



Hawaii Condominium Bulletin

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Condominium Basics Introduction to Condominium Governance

The uniqueness of the condominium concept of ownership has caused the law to recognize that each unit owner must give up some degree of "freedom of choice he might otherwise enjoy in separate, privately owned property." ASSOCIATION OF OWNERS OF KUKUI PLAZA, v. CITY AND COUNTY OF HONOLULU, Hawaii Intermediate Court of Appeals (1987).

This is an excerpt from the Real Estate Commission's Core B 2015-2016 on condominium governance.

Lesson: Upkeep of the Property: The Association's v. An Owner's Obligations

Section 514B-137 of the Act specifies that the Association is responsible for the operation of the condominium project as a whole while each unit owner is responsible for the maintenance, repair, and replacement of the owner's individual unit. In order to fulfill its responsibility, this section of the Act authorizes the Association and its employees, independent contractors, and agents of the association to access an owner's unit reasonably necessary for those purposes during reasonable hours. The Association also has an irrevocable right, to be exercised by its board of directors, to access a unit at any time as may be necessary for making emergency repairs to prevent loss of life and/or damage to the common elements or to another unit (or units).

Lesson: Board of Directors

(Section 514B-103 of the Act defines board or board of directors as the body, regardless of name, designated in the declaration or bylaws to act on behalf of the association (hereafter referred to as "the Board").

Purpose of the Association's Board

§514B-106 Board; powers and duties. (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association. In the performance of their duties, officers and members 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 corporation under chapter 414D..."

This section of the Act is important for three reasons:

- 1- It authorizes the Board to act on behalf of the Association; and
- 2- It specifies that the Board's officers and its members owe a fiduciary duty to the Association.
- 3- Since all unit owners are members of the Association, they are covered by this fiduciary duty owed by the Board.

The number of Board members, how they are elected, how long they serve as directors, and what they can and cannot do can vary with each condominium project. This is because these types of provisions are typically covered in the bylaws for each project. In fact, section 514B-108 of the Act states the bylaws must include:

Message from the Chair

Aloha!

It's been a busy summer, what with new legislation signed into law by the Governor amending the current condominium law and dealing with the hurricane season. I hope that all condominium associations stayed safe during the threat of Hurricane Lane and remain vigilant through the end of this current hurricane season in November. Please also pay special attention to those of your neighbors who may need extra assistance during emergency situations.

On July 10, 2018, Governor David Ige signed HB 1873 into law as Act 195. Act 195 (2018) modifies the foreclosure process for associations where there is an agreed upon payment plan and prohibits associations deducting late fees, legal fees, fines and interest from common expense payments notwithstanding any board policy. On that same day the Governor also signed HB 1874 into law as Act 196. Act 196 (2018) expands the subsidized mediation program to include voluntary binding arbitration. Please take a look back at the June 2018 Condominium Bulletin for a full description of these bills.

In this issue, you'll find useful information on the upcoming January 1, 2019, repeal of Chapter 514A; if you've developed even a small condominium of two or three units under Chapter 514A, the repeal may affect you. You'll also find suggestions for dealing with legal issues that associations may face regarding the use of medical marijuana.

Finally, check the Real Estate Branch's website later this month for information on an upcoming Condorama IV in the fall.

Until next time,

Laurie A. Lee
Chair, Condominium Review Committee



Six Things You Need to Know About the Repeal of the Old Condominium Law, Chapter 514A

This article is reprinted with permission from the law firm Imanaka Asato.

Major changes in Hawai'i condominium law are upon us. In 2017, the Hawai'i State Legislature passed SB 292 to repeal Chapter 514A, Hawai'i Revised Statutes ("514A"). SB 292 was subsequently signed into law as Act 181. The legislature elected to repeal 514A to eliminate confusion between two existing condominium laws.

Most of 514A was originally superseded by the 2006 recodification under Chapter 514B, Hawai'i Revised Statutes ("514B"). The development sections of 514A still applied, however. Act 181 now brings the developer sections under 514B, effective on January 1, 2019. The impending repeal of 514A may create confusion as to the transition of certain documents and sale of units for developers.

Note the following:

- Act 181 provides a safe harbor provision for projects still under 514A. The safe harbor allows the most recent final report, supplementary, and disclosure abstracts that are active under 514A to be treated as non-expiring under 514B. Active reports for the 514A project will be automatically transferred to 514B. Developers will be permitted to continue sales using a previously issued 514A developer's public report past January 1, 2019 and into the future, so long as the report is accurate and not misleading.
- In the event that there are any pertinent and/or material changes to a condominium, a developer must file an amended public report under 514B. This new public report would then supersede all prior reports.
- Contingent and preliminary reports will not be treated as non-expiring under 514B. Therefore, developers with 514A projects that have contingent or preliminary reports must file as a new project under 514B to sell units after January 1, 2019. Any condominium that was not issued an effective date will be required to file as a new project under 514B to sell units once the repeal takes effect.
- Developers with projects registered under 514A that contain unsold inventory and who fail to have an active report pursuant to HRS § 514A-4 and 41 by January 1, 2019, will be required to withdraw any previously filed registration and refile as a completely new project.

Condominium Basics

Introduction to Condominium Governance (cont. from page 1)

- 1- The number of members of the board and the titles of the officers of the association
- 2- Election by the board of a president, treasurer, secretary, and any other officers of the association the bylaws specify
- 3- The qualifications, powers and duties, terms of office, and manner of electing and removing directors and officers and the filling of vacancies
- 4- Designation of the powers the board or officers may delegate to other persons or to a managing agent
- 5- Designation of the officers who may prepare, execute, certify, and record amendments to the declaration on behalf of the association
- 6- The compensation, if any, of the directors
- 7- Subject to subsection (e), a method for amending the bylaws, and
- 8- The percentage, consistent with this chapter, that is required to adopt decisions binding on all unit owners; provided that votes allocated to lobby areas, swimming pools, recreation areas, saunas, storage areas, hallways, trash chutes, laundry chutes, and other similar common areas not located inside units shall not be cast at any association meeting, regardless of their designation in the declaration.

Ask the Condominium Specialist

- Q:** I hold an active Hawaii real estate broker's license and will be managing several condominium associations as their condominium managing agent. Is there a requirement that I also register with the Real Estate Branch as a condominium managing agent?
- A:** No. HRS § 514B-132 requires that "every condominium managing agent" be a licensed real estate broker in compliance with HRS Chapter 467, the real estate licensing law in Hawaii. It also states that the registration requirements of HRS § 514B-132 "shall not apply to active real estate brokers in compliance with and licensed under chapter 467". There is however, a fidelity bond requirement that broker's must comply with if they are acting as condominium managing agents, pursuant to HRS § 514B-132 (a) (3).
- Q:** My condominium association board has notified us that it is not renewing our existing flood insurance policy. Is my condominium association legally required to obtain flood insurance?
- A:** HRS § 514B-143 addresses insurance requirements for condominium associations. HRS § 514B-143 (e) provides that project documents, i.e., the declaration or bylaws, or the board of a condominium association "may require the association" to obtain insurance not specifically required by the law and which the board may deem important to protect the association, for example, insurance for workers' compensation.

Flood insurance "shall be maintained" if the property is in a special flood hazard area as designated on flood maps issued by the Federal Emergency Management Agency ("FEMA"). The law does not provide any discretion if an association's property is in an area designated a flood hazard area by FEMA. Check the FEMA website's flood information and map at <https://www.fema.gov/states/hawaii>. Also consult with your insurance provider for additional policy information.

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.

Mediation Case Summaries

From June 2018 through August 2018, 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.

AOUO vs. Owner	Issue of responsibility for upkeep and repair of exterior pipes.	No agreement reached; mediation continues w/ the goal of reaching an agreement of the parties.
Owner vs. AOUO	Damage to unit allegedly caused by common elements.	Parties agreed to make certain repairs by an agreed upon period.
AOUO vs. Owner	Owner challenged AOUOs billing procedures and maintenance of the common areas.	Mediated to agreement.
Owner vs. AOUO	Owner challenged litigation-related assessment to all owners.	Mediated; no agreement.
Owner vs. AOUO	Issue surrounding maintenance fees and penalties.	Mediated to agreement.

Mediation Center of the Pacific

Owner vs. AOUO	Owner sought access to an engineer's report re: the significance of a crack in the wall outside of her unit.	Mediated; no agreement.
Owner vs. AOUO	Owner alleged board not following house rules regarding noise from upstairs unit.	Mediated to agreement.
Owner vs. AOUO	Regarding a request for documents.	Parties did not follow up on mediation request.
AOUO vs. Owner	Alleged violation by owner of project covenants.	Board withdrew mediation request.
Owner vs. AOUO	Dispute over liability for damage to common area and downstairs unit due to water leak.	Owner withdrew request for mediation.

Six Things You Need to Know About the Repeal of the Old Condominium Law, Chapter 514A (cont. from page 2)

- Condominium property regimes created prior to July 1, 2006, that were not issued a final report or supplementary public report under 514A and did not file a notice of intent to sell will be required to revise their governing documents and file a public report under 514B. Given the multitude of changes that will occur on January 1, 2019, it is important for developers with 514A projects to be prepared. Below provides guidance on the next steps developers should take and addresses certain scenarios that may arise during this transition.

Next Steps:

- Check to see if the public report for your 514A is active and accurate.
- Check to see if there are any remaining units to be sold for your 514A project.
- Developers who still retain inventory should file for an extension and supplementary reports to ensure that their projects are active and non-expired as of January 1, 2019.
- Be sure to plan ahead. Due to the large numbers of developers filing reports in response to Act 181, the Real Estate Commission recommends that developers file the necessary documentation by August 2018 to account for the delay in the review process.
- Developers planning to transition pursuant to Act 244 Session Laws of Hawai'i ("SLH") 2007 should submit their application by August 2018 to account for the delay as well.
- Developers are encouraged to become familiar with 514B.

How Do We Balance the Medical Marijuana Users' and Non-Smokers' Interests in Condominium Buildings and Planned Communities? by Na Lan, Esq.

This article has been reprinted with permission from the June CAI Hawaii Newsletter.

On March 16, 2018, the State's fifth licensed medical marijuana dispensary received official approval to begin selling medical cannabis. For people living in condominium buildings or planned communities, more often we have to deal with the following questions:

- (1) As a resident, can I protect my family from secondhand pot smoke by stopping the neighbor from smoking marijuana?
- (2) As a landlord, can I evict a tenant who smokes marijuana in my unit?
- (3) As a property manager, what should I do after I receive a complaint from a resident against a marijuana smoker in my project?
- (4) As a Board director, what can our Association do to avoid any violation of law and prevent such disputes?

The first step is to figure out whether the marijuana smoker has a valid certificate for medical use of marijuana, also known as the 329 Card. This card is required for one to legally possess, use and grow cannabis for medical use subject to statutory limitations. It has to be issued by the State of Hawaii, as Hawaii does not offer reciprocity for out-of-state medical marijuana cards. The card has an expiration date that is one year from issuance, but may be renewed.

If the marijuana smoker has a valid 329 card, the next question is whether your building has adopted a no-smoking policy, or whether your rental agreement has a smoking ban provision if you are a landlord. If the answer is no, you cannot treat a medical marijuana smoker in a way different from a tobacco smoker. Otherwise, you would be engaging in illegal discrimination under HRS § 514B-113 (condominiums), HRS § 421J-16 (planned communities), and HRS § 521-39 (residential tenant eviction).

HRS § 328J-3 prohibits smoking in common areas of condominiums and other multiple-unit residential facilities. This also applies to prohibit the use of an electronic smoking device. If a condominium association wants to also ban smoking in individual owner's units or lanais, it usually needs to pass and record an amendment to the Bylaws requiring 67% of ownership approval. Associations may attempt to regulate smoking inside the units through its power to control nuisances by simply adopting house rules, but this may lead to contests by certain owners or tenants and even legal battles.

However, that is not the end of the legal analysis here. Despite the project-wide smoking ban, a medical marijuana user may claim he or she is disabled and request for a reasonable accommodation under the Fair Housing Act from the Association or landlord. Under such circumstance, the board of directors of an association is permitted to request documentation of the need for an accommodation, including but not limited to a copy of the 329 card, and a signed note from a doctor documenting the medical need for marijuana. Until the marijuana user provides satisfactory evidence, the association can enforce its project rules and regulate/fine the marijuana smoking. To avoid being dragged into a possible claim with the Hawaii Civil Rights Commission, the Association Board should follow the lawful steps to correctly handle a reasonable accommodation request and adopt a written policy if none has yet been established.

Due to possible neighbors' conflicting interests (e.g., a pregnant woman, a newborn baby, someone who has an allergic reaction, or a pilot who would fail his employer's drug test due to second hand pot smoking), the Association may request the user of medical marijuana to ingest in a non-smoking form. If smoking is the only medically necessary way for the patient to consume marijuana, then the association could request the medical marijuana user install filters within his or her unit, and seal all possible penetrations and points of seepage in walls, ceilings, doors, windows, and floor so as not to spread the odor throughout the building.

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**

Wednesday, September 12, 2018*

Wednesday, October 10, 2018

Wednesday, November 14, 2018

Wednesday, December 12, 2018

Real Estate Commission – 9:00 a.m.

Friday, September 21, 2018

Friday, October 26, 2018

Wednesday, November 21, 2018

Friday, December 21, 2018

*This meeting scheduled for Lihue, Kaua'i was cancelled due to Hurricane Olivia.

All other 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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