



Hawaii Condominium Bulletin

Condominium Basics Introduction to Condominium Governance

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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: Board Member's Fiduciary Duty and Degree of Care and Loyalty

Section 514B-106 of the Act states that members of the Board must owe the association a fiduciary duty and exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D. While the Act does not provide a definition of "fiduciary duty" this concept should be familiar to real estate licensees since it is the same type of duty that an agent owes to their client/principal. The reference to "chapter 414D" pertains to the Hawaii statute governing nonprofit corporations for defining "degree of care and loyalty" that a director must exercise with respect to the Association and its unit owners. This is like what a director of a nonprofit corporation must provide to the corporation's members. Both concepts are discussed below.

Defining fiduciary.

A **fiduciary** is someone who acts on behalf of others in a capacity that is based on confidence and trust. A **fiduciary relationship** is "a special type of relationship which arises when the confidence, trust, and reliance of one party is placed upon the judgment and advice of another." Most states and the National Association of REALTORS® recognize that a fiduciary relationship creates the highest duties under the law by an agent to the agent's principal/client.

For a member of the Board, the situation is similar. In this case, the board member is a fiduciary of the Association, which means that they owe the highest duties under the law to the Association and its members. Generally speaking, these duties include the following:

Duty of obedience.

Obedience means knowing and complying with all related laws and the condominium project's governing documents. In addition, members should be mindful not to exceed the authority delegated to them under the Act and the condominium project documents when making decisions.

Duty of diligence.

Diligence, also known as "due care," means acting in the manner that a regular, reasonably prudent person would act in similar circumstances. This means that decisions are made after first taking the time and making the effort when it comes to obtaining information, facts, figures, either through review, research, and/or professional advice. In addition, any issues should be promptly handled and monitored. Directors should make sure they are informed on all association-related matters.

Message from the Chair

Aloha!

Seasons greetings to all!

November brought the fourth Condorama event at the State Capitol Auditorium produced by the Real Estate Commission and CAI Hawaii. If you missed it, or want to catch parts of it again, this link will allow you to watch all or portions of it at your leisure <http://cca.hawaii.gov/reb/educational-video-seminars/>. You can listen to our speakers discuss the City and County of Honolulu Sprinkler Ordinance, the upcoming law that expands evaluative mediation and provides for subsidized voluntary binding arbitration or learn the latest on the law affecting service and assistance animals in residential housing.

In this issue of our bulletin, you'll learn about the condominium board member's fiduciary duty and degree of care and loyalty. You'll also find out about setting an agenda for board meetings and find construction insurance tips from insurance professional, Sue Savio.

Finally, a reminder that Act 196 (2018), will take effect on January 2, 2019. It will expand the evaluative mediation program and include subsidized voluntary binding arbitration for eligible condominium owners. Please take a look back at the June 2018 Condominium Bulletin for a full description of these bills.

And thanks for taking the time to read this condominium bulletin for news and updates on the condominium community in Hawaii. I know that everyone is busy preparing for the holidays and we at the Real Estate Commission appreciate the time you take to educate yourselves on the condominium issues affecting us.

Happy holidays and a peaceful new year to all.

Laurie A. Lee
Chair, Condominium Review Committee



Robert's Rules Corner - Who Owns the Agenda

The order of business or order of the day is called an agenda. The agenda is the order of business to be taken up during an ordinary society's session and the scheduling of business. Some Associations delegate the drafting of the agenda to a third party, such as a secretary, the property manager, a general manager, etc. It is up to the governing board to set the agenda. In legal and practical terms, it's the board's agenda, and it's up to them to decide on the matters it wishes to take up in the meeting. The decision is that of the body, not the chair or any individual member. Unless there is language in the governing documents of the Association or a law or ordinance or a board policy provides that dictates otherwise, decisions about what goes on the agenda (or comes off it), and what is actually addressed in the meeting are made by the board by majority vote. The agenda is designed to serve the Association to bring order to the meeting and to keep on track.

It is customary to adopt an agenda for each session or meeting. When the adoption of a proposed agenda is pending, it is subject to approval by a majority vote. Once adopted no change may be made except by a two-third vote, a vote by the majority of the membership, or by unanimous consent.

The presiding officer has no inherent power to control what is on the agenda; that power rests with the board. Presiding officers typically manage the agenda as part of managing the meeting, adding and deleting items with the board's approval.

The President does not have the authority to refuse an issue come before the board unless there is a written rule that states otherwise. The President can rule the issue out of order, if it is indeed out of order, if it is in conflict with the Association's bylaws. The President can object to consideration of the question, but that does not prevent the question from coming before the board. The board must vote on the motion. The President should never remove an item, which was duly voted to be on the agenda for discussion, without the permission of the board. Presidents who exceed their authority may be sanctioned or removed.

This article has been reprinted with permission from the CAI Hawaii October 2018 Newsletter.

Condominium Basics

Introduction to Condominium Governance (cont. from page 1)

Duty of loyalty.

Loyalty, in terms of a fiduciary duty, means making decisions for the benefit of the Association rather than just one or a few (or self), with adherence to the project's governing documents and avoiding conflicts of interest. If a board member feels they may be in a situation where a conflict of interest exists, either personal or financial, what should they do? They must disclose any relationship or situation that creates the conflict, and must not vote in any matter where that conflict exists.

Duty of good faith.

Good faith means acting with the conviction that it's in the association's best interests. This includes acting with honesty and fair dealing, with no ulterior motive.

Lesson: Fulfilling the Fiduciary Duty

As mentioned above, section 514B-106 of the Act states that board members are required to exercise the degree of care and loyalty required of an officer or director of a Hawaii nonprofit corporation. Section 414D-149(a) of the Hawaii law pertaining to these corporations states, "A director shall discharge the director's duties as a director, including the director's duties as a member of a committee:

- 1- In good faith
- 2- With the care an ordinarily prudent person in a like position would exercise under similar circumstances, and
- 3- In a manner the director reasonably believes to be in the best interests of the corporation."

All actions and decisions of a board and its members must be consistent with these three standards. To evaluate if these standards are being followed, courts and other decision makers will often utilize the **business judgment** rule. Under this rule, a board member's actions are compared to what an ordinary, prudent and reasonable person would do in similar circumstances. If it is determined that the actions are consistent with the business judgment rule, then, in most cases, the board member(s) will be found to have acted consistently with the standards set forth in section 414D-149 above. This is true even if the Board or a board member ends up making the wrong decision if the process that was followed was consistent with the business judgment rule.

On the other hand, if a board member's actions are found to be inconsistent with the statutory standards using the business judgment rule, they may have personal liability to the owner or other person who may have been harmed as a result of the board member's actions. In such cases, the Board and its members will, hopefully, have a directors' and officers' insurance policy to help defend them against such claims or invoke an indemnification provision in the condominium project documents.

***Note** that if a Board or board member is found to have been grossly negligent or engaged in intentional misconduct, neither the insurance nor indemnification may be available. For a board member to be grossly negligent, it usually means that they did something more than just make a mistake. Examples of "gross negligence" could include reckless behavior or refusing to act or make a decision.

Developer Control of the Board.

§514B-106 Board; powers and duties. (d) the declaration may provide for a period of developer control of the association, during which a developer, or persons designated by the developer, may appoint and remove the officers and members of the board. Regardless of the period provided in the declaration, a period of developer control terminates no later than the earlier of:

- (1) Sixty days after conveyance of seventy-five per cent of the common interest appurtenant to units that may be created to unit owners other than a developer or affiliate of the developer;
- (2) Two years after the developer has ceased to offer units for sale in the ordinary course of business;
- (3) Two years after any right to add new units was last exercised; or
- (4) The day the developer, after giving written notice to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association.

Before any period of developer control ends, the unit owners need to elect their association board—at least three members. For projects with 100 or more units completed after May 18, 1984 the unit owners must elect a board of at least nine members unless the bylaws state otherwise. If a board member seat needs to be filled, a new member may be elected at any association meeting by majority vote to fill the vacancy.

Mediation Case Summaries

From September 2018 through November 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 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	Dispute over allowing short term rentals in the AOUO, despite governing documents allowing such rentals.	Mediated; no agreement.
Owner vs. AOUO	Dispute over responsibility for repair of water damage coming from an upstairs unit.	Mediated; no agreement.

West Hawaii Mediation Center

Owner vs. AOUO	Disagreement with board regarding assessment and past board decisions.	Mediated; no agreement.
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Ask the Condominium Specialist

Q: With the next legislative session approaching in a couple of months, a group of my fellow condominium owners have suggestions for amending the condominium law in ways we feel would benefit all owners in Hawaii. We would like to give more power to the majority of owners rather than to board members. Does the Real Estate Branch propose changes to the law that would ultimately benefit condominium owners?

A: All legislation considered each session by the legislature is generated through individual legislators who either introduce legislation of their own or introduce legislation at the request of constituents ("By Request"). Should your group want to sponsor legislation to amend HRS Chapter 514B, approach your local representative or senator to discuss ways in which you would like to see the law changed. The legislator should be able to assist you with drafting the proposed bill and may be able to introduce it for consideration with all legislation for that session. From there the bill would be routed through the normal procedural course for a bill to become law.

Q: An opportunity has come up for me where I can manage condominium units that are available for short-term rentals (less than 30 days) for a group of owners in my condominium association. I do not hold any type of real estate license. Is there a process by which I may manage these units for others?

A: Yes. A Condominium Hotel Operator (CHO) Registration is available through the Real Estate Branch for persons who do not hold any type of real estate license and want to manage short-term rentals (less than thirty days) of condo units for others. The CHO registration application, information on the requirements and necessary forms may be found at http://cca.hawaii.gov/reb/rec_forms/#CondominiumHotelOperator-5.

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.

AOUO Construction Do's and Don't by Sue Savio

Because our buildings are aging we have been asked to look at improvement and repair contracts almost on a weekly basis. As the insurance agent for many condos, co-ops and HOA's, our concern is proper limits, coverage and correct insurance forms. Not all contractors' insurance policies are created equal. Most General Liability policies have exclusions such as Pollution, Lead, Asbestos, Profession Liability, Wrap Up Programs and the "biggie" for all residential condos is an exclusion if the contractor works on your residential condo.

So prior to signing a contract you must make sure your contractor is adequately insured. You should send the unsigned contract to your condo attorney to review the non-insurance issues and to your agent to review the insurance issues. Many a contract has come to us without insurance limits being required of the contractor. Below are the types of coverage and limits recommended. Of course if the job is extremely hazardous the \$5MM Umbrella limit may need to be increased to at least \$10MM. Your agent will give you that recommendation.

Contractors and Subcontractors Insurance Requirements

Prior to the commencement of any work, the contractor and all subcontractors agree, at its own expense, to procure, carry and maintain insurance from an insurance company or companies lawfully authorized to do business in the State of Hawaii and acceptable to the owner and will protect against claims for bodily injury or death and property damage which may arise out of operations and completed operations under this contract whether such operations be by the contractor or by a subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable. Such insurance shall include but not be limited to, the minimum coverage or limits of liability specified hereunder or required by law.

Coverage and Limits of Liability

The contractor and all subcontractors shall maintain in force and effect during the period of the contract the following insurance coverage written by carriers with at least an A- VII financial rating according to the current edition of Best's Key Rating Guide with minimum limits of liability as follows:

Commercial General Liability

General Aggregate	\$2,000,000
Products and Completed Operations Aggregate	\$2,000,000
Personal and Advertising Injury	\$1,000,000
Each Occurrence	\$1,000,000
Damage to Premise rented to insured	\$100,000
Medical Expense Limit	\$5,000

The Commercial General Liability insurance required shall include without limitation at least coverage for bodily injury and property damage, premises and operations, contractual liability, independent contractors, products and completed operations, personal and advertising injury, damage to premises rented to the insured and medical expense. The commercial general liability shall be written on an occurrence basis and the coverage shall provide for defense expense in addition to the limits of liability. The general liability policy shall be endorsed to provide primary and non-contributory coverage to the owner and any additional insured's and to provide coverage on a per project general aggregate basis. The additional insured endorsements shall be on form CG 2010 10 04 and CG 2037 10 04 or their equivalent. The policy shall contain a waiver of subrogation in favor of the additional insured's. There shall be no exclusion for multi-family, townhouse or condominium projects. Policy shall also include a Hawaii Revised definition of Occurrence endorsement acceptable to the owner.

Additional Insureds

The owner, the owners managing agent, the board of directors, and their respective members, affiliates, owners, parent companies, subsidiaries, officers, employees, lenders, successors and or assigns now existing or that may hereafter exist shall be named as additional insureds as respects to the commercial general liability policy and assume and provide for the Owners, Contractors, Subcontractors and additional insured's defense.

Business Automobile Liability

Bodily Injury Each Person	\$1,000,000
Bodily Injury Each Accident	\$1,000,000
Property Damage Each Accident	\$1,000,000
or	
Combined Single Limit of Liability	\$1,000,000

AOUO Construction Do's and Don't (cont. from page 5)

The business auto policy shall include coverage for all owned, leased, hired and non-owned automobiles.

Workers' Compensation

Statutory

Employers Liability

Bodily Injury by Accident	\$1,000,000 Each Accident
Bodily Injury by Disease	\$1,000,000 Policy Limit
Bodily Injury by Disease	\$1,000,000 Each Employee

The workers' compensation shall be endorsed to provide a waiver of subrogation in favor of the additional insured's.

Umbrella Liability

\$5,000,000 Each Occurrence
\$5,000,000 Aggregate

The umbrella liability shall be at least following form excess over the commercial general liability, business auto liability and employer's liability. The coverage shall be written on an occurrence basis and with a self-insured retention no greater than \$10,000.00. The policy shall provide defense in addition to the limits of liability.

Professional Liability

Any contractor or subcontractor performing any work that includes design, design/build work or services shall carry a professional liability policy. Design or design/build work includes, without limitation, work with respect to mechanical, electrical, plumbing, and structural or sprinkler systems. The limit of Liability shall be at least \$2,000,000.

Certificates of Insurance

Certificates of Insurance acceptable to the owner, as satisfactory evidence of the insurance required by this contract, shall be furnished by the contractor and all subcontractors prior to the commencement of any work hereunder and thereafter upon renewal or replacement of each required policy of insurance. The owner shall not be obligated to compensate the contractor for work performed or materials furnished by the contractor before such certificate of insurance has been deemed satisfactory by the owner. The contractor shall upon request of the owner provide copies of the policies and or required endorsements to the owner. An additional certificate evidencing continuation of the required insurance shall be submitted with the application for final payment.

In the event contractor fails to procure or maintain any insurance coverage set forth above the owner, at its option, may purchase such coverage and deduct the cost thereof from monies due to the contractor, or terminate this contract in addition to all other remedies available to the owner.

The insurance requirements in regards to types or limits or acceptance of certificates of insurance by the owner shall in no way limit or relieve the contractor or subcontractors of its responsibilities under this contract or at law including, without limitation, contractors and subcontractors indemnification obligations and liability in excess of the limits of the coverage required. Owner makes no representation that the minimum limits of liability specified under the terms of this contract are adequate to protect the contractor or subcontractors against contractors or subcontractors undertaking of this contract. In the event contractor or subcontractors believe that the insurance coverage called for under this contract is insufficient, contractor or subcontractors shall provide at its own expense such additional insurance as the contractor or subcontractors deem adequate and necessary. In the event contractor or subcontractors maintains higher limits or liability, contractor's and all subcontractors liability and obligation to defend, indemnify and hold harmless owner and additional insureds shall not be limited to the minimum limits of liability required to be carried by the contractor or subcontractors as outlined above.

Insurance Regarding Materials

The Contractor and all subcontractors will insure any materials in their possession or in transit until arrival at the job site. The Contractor and subcontractors will also insure contractor's equipment and property.

So in conclusion never sign a contract until you have had your attorney review it along with your insurance agent. A well written contract protects the AOUO and the contractor.

About the Author: Sue Savio is the sole proprietor of Insurance Associates. Sue may be reached at (808) 526-9271.

2019 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 9, 2019*
Wednesday, February 6, 2019
Wednesday, March 6, 2019
Wednesday, April 17, 2019
Wednesday, May 8, 2019
Wednesday, June 12, 2019
Wednesday, July 10, 2019
Wednesday, August 7, 2019
Wednesday, September 11, 2019
Wednesday, October 9, 2019
Wednesday, November 6, 2019
Wednesday, December 11, 2019

Real Estate Commission – 9:00 a.m.

Friday, December 21, 2018
Friday, January 18, 2019
Friday, February 22, 2019
Friday, March 22, 2019
Friday, April 26, 2019
Friday, May 17, 2019
Friday, June 28, 2019
Friday, July 26, 2019
Friday, August 23, 2019
Friday, September 27, 2019
Friday, October 25, 2019
Friday, November 22, 2019
Friday, December 20, 2019

* January 9, 2019, meetings to be held at the REALTORS® Association of Maui offices located at 441 Ala Makani St., Kahului 96732.

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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