chapter 514B or apply for a transition to a Chapter 514B report pursuant to Act 244, SLH 2007. Furthermore, please read in detail the attached Commission’s developer’s memorandum, contact the attorney who prepared your report, and the Commission.

## **I’m a developer of a registered Chapter 514A project on a preliminary or contingent report. Does this impact me?**

**YES:** Preliminary and contingent reports will not be automatically transferred to Chapter 514B. You may either apply for a developer’s final public report or transition to a Chapter 514B report pursuant to Act 244, SLH 2007. Please contact your attorney or the Commission for more information.

## **It appears that the repeal of HRS Chapter 514A impacts me as a developer. What’s the timeline for extensions or supplementary reports?**

The Commission is anticipating a sizable increase in applications along with its regular workload. Thus, the Commission strongly recommends submitting supplemental developer’s public reports if there are any changes as soon as possible and no later than August

2018 to ensure that your project will have an active effective date on January 1, 2019. For developers with no changes requesting extensions which extends the effective date for 13 months, please make sure that the extension date will last through January 1, 2019.

**I'm a Developer. Do I receive any documentation from the Commission confirming that my registered Chapter 514A project was transferred to Chapter 514B? If I don't meet the requirements and my project is not automatically transferred to Chapter 514B on January 1, 2019, what are my options at that point?**

The Commission is not planning to send any documentation regarding automatic transfer and refers all developers and buyers to the Commission's online database for the most recent active status of a project on January 1, 2019. If the database notes an active status through January 1, 2019 and no material changes are known, the project will be considered to have been automatically transferred.

Should your project not meet the requirements to automatically transfer to Chapter 514B, all sales must stop, and the registration with the Commission must be withdrawn and resubmitted as a new Chapter 514B project.

**I'm a developer of a registered Chapter 514A project, and I've sold all the units. What do I have to do?**

**NOTHING:** All your obligations to update the report ended with the sale of the last unit. Just make sure that you do not have any other Chapter 514A projects with units remaining to be sold.

**I'm a developer of a registered Chapter 514B project. Does this concern me?**

**NO:** Act 181, SLH 2017 only repeals Chapter 514A. There are no changes to your responsibilities as Chapter 514B developer.

**I'm an owner of a registered Chapter 514B unit. Does this concern me?**

**NO:** Act 181, SLH 2017 only repeals Chapter 514A. The repeal does not impact owners of Chapter 514B units in any way.

**I'm a developer of an unregistered Chapter 514A project intending to sell units. Does this impact me?**

**YES:** Unless you provided notice of intent to the Commission prior to 2007, you must register as a Chapter 514B project. Please contact the Commission and/or an attorney for more information.

**I'm an attorney or property manager for a condominium project. What should I do?**

Check to see if the project(s) that you're working on is a Chapter 514A project and whether all of the units have been sold. If there are remaining developer's units left, contact the developer to inform them of the deadline.

**Where can I get a copy of the repeal law?**

You may find a copy of Act 181 on the Hawaii State Legislature website, <http://www.capitol.hawaii.gov>, and search for SB 292 in the "bills status" field.

**I'm a renter in a condominium unit. Should I worry?**

**NO:** The repeal has no impact upon renters.

# Mediation Case Summaries

From September 2017 through November 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 over enforcement of house rules regarding noise and the common area	Mediation; no agreement.
Owner vs. AOOU	Dispute regarding the replacement of windows and who is responsible for payment.	Mediation; no agreement.
Owner vs. AOOU	Issue of water damage with subsequent mold and who is responsible for payment of the damages.	Mediation; no agreement.
AOOU vs. Owner	Alleged excessive noise, parking and storage violations.	Mediated to agreement.
AOOU vs. Owner	Alleged violation of rules governing pets.	Mediated to agreement.
Owner vs. AOOU	Dispute regarding boundaries of unit.	Mediated; no agreement.
Owner vs. AOOU	Dispute regarding sewer break and who was responsible for damage to owners' unit.	Mediated; no agreement.
Owner vs. AOOU	Issue around pipe leak, subsequent damage to bathroom and who would pay for repairs.	Mediated to agreement.
AOOU vs. Owner	Dispute regrading payment for lanai renovation and repairs.	Mediated; no agreement.

## Maui Mediation Services

Owner vs. AOOU	Dispute regarding the implementation of house rules without owner input.	Owner declined to mediate.
Owner vs. AOOU	Dispute over water damage to unit and board member entering unit without owner's permission.	Mediated to agreement.
Owner vs. AOOU	Dispute regarding payment for water and mold damage to unit.	Board declined mediation.
Owner vs. AOOU	Owner challenged validity of vote regarding the repair of solar panels.	Board declined mediation.

## Mediation Center of the Pacific

Owner vs. AOOU	Dispute over assessment of fine against unit owner.	Mediated to agreement.
Owner vs. AOOU	Owner disputing maintenance fees and assessments.	Board declined mediation.
Owner vs. AOOU	Issue regarding common area water heater.	Owner declined mediation.

# 2017 - 2018 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, December 06, 2017  
Wednesday, January 10, 2018 \*  
Wednesday, February 14, 2018  
Wednesday, March 14, 2018  
Wednesday, April 11, 2018  
Wednesday, May 9, 2018  
Wednesday, June 13, 2018  
Wednesday, July 11, 2018  
Wednesday, August 8, 2018  
Wednesday, September 12, 2018  
Wednesday, October 10, 2018  
Wednesday, November 14, 2018  
Wednesday, December 12, 2018

Friday, December 15, 2017  
Friday, January 26, 2018  
Friday, February 23, 2018  
Friday, March 23, 2018  
Friday, April 27, 2018  
Friday, May 25, 2018  
Friday, June 29, 2018  
Friday, July 27, 2018  
Friday, August 24, 2018  
Friday, September 21, 2018  
Friday, October 26, 2018  
Wednesday, November 21, 2018  
Friday, December 21, 2018

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

\* The meetings will be held at the REALTORS Association of Maui office at 441 Ala Makani St, Kahului, Maui 96732.

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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