



Hawaii Real Estate Commission

MAUI CONDORAMA

PRESENTED BY CAI HAWAII

A **Free** Education Program for Condominium Owners

Topics Include:

Avoiding Annual Meeting Blunders,
Construction Contracts, Insurance Contractors,
Nonjudicial Foreclosures—Where Are We Now?



Friday, January 24, 2020
Program: 10:30 a.m. to 12:00 p.m.
J. Walter Cameron Center

MAUI CONDORAMA
January 24, 2020
J. Walter Cameron Center
Wailuku, Maui

AGENDA

10:00 – 10:30 a.m.	Registration
10:30 – 10:35 a.m.	Welcome & Introductions
10:35 - 10:55 a.m.	Nonjudicial Foreclosures – Where Are We Now? Melanie Oyama, Esq., Motooka Rosenberg Lau & Oyama
10:55 – 11:15 a.m.	Do's & Don'ts of Construction Contracts Lance S. Fujisaki, Esq., Anderson Lahne & Fujisaki
11:15 – 11:35 a.m.	What Insurance Contractors Should Have Before You Hire Them Joshua German, Insurance Associates
11:35 – 11:55 a.m.	Annual Meeting Blunders to Avoid Steve Glanstein, Professional Registered Parliamentarian
11:55 – 12:00 noon	Evaluation and Adjournment

The materials and information provided in this educational effort is intended to provide general education and information and is not a substitute for obtaining legal advice or other competent professional assistance to address specific circumstances. The information contained in this presentation is not an official or binding interpretation, opinion or decision of the Hawaii Real Estate Commission (Commission) or the Department of Commerce and Consumer Affairs.

This educational presentation is funded by the Condominium Education Trust Fund (CETF), Real Estate Commission, Professional and Vocational Licensing Division, Department of Commerce and Consumer Affairs, State of Hawaii for condominium unit owners whose associations are registered with the Real Estate Commission.

SPEAKERS

MELANIE K. OYAMA, ESQ.: Ms. Oyama is one of the Partners in the firm of Motooka Rosenberg Lau & Oyama. Her primary practice areas are delinquency collections and general counsel for Condo and Community Associations, including litigation, conveyance matters, mediation, and rendering opinions on house rules violations.

She earned her Juris Doctor at Arizona Summit School of Law in 2015, where she completed a three-year juris doctor program in just over two years, including courses in Ireland. Prior to attending law school, Ms. Oyama received her Bachelors in Justice Administration from Hawaii Pacific University in 2013. Ms. Oyama previously worked for Motooka & Rosenberg for thirteen and a half years as a Legal Assistant and Paralegal.

This is her fourth year as co-chair of CAI's Board Leadership Development Workshop. In 2019, Ms. Oyama received the Hoku Award, which is given in recognition of participating in support of CAI education programs, and demonstrated leadership skills, and an interest in being a future leader with CAI Hawaii.

LANCE S. FUJISAKI: Mr. Fujisaki was born and raised in Honolulu, received his Bachelor of Arts degree from the University of California, Berkeley, and his Juris Doctor degree from Hastings College of the Law. He served as a Technical Editor on the Hastings Law Journal. A partner at Anderson Lahne & Fujisaki LLP A Limited Liability Law Partnership, he has been a member of the Hawai'i State Bar Association and the American Bar Association since 1986 and is licensed to practice in all courts of the State of Hawai'i, as well as the U.S. District Court, District of Hawai'i. He has taught numerous programs on legal matters for CAI and other local organizations, has written articles for the community association community, and has spoken at Condorama presentations in Honolulu. His exclusive field of practice is in the representation of community associations, including counseling, contract negotiations and documentation for renovation projects.

JOSH GERMAN: Mr. German is an agent with Insurance Associates, Inc. Insurance Associates handles approximately 1,000 community associations throughout Hawaii. This is more than any other agency in Hawaii. Josh has handled insurance for community associations since 2007. Since joining Insurance Associates in 2014, Josh's primary responsibility has been neighbor island associations. He personally handles approximately 300 associations on the islands of Kauai, Maui, Molokai, Lanai, and the Big Island.

Josh was born and raised in Lihue, Kauai and was an accounting major in college. He served as the Treasurer for the Honolulu Association of Insurance Professionals from 2016 to 2019. He is

also active in the Community Associations Institute, Institute for Real Estate Managers and Community Council of Maui.

He survived Hurricanes Iwa and Iniki on Kauai, which has helped him to handle stressful situations for the associations. In his free time he enjoys traveling, watching sports, and spending time with his family.

STEVE GLANSTEIN: Mr. Glanstein has lived in Hawai'i continuously since 1963. After purchasing a condominium in Honolulu, he recognized the need to become skilled in proper parliamentary procedure. While serving on the board of directors at his condominium, Steve attained certification as a Registered Parliamentarian® in 1983 and a Professional Registered Parliamentarian® in 1984. The latter designation is the highest credential issued by the National Association of Parliamentarians® (NAP) - the largest association of parliamentarians in the United States and abroad, founded in June 1930.

Involvement with the NAP led Steve to serve as founder and first president of Hawai'i's largest local parliamentary unit (Aloha-Ohana Unit of Parliamentarians), then as president of the Hawai'i State Association of Parliamentarians. For the National Association of Parliamentarians, Steve advanced to serve as a District Director, and ultimately, on the Board of Directors, as Treasurer and Director at Large. He is a frequent sought-after speaker/trainer at national conferences and conventions.

Since 1983, Steve has professionally served more than 1,800 meetings. They include condominium associations, cooperatives, community associations, timesharing organizations, numerous professional organizations, as well as unincorporated associations, for-profit and not-for-profit corporations, unions, and churches. He has served both as a Parliamentarian and Professional Presiding Officer. Occasionally, he has assisted clients in an advocacy role in the audience at various meetings.

Steve is clear to inform clients that he is *not* a lawyer; he does provide testimony on much of the proposed condominium and community legislation in Hawai'i. He is the longest practicing professional parliamentarian in Hawai'i and is frequently contacted to provide both verbal and written opinions regarding the effect of proposed legislation on parliamentary procedure. Generally, Steve issues about 5-7 written opinions and 20-30 verbal opinions per year. He has assisted 44 attorneys in various aspects of parliamentary procedure during his career, also earning the designation of 'expert witness' when providing testimony for various Hawai'i courts.

For advanced training, Steve facilitated the 'Master's Group' of Hawai'i - an intense training program for professional parliamentarians to improve their skills beyond those of most credentialed parliamentarians in the national organization. He organized a Professional Presiding Workshop for credentialed parliamentarians on a national basis to further improve their presiding skills.

During the first six months of 2019, Steve served about 89 meetings as a parliamentarian or professional presiding officer. During that same period, he supervised parliamentarians for several other organizations, totaling about 60 meetings. He also instructed in about 12 seminars.

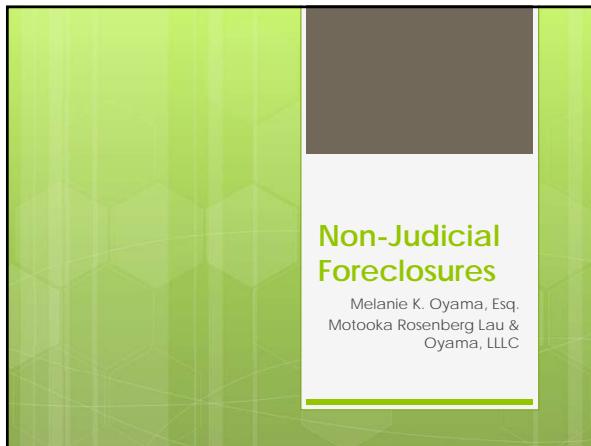
Though in high demand for his parliamentary skills, Steve believes knowledge should be shared. In order that more individuals become skilled with parliamentary procedure, he has been actively involved in training entry-level parliamentarians in the State of Hawai'i. He frequently instructs for the Hawai'i Chapter of the Community Associations Institute (part of a national group of community associations) of which he is a past president.

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MILTON M. MOTOOKA, ESQ. MODERATOR OF THE MAUI CONDORAMA: Mr. Motoooka is the Senior Partner of the firm of Motoooka Rosenberg Lau & Oyama and has been practicing law in Hawaii for over 40 years. In 1994, he was inducted into the Charter Class of the College of Community Association Lawyers. The College of Community Association Lawyers is comprised of attorneys who have distinguished themselves through published writings, teaching and speaking in the field of community association law, and community service. The Charter Class of the College is comprised of twenty-eight (28) community association attorneys selected nationwide. Seventy-three (73) community association attorneys, who have practiced for at least ten (10) years, applied for admission to the college. He was the only attorney selected from Hawaii for the Charter Class.

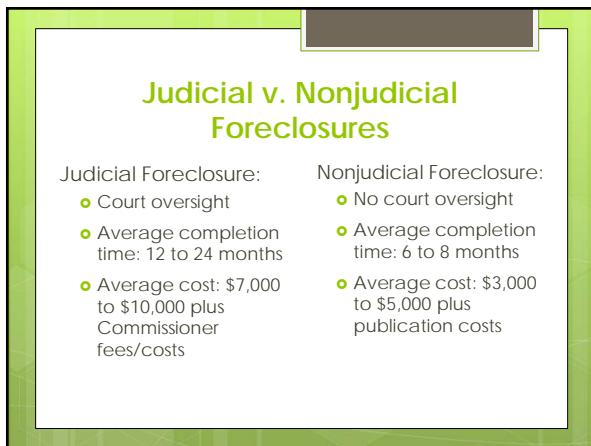
In 1997, he was selected as the recipient of the Richard Murray Gourley Distinguished Service Award for outstanding contribution to Hawaii's community association industry as an industry leader in community association law in the State of Hawaii.

Mr. Motooka was one of the founding members of the Hawaii Chapter of the Community Associations Institute ("CAI"). He served as President of Hawaii Chapter of CAI for two years and Chairman or Co-Chairman of the Programs Committee for over thirty (30) years. The Programs Committee is responsible for producing all of the educational programs presented to homeowner association Boards of Directors, owners, management companies and other professionals and companies who provide services to homeowner associations. The goal of the Programs Committee is to provide timely and informative programs to keep homeowner association members abreast of the rapidly changing and complex problems confronting them. He has been a frequent speaker on issues involving community associations.



A slide with a green geometric background. In the center, there is a white rectangular area containing the title "Non-Judicial Foreclosures" and the name "Melanie K. Oyama, Esq. Motooka Rosenberg Lau & Oyama, LLC".

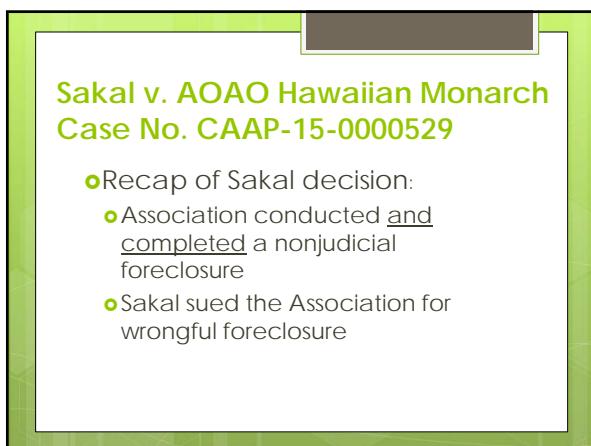
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A slide with a green border. Inside, the title "Judicial v. Nonjudicial Foreclosures" is at the top. Below it, two columns compare Judicial and Nonjudicial Foreclosure processes.

Judicial Foreclosure:	Nonjudicial Foreclosure:
<ul style="list-style-type: none">● Court oversight● Average completion time: 12 to 24 months● Average cost: \$7,000 to \$10,000 plus Commissioner fees/costs	<ul style="list-style-type: none">● No court oversight● Average completion time: 6 to 8 months● Average cost: \$3,000 to \$5,000 plus publication costs

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A slide with a green border. It features the title "Sakal v. AOAO Hawaiian Monarch" and the case number "Case No. CAAP-15-0000529". Below the title, a section titled "Recap of Sakal decision:" lists two points.

- Association conducted and completed a nonjudicial foreclosure
- Sakal sued the Association for wrongful foreclosure

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**Sakal v. AOAO Hawaiian Monarch
Case No. CAAP-15-0000529**

- Recap of Sakal decision:
 - Court concluded the Association did not have authority to conduct Non-Judicial foreclosures
 - Why?
 - Need nonjudicial foreclosure sale provision in the governing documents ("buzz words")

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**Sakal v. AOAO Hawaiian Monarch
Case No. CAAP-15-0000529**

- Recap of Sakal decision:
 - Buzz Words:
 - Nonjudicial Foreclosure
 - Power of Sale Foreclosure
 - Example:
 - "The lien of the Association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in Chapter 667."

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**Nonjudicial Foreclosures
Act 282 (SB551 SD1 HD2 CD1)**

Clarified Sakal ruling

- Association can nonjudicially foreclose without language in the governing documents

Certain prohibitions

- Cannot conduct nonjudicial foreclosure when balance is from fines, penalties, legal fees, or late fees

Consumer protections

- Military

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Nonjudicial Foreclosures Act 282 (SB551 SD1 HD2 CD1)

Notice requirements:

- Mediation:

- Thirty (30) days to request
- Sixty (60) days to complete

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Nonjudicial Foreclosures Act 282 (SB551 SD1 HD2 CD1)

Possible challenges to Act 282:

- Retroactive clause:

- Applies to all past completed Nonjudicial foreclosures

- Due Process:

- The right to receive notice

- Interfering with a private contract:

- Governing documents are a contract between the Association and owner

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Nonjudicial Foreclosures Act 282 (SB551 SD1 HD2 CD1)

Rewards:

- No express provision in the governing documents required
- Less costly than a judicial foreclosure
- Less time than a judicial foreclosure

Risks:

- Challenges to Act 282 may take years to resolve
- No way to predict outcome of challenges
- Insurance coverage

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Takeaways

Before making a decision about using a Nonjudicial foreclosure, check with the Association's experts:

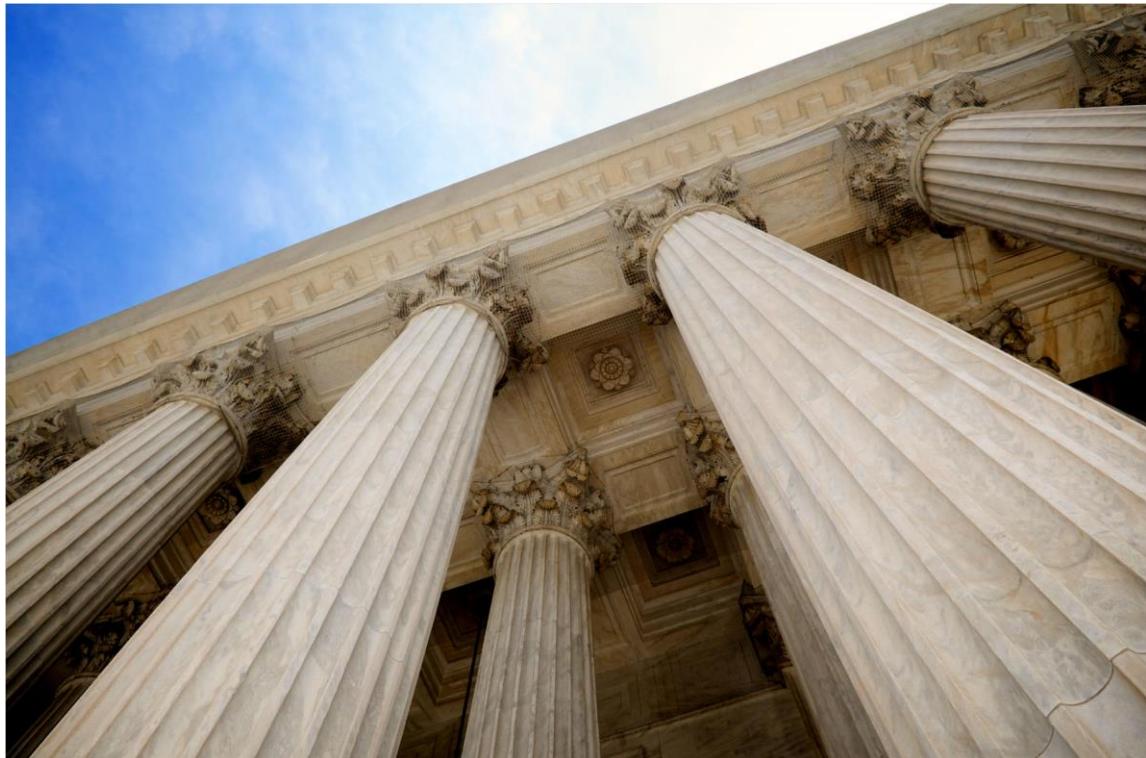
- Association Attorney
 - Legal written opinion
- Insurance agent
 - Coverage (or not) for foreclosures

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THANK YOU!

Questions & Comments
Mel@MyHawaiiLaw.com

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Do's and Don'ts of Construction Contracts

The following discussion is general in nature and offered for informational purposes only. Nothing in these materials is intended to nor shall these materials constitute, legal advice. Please consult with your association attorney for legal advice. Depending upon the facts, circumstances and situation, provisions or exceptions found in the law and the governing instruments, different from those discussed in this presentation, may apply.

Lance S. Fujisaki | Anderson & Fujisaki LLP A Limited Liability Law Partnership |

733 Bishop Street Suite 2301, Honolulu, Hawai'i 96813, Ph. (808)697-6005

January 24, 2020

I. Introduction

This presentation assumes several things:

- “Association’s legal counsel” refers to counsel practicing and experienced in the field of community association law.
- “Contracts” include service contracts such as maintenance agreements, professional services agreements, and renovation contracts with licensed contractors. Although Boards should consult with legal counsel before entering into management agreements with their managing agent, as well as employment agreements, this presentation does not address those kinds of contracts. Also, this presentation does not address retainer agreements with the association’s law firm.
- I am assuming that after the attorney reviews the contract and gives the board advice, the board will follow the advice of the attorney. Under 414D-149(d), a director of a nonprofit corporation, in discharging the director’s duties, is entitled to rely on opinions and statements if prepared or presented by an attorney. On the other hand, directors who ignore the association’s attorney’s advice may be breaching their fiduciary duty. (Section 514B-106 provides in part: “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 organized under chapter 414D.”)

- I am assuming that the association has properly vetted the contractor or vendor before consulting with the attorney. Selecting the right contractor or vendor is probably more important than the contract terms. But associations still need adequate terms in their contracts. Past performance is never a guarantee of future performance.
- This is not a “how to” presentation. Rather, the point is that contract review is something best left to your association attorney.

II. Boards should be concerned about association contracts because each director owes a fiduciary duty to the association.

The fiduciary duty is a bundling of a number of obligations, including the duty of:

- obedience
- diligence (due care)
- loyalty
- good faith

Directors have duties similar to the duties of a trustee to the beneficiaries of a trust. This means that a director must not act with self-interest, must act with such care as an ordinary reasonable and prudent person in a like position would under similar circumstances, and act in a manner believed to be in the best interest of the association.

Examples of the duty of diligence:

- Gathering (researching, investigating) all necessary information for decision making;

- Consulting the opinions of appropriate professionals where necessary (i.e. legal counsel, engineers, architects, managing agents, parliamentarians, certified public accountants, etc.);
- Checking the license status of a contractor or consultant the board intends to hire;
- Complying with the requirements of the governing documents; and
- Complying with the requirements of the Condominium Property Act, Chapter 514B, Hawai`i Revised Statutes

Examples of good faith:

- Approving a higher bid for repaving the driveway because the proposed materials were of a higher quality rather than approve the next lower bid.

For more information, see the resources on the Department of Commerce and Consumer Affairs' website on fiduciary duty:

<https://cca.hawaii.gov/reb/files/2016/05/Board-of-Directors-Fiduciary-Duty.JC-yellow.pdf>
<http://cca.hawaii.gov/reb/resources-for-condominium-owners/>

III. Review "all" contracts? Really!

- Generally, all contracts should be reviewed by legal counsel. Even small contracts can significantly affect the Association adversely.
- Your association may have contracts that (1) will not expose the Association to risk of bodily injury, property damage or financial risk, (2) are short in duration, (3) are limited in scope, and (4) that involve amounts that are insignificant relative to the Association's budget. Probably very few contracts meet these criteria. These contracts may not need legal review.
- Although all contracts should be reviewed by your attorney, on small contracts, it is

perfectly fine for the Board to ask the attorney to spend not more than a specified amount of time to review and report in writing or orally on obvious or any major problems. The attorney should be able to spot major issues without investing a lot of time. In this way, the Board can economically protect the Association from major issues.

- Occasionally, associations will forego a legal review because it is believed that the services/goods to be provided are nominal and therefore do not justify the expense of attorney assistance. However, that decision could expose your association to significant liability if it is discovered that the vendor is not contractually obligated to maintain liability insurance and/or defend and indemnify (reimburse) the association and its managing agent, among other essential protections.
- For example, assume your association enters into a vendor contract for services that total \$5,000.00. That vendor, during the scope of its work for the association, inadvertently causes catastrophic injury to a third party. Upon receipt of a claim from an injured party, it is discovered that the vendor contract did not require the vendor to maintain adequate levels of insurance, if any. Under that circumstance, your association could be exposed to significant financial liability—and the board could be targeted for failing to exercise its prudent business judgment by requiring sufficient levels of insurance before signing of the vendor's contract.
- Everyday English and contract English may have significant differences. Contracts may include "terms of art," which are legal terms that have special meanings and that pack decades of legal precedent into simple terms.

IV. Some common issues that your association attorney may help spot

A. Your attorney can help you set the project on the right trajectory to increase the chances of a positive outcome:

1. Owner approval issues
2. Does the work involve portions of the project that are the responsibility of the owners, versus the association?
3. Harrison v. Casa de Emdeko, Inc., 142 Hawai`i 218, 418 P.3d 559 (2018).
 - The Hawai`i Supreme Court applied Chapter 514A, not 514B.
 - Limited common elements are common elements designated in the declaration as reserved for use of a certain apartment or at certain apartments to the exclusion of other apartments.
 - All limited common element costs must be charged to the owner of the apartment to which the limited common element is appurtenant.
 - Surprise: Lanai railings and elevators were deemed limited common elements.
 - The court remanded the issue of whether expenses for drain lines, cable television wire, cable television services, and pest control services, were limited common expenses, for which the commercial unit owner was not responsible.
 - Comment: the outcome would probably have been different if the court applied Chapter 514B, rather than 514A.

B. Your attorney may propose a more comprehensive contract that provides better protection for your association at no additional expense.

- A better contract usually does not cost more.

- Most contractors want your business and are reasonable.
- Nearly all contractors will accept the American Institute of Architects (“AIA”) contract forms that provide better protections than contractor forms.
- There are no standard forms of service contracts, but your association attorney may have alternate forms.

C. Your attorney may negotiate better warranty protection for the association.

- Warranties are among the most overlooked parts of contracts.
- Absent a warranty, the contractor or vendor may not respond to fix deficiencies.

D. Your attorney may negotiate better indemnification provisions for the association.

- Avoid agreements to indemnify contractors, vendors or consultants.

E. Your attorney should alert you to potential problems with contracts.

- Nearly every contract must include provisions such as: a definite term, the amount to be paid, how the amount may be increased, indemnity provisions, insurance requirements, termination provisions.
- If the association exercises its right to terminate, will the association incur liability?
- If the association experiences a delay in the project, for example, while it obtains owner approval, will the contractor seek delay damages? On the HART project, a settlement was reached for \$160 million for delay damages.
- Some contractors, design professionals and vendors insert limitations on liability. For example, liability may be limited to

- the amount paid or a fixed sum, whichever is higher (or lower).
- Some contracts require associations to waive claims for “special damages”.
- F. Your attorney may remind you about things you may forget to check, such as bonding requirements.**
- See attached primer on performance and payment bonds.
- G. Your attorney may alert you to provisions to help avoid delays.**
- Liquidated damages for delays may help provide incentives to avoid delays, as well as compensation in light of delays. Delay damages are otherwise difficult to establish.
- H. Your attorney may alert you to provisions that call for automatic renewals.**
- These provisions require the board to give advance notice of termination. Your association may end up stuck in a contract for a year or more because you missed the deadline for sending the notice of termination. Avoid automatic renewals.
- I. Your attorney may help spot obvious problems with contractors**
- Unlicensed contractors
- Contractors operating under licenses of other persons
- Contractors are subject to complaints/discipline by RICO.
- J. Your attorney will help decide what to include and not include in contracts.**
- There is a balance between KISS (“Keep it simple stupid”) and comprehensive.
- Including extraneous, conflicting provisions may lead to disputes and result in the contract being deemed ambiguous and unenforceable.
- There is a tendency to include more information than appropriate. Exclude bid documents.
- The contract should “tell a story” of the purpose of the contract and the association’s expectations. If the purpose of the contract is not clear, there are greater risks of disputes. If litigated or arbitrated, the fact finder may have difficulty discerning the intent of the parties.
- K. Your attorney may actually enjoy reading boilerplate provisions.**
- Boilerplate provisions are sometimes attached to contracts as general conditions, printed in the smallest size of font possible, visible only with an electron microscope.
- Boilerplate provisions can have major effects.
- Some contracts also say: “Paragraph and section headings shall have no meaning in the interpretation of this agreement.” Anyone skimming the contract could be in for a shock when he or she later discovers, for example, that the phrase “late payments will incur a 25% penalty” was buried in a paragraph with a completely irrelevant heading.
- Contracts typically include “Integration” or “Entire Agreement” clauses that nothing counts unless it’s in the written agreement. If you have not included significant promises or representations in the contract, you should not count on receiving them. Oral promises before or

during signing may have no legal significance. Nor may brochures, web pages and emails unless “incorporated” into the contract.

V. Using Consultants

- Achieving a good outcome requires a team effort.
- Honestly assess whether the Association has the ability to prepare adequate specifications for the work.
- Honestly assess whether the Association has the ability to manage the project, accurately process payment applications, monitor the work, and assess whether the work meets the requirements of the contract documents.

VI. Closing Thoughts

- Boards should have their association’s legal counsel review all contracts before signing them. At minimum, following the recommendations of legal counsel should protect your board from any argument that directors have failed to discharge their fiduciary duty.
- Although your association will have to pay legal fees for your attorneys’ work, consider the legal review a form of insurance against common pitfalls. The association will be protected by a clear agreement that everyone hopefully understands; various safeguards may be built into the agreement; and you may have a binding and enforceable agreement that a court or arbitrator will uphold in the event of a dispute.
- However, legal review will not guarantee a successful outcome. Success will depend upon team effort -- the collective effort of your managing agent, contractor or vendor, board representatives, legal

counsel, design professionals, project managers, etc.

- If everyone does their job, you will have a successful outcome without having to take legal action to enforce your association’s contractual rights.

Performance and Payment Bonds

By way of background, performance bonds are issued by sureties. A surety is like a guarantor and is typically an insurance company. The surety agrees to pay for the performance of a contract if the Contractor defaults in the performance of the contract. A payment bond is an agreement in which the surety assures the obligee (the Association) that the persons providing labor, materials and equipment to the project will be paid by the principal/Contractor. In many cases, Association governing documents require Boards to procure bonds for improvements to the project.

If the Contractor fails to provide bonds and fails to perform the work or pay subcontractors or suppliers, the Association may have very little recourse against the Contractor if it is judgment proof. While a bond will not provide the Association a complete guarantee of performance, it will provide the Association with substantial protection in the event of a problem. If the Contractor fails to perform, the Association may have no effective recourse. It is a business decision for the Board whether to require bonds, unless they are required by the governing documents.

Although we recommend that Associations procure performance and payment bonds as they provide some assurance that the Contractor will perform in accordance with its terms and conditions of the contract, the following are additional factors that the Board may consider when deciding whether to require a bond:

1. If the Contractor fails to provide bonds and fails to perform the work or pay subcontractors or suppliers, the Association may have very little recourse against the Contractor if, for example, it is judgment proof or files for bankruptcy. While a bond will not provide the Association a complete guarantee of performance, it will provide the Association with substantial protection in the event of a problem. Thus, the Association should obtain bonds if the amount of the contract is significant and the Association will experience financial hardship if the Contractor fails to perform. Conversely, if the contract sum is small and the Association has the resources to "self-insure" the project, then bonds may not be necessary.
2. Although we do not have any statistical data, we believe it is within the standard of care of community associations in Hawai'i to obtain bonds for repair projects. In our experience in assisting Associations with repair projects, a substantial majority of Associations procure bonds. At a 2007 seminar presented by the Hawai'i Chapter of the Community Associations Institute, the President of Alakai Mechanical Corporation, one of the largest companies in its field in Hawai'i, informed community association leaders: "Always require performance and payment bonds no matter how big the company may be." The Board should keep in

General Discussion of Performance and Payment Bonds

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mind that while an owner could not argue that the Board breached its fiduciary duty by requiring the Contractor to provide performance and payment bonds, if the Contractor failed to perform and the Association were damaged by the Contractor's failure to perform, an owner could certainly argue that the Board breached its fiduciary duty by failing to require bonds.

3. The need for bonds is greater where the Association is required to pay substantial amounts up front. Conversely, a bond may be of lesser importance if payments are due upon final completion of the work. In that event, the Association may withhold payment if the Contractor fails to adequately perform the work. Unfortunately, most Contractors require substantial payments up front. If, after receiving the initial payment, the Contractor fails to perform and refuses to return the initial payment, the Association may have no effective recourse.

4. The Association should obtain bonds when working with a Contractor with whom the Association does not have a substantial business relationship. Where the parties do not have established a course of dealing, there is a greater likelihood of disputes arising over performance of the contract. While we recommend bonds for all contracts, the Board may feel that bonds are not necessary where it has had a long relationship with a particular Contractor.

5. Given that the Contractor has a vested interest to maintain a good relationship with its surety, and the Contractor's claims history may affect its ability to obtain bonds in the future, the procurement of a bond and possibility of involving the surety in a dispute may provide the Contractor with an incentive to resolve disputes with the Association before they lead to claims with the surety.

6. A bonded Contractor has obtained the stamp of approval of the surety. Not all Contractors are bonded. A Contractor with a poor history may not be bondable. A bond charge (e.g., 4%) may be an indication of a poor loss history. By requiring a performance bond, the Association will be somewhat protected by the surety overseeing the affairs of the Contractor. Given that sureties must guaranty performance of contracts, they must carefully monitor the operations of the Contractors.

7. Note that an AIA A312 bond should provide protection for 2 years. Although the Association will make progress payments and have the work inspected before making payments, it may not discover defects until after it has paid the Contractor for the work.

In summary, the Board can easily justify the expense of a bond to owners, however, the Board would have difficulty explaining to owners why it did not require a bond.

Contractor's Insurance

Presented by:
Joshua German
January 24, 2020



Agenda

- ▶ Contractor's Commercial General Liability Policy (CGL)
 - Exclusions
 - Policy language differences
- ▶ Other Insurance Considerations
 - Auto, WC, Umbrella, etc.
 - Limits of liability
 - Common BOD mistakes
- ▶ Licensing and Bonding
 - What does it mean?
 - Why is it important?
 - When is it needed?

Commercial General Liability



General Liability Policy

- ▶ Covers
 - Bodily Injury
 - Property Damage
 - Damage from work product of the contractor

- ▶ But....every policy has exclusions

Some require special policies to overcome the deficiencies of the CGL. Others require tweaking the CGL coverage.

Exclusions - Pollution

Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

- (a) At or from any premises, site or location, or at any time owned or occupied by, or rented or leased to, any insured. However, this subparagraph does not apply to:
- (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot from equipment used to heat that building;
- (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy;



LESSON:

The standard General Liability policy form offers very little pollution coverage. A separate Pollution policy may be necessary. A construction consultant can help you identify exposures.

lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on to the premises, site or location with the intent that they may be discharged, dispersed or released as part of the process being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(A) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(B) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.



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Exclusions - Lead

EXCLUSION - LEAD

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to "bodily injury", "property damage", or "personal and advertising injury" arising out of or resulting from the use of lead paint.



LESSON:

A separate Pollution policy may be necessary. A construction consultant can help you identify exposures.



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Exclusions - Asbestos

EXCLUSION - ASBESTOS

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. This insurance does not apply to:

LESSON:

A separate Pollution policy may be necessary. A construction consultant can help you identify exposures.

- a. emitted or released, or
- b. transmitted by any other means.

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Exclusions - Professional Liability

EXCLUSION - CONTRACTORS - PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2, Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability and 2. Subject to Paragraph 3. below, professional services include:

LESSON:

When you engage with a contractor to do structural or design work a separate Professional Liability policy is needed.

architectural or surveying services in connection with construction work you perform.

sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

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Exclusions - Residential

MULTI-FAMILY RESIDENTIAL CONSTRUCTION EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to 2. Exclusions of COVERAGE A - BODILY INJURY AND PROPERTY DAMAGE LIABILITY (Section I):

This insurance does not apply to:

"Property damage" arising out of any construction operations, whether ongoing operations or the "products/completed operations hazard", which involve "multi-family owned developments", "tract housing" developments or "condominiums projects".

This exclusion applies to construction operations including "pre-construction", "construction", "post-construction", or "reconstruction" of such buildings or structures, whether performed by the insured or on the insured's behalf.



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Additional Insured

- ▶ CG 2010– for ongoing operations
- ▶ CG 2037- for completed work
- ▶ New version is (Ed. 04-13) difference is
*"If coverage to the additional insured is required by a contract or agreement, **the most [the insurer] will pay on behalf of the additional insured is the amount of insurance required by the contract.**"*



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Additional Insured

- ▶ Sample Additional Insured Contract Requirement that we have seen used.

The Contractor, and its subcontractors of any tier, shall obtain and maintain in full force and affect the following insurances with limits which will be the greater of:

- (a) those specified in this Agreement;
- (b) Contractor's actual insurance policy limits; or
- (c) those limits required by law.

- ▶ Primary and Non-contributory status and Waiver of Subrogation is recommended.

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Occurrence Endorsement

CHANGE IN OCCURRENCE DEFINITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The definition of "occurrence" in **SECTION V - DEFINITIONS** is replaced by the following:

"Occurrence" means:

- a. An accident, including continuous or repeated exposure to substantially the same general harmful conditions; or
- b. A negligent act or omission in the performance of a "construction contract", but only with respect to "property damage".

- B. The following definition is added to **SECTION V - DEFINITIONS**:

"Construction Contract" means a written contract or written agreement to build, demolish, repair, remodel, or alter tangible real property, including land and the improvements thereon, or a written contract or written agreement to supply material, parts, equipment, goods or products for such work on tangible real property.

- C. All other terms, conditions, provisions and exclusions of the policy shall apply.

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General Liability

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

*Per project aggregate is recommended.



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Key Commercial General Liability Considerations

- No exclusion for multi-family, townhouse or condominium projects.
- Additional insured endorsements shall be on form CG 2010 07 04 (ongoing operations) and CG 2037 10 04 (completed work) or their equivalent if possible
- Primary and non-contributory coverage in favor of the additional insured
- Waiver of subrogation in favor of the additional insureds
- Coverage for completed operations with a revised definition of Occurrence
- Coverage on a per project general aggregate basis



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General Liability



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Other Insurance Considerations



Business Automobile Liability

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

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

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Workers' Compensation

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

▶ Employer's Liability

- \$500,000 Bodily Injury by Accident (each accident)
- \$500,000 Bodily Injury by Disease Limit (policy limit)
- \$500,000 Bodily Injury by Disease Employee (each employee)

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Workers' Compensation



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Umbrella Liability

- ▶ The umbrella liability shall be at least following form excess over the commercial general liability, business auto liability and employer's liability.

- ▶ The policy shall provide defense in addition to the limits of liability.

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Common BOD Mistakes

- ▶ Not verifying who's insuring the materials in transit, off the jobsite, and while on the job site.
- ▶ Not verifying the if the contractor has the correct lines and limits.
- ▶ Not verifying if the contractor has the proper endorsements and coverage enhancements. (Primary wording, Waiver of Subrogation, etc.)

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Licensing and Bonding



Licensing

- ▶ A Licensed contractor has training, Insurance (Commercial General Liability and Workers' Compensation), and can obtain building permits.
- ▶ The DCCA requires projects over \$1,500 to be done by licensed contractors (Plumbing and electrical work always require licensed contractors).



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Bonding

A bond is a guarantee by a 3rd party that ensures the contractor's obligation will be fulfilled.

3 Parties to a bond:

- ▶ Obligee (association)
- ▶ Principal (contractor)
- ▶ Surety (the company that assures the contractor's performance)



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Types of Bonds

► **Performance Bond**

If the contractor does not complete the job the surety will pay to get it done.

► **Payment Bond**

If the contractors does not pay the subcontractors or material suppliers the surety will pay.

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When is Bonding Needed?

- If it is a governing document requirement.
- If it is a lender requirement.
- When the size of the project is large.
- When there is difficulty finding a qualified alternative contractor.

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Takeaways

- ▶ Consult with Professionals when Engaging with a Contractor
 - Construction Consultant
 - Attorney
 - Insurance Agent
- ▶ A well written contract protects the Association and the contractor.

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Thank you.



Special Presentation Outline: 2020 Annual Meetings Blunders to Avoid

For: Hawaii Chapter of the Community Associations Institute

By: Steve Glanstein, Professional Registered Parliamentarian

1. Pre-meeting planning

- a. Governing documents: DCC&Rs, Declaration, Articles of Incorporation, Bylaws, Permanently adopted meeting rules
- b. Posting requirements, deadlines
- c. Candidate or individual statements requesting proxies; black text on white paper
- d. Notice, Mailing, Agenda (Bylaws)
- e. Proxies
- f. Quantity of administrative personnel

2. Meeting check-in

- a. Up to date owners' list
- b. Proxies
- c. Room logistics
- d. Entry control
- e. Handout control and unauthorized handouts
- f. Ballot control

3. Quorum Issues

- a. What are options with no quorum?
- b. Do you have a backup plan?
- c. Can a meeting be cancelled?
- d. What if a quorum is lost during the meeting?
- e. Owner outside door and quorum issues

4. Conduct of Meeting

- a. Who chairs the meeting? – Professional presiding officer vs. parliamentarian
- b. Who chairs the meeting if President and Vice-president not there?
- c. Hazards of property manager chairing the meeting
- d. Are there any meeting rules?
- e. Meeting rules permanently adopted? Explicit record in minutes?
- f. Who takes the minutes?
- g. Contents of minutes (See <https://cca.hawaii.gov/reb/files/2019/06/CB1906.pdf>).

5. Reports of Officers

- a. Written vs. verbal reports
- b. Report length
- c. President's Report [especially HRS §414D-101(d)(1)]
- d. Treasurer's Report
- e. Other Reports, such as site manager, committees, etc.
- f. Nominating Committee Report if in bylaws (Note any requirement in the bylaws for placement in the agenda)

6. Appointment of Tellers, sometimes called Inspectors of Election

- a. Ideal selection
- b. What to avoid
- c. Responsibility for counting
- d. Guidelines for counting

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7. Nomination of Candidates to the Board of Directors

- a. Eligibility
- b. Names preprinted on ballots
- c. Multiple nominations by one person
- d. Absentee nominations
- e. Nominating Speeches
- f. Questions and Answers

8. Election of Directors

- a. What are the terms?
- b. Interim vacancies?
- c. Is a ballot vote required in the bylaws? If so, where is it?
- d. Can a ballot vote be waived if ballot is required in the bylaws? Consequences?
- e. Exception to ballot vote
- f. Requirements for election including cumulative voting, majority present, and incomplete elections
- g. Quick check on ballot calculations
- h. Removal and Replacement issues
- i. Effective time of election

9. New Business Items

- a. IRS Tax Resolution (get from CPA!)
- b. Rent Collection Resolution (get from attorney!)
- c. Common Area Resolution (get from attorney!)
- d. Motions ordering action in violation of the bylaws
- e. Approval of Property Management Contract
- f. Surprise Declaration or Bylaw Amendments

10. Board Organization Meeting, sometimes called Board Annual Meeting

- a. Who chairs the meeting?
- b. Legitimate business
- c. Deadlocked officer elections
- d. Postponement

11. Post-Meeting issues

- a. Check-in lists, ballots, proxy requests
- b. Election Challenges, counting errors
- c. Recount petition or call of Special Meeting
- d. Minutes to parliamentarian for review

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