

Recodifying Hawaii's Condominium Property Regimes Law

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What is the Problem We're Trying to Fix?

In 1961, Hawaii became the first state to pass a law enabling the creation of condominiums. The 1961 "Horizontal Property Regime" law consisted of 33 sections covering a little more than 3 pages in the Revised Laws of Hawaii. Since that time, the law has been amended constantly. Entering the 2002 legislative session, Hawaii's "Condominium Property Regime" law consisted of 118 sections taking up 98 pages in the Hawaii Revised Statutes (HRS). As noted by the 2000 Legislature, "[t]he present law is the result of numerous amendments enacted over the years made in piecemeal fashion and with little regard to the law as a whole." (*See*, Act 213, SLH 2000.)

The 2000 Legislature recognized that "[Hawaii's] condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micromanages condominium associations." Consequently, the Legislature directed the Hawaii Real Estate Commission to examine Hawaii's condominium property regimes law and submit draft legislation to the 2003 Legislature to "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law." (Act 213, SLH 2000) About a year and a half ago, the Commission embarked on its ambitious effort to rewrite Hawaii's Condominium Property Act (HRS Chapter 514A).

Why Should We Care?

- 1. Prevalence of condominium ownership in Hawaii.** 25% of Hawaii's housing units are held in condominium ownership. For decades, Hawaii has had the highest percentage of condominium housing units in the United States of America. [*See, Community Associations Factbook*, by Clifford J. Treese (1999), at page 18.] This alone makes the recodification project extremely important for the citizens of Hawaii.
- 2. Importance to efficient use of Hawaii's limited land resources.** As a very flexible form of real estate ownership, condominiums (especially traditional ones going up rather than out), have helped policymakers to discourage sprawl while still providing home ownership opportunities for many in our urban areas. Consistent with State and local government land use policies, the condominium form of ownership is a valuable tool in helping to develop higher density/lower per-unit cost homeownership opportunities (i.e., creating more affordable housing). Of course, condominiums encompass the entire spectrum of homeownership opportunities – from affordable to luxury units. All of this is important for an island state with limited land area.
- 3. Importance to Hawaii's housing stock and growth policies (e.g., private provision of "public" facilities and services).** The rapid growth of common interest ownership communities (condominiums, cooperatives, and planned communities) since 1960 goes hand in hand with government policy for much of the past 30-40 years dictating that new development "pay its own way." Condominiums and other common interest ownership communities (with their regimes of privately enforceable use restrictions and financial obligations paying for formerly "public facilities" such as roads, trash collection, and recreational areas) have become a critical part of our land use fabric. Indeed, virtually all new development in Hawaii consists of common interest ownership communities.

Given the importance of condominiums to the quality of life of Hawaii's people, it is important that we recodify our condominium law in ways that improve life for those who build, sell, buy, manage, and live in condominiums.

Basic Concepts of Condominium Property Laws

Preliminarily, it is useful to understand exactly what a “condominium property regimes law” is – and what it isn’t. A condominium property regimes law is a land *ownership* law, a *consumer protection* law, and a community *governance* law. It is not a land *use* law (i.e., it does not govern what structures may be built on real property; separate state and county land use laws control – or should control – land use matters).

A condominium property regimes law is essentially an *enabling* law, allowing people to:

- Own real estate under the condominium form of property ownership (i.e., a form of real property ownership where each individual member holds title to a specific unit and an undivided interest as a “tenant-in-common” with other unit owners in common elements such as the exterior of buildings, structural components, grounds, amenities, and internal roads and infrastructure);
- Protect purchasers through adequate disclosures; and
- Manage the ongoing affairs of the condominium community.

The ability to build, sell, buy, borrow/lend money, insure title, insure property, and more are all part of real property ownership and, therefore, part of condominium law.

Current Status

In January 2002, the Commission completed its initial draft of the recodification. The Uniform Condominium Act (1980), with appropriate changes incorporated from the Uniform Common Interest Ownership Act (1994), served as the basis for Recodification Draft #1. Where appropriate, we also incorporated provisions from HRS Chapter 514A, other jurisdictions’ laws, and the Restatement of the Law, Third, Property (Servitudes).

Recodification Draft #1 provides a starting point and framework from which to: 1) work on specific problems, and 2) continue our discussions on improving Hawaii’s condominium law. Some portions are more complete than others, with Article 3 (Management of Condominium) needing a lot more work integrating provisions of HRS Chapter 514A and suggestions from stakeholders.

A Blue Ribbon advisory committee made up of attorneys whose practices, combined, cover the full spectrum of condominium law, is currently reviewing Recodification Draft #1. Based on feedback we’ve received from the advisory committee, realtors, property managers, and others, the Commission has decided to use HRS Chapter 514A (rather than the uniform laws) as the base for most of the recodification (i.e., general provisions; creation, alteration, and termination of condominiums; protection of purchasers; administration and registration of condominiums; and condominium management education fund). At this point, the Uniform Condominium Act and Uniform Common Interest Ownership Act remain as the base for condominium governance matters.

As always, we are interested in learning what problems you have with HRS Chapter 514A and what solutions you might suggest. For your reference, Recodification Draft #1, our recodification workplan, timetable, base working document [a comparison of the Uniform Common Interest Ownership Act (UCIOA), Uniform Condominium Act (UCA), and HRS Chapter 514A], and other recodification materials are available on our website - <http://www.state.hi.us/hirec/>.

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What Happens Next?

We are now targeting mid-August to complete a second draft of the recodification. The Commission then plans to hold public hearings on the proposed condominium law in each of the counties (probably some time in September or October). We will consider the public hearing comments and work on a third draft of the recodification. The Commission should submit a final report and proposed recodification bill to the Legislature twenty days before the start of the 2003 legislative session. (The 2003 regular session convenes on 1/15/03, so the recodification final report and proposed bill should be submitted by December 26, 2002.)

Special Note re: Management of Condominiums in the Recodification

“Every [unit owners’ association] has three functions – to serve as a business, a governance structure, and a community.”

~ *Community Associations Factbook (1999)*

As explained in the *Community Associations Factbook (1999)*, the business, governance, and community functions of community associations (including associations of apartment owners) 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”. “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. We will keep these functions and principles in mind as we work on the provisions for management of condominiums.

The philosophy guiding our condominium governance provisions continues to be **minimal government involvement** and **self-governance** by the condominium community. Essentially, this means that we must ensure that the condominium community (both owners and management) has the tools with which to govern itself.

[Note: This does not 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; others may more appropriately be handled in condominium governing documents or other private mechanisms.]

Special Note re: Need to conform to underlying Land Use Laws

Hawaii’s counties (particularly the Neighbor Island counties) have long complained that developers were using HRS Chapter 514A to circumvent underlying county land use laws. However, the counties have always had the power to regulate the *uses* of land pursuant to their police powers (i.e., their powers to protect the public health and safety – the legal basis for zoning laws) under HRS Chapter 46. [See, HRS §§46-1.5(13) and 46-4.] HRS §514A-1.6, passed by the Legislature in 2000, simply made this explicit in the condominium property regime law.

There appears to be quite a bit of confusion over the fact that condominium property is a land *ownership*, as opposed to a land *use*, concept. In response to our request for comments from the community, various parties have asked that Hawaii’s condominium property regime law be used to ensure compliance with land *use* laws (e.g., HRS Chapter 205 and county zoning, subdivision, and building ordinances). The suggestions of two of these parties – the State Department of Business, Economic Development & Tourism (DBEDT) and the County of Hawaii – are described below.

a. DBEDT's Suggestions

DBEDT has suggested that: 1) the statutory language of HRS §514A-1.6 be retained; 2) HRS §514A-1.6 be amended to add language requiring conformance of condominium property regimes with HRS Chapter 205; 3) the statutory language of HRS §514A-45 be retained; 4) counties be afforded the opportunity to review condominium property regime site or parcel plans/maps prior to recordation so that any questions as to conformance with county codes can be examined prior to recordation and the establishment of ownership interests in the units created under a condominium property regime; and 5) we carefully examine how to effectively manage condominium property regimes on agricultural lands, and how State or county laws or codes should be amended to best address the issue. (See, September 20, 2001 letter from DBEDT – Office of Planning to Gordon M. Arakaki.)

b. County of Hawaii's Suggestions

The County of Hawaii has suggested that Hawaii's condominium law be amended to: 1) require county certification of compliance with applicable codes for all condominium projects before final public reports may be issued (not just condominium conversions, as is currently the case under HRS §514A-40); 2) require minimum value for condominium apartments (to prevent "toolshed" apartments); 3) explicitly require that condominium property regimes follow county subdivision codes; and 4) ensure that county planning departments are allowed to comment on notice of intention for all condominium projects, at an early stage. (See, May 29, 2001 letter from County of Hawaii Planning Department to Mitchell A. Imanaka and Gordon M. Arakaki.)

DBEDT-OP, the County of Hawaii, and others have raised legitimate concerns over the current interplay between HRS Chapter 514A and state and county land use laws. The question remains how to properly address the problem. In crafting a provision to prevent abuse of the condominium property regimes law as it relates to underlying land use laws, we should take the following factors into consideration:

- Purpose of Condominium Property Regime Law. As previously noted, a condominium property regimes law is a land *ownership* law, a *consumer protection* law, and a *community governance* law. It is not a land *use* law (i.e., it does not govern what structures may be built on real property; separate state and county land use laws control – or should control – land use matters). As a consumer protection law, the primary purpose of Hawaii's current condominium property regimes law is to make sure that buyers know what they are buying. Theoretically, if a sophisticated buyer wants to take a chance on being able to get government approval to build a structure that is not allowed under State or county land use laws at the time of purchase, that should be the buyer's choice. The key is to give the buyer a chance to make an informed decision.
- Purpose of the Real Estate Commission. The Real Estate Commission is a consumer protection body established under HRS Chapter 467 (Real Estate Brokers and Salespersons) to regulate real estate licensees. The purpose of HRS Chapter 467 (and the Commission) is to protect the general public in its real estate transactions. Pursuant to HRS §467-3, the Real Estate Commission consists of nine members, at least four of whom must be licensed real estate brokers.
- Need for Appropriate and Consistent Lines of Authority. We need to make sure that the appropriate governmental entities enforce the appropriate laws. County land use agencies – i.e., planning and permitting departments – have the responsibility for ensuring that all proposed development projects comply with county land use laws. County councils have the authority to pass laws giving county land use agencies the tools to ensure that any proposed condominium development complies with county land use laws.

- Timing. Under Hawaii's current law, condominiums are created upon proper filing with Bureau of Conveyances or Land Court. The Real Estate Commission's involvement begins when condominium units are offered for sale.

As we continue our efforts to recodify Hawaii's condominium law, we have tried to keep the condominium law (and the Real Estate Commission) true to its purpose while making it clear that HRS Chapter 205 and county land use laws control land use matters.

It does not appear to be necessary or appropriate to have blanket requirements in the recodified Hawaii condominium law that: 1) make the recordation of all condominium property regime declarations (and other applicable documents) contingent upon county certification of compliance with county land use laws, or 2) make the sale of any condominium units (currently allowed upon the Commission's issuance of an effective date for a project's preliminary, contingent final, or final public report) contingent upon county certification of compliance with county land use laws.

Finally, consistent with the principle that physically identical developments should be treated equally, the counties can draft land use ordinances governing the development of condominiums. The ordinances should hold condominium developments to the same standards as physically identical developments under different forms of ownership. In other words, the ordinances should require that condominium developments follow the same physical requirements (density, bulk, height, setbacks, water, sewerage, etc.) as physically identical developments under existing land use requirements (e.g., zoning, subdivision, building code, and cluster development laws). If a particular development proposal is inconsistent with state and county land use laws under forms of real estate ownership other than condominium ownership, the condominium property regimes law does not and will not somehow allow the project to be built.

Land *use* laws should control land *use* matters. The condominium property regimes law should continue to encompass and control land *ownership*, *consumer protection*, and condominium *community governance* matters. And just as it would be inappropriate for the Real Estate Commission to control land *use* matters, it would be inappropriate for land use agencies to control condominium property regime matters.

Thank You!

The Commission appreciates the commitment of time, interest, and energy that many people and organizations have put into this important effort. With everyone's help and cooperation, we look forward to crafting a condominium property law that we can all live and work with for at least the next 40 years.