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Part II. CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

PART II. CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

§ ___: 2-1. Creation. (a) To create a condominium, all of the owners of the fee simple interest in land must execute and record a declaration submitting the land to the condominium property regime. Upon recordation of the declaration, the condominium shall be deemed created.

(b) The condominium shall be subject to any right, title or interest existing when the declaration is recorded if the person who owns such right, title or interest does not execute or join in the declaration or otherwise subordinate such right, title or interest. A person with any other right, title or interest in the land may subordinate that person's interest to the condominium by executing the declaration or by executing and recording a document joining in or subordinating to the declaration.

Real Estate Commission's Comment

1. HRS §§514A-11 and 514A-20, modified, are the sources of this section.

§ ___: 2-2. Contents of Declaration. (a) A declaration must describe the following:

(1) The land submitted to the condominium;

(2) The number of the condominium map filed concurrently with the declaration;

(3) The number of units in the condominium;

(4) The unit number of each unit and common interest appurtenant to each unit;

(5) The number of buildings in the condominium, and the number of stories and units in each building;

(6) The permitted and prohibited uses of each unit;

(7) To the extent not shown on the condominium map, a description of the location and dimensions of the horizontal and vertical boundaries of any unit. Unit boundaries may be defined by physical structures or, if a unit boundary is not defined by a physical structure, spatial coordinates;

(8) The condominium's common elements;

(9) The condominium's limited common elements, if any, and the unit or units to which each limited common element is appurtenant;

(10) The total percentage of the common interest that is required to approve rebuilding, repairing, or restoring the condominium if it is damaged or destroyed;

(11) The total percentage of the common interest, and any other approvals or consents, that are required to amend the declaration. Except as otherwise specifically provided in this chapter, and except for any amendments made pursuant to reservations set forth in paragraph (12) below, the approval of the owners of at least sixty-seven percent of the common interest shall be required for all amendments to the declaration;

(12) Any rights that the developer or others reserve regarding the condominium, including, without limitation, any development rights, and any reservations to modify the declaration or condominium map. An amendment to the declaration made pursuant to the exercise of those reserved rights shall require only the consent or approval, if any, specified in the reservation; and

(13) A declaration, subject to the penalties set forth in section ___: 3-19(b), that the condominium property regime is in compliance with all zoning and building ordinances and codes, and all other permitting requirements pursuant to section ___: 1-5, and specifying in the case of a property which includes one or more existing structures being converted to condominium status:

(A) Any variances which have been granted to achieve such compliance; and

(B) Whether, as the result of the adoption or amendment of any ordinances or codes, the project presently contains any legal non-conforming conditions, uses, or structures; except that a property that is registered pursuant to section ___: 3-1 shall instead provide this declaration pursuant to section ___: 3-4.

If a developer is converting a structure to condominium status and the structure is not in compliance with all zoning and building ordinances and codes, and all other permitting requirements pursuant to section ___: 1-5, and the developer intends to use purchaser's funds pursuant to the requirements of sections ___: 4-12 or ___: 4-13 to cure the violation or violations, then the declaration required by this paragraph may be qualified to identify with specificity each violation and the requirement to cure such violation.

(b) The declaration may contain any additional provisions that are not inconsistent with this chapter.

Real Estate Commission's Comment

1. HRS §514A-11, modified, is the source of this section.

2. In 1982, the Legislature lowered the approval percentage required to amend condominium bylaws from 75% to 65% and established a 75% approval percentage for amending declarations. FannieMae Section 601.03 requires at least 67% approval to make "amendments of a material nature" to project documents. Among the "material amendments" listed are:

- Voting rights;
- Increases in assessments that raise the previously assessed amount by more than 25%, assessment liens, or the priority of assessment liens;
- Reductions in reserves for maintenance, repair, and replacement of common elements;
- Responsibility for maintenance and repairs;
- Reallocation of interests in the general or limited common elements, or rights to their use;
- Redefinition of any unit boundaries;
- Convertibility of units into common elements or vice versa;
- Expansion or contraction of the project, or the addition, annexation, or withdrawal of property to or from the project;
- Hazard or fidelity insurance requirements;
- Imposition of any restrictions on the leasing of units;
- Imposition of any restrictions on a unit owner's right to sell or transfer his or her unit;
- A decision by the owners' association of a project that consists of 50 or more units to establish self-management if professional management had been required previously by the project documents or by an eligible mortgage holder;
- Restoration or repair of the project (after damage or partial condemnation) in a manner other than that specified in the documents; or
- Any provisions that expressly benefit mortgage holders, insurers, or guarantors.

Therefore, the Commission used 67% as the base percentage for amending condominium governing documents (i.e., declaration, bylaws, and condominium map). (There are some exceptions, of course; e.g., in §___: 2-17, 80% to remove from the provisions of this chapter.)

3. The last paragraph of paragraph (a)(13) is meant to allow a developer of a conversion project to complete a project registration and use project funds to complete repairs necessary to comply with §___: 1-5. This was frequently done (either with the developer doing the work or leaving funds to the AOAO), before the developer's certification requirement was added to HRS §514A-40(b). Now that the developer must certify in the declaration and report that the project is in compliance, it appears that the developer must cure all code violation prior to filing the declaration (which may result in the developer having to go significantly out-of -pocket before having commitments for sales). Paragraph (a)(13) specifically allows developers to use purchasers funds to cure violations in the same manner that they can use purchasers funds to complete new construction pursuant to §§___: 4-11 and ___: 4-12. This gives the developer a practical means to get the work done with committed funds, and provides purchasers with the protections of §§___4-11, and ____4-12. The Commission hopes this will encourage the preservation and use of buildings requiring significant rehabilitation. Conforming revisions have been made to §§___: 3-4(8), ___: 4-3(2) and (7), ___: 4-4(2), ___:

4-9, ___: 4-12(a), and ___: 4-13(a).

§ ___: 2-3. Condominium Map. (a) A condominium map shall be recorded with the declaration. The condominium map must contain the following:

(1) A site plan for the condominium, depicting the location and layout and access to a public road of all buildings included in the condominium, and depicting access for the units to a public road or to a common element leading to a public road;

(2) Elevations and floor plans of all buildings in the condominium;

(3) The layout, location, boundaries, unit numbers, and dimensions of the units;

(4) To the extent that there is parking in the condominium, a parking plan for the condominium, showing the location, layout and stall numbers of all parking stalls included in the condominium;

(5) Unless specifically described in the declaration, the layout, location, and numbers or other identifying information of the limited common elements, if any; and

(6) A description in sufficient detail, as may be determined by the commission, to identify any land area that constitutes a limited common element.

(b) The condominium map may contain any additional information that is not inconsistent with this chapter.

Real Estate Commission's Comment

1. Part of HRS §514A-12, modified, is the source of this section.

2. Paragraph (a)(6) gives needed flexibility to developers and the Commission regarding the description of limited common element land areas. Pursuant to a November 30, 2000 "Non-binding informal Real Estate Commission decision affecting the registration of condominium projects," developers were required to provide metes and bounds descriptions of "land areas of the project which are designated as limited common element areas." This requirement proved to be onerous and perhaps redundant for some developers.[1] On August 30, 2002, in response to concerns raised by the Hawaii Association of Land Surveyors,[2] the Commission adopted an informal non-binding opinion that metes and bounds descriptions are not required "to define limited common element areas where there are 'visible demarcations,' 'physical boundaries,' or 'structural monuments,' including, without limitation, roads, walls, fences and parking stall striping." Metes and bounds descriptions are still required "to define limited common element areas where there are no 'visible demarcations,' 'physical boundaries,' 'permanent' or 'structural' monuments to aide in the description of limited common element areas." Paragraph (a)(6), incorporating a concept from California Civil Code §1351(e), simply allows developers to select the most appropriate means to describe limited common element land areas.[3]

§ ___: 2-4. Condominium Map; Certification of Architect, Engineer, or Surveyor. The condominium map must bear the statement of a licensed architect, engineer, or surveyor certifying that the condominium map is consistent with the plans of the condominium's building or buildings filed or to be filed with the government official having jurisdiction over the issuance of permits for the construction of buildings in the county in which the condominium is located. If the building or buildings have been built at the time the condominium map is recorded, the certification must state that, to the best of the architect's, engineer's, or surveyor's knowledge, the condominium map depicts the layout, location, dimensions and numbers of the units substantially as built. If the building or buildings, or portions thereof, have not been built at the time the condominium map is recorded, within thirty days from the completion of construction, the

[1] *See, e.g.,* July 3, 2001 e-mail from Nelson Lee of Haseko to Gordon M. Arakaki, in which Mr. Lee states: "I understand the need in most condo projects to identify by survey or other means elements that most people understand to be an important appurtenance to their units. This was a concern with the City in our Cluster and Condo processing since we pioneered with them a condo within a cluster to implement the unique site planning that distinguishes Ocean Pointe. To address the City's concern of identifying common elements, we now file with the City at the time of permitting, drawings that are dimensionally very specific to common and limited common elements. These drawings are not part of the State and/or Real Estate Commission processing and, therefore, they may not be aware of these consumer protection controls already deliberated and implemented with the City during our land use and building permit processing with the City. My point being that, in our case, to survey these common elements in the condo filing process may be redundant."

[2] *See,* August 5, 2002 letter from the Hawaii Association of Land Surveyors to the Hawaii Real Estate Commission.

[3] *See also,* comments (9) and (10) to UCIOA (1994) §2-109 (Plats and Plans). The comments note: "The 1994 amendments … seek to balance the need for disclosure and certainty in understanding what a unit owner 'owns,' with the practical limitations of the surveying profession. The balance struck in the 1994 amendments to this section requires that the plat or survey – as a minimum – actually show only the kinds of limited common elements that most people would understand to be an important appurtenance to their units. All other kinds of limited common elements – parking spaces, window boxes, etc., – may be either shown on the survey or simply described in words. … New subsection (h) eliminates the need for any unit boundary survey so long as the building location is shown on the project survey and a practical means exists by which the potential purchaser can understand the unit layout and its assigned common elements. This is a common practice in the sale of cooperative units."

developer shall execute and record an amendment to the declaration accompanied by a certification of a licensed architect, engineer, or surveyor certifying that the condominium map previously recorded, as amended by the revised pages filed with such amendment, if any, fully and accurately depicts the layout, location, boundaries, dimensions, and numbers of the units substantially as built. If the condominium is a conversion and the government official having jurisdiction over the issuance of permits for the construction of buildings in the county in which the condominium is located is unable to locate the original permitted construction plans, the certification need only state that the condominium map depicts the layout, location, boundaries, dimensions, and numbers of the units substantially as built. If there are no buildings, no certification shall be required.

Real Estate Commission's Comment

1. A part of HRS §514A-12, modified, is the source of this section.

2. Certifications by licensed surveyors have been added consistent with the Commission's informal non-binding decision on this issue.

3. Although UCA, UCIOA, and even HRS Chapter 514A (in some places) use the term "registered" or "professional" engineer, surveyor, or architect, the proper term for Hawaii's level of regulation is "licensed." *See*, HRS Chapter 464.

§ ___: 2-5. Unit Boundaries. Except as provided by the declaration:

(1) If walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings, are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element appurtenant solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

(3) Subject to paragraph (2), all spaces, interior non-loadbearing partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, lanais, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but which are located outside the unit's boundaries, are limited common elements appurtenant exclusively to that unit.

Real Estate Commission's Comment

1. UCA/UCIOA §2-102, modified slightly, is the source of this section.

2. As noted in the official comments to UCIOA: "It is important for title purposes, for purposes of defining maintenance responsibilities, and other reasons to have a clear guide as to precisely which parts of a condominium constitute the units and which parts constitute the common elements. This section fills the gap left when the declaration merely defines unit boundaries in terms of floor, ceilings, and perimetric walls."

§ ___: 2-6. Leasehold Units. An undivided interest in the land that is subject to a condominium equal to a unit's common interest may be leased to the unit owner, and the unit and its common interest in the common elements exclusive of the land may be conveyed to the unit owner. The conveyance of the unit with an accompanying lease of an interest in the land shall not constitute a division or partition of the common elements, or a separation of the common interest from its unit. Where a deed of a unit is accompanied by a lease of an interest in the land, the deed shall not be construed as conveying title to the land included in the common elements.

Real Estate Commission's Comment

1. HRS §514A-13(g), clarified, is the source of this section.

§ ___: 2-7. Common Interest. Each unit shall have the common interest it is assigned in the declaration. Except as provided in sections ___: 2-2(12) and ___: 2-16, and except as provided in the declaration, a unit's common interest shall be permanent and remain undivided, and may not be altered or partitioned without the consent of the owner of the unit and the owner's mortgagee, expressed in a duly executed and recorded declaration amendment. The common interest shall not be separated from the unit to which it appertains, and shall be deemed to be conveyed or encumbered with the unit even if the common interest is not expressly mentioned or described in the conveyance or other instrument.

Part II. Creation, Alteration, and Termination of Condominiums

Real Estate Commission's Comment

1. HRS §514A-13(a), (b), and (c), modified, are the sources of this section.

§ ___: 2-8. Common Elements. Each unit owner may use the common elements in accordance with the purposes permitted under the declaration, subject to:

(1) The rights of other unit owners to use the common elements;

(2) Any owner's exclusive right to use of the limited common elements as provided in the declaration;

(3) The right of the owners to amend the declaration to change the permitted uses of the common elements or to designate any portion of the common elements as a limited common element;

(4) Any rights reserved in the declaration to amend the declaration to change the permitted uses of the common elements;

(5) The right of the board, on behalf of the association, to lease or otherwise use for the benefit of the association those common elements that the board determines are not actually used by any of the unit owners for a purpose permitted in the declaration. Unless the lease is approved by the owners of at least sixty-seven percent of the common interest, any such lease shall have a term of no more than five years and may be terminated by the board or the lessee on no more than sixty days prior written notice; and

(6) The right of the board, on behalf of the association, to lease or otherwise use for the benefit of the association those common elements that the board determines are actually used by one or more unit owners for a purpose permitted in the declaration. Any such lease or use must be approved by the owners of at least sixty-seven percent of the common interest, including all directly affected unit owners that the board reasonably determines actually use the common elements, and such owners' mortgagees.

Real Estate Commission's Comment

1. HRS §514A-13(d), modified, is the source of this section.

2. §§___: 2-7 together with ___: 2-8(3) negate Penney v. AOAO of Hale Kaanapali.[4] Penney involved Hale Kaanapali Hotel Associates' attempted conversion of a clubhouse (including restrooms) from a common element to a limited common element. Hale Kaanapali Hotel Associates owned 72.3% of the common interest and controlled another 4.53% interest by proxies, so they were able to get an amendment to the declaration allowing them to do so (i.e., claim exclusive use of the formerly common element clubhouse and restrooms). In overruling a circuit court decision upholding the amendment, the Hawaii Supreme Court correctly recognized that the conversion in Penney involved a situation where the benefit to all unit owners was significantly diminished by the restricted exclusive use of the clubhouse and restrooms. The Supreme Court's ruling, however, that 100% of the unit owners' approval is required any time a common element is converted into a limited common element, is too broad. For example, under Penney, the piping from a split system air conditioner passing through a common element area in the ceiling would require approval of 100% of the unit owners. Therefore, the Commission chose to negate Penney's overbroad rule of law.

§ ___: 2-9. Limited Common Elements. If the declaration designates any portion of the common elements as limited common elements, those limited common elements shall be subject to the exclusive use of the owner or owners of the unit or units to which they are appurtenant, subject to the provisions of the declaration and bylaws. No amendment of the declaration affecting any of the limited common elements shall be effective without the consent of the owner or owners of the unit or units to which such limited common elements are appurtenant.

Real Estate Commission's Comment

1. HRS §514A-3, modified, is the source of this section.

2. A member of the Commission's advisory committee recommended using the term "private elements" rather than "limited common elements". (California uses the term "exclusive use common elements".) The Commission chose to keep the term "limited common elements" since it is essentially a term of art already defined by Hawaii courts.

§ ___: 2-10. 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. Such a transfer may be made by execution and recordation of an amendment to the declaration. Such an 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 any such amendment shall be promptly delivered

[4] 70 Haw. 469, 776 P.2d 393 (1989).

to the association.

Real Estate Commission's Comment

1. HRS §514A-14, modified, is the source of this section. The section now applies to all limited common elements, not just parking stalls.

§ ___: 2-11. Common Profits and Expenses. (a) The common profits of the property shall be distributed among, and the common expenses shall be charged to, the unit owners, including the developer, in proportion to the common interest appurtenant to their respective units, except as otherwise provided in the declaration or bylaws. In a mixed-use project containing units for both residential and non-residential use, such charges and distributions may be apportioned in a fair and equitable manner as set forth in the declaration. Except as otherwise provided in subsection (c) or the declaration or bylaws, all limited common element costs and expenses, including but not limited to, maintenance, repair, replacement, additions and improvements, shall be charged to the owner or owners of the unit or units to which the limited common element is appurtenant in an equitable manner as set forth in the declaration.

(b) A unit owner, including the developer, shall become obligated for the payment of the share of the common expenses allocated to the owner's unit at the time the certificate of occupancy relating to the owner's unit is issued by the appropriate county agency; provided that a developer may assume all the actual common expenses in a project, by stating in the public report required by section ___: 3-4 that the unit owner shall not be obligated for the payment of the owner's share of the common expenses until such time as the developer sends the owners written notice that, after a specified date, the unit owners shall be obligated to pay for the portion of common expenses that is allocated to their respective units. The developer shall mail such written notice to the owners, the association, and the managing agent, if any, at least thirty days before the specified date.

(c) Unless otherwise provided in the declaration or bylaws, if the board reasonably determines that the extra cost incurred to separately account for and charge for the costs of maintenance, repair, or replacement of limited common elements is not justified, the board may adopt a resolution determining that certain limited common element expenses will be assessed in accordance with the undivided common interest appurtenant to each unit. In reaching its determination, the board shall consider:

(1) The amount at issue;

(2) The difficulty of segregating such costs;

(3) The number of units to which similar limited common elements are appurtenant;

(4) The apparent difference between separate assessment and assessment based on the undivided common interest; and

(5) Any other relevant factors, as determined by the board.

The resolution shall be final and binding in the absence of a determination that the board abused its discretion.

(d) Unless made pursuant to rights reserved in the declaration and disclosed in the public report, if an association amends its declaration or bylaws to change the use of the condominium from residential to non-residential, all direct and indirect costs attributable to the newly permitted non-residential use shall be charged only to the unit owners using or directly benefiting from the new non-residential use, in a fair and equitable manner as set forth in the amendment to the declaration or bylaws.

Real Estate Commission's Comment

1. HRS §514A-15, modified, is the source of this section. Subsection (b) has been amended to allow a developer to assume all of the actual common expenses for any project, not just 100% residential projects. Subsections (c) and (d) have been added.

2. Subsection (d) recognizes that the use of a condominium may be changed from residential to non-residential (e.g., from residential to condominium hotel or assisted living facility) by less than 100% of the unit owners. The subsection is intended to protect unit owners in the minority of such a vote by ensuring that the costs attributable to the new non-residential use are allocated to those unit owners who choose to use or are directly benefitted by the new use. Such fair and equitable cost allocation is already common practice for condominium hotels.

§ ___: 2-12. Metering of Utilities. (a) Units in a project that includes units designated for both residential and non-residential use shall have separate meters, or calculations shall be made, or both, as may be practicable, to determine the use by the non-residential units of utilities, including electricity, water, gas, fuel, oil, sewerage, air conditioning, chiller water, and drainage, and the cost of such utilities shall be paid by the owners of such non-residential units;

provided that the apportionment of such charges among owners of non-residential units shall be done in a fair and equitable manner as set forth in the declaration or bylaws. The requirements of this paragraph shall not apply to projects for which construction commenced before January 1, 1978.

(b) Subject to any approval requirements and spending limits contained in a project's declaration or bylaws, an association's board may authorize the installation of meters to determine the use by the individual units of utilities, including electricity, water, gas, fuel, oil, sewerage, air conditioning, chiller water and drainage. The cost of metered utilities shall be paid by the owners of such units based on actual consumption and, to the extent not billed directly to the unit owner by the utility provider, may be collected in the same manner as common expense assessments. Owners' maintenance fees shall be adjusted as necessary to avoid any duplication of charges to owners for the cost of metered utilities.

Real Estate Commission's Comment

1. HRS §514A-15.5, clarified, is the source of this section.

§ ___: 2-13. Liens Against Units. (a) For purposes of this section, "visible commencement of operations" shall have the meaning it has under chapter 507, part II, and a "lien" as used herein means a lien created pursuant to chapter 507, part II.

(b) If visible commencement of operations occurs prior to the creation of the condominium, then, upon creation of the condominium, liens arising from such work shall attach to all units in the condominium described in the declaration and their respective undivided interests in the common elements, but not to the common elements as a whole. If visible commencement of operations occurs after creation of the condominium, then liens arising from such work shall attach only to the unit or units described in the declaration on which the work was performed in the same manner as other real property, and shall not attach to the common elements.

(c) If the developer contracts for work on the common elements, either on its behalf or on behalf of the association prior to the first meeting of the association, then liens arising from such work may attach to all units owned by the developer described in the declaration at the time of visible commencement of operations.

(d) If the association contracts for work on the common elements after the first meeting of the association, there shall be no lien on the common elements, but the persons contracting with the association to perform the work or supply the materials incorporated in the work shall have a contractual right to payment by the association.

Real Estate Commission's Comment

1. HRS §514A-16, clarified, is the source of this section.

§ ___: 2-14. Contents of Deeds or Leases of Units. Deeds or leases of units adequately describe the property conveyed or leased if they contain the following information:

(1) The title and date of the declaration and the declaration's bureau of conveyances or land court document number or liber and page numbers;

(2) The unit number of the unit conveyed or leased;

(3) The common interest appurtenant to the unit conveyed or leased; provided that the common interest shall be deemed to be conveyed or encumbered with the unit even if the common interest is not expressly mentioned in the conveyance or other instrument, as provided in section ___: 2-7.

(4) For a unit, title to which is registered in the land court, the land court certificate of title number for the unit, if available; and

(5) For a unit, title to which is not registered in the land court, the bureau of conveyances document number or liber and page numbers for the instrument by which the grantor acquired title.

Deeds or leases of units may contain such additional information and details deemed desirable and consistent with the declaration and this chapter, including, without limitation, a statement of any encumbrances on title to the unit which are not listed in the declaration. The failure of a deed or lease to include all of the information specified above does not render it invalid.

Real Estate Commission's Comment

1. HRS §514A-17, clarified, is the source of this section.

§ ___: 2-15. Blanket Mortgages and Other Blanket Liens Affecting a Unit at Time of First Conveyance or Lease. At the time of the first conveyance or lease of each unit, every mortgage and other lien, except any improvement

district or utility assessment, affecting both the unit and any other unit shall be paid and satisfied of record, or the unit being conveyed or leased and its common interest shall be released therefrom by partial release duly recorded.

Real Estate Commission's Comment

1. This section is identical to HRS §514A-18.

§ ___: 2-16. Merger of Projects or Increments. (a) Two or more projects, or increments of a project, whether or not adjacent to one another, but which are part of the same incremental plan of development and in the same vicinity, may be merged together so as to permit the joint use of the common elements of the projects by all the owners of the units in the merged projects. A merger may be implemented with the vote or consent that the declaration requires for a merger, pursuant to any reserved rights set forth in the declaration, or upon vote of sixty-seven percent of the common interest.

(b) A merger becomes effective at the earlier of:

(1) A date certain set forth in the certificate of merger; or

(2) The date that the certificate of merger is recorded.

The certificate of merger may provide for a single association and board for the merged projects and for a sharing of the common expenses of the projects among all the owners of the units in the merged projects. The certificate of merger may also provide for a merger of the common elements of the projects so that each unit owner in the merged projects has an undivided ownership interest in the common elements of the merged projects. In the event of such a merger of common elements, the common interests of each unit in the merged projects shall be adjusted in accordance with the merger provisions in the projects' declarations so that the total common interests of all units in the resulting merged project totals one hundred percent. If the certificate of merger does not provide for a merger of the common elements, the common elements and common interests of the merged projects shall remain separate, but they shall be subject to the provisions set forth in the respective declarations with respect to merger.

(c) Upon the recording of a certificate of merger that indicates that the fee simple title to the lands of the merged projects are merged, the registrar shall cancel all existing certificates of title for the units in the projects being merged and shall issue new certificates of title for the units in the merged project, covering all of the land of the merged projects. The new certificates of title for the units in the merged project shall describe, among other things, each unit's new common interest. The certificate of merger shall at least set forth all of the units of the merged projects, their new common interests, and to the extent practicable, their current certificate of title numbers in the common elements of the merged projects.

(d) In the event of a conflict between declarations and bylaws upon the merger of projects or increments, unless otherwise provided in the certificate of merger, the provisions of the first declaration and bylaws recorded shall control.

Real Estate Commission's Comment

1. HRS §514A-19, modified, is the source of this section.

2. Subsection (b) is intended to address the so-called "administrative merger" (i.e., a merger for administrative purposes but where title does not merge).

§ ___: 2-17. Removal from Provisions of This Chapter. (a) If:

(1) Unit owners owning units to which are appurtenant at least eighty percent of the common interests execute and record an instrument to the effect that they desire to remove the property from this chapter, and the holders of all liens affecting any of the units of the unit owners executing such instrument consent thereto by instruments duly recorded; or

(2) The common elements suffer substantial damage or destruction and such damage or destruction has not been rebuilt, repaired, or restored within a reasonable time after the occurrence thereof, or the unit owners have earlier determined as provided in the declaration that such damage or destruction shall not be rebuilt, repaired, or restored;

then, and in either event, the property shall be subject to an action for partition by any unit owner or lienor as if owned in common, in which event the sale of the property shall be ordered by the court and the net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and, except as otherwise provided in the declaration, shall be divided among all the unit owners in proportion to their respective common interests, provided that no payment shall be made to a unit owner until there has first been paid off out of the owner's share of such net proceeds all liens on the owner's unit. Upon such sale, the property ceases to be a condominium or subject to this chapter.

(b) All of the unit owners may remove a property, or a part of a property, from this chapter by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the units consent thereto, by instruments duly recorded. Upon such removal from this chapter, the property, or the part of the property designated in the instrument, ceases to be the subject of a condominium or subject to this chapter, and is deemed to be owned in common by the unit owners in proportion to their respective common interests.

(c) Notwithstanding subsections (a) and (b), if the unit leases for a leasehold project (including condominium conveyance documents, ground leases, or similar instruments creating a leasehold interest in the land) provide that:

(1) The estate and interest of the unit owner shall cease and determine upon the acquisition, by an authority with power of eminent domain of title and right to possession of any part of the project;

(2) The unit owner shall not by reason of the acquisition or right to possession be entitled to any claim against the lessor or others for compensation or indemnity for the unit owner's leasehold interest;

(3) All compensation and damages for or on account of any land shall be payable to and become the sole property of the lessor;

(4) All compensation and damages for or on account of any buildings or improvements on the demised land shall be payable to and become the sole property of the unit owners of the buildings and improvements in accordance with their interests; and

(5) The unit lease rents are reduced in proportion to the land so acquired or possessed;

then, the lessor and the developer shall file an amendment to the declaration to reflect any acquisition or right to possession. The consent or joinder of the unit owners or their respective mortgagees shall not be required, if the land so acquired or possessed constitutes no more than five per cent of the total land of the project. Upon the filing of the amendment, the land acquired or possessed shall cease to be the subject of a condominium or this chapter. The lessor shall notify each unit owner in writing of the filing of the amendment and the rent abatement, if any, to which the unit owner is entitled. The lessor shall provide the association, through its board, with a copy of the amendment.

For purposes of this subsection, the acquisition or right to possession may be effected:

(1) By a taking or condemnation of property by the State or a county pursuant to chapter 101;

(2) By the conveyance of property to the State or county under threat of condemnation; or

(3) By the dedication of property to the State or county if the dedication is required by state law or county ordinance.

(d) The removal provided for in this section shall in no way bar the subsequent resubmission of the property to this chapter.

Real Estate Commission's Comment

1. HRS §§514A-21 and 514A-22 are the sources of, and essentially identical to, this section.

Real Estate Commission's Comment

1. HRS §514A-13.5 (Renumeration to allow ingress and egress prohibited) has not been included in the recodification.

2. HRS §514A-13.5 (Mailboxes for each dwelling required) has not been included in the recodification. If separate mailboxes are not to be provided, that fact should simply be disclosed to prospective purchasers in the public offering statement.

3. HRS §514A-14.5 (Ownership of parking stalls) has not been included in the recodification. Parking requirements should be governed by state and county land use laws.

4. HRS §514A-15.1 (Common expenses; prior late charges) has been incorporated in Part V – Management of Condominium, §___: 5-5(c).