



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.

Common Management Issues

This unit explores some of those real-world situations that come up during the daily operations of a condominium project, especially those situations that are governed by the Act and/or other specific laws. These include:

- Additions and modifications
- Insurance for the units/project
- Transfers of assigned parking stalls
- Aging in place
- Pets
- Smoking

Lesson: Additions and Modifications by Owners

As mentioned at the beginning of the course, Hawaii law recognizes that a condominium unit owner must give up some degree of freedom of choice they might otherwise enjoy in separate, privately owned property. This is especially true when addressing an owner's ability to make additions and modifications to their unit.

Material additions and modifications.

§514B-140 Additions to and alterations of condominium. (a) No unit owner shall do any work that may jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement, as reasonably determined by the board.

(b) Subject to the provisions of the declaration, no unit owner may make or allow any material addition or alteration, or excavate an additional basement or cellar, without first obtaining the written consent of sixty-seven per cent of the unit owners, the consent of all unit owners whose units or appurtenant limited common elements are directly affected, and the approval of the board, which shall not unreasonably withhold such approval. The declaration may limit the board's ability to approve or condition a proposed addition or alteration; provided that the board shall always have the right to disapprove a proposed addition or alteration that the board reasonably determines could jeopardize the soundness or safety of the property, impair any easement, or interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of the property.

When it comes to material additions or alterations, the Act is very specific. An owner is prohibited from doing any work on or outside their unit (i.e. yard area, parking space, or other area under the owner's control), which would jeopardize the soundness and safety of the "property" which the Act defines as the land, the buildings, all improvements and all easements, rights, and appurtenances intended for use in connection with the condominium. If the owner is proposing to make a material addition or alteration that would not jeopardize the property, they must still obtain the written consent of 67% of the unit owners plus the consent of all unit owners whose units or appurtenant limited common elements would be directly affected by the addition or alteration, plus the approval of the board.

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Message from the Chair

Aloha!

I hope 2020 finds you well and in good spirits.

On Friday, January 24, 2020, in association with CAI Hawaii, the Commission took the Condorama to the J. Walter Cameron Center in Kahului, Maui for our first neighbor island Condorama event. Maui Commissioner Bruce Faulkner welcomed the audience and four speakers addressed a packed room on the status of the law pertaining to non-judicial foreclosures; entering into construction contracts; ensuring that independent contractors are properly insured for the protection of the condominium association; and avoiding annual meeting blunders. The response to the speakers was positive, with many attendees expressing appreciation for bringing the speakers to Maui. We hope to make neighbor island Condoramas a regular event. Visit our website at www.hawaii.gov/hirec to view the Maui Condorama online.

The 2020 Hawaii legislative session is in full swing. In this issue of the Bulletin you'll read about some of the proposed bills that the Commission is following at the legislature relating to condominiums; find a discussion of some common management issues; and find a review of the board member's fiduciary duty to the condominium association. Our calendar of Commission meetings for the year is included as well; you are always welcome to attend a Commission or Committee meeting of your choice.

Our next Honolulu Condorama will be held at the State Capitol Auditorium on Saturday, April 11, 2020. You can find a link to register at our website, www.hawaii.gov/hirec. While attendance is free, register early to assure yourself a seat.

And don't forget to sign up for direct-to-you informational and educational quarterly emails at <http://cca.hawaii.gov/reb/subscribe>.

Thanks for taking an interest in condominium education.

Laurie A. Lee
Chair, Condominium Review Committee



A Board Member's Fiduciary Duties

You got elected to your condominium association board. Congratulations are in order. A board member is a fiduciary which means that you owe the highest duties under the law to your fellow condominium owners. These duties include:

Obedience Board members must comply with the condominium law, Declaration, Bylaws and House Rules and all duly adopted decisions by the Board.

Diligence As a Board member, you must prepare for meetings; seek and follow opinions/reports/advice from the association attorney, accountant and staff.

Loyalty Serve the interests of all condominium owners; avoid conflicts of interests.

Good Faith You must have a reasonable belief that your actions serve the interests of the owners in light of the facts and circumstances presented.

In order to meet your fiduciary duties, a Board member must act:

1. In good faith;
2. In a manner consistent with the board member's duty of loyalty to the condominium association;
3. With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
4. In a manner reasonably believed to be in the best interests of the condominium association.



Condominium Basics

Introduction to Condominium Governance (cont. from page 1)

Nonmaterial additions and alterations.

§514B-140 Additions to and alterations of condominium. (c) Subject to the provisions of the declaration, nonmaterial additions to or alterations of the common elements or units, including, without limitation, additions to or alterations of a unit made within the unit or within a limited common element appurtenant to and for the exclusive use of the unit, shall require approval only by the board, which shall not unreasonably withhold the approval, and such percentage, number, or group of unit owners as may be required by the declaration or bylaws; provided that the installation of solar energy devices shall be allowed on single-family residential dwellings or townhouses pursuant to the provisions in section 196-7.

“Nonmaterial additions and alterations” means an addition to or alteration of the common elements or a unit that does not jeopardize the soundness or safety of the property, reduce the value thereof, impair any easement, detract from the appearance of the project, interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of property, or directly affect any nonconsenting owner.

As you can see, the approval process for nonmaterial additions and alterations is less strict than the one involving material additions and alterations. In this case, an owner is only required to obtain the approval of the board unless the Declaration also requires the owner to obtain the approval of a specific percentage or number of the unit owners at the project.

It should be pointed out that both sections 514B-140(b) and 514B-140(c) state their provisions are “subject to the provisions of the declaration.” This means that if the Declaration for the project provides for a different standard or process for the approval of material and/or nonmaterial additions or alterations, the terms of the Declaration will control.

Finally, it should also be pointed out that this section of the Act contains a clause which specifically authorizes the installation of solar energy devices by owners on single-family residential dwellings or townhouses to the extent that such structures are part of a condominium project. The Act requires an Association to adopt rules to facilitate the installation of solar energy devices but also must not increase the cost of installation, maintenance, and removal of the device by more than 15 percent nor can the association require an encumbrance on title as a condition for the placement of any solar energy device. This section of the Act also contains provisions pertaining to the rights of the board to install solar energy and wind energy devices at a condominium project, but that topic is outside the scope of this course.

Applicability of fair housing laws and the Americans with Disabilities Act.

These laws, both federal and state, may apply if an addition or modification is requested by someone whom the law recognizes has the right to make reasonable modifications to a unit or the common areas; and should have reasonable exemptions from requirements of the association documents, in order for the person to have full use and enjoyment of the unit/project. Depending on which law applies, will determine whether the owner or the Association will be responsible for the cost and maintenance of the addition or modification.

This is a highly technical area and the penalties for noncompliance can be severe. Therefore, an attorney or other person with special expertise should be consulted when questions come up related to these laws.

Lesson: Insurance

In this lesson, we will look at the types of insurance coverage that an association must obtain, how claims for damage are handled and the benefits to a unit owner to obtaining his/her own insurance along with the circumstances under which the Association can require an owner to obtain his/her own insurance. Section 514B-143 of the Act requires an Association to obtain the following types of insurance:

- (1) Property insurance:
 - (A) On the common elements;
 - (B) Providing coverage for special form causes of loss; and
 - (C) In a total amount of not less than the full insurable replacement cost of the insured property, less deductibles, but including coverage for the increased costs of construction due to building code requirements, at the time the insurance is purchased and at each renewal date;
- (2) Commercial general liability insurance against claims and liabilities arising in connection with the ownership, existence, use, or management of the property in a minimum amount of \$1,000,000, or a greater amount deemed sufficient in the judgment of the board.
- (3) A fidelity bond (if there are more than 5 units at the project), covering persons, including the managing agent and its employees who control or disburse funds of the association. The amount of the bond varies with the number of units and
- (4) Directors' and officers' liability coverage at a level deemed reasonable by the board, if not otherwise limited by the declaration or bylaws.

The declaration, bylaws, or the Board may require the association to carry any other insurance (including workers' compensation, em-

Condominium Basics

Introduction to Condominium Governance (cont. from page 3)

ployment practices, environmental hazards, and equipment breakdown), that the Board considers appropriate to protect the association, the unit owners, or officers, directors, or agents of the association. Flood insurance shall also be maintained if the property is located in a special flood hazard area as delineated on flood maps issued by the Federal Emergency Management Agency.

Attached v. detached units.

If a condominium project contains attached units, the Association's property insurance shall include the units, the limited common elements, except as otherwise determined by the Board, and the common elements. The insurance is not required to cover improvements and betterments to the units installed by unit owners, but if improvements and betterments are covered, any increased cost may be assessed by the association against the units affected. (§514B-143(b)). (**Improvements and betterments** refers to all decorating, fixtures, and furnishings within a unit such as electrical fixtures, air conditioning/heating equipment, and water heaters installed by owners.)

If a project contains detached units, then if the Board determines that it is in the best interest of the association to do so, property insurance may be obtained on an individual basis for each unit by each unit owner and the association shall be named as an additional insured. (§514B-143(c)).

Options available to the board in the event of an insurance claim.

§514B-143 Insurance. (d) The board, in the case of a claim for damage to a unit or the common elements, may:

- (1) Pay the deductible amount as a common expense;
- (2) After notice and an opportunity for a hearing, assess the deductible amount against the owners who caused the damage or from whose units the damage or cause of loss originated; or
- (3) Require the unit owners of the units affected to pay the deductible amount.

This section of the Act is based on the following theories:

- (1) Since all owners pay premiums for the insurance and benefit from the advantages a deductible creates, all owners should pay the cost of the deductible (i.e., the association pays it as a common expense).
- (2) The owner(s) of the unit(s) where the damage originated should be responsible for payment of the deductible
- (3) Those receiving the benefit of the insurance coverage share in the deductible. For example, if the deductible is a \$1,000 and two owners benefit from the insurance coverage, each should pay one-half of the deductible (i.e., \$500).

The board can require unit owners to carry certain types of insurance.

§514B-143 Insurance. (g) The board, with the vote or written consent of a majority of the unit owners, may require unit owners to obtain reasonable types and levels of insurance. The liability of a unit owner shall include but not be limited to the deductible of the owner whose unit was damaged, any damage not covered by insurance required by this subsection, as well as the decorating, painting, wall and floor coverings, trim, appliances, equipment, and other furnishings.

If the unit owner does not purchase or produce evidence of insurance requested by the board, the directors may, in good faith, purchase the insurance coverage and charge the reasonable premium cost back to the unit owner. In no event is the association or board liable to any person either with regard to the failure of a unit owner to purchase insurance or a decision by the board not to purchase the insurance for the owner, or with regard to the timing of its purchase of the insurance or the amounts or types of coverages obtained.

(h) The provisions of this section may be varied or waived in the case of a project in which all units are restricted to nonresidential use.

Requiring owners to obtain their own insurance policy has benefits for both the owners and the Association. By having an owner-held insurance policy, the owner is covered for such things as personal injury claims arising within the owner's unit, as well as upgrades to the unit and damage to the contents of the unit (i.e., the owner's personal property). Moreover, an individual owner can frequently obtain coverage under the owner's policy for any deductible of the Association's policy that is assessed against the owner.

From the association's point of view, owner claims against the Association frequently result from damage to unit upgrades and unit contents. Owners also make claims after they are assessed for the deductible of the association's policy. Therefore, requiring owners to have their own insurance can reduce claims against the association, as well as the significant legal expenses that often result from those claims. In effect, requiring owners to have insurance creates a practical allocation of responsibility for insurance claims between the association and the owner:

- 1 - The Association's insurance pays to restore the unit to its as-built condition; while
- 2 - The individual owner's insurance pays for upgrades and contents, as well as, in some cases, the deductible on the Association's policy.

Source: *Ekimoto & Morris, Director's Guide to Hawaii Community Association Law (2014).*

Ask the Condominium Specialist

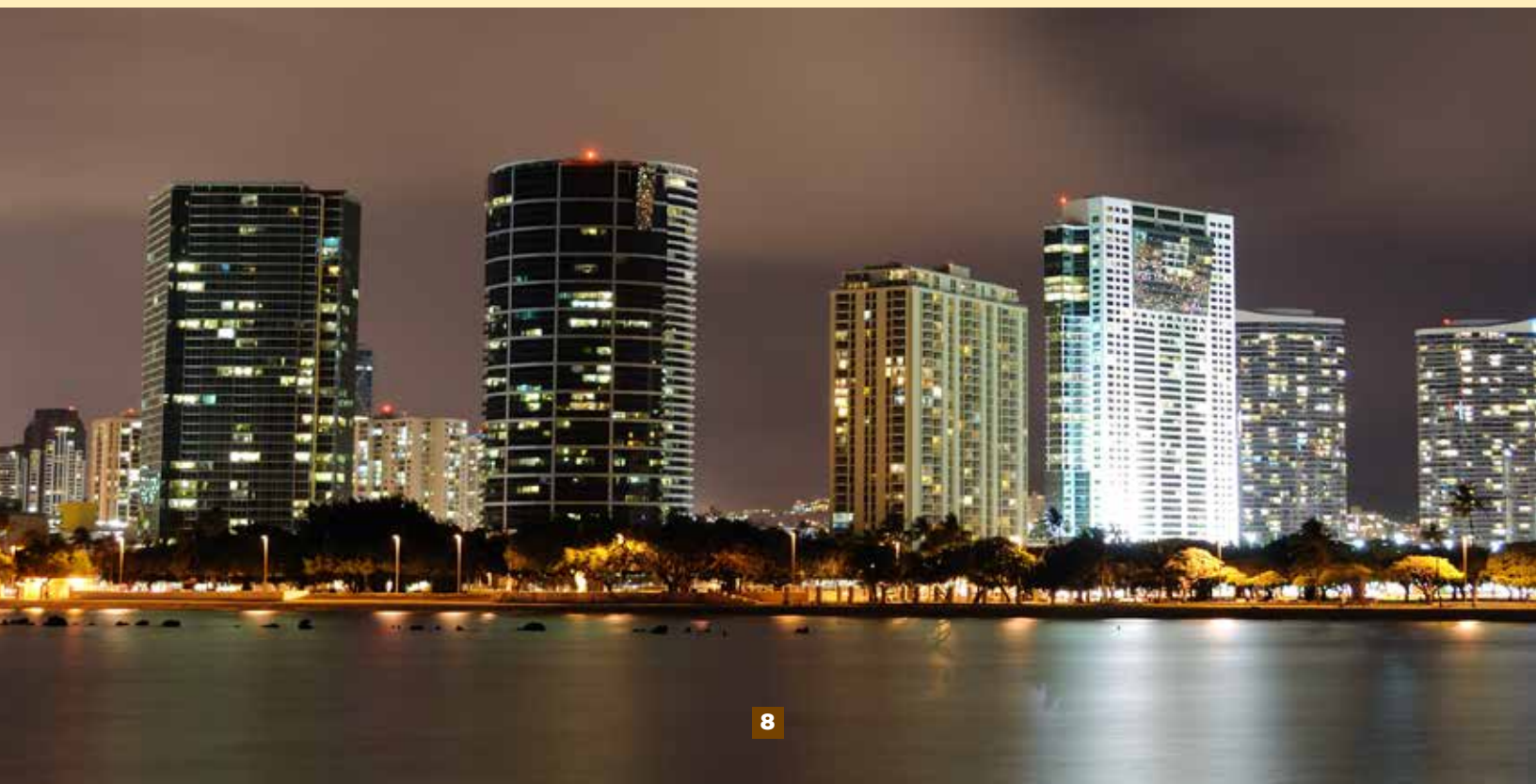
Q: Are there any proposed bills that the Real Estate Branch is following at the legislature this session that might affect my condominium association?

A: Yes. These bills are being followed by the REB. At the time of this writing, these bills are still being considered. SB 3043 (its companion bill in the House is HB 2161) would clarify that all condominium associations may amend their declarations with the common interest vote or written consent of 67% of the owners, unless amended to require a higher percentage; clarifies the definition of “tenant” as it relates to being eligible to serve on the association board; limits defamation actions against an association or association representative; and clarifies provisions concerning the placement of solar devices on common and limited common elements. SB 2421 would repeal the sunset provision of Act 195 (2018) and make amendments to HRS § 514B-146 (relating to association fiscal matters and liens for assessments) permanent. SB 2425 would repeal the sunset provision of Act 196 (2018) and make the amendments affecting mediation and voluntary binding arbitration permanent.

Q: I received a bill from the management company for my condominium association. In addition to my monthly common expense assessments, the bill is for fines for supposedly breaking house rules and for attorney’s fees. May I pay the maintenance fee portion and dispute the fines and attorney’s fees?

A: Yes. As a unit owner, you may contest the amount of any attorneys’ fees, penalties, fines, late fees, or any other charges **except common expense assessments** by making a demand in writing for mediation on the validity of the additional charges. HRS § 514B-146 (g) sets forth the time lines for requesting mediation; if the mediation is requested in a timely manner, the condominium association is prohibited from attempting to collect any of the disputed amounts until the association has participated in the mediation. The mediation must be completed and resolved within 60 days of the request for mediation or the association may proceed with collecting the amounts other than common expenses. You may find a copy of HRS Chapter 514B and HRS § 514B-146 at www.hawaii.gov/hirec.

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 your situation.



Mediation Case Summaries

From December 2019, through February 2020, the following condominium mediations or arbitrations 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	Alleged violation of dec/bylaws regarding care of pets in the unit.	Mediated to agreement.
Owner vs. AOUO	Dispute over reimbursement for repair and subsequent damage of ceiling.	Mediated; no agreement.
Owners vs. AOUO	Owners alleged being over-assessed association maintenance fees.	Mediated to agreement.
Owners vs. AOUO	Dispute over owners and long-term tenants paying for short-term rental desk.	Mediated; no agreement.
AOUO vs. Owner	Alleged violation of parking and noise violations as well as noise and pet rule violations.	Mediated to agreement.
Owner vs. AOUO	Dispute over payment for water and mold damage and repair.	Mediated; no agreement.
Owner vs. AOUO	Dispute over the use of medicinal marijuana and odors disturbing neighbors.	Mediated; no agreement.
Owner vs. AOUO	Owner alleges violation of dec/bylaws in recent association election.	Mediated; no agreement.
AOUO vs. Owner	Dispute involving the enclosure of an owner's lanai and whether enclosure was in compliance with association declaration.	Mediated to agreement.

Mediation Center of the Pacific

Owner vs. AOUO	Dispute regarding alleged violation of house-rules and bylaws terminating in eviction.	Issue resolved after mediation intake.
Owner vs. AOUO	Dispute over late fees and legal fees.	Mediated to agreement.
Owner vs. AOUO	Dispute over alleged violation of bylaws and house rules.	Mediated; no agreement.
Owner vs. AOUO	Dispute regarding alleged violation of house rules and bylaws resulting in property damage.	Mediated; no agreement.

Maui Mediation Services

Owner vs. AOUO	Owner disputes assessed legal fees.	Mediated; no agreement.
Owner vs. AOUO	Owner unhappy with allocation of owners' funds in the association.	Owner decided against mediation.
Owners vs. AOUO	Owners had a set of complaints regarding the board's operation of the association property.	Mediated; no agreement.

2020 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, March 11, 2020
Wednesday, April 8, 2020
Wednesday, May 13, 2020
Wednesday, June 10, 2020
Wednesday, July 8, 2020
Wednesday, August 12, 2020
Wednesday, September 9, 2020
Wednesday, October 7, 2020
Wednesday, November 4, 2020
Wednesday, December 9, 2020

Real Estate Commission – 9:00 a.m.

Friday, March 27, 2020
Friday, April 24, 2020
Friday, May 29, 2020
Friday, June 26, 2020
Friday, July 24, 2020
Friday, August 28, 2020
Friday, September 18, 2020
Friday, October 23, 2020
Friday, November 20, 2020
Friday, December 18, 2020

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 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 586-2643 to submit your request.

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