



Hawaii Condominium Bulletin

contents

Condominium Basics
Introduction to
Condominium Governance
page 1, 3, 4

Message from the Chair
page 2

KEO Offers Mediator Training
page 2

Ask the
Condominium Specialist
page 5

Mediation Case Summaries
page 5

Insurance Corner
page 7

Director Standard of Care:
“Business Judgment Rule”
page 7

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 the last in a series of excerpts from the Real Estate Commission’s Core B 2015-2016 on condominium governance.

Lesson: Parking Stall Changes/Swaps

Transfer of limited common elements.

§514B-40 Transfer of limited common elements. Except as provided in the declaration, any unit owner may transfer or exchange a limited common element that is assigned to the owner’s unit to another unit. Any transfer shall be executed and recorded as an amendment to the declaration. The amendment need only be executed by the owner of the unit whose limited common element is being transferred and the owner of the unit receiving the limited common element; provided that unit mortgages and leases may also require the consent of mortgagees or lessors, respectively, of the units involved. A copy of the amendment shall be promptly delivered to the association.



This section of the statute is applicable to limited common elements such as reserved parking stalls, which are typically assigned to a specific unit at the project.

Lesson: Smoking

Smoking is Prohibited by Law in Elevators, lobbies, hallways and other common areas

{§328J-3} Prohibition in enclosed or partially enclosed places open to the public. Smoking shall be prohibited in all enclosed or partially enclosed areas open to the public, including but not limited to the following places:

- (8) Elevators;
- (13) Lobbies, hallways, and other common areas in apartment buildings, condominiums, retirement facilities, nursing homes, multifamily dwellings, and other multiple-unit residential facilities;



Section 328J-1 states, “Enclosed or partially enclosed” means closed in by a roof or overhang and at least two walls. Enclosed or partially enclosed areas include but are not limited to areas commonly described as

Funded through
the Condominium
Education Trust Fund

This material can be made available for individuals with special needs. Please call the Senior Condominium Specialist at (808) 586-2643 to submit your request.

Message from the Chair

Aloha kakou!

We are completing our 5th month of working remotely from home, currently with abbreviated walk-in public office hours, 7:45-noon, while phone service is 7:45-4:30. It's been an adjustment for everyone. While the educational seminars scheduled for the spring were cancelled, CAI Hawaii has webinars scheduled for September 17 and October 8 of this year. Webinars are a good platform for participants to take advantage of educational offerings while keeping themselves and those around them safe. We can continue our educational efforts with modifications in the delivery style!

The Commission held meetings on July 24 and August 28, its first meetings since the shutdown in March. The meetings are held on the zoom platform and the public is welcome to attend. Agendas for each month's meetings are posted at the Commission website with a link to join. The next Commission meeting is scheduled for September 25. Make a note of the date and please plan to join us to keep up with events and issues affecting condominiums.

I am pleased to announce that our ongoing Condorama educational seminars have been recognized by the Association of Real Estate License Law Officials (ARELLO) with its 2020 Education Award in the Consumer Education Program category. ARELLO is a national organization for real estate regulators with a focus on education. Congratulations to our REB staff!

If you are a Kaua'i resident and interested in the process of mediation, Kaua'i Economic Opportunity is providing mediator training, virtually, in September. Information on this training is included inside this issue of our bulletin.

Also, we've included in this edition of our bulletin information on obtaining financial relief through the COVID-19 Hardship Relief Program, established by the City of Honolulu Administration and the Honolulu City Council. Please review the eligibility and contact information in this bulletin.

As of the time of this writing, the Governor has not indicated his intent to veto any condominium bills that remain. The deadline to veto, sign into law or allow to become law without his signature is September 15. All deadlines have been pushed back this year due to the Legislature's pandemic adjustments to its schedule. To keep up with the latest legislative updates, be sure to subscribe to the Commission's quarterly email subscription service, here, <http://cca.hawaii.gov/reb/subscribe>.

Until next time, keep up with condominium education virtually and stay safe.

Laurie A. Lee
Chair, Condominium Review Committee



KEO Offers Mediator Training

Kauai Economic Opportunity, Inc. (KEO) is offering a training to become a mediator. The training will be held virtually on September 19, 20, 26 and 27, 2020 (from 9:00 am to 3:30 pm).

The KEO Mediation Program has been serving the Kauai community for 38 years providing quality and accessible dispute resolution services and training. Mediation is a confidential process where neutral mediators assist opposing parties to negotiate mutually acceptable solutions to their conflicts often avoiding costly court proceedings. Mediation assists in a variety of disputes such as family, court referrals, business, landlord/tenant, neighbor and other conflicts.

During the training for Mediators, trainees will learn the attitude process and skills to assist people in conflicts to resolve their dispute peacefully to their mutual satisfaction. Trained mediators are community volunteers. After the training, the trainees may continue with the KEO mediation certification process by enrolling in its apprenticeship program which requires the trainees to work with experienced mediators for 10 cases within 12 months to become a KEO certified mediator.

There is a nominal fee charged (\$50.00) for those committed to volunteer as a mediator for KEO. For registration and application, please contact Adriana Turner, KEO Mediation Director at 245-4077, extension 234 or e-mail mediation@keoinc.org.

Condominium Basics

Introduction to Condominium Governance (cont. from page 1)

public lobbies, lanais, interior courtyards, patios, and covered walkways. Under this definition, enclosed or partially enclosed parking areas at a condominium project would likely be subject to the smoking prohibition in addition to the examples given.

On Oahu, **Section 41-21.2(i)** of the Revised Ordinances of Honolulu, prohibits smoking within all enclosed or partially enclosed areas within multifamily dwellings that are open to the common use of all unit owners or residents, including but not limited to lobbies, hallways, corridors, stairways, waiting areas, and recreation areas within multi-family dwellings. This law defines “enclosed or partially enclosed areas” as areas closed in by a roof or overhang and at least one wall. This definition is more restrictive than the State law and is likely to have an even broader application to common areas in condominium projects located on Oahu.

Note: If the condominium project contains commercial units or other spaces that are open to the general public, then it is likely that smoking is prohibited in those areas pursuant to other subsections of section 328J-3.

Note: The prohibition on smoking described above also applies to electronic smoking devices which are defined as any electronic product that can be used to aerosolize and deliver nicotine or other substances to the person inhaling from the device, including but not limited to an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, hookah pipe, or hookah pen, and any cartridge or other component of the device or related product, whether or not sold separately. {HRS §328J-1.}

Associations have the authority to decide whether to prohibit smoking in residential units at a condominium project.

There are no State or county laws that prohibit smoking within individual residential condominium units. Thus, an Association could choose to prohibit smoking in the individual units by amending the project’s Declaration or Bylaws. However, such an amendment could require the approval of at least 67% of the unit owners and possibly more if a higher approval rate is contained in the Declaration for the project.

Lesson: Alternative Dispute Resolution: Mediation & Arbitration

Mediation.

§514B-161 Mediation. (a) If an apartment owner or the board of directors requests mediation of a dispute involving the interpretation or enforcement of the association of apartment owners’ declaration, bylaws, or house rules, the other party in the dispute shall be required to participate in mediation. Each party shall be wholly responsible for its own costs of participating in mediation, unless both parties agree that one party shall pay all or a specified portion of the mediation costs. If a party refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorneys’ fees.

The Act does not require mediation in the following circumstances:

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

Also, if any mediation under this section is not completed within two months from commencement, no further mediation shall be required unless agreed to by the parties.

Mediation is highly valued as a means of resolving disputes involving condominiums in Hawaii. According to the Hawaii Real Estate Commission’s February 2016 Bulletin, the state legislature amended the Act in order to promote the use of mediation to resolve condominium-related disputes and implemented an additional annual condominium education trust fund fee for condominiums registered with the Commission to support mediation efforts utilizing professionally trained mediators.

continued page 4

Condominium Basics

Introduction to Condominium Governance (cont. from page 3)

Arbitration.

§514B-162 Arbitration. (a) At the request of any party, any dispute concerning or involving one or more-unit owners and an association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of this chapter or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration.

Disputes where arbitration may not be required would be those involving:

- 1- The real estate commission
- 2- The mortgagee of a mortgage of record
- 3- The developer, general contractor, subcontractors, or design professionals for the project; provided that when any person exempted by this paragraph is also a unit owner, a director, or managing agent, such person in those capacities, shall be subject to the provisions of subsection (a)
- 4- Actions seeking equitable relief involving threatened property damage or the health or safety of unit owners or any other person
- 5- Actions to collect assessments which are liens or subject to foreclosure; provided that a unit owner who pays the full amount of an assessment and fulfills the requirements of section 514B-146 shall have the right to demand arbitration of the owner's dispute, including a dispute about the amount and validity of the assessment
- 6- Personal injury claims
- 7- Actions for amounts in excess of \$2,500 against an association, a board, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association or its board would be unavailable because action by arbitration was pursued, or
- 8- Any other cases which are determined, as provided in subsection (c), to be unsuitable for disposition by arbitration.

The circuit court can determine if the dispute is suitable for resolving through arbitration.

If an arbitration demand is made, a party can apply to the circuit court for a determination that the subject matter of the dispute is unsuitable for disposition by arbitration. The arbitrator, regardless of what may be stated in the project documents, has sole discretion to determine and award any costs, expenses, and legal fees which would be binding upon all parties. Any party to an arbitration may apply to vacate, modify, or correct the arbitration award, subject to HRS chapter 658A and all reasonable costs, expenses, and attorneys' fees on appeal would be charged to the nonprevailing party.

Request for a trial

The submission of any dispute to an arbitration under the Act does not prohibit the right of any party to a court trial. However, if the party demanding a trial does not prevail, the party demanding the trial is responsible for all reasonable costs, expenses, and attorneys' fees of the trial.



Ask the Condominium Specialist

Q: Although I do not have a real estate broker's license, I operate a condominium hotel operation legally by registering my operation with the Real Estate Branch ("REB"). Is there a similar registration that would allow me to manage condominium associations as a condominium managing agent?

A: The short answer is "no". Condominium hotel operators ("CHO") and condominium managing agents ("CMA") are governed by two different laws with different requirements for operating legally.

CHOs manage the short-term rentals of individual units within a given condominium association for periods of less than 30 days. CMAs are independent contractors who manage the operation of the property of a condominium association, including the physical and fiscal management of the association property.

The requirements for CHOs are provided in Hawai'i Revised Statutes ("HRS") section 467-30 and among other things, allows registration with the REB in place of a broker's license to operate a CHO.

CMA activity is governed by HRS section 514B-132 and as one of the conditions to operating, aside from an exemption for trust companies doing business under article 8 of Chapter 412, a broker's license is required.

Therefore, while you may operate legally as a CHO by registering with the REB, you must obtain a Hawai'i real estate broker's license to operate as a CMA.

Q: Someone in my building has tested positive for the Covid-19 virus. Do other residents have the right to know who the affected resident is and in which unit he or she resides? We are thinking of the safety of all residents, especially those who may live near the infected resident.

A: The conflict in this situation lies in the individual resident's right to privacy of his or her health information against the interests of all residents in staying safe and healthy.

A condominium board may only disclose the name of an infected resident with full written authorization to do so from the resident or resident's attorney. Without written authorization for disclosure from the resident or resident's attorney, a board may still have a duty to notify residents of the association that a resident of their community has tested positive, without specifying the individual. The other residents are then free to take safety precautions for themselves.

We strongly advise a board faced with this scenario to seek advice from its legal counsel and to consult with the Centers for Disease Control and Prevention for the latest Covid-19 guidelines. Board members are volunteers and should seek expert advice from legal and public health experts.

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

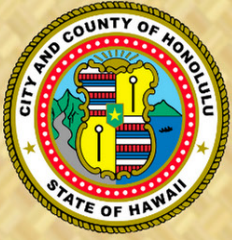
From June 2020, through August 2020, the following condominium mediations or arbitrations were conducted pursuant to Hawai'i Revised Statutes § 514B-161 and subsidized by the Real Estate Commission. The Mediation Center of the Pacific conducted additional condominium mediations in the District Courts and mediation providers conducted community outreach in their respective communities as well.

Dispute Prevention and Resolution, Inc.

Owner vs. AOOU	Owner alleges conflict of interest of board members.	Mediated; no agreement.
AOOU vs. Owner	Issue of responsibility for yard maintenance.	Mediated to partial agreement.
AOOU vs. Owner	Dispute over bylaws provisions related to rentals.	Mediated; no agreement.
Owner vs. AOOU	Dispute surrounding driveway easement.	Mediated; no agreement.

Mediation Center of the Pacific

Owner vs. AOOU	Alleged violation of bylaws and house rules.	Mediated to agreement.
Owner vs. AOOU	Alleged violation of bylaws and subsequent fines.	No mediation conducted after intake.



Need help paying your bills?

Welina mai kākou! The COVID-19 public health emergency has presented many challenges for O'ahu's residents. The City Administration, in cooperation with the Honolulu City Council, established the **COVID-19 Hardship Relief Program** with \$25 Million in CARES Act funds to offer quick financial relief to O'ahu households impacted by the pandemic. The program is now open and all O'ahu residents may apply through either one of our partners:

Aloha United Way:

2-1-1
www.auw.org

Council for Native Hawaiian Advancement:

(808) 596-8155
www.covidkokua.com

Helping Hands Hawai'i:

(808) 536-7234
www.helpinghands hawaii.org

CRITERIA:

Applicants must be able to demonstrate economic hardship due to COVID-19 or business closures related to the pandemic
Applicants should be prepared to provide copies of tax returns, bank statements, pay stubs, and eligible unpaid expenses

MAXIMUM PER HOUSEHOLD:

Up to \$2,000 per month
Up to \$500 additional per month for childcare services
Payments will be made directly to the vendor

ELIGIBLE EXPENSES:

Eligible payments may include rent, mortgage, certain utilities, other emergency expenses, and childcare providers recognized by Department of Human Services

For additional information on the economic support program supported by CARES Act funds visit www.oneoahu.org.



Would Insurance Policies Cover us if we're sued for coronavirus related issues – such as opening amenities too early?

When it comes to insurance policies in general, the stock answer would have to be “it depends.” It depends on what policy you have and what exclusions are noted in the policy and even when the policy was obtained.

As it relates to the coronavirus pandemic – or any other virus – your liability policy may offer defense coverage. However, the allegations and the specific facts of the claim would affect this. Under some Commercial General Liability policies there is no specific exclusion for viruses or for communicable diseases. Most policies will have bacteria, mold, fungi exclusions. A virus doesn't fall under these types of exclusions and will likely not fall under a pollution exclusion. While it could technically be considered a contaminant, it would not seem that exposure to a virus on an Association's property can be characterized as relating to the exposure to a pollutant.

So while it cannot be concluded that there will or will not be coverage for a future claim, ask your insurance agent to review an existing policy's terms and conditions to determine coverage based on the specific loss. When in doubt, submit any claims or potential claims to your Insurance Agent.

Director Standard of Care: “Business Judgment Rule”

Business Judgment Rule: Board members' actions are compared to what an ordinarily prudent and reasonable person would do under similar circumstances.

The question a Director and/or Board must answer in the event a decision is questioned is whether the action (or omission) is consistent with what could reasonably be expected from a Director or Board if faced with similar facts and circumstances.

If a Director's actions are consistent with the business judgment rule, then typically the Board member will be found to have acted with the required degree of care and loyalty. This is true even if the Director ends up making the wrong decision.

On the other hand, if the Director is found to have acted inconsistent with the required degree of care and loyalty using the business judgment rule, the Director may have personal liability.

As a statutory matter, the Hawaii Nonprofit Corporations Act, Hawaii Revised Statutes §414D-149, regarding general standards for Directors provides in pertinent part:

- (a) 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) In a manner consistent with the director's duty of loyalty to the corporation;
 - (3) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
 - (4) In a manner the Director reasonably believes to be in the best interests of the corporation.

Thus, Directors should keep informed about the association's business; make decisions based upon all relevant available information; attend and participate in meetings; make sure absences and objections are recorded in the meeting minutes; act always in the best interest of the owners while avoiding conflicts of interest; not exceed their authority under the law and the project documents; and finally, act in a timely manner.

HAWAII CONDOMINIUM BULLETIN, September 2020 copyright Hawaii Real Estate Commission. All rights reserved. This Bulletin, or any part thereof, may not be reproduced without the written permission of the Hawaii Real Estate Commission, except permission is granted to registered Hawaii condominium associations to reproduce and distribute copies of this entire publication, but not for profit, as an educational service. This publication is intended to provide general information and is not a substitute for obtaining legal advice or other competent professional assistance to address specific circumstances. The information contained in the Bulletin is made pursuant to Hawaii Administrative Rules Section 16-201-92 and is not an official or binding interpretation, opinion or decision of the Hawaii Real Estate Commission or the Department of Commerce and Consumer Affairs. The Hawaii Condominium Bulletin is funded by the Condominium Education Trust Fund, Real Estate Commission, Professional and Vocational Licensing Division, Department of Commerce and Consumer Affairs, State of Hawaii.