

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>[This prefatory comment should also be incorporated as a “purpose” subsection in draft legislation that will eventually be part of the session laws text (but not part of HRS).]</p> <p style="text-align: center;">BRRAC’s [Real Estate Commission’s] Prefatory Comment to Part V</p> <p style="text-align: center;">“Every [unit owners’ association] has three functions – to serve as a business, a governance structure, and a community.”</p> <p style="text-align: center;">~ <i>Community Associations Factbook (1999)</i></p> <p>As explained in the <i>Community Associations Factbook (1999)</i>, the business, governance, and community functions of community associations (including condominium unit owners’ associations) have evolved over time. Early in the history of community associations, “business” meant “austerity”, “governance” meant “compliance”, and “community” meant “conformity”. As the movement matured, “business” has come to mean “prudence”, “governance” has come to mean “justice”, and “community” has come to mean “harmony”.</p> <p>“Community/harmony” is obviously not something we can mandate by State law. Just as obviously, State law can help (or hinder) associations in their “business” and “governance” functions. The Commission has kept these functions and principles in mind as it has crafted the provisions for management of condominiums.</p> <p>To paraphrase the <i>Restatement of the Law, Third, Property (Servitudes)</i> introductory note to Chapter 6:</p> <p>The law of residential condominium communities reflects tensions between protecting freedom of contract, protecting private and public interests in the home both as a personal base and as a financial asset, and protecting the public interest in the ongoing financial stability of condominium communities. It also reflects the tensions between protecting the democratic process at work in condominium communities and protecting the interests of individual community members from imposition by those who control the association. This Chapter should balance such concerns with the overall purpose of enabling condominium communities to carry out their potential for creating enduring and desirable communities.</p> <p>Determining the law that applies to unit owners’ associations has proven to be challenging at times because the associations share some characteristics of business corporations, nonprofit organizations, local governments, and private trusts, but differ significantly from all of them. Often incorporated under nonprofit corporation statutes (HRS Chapter 414D in Hawaii), most associations are managed by a board of directors (usually unpaid volunteers) elected by the members. Like business corporations, votes are allocated on the basis of the number of units owned. The votes assigned to condominium units may be equal or weighted in accord with an initial allocation or specified formula. The developer may hold special voting rights. Unlike most corporations, but like municipal governments, associations have the power to raise funds by levying assessments on individually owned properties and charging fees. Like a private trust, the purpose of an association is to manage property for the benefit of its members, but unlike trustees, the directors are elected by popular vote and answer to political considerations. Like business organizations and municipalities, associations often manage substantial property and handle significant cash flows, but unlike businesses, their purpose is not to make money by taking entrepreneurial risks. Unlike the boards of either business or nonprofit charitable corporations, association board members have strong personal as well as financial stakes in the success of the association, because it is usually their home as well as a significant investment.</p> <p>Like local governments, unit owners’ associations have the power to make rules governing some behavior within the community, and the power to enforce the servitudes through judicial action. Like local governments, associations often administer land use regulations and provide utility services to their members. Unlike local governments, however, association charters are created by private contract and, absent other circumstances, the associations’ actions are not state action sufficient to subject them to challenge under the U.S. Constitution or §1983 liability.</p> <p>Ultimately, this Chapter should facilitate the operation of condominium communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their members.</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>Guiding Principles:</p> <p>1. The philosophy guiding Part V (Management of Condominium) continues to be minimal government involvement and self-governance by the condominium community.</p> <p>Essentially, this means that we must ensure that the condominium community (both owners and management) has the tools with which to govern itself. We should enhance self- governance (e.g., conduct of meetings, financial decisions). This does <u>not</u> mean that every problem and contingency should be addressed in State law (as happened too often in the past, resulting in our current need to recodify our condominium law). Addressing problems in State law is appropriate in some areas. Other problems may more appropriately be handled in condominium governing documents or through other private mechanisms. And some matters simply must be resolved in court.</p> <p>2. The recodified condominium law should recognize the difficulty of a “one size fits all” approach to management provisions.</p> <p>3. The recodified condominium law should enhance clarity of Condominium Property Act.</p> <p>We should consolidate or group together provisions on a single issue (e.g., proxies, assessments). We should eliminate the artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b). And we should minimize the statutory requirements for condominium governing documents while incorporating certain provisions currently in HRS §514A-82(a) and (b) in more appropriate statutory sections.</p> <p>4. The recodified condominium law should not result in an increase in the cost of government.</p>	
	<p style="text-align: center;">TABLE OF CONTENTS</p> <p style="text-align: center;">Part V. MANAGEMENT OF CONDOMINIUM</p> <p style="text-align: center;">Subpart 1. POWERS, DUTIES, AND OTHER GENERAL PROVISIONS</p> <p>§ ____: 5-1. Applicability; Exceptions</p> <p>§ ____: 5-2. Unit Owners’ Association; Organization and Membership</p> <p>§ ____: 5-3. Same; Registration</p> <p>§ ____: 5-4. Same; Powers</p> <p>§ ____: 5-5. Same; Limitations on Powers</p> <p>§ ____: 5-6. Board of Directors; Powers and Duties</p> <p>§ ____: 5-7. Same; Limitations</p> <p>§ ____: 5-8. Same; Conflicts of Interest (Moved into § ____: 5-20)</p> <p>§ ____: 5-9. Bylaws</p> <p>§ ____: 5-10. Restatement of Declaration and Bylaws</p> <p>§ ____: 5-11. Bylaws Amendment Permitted; Mixed Use Property; Proportionate Representation on Board of Directors</p> <p>§ ____: 5-12. Judicial Power to Excuse Compliance with Requirements of Declaration or Bylaws</p> <p>§ ____: 5-13. Condominium Community Mutual Obligations</p> <p style="text-align: center;">Subpart 2. GOVERNANCE – ELECTIONS AND MEETINGS</p> <p>§ ____: 5-14. Unit Owners’ Association Meetings</p> <p>§ ____: 5-15. Same; Quorums</p> <p>§ ____: 5-16. Same; Meeting Minutes</p> <p>§ ____: 5-17. Same; Voting; Proxies</p> <p>§ ____: 5-18. Same; Good Faith Unintentional Failure to Comply</p> <p>§ ____: 5-19. Same; Purchaser’s Right to Vote</p> <p>§ ____: 5-20. Board of Directors Meetings</p> <p>§ ____: 5-21. Same; Meeting Minutes</p> <p style="text-align: center;">Subpart 3. OPERATIONS</p> <p>§ ____: 5-22. Managing Agents</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p> § ____: 5-23. Association Employees; Background Check; Prohibition § ____: 5-24. Management and Contracts; Developer, Managing Agent, and Unit Owners' Association § ____: 5-25. Termination of Contracts and Leases of Developer § ____: 5-25.1 Transfer of Special Developer Rights § ____: 5-26. Upkeep of Condominium § ____: 5-27. Same; Disposition of Unclaimed Possessions § ____: 5-28. Modifications and Additions to Condominium § ____: 5-29. Tort and Contract Liability; Tolling of Limitation Period § ____: 5-30. Conveyance or Encumbrance of Common Elements] § ____: 5-31. Insurance § ____: 5-32. Association Fiscal Matters; Assessments for Common Expenses § ____: 5-33. Same; Collection of Unpaid Assessments from Tenants § ____: 5-34. Same; Lien for Assessments § ____: 5-35. Same; Other Liens Affecting the Condominium § ____: 5-36. Same; Budgets and Reserves § ____: 5-37. Same; Handling and Disbursement of Funds § ____: 5-38. Same; Audits, Audited Financial Statement, Transmittal § ____: 5-39. Same; Lease Rent Renegotiation § ____: 5-40. Association Records; Generally § ____: 5-41. Same; Records to be Maintained § ____: 5-42. Same; Availability; Disposal; Prohibitions § ____: 5-43. Association as Trustee § ____: 5-44. Pets § ____: 5-45. Attorneys' Fees, Delinquent Assessments, and Expenses of Enforcement </p> <p style="text-align: center;">Subpart 4. ALTERNATIVE DISPUTE RESOLUTION</p> <p> § ____: 5-46. Mediation § ____: 5-47. Arbitration </p> <p>[The table of contents will be appropriately renumbered when we finish reorganizing, tearing apart, and tinkering with the draft. Internal references will also be renumbered accordingly.]</p>	
	PART V. MANAGEMENT OF CONDOMINIUM	
	Subpart 1. POWERS, DUTIES, AND OTHER GENERAL PROVISIONS	
	<p> § ____: 5-1 [5-0]. Applicability; Exceptions. [Source: New.] (a) This part applies to all condominiums subject to this chapter, except as provided in subsection (b). (b) Unless otherwise provided in the declaration or bylaws, this part does not apply to: (1) condominiums in which all units are restricted to non-residential purposes; or (2) condominiums, not subject to any development rights, containing no more than five units. </p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <p>1. Rather than exempting 100% non-residential condominiums from the entire Chapter (as provided in §____: 1-18 of Recodification preliminary draft #2), the BRRAC [Real Estate Commission] has exempted such condominiums from this Part only. 100% non-residential condominiums may still "opt-in" to the provisions of this Part if their declarations or bylaws so provide.</p>	
	<p> § ____: 5-2 [5-4]. Unit Owners' Association; Organization and Membership [Source: HRS §514A-82(a)(11); UCA/UCIOA §3-101.] (a) The first meeting of the unit owners' association shall be held not later </p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>than one hundred eighty days after recordation of the first unit conveyance, provided that forty percent or more of the project has been sold and recorded. If forty percent of the project is not sold and recorded at the end of one year after recordation of the first unit conveyance, an annual meeting shall be called if ten percent of the unit owners so request.</p> <p>(b) The membership of the association shall consist exclusively of all the unit owners. Following termination of the condominium, the membership of the association shall consist of all former unit owners entitled to distributions of proceeds under section ____: 2-17, or their heirs, successors, or assigns.</p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <p>1. From a legal standpoint, a condominium association (and its powers and duties) exists at recordation of the legal documents creating the condominium. While the developer inevitably acts as the association for some period of time, nevertheless, the association exists as an entity independent of the developer and the developer has a fiduciary obligation to act on behalf of the association from the time the declaration is recorded. <i>See, State Savings & Loan Association v. Kauaian Development Company, Inc., et al.</i>, 50 Haw. 540, 445 P.2d 109 (1968); <u>Hawaii Real Estate Law Manual</u>, "Community Associations," by J. Neeley, ____, (year?).</p> <p>2. As noted in the official commentary to UCA/UCIOA §3-101: "The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium even during a period of declarant control ..."</p> <p>3. HRS §514A-82(a)(11) is the source of §__: §5-1(a). [For background regarding the use of first recordation of a unit conveyance versus certificate of occupancy, <i>see, A Study of Problems in the Condominium Owner-Developer Relationship</i>, by Office of Consumer Protection, Office of the Legislative Reference Bureau, and Real Estate Commission, State of Hawaii (December 1976) at page 16.] UCA/UCIOA §3-101 is the source of §__: 5-1(b).</p> <p>3. HRS Chapter 514A has used the term "Association of Apartment Owners" (AOAO) to describe "all of the apartment owners acting as a group in accordance with the bylaws and declaration." <i>See</i>, HRS §514A-3. However, Hawaii's recodified condominium law uses the term "unit" instead of "apartment" since, as understood by the general public, "unit" more accurately reflects the fact the ownership interests in condominiums can consist of commercial spaces, parking spaces, boat slips, and other non-residential spaces.</p>	
	<p>§ __: 5-3 [5-2]. Same; Registration. [Source: HRS §514A-95.1; <i>modified slightly</i>.] (a) Each project or unit owners' association having more than five units shall:</p> <p>(1) Register with the commission through approval of a completed registration application, payment of fees, and submission of any other additional information set forth by the commission. The registration shall be for a biennial period with termination on June 30 of each odd-numbered year. The commission shall prescribe a deadline date prior to the termination date for the submission of a completed reregistration application, payment of fees, and any other additional information set forth by the commission. Any project or unit owners' association that has not met the submission requirements by the deadline date shall be considered a new applicant for registration and subject to initial registration requirements. Any new project or unit owners' association shall register within thirty days of the unit owners' association's first meeting. If the unit owners' association has not held its first meeting and it is at least one year after the recordation of the purchase of the first unit in the project, the developer or developer's affiliate or the managing agent shall register on behalf of the unit owners' association and shall comply with this section, except the fidelity bond requirement for unit owners' associations required by section __: 5-31(a)(3). The public information required to be submitted on any completed application form shall include but not be limited to evidence of and information on fidelity bond coverage, names and positions of the officers of the association, the name of unit owners' association's managing agent, if any, the street and the postal address of the condominium, and the name and current mailing address of a designated officer of the unit owners' association where the officer can be contacted directly;</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>(2) Pay a nonrefundable application fee and, upon approval, an initial registration fee and subsequently pay a reregistration fee, and the condominium education <u>trust</u> fund fee, as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91;</p> <p>(3) Register or reregister and pay the required fees by the due date. Failure to register or reregister or pay the required fees by the due date shall result in the assessment of a penalty equal to the amount of the registration or reregistration fee; and</p> <p>(4) Report <u>immediately</u> promptly in writing to the commission any changes to the information contained on the registration or reregistration application, <u>the evidence of the fidelity bond,</u> or any other documents <u>set forth</u> required by the commission. Failure to do so may result in termination of registration and subject the project or the unit owners' association to initial registration requirements.</p> <p>(b) The commission may reject or terminate any registration submitted by a project or a unit owners' association that fails to comply with this section. Any unit owners' association that fails to register as required by this section or whose registration is rejected or terminated shall not have standing to maintain any action or proceeding in the courts of this State until it registers. The failure of a unit owners' association to register, or rejection or termination of its registration, shall not impair the validity of any contract or act of the unit owners' association nor prevent the unit owners' association from defending any action or proceeding in any court in this State.</p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-95.1 is the source of this section. In pertinent part, it has been modified slightly. HRS §514A-95.1 contains both registration requirements and fidelity bond requirements for unit owners' associations. We have incorporated the fidelity bond provisions of HRS §514A-95.1(1) in a separate insurance section. <i>See</i>, §___: <u>5-31</u>.</p> <p>2. Keeping the unit owners' association registration requirement is important to continued support of alternative dispute resolution and condominium education efforts.</p> <p>3. Requiring unit owners' associations to register with the Commission is not meant to imply that the Commission has jurisdiction over condominium governance matters. (The Commission's powers and duties are described in Part III, §___: <u>3-9</u>.) As provided in subsection (b) above, failure of a unit owners' association to register results in a self-enforcing sanction – the association's lack of standing to maintain actions in State court until properly registered with the Commission.</p> <p>4. Note: The following terms are used in the recodification: "Unit" (in place of "apartment"); "Unit owners' association" (in place of "association of apartment owners"); "Project" (in place of "condominium project" since "project" is defined in §___: 1-3 (HRS §514A-3); "Condominium education trust fund" (in place of "condominium management education fund" to more accurately reflect its funding sources and permissible uses).</p>	
	<p>§ ___: 5-4 [5-3]. Same; Powers. [Source: UCA/UCIOA §3-102.] (a) Except as provided in section ___: <u>5-5</u>, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may:</p> <p>(1) adopt and amend bylaws and rules and regulations;</p> <p>(2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners, subject to section ___: <u>5-36</u>;</p> <p>(3) hire and discharge managing agents and other independent contractors, agents, and employees;</p> <p>(4) institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium; <u>for the purposes of actions under chapter 480, associations shall be deemed to be "consumers";</u></p> <p>(5) make contracts and incur liabilities;</p> <p>(6) regulate the use, maintenance, repair, replacement, and modification of common elements;</p> <p>(7) cause additional improvements to be made as a part of the common elements;</p>	<p>[Compare subsection (4) with: HRS §514A-93 Actions. Without limiting the rights of any apartment owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors on behalf of two or more of the apartment owners, as their respective interests may appear, with respect to any cause of action relating to the common</p>

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>(8) acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to section 5-30; [The following language is from §514A-92.1 (Designation of additional areas).] <u>provided that designation of additional areas to be common elements or subject to common expenses after the initial filing of the bylaws or declaration shall require the approval of ninety sixty-seven percent of the unit owners; provided further that if the developer discloses to the initial buyer in writing that additional areas will be designated as common elements whether pursuant to an incremental or phased project or otherwise, this requirement shall not apply as to those additional areas; and provided further that this subsection shall not apply to the purchase of a unit for a resident manager;</u></p> <p>(9) grant easements, leases, licenses, and concessions through or over the common elements <u>and permit encroachments on the common elements</u>;</p> <p>(10) impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in section <u>2-5(2) and (4)</u>, and for services provided to unit owners;</p> <p>(11) impose charges <u>and penalties, including late fees and interest</u>, for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules, and regulations of the association, <u>either in accordance with the bylaws or, if the bylaws are silent, pursuant to a resolution adopted by the board</u>;</p> <p>(12) impose reasonable charges for the preparation and recordation of amendments to the declaration, <u>documents requested for resale of units</u>, or statements of unpaid assessments;</p> <p>(13) provide for the indemnification of its officers, board of directors, <u>and committee members</u> and maintain directors' and officers' liability insurance;</p> <p>(14) assign its right to future income, including the right to receive common expense assessments, but only to the extent <u>[the declaration] section 5-7(i)</u> expressly so provides;</p> <p>(15) exercise any other powers conferred by the declaration or bylaws;</p> <p>(16) exercise all other powers that may be exercised in this State by legal entities of the same type as the association;</p> <p>(17) exercise any other powers necessary and proper for the governance and operation of the association; and</p> <p>(18) by regulation, <u>subject to sections 5-46, 5-47, and 5-34</u>, require that disputes between the board of directors and unit owners or between two or more unit owners regarding the condominium must be submitted to nonbinding alternative dispute resolution in the manner described in the regulation as a prerequisite to commencement of a judicial proceeding.</p> <p>(b) If a tenant of a unit owner violates the declaration, bylaws, or rules and <u>regulations</u> of the association, in addition to exercising any of its powers against the unit owner, the association may:</p> <p>(1) exercise directly against the tenant the powers described in subsection (a)(11);</p> <p>(2) after giving notice to the tenant and the unit owner and an opportunity to be heard, levy reasonable fines against the tenant for the violation, <u>provided that a unit owner shall be responsible for the conduct of his tenant and for any fines levied against the tenant or any legal fees incurred in enforcing the declaration, bylaws, or rules and regulations of the association against the tenant</u>; and</p> <p>(3) enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease, <u>including eviction</u>, or which the association could lawfully have exercised directly against the unit owner, or both.</p> <p>(c) The rights granted under subsection (b)(3) may only be exercised if the tenant or unit owner fails to cure</p>	<p>elements or more than one apartment. Service of process on two or more apartment owners in any action relating to the common elements or more than one apartment may be made on the person designated in the declaration to receive service of process.]</p> <p>[See also, HRS §514A-94 "Attorneys' fees, delinquent assessments, and expenses of enforcement."]</p> <p>[Compare subsection (13) with, HRS §514A-86(b), which reads: "The association of apartment owners may purchase and maintain directors' and officers' liability insurance with minimum coverage in such amount as shall be determined by the board of directors. Premiums shall be common expenses."]</p> <p>...</p>

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>the violation within ten days after the association notifies the tenant and unit owner of that violation.</p> <p>(d) Unless a lease otherwise provides, this section does not:</p> <p>(1) affect rights that the unit owner has to enforce the lease or that the association has under other law; or</p> <p>(2) permit the association to enforce a lease to which it is not a party in the absence of a violation of the declaration, bylaws, or rules and regulations.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-102 is the source of this section. Some provisions have been modified using language of similar provisions in HRS Chapter 514A. Others have been modified to address problems that have arisen over time. [For example, subsection (9) helps correct problems created by encroachments on common elements.] UCA/UCIOA §3-102 (b) and (c) have been moved to §___: 5-5 (Limitations on Powers).</p> <p>2. The official comments to §3-102 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section.</p> <p>3. Under subsection (a)(4), unit owners' associations are deemed to be "consumers" for the purposes of HRS Chapter 480 (Unfair and Deceptive Practices) actions. Although unit owners' associations are collections of "consumers," they have sometimes been denied rights to pursue claims under HRS Chapter 480 (a powerful consumer protection statute) that are enjoyed by owners of single family houses.</p> <p>4. "Notice and hearing" requirements such as those in subsection (b)(2) are not meant to prohibit the association from taking immediate corrective action in appropriate situations. Just as traffic citations are given at the time of the infraction and may be contested at a later date, so may fines pursuant to subsection (b)(2) be assessed at the time of infraction, with the opportunity to contest the fine at a later date. [A stakeholder expressed concern that subsection (b)(2) might be read to prohibit associations from exercising "immediate fine" systems for unit owner/tenant actions that are hazardous and not immediately stopped, e.g., throwing items off balconies.]</p> <p>5. [Note: HRS Chapter 521 probably needs to be amended to make subsection (b)(3), regarding eviction of tenants, work. Also need to make sure that subsection (c) is consistent with HRS Chapter 521.]</p>	
	<p>§ ___: 5-5 [5-4]. Same; Limitations on Powers. (a) <i>Association dealing with developer.</i> [Source: UCA/UCIOA §3-102(b).] The declaration <u>and bylaws</u> may not impose limitations on the power of the association to deal with the developer which are more restrictive than the limitations imposed on the power of the association to deal with other persons.</p> <p>(b) <i>Behavior in units.</i> [Source: UCIOA §3-102(c).] Unless otherwise permitted by the declaration, <u>bylaws</u>, or this chapter, an association may adopt rules and regulations that affect the use of or behavior in units that may be used for residential purposes only to:</p> <p>(1) prevent any use of a unit which violates the declaration <u>or bylaws</u>;</p> <p>(2) regulate any behavior in or occupancy of a unit which violates the declaration or <u>bylaws or unreasonably interferes with</u> the use and enjoyment of other units or the common elements by other unit owners; or</p> <p>(3) restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders who regularly lend money secured by first mortgages on units in condominium communities or regularly purchase those mortgages.</p> <p>Otherwise, the association may not regulate any use of or behavior in units <u>by means of the rules and regulations</u>.</p> <p>(c) <i>Prior written notice of assessment of late charges, legal fees, fines, and interest.</i> [Source: HRS §514A-15.1.] No unit owners' association shall deduct and apply portions of common expense payments received from a unit owner to unpaid late fees, <u>legal fees, fines, and interest</u> (other than amounts remitted by a unit in payment of late fees, <u>legal fees, fines, and interest</u>) unless it delivers or mails a written notice to such unit</p>	<p>[Compare (b)(2) with: HRS §514A-82(a)(10), which reads: (The bylaws shall provide for at least the following) "The restrictions on and requirements respecting the use and maintenance of the apartments and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective apartments and of the common elements by the several apartment owners."]</p> <p>[See <i>also</i>, HRS §514A-88, which reads: "Each apartment owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time,</p>

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>owner, at least seven days prior to the first such deduction, which states that:</p> <p>(1) Failure to pay late fees, <u>legal fees, fines, and interest</u> will <u>may</u> result in the deduction of <u>such</u> late fees, <u>legal fees, fines, and interest</u> from future common expense payments, so long as a delinquency continues to exist.</p> <p>(2) Late fees shall <u>may</u> be imposed against any future common expense payment which <u>that</u> is less than the full amount owed due to the deduction of unpaid late fees, <u>legal fees, fines, and interest</u> from such payment.</p> <p>(d) <i>Prior written notice of assessment of the cost of providing information.</i> [Source: Act 140 (SLH, 2002).] No unit owner who requests legal or other information from the unit owners' association, the board of directors, the managing agent, or their employees or agents, shall be charged for the cost of providing the information unless the association notifies the unit owner that it intends to charge the unit owner for the cost. The association shall notify the unit owner in writing at least ten days prior to incurring the cost of providing the information, except that no prior notice shall be required to assess the cost of providing information on delinquent assessments or in connection with proceedings to enforce the law or the association's governing documents.</p> <p>After being notified of the cost of providing the information, the unit owner may withdraw the request, in writing. A unit owner who withdraws a request for information shall not be charged for the cost of providing the information.</p>	<p>and with the covenants, conditions, and restrictions set forth in the declaration. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or, in a proper case, by an aggrieved apartment owner.”]</p> <p>...</p>
	<p>BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-102(b) is the source of §___: 5-5(a). UCIOA §3-102(c) is the source of §___: 5-5(b). Act 140 (SLH, 2002) is the source of §___: 5-5(d).</p> <p>2. In §___: 5-5(b), the term “adversely affects” (from UCIOA §3-102(c)) was changed to “unreasonably interferes with” (from HRS §514A-82(10)).</p> <p>3. Subsection (c) is intended to require prior written notice of assessment of all costs of collection.</p> <p>4. Professor Susan F. French, Reporter for the <i>Restatement, Third, of Property (Servitudes)</i>, has proposed that common interest community developers include a “Homeowner’s Bill of Rights” in the governing documents for their projects. (See, “The Constitution of a Private Residential Government Should Include a Bill of Rights,” 27 <i>Wake Forest L. Rev.</i> 331 (1992).) As a starting point for discussion, we should consider Professor French’s Proposed Provisions for a Homeowner’s Bill of Rights. (We should also keep in mind that there are practical problems inherent in some of Professor French’s provisions depending on circumstances.) More broadly, we need to consider what limitations are appropriate for general application in State law, and what limitations are more appropriately addressed in individual condominium governing documents.</p>	
	<p>§ ___: 5-6 [5-7]. Board of Directors; Powers and Duties. [Source: UCA/UCIOA § 3-103.] (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board of directors may act in all instances on behalf of the association. In the performance of their duties, officers and members of the board of directors appointed by the developer shall exercise the degree of care and loyalty required of a trustee. Officers and members of the board of directors not appointed by the developer shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D.</p> <p>(b) The board of directors may not act on behalf of the association to amend the declaration <u>or bylaws</u> (sections ___: <u>2-2(11)</u> and ___: <u>5-9(a)(6)</u>), to remove the condominium from the provisions of this chapter (section ___: <u>2-17</u>), or to elect members of the board of directors or determine the qualifications, powers and duties, or terms of office of board of directors members (section ___: <u>5-6(f)</u>); provided that <u>nothing in this paragraph shall be construed to prohibit board members from voting proxies</u> (section ___: <u>5-17</u>) to elect members of the board; provided further <u>that the board of directors may fill vacancies in its membership</u> for the</p>	

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>unexpired portion of any term].</p> <p>(c) Within thirty days after adoption of any proposed budget for the condominium, the board of directors shall provide make available a summary of the budget to all the unit owners.</p> <p>(d) Subject to subsection (e), the declaration may provide for a period of developer control of the association, during which a developer, or persons designated by him, may appoint and remove the officers and members of the board of directors. Regardless of the period provided in the declaration, a period of developer control terminates no later than the earlier of:</p> <ol style="list-style-type: none"> (1) Sixty days after conveyance of seventy-five percent of the <u>common interest appurtenant to</u> units that may be created to unit owners other than a developer <u>or affiliate of the developer</u>; (2) Two years after all developers have ceased to offer units for sale in the ordinary course of business; (3) Two years after any right to add new units was last exercised; or (4) The day the developer, after giving written notice to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association. <p>A developer may voluntarily surrender the right to appoint and remove officers and members of the board of directors before termination of that period, but in that event the developer may require, for the duration of the period of developer control, that specified actions of the association or board of directors, as described in a recorded instrument executed by the developer, be approved by the developer before they become effective.</p> <p>(e) Not later than sixty days after conveyance of twenty-five percent of the units that may be created to unit owners other than a developer, at least one member and not less than twenty-five percent of the members of the board of directors must be elected by unit owners other than the developer. Not later than sixty days after conveyance of fifty percent of the units that may be created to unit owners other than a developer, not less than thirty-three and one-third percent of the members of the board of directors must be elected by unit owners other than the developer.</p> <p>(f) Not later than the termination of any period of developer control, the unit owners shall elect a board of directors of at least three members, at least a majority of whom must be unit owners. The board of directors shall elect the officers. The board of directors members and officers shall take office upon election.</p> <p>(g) Notwithstanding any provision of Unless otherwise provided by the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of all persons <u>sixty-seven percent of unit owners</u> present by person or proxy and entitled to vote voting at any meeting of the unit owners at which a quorum is present, may remove any member of the board of directors with or without cause, other than a member appointed by the developer. <u>The following language is from HRS §514A-82(b)(1) The removal and replacement shall be in accordance with all applicable requirements and procedures in the bylaws for the removal and replacement of directors, including any provision relating to cumulative voting. If removal and replacement is to occur at a special association meeting, the call for the meeting shall be by the president or by a petition to the secretary or managing agent signed by not less than twenty-five percent of the unit owners as shown in the association's record of ownership; provided that if the secretary or managing agent fails to send out the notices for the special meeting within fourteen days of receipt of the petition, the petitioners shall have the authority to set the time, date, and place for the special meeting and to send out the notices for the special meeting in accordance with the requirements of the bylaws. Except as otherwise provided in this section, the meeting for the removal and replacement from office of directors shall be scheduled, noticed, and conducted in accordance with the bylaws of the association.</u></p>	
<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §3-103 is the source of this section. Subsection §3-103(g) was amended by adding language from HRS §514A-82(b)(1) (Bylaws). 2. The official comments to §3-103 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting 	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>this section.</p> <p>3. Currently, HRS §514A-82.4 (Duty of directors) states that “[e]ach director shall owe the association of apartment owners a fiduciary duty in the performance of the director’s responsibilities.” §___: 5-6(a) reflects our decision to adopt the language of UCIOA (1994) §3-103(a). The official comment to UCIOA (1994) §3-103 explains the duty owed by directors as follows:</p> <p>The 1994 amendment to subsection (a) is intended to conform the Act to expectations of owners, members of executive boards, and courts. The duty owed by an elected member of an executive board ought to parallel the standard imposed on directors of non-profit corporations. The original text set out a lesser standard. By making reference to the non-profit corporate model, members will also obtain the benefits of the business judgment rule, now commonly applied by courts in the non-profit context; see, for example, <i>Levandusky v. One Fifth Avenue Apartment Corp.</i>, 75 N.Y.2d 530 (1990).</p> <p>The change from “fiduciary” to “trustee” as the standard of care for declarant-appointed directors makes the standard of care more precise. The law contemplates many forms of fiduciary relationships; among them, the trustee’s duty is the highest.</p> <p>4. The official comments to UCIOA (1994) §3-103 explain subsections (d) and (e), regarding transition of developer control to unit owner control of the association, as follows:</p> <p>Subsections (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity. ...</p> <p>Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant’s rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.</p> <p>Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters. ...</p> <p>Subsection (d) has been amended in the 1994 amendment to add a new fourth category regarding voluntary relinquishment of retained rights to control any aspect of the affairs of the association. This category frequently has been written into declarations under the Act. The amendment incorporates this practice and is important in order to track the time when statutes of limitation involving the declarant begin to run.</p>	
	<p>§ ___: 5-7 [5-8]. Same; Limitations. (a) Staggered terms for directors. [Source: HRS §414-196. The bylaws shall provide for staggering of directors terms by dividing the total number of directors into two or three groups, with each group containing one-half or one-third of the total, as near as may be. In that event, the terms of directors in the first group expire at the first annual meeting after their election, the terms of the second group expire at the second annual meeting after their election, and the terms of the third group, if any, expire at the third annual meeting after their election. At each annual meeting held thereafter, directors shall be chosen for a term of two years or three years, as the case may be, to succeed those whose terms expire.</p> <p>(b) [Source: HRS §514A-82(a)(1)(E).] The compensation, if any, of the directors, <u>shall be specified in the bylaws</u>.</p> <p>(c) [Source: HRS §514A-82(a)(12); <i>substantially modified</i>.] <u>Members</u> of the board of directors shall be <u>unit owners or co-owners, vendees under an agreement of sale, the trustee or beneficiary of a trust which owns a</u></p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>unit, an officer of any corporate owner – including a limited liability corporation – of a unit, or a representative of any other legal entity which owns a unit; provided that the declaration or bylaws may allow any other individual to serve as a director, whether such individual owns a unit or not. The partners in a general partnership and the general partners of a limited partnership or limited liability partnership shall be deemed to be the owners of a unit for the purpose of serving on the board. There shall not be more than one representative on the board from any one unit.</p> <p>(d) [Source: HRS §514A-82(a)(14). No <u>managing agent</u>, resident manager, <u>rental agent</u>, or <u>employee</u> of a condominium <u>or their spouses</u>, shall serve on its board of directors.</p> <p>(e) [Source: HRS §514A-82(b)(7).] An owner shall not act as <u>[an officer]</u> a director of an association and an employee of the managing agent employed by the association.</p> <p>(f) [Source: HRS §514A-82(b)(10).] Directors shall not expend association funds for their travel, directors' fees, and per diem, unless owners are informed and a majority approve of these expenses; <u>provided that, with the approval of the board, directors may be reimbursed for actual expenditures on behalf of the association.</u></p> <p>(g) [Source: HRS §514A-82(b)(11).] Associations at their own expense shall provide all board members with a current copy of the association's declaration, bylaws, house rules, and, annually, a copy of this chapter with amendments.</p> <p>(h) [Source: HRS §514A-82(b)(12).] The directors may expend association funds, which shall not be deemed to be compensation to the directors, to educate and train themselves in subject areas directly related to their duties and responsibilities as directors; provided that the approved annual operating budget shall include these expenses as separate line items. These expenses may include registration fees, books, videos, tapes, other educational materials, and economy travel expenses. Except for economy travel expenses within the State, all other travel expenses incurred under this subsection shall be subject to the requirements of subsection (f).</p> <p>(i) Borrowing of money. [Source: §514A-82.3. Subject to any approval requirements and spending limits contained in the declaration or bylaws of the unit owners' association, the board of directors may authorize the borrowing of money to be used by the association for the repair, replacement, maintenance, operation, or administration of the common elements <u>and personal property</u> of the project, or the making of any additions, alterations, and improvements thereto. <u>In connection with such borrowing, the board may assign and pledge reserve accounts of the association, and may grant to the lender the right to assess and collect monthly or special assessments from the unit owners and to enforce the payment of such assessments or other sums by statutory lien and foreclosure proceedings.</u> The cost of such borrowing, including, without limitation, all principal, interest, commitment fees, and other expenses payable with respect to such borrowing <u>or the enforcement of the obligations under the borrowing</u>, shall be a common expense of the project; provided that owners representing fifty percent of the common interest <u>[and apartments]</u> <u>vote or</u> give written consent to such borrowing, having been first notified of the purpose and use of the funds. <u>For purposes of this section, no lease shall be deemed a loan if it provides that at the end of the lease the association may purchase the leased equipment for its fair market value.</u></p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. Consistent with our goal of eliminating the artificial approach regarding bylaws in HRS §514A-82(a) and (b), and to help reduce the statutory requirements for condominium governing documents, we have consolidated appropriate provisions under separate sections (i.e., separate from the bylaws section). The following provisions from HRS Chapter 514A have been consolidated in this section: HRS §§514A-82(a)(1)(E), -82(a)(12), -82(a)(14), -82(b)(7), -82(b)(10), -82(b)(11), -82(b)(12), and -82.3. In addition, HRS §414-196 has been incorporated in subsection (a).</p> <p>2. The BRRAC [Commission] has deleted the requirement in HRS §514A-82(a)(1)(B) that: "condominiums with more than one hundred individual apartment units shall have an elected board of not less than nine members unless not less than sixty-five per cent of all apartment owners vote by mail ballot, or at a special or annual meeting, to reduce the</p>	

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>minimum number of directors.” The minimum nine-member board requirement has been problematic for resort projects and projects with a substantial number of off-island owners.</p> <p>3. Stakeholders have suggested that, in addition to resident managers, we also prohibit managing agents, rental agents, any employees of associations, and their spouses from serving on the boards of those associations. Except for prohibiting spouses of managing agents, et al., from serving on boards (because of Fair Housing Act and other concerns), the BRRAC [Commission] has incorporated these suggestions in this section.</p> <p>4. Although some stakeholders object to the broadening of the authority of associations to borrow money under subsection (i), others note that borrowing money is a very consumer/association friendly way of getting funds (as opposed to raising annual fees or special assessments).</p>	
<p>§ ____: 5-8 [5-9]. Same; Conflicts of Interest. [Moved into § ____: 5-20.]</p>	
<p>§ ____: 5-9 [5-10]. Bylaws. (a) [Source: UCA/UCIOA §3-106; HRS §514A-81.] <u>The operation of the property shall be governed by bylaws, a true copy of which shall be recorded in the same manner as the declaration. No amendment to the bylaws is valid unless the amendment is duly recorded.</u> The bylaws of the association must provide:</p> <p>(1) the number of members of the board of directors and the titles of the officers of the association;</p> <p>(2) election by the board of directors of a president, treasurer, secretary, and any other officers of the association the bylaws specify;</p> <p>(3) the qualifications, powers and duties, terms of office, and manner of electing and removing board of directors members and offices and filling vacancies;</p> <p>(4) which, if any, of its powers the board of directors or officers may delegate to other persons or to a managing agent;</p> <p>(5) which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association;</p> <p>(6) <u>subject to subsection (c), a method for amending the bylaws; and</u></p> <p>(7) [Source: HRS §514A-82(a)(2); partial.] the percentage, consistent with this chapter, that is necessary to adopt decisions binding on all unit owners; provided that votes allocated to <u>lobby areas, swimming pools, recreation areas, saunas, storage areas, hallways, trash chutes, laundry chutes, and other similar common areas not located inside units</u> shall not be cast at any association meeting, regardless of <u>whether it is so designated</u> their designation in the declaration.</p> <p>(b) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.</p> <p>(c) [Source: HRS §514A-82(b)(2) as amended by Act 141 (SLH, 2002).] The bylaws may be amended at any time by the vote or written consent of <u>sixty-five, sixty-seven</u> percent of all unit owners; provided that <u>each: Approval percentage raised to 67% to match FannieMae requirement.</u></p> <p>(1) <u>Each</u> one of the particulars set forth in this subsection shall be embodied in the bylaws always; and <u>provided further that any</u></p> <p>(2) <u>Any</u> proposed bylaws with the rationale for the proposal may be submitted by the board of directors or by a volunteer unit owners' committee. If submitted by that committee, the proposal shall be accompanied by a petition signed by not less than twenty-five percent of the unit owners as shown in the association's record of ownership. The proposed bylaws, rationale, and ballots for voting on any proposed bylaw shall be mailed by the board of directors to the owners at the expense of the association for vote or written consent without change within thirty days of the receipt of the petition by the board of directors. The vote or written consent required to adopt the proposed bylaw shall <u>not be less than be at least sixty-five, sixty-seven</u> percent of all unit owners; provided that the vote or written consent must be obtained within three hundred sixty-five days</p>	<p>[Compare: HRS §514A-82(a) ...</p> <p>(2) Method of calling meetings of the apartment owners...; (covered by § ____: 5-23)</p> <p>(6) Operation of the property, payment of the common expenses, and determination and collection of the common charges; (covered by § ____: 5-4(a)(2))</p> <p>(7) Manner of collecting common expenses, expenses, costs, and fees recoverable by the association under section 514A-94, and any penalties and late charges; (covered by §§ ____: 5-32, 5-4(a)(11), 5-5(c))</p> <p>(8) Designation and removal of personnel necessary for the maintenance, repair, and replacement of the common elements; (covered by § ____: 5-4(a)(3))</p> <p>(9) Method of adopting and amending administrative rules governing the details of the operation and use of the common elements; (covered by § ____: 5-4(a)(1))</p> <p>(10) The restrictions on and requirements respecting the use and maintenance of the apartments and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective apartments and of the common elements by the several apartment owners; (covered by §§ ____: 5-4(a)(6), 5-5(b))</p> <p>(18) Penalties chargeable against persons for violation of the covenants, conditions, or restrictions set forth in the declaration, or of the bylaws and administrative rules adopted pursuant thereto, method of determination of violations, and manner of enforcing penalties, if any. (Covered by §§ ____: 5-4(a)(11), 5-5(c))</p> <p>(b) In addition to the requirements of subsection (a), the bylaws shall be consistent with the following provisions:</p> <p>(13) A lien created pursuant to section 514A-90</p>

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>after mailing for a proposed bylaw submitted by either the board of directors or a volunteer unit owners' committee. If the bylaw is duly adopted, then the board shall cause the bylaw amendment to be recorded in the bureau of conveyances or filed in the land court, as the case may be. The volunteer unit owners' committee shall be precluded from submitting a petition for a proposed bylaw that is substantially similar to that which has been previously mailed to the owners within one year after the original petition was submitted to the board.</p> <p>This subsection shall not preclude any unit owner or voluntary unit owners' committee from proposing any bylaw amendment at any annual association meeting.</p>	<p>may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale foreclosure procedures authorized by chapter 667 ... (covered by §___: 5-34)</p> <p>The provisions of this subsection shall be deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date. (<i>Transition covered by Part I, Subpart 2</i>)</p>
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-106 and HRS §§514A-81, 514A-82(a)(2), and 514A-82(b)(2) are the sources of this section. Consistent with our goals to eliminate the artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b) and to minimize the statutory requirements for condominium governing documents, certain provisions currently in HRS §514A-82(a) and (b) have been incorporated in more appropriate statutory sections.</p> <p>2. The official comments to §3-106 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. [Note: In contrast to UCA/UCIOA, the recodification has retained the HRS §514A-81 requirement that bylaws be "recorded in the same manner as the declaration."]</p> <p>3. Regarding subsection (a), a stakeholder noted that there has sometimes been confusion between "recording" bylaws with the Bureau of Conveyances (or Land Court) versus the Department of Commerce and Consumer Affairs. There should be no confusion. As noted in §___: 1-3, "'To record' [Source: HRS §514A-3.] means to record in accordance with chapter 502 (<i>Bureau of Conveyances</i>), or to register in accordance with chapter 501 (<i>Land Court</i>)."</p> <p>4. Regarding subsection (c)(2), a property manager noted that, where time share owners are "owners," 1500 time share owners may own 10% of the project. It is important to remember, however, that time share governance issues are covered by HRS Chapter 514E, related administrative rules, and the time share governing documents.</p>	
	<p>§ ___: 5-10 [5-20]. Restatement of Declaration and Bylaws. [Source: HRS §514A-82.2.] (a) Notwithstanding any other provision of this chapter or of any other statute or instrument, a unit owners' association may at any time restate the declaration or bylaws of the association to set forth all amendments thereof by a resolution adopted by the board of directors.</p> <p>(b) A unit owners' association may at any time restate the declaration or bylaws of the association to amend the declaration or bylaws as may be required in order to conform with the provisions of this chapter or of any other statute, ordinance, or rule enacted by any governmental authority, by a resolution adopted by the board of directors. The restated declaration or bylaws shall be as fully effective for all purposes as if adopted by a vote or written consent of the unit owners.</p> <p>Any declaration or bylaws restated pursuant to this subsection must:</p> <ul style="list-style-type: none"> (1) identify each portion so restated; (2) contain a statement that those portions have been restated solely for purposes of information and convenience; (3) identify the statute, ordinance, or rule implemented by the amendment; and (4) contain a statement that, in the event of any conflict, the restated declaration or bylaws shall be subordinate to the cited statute, ordinance, or rule. <p>(c) Upon the adoption of a resolution pursuant to subsection (a) or (b), the restated declaration or bylaws shall set forth all of the operative provisions of the declaration or bylaws, as amended, together with a statement that the restated declaration or bylaws correctly sets forth without change the corresponding provisions of the declaration bylaws, as amended, and that the restated declaration or bylaws supersede the</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>original declaration or bylaws and all prior amendments thereto.</p> <p>(d) The restated declaration or bylaws must be recorded and, upon recordation, shall supersede the original declaration or bylaws and all prior amendments thereto.</p> <p>In the event of any conflict, the restated declaration or bylaws shall be subordinate to the original declaration of condominium property regime or bylaws and all prior amendments thereto.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-82.2 is the source of this section.</p>	
	<p>§ ____: 5-11 [5-13]. Bylaws Amendment Permitted; Mixed Use Property; Representation on Board of Directors. [Source: HRS §514A-82.15.] (a) The bylaws of a unit owners' association may be amended to provide that the composition of the board of directors reflect the proportionate number of units for a particular use, as set forth in the declaration. For example, a unit owners' association may provide that for a nine-member board where two-thirds of the units are for residential use and one-third is for commercial use, sixty-six and two-thirds percent of the nine-member board, or six members, shall be owners of residential use units and thirty-three and one-third percent, or three members, shall be owners of commercial use units.</p> <p>(b) Any proposed bylaws amendment to modify the composition of the board in accordance with subsection (a) may be initiated by:</p> <p>(1) A majority vote of the board of directors; or</p> <p>(2) A submission of the proposed bylaw amendment to the board of directors from a volunteer unit owner's committee accompanied by a petition from twenty-five percent of the unit owners of record.</p> <p>(c) Within thirty days of a decision by the board or receipt of a petition to initiate a bylaws amendment, the board of directors shall mail a ballot with the proposed bylaws amendment to all of the unit owners of record. For purposes of this section only [and notwithstanding section 514A-82(b)(2)], the bylaws may be initially amended by a vote or written consent of the majority (at least fifty-one percent) of the unit owners; and thereafter by [sixty-five] <u>sixty-seven</u> percent of all unit owners; provided that each of the requirements set forth in this section shall be embodied in the bylaws. [Approval percentage raised to 67% to match FannieMae requirement.]</p> <p>(d) The bylaws, as amended pursuant to this section, shall be recorded in the bureau of conveyances or filed in land court, as the case may be.</p> <p>(e) Election of the new board of directors in accordance with an amendment adopted pursuant to this section shall be held within sixty days from the date the amended bylaws are recorded pursuant to subsection (d).</p> <p>(f) As permitted in the bylaws or declaration, the vote of a commercial unit owner shall be cast and counted only for the commercial seats available on the board of directors and the vote of a residential unit owner shall be cast and counted only for the residential seats available on the board of directors.</p> <p>(g) No petition for a bylaw amendment pursuant to subsection (b)(2) to modify the composition of the board shall be distributed to the unit owners within one year of the distribution of a prior petition to modify the composition of the board pursuant to that subsection.</p> <p>(h) This section shall not preclude the removal and replacement of any one or more members of the board pursuant to section ____: 5-6(g). Any removal and replacement shall not affect the proportionate composition of the board as prescribed in the bylaws as amended pursuant to this section.</p> <p>[(i) This section shall be deemed incorporated into the bylaws of all properties subject to this chapter existing as of July 1, 1998, and thereafter.]</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-82.15 is the source of this section.</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>§ ____: 5-12 [5-20.4]. Judicial Power to Excuse Compliance with Requirements of Declaration or Bylaws. [Source: <i>Restatement of the Law, Third, Property (Servitudes)</i> §6.12.] The circuit court of the judicial circuit in which a condominium is located may excuse compliance with any of the following provisions in a declaration or bylaws if it finds that the provision unreasonably interferes with the association's ability to manage the common property, administer the condominium property regime, or carry out any other function set forth in the declaration or bylaws, and that compliance is not necessary to protect the legitimate interests of the members or lenders holding security interests:</p> <p>(1) A provision limiting the amount of any assessment that can be levied against individually owned property;</p> <p>(2) A provision requiring that an amendment to the declaration or bylaws be approved by lenders;</p> <p>(3) A provision requiring approval of at least sixty-seven percent of the common interest to adopt an amendment pursuant to section ____: 2-2(11) or section ____: 5-9(c); provided that the amendment does not:</p> <p>(A) Prohibit or materially restrict the use or occupancy of, or behavior within, individually owned units;</p> <p>(B) Change the basis for allocating voting rights or assessments among unit owners; or</p> <p>(C) Apply to less than all of the unit owners;</p> <p>(4) A requirement that an amendment to the declaration be signed by members;</p> <p>(5) A quorum requirement for meetings of members.</p>	<p>[Note: A stakeholder suggests that, if this section is workable, authority to excuse compliance with or remove the following types of provisions be added to this section:</p> <p>? The onerous requirement that some associations have for registered or certified mail for notice of association meetings and bylaw amendments.</p> <p>? The requirement that some associations have for a majority of all owners to adopt anything.</p> <p>? The requirement that some associations have for an election to require a higher vote than a plurality, as this has deadlocked several associations.]</p>
	<p>BRRAC's [Real Estate Commission's] Comment</p> <p>1. The <i>Restatement of the Law, Third, Property (Servitudes)</i> §6.12 is the source of this section.</p> <p>2. Several practitioners, management companies, and unit owners have commented on the virtual impossibility of changing obsolete provisions (among others) contained in condominium declarations.</p> <p>For example, in one old condominium, the elevator was so small that no one could fit any furniture bigger than a love seat into the elevator. The majority of unit owners (over 70%) wanted to modify the elevator so they could move bigger pieces of furniture up to their apartments. However, the declaration contained an owner-approval requirement for spending more than \$2,000. Since first and second floor owners and others (for various reasons, including apathy) didn't care to approve spending for enlarging the elevator, it was not possible to get the necessary 75% unit owners' consent. [HRS §514A-11(11) allows declarations to be amended if at least 75% of the unit owners consent.] Ultimately, while such "spending limit" provisions might have had appeal to a buyer (initially) or to a developer who believes that it is the right "democratic" thing to do, it makes little sense in the long run for the people who have to live in the condominium since it becomes virtually impossible to change the declaration (even with its outdated dollar figure limits).</p> <p>The <i>Restatement of the Law, Third, Property (Servitudes)</i>, recognizes this problem and addresses it in §6.12 – Judicial Power to Excuse Compliance with Requirements of the Governing Documents. [Note: Restatement §6.10, referenced in §6.12, deals with the common interest community's power to amend the declaration. The extensive comments, illustrations, Reporter's notes, and cross-references to §6.12 provide an excellent analysis of the issues surrounding the amendment of common interest community declarations.]</p> <p>In its comments to §6.12, the Restatement explains its rationale as follows:</p> <p>The public and the property owners have substantial interests in the long-term viability of the common-interest community. The declaration, the foundational document setting the parameters of the community's authority, is usually drafted by the developer for whom the project's immediate financial success is generally more important than creation of a community that will function successfully in the long term. Through ignorance, inadvertence, reliance on poorly drafted forms, or lack of foresight, many declarations include provisions that impair the ability of the community or its association to function over the long term. The resulting problems have sometimes been corrected or ameliorated by legislation. However, remedial legislation is not yet available</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>in many states and may not apply to some common-interest communities. A court has a general dispensing power, under principles of equity jurisdiction, to excuse compliance with requirements that significantly impede the functioning of common-interest communities and their associations. The interests of property owners and lenders who relied on the provisions of the declaration are protected by the requirement that the court find that compliance with the provision in question is unnecessary to protect their legitimate interests.</p> <p>3. Restatement §6.12 is patterned after California Civil Code §§1356 and 1366. It also finds some support in case law (listed in Reporter's Note). Florida also has provisions allowing for the courts to excuse compliance with condominium governing documents under very specific circumstances.</p>	
	<p>§ ____: 5-13 [5-45]. Condominium Community Mutual Obligations. [Source: HRS §514A-87.] (a) All unit owners, tenants of such owners, employees of owners and tenants, or any other persons that may in any manner use property or any part thereof submitted to this chapter are subject to this chapter and to the declaration and bylaws of the unit owners' association adopted pursuant to this chapter.</p> <p>(b) All agreements, decisions, and determinations lawfully made by the unit owners' association in accordance with the voting percentages established in this chapter, the declaration, or the bylaws are binding on all unit owners.</p> <p>(c) [Source: HRS §514A-88.] Each unit owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions, and restrictions set forth in the declaration. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the unit owners' association or, in a proper case, by an aggrieved unit owner.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §§514A-87 and 514A-88 are the sources of this section.</p>	
	<p>Subpart 2. GOVERNANCE – ELECTIONS AND MEETINGS</p>	
	<p>§ ____: 5-14 [5-23]. Unit Owners' Association Meetings. [Source: UCA/UCIOA §3-108.] (a) A meeting of the association must be held at least once each year.</p> <p>(b) Special meetings of the association may be called by the president, a majority of the board of directors, or by unit owners having twenty-five percent, or any lower percentage specified in the bylaws, of the votes in the association <u>[The following language is from HRS §514A-82(b)(1)] or by a petition to the secretary or managing agent signed by not less than twenty-five percent of the unit owners as shown in the association's record of ownership; provided that if the secretary or managing agent fails to send out the notices for the special meeting within fourteen days of receipt of the petition, the petitioners shall have the authority to set the time, date, and place for the special meeting and to send out the notices for the special meeting in accordance with the requirements of the bylaws.</u></p> <p>(c) Not less than fourteen nor more than [60] days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be:</p> <p>(1) Hand-delivered; [or]</p> <p>(2) Sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner; <u>or</u></p> <p>(3) <u>At the option of the unit owner, expressed in writing, by electronic mail to the electronic mailing address designated in writing by the unit owner.</u></p> <p>The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, [any budget changes.]</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>and any proposal to remove an officer or member of the board of directors. <i>[The following language is from HRS §514A-82(b)(3)]</i> Notices of association meetings[- whether annual or special, shall be sent to each member of the association of apartment owners at least fourteen days prior to the meeting and] shall contain at least: the date, time, and place of the meeting, the items on the agenda for the meeting, and a standard proxy form authorized by the association, if any.</p> <p>(d) [Source: HRS §514A-82(a)(16).] All association [and board of directors] meetings shall be conducted in accordance with the most [current] recent edition of Robert's Rules of Order Newly Revised [or the Modern Rules of Order]. Meetings may be conducted by any means that allow participation by all unit owners in any deliberation or discussion, unless a majority of a quorum of the members votes otherwise, or as otherwise provided by the declaration or bylaws.</p> <p>(e) [Source: HRS §514A-82(a)(17).] All association meetings shall be held at the address of the condominium project or elsewhere within the State as determined by the board of directors; <u>provided that in the event of a natural disaster, such as a hurricane, an association meeting may be held outside the State.</u></p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §3-108 and HRS §§514A-82(a)(16), 514A-82(a)(17), and 514A-82(b)(3) – edited to separate association and board meetings – are the sources of this section. 2. UCA (1980) and UCIOA (1994) do not have any official comments to §3-108 (Meetings). 3. Steve Glanstein, a parliamentarian, has suggested that a removal can come about at the annual meeting under new business. §514A-85(b)(2)(B) allows for bylaw amendment to be taken at an annual meeting so bottom line, does this mean that you have to place it on the agenda before hand or bring it up under new business. If the board is in control, minority cannot get it to consider placing it on the agenda before hand, thus, these rights removal and bylaws amendments cannot be acted on; solution...allow these or require that these agenda items are always there on the agenda no prior notice required. 4. The Modern Rules of Order was initially added to subsection (d) at the suggestion of an advisory committee member. After further review, reference to the Modern Rules of Order has been deleted. A parliamentarian notes that the Modern Rules of Order “presents numerous problems. It fails to include numerous important parliamentary points that are relevant to any organization. It has incomplete methodology for handling points of order, appeals, and the motion to amend, and provides minimal guidance for interpreting bylaws.” 5. Subsection (c) permits electronic mail (Internet) notice of unit owners' association meetings at the option of the unit owner. [Note: The BRRAC [Commission] also considered HRS §414D-105 (Notice of Meeting), which allows nonprofit corporations to “give notice consistent with its bylaws of meetings of members in a fair and reasonable manner” and goes on to define “fair and reasonable.”] <p>A stakeholder suggests adding the following language:</p> <p>“One or more unit owners can authorize notice by Internet electronic mail if the unit owner executes an ‘Internet Notice Authorization’ that contains the statement, ‘Notwithstanding any contrary notice requirement in the declaration or bylaws, I authorize the association to send notice of meetings by electronic mail (e-mail) to my e-mail address. I understand that this Internet Notice Authorization is effective immediately and shall remain in effect unless amended or revoked in writing. Such amendment or revocation will be effective only upon receipt by the association. I agree that I am responsible for maintaining a current e-mail address on file with the association. I further agree that the association meeting may not be contested based upon non-receipt of any e-mail notice.’ The notice must be signed by the unit owner and contain the unit owner's e-mail address.”</p> <ol style="list-style-type: none"> 6. Subsection (d) is intended to authorize videoconferencing and other means of conducting remote meetings. 	
	<p>[Deleted per stakeholders' comments.] [§ —: 5-15 [5-24]. Same; Quorums. [Source: UCA/UCIOA §3-109(a).] Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast [twenty] percent of the votes that may be cast for election of the board of directors</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>are present in person or by proxy at the beginning of the meeting. <i>[Stakeholders strongly objected to this section, noting, among other things, that such a provision would take away the power of a minority to walk out of a meeting and break quorum.]</i></p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §3-109(a) is the source of this section. 2. The official comment to UCA/UCIOA §3-109 notes that: Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort condominiums where many owners may reside elsewhere, often at considerable distances, for most of the year. 	
	<p>§ ____ : 5-16 [5-25]. Same; Meeting Minutes. [Source: HRS §514A-83.4.] (a) Minutes of meetings of the board of directors and association of apartment owners shall include the recorded vote of each board member on all motions except motions voted on in executive session.] (a) Minutes of meetings of the [board of directors and] association [of apartment owners] shall be approved at the next succeeding regular meeting[- provided that for board of directors meetings, no later than the second succeeding meeting] or by the board if authorized by the owners at an annual meeting. (b) Minutes of all meetings of the association shall be available within seven calendar days after approval and unapproved final drafts of the minutes of a meeting shall be available within sixty days after the meeting[- provided that the minutes of any executive session may be withheld if their publication would defeat the lawful purpose of the executive session].</p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. HRS §514A-83.4 – edited to separate association and board meetings – is the source of this section. 	
	<p>§ ____ : 5-17 [5-26]. Voting; Proxies. [Source: UCA/UCIOA §3-110.] (a) If only one of several owners of a unit is present at a meeting of the association, that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners is present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit. (b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. <u>A unit owner may vote by mail or electronic transmission through a duly executed directed proxy.</u> If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the [person presiding over a meeting of the association] <u>secretary of the unit owners' association or the managing agent.</u> A proxy is void if it [is not dated or] purports to be revocable without notice. [A proxy terminates one year after its date, unless it specifies a shorter term.] (c) No votes allocated to a unit owned by the association may be cast <u>for the election or re-election of directors.</u> (d) [Source: HRS §514A-83.2(a).] A proxy, to be valid, must: (1) Be delivered to the secretary of the unit owners' association or the managing agent, if any, no later than 4:30 p.m. on the second business day prior to the date of the meeting to which it pertains; (2) Contain at least the name of the unit owners' association, the date of the meeting of the unit owners' association, the printed names and signatures of the persons giving the proxy, the units for which the proxy is given, and the date that the proxy is given; and (3) <u>If it is a standard proxy form authorized by the association, contain boxes wherein the owner has</u></p>	

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>indicated that the proxy is given: <u>["Standard proxy form authorized by the association" is the term used in §514A-82(b)(3), incorporated in §____: 5-14(c) above.]</u></p> <p><u>[(A) For quorum purposes only;]</u></p> <p>(A) To the individual whose name is printed on a line next to this box;</p> <p>(B) To the board of directors as a whole and that the vote be made on the basis of the preference of the majority of the board; or</p> <p>(C) To those directors present at the meeting and the vote to be shared with each board member receiving an equal percentage.</p> <p><u>[The proxy shall also contain a box in which the owner may indicate that the proxy may not be used for the election of directors.]</u></p> <p><u>The proxy form shall also contain a box wherein the owner may indicate that the owner wishes to obtain a copy of the annual audit report required by section ____: 5-38.</u></p> <p>(e) [Source: HRS §514A-83.2(b).] A proxy shall only be valid for the meeting to which the proxy pertains and its adjournments, may designate any person as proxy, and may be limited as the unit owner desires and indicates; provided that no proxy shall be irrevocable unless coupled with a financial interest in the unit.</p> <p>(f) [Source: HRS §514A-83.2(d).] A copy, facsimile telecommunication, or other reliable reproduction of a proxy may be used in lieu of the original proxy for any and all purposes for which the original proxy could be used; provided that any copy, facsimile telecommunication, or other reproduction shall be a complete reproduction of the entire original proxy.</p> <p>(g) [Source: HRS §514A-83.2(e).] Nothing in this section shall affect the holder of any proxy under a first mortgage of record encumbering a unit or under an agreement of sale affecting a unit.</p> <p>(h) [Source: HRS §514A-82(b)(4); except for first sentence, which is incorporated in subsection (i).] (1) Any board of directors that intends to use association funds to distribute proxies, including the standard proxy form referred to in paragraph (d)(3), shall first post notice of its intent to distribute proxies in prominent locations within the project at least <u>[thirty days prior to] twenty-one days before</u> its distribution of proxies. If the board receives within seven days of the posted notice a request by any owner for use of association funds to solicit proxies accompanied by a statement, the board shall mail to all owners either:</p> <p>(A) A proxy form containing the names of all owners who have requested the use of association funds for soliciting proxies accompanied by their statements; or</p> <p>(B) A proxy form containing no names, but accompanied by a list of names of all owners who have requested the use of association funds for soliciting proxies and their statements.</p> <p>The statement shall not exceed <u>[one hundred words] one single-sided 8 ½" x 11" page</u>, indicating the owner's qualifications to serve on the board <u>[and] or</u> reasons for wanting to receive proxies.</p> <p>(2) <u>[The following language contains the essence of HRS §514A-83.2(c). A board of directors or member of the board may use association funds to solicit proxies as part of the distribution of proxies. If a member of the board, as an individual, seeks to solicit proxies using association funds, the board member shall proceed as a unit owner under paragraph (1). Members of the board may submit a single statement which may not exceed one single-sided 8 ½" x 11" page multiplied by the number of directors participating in the single statement.]</u></p> <p>(i) [Source: HRS §514A-82(b)(4), first sentence.] No resident manager or managing agent, <u>or their employees [or spouses],</u> shall solicit, for use by the manager or managing agent, any proxies from any unit owner of the unit owners' association that employs the resident manager or managing agent, nor shall the resident manager or managing agent cast any proxy vote at any association meeting except for the purpose of establishing a quorum.</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>(j) [Source: HRS §514A-83.3; <i>partial</i>.] No board of directors shall adopt any rule prohibiting the solicitation of proxies or distribution of materials relating to association matters on the common elements by unit owners; provided that a board of directors may adopt rules regulating reasonable time, place, and manner of such solicitations or distributions, or both. A board of directors may prohibit commercial solicitations.</p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §3-110 and HRS §§514A-82(b)(4), 514A-83.2, and 514A-83.3 are the sources of this section. 2. Voting processes should, in addition to being fundamentally fair, be practical. To that end, subsection (b) explicitly allows voting by mail and electronic transmission (i.e., Internet voting). Requiring votes by mail or electronic transmission to be done through "duly executed directed proxies" should resolve procedural concerns relating to mail-in and electronic voting (e.g., ability to revoke the proxy). Although some stakeholders are uncomfortable with electronic voting, many associations across the country vote by this increasingly popular means. As long as security, validation, and auditing concerns are addressed, it makes no sense to prohibit such a valuable tool of democracy. Ultimately, permitting voting by mail and electronic transmission encourages participation by as many association members as possible. 3. The statutory requirement allowing proxies to be given "for quorum purposes only" (HRS §514A-83.2(a)(3)(A)) has been deleted. "Quorum purposes only" proxies often result in "opening meeting doors" but not allowing any business to be done. Associations suffer almost pointless additional mailing and meeting expenses because of this. However, a stakeholder wants to keep "quorum purposes only" in and wants to add as a new subsection (d)(4): "Instructions distributed on or with the proxy shall not oppose or discourage the use by owners of any one or more of these alternatives." Rationale: Some property managers have been steering proxies to directors. 4. Note that unit owners, including directors, using their own funds are not restricted by the provisions of subsection (h). 5. Subsection (h) codifies a property manager's suggestion that the 100 word limit to proxy solicitation statements be eliminated in favor of providing that the association will mail a single-sided 8 ½" x 11" proxy solicitation at the association's expense. This is consistent with the provision's original intent (i.e., limiting the cost of producing large amounts of information for an owner at the association's expense). A stakeholder objects to allowing board members to combine statements, though. 6. Stakeholders have suggested that, in addition to resident managers, we also prohibit managing agents, rental agents, any employees of associations, and their spouses from serving on the boards of those associations. Except for prohibiting spouses of managing agents, et al., from serving on boards (because of Fair Housing Act and other concerns), the BRRAC [Commission] has incorporated these suggestions in subsection (i). 7. Additional considerations and questions: <ul style="list-style-type: none"> ? Electing association directors is usually the most important decision of the unit owners. Real and perceived unfairness in voting for directors comes up often in complaints to the Commission. (See, HRS Chapter 514A Recodification "Stakeholders Comments and Recommendations" on the Commission's website, http://www.hawaii.gov/hirec/.) We need to determine which matters are appropriate to address in State law. ? It may also be desirable to explicitly allow cumulative voting (already implicitly allowed if in the bylaws; see, HRS §514A-82(b)(1)) and voting by acclamation (i.e., without a formal ballot vote, e.g., when the number of candidates and vacancies are the same). 	
	<p>§ ____: 5-18 [5-27]. Same; Good Faith Unintentional Failure to Comply. [Source: New.] <u>A managing agent's or board's good faith failure to meet any deadlines or requirements relating to proxies, solicitation of proxies, or meetings shall not invalidate the action taken or the validity of the meeting, provided that (i) no substantive rights of any unit owners have been violated, and (ii) the board or managing agent takes reasonable action to correct the failure or the failure does not materially affect the solicitation of proxies or the outcome of the meeting.</u></p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. This new section is consistent with the Commission's desire to facilitate the fair and efficient functioning of condominium communities.</p>	
	<p>§ ____: 5-19 [5-28]. Same; Purchaser's Right to Vote. [Source: HRS §514A-83.] The purchaser of a unit pursuant to an agreement of sale recorded in the bureau of conveyances or land court shall have all the rights of a unit owner, including the right to vote; provided that the seller may retain the right to vote on matters substantially affecting the seller's security interest in the unit, including but not limited to, the right to vote on:</p> <ul style="list-style-type: none"> (1) Any partition of all or part of the project; (2) The nature and amount of any insurance covering the project and the disposition of any proceeds thereof; (3) The manner in which any condemnation of the project shall be defended or settled and the disposition of any award or settlement in connection therewith; (4) The payment of any amount in excess of insurance or condemnation proceeds; (5) The construction of any additions or improvements, and any substantial repair or rebuilding of any portion of the project; (6) The special assessment of any expenses; (7) The acquisition of any unit in the project; (8) Any amendment to the declaration of condominium property regime or bylaws; (9) Any removal of the project from the provisions of this chapter; and (10) Any other matter which would substantially affect the security interest of the seller. 	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-83 is the source of this section.</p>	
	<p>§ ____: 5-20 [5-40]. Meetings; Board of Directors. (a) [Source: HRS §514A-83.1(a).] All meetings of the board of directors, other than executive sessions, shall be open to all members of the association, and association members who are not on the board of directors may participate in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the board of directors votes otherwise.</p> <p>(b) [Source: HRS §514A-83.1(b); modified.] The board of directors, with the approval of a majority of a quorum of its members, may adjourn a meeting and reconvene in executive session to discuss and vote upon matters:</p> <ul style="list-style-type: none"> (1) Concerning personnel; (2) Concerning litigation in which the association is or may become involved; (3) [Source: HRS §421J-5(d).] <u>Necessary to protect the attorney-client privilege of the association; or</u> (4) [Source: New.] <u>Necessary to protect the interests of the association while negotiating contracts, leases, and other commercial transactions.</u> <p>The general nature of any business to be considered in executive session shall first be announced in open session.</p> <p>(c) [Source: HRS §514A-82(a)(16).] All [association and] board of directors meetings shall be conducted in accordance with the most [current] recent edition of Robert's Rules of Order Newly Revised [or the Modern Rules of Order]. Meetings may be conducted by any means that allow participation by all unit owners in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the members votes otherwise, or as otherwise provided by the declaration or bylaws.</p> <p>(d) [Source: HRS §514A-82(b)(9).] The board of directors shall meet at least once a year. [Whenever</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>practicable, notice Notice of all board meetings shall be posted by the resident manager or a member of the board in prominent locations within the project seventy-two hours prior to the meeting or simultaneously with notice to the board of directors.</p> <p>(e) [Source: HRS §421J-5(e).] [No board member] A director shall not vote by proxy at board meetings. [Compare: HRS §514A-82(a)(13): A director shall not cast any proxy vote at any board meeting ...]</p> <p>(f) [Source: HRS §514A-82(a)(13).] A director shall not cast any proxy vote at any board meeting, nor shall a director vote at any board meeting on any issue in which the director has a conflict of interest.</p> <p>(g) [Source: HRS §514A-82(b)(5); Robert's Rules of Order Newly Revised.] A director who has a conflict of interest on any issue before the board shall disclose the nature of the conflict of interest prior to a vote on that issue at the board meeting, and the minutes of the meeting shall record the fact that a disclosure was made.</p> <p><u>"Conflict of interest," as used in this section, means an issue in which a director has a direct personal or pecuniary interest not common to other members of the association.</u></p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §§514A-83.1(a), 514A-83.1(b), 421J-5(d), 514A-82(a)(16), 514A-82(b)(9), 421J-5(e), and 514A-82(a)(13), 514A-82(b)(5), and Robert's Rules of Order Newly Revised (previously in §___: 5-8) are the sources of this section.</p> <p>2. Subsection (b)(4) recognizes that, in addition to personnel and litigation matters, it is appropriate to allow boards to go into executive session to discuss and vote on matters dealing with contracts, leases, and other commercial transactions while they are being negotiated. Such negotiations often involve confidential information (e.g., an association's appraiser's estimates and advice during lease-to-fee negotiations, and review of competing bids from vendors during a sealed bidding process). Subsection (b)(4) allows associations to protect their interests during the pendency of these negotiations.</p> <p>3. Some stakeholders have suggested that the Commission make it clear that directors have the right to attend any committee meetings, whether they sit on the committee or not, unless they have a conflict of interest on the subject matter. Others disagree. They point out that associations could be damaged by such a requirement.</p> <p>Example: A director (otherwise very helpful) is known for asking questions of prospective employees that are illegal under current law. The director has no conflict of interest, but the director's participation in the interview process would subject the association to significant liability. Should State law force the association to allow this director's participation in its personnel committee's interview process? The BRRAC [Commission] does not believe so.</p> <p>4. The Modern Rules of Order was initially added to subsection (c) at the suggestion of an advisory committee member. After further review, reference to the Modern Rules of Order has been deleted. A parliamentarian notes that the Modern Rules of Order "presents numerous problems. It fails to include numerous important parliamentary points that are relevant to any organization. It has incomplete methodology for handling points of order, appeals, and the motion to amend, and provides minimal guidance for interpreting bylaws."</p> <p>5. Subsection (c) is intended to authorize videoconferencing and other means of conducting remote meetings.</p> <p>6. Stakeholders have questioned the qualifier "practicable" in HRS §514A-82(b)(9). It has been deleted in subsection (d)</p> <p>7. Regarding subsection (g), a stakeholder proposed that the "nature of the conflict of interest" be recorded in meeting minutes, not just the fact that a disclosure was made. Others disagreed, citing privacy issues (e.g., issues involving AIDS or other health matters), and noted that the director with a conflict abstaining from voting is the key.</p>	
	<p>[Deleted per 7/14/03 BRRAC meeting.] [§___: 5-11. Same; Quorums. [Source: SUCA/UCIOA §3-109(b).] Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the board of directors if persons entitled to cast fifty percent of the votes on that board are present at the beginning of the meeting.]</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>§ ____: 5-21 [5-42]. Same; Meeting Minutes. [Source: HRS §514A-83.4.] (a) Minutes of meetings of the board of directors [and association of apartment owners.] shall include the recorded vote of each board member on all motions except motions voted on in executive session.</p> <p>(b) Minutes of meetings of the board of directors [and association of apartment owners.] shall be approved [at the next succeeding meeting; provided that for board of directors meetings,] no later than the second succeeding <u>regular</u> meeting.</p> <p>(c) Minutes of all meetings of the board of directors shall be available within seven calendar days after approval and unapproved final drafts of the minutes of a meeting shall be available within sixty days after the meeting; provided that the minutes of any executive session may be withheld if their publication would defeat the lawful purpose of the executive session.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-83.4 – edited to separate association and board meetings – is the source of this section.</p>	
	<p>Subpart 3. OPERATIONS</p>	
	<p>§ ____: 5-22 [5-44]. Managing Agents. [Source: §514A-95.] (a) Every managing agent shall:</p> <p>(1) Be licensed as a real estate broker in compliance with chapter 467 and the rules of the commission or be a corporation, <u>limited liability company</u>, or <u>limited partnership</u> authorized to do business under article 8 of chapter 412;</p> <p>(2) Register with the commission prior to conducting managing agent activity through approval of a completed registration application, payment of fees, and submission of any other additional information set forth by the commission. The registration shall be for a biennial period with termination on December 31 of an even-numbered year. The commission shall prescribe a deadline date prior to the termination date for the submission of a completed reregistration application, payment of fees, and any other additional information set forth by the commission. Any managing agent who has not met the submission requirements by the deadline date shall be considered a new applicant for registration and subject to initial registration requirements. The information required to be submitted with any application shall include the name, business address, phone number, and names of unit owners' associations managed;</p> <p>(3) Obtain and keep current a fidelity bond in an amount equal to \$500 multiplied by the aggregate number of units of the unit owners' association managed by the managing agent; provided that the amount of the fidelity bond shall not be less than \$20,000 nor greater than \$100,000. Upon request by the commission, the managing agent shall provide evidence of a current fidelity bond or a certification statement from an insurance company authorized by the insurance division of the department of commerce and consumer affairs certifying that the fidelity bond is in effect and meets the requirement of this section and the rules adopted by the commission. The managing agent shall permit only employees covered by the fidelity bond to handle or have custody or control of any unit owners' association funds, except any principals of the managing agent that cannot be covered by the fidelity bond. The fidelity bond shall protect the managing agent against the loss of any unit owners' association's moneys, securities, or other properties caused by the fraudulent or dishonest acts of employees of the managing agent. Failure to obtain or maintain a fidelity bond in compliance with this chapter and the rules adopted pursuant thereto, including failure to provide evidence of the fidelity bond coverage in a timely manner to the commission, shall result in non-registration or the automatic termination of the registration, unless an approved exemption or a bond alternative is presently maintained. A managing agent who is unable to obtain a fidelity bond may seek an exemption from the fidelity bond requirement from the commission. The commission [shall] <u>may</u> adopt rules establishing the conditions and terms by which it may grant an exemption or a bond alternative, or permit deductibles;</p> <p>(4) Act promptly and diligently to recover from the fidelity bond, if the fraud or dishonesty of the managing agent's employees causes a loss to a unit owners' association, and apply the fidelity bond proceeds, if any, to reduce the unit owners' association's loss. If more than one unit owners' association suffers a loss, the</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>managing agent shall divide the proceeds among the unit owners' associations in proportion to each unit owners' association's loss. A unit owners' association may request a court order requiring the managing agent to act promptly and diligently to recover from the fidelity bond. If a unit owners' association cannot recover its loss from the fidelity bond proceeds of the managing agent, the unit owners' association may recover by court order from the real estate recovery fund established under section 467-16, provided that:</p> <p>(A) The loss is caused by the fraud, misrepresentation, or deceit of the managing agent or its employees ;</p> <p>(B) The managing agent is a licensed real estate broker; and</p> <p>(C) The unit owners' association fulfills the requirements of sections 467-16 and 467-18 and any applicable rules of the commission;</p> <p>(5) Pay a nonrefundable application fee and, upon approval, an initial registration fee, and subsequently pay a reregistration fee, as prescribed by rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. A compliance resolution fee shall also be paid pursuant to section 26-9(o) and the rules adopted pursuant thereto; and</p> <p>(6) Report immediately in writing to the commission any changes to the information contained on the registration application or any other documents provided for registration. Failure to do so may result in termination of registration and subject the managing agent to initial registration requirements.</p> <p>(b) The commission may deny any registration or reregistration application or terminate a registration without hearing if the fidelity bond and its evidence fail to meet the requirements of this chapter and the rules adopted pursuant thereto.</p> <p>(c) Every managing agent shall be considered a fiduciary with respect to any property managed by that managing agent.</p> <p><u>(d) [Source: Act 129 (SLH, 2002).] The registration and fidelity bond requirements of this section shall not apply to active real estate brokers in compliance with and licensed under chapter 467.</u></p> <p><u>(e) If a managing agent receives a request from the commission to distribute any commission-generated information, printed material, or documents to the association, its board, or unit owners, the managing agent shall make the distribution within a reasonable period of time after receiving the request. The requirements of this subsection apply to all managing agents, including unregistered managing agents.</u></p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. HRS §514A-95 is the source of this section. 2. Subsection (a)(1) has been amended to allow a managing agent to organize as limited liability company or a limited partnership. The Uniform Limited Liability Company Act was not enacted until 1996, and many of the largest condominium management firms in recent years have organized as limited liability companies or limited partnerships. 3. The BRRAC subcommittee does not believe that the change made by Act 129 (SLH, 2002) was wise. At least part of the theory behind exempting licensed, active, real estate brokers from the registration and fidelity bond requirements of this section is that victims of such real estate brokers would have recourse against the Real Estate Recovery Fund. <i>See</i>, HRS §467-16, et seq. Such a remedy, however, is woefully inadequate as a few "bad acts" involving large condominiums managed by such real estate brokers could easily result in claims exceeding available Recovery Fund monies. 4. A resolution passed the 2003 legislature (SCR 62) directing the Auditor to conduct a "sunrise review" regarding certification or licensure of condominium managing agents. 	
	<p>§ ____: 5-23 [5-45]. Association Employees; Background Check; Prohibition. (a) [Source: HRS §514A-82.1, as amended by Act 95 (SLH 2003).] The board of directors of a unit owners' association or the manager of a condominium, upon the written authorization of an applicant for employment as security guard</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>or manager or for a position which would allow the employee access to the keys of or entry into the units in the condominium or access to association funds, may conduct a background check on the applicant or direct another responsible party to conduct the check. Before initiating or requesting a check, the board or the manager shall first certify that the signature on the authorization is authentic and that the person is an applicant for such employment. The background check, at a minimum, shall require the applicant to disclose whether the applicant has been convicted in any jurisdiction of a crime which would tend to indicate that the applicant may be unsuited for employment as an association employee with access to association funds or the keys of or entry into the units in the condominium, and the judgment of conviction has not been vacated. For the purpose of this section, the criminal history disclosure made by the applicant may be verified by the board, manager, or other responsible party, if so directed by the board or the manager, by means of information obtained through the Hawaii criminal justice data center. <u>The applicant shall provide the Hawaii criminal justice data center with personal identifying information which shall include but not be limited to the applicant's name, social security number, date of birth, and gender. This information shall be used only for the purpose of conducting the criminal history record check authorized by this section.</u> Failure of a unit owners' association or the manager to conduct or verify or cause to have conducted or verified a background check shall not alone give rise to any private cause of action against an association or manager for acts and omissions of the employee hired.</p> <p>(b) [Source: HRS §514A-82(b)(8).] An association's employees shall not engage in selling or renting units in the condominium in which they are employed except association-owned units, unless such activity is approved by an affirmative vote of sixty-five sixty-seven percent of the membership. [Approval percentage raised to 67% to match FannieMae requirement.]</p> <p>[(b) [Source: HRS §514A-82(b)(4), partial.] No resident manager or managing agent, or their employees or spouses, shall solicit, for use by the manager or managing agent, any proxies from any unit owner of the unit owners' association that employs the resident manager or managing agent, nor shall the resident manager or managing agent cast any proxy vote at any association meeting except for the purpose of establishing a quorum.] [Moved to § ____: 5-17(i)]</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. The BRRAC subcommittee originally believed that HRS §514A-82.1 (Employees of condominiums; background check) had been superseded by HRS §846-41 and was therefore omitted from the recodified condominium law. The 2003 Legislature, however, amended HRS §514A-82.1 as part of an overall rewrite of statutes on criminal history record checks. [(See, Act 95 (SLH 2003).] Therefore, the section is incorporated in subsection (a).</p> <p>2. HRS §514A-82(b)(8) is the source of subsection (b).</p>	
	<p>§ ____: 5-24 [5-46]. Management and Contracts; Developer, Managing Agent, and Unit Owners' Association. [Source: § 514A-84.]</p> <p>[(a) If the developer or any affiliate of the developer acts as the first managing agent for the association of apartment owners following its organization, the contract shall not have a term exceeding one year and shall contain a provision that the contract may be terminated by either party thereto on not more than sixty days' written notice. The identity of the managing agent as the developer or the developer's affiliate shall be disclosed to the association of apartment owners no later than the first meeting of the association of apartment owners, which is when the association of apartment owners is organized. An affiliate of, or person affiliated with, a developer is a person that directly or indirectly controls, is controlled by, or is under common control with, the developer.] [HRS §514A-84(a) replaced by provisions of UCA/UCIOA §3-105, incorporated below in § ____: 5-25]</p> <p>(a) Any developer or affiliate of the developer or a managing agent, who manages the operation of the property from the date of recordation of the first unit conveyance until the organization of the unit owners' association, shall comply with the requirements of sections § ____: 5-3, ____: 5-37, and ____: 3-21, with the</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>exception of the fidelity bond requirement for the unit owners' association.</p> <p>(b) The developer or affiliate of the developer, board, and managing agent shall ensure that there is a written contract for managing the operation of the property, expressing the agreements of all parties including but not limited to financial and accounting obligations, services provided, and any compensation arrangements, including any subsequent amendments. Copies of the executed contract and any amendments shall be provided to all parties to the contract. Prior to the organization of the unit owners' association, any unit owner may request to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-84 is the source of this section.</p>	
	<p>§ ____: 5-25 [5-47]. Termination of Contracts and Leases of Developer. [Source: UCA/UCIOA §3-105; underscored language is from HRS §514A-84(a).] If entered into before the board of directors elected by the unit owners pursuant to section ____: 5-6(f) takes office, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a developer or an affiliate of a developer, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the board of directors elected by the unit owners pursuant to section ____: 5-6(f) takes office upon not less than ninety days' notice to the other party. This section does not apply to: (i) any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section, or (ii) a proprietary lease.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-105 is the source of this section. The definition of "affiliate of a developer", found in this section in earlier drafts of the recodification, has been moved to the "Definitions" section in Part I (General Provisions).</p> <p>2. The official comments to §3-105 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. [Note: A combined comment is contained in Recodification Draft #1, under §3-105.]</p>	
	<p>§ ____: 5-25.1 [5-48]. Transfer of Special Developer Rights. [Source: UCA/UCIOA §3-104.] (a) A special developer right created or reserved under this chapter may be transferred only by a recorded instrument evidencing the transfer. The instrument is not effective unless executed by the transferee.</p> <p>(b) Upon transfer of any special developer right, the liability of a transferor developer is as follows:</p> <p>(1) A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon him by this chapter. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor.</p> <p>(2) If a successor to any special developer right is an affiliate of a developer, the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the condominium.</p> <p>(3) If a transferor retains any special developer rights, but transfers other special developer rights to a successor who is not an affiliate of the developer, the transferor is liable for any obligations or liabilities imposed on a developer by this chapter or by the declaration relating to the retained special developer rights and arising after the transfer.</p> <p>(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special developer right by a successor developer who is not an affiliate of the transferor.</p> <p>(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security</p>	

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a developer or real estate in a condominium subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon his request, succeeds to all special developer rights related to that property held by that developer, or only to any rights reserved in the declaration and held by that developer to maintain models, sales offices, and signs. The judgment or instrument conveying title must provide for transfer of only the special developer rights requested.</p> <p>(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under Bankruptcy Code or receivership proceedings, of all interests in a condominium owned by a developer:</p> <ul style="list-style-type: none"> (1) the developer ceases to have any special developer rights, and (2) the period of developer control (section ____: 5-6(d)) terminates unless the judgment or instrument conveying title provides for transfer of all special developer rights held by that developer to a successor developer. <p>(e) The liabilities and obligations of a person who succeeds to special developer rights are as follows:</p> <ul style="list-style-type: none"> (1) A successor to any special developer right who is an affiliate of a developer is subject to all obligations and liabilities imposed on the transferor by this chapter or by the declaration. (2) A successor to any special developer right, other than a successor described in paragraph (3) or (4) or a successor who is an affiliate of a developer, is subject to the obligations and liabilities imposed by this chapter or the declaration: <ul style="list-style-type: none"> (i) on a developer which relate to the successor's exercise or nonexercise of special developer rights; or (ii) on his transferor, other than: <ul style="list-style-type: none"> (A) misrepresentations by any previous developer; (B) warranty obligations on improvements made by any previous developer, or made before the condominium was created; (C) breach of any fiduciary obligation by any previous developer or his appointees to the board of directors; or (D) any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer. (3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs, may not exercise any other special developer right, and is not subject to any liability or obligation as a developer, except the obligation to provide a public report and any liability arising as a result thereof, and obligations under part III. (4) A successor to all special developer rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all special developer rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by his transferor to control the board of directors in accordance with section ____: 5-6(d) for the duration of any period of developer control, and any attempted exercise of those rights is void. So long as a successor developer may not exercise special developer rights under this subsection, the successor developer is not subject to any liability or obligation as a developer other than liability for his acts 	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>and omissions under section ____: 5-6(d).</p> <p>(f) Nothing in this section subjects any successor to a special developer right to any claims against or other obligations of a transferor developer, other than claims and obligations arising under this chapter or the declaration.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-104 is the source of this section.</p> <p>2. The <i>extensive</i> official comments to §3-104 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. [Note: A combined comment is contained in Recodification Draft #1, under §3-104.]</p> <p>If the Commission chooses to incorporate UCA/UCIOA §3-104 in the recodification, as recommended by the BRRAC subcommittee, it should also incorporate the UCA/UCIOA §1-103 definitions of “special [declarant] <u>developer</u> rights” and “development rights” along with the official comments to those definitions.</p> <p>? UCA §1-103(23) defines “special declarant rights” as follows:</p> <p>“Special declarant rights” means rights reserved for the benefit of a declarant to (i) complete improvements indicated on plats and plans filed with the declaration (Section 2-109); (ii) to exercise any development right (Section 2-110); (iii) to maintain sales offices, management offices, signs advertising the condominium, and models (Section 2-115); (iv) to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (Section 2-116); (v) to make the condominium part of a larger condominium or a planned community (Section 2-121); (vi) to make the condominium subject to a master association (Section 2-120); (vii) or to appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (Section 3-103(c)).</p> <p>? The official comment to the UCA definition of “special declarant rights” states that:</p> <p>Definition (23), “special declarant rights,” seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.</p> <p>Any person who possesses a special declarant right would be a “declarant”, including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.</p>	
	<p>§ ____: 5-26 [5-24]. Upkeep of Condominium. (a) [Source: UCA/UCIOA §3-107(a); <i>underscored phrase is from HRS §§514A-13(f)/514A-82(b)(6)</i>.] Except to the extent provided by the declaration, <u>bylaws, or</u> subsection (c), the association is responsible for maintenance, repair, and replacement of the common elements, and each unit owner is responsible for maintenance, repair, and replacement of [his] <u>the owner's</u> unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, <u>during reasonable hours</u>, access through his unit reasonably necessary for those purposes. If damage is inflicted on the common elements or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, is liable for the prompt repair thereof.</p> <p>(b) [Source: HRS §§514A-13(f)/514A-82(b)(6).] The unit owners shall have the irrevocable right, to be exercised by the board of directors, to have access to each unit [from time to time] during reasonable hours as may be necessary for the operation of the property or for making emergency repairs therein necessary to prevent damage to the common elements or to another unit or units.</p> <p>(c) [Source: UCA/UCIOA §3-107(b).] In addition to the liability that a developer as a unit owner has under this chapter, the developer alone is liable for all expenses in connection with real estate subject to development rights. No other unit owner and no other portion of the condominium is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	estate subject to development rights inures to the developer.	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-107 and HRS §§514A-13(f)/514A-82(b)(6) are the sources of this section.</p> <p>2. The official comments to §3-107 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section.</p>	
	<p>§ ____: 5-27 [5-24.4]. Same; Disposition of Unclaimed Possessions. [Source: §514A-93.5.] (a) When personalty in or on the common elements of a project has been abandoned, the board of directors may sell the personalty in a commercially reasonable manner, store such personalty at the expense of its owner, donate such personalty to a charitable organization, or otherwise dispose of such personalty in its sole discretion; provided that no such sale, storage, or donation shall occur until sixty days after the board complies with the following:</p> <p>(1) The board notifies the owner in writing of:</p> <p>(A) The identity and location of the personalty, and</p> <p>(B) The board of directors' intent to so sell, store, donate, or dispose of the personalty.</p> <p>Notification shall be by certified mail, return receipt requested to the owner's address as shown by the records of the association or to an address designated by the owner for the purpose of notification or, if neither of these is available, to the owner's last known address, if any; or</p> <p>(2) If the identity or address of the owner is unknown, the board of directors shall first advertise the sale, donation, or disposition at least once in a daily paper of general circulation within the circuit in which the personalty is located.</p> <p>(b) The proceeds of any sale or disposition of personalty under subsection (a) shall, after deduction of any accrued costs of mailing, advertising, storage, and sale, be held for the owner for thirty days. Any proceeds not claimed within this period shall become the property of the unit owners' association.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-93.5 is the source of this section.</p>	
	<p>§ ____: 5-28 [5-24.2]. Modifications and Additions to Condominium. [Source: §514A-89; rewritten for clarity.] (a) <i>Material structural additions.</i> A unit owner may add a material structure or excavate an additional basement or cellar if the owner first obtains the <u>written</u> consent of <u>[seventy-five] sixty-seven</u> percent of the unit owners, together with the consent of all unit owners whose units or appurtenant limited common elements are directly affected. <u>[Proposed approval percentage changed from 65% to 67% to match FannieMae requirement.]</u></p> <p>(b) <i>Nonmaterial structural additions.</i> Nonmaterial structural additions to the common elements shall require approval only by the board of directors of the unit owners' association and such percentage, number, or group of unit owners as may be required by the declaration or bylaws. Nonmaterial structural additions include, without limitation:</p> <p>(1) the installation of solar energy devices; and</p> <p>(2) 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.</p> <p>"Nonmaterial structural additions to the common elements", as used in this section, means a structural addition to the common elements which does not jeopardize the soundness or safety of the property, reduce the value thereof, impair any easement or hereditament, 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.</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>"Solar energy device", for purposes of this section, means any new identifiable facility, equipment, apparatus, or the like which makes use of solar energy for heating, cooling, or reducing the use of other types of energy dependent upon fossil fuel for its generation; provided that if the equipment sold cannot be used as a solar device without its incorporation with other equipment, it must be installed in place and ready to be made operational in order to qualify as a "solar energy device".</p> <p>(c) <i>Telecommunications equipment</i>. [Source: §514A-13.4.]</p> <p>(1) Notwithstanding any other provisions to the contrary in this chapter, in the declaration of any project, or in the by-laws of any association:</p> <p>(A) The board of directors of an association shall have the authority to install or cause the installation of antennas, conduits, chases, cables, wires, and other television signal distribution and telecommunications equipment upon the common elements of the project; provided that the same shall not be installed upon any limited common element without the consent of the owner or owners of the unit or units for the use of which the limited common element is reserved; and</p> <p>(B) The installation of antennas, conduits, chases, cables, wires, and other television signal distribution and telecommunications equipment upon the common elements by the board shall not be deemed to alter, impair, or diminish the common interest, elements, and easements appurtenant to each unit or to be a structural alteration or addition to any building different in any material respect from the plans of the project filed in accordance with section ____: 2-3; provided that no such installation shall directly affect any nonconsenting unit owner.</p> <p>(2) Notwithstanding any other provision to the contrary in this chapter, in the declaration of any project or in the by-laws of any association:</p> <p>(A) The board shall be authorized to abandon or change the use of any television signal distribution and telecommunications equipment due to technological or economic obsolescence or to provide an equivalent function by different means or methods; and</p> <p>(B) The abandonment or change of use of any television signal distribution or telecommunications equipment by the board due to technological or economic obsolescence or to provide an equivalent function by different means or methods shall not be deemed to alter, impair, or diminish the common interest, elements, and easements appurtenant to each unit or to be a structural alteration or addition to any building different in any material respect from the plans of the project filed in accordance with section ____: 2-3.</p> <p>(3) As used in this subsection:</p> <p>"Directly affect" means the installation of television signal distribution and telecommunications equipment in a manner which would specially, personally, and adversely affect a unit owner in a manner not common to the unit owners as a whole.</p> <p>"Television signal distribution" and "telecommunications equipment" shall be construed in their broadest possible senses in order to encompass all present and future forms of communications technology."</p> <p>(d) No unit owner shall do any work which could jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement or hereditament.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-89, rewritten for clarity, is the source of subsections (a), (b), and (d). HRS §514A-13.4 [Act 137, SLH, 2002]] is the source of subsection (c).</p>	
	<p>§ ____: 5-29. Tort and Contract Liability; Tolling of Limitation Period. [Source: UCA/UCIOA §3-111.] (a) A unit owner is not liable, solely by reason of being a unit owner, for an injury or damage arising out of the condition or use of the common elements. Neither the association nor any unit owner except the developer is liable for that developer's torts in connection with any part of the condominium that that developer has the</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>responsibility to maintain.</p> <p>(b) An action alleging a wrong done by the association, including an action arising out of the condition or use of the common elements, may be maintained only against the association and not against any unit owner. If the wrong occurred during any period of developer control and the association gives the developer reasonable notice of and an opportunity to defend against the action, the developer who then controlled the association is liable to the association or to any unit owner for (i) all tort losses not covered by insurance suffered by the association or that unit owner, and (ii) all costs that the association would not have incurred but for a breach of contract or other wrongful act or omission. Whenever the developer is liable to the association under this section, the developer is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association.</p> <p>(c) Any statute of limitation affecting the association's right of action against a developer under this chapter is tolled until the period of developer control terminates. A unit owner is not precluded from maintaining an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by section ____: 5-35 (Other Liens Affecting the Condominium).</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-111 is the source of this section. [Note: With respect to subsection (c), the BRRAC rejected the warranty provisions in Article 4 of UCIOA, so the reference was deleted.]</p> <p>2. The official comments to §3-111 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. [Note: A combined comment is contained in Recodification Draft #1, under §3-111.]</p>	
	<p>[Deleted per BRRAC.] [§ ____: 5-30. Conveyance or Encumbrance of Common Elements. [Source: UCA/UCIOA §3-112.] (a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent of the votes in the association, including eighty percent of the votes allocated to units not owned by a developer, or any larger percentage the declaration specifies, agree to that action; but all owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to non-residential uses. Proceeds of the sale are an asset of the association, but the proceeds of the sale of limited common elements must be distributed equitably among the owners of units to which the limited common elements were allocated.</p> <p>(b) An agreement to convey common elements or subject them to a security interest must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof is effective only upon recordation.</p> <p>(c) The association, on behalf of the unit owners, may contract to convey an interest in a condominium pursuant to subsection (a), but the contract is not enforceable against the association until approved pursuant to subsections (a) and (b). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.</p> <p>(d) Unless made pursuant to this section, any purported conveyance, encumbrance, judicial sale, or other voluntary transfer of common elements is void.</p> <p>(e) A conveyance or encumbrance of common elements pursuant to this section does not deprive any unit of its rights of access and support.</p> <p>(f) Unless the declaration otherwise provides, if the holders of first security interests on eighty percent of the units that are subject to security interests on the day the unit owners' agreement under subsection (b) is recorded consent in writing:</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>—(1) a conveyance of common elements pursuant to this section terminates both the undivided interests in those common elements allocated to the units and the security interests in those undivided interests held by all persons holding security interests in the units; and</p> <p>—(2) an encumbrance of common elements pursuant to this section has priority over all preexisting encumbrances on the undivided interests in those common elements held by all persons holding security interests in the units.</p> <p>(g) The consents by holders of first security interests on units described in subsection (f), or a certificate of the secretary affirming that those consents have been received by the association, may be recorded at any time before the date on which the agreement under subsection (b) becomes void. Consents or certificates so recorded are valid from the date they are recorded for purposes of calculating the percentage of consenting first security interest holders, regardless of later sales or encumbrances on those units. Even if the required percentage of first security interest holders so consent, a conveyance or encumbrance of common elements does not affect interests having priority over the declaration, or created by the association after the declaration was recorded.</p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-112 is the source of this section.</p> <p>2. The extensive official comments to §3-112 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. [Note: A combined comment is contained in Recodification Draft #1, under §3-112.] As explained in the comments:</p> <p>The ability to sell a portion of the common elements without termination of the condominium gives the condominium regime desirable flexibility. For example, the unit owners, some years after the initial creation of the condominium, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.</p>	
	<p>§ ____: 5-31. Insurance. [Source: §765 Illinois Compiled Statutes (ILCS) 605/12 (As amended by P.A. 92-518, effective June 1, 2002); HRS §514A-86(a).] (a) <i>Required coverage.</i> Unless otherwise provided in the declaration or bylaws, and to the extent reasonably available, [No policy of insurance shall be issued or delivered to a condominium association, and no policy of insurance issued to a condominium association shall be renewed, unless the insurance coverage under the policy includes the following] <u>the association shall purchase and at all times maintain the following:</u></p> <p>(1) <i>Property insurance.</i> Property insurance (i) on the common elements [and the units, including the limited common elements and except as otherwise determined by the board of directors, the bare walls, floors, and ceilings of the unit], (ii) providing coverage for special form causes of loss, and (iii) 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.</p> <p>(2) <i>General liability insurance.</i> 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, insuring the board, the association, the management agent, and their respective employees and agents and all persons acting as agents. The developer must be included as an additional insured in its capacity as a unit owner, manager, board member, or officer. The unit owners must be included as additional insured parties but only for claims</p>	<p>[Compare: HRS §514A-86 Insurance (as amended by Act 17, SLH, 2002). (a) The association of apartment owners shall purchase and at all times maintain insurance which covers the common elements and, whether or not part of the common elements, all exterior and interior walls, floors, and ceilings, in accordance with the as-built condominium plans and specifications, against loss or damage by fire sufficient to provide for the repair or replacement thereof in the event of such loss or damages. Flood insurance shall also be [provided under the federal Flood Disaster Protection Act if the property is located in an identified flood hazard area as designated by the federal Department of Housing and Urban Development.] <u>maintained if the property is located in a special flood hazard area as delineated on flood maps issued by the Federal Emergency Management Agency. The flood insurance policy shall comply with the requirements of the National Flood Insurance Program and the Federal</u></p>

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>and liabilities arising in connection with the ownership, existence, use, or management of the common elements. The insurance must cover claims of one or more insured parties against other insured parties.</p> <p>(3) <i>Fidelity bond; directors and officers coverage.</i> [Compare HRS §514A-95.1(a)(1).]</p> <p>(A) An association with more than five dwelling units must obtain and maintain a fidelity bond covering persons, including the managing agent and its employees who control or disburse funds of the association, for the maximum amount of coverage available to protect funds in the custody or control of the association, plus the association reserve fund.</p> <p>(B) All management companies that are responsible for the funds held or administered by the association must be covered by a fidelity bond for the maximum amount of coverage available to protect those funds. The association has standing to make a loss claim against the bond of the managing agent as a party covered under the bond.</p> <p>(C) For purposes of paragraphs (A) and (B), the fidelity bond must be in the full amount of association funds and reserves in the custody of the association or the management company.</p> <p>(D) The board of directors must obtain directors and officers liability coverage at a level deemed reasonable by the board, if not otherwise established by the declaration or bylaws. Directors and officers liability coverage must extend to all contracts and other actions taken by the board in their official capacity as directors and officers, but this coverage shall exclude actions for which the directors are not entitled to indemnification under <u>chapter 414D</u> or the declaration and bylaws of the association.</p> <p>(b) [Contiguous] <u>Attached units; improvements and betterments.</u> <u>In the case of a building containing attached units, [The] the insurance maintained under subdivision (a)(1), to the extent reasonably available, must include the units, the limited common elements except as otherwise determined by the board of directors, and the common elements. The insurance need not 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.</u></p> <p><u>For the purposes of this section,</u> common elements include fixtures located within the unfinished interior surfaces of the perimeter walls, floors, and ceilings of the individual units initially installed by the developer. Common elements exclude floor, wall, and ceiling coverings. "Improvements and betterments" means all decorating, fixtures, and furnishings installed or added to and located within the boundaries of the unit, including electrical fixtures, appliances, air conditioning and heating equipment, water heaters, or built-in cabinets installed by unit owners.</p> <p>(c) <i>Deductibles.</i> The board of directors may, in the case of a claim for damage to a unit or the common elements, (i) pay the deductible amount as a common expense, (ii) 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 (iii) require the unit owners of the units affected to pay the deductible amount.</p> <p>(d) <i>Other coverages.</i> The declaration may require the association to carry any other insurance, including workers compensation, employment practices, environmental hazards, and equipment breakdown, the board of directors considers appropriate to protect the association, the unit owners, or officers, directors, or agents of the association. [The following underscored language is from HRS §514A-86(a).] <u>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. The flood insurance policy shall comply with the requirements of the National Flood Insurance Program and the Federal Insurance Administration.</u></p> <p>(e) <i>Insured parties; waiver of subrogation.</i> Insurance policies carried pursuant to subsections (a) and (b) must include each of the following provisions:</p> <p>(1) Each unit owner and secured party is an insured person under the policy with respect to liability</p>	<p><u>Insurance Administration.</u> Exterior glass may be insured at the option of the association of apartment owners. The insurance coverage shall be written on the property in the name of the association of apartment owners. Premiums shall be common expenses. Provision for the insurance shall be without prejudice to the right of each apartment owner to insure the owner's own apartment for the owner's benefit.</p> <p>(b) The association of apartment owners may purchase and maintain directors' and officers' liability insurance with minimum coverage in such amount as shall be determined by the board of directors. Premiums shall be common expenses.</p> <p>(c) Any insurance policy providing the coverage required by subsections (a) and (b) shall contain a provision requiring the insurance carrier, at the inception of the policy and on each anniversary date thereof, to provide the board of directors with a written summary, in layperson's terms, of the policy. The summary shall include the type of policy, a description of the coverage and the limits thereof, amount of annual premium, and renewal dates. The board of directors shall provide this information to each apartment owner.]</p> <p>[Compare further. HRS §514A-95.1 Association of apartment owners registration; fidelity bond. (a)] Each condominium project or association of apartment owners having six or more apartments shall:</p> <p>(1) Secure a fidelity bond in an amount equal to \$500 multiplied by the number of apartments, to cover all officers, directors, employees, and managing agents of the association of apartment owners who handle, control, or have custody of the funds of the association of apartment owners; provided that the amount of the fidelity bond required by this subsection shall not be less than \$20,000 nor greater than \$100,000. The fidelity bond shall protect the association of apartment owners against fraudulent or dishonest acts by persons, including any managing agent, handling the funds of the association of apartment owners. An association of apartment owners shall act promptly and diligently to recover from the fidelity bond required by this section. An association of apartment owners that is unable to obtain a fidelity bond may seek approval for an exemption or a bond alternative from the commission. The commission shall adopt rules establishing the conditions and terms for which it may grant an exemption or a bond alternative, or permit deductibles.</p>

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>arising out of the unit owner's interest in the common elements or membership in the association.</p> <p>(2) The insurer waives its right to subrogation under the policy against any unit owner of the condominium or members of the unit owner's household and against the association and members of the board of directors.</p> <p>(3) The unit owner waives his or her right to subrogation under the association policy against the association and the board of directors.</p> <p>(f) <i>Primary insurance.</i> If at the time of a loss under the policy there is other insurance in the name of a unit owner covering the same property covered by the policy, the association's policy is primary insurance.</p> <p>(g) <i>Adjustment of losses; distribution of proceeds.</i> Any loss covered by the property policy under subdivision (a)(1) must be adjusted by and with the association. The insurance proceeds for that loss must be payable to the association, or to an insurance trustee designated by the association for that purpose. The insurance trustee or the association must hold any insurance proceeds in trust for unit owners and secured parties as their interests may appear. The proceeds must be disbursed first for the repair or restoration of the damaged common elements, the bare walls, ceilings, and floors of the units, and then to any improvements and betterments the association may insure. Unit owners are not entitled to receive any portion of the proceeds unless there is a surplus of proceeds after the common elements and units have been completely repaired or restored or the association has been terminated as trustee.</p> <p>(h) <i>Mandatory unit owner coverage.</i> The board of directors may, under the declaration and bylaws or by rule, require condominium unit owners to obtain insurance covering their personal liability and compensatory (but not consequential) damages to another unit caused by the negligence of the owner or his or her guests, residents, or invitees, or regardless of any negligence originating from the unit. The personal liability of a unit owner or association member must include 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.</p> <p>If the unit owner does not purchase or produce evidence of insurance requested by the board, the directors may purchase the insurance coverage and charge the premium cost back to the unit owner. In no event is the board liable to any person either with regard to its decision not to purchase the insurance, or with regard to the timing of its purchase of the insurance or the amounts or types of coverages obtained.</p> <p>(i) <i>Certificates of insurance.</i> Contractors and vendors (except public utilities) doing business with a condominium association under contracts exceeding \$10,000 per year must provide certificates of insurance naming the association, its board of directors, and its managing agent as additional insured parties.</p> <p>(j) <i>Non-residential condominiums.</i> The provisions of this section may be varied or waived in the case of a condominium community in which all units are restricted to nonresidential use.</p> <p>(k) <i>Settlement of claims.</i> Any insurer defending a liability claim against a condominium association must notify the association of the terms of the settlement no less than ten days before settling the claim. The association may not veto the settlement unless otherwise provided by contract or statute.</p>	<p>Failure to obtain or maintain a fidelity bond in compliance with this chapter and the rules adopted pursuant thereto, including failure to provide current evidence of the fidelity bond coverage in a timely manner to the commission, shall result in non-registration or the automatic termination of the registration, unless an approved exemption or a bond alternative is presently maintained. Current evidence of a fidelity bond includes a certification statement from an insurance company registered with the department of commerce and consumer affairs certifying that the bond is in effect and meets the requirement of this section and the rules adopted by the commission; ...]</p>
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. §765 Illinois Compiled Statutes (ILCS) 605/12 (As amended by P.A. 92-518, effective June 1, 2002) and HRS §514A-86(a) are the sources of this section. [Some believe this section is too extensive and restrictive. Others believe that this example, in statute, serves as a "checklist" and helps protect against "artless" declaration and bylaw drafters.]</p> <p>2. UCA/UCIOA §3-113 is a source for amendments to this section (particularly subsection (b)). To that extent, the extensive official comments to §3-113 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. [Note: A combined comment is contained in Recodification Draft #1, under §3-113.]</p> <p>Among the many interesting features of UCA/UCIOA §3-113, the Acts do not mandate association insurance on units in town house or other arrangements in which there are no stacked units. However, if the developer wishes, the declaration</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units. We have incorporated this concept in subsection (b).</p> <p>UCA/UCIOA §3-113 and their official comments also attempt to clarify the complex issue of what is a common element and what is a unit with respect to insurance coverage.</p>	
	<p>§ ____: 5-32. Association Fiscal Matters; Assessments for Common Expenses. [Source: UCA/UCIOA §3-115; <i>underscored language in subsection (a) is essentially from HRS §514A-83.6(a).</i>] (a) Until the association makes a common expense assessment, the developer shall pay all common expenses. After an assessment has been made by the association, assessments must be made at least annually, based on a budget adopted <u>and distributed to unit owners</u> at least annually by the <u>[association] board of directors</u>.</p> <p>(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations under section <u>[HRS §514A-15] ____: 2-11</u>. Any past due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding eighteen percent per year.</p> <p><u>[(c) To the extent required by the declaration:</u></p> <p><u>____ (1) any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion the declaration provides;</u></p> <p><u>____ (2) any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefitted; and</u></p> <p><u>____ (3) the costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.]</u></p> <p>(c) Assessments to pay a judgment against the association (section ____: <u>5-35(a)</u>) may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense allocations under section ____: 2-11.</p> <p>(d) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.</p> <p>(e) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due must be recalculated in accordance with the reallocated common expense liabilities.</p> <p>(f) [Source: HRS §514A-91.] In a voluntary conveyance the grantee of a unit is jointly and severally liable with the grantor for all unpaid assessments against the latter for the grantor's share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. However, any such grantor or grantee is entitled to a statement from the <u>[manager or] board of directors, either directly or through its managing agent or resident manager,</u> setting forth the amount of the unpaid assessments against the grantor, and except as to the amount of subsequently dishonored checks mentioned in such statement as having been received within the thirty day period immediately preceding the date of such statement, the grantee is not liable for, nor is the unit conveyed subject to a lien for, any unpaid assessments against the grantor in excess of the amount therein set forth.</p> <p>(g) [Source: HRS §514A-92.] No unit owner may exempt himself from liability for his contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit. Subject to such terms and conditions as may be specified in the bylaws, any unit owner may, by conveying his unit and his common interest to the board of directors on behalf of all other unit owners, exempt himself from common expenses thereafter accruing.</p> <p>(h) [Source: HRS §514A-92.2.] The <u>[manager or] board of directors, either directly or through its managing</u></p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>agent or resident manager, shall notify the unit owners in writing of maintenance fee increases at least thirty days prior to such an increase.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-115 is the source of subsections (a) through (e). The official comments to §3-115 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting these subsections.</p> <p>2. HRS §§514A-91, 514A-92, and 514A-92.2 are the sources of subsections (f) through (h).</p>	
	<p>§ ____: 5-33. Same; Collection of Unpaid Assessments from Tenants. [Source: HRS §514A-90.5.] (a) If the owner of a unit rents or leases the unit and is in default for thirty days or more in the payment of the unit's share of the common expenses, the board of directors, for as long as the default continues, may demand in writing and receive each month from any tenant occupying the unit, an amount sufficient to pay all sums due from the unit owner to the association, including interest, if any, but the amount shall not exceed the tenant's rent due each month. The tenant's payment under this section shall discharge that amount of payment from the tenant's rent obligation, and any contractual provision to the contrary shall be void as a matter of law.</p> <p>(b) Prior to Before taking any action under this section, the board of directors shall give to the delinquent unit owner written notice of its intent to collect the rent owed. The notice shall:</p> <p>(1) Be sent both by first-class and certified mail;</p> <p>(2) Set forth the exact amount the association claims is due and owing by the unit owner; and</p> <p>(3) Indicate the intent of the board of directors to collect such amount from the rent, along with any other amounts that become due and remain unpaid.</p> <p>(c) The unit owner shall not take any retaliatory action against the tenant for payments made under this section.</p> <p>(d) The payment of any portion of the unit's share of common expenses by the tenant pursuant to a written demand by the board is a complete defense, to the extent of the amount demanded and paid by the tenant, in an action for nonpayment of rent brought by the unit owner against a tenant.</p> <p>(e) The board may not demand payment from the tenant pursuant to this section if:</p> <p>(1) A commissioner or receiver has been appointed to take charge of the premises pending a mortgage foreclosure;</p> <p>(2) A mortgagee is in possession pending a mortgage foreclosure; or</p> <p>(3) The tenant is served with a court order directing payment to a third party.</p> <p>(f) In the event of any conflict between this section and any provision of chapter 521, the conflict shall be resolved in favor of this section; provided that if the tenant is entitled to an offset of rent under chapter 521, the tenant may deduct the offset from the amount due to the association, up to the limits stated in chapter 521. Nothing herein precludes the unit owner or tenant from seeking equitable relief from a court of competent jurisdiction or seeking a judicial determination of the amount owed.</p> <p>(g) Before the board of directors may take the actions permitted under subsection (a), the board must adopt a written policy providing for the actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a majority of the unit owners.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-90.5 is the source of this section.</p>	
	<p>§ ____: 5-34. Same; Lien for Assessments. [Source: HRS §514A-90; <i>Repeal and reenactment on December 31, 2007. L 2003, c 80, §2</i>; incorporates Act 53 (SLH, 2003) and Act 80 (SLH, 2003).] (a) All sums assessed by the unit owners' association but unpaid for the share of the common expenses chargeable to any unit constitute a lien on the unit prior to all other liens, except:</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>(1) Liens for taxes and assessments lawfully imposed by governmental authority against the unit; and</p> <p>(2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the unit owners' association, and costs and expenses including attorneys' fees provided in such mortgages.</p> <p>The lien of the unit owners' association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board of directors, acting on behalf of the unit owners' association, in like manner as a mortgage of real property. In any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed. The managing agent or board of directors, acting on behalf of the unit owners' association, unless prohibited by the declaration, may bid on the unit at foreclosure sale, and acquire and hold, lease, mortgage, and convey the unit. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.</p> <p>(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or assessments by the unit owners' association chargeable to the unit which became due prior to the acquisition of title to the unit by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the unit shall be deemed to acquire title and shall be required to pay the unit's share of common expenses and assessments beginning:</p> <p>(1) Thirty-six days after the order confirming the sale to the purchaser has been filed with the court;</p> <p>(2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser;</p> <p>or</p> <p>(3) <u>Thirty days after the public sale in a nonjudicial power of sale foreclosure pursuant to section 667-5:</u></p> <p><u>or</u></p> <p>(3) (4) <u>Upon the recording of the [deed] instrument of conveyance,</u></p> <p><u>whichever occurs first[-]; provided that the mortgagee of record or other purchaser of the unit shall not be deemed to acquire title under paragraph (1), (2), or (3), if transfer of title is delayed past the thirty-six days specified in paragraph (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the unit shall be deemed to acquire title upon recordation of the instrument of conveyance.</u></p> <p>(c) No unit owner shall withhold any assessment claimed by the association. A unit owner who disputes the amount of an assessment may request a written statement clearly indicating:</p> <p>(1) The amount of common expenses included in the assessment, including the due date of each amount claimed;</p> <p>(2) The amount of any penalty, late fee, lien filing fee, and any other charge included in the assessment;</p> <p>(3) The amount of attorneys' fees and costs, if any, included in the assessment;</p> <p>(4) That under Hawaii law, a unit owner has no right to withhold assessments for any reason;</p> <p>(5) That a unit owner has a right to demand mediation or arbitration to resolve disputes about the amount or validity of an association's assessment, provided the unit owner immediately pays the assessment in full</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>and keeps assessments current; and</p> <p>(6) That payment in full of the assessment does not prevent the owner from contesting the assessment or receiving a refund of amounts not owed.</p> <p>Nothing in this section shall limit the rights of an owner to the protection of all fair debt collection procedures mandated under federal and state law.</p> <p>(d) A unit owner who pays an association the full amount claimed by the association may file in small claims court or require the association to mediate to resolve any disputes concerning the amount or validity of the association's claim. If the unit owner and the association are unable to resolve the dispute through mediation, either party may file for arbitration under <u>section 5-47</u>; provided that a unit owner may only file for arbitration if all amounts claimed by the association are paid in full on or before the date of filing. If the unit owner fails to keep all association assessments current during the arbitration, the association may ask the arbitrator to temporarily suspend the arbitration proceedings. If the unit owner pays all association assessments within thirty days of the date of suspension, the unit owner may ask the arbitrator to recommence the arbitration proceedings. If the owner fails to pay all association assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The unit owner shall be entitled to a refund of any amounts paid to the association which are not owed.</p> <p>(e) <u>In conjunction with or</u> as an alternative to foreclosure proceedings under subsection (a), where a unit is owner-occupied, the unit owners' association may authorize its managing agent or board of directors to, after sixty days' written notice to the unit owner and to the unit's first mortgagee of the nonpayment of the unit's share of the common expenses, terminate the delinquent unit's access to the common elements and cease supplying a delinquent unit with any and all services normally supplied or paid for by the unit owners' association. Any terminated services and privileges shall be restored upon payment of all delinquent assessments <u>but need not be restored until payment in full is received</u>.</p> <p>(f) Before the board of directors or managing agent may take the actions permitted under subsection (e), the board must adopt a written policy providing for such actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a majority of the unit owners.</p> <p>(g) Subject to this subsection, and subsections (h) and (i), the board of an unit owners' association may specially assess the amount of the unpaid regular monthly common assessments for common area expenses against a person who, in a judicial or nonjudicial power of sale foreclosure, purchases a delinquent unit; provided that:</p> <p>(1) A purchaser who holds a mortgage on a delinquent unit that was recorded prior to the filing of a notice of lien by the unit owners' association and who acquires the delinquent unit through a judicial or nonjudicial foreclosure proceeding, including purchasing the delinquent unit at a foreclosure auction, shall not be obligated to make, nor be liable for, payment of the special assessment as provided for under this subsection; and</p> <p>(2) A person who subsequently purchases the delinquent unit from the mortgagee referred to in paragraph (1) shall be obligated to make, and shall be liable for, payment of the special assessment provided for under this subsection; provided that <u>the mortgagee or subsequent purchaser may require the unit owners' association [has filed] to provide at no charge a notice of the association's intent to claim lien against the delinquent unit for the [unpaid assessments for common area expenses which form the basis of] amount of the special assessment, prior to the subsequent purchaser's acquisition of title to the delinquent unit. The notice shall state the amount of the special assessment, how that amount was calculated, and the legal description of the unit.</u></p> <p>(h) The amount of the special assessment assessed under subsection (g) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the six months immediately</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>preceding the completion of the judicial or nonjudicial power of sale foreclosure[-and for which the unit owners' association had filed a notice of lien against the delinquent unit pursuant to subsection (g)(2)]. In no event shall the amount of the special assessment exceed the sum of \$1,800. [Note: BRRAC subcommittee would like the \$1,800 sum to be tied to the Consumer Price Index or something similar.]</p> <p>(i) For purposes of subsections (g) and (h), the following definitions shall apply:</p> <p>(1) "Completion" means:</p> <p>(A) In a nonjudicial power of sale foreclosure, when the affidavit required under section 667-5 is filed; and</p> <p>(B) In a judicial foreclosure, when a purchaser is deemed to acquire title pursuant to subsection (b).</p> <p>(2) "Regular monthly common assessments" shall not include:</p> <p>(A) Any other special assessment, except for a special assessment imposed on all units as part of a budget adopted pursuant to section ____: 5-36;</p> <p>(B) Late charges, fines, or penalties;</p> <p>(C) Interest assessed by the unit owners' association;</p> <p>(D) Any lien arising out of the assessment; or</p> <p>(E) Any fees or costs related to the collection or enforcement of the assessment, including attorneys' fees and court costs; <u>except that the cost of a release of any lien filed pursuant to this section shall be paid by the party requesting the release.</u></p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-90, as amended and re-enacted by the 2003 Legislature, is the source of this section.</p> <p>2. The BRRAC subcommittee found many of the provisions of UCA/UCIOA § 3-116 (Lien for Assessments) to be worthwhile (e.g., providing that, unless the declaration provides otherwise, fees, charges, late charges, fines, and interest charged are enforceable as assessments under this section). The official comments to §3-116 of UCIOA (1994) and UCA (1980) also provide excellent context for the assessment lien priority issue.</p> <p>3. The Hawaii Bankers Association opposes the provisions of UCA/UCIOA §3-116. (<i>See</i>, May 18, 2001 letter from Hawaii Bankers Association to Gordon M. Arakaki.)</p> <p>4. For an excellent discussion of the issues involved with the UCA/UCIOA limited lien priority, <i>see</i>, Winokur, James L., "Meaner Lienor Community Associations: The 'Super Priority' Lien and Related Reforms Under the Uniform Common Interest Ownership Act," 27 <i>Wake Forest L. Rev.</i>353 (1992).</p>	
	<p>§ ____: 5-35. Same; Other Liens Affecting the Condominium. [Source: UCA/UCIOA §3-117.] (a) Except as provided in subsection (b), a judgment for money against the association, if recorded, is not a lien on the common elements, but is a lien in favor of the judgment lienholder against all of the units in the condominium at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.</p> <p>[(b) If the association has granted a security interest in the common elements to a creditor of the association pursuant to Section 3-112, the holder of that security interest shall exercise its right against the common elements before its judgment lien on any unit may be enforced.]</p> <p>(b) Whether perfected before or after the creation of the condominium, if a lien, other than a deed of trust or mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium), becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.</p> <p>(c) A judgment against the association must be indexed in the name of the condominium and the association and, when so indexed, is notice of the lien against the units.</p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. UCA/UCIOA §3-117 is the source of this section. 2. The detailed official comments to §3-117 of UCIOA (1994) and UCA (1980) should be used for guidance in interpreting this section. 	
	<p>§ ____: 5-36. Same; Budgets and Reserves. [Source: HRS §514A-83.6.] (a) The budget required under section ____: 5-32(a) must include at least the following:</p> <ol style="list-style-type: none"> (1) The estimated revenues and operating expenses of the association; (2) Information as to whether the budget has been prepared on a cash or accrual basis; [Note: Several property managers strongly recommend that only accrual basis accounting be allowed.] (3) The total replacement reserves of the association as of the date of the budget; (4) The estimated replacement reserves the association will require to maintain the property based on a reserve study performed by the association; (5) A general explanation of how the estimated replacement reserves are computed; (6) The amount the association must collect for the fiscal year to fund the estimated replacement reserves; and (7) Information as to whether the amount the association must collect for the fiscal year to fund the estimated replacement reserves was calculated using a percent funded or cash flow plan. The method or plan shall not circumvent the estimated replacement reserves amount determined by the reserve study pursuant to paragraph (4). <p>(b) The association shall assess the unit owners to either fund a minimum of fifty percent of the estimated replacement reserves or fund one hundred percent of the estimated replacement reserves when using a cash flow plan; provided that a new association [created after January 1, 1993,] need not collect estimated replacement reserves until the fiscal year which begins after the association's first annual meeting. For each fiscal year, the association shall collect the amount assessed to fund the estimated replacement for that fiscal year reserves, as determined by the association's plan, except:</p> <p>(1) The commission shall adopt rules to permit an existing association to fund its estimated replacement reserves in increments after January 1, 1993 and prior to January 1, 2000; and</p> <p>(2) The commission shall adopt rules to permit an association to fund in increments, over three years, estimated replacement reserves that have been substantially depleted by an emergency].</p> <p>(c) The association shall compute the estimated replacement reserves by a formula which is based on the estimated life and the estimated capital expenditure or major maintenance required for each part of the property. The estimated replacement reserves shall include:</p> <ol style="list-style-type: none"> (1) Adjustments for revenues which will be received and expenditures which will be made before the beginning of the fiscal year to which the budget relates; and (2) Separate, designated reserves for each part of the property for which capital expenditures or major maintenance will exceed \$10,000. Parts of the property for which capital expenditures or major maintenance will not exceed \$10,000 may be aggregated in a single designated reserve. <p>(d) No association or unit owner, director, officer, managing agent, or employee of an association who makes</p>	

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>a good faith effort to calculate the estimated replacement reserves for an association shall be liable if the estimate subsequently proves incorrect.</p> <p>(e) The commission may request a copy of the annual operating budget of the unit owners' association as part of the association's registration with the commission under section ____: 5-3.</p> <p>(f) Except in emergency situations or with the approval of a majority of the unit owners, a board may not exceed its total adopted annual operating budget by more than twenty percent during the fiscal year to which the budget relates, except in emergency situations. [Prior to the imposition or collection of] Before imposing or collecting an assessment under this paragraph that has not been approved by a majority of the unit owners, the board [shall] must pass a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment.</p> <p>(g) The requirements of this section shall override any requirements in an association's declaration, bylaws, or any other association documents relating to preparation of budgets, calculation of reserve requirements, assessment and funding of reserves, and expenditures from reserves with the exception of:</p> <p>[(1) Any provisions relating to the repair and maintenance of property;]</p> <p>(1) Any requirements in an association's declaration, bylaws, or any other association documents which require the association to collect more than fifty percent of reserve requirements; or</p> <p>(2) Any provisions relating to upgrading the common elements, such as additions, improvements, and alterations to the common elements.</p> <p>(h) Subject to the procedures of section ____: 5-45 and any rules adopted by the commission, any unit owner whose association board fails to comply with this section may enforce compliance by the board. In any proceeding to enforce compliance, a board which has not prepared an annual operating budget and reserve study shall have the burden of proving it has complied with this section.</p> <p>[(i) The commission may adopt rules to implement this section.]</p> <p>(i) As used in this section:</p> <p>"Capital expenditure" means an expense that results from the purchase or replacement of an asset whose life is greater than one year, or the addition of an asset that extends the life of an existing asset for a period greater than one year.</p> <p>"Cash flow plan" means a minimum twenty-year projection of an association's future income and expense requirements to fund fully its replacement reserves requirements each year during that twenty-year period, except in an emergency; provided that it does not include a projection of special assessments or loans during that twenty-year period, except in an emergency.</p> <p>"Emergency situation" means any extraordinary expenses:</p> <p>(1) Required by an order of a court;</p> <p>(2) Necessary to repair or maintain any part of the property for which the association is responsible where a threat to personal safety on the property is discovered;</p> <p>(3) Necessary to repair any part of the property for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget; or</p> <p>(4) Necessary to respond to any legal or administrative proceeding brought against the association that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget.</p> <p>(5) Necessary for the association to obtain adequate insurance for the property which the association must insure.</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>"Major maintenance" means an expenditure for maintenance or repair that will result in extending the life of an asset for a period greater than one year.</p> <p>"Replacement reserves" means funds for the upkeep, repair, or replacement of those parts of the property, including, but not limited to roofs, walls, decks, paving, and equipment, that the association is obligated to maintain.</p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. HRS §514A-83.6 is the source of this section. 2. Several property managers strongly recommend that only accrual basis accounting be allowed. The BRRAC [Commission] has not yet decided to eliminate cash flow basis accounting, but is considering it 3. There may be potential to use community facilities district bond financing in some situations. (See, HRS §46-80.1.) The philosophical basis for bond financing of public facilities is that those who use such facilities should pay for them. When government builds a public facility, money is borrowed through the sale of bonds secured by the full faith and credit of the governmental body. The bond is repaid with tax dollars over a period of time that roughly corresponds to the life of the public facility. The bottom line is that taxpayers are paying for the public facility during the time they are using the facility. 	
	<p>§ ____: 5-37. Same; Handling and Disbursement of Funds. [Source: HRS §514A-97.] (a) The funds in the general operating account of the unit owners' association shall not be commingled with funds of other activities such as lease rent collections and rental operations, nor shall a managing agent commingle any association funds with the managing agent's own funds.</p> <p>(b) For purposes of subsection (a), lease rent collections and rental operations shall not include the rental or leasing of common elements that is conducted on behalf of the association or the collection of ground lease rents from individual unit owners of a project and the payment of such ground lease rents to the ground lessor; provided that:</p> <ol style="list-style-type: none"> (1) The collection is allowed by the provisions of the declaration, bylaws, master deed, master lease, or individual unit leases of the project; (2) If a management contract exists, it requires the managing agent to collect ground lease rents from the individual unit owners and pay the ground lease rents to the ground lessor; (3) The system of lease rent collection is approved by a majority vote of all unit owners at a meeting of the association; and (4) No managing agent or association shall pay ground lease rent to the ground lessor in excess of actual ground lease rent collected from individual unit owners. <p>(c) All funds collected by an association, or by a managing agent for any association, shall be:</p> <ol style="list-style-type: none"> (1) Deposited in a financial institution, including a federal or community credit union, located in the State and whose deposits: <ol style="list-style-type: none"> (A) Are insured by an agency of the United States government, <u>and</u> (B) <u>Maintain a Community Reinvestment Act (U.S. Code, Title 12, Chapter 30) evaluation of "Outstanding" or "Satisfactory", and</u> (C) <u>Maintain a Moody's Investors Service:</u> <ol style="list-style-type: none"> (i) <u>Long-Term Bank Deposit Rating of "Baa" or better, or</u> (ii) <u>Short-Term Bank Deposit Ratings of "Prime-3" or better, or</u> (iii) <u>Bank Financial Strength Rating of "C" or better;</u> (2) Held by a corporation authorized to do business under article 8 of chapter 412 <u>meeting the provisions</u> 	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p><u>of this section</u>;</p> <p>(3) Held by the United States Treasury; or</p> <p>(4) Purchased in the name of and held for the benefit of the association through a securities broker that is registered with the Securities and Exchange Commission, has an office in the State, and the accounts of which are held by member firms of the New York Stock Exchange or National Association of Securities Dealers and insured by the Securities Insurance Protection Corporation.</p> <p>All funds collected by an association, or by a managing agent for any association, shall be invested only in:</p> <p>(1) Demand deposits, investment certificates, and certificates of deposit;</p> <p>(2) Obligations of the United States government, the State of Hawaii, or their respective agencies; provided that those obligations shall have stated maturity dates no more than ten years after the purchase date unless approved otherwise by a majority vote of the unit owners at an annual or special meeting of the association or by written consent of a majority of the unit owners; or</p> <p>(3) Mutual funds comprised solely of investments in the obligations of the United States government, the State of Hawaii, or their respective agencies; provided that those obligations shall have stated maturity dates no more than ten years after the purchase date unless approved otherwise by a majority vote of the unit owners at an annual or special meeting of the association or by written consent of a majority of the unit owners;</p> <p>provided that before any investment longer than one year is made by an association, the board must approve the action; and provided further that the board must clearly disclose to owners all investments longer than one year at each year's association annual meeting.</p> <p>Records of the deposits and disbursements shall be disclosed to the commission upon request. All funds collected by an association shall only be disbursed by employees of the association under the supervision of the association's board of directors. All funds collected by a managing agent from an association shall be held in a client trust fund account and shall be disbursed only by the managing agent or the managing agent's employees under the supervision of the association's board of directors. <u>The commission may draft rules governing the handling and disbursement of condominium association funds.</u></p> <p>(d) A managing agent or board of directors shall not, <u>by oral instructions over the telephone</u>, transfer association funds <u>by telephone</u> between accounts, including but not limited to the general operating account and reserve fund account.</p> <p>(e) A managing agent shall keep and disburse funds collected on behalf of the condominium owners in strict compliance with any agreement made with the condominium owners, chapter 467, the rules of the commission, and all other applicable laws.</p> <p>(f) Any person who embezzles or knowingly misapplies association funds received by a managing agent or unit owners' association shall be guilty of a class C felony.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-97 is the source of this section.</p> <p>2. The treasurer of a condominium association suggested the amendments to subsection (c). (See, February 4, 2002 e-mail from George Taylor to Gordon M. Arakaki.)</p> <p>3. The Hawaii Bankers Association recommends that "funds be deposited in a financial institution located in the State whose deposits are insured by an agency of the United States government." They question "the ability or authority of credit unions in receiving such deposits from the AOA." (See, May 18, 2001 letter from Hawaii Bankers Association to Gordon M. Arakaki.)</p> <p>4. It has also been suggested that State law explicitly allow a prudent percentage of the unit owners' association funds to be invested in higher yielding instruments. Some stakeholders, however, strongly object allowing association</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>funds to be deposited or invested in anything other than banks, credit unions, and Treasury bills.</p> <p>5. Subsection (d) was amended to clarify that only unverifiable orally instructed transfers over the telephone are prohibited. Facsimile and e-mail transfers, as well as properly set up automatic bill payments through electronic transfers are obviously permitted. The key is to have a verifiable “paper trail.”</p>	
	<p>§ ____: 5-38. Same; Audits, Audited Financial Statement, Transmittal. [Source: HRS §514A-96.] (a) The unit owners’ association shall require an annual audit of the association financial accounts and no less than one annual unannounced verification of the association’s cash balance by a public accountant; provided that if the association is comprised of less than twenty [owners] units, the annual audit and the annual unannounced cash balance verification may be waived by a majority vote of all unit owners taken at an association meeting.</p> <p>(b) The board of directors of the association shall make available a copy of the annual audit to each unit owner at least thirty days prior to the annual meeting which follows the end of the fiscal year. [The board shall provide upon all official proxy forms a box wherein the owner may indicate that the owner wishes to obtain a copy of the annual audit report.] The board shall not be required to submit a copy of the annual audit report to [the] an owner if the proxy form issued pursuant to ____: 5-17(d) is not marked to indicate that the owner wishes to obtain a copy of the report. If the annual audit has not been completed by that date, the board shall make available:</p> <p>(1) An unaudited year end financial statement for the fiscal year to each unit owner at least thirty days prior to the annual meeting; and</p> <p>(2) The annual audit to all owners at the annual meeting, or as soon as the audit is completed, whichever occurs later.</p> <p>If the association’s fiscal year ends less than two months prior to the convening of the annual meeting, the year to date unaudited financial statement may cover the period from the beginning of the association’s fiscal year to the end of the month preceding the date on which notice of the annual meeting is mailed.</p>	
	<p>BRRAC’s [Real Estate Commission’s] Comment</p> <p>1. HRS §514A-96 is the source of this section.</p>	
	<p>§ ____: 5-39 [5-38.4]. Same; Lease Rent Renegotiation. [Source: HRS §514A-90.6.] (a) Notwithstanding any provision in the declaration or bylaws of any condominium subject to this chapter, any lease or sublease of the real estate or of a unit, or an undivided interest in the real estate to a unit owner, whenever any lease or sublease of the real estate, a unit, or an undivided interest in the real estate to a unit owner provides for the periodic renegotiation of lease rent thereunder, the unit owners’ association shall represent the unit owners in all negotiations and proceedings, including but not limited to appraisal or arbitration, for the determination of lease rent as a common expense of the association.</p> <p>(b) If some, but not all of the unit owners have <u>already</u> purchased the leased fee interest appurtenant to their units <u>at the time of renegotiation</u>, all costs and expenses of the renegotiation shall be assessed to the remaining lessees in the same proportion that the common interest appurtenant to each lessee’s unit bears to the common interest appurtenant to all lessees’ units. The unpaid amount of this assessment shall constitute a lien upon the lessee’s unit, which may be collected in accordance with section ____: 5-34 (Lien for Assessments) in the same manner as an unpaid common expense.</p>	
	<p>BRRAC’s [Real Estate Commission’s] Comment</p> <p>1. HRS §514A-90.6 is the source of this section.</p>	
	<p>§ ____: 5-40 [5-39]. Association Records; Generally. [Source: UCA/UCIOA §3-118.] The association shall keep financial <u>and other</u> records sufficiently detailed to enable the association to comply with <u>requests for information and disclosures related to resale of units</u>. <u>Except as otherwise provided by law</u>, all financial and other records must be made reasonably available for examination by any unit owner and the owner’s</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	authorized agents.	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-118 is the source of this section. [Note: UCA (1980) and UCIOA (1994) do not have any official comments for §3-118.]</p> <p>2. Two standard Hawaii Association of Realtor disclosure forms are generally used in connection with the resale of condominium units. One is the RR105C that unit owners' associations complete. The other is the seller disclosure form. Associations should keep records that allow them to adequately comply with these requests for information and disclosure.</p>	
	<p>§ ____: 5-41 [5-40]. Same; Records to be Maintained. (a) [Source: HRS §514A-84.5; <i>partial</i>.] An accurate copy of the declaration of condominium property regime, the bylaws of the unit owners' association, the house rules, if any, the master lease, if any, a sample original conveyance document, all public reports and any amendments thereto, shall be kept at the managing agent's office.</p> <p>(b) [Source: HRS §514A-85(a).] The managing agent or board of directors shall keep detailed, accurate records in chronological order, of the receipts and expenditures affecting the common elements, specifying and itemizing the maintenance and repair expenses of the common elements and any other expenses incurred. The managing agent or board of directors shall also keep monthly statements indicating the total current delinquent dollar amount of any unpaid assessments for common expenses.</p> <p>(c) [Source: HRS §514A-85(b).] All records and the vouchers authorizing the payments and statements shall be kept and maintained at the address of the project, or elsewhere within the State as determined by the board of directors.</p> <p>(d) [Source: HRS §514A-84(c); <i>partial</i>; language also incorporated in §____: 5-24 above.] The developer or affiliate of the developer, board, and managing agent shall ensure that there is a written contract for managing the operation of the property, expressing the agreements of all parties including but not limited to financial and accounting obligations, services provided, and any compensation arrangements, including any subsequent amendments. Copies of the executed contract and any amendments shall be provided to all parties to the contract.</p> <p>(e) [Source: HRS §514A-83.3; <i>partial</i>.] The resident manager or managing agent or board of directors shall keep an accurate and current list of members of the unit owners' association and their current addresses and the names and addresses of the vendees under an agreement of sale, if any. The list shall be maintained at a place designated by the board of directors and a copy shall be available, at cost, to any member of the association as provided in the declaration or bylaws or rules and regulations or, in any case, to any member who furnishes to the resident manager or managing agent or board of directors a duly executed and acknowledged affidavit stating that the list (1) will be used by such owner personally and only for the purpose of soliciting votes or proxies or providing information to other owners with respect to association matters, and (2) shall not be used by such owner or furnished to anyone else for any other purpose.</p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §§514A-83.3, 514A-84(c), 514A-84.5, 514A-85(a), and 514A-85(b) are the sources of this section.</p> <p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>1. Access to association documents and records is a key to self-governance by the condominium community.</p> <p>2. We need to authorize/encourage the provision of association documents and records on-line. This should help end most access disputes.</p> <p>3. A condominium unit owner suggests that the recodification should require that: a) boards distribute (as opposed to simply make available) year-end financial statements 30 days before annual meetings; b) budgets be distributed 30 days before the fiscal year (noting that maintenance fee increase notices must be sent 30 days before being imposed); and</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>c) association records be maintained on the same island where the project is located (for review and copying by unit owners).</p> <p>[Note that the last suggestion might be unnecessary if records are available on-line and unit owners have access to computers. Note further that all public libraries have computers with Internet access.]</p>	
	<p>§ ____: 5-42 [5-44]. Same; Availability; Disposal; Prohibitions. (a) [Source: HRS §514A-83.5 (a).] The association's most current financial statement and minutes of the board of directors' meetings, once approved, shall be available to any owner at no cost or on twenty-four hour loan, at a convenient location designated by the board of directors.</p> <p>(b) [Source: HRS §514A-83.5(b).] Minutes of meetings of the board of directors and the association for the current and prior year shall be available for examination by unit owners at convenient hours at a place designated by the board. Minutes of meetings shall include the recorded vote of each board member on all motions except motions voted on in executive session. [Deleted language already in § ____: 5-21(a).] Copies of meeting minutes shall be provided to any owner upon the owner's request provided that the owner pay a reasonable fee for duplicating, postage, stationery, and other administrative costs associated with handling the request.</p> <p>(c) [Source: HRS §514A-83.5(c).] Financial statements, general ledgers, the accounts receivable ledger, accounts payable ledgers, check ledgers, insurance policies, contracts, and invoices of the unit owners' association for the current and prior year and delinquencies of ninety days or more shall be available for examination by unit owners at convenient hours at a place designated by the board; provided that:</p> <p>(1) The board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interests of the association or its members or both; and</p> <p>(2) Owners pay for administrative costs in excess of eight hours per year.</p> <p>Copies of these items shall be provided to any owner upon the owner's request, provided that the owner pay a reasonable fee for duplicating, postage, stationery, and other administrative costs associated with handling the request.</p> <p>(d) [Source: HRS §514A-83.5(d).] Owners shall also be permitted to view proxies, tally sheets, ballots, owners' check-in lists, and the certificate of election for a period of thirty days following any association meeting, and not earlier; provided that:</p> <p>(1) The board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interest of the association or its members or both; and</p> <p>(2) Owners pay for administrative costs in excess of eight hours per year.</p> <p>Proxies and ballots may be destroyed following the thirty-day period. Copies of tally sheets, owners' check-in lists, and the certificates of election from the most recent association meeting shall be provided to any owner upon the owner's request, provided that the owner pay a reasonable fee for duplicating, postage, stationery, and other administrative costs associated with handling the request.</p> <p>(e) [Source: HRS §514A-84.5.] The managing agent shall provide copies of those documents to owners, prospective purchasers and their prospective agents during normal business hours, upon payment to the managing agent of a reasonable charge to defray any administrative or duplicating costs. In the event that the project is not managed by a managing agent, the foregoing requirements shall be undertaken by a person or entity, if any, employed by the unit owners' association, to whom this function is delegated.</p> <p>(f) [Source: HRS §514A-84(c); partial; language also incorporated in § ____: 5-24 above.] Prior to the organization of the unit owners' association, any unit owner may request to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>(g) [Source: HRS §514A-83.5(e).] Owners may file a written request with the board to examine other documents. The board shall give written authorization or written refusal with an explanation of the refusal within thirty calendar days of receipt of the request.</p> <p>(h) [Source: New.] <u>An association may comply with this section by making information available to unit owners, at the option of the unit owner and at no cost, through an Internet site.</u></p> <p>(i) <i>Disposal.</i> [Source: HRS §514A-85(c).] A managing agent employed or retained by one or more condominium associations may dispose of the records of any condominium association which are more than five years old without liability if the managing agent first provides the board of directors of the condominium association affected with written notice of the managing agent's intent to dispose of the records if not retrieved by the board of directors within sixty days, which notice shall include an itemized list of the records which the managing agent intends to dispose of. <u>[Some stakeholders suggest a 7 year retention period.]</u></p> <p>(j) <i>Prohibitions.</i> [Source: HRS §514A-85(d).] No person shall knowingly make any false certificate, entry, or memorandum upon any of the books or records of any managing agent or association. No person shall knowingly alter, destroy, mutilate, or conceal any books or records of a managing agent or association.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §§514A-83.5, 514A-84(c), 514A-84.5, and 514A-85(c) and (d) are the sources of this section.</p> <p>2. Subsection (d) has been amended to make it clear that no one (except the secretary and managing agent pursuant to §__: 5-17(d)) is permitted to view proxies and tally sheets <u>before</u> the meeting at which they are to be used.</p>	
	<p>§ __: 5-43 [5-44]. Association as Trustee. [Source: UCA/UCIOA §3-119.] With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <p>1. UCA/UCIOA §3-119 is the source of this section. The official comment to UCA (1980) §3-119 should be used for guidance in interpreting this section. [Note: UCIOA (1994) does not have any official comments to §3-119 (Association as Trustee).]</p> <p align="center">UCA (1980) Comment</p> <p>Based on Section 7 of the Uniform Trustees' Powers Act, this section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under Section 3-113 for insurance proceeds, or Section 2-118 following termination.</p>	
	<p>§ __: 5-44 [5-46]. Pets. (a) [Source: HRS §514A-82.6(a).] Any unit owner who keeps a pet in the owner's unit pursuant to a provision in the bylaws which allows owners to keep pets or in the absence of any provision in the bylaws to the contrary may, upon the death of the animal, replace the animal with another and continue to do so for as long as the owner continues to reside in the owner's unit or another unit subject to the same bylaws.</p> <p>(b) [Source: HRS §514A-82.6(b).] Any unit owner who is keeping a pet pursuant to subsection (a) as of the effective date of an amendment to the bylaws which prohibits owners from keeping pets in their units shall not be subject to the prohibition but shall be entitled to keep the pet and acquire new pets as provided in subsection (a).</p> <p>(c) [Source: HRS §514A-82.5(a)(4)(5).] The bylaws may include reasonable restrictions or prohibitions</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>against excessive noise or other problems caused by pets on the property and the running of pets at large in the common areas of the property. No animals described as pests under section 150A-2, or animals prohibited from importation under section 141-2, 150A-5, or 150A-6 shall be permitted.</p> <p>(d) [Source: HRS §514A-82.5(a)(1)(2)(3).] Whenever the bylaws do not forbid unit owners from keeping animals as pets in their units, the bylaws shall not forbid the tenants of the unit owners from keeping pets in the units rented or leased from the owners; provided that:</p> <ul style="list-style-type: none"> (1) The unit owner agrees in writing to allow the unit owner's tenant to keep a pet in the unit; (2) The tenants may keep only those types of pets which may be kept by unit owners; and (3) The bylaws may allow each owner or tenant to keep only one pet in the unit. <p>(e) [Source: HRS §514A-82.5(b).] Any amendments to the bylaws pertaining to pet restrictions or prohibitions which exempt circumstances existing prior to the adoption of the amendments shall apply equally to unit owners and tenants.</p> <p><u>(f) [Source: New.] Nothing in this section shall prevent a unit owners' association from immediately acting to remove vicious animals to protect persons or property.</u></p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. HRS §§514A-82.5 and 514A-82.6 are the sources of this section. 2. <i>See</i>, HRS Chapter 515 (Discrimination in Real Property Transactions), which allows a resident to keep a guide, signal, or service dog in a "no pets" apartment as long as the resident provides, to the apartment management or board of directors of the owners association, medical evidence or a physician's certification that: <ol style="list-style-type: none"> a. The resident has a physical or mental impairment that substantially limits one or more of the resident's major life activities; b. Has a record of having such impairment; or c. Is regarded as having such impairment and that allowing the resident to have a pet would be a reasonable and necessary accommodation for the resident's equal opportunity to use and enjoy the apartment. <p>The federal Fair Housing Act has similar provisions. <i>See also</i>, HR 98, HD 1 (2000), "House Resolution Urging Landlords, Associations of Apartment Owners, and Tenants With and Without Pets, to Respect Each Others' Rights and to Work Together to Provide for the Needs of All Owners and Tenants."</p>	
	<p>§ ____: 5-45 [5-47]. Attorneys' Fees, Delinquent Assessments, and Expenses of Enforcement. [Source: HRS §514A-94.] (a) All costs and expenses, including reasonable attorneys' fees, incurred by or on behalf of the association for:</p> <ul style="list-style-type: none"> (1) Collecting any delinquent assessments against any owner's unit; (2) Foreclosing any lien thereon; or (3) Enforcing any provision of the declaration, bylaws, house rules, and <u>the Condominium Property Act</u> <u>this chapter</u>; or the rules of the real estate commission; <p>against an owner, occupant, tenant, employee of an owner, or any other person who may in any manner use the property shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association.</p> <p>(b) If any claim by an owner is substantiated in any action against an association, any of its officers or directors, or its board of directors to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an owner shall be awarded to such owner; provided that no such award shall be made in any derivative action unless:</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>(1) The owner first shall have demanded and allowed reasonable time for the board of directors to pursue such enforcement; or</p> <p>(2) The owner demonstrates to the satisfaction of the court that a demand for enforcement made to the board of directors would have been fruitless.</p> <p>If any claim by an owner is not substantiated in any court action against an association, any of its officers or directors, or its board of directors to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an association shall be awarded to the association, unless [the action was filed in small claims court or prior to] before filing the action in [a higher] court the owner has first submitted the claim to mediation, or to arbitration under [part VII of this chapter] <u>subpart 4</u>, and made a good faith effort to resolve the dispute under any of those procedures.</p> <p>[(c) Anyone contracted by the association of apartment owners to collect delinquent assessments against any owner's apartment shall not share in any portion of any penalties or late charges collected.]</p>	
	<p align="center">BRRAC's [Real Estate Commission's] Comment</p> <ol style="list-style-type: none"> 1. HRS §514A-94 is the sources of this section. 2. Some members may feel that because they are members of the association, and because the attorney represents the association, the attorney represents them too. The association attorney is, however, actually general corporate counsel whose client is the corporation/association, not the board of directors or any of the association's membership. 3. A stakeholder was concerned about deleting the reference to Small Claims Court in subsection (c). Note, however, that Small Claims Court does not award attorneys' fees. Furthermore, Small Claims Court does not have jurisdiction over equity claims; it only awards money damages (e.g., it does not order injunctions). 4. HRS §514A-94(c) has been deleted since the federal Fair Debt Collection Practices Act and HRS §§443B (Collection Agencies) and 480D (Collection Practices) regulate this area. 	
	<p>Subpart 4. ALTERNATIVE DISPUTE RESOLUTION</p>	
	<p>§ ____: 5-46 [5-5]. Mediation. (a) [Source: HRS §514A-121.5 as amended by Act 142 (SLH, 2002); <i>modified</i>.] If [a unit owner or the board of directors] <u>any party</u> requests mediation of a dispute <u>concerning or involving one or more unit owners and a unit owners' association, its board of directors, managing agent, or one or more other unit owners relating to</u> the interpretation or enforcement of the unit owners' association declaration, bylaws, or house rules, or involving this part, the other party in the dispute shall be required to participate in mediation. <u>Each party shall be wholly responsible for its own costs of participating in mediation; unless at the end of the mediation process, both parties agree that one party shall pay all or a specified portion of the mediation costs.</u> If [an owner or the board] <u>a party</u> refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorney's fees.</p> <p>(b) [Source: HRS §421J-13(b).] Nothing in subsection (a) shall be interpreted to mandate the mediation of any dispute involving:</p> <ol style="list-style-type: none"> (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 of directors, 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 of directors would be unavailable for defense or judgment because mediation was pursued. 	<p>[Compare: HRS §514A-121.5 (Mediation). 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, or involving section 514A-82(b)(1) to (13), 514A-82.1, 514A-82.15, 514A-82.3, 514A-82.5, 514A-82.6, 514A-83, 514A-83.1, 514A-83.2, 514A-83.3, 514A-83.4, 514A-83.5, 514A-84, or 514A-84.5, the other party in the dispute shall be required to participate in mediation. <u>Each party shall be wholly responsible for its own costs of participating in mediation; unless at the end of the mediation process, both parties agree that one party shall pay all or a specified portion of the mediation costs.</u> If an owner or the board refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorney's fees in accordance with section 514A-94.]</p>

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>(c) [Source: HRS §421J-13(c).] 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 [association and the member] parties.</p>	
	<p>BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §514A-121.5 is the source of subsection (a). HRS §421J-13 (Planned Community Associations, Mediation of disputes) is the source of subsections (b) and (c). These provisions have been modified to allow any party to request mediation under this section.</p> <p>2. Note: Pursuant to HRS §514A-131(a)(3) (Condominium Education Trust Fund), the Commission has established a special condominium mediation program with the Mediation Center of the Pacific for the mediation of condominium disputes. Parties must pay a nominal fee to use the program.</p>	
	<p>§ ____: 5-47 [5-6]. Arbitration. (a) [Source: HRS §514A-121.] At the request of any party, any dispute concerning or involving one or more unit owners and a unit owners' association, its board of directors, 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. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and the provisions of chapter 658A; provided that the [Condominium Property Regime Rules on Arbitration of Disputes of the American Arbitration Association] <u>rules of the arbitration service conducting the arbitration</u> shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658A, chapter 658A shall prevail; provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect.</p> <p>(b) Nothing in subsection (a) shall be interpreted to mandate the arbitration of any dispute involving:</p> <ol style="list-style-type: none"> (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 shall, in those capacities, 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 ____: 5-34(d) 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 a unit owners' association, a board of directors, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the unit owners' association or its board of directors 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 	

Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
<p>by arbitration.</p> <p>(c) <i>Determination of unsuitability.</i> [Source: HRS §514A-122.] At any time within twenty days of being served with a written demand for arbitration, any party so served may apply to the circuit court in the judicial circuit in which the condominium is located for a determination that the subject matter of the dispute is unsuitable for disposition by arbitration.</p> <p>In determining whether the subject matter of a dispute is unsuitable for disposition by arbitration, a court may consider:</p> <ul style="list-style-type: none"> (1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute; (2) Problems referred to the court where court regulated discovery is necessary; (3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter; (4) The fact that the matter to be arbitrated is only part of a dispute involving other parties or issues which are not subject to arbitration under this section; (5) Any matters of dispute where disposition by arbitration, in the absence of complete judicial review, would not afford substantial justice to one or more of the parties. <p>Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed \$200.</p> <p>(d) <i>Determination of insurance coverage.</i> [Source: HRS §514A-123.] In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under subsection (b)(7) any party to an arbitration may file a complaint for declaratory relief against the involved insurer or insurers for a determination of whether insurance coverage is unavailable due to the pursuit of action by arbitration. The complaint shall be filed with the circuit court in the judicial circuit in which the condominium is located. The insurer or insurers shall file an answer to the complaint within twenty days of the date of service of the complaint and the issue shall be disposed of by the circuit court at a hearing to be held at the earliest available date; provided that the hearing shall not be held within twenty days from the date of service of the complaint upon the insurer or insurers.</p> <p>(e) <i>Costs, expenses, and legal fees.</i> [Source: HRS §514A-124.] Notwithstanding any provision in this chapter to the contrary, the declaration or the bylaws, the award of any costs, expenses, and legal fees by the arbitrator shall be in the sole discretion of the arbitrator and the determination of costs, expenses and legal fees shall be binding upon all parties.</p> <p>(f) <i>Award; confirming award.</i> [Source: HRS §514A-125.] The award of the arbitrator shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and shall be served by the arbitrator on each of the parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court of the judicial circuit in which the condominium is located for an order confirming the award. The court shall grant the order confirming the award pursuant to section 658A-22, unless the award is vacated, modified, or corrected, as provided in sections 658A-20, 658A-23, and 658A-24, or a trial de novo is demanded under subsection (h), or the award is successfully appealed under subsection (h). The record shall be filed with the motion to confirm award, and notice of the motion shall be served upon each other party or their respective attorneys in the manner required for service of notice of a motion.</p> <p>(g) Findings of fact and conclusions of law. [Source: HRS §514A-126.] Findings of fact and conclusions of law, as requested by any party prior to the arbitration hearing, shall be promptly provided to the requesting party upon payment of the reasonable cost thereof.</p> <p>(h) <i>Trial de novo and appeal.</i> [Source: HRS §514A-127.]</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	Notes
	<p>(1) The submission of any dispute to an arbitration under this section shall in no way limit or abridge the right of any party to a trial de novo.</p> <p>(2) Written demand for a trial de novo by any party desiring a trial de novo shall be made upon the other parties within ten days after service of the arbitration award upon all parties <u>and the trial de novo shall be filed in circuit court within one month of the written demand. Failure to meet these deadlines shall preclude a party from demanding a trial de novo.</u></p> <p>(3) The award of arbitration shall not be made known to the trier of fact at a trial de novo.</p> <p>(4) In any trial de novo demanded under paragraph (2), if the party demanding a trial de novo does not prevail at trial, the party demanding the trial de novo shall be charged with all reasonable costs, expenses, and attorneys' fees of the trial. When there is more than one party on one or both sides of an action, or more than one issue in dispute, the court shall allocate its award of costs, expenses and attorneys' fees among the prevailing parties and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity.</p> <p>(5) Any party to an arbitration under this section may apply to vacate, modify, or correct the arbitration award for the grounds set out in chapter 658A. All reasonable costs, expenses, and attorneys' fees on appeal shall be charged to the nonprevailing party.</p>	
	<p style="text-align: center;">BRRAC's [Real Estate Commission's] Comment</p> <p>1. HRS §§514A-121 (Arbitration of disputes), 514A-122 (Determination of unsuitability), 514A-123 (Determination of insurance coverage), 514A-124 (Costs, expenses and legal fees), 514A-125 (Award; confirming award), 514A-126 (Findings of fact and conclusions of law), and 514A-127 (Trial de novo and appeal) are the sources of this section.</p> <p>2. Stakeholders have commented that HRS Chapter 514A's mandatory arbitration provisions are impractical and expensive in most cases – particularly with the trial de novo provision of HRS §514A-127. The BRRAC subcommittee considered deleting the arbitration section, but decided to keep it with a few amendments to the trial de novo provisions. <u>Further comparison with the new arbitration statute (Uniform Arbitration Act) is necessary.</u></p> <p>3. Real Estate Branch Senior Condominium Specialist Cynthia Yee believes that, before commencement of proceedings, the arbitrator should provide the parties with an explanation of nonbinding arbitration and the resulting impact on trial de novo.</p> <p>4. Some members of the condominium community have strongly suggested that a “Condominium Court” be established to help resolve condominium disputes (either as small claims court is organized, as a part of district court; or as a hearings officer, like existing DCCA hearings officers). (There is a split of opinion on the BRRAC) At this point, the Commission is not considering or researching proposals that increase the cost and size of government. [Note: For an excellent discussion of various condominium dispute resolution possibilities, <u>see, Condominium Dispute Resolution: Philosophical Considerations and Structural Alternatives – An Issues Paper for the Hawaii Real Estate Commission</u>, by Gregory K. Tanaka (January 1991). It appears to be clear that some sort of “dispute triage” is desirable. As noted above, however, figuring out how to pay for the “dispute triage” is critical.]</p> <p>4. Finding an alternative dispute resolution mechanism that works for common interest communities is one of the initial priorities of the California Law Revision Commission's research into improving their common interest community law (the Davis-Stirling Act). The Commission [Legislature] can choose to build on their work.</p>	
	<p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>1. HRS §514A-90.6 was incorporated in Recodification Draft #1 §2-106.1. It is now §____: <u>5-39.</u></p> <p>2. The essence of HRS §514A-98 (False statement) is incorporated in Part III – Administration and Registration of Condominiums. [See, e.g., §____: <u>3-16(a)(4)</u>]. The language has been deleted from Part V.</p> <p>3. HRS §514A-99 (Rules) is deleted from Part V since it is covered under Part III – Administration and Registration</p>	

	Part V. Management of Condominium (Recodification Public Hearing Discussion Draft)	<u>Notes</u>
	of Condominiums. [See, §___: 3-9 (“General Powers and Duties of Agency”).]	