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## PART I. GENERAL PROVISIONS

#### SUBPART 1. DEFINITIONS AND OTHER GENERAL PROVISIONS

**§** : 1-1. Short Title. [Source: UCA/UCIOA §1-101; HRS §514A-1.] This chapter may be cited as the Condominium Property Act.

§ \_\_\_: 1-2. Applicability. [Source: UCIOA §1-102.] Applicability of this chapter is governed by subpart 2 of this part.

§ \_\_\_: 1-3. Definitions. [Source: UCA/UCIOA §1-103; HRS §514A-3.] In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this chapter:

"Affiliate of a developer" or "person affiliated with a developer" [Source: HRS §514A-84(a).] is a person that directly or indirectly controls, is controlled by, or is under common control with, the developer.

"Association" or "unit owners' association" [Source: UCA/UCIOA §1-103(3); HRS §514A-3.] means the unit owners' association organized under section : 5-2.

"Commission" [Source: **HRS §514A-3**.] means the real estate commission of the state department of commerce and consumer affairs.

"Common elements" [Source: UCA/UCIOA §1-103(4).] means:

(1) all portions of a condominium other than the units; and

(2) any other interests in real estate for the benefit of unit owners that are subject to the declaration.

"Common expenses" [Source: UCA/UCIOA §1-103(5); HRS §514A-3.] means expenditures made by, or financial liabilities of, the association for operation of the property, together with any allocations to reserves.

"Common interest" [Source: **HRS §514A-3**.] means the percentage of undivided interest in the common elements appertaining to each unit, as expressed in the declaration, and any specified percentage of the common interests means such percentage of the undivided interests in the aggregate.

"Common profits" [Source: **HRS §514A-3**.] means the balance of all income, rents, profits, and revenues from the common elements remaining after the deduction of the common expenses.

"Completion of construction" [Source: **HRS §514A-3**.] means the issuance by the appropriate county official of a certificate of completion, or, if no such certificate is normally issued, then the certification by an architect or engineer licensed in the State of Hawaii that the project is substantially complete, or the court filing of an affidavit of publication and the notice of completion as required by section 507-43, HRS, or by the issuance of a certificate of occupancy.

"Condominium" [Source: **UCA §1-103(7)**.] means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

"Condominium map" [Source: HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] means the floor plans and elevations of the building or buildings containing information as required by section \_\_\_\_: 2-3.

"Converted" and "conversion" [Source: HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] means the submission of a structure to a condominium property regime more than twelve months after construction of the structure has been completed. Completion of construction may be evidenced by the court filing of an affidavit of publication and the notice of completion as required by section 507-43, HRS, or by the issuance of the certificate of occupancy.

"Declaration" [Source: UCA §1-103(10); HRS §514A-3.] means any instruments, however denominated, that create a condominium, including any amendments to those instruments.

"Developer" [Source: HRS §514A-3; HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] means a person who undertakes to develop a real estate condominium project\_including a person who succeeds to the interest of the developer by acquiring a controlling interest in the developer or in the project.

"Development rights" [Source: UCA §1-103(11).] means any right or combination of rights reserved by a developer in the declaration to:

(1) add real estate to a condominium;

(2) create, adjust, or redefine units, common elements, or limited common elements within a condominium;

(3) subdivide units, combine units, or convert units into common elements; or

(4) withdraw real estate from a condominium.

"Limited common element" [Source: **UCA §1-103(16)**.] means a portion of the common elements allocated by the declaration or by operation of section \_\_\_\_: 2-5 for the exclusive use of one or more but fewer than all of the units.

"Majority" or "majority of unit owners" [Source: **HRS §514A-3**.] means the owners of units to which are appurtenant more than fifty percent of the common interests, and any specified percentage of the unit owners means the owners of units to which are appurtenant such percentage of the common interests.

"Managing agent" [Source: **HRS §514A-3**.] means any person retained, as an independent contractor, for the purposes of managing the operation of the property.

"Master deed" or "master lease" [Source: **HRS §514A-3**.] means any deed or lease showing the extent of the interest of the person submitting the property to the condominium property regime.

"Material facts" [Source: HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02).] except as otherwise provided by law, means any fact, defect or condition, past or present, pertaining to the project, unit, or property being offered or proposed to be offered for sale, that would have a direct and substantial negative impact on the value of a unit, or compel a person to not purchase a unit.

"Material respect" [Source: **HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02)**.] means a material fact, not previously disclosed in the most recent developer's public report, that renders the information provided in the developer's public report or in any disclosure statement inaccurate, including changes in the:

(1) size, construction materials, location or permitted use of a unit or its appurtenant limited common element;

(2) size, use, location, or construction materials of the common elements of the project;

(3) common interest appurt enant to the unit; or

(4) any other changes as determined by the commission.

"Operation of the property" [Source: **HRS §514A-3**.] means the administration, fiscal management, and operation of the property and the maintenance, repair, and replacement of, and the making of any additions and improvements to, the common elements.

"Person" [Source: **HRS §514A-3**.] means an individual, firm, corporation, partnership, association, trust, or other legal entity, or any combination thereof.

"Project" [Source: **HRS §514A-3**.] means a real estate condominium project; a plan or project whereby a condominium of two or more units located within the condominium property regime are offered or proposed to be offered for sale.

"Property" [Source: **HRS §514A-3**; **UCIOA §1-103(26)**.] means the land, whether or not contiguous and including more than one parcel of land, but located within the same vicinity, whether leasehold or in fee simple, to the extent of the interest held by the owner or lessee submitting such interest to the condominium property regime, the building or buildings, all improvements and all structures thereon, and all easements, rights, and appurtenances intended for use in connection with the regime, which have been or are intended to be submitted to the regime established by this chapter. "Property" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

"Resident manager" [Source: **New**.] means any person employed on-site to manage the operations of the property.

"Time share unit" [Source: **HRS §514E-1**.] means the actual and promised accommodations, and related facilities, that are the subject of a time share plan as defined in chapter 514E.

"To record" [Source: **HRS §514A-3**.] means to record in accordance with chapter 502, or to register in accordance with chapter 501.

"Unit" [Source: **UCA §1-103(25)**.] means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to section \_\_\_\_: 2-5.

"Unit owner" [Source: **HRS §514A-3**.] means the person owning, or the persons owning jointly or in common, a unit and its appurtenant common interest; provided that to such extent and for such purposes as provided by lease registered under chapter 501 or recorded under chapter 502, including the exercise of voting rights, a lessee of a unit shall be deemed to be the unit owner.

All pronouns used in this chapter include the male, female, and neuter genders and include the singular or plural numbers, as the case may be.

§ \_\_\_: 1-4. Separate Titles and Taxation. (a) [Source: UCA/UCIOA §1-105(a); *compare*, HRS §514A-4 and 514A-5.] If there is any unit owner other than a developer, each unit that has been created, together with its interest in the common elements, constitutes, for all purposes, a separate parcel of real estate.

(b) [Source: UCA/UCIOA §1-105(b); HRS §514A-6.] If there is any unit owner other than a developer, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements. The laws relating to home exemptions from state property taxes are applicable to individual units, which shall have the benefit of home exemption in those cases where the owner of a single-family dwelling would qualify. Property taxes assessed by the State or any county shall be assessed and collected on the individual units and not on the property as a whole. Without limitation of the foregoing, each unit and its appurtenant common interest shall be deemed to be a "parcel" and shall be subject to separate assessment and taxation for all types of taxes authorized by law, including, but not limited to, special assessments.

(c) [Source: **UCA/UCIOA §1-105(d)**.] If there is no unit owner other than a developer, the real estate comprising the condominium may be taxed and assessed in any manner provided by law.

§ \_\_\_: 1-5. Conformance with State and County Land Use Laws. [Source: UCA/UCIOA §1-106; HRS §514A-1.6; modified.] (a) Any condominium property regime established under this chapter shall conform to the existing underlying state and county land use and zoning laws, regulations, ordinances, and rules for the property to ensure the conformance by owners of lands subject to a condominium property regime with the purposes and provisions of such state and county land use and zoning laws, regulations, ordinances, and rules. Except as provided in subsection (b), provisions of this chapter do not invalidate or modify any provision of any building code, zoning, subdivision, or other state or county land use law, ordinance, rule or regulation governing the use of real estate.

(b) No county land use law, ordinance, rule or regulation shall prevent any person from submitting any property in this State to a condominium property regime and from holding title to lands in this State under a condominium property regime, or from obtaining an effective date for a public report from the commission.

(c) In the case of a property which includes one or more existing structures being converted to condominium status, the condominium property regime shall comply with section \_\_\_\_: 4-3.1(a).

**§** \_\_\_\_: **1-6.** Supplemental General Principles of Law Applicable. [Source: UCA/UCIOA §1-108.] The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.

§ \_\_\_: 1-7. Construction Against Implicit Repeal. [Source: UCA/UCIOA §1-109.] This chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

**§**\_\_\_: **1-8. Severability.** [Source: **UCA/UCIOA §1-111**.] If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provisions or applications, and to this end the provisions of this chapter are severable.

§ \_\_\_\_: 1-9. Obligation of Good Faith. [Source: UCA/UCIOA §1-113.] Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

§ \_\_\_: 1-10. Remedies To Be Liberally Administered. [Source: UCA/UCIOA §1-114.] (a) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. Consequential, special, or punitive damages may not be awarded, however, except as specifically provided in this chapter or by other rule of law.

(b) [Source: **California Civil Code §1370**.] Any deed, declaration, bylaw, or condominium map shall be liberally construed to facilitate the operation of the condominium.

(c) Any right or obligation declared by this chapter is enforceable by judicial proceeding.

# SUBPART 2. APPLICABILITY [Compare: HRS §514A-1.5.]

**§** \_\_\_\_: **1-11. Applicability to New Condominiums.** [Source: **UCIOA §1-201**.] Except as provided in section \_\_\_\_: 1-12, this chapter applies to all condominiums created within this State after the effective date of this chapter. The provisions of chapter 514A do not apply to condominiums created after the effective date of this chapter. Amendments to this chapter apply to all condominiums created after the effective date of this chapter or subjected to this chapter, regardless of when the amendment is adopted.

§ \_\_\_: 1-12. Exception for Small Condominiums. [Source: UCIOA §1-203.] If a condominium contains no more than five units and is not subject to any development rights, it is subject only to sections \_\_\_: 1-4 (Separate Titles and Taxation) and \_\_\_: 1-5 (Conformance with State and County Land Use Laws) unless the declaration provides that the entire chapter is applicable.

**§**\_\_\_: **1-13. Applicability to Pre-Existing Condominiums.** [Source: **UCIOA §1-204**.] Except as provided in section \_\_\_: 1-14 (Exception for Small Pre-Existing Condominiums), sections \_\_\_: 1-4 (Separate Titles and Taxation), \_\_\_: 1-5 (Conformance with State and County Land Use Laws), \_\_\_: 2- \_\_\_ (Merger of Increments), \_\_\_: 5-4(a)(1) through (6) and (11) through (16) (Powers of Unit Owners' Association), \_\_\_: 5-29 (Tort and Contract Liability), \_\_\_: 5-34 (Lien for Assessments), and \_\_\_: 5-40 (Association Records), and section \_\_\_: 1-3 (Definitions) to the extent necessary in construing any of those sections, apply to all condominiums created in this State before the effective date of this chapter; but those sections apply only with respect to events and circumstances occurring after the effective date of this chapter and do not invalidate existing provisions of the declaration, bylaws, condominium map or other constituent documents of those condominiums.

For purposes of this chapter, the terms "condominium property regime" and "horizontal property regime" shall be deemed to correspond to the term "condominium"; the term "apartment" shall be deemed to correspond to the term "unit"; the term "apartment owner" shall be deemed to correspond to the term "unit"; the term "apartment owner" shall be deemed to correspond to the term "unit owner"; and the term "association of apartment owners" shall be deemed to correspond to the term "unit owners' association".

§ \_\_\_: 1-14. Exception for Small Pre-Existing Condominiums. [Source: UCIOA §1-205.] If a condominium created within this State before the effective date of this chapter contains no more than five units and is not subject to any development rights, it is subject only to sections 1-4 (Separate Titles and Taxation) and 1-5 (Conformance with State and County Land Use Laws) unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of the provisions of section \_\_\_: 1-15, in which case all the sections enumerated in section \_\_\_: 1-13 apply to that condominium.

§ \_\_\_: 1-15. Amendments to Governing Instruments. [Source: UCIOA §1-206.] (a) The declaration, bylaws, condominium map or other constituent documents of any condominium created before the effective date of this chapter may be amended to achieve any result permitted by this chapter, regardless of what applicable law provided before this chapter was adopted.

(b) An amendment to the declaration, bylaws, condominium map or other constituent documents authorized by this section must be adopted in conformity with any procedures and requirements for amending the instruments specified by those instruments or, if there are none, in conformity with the

amendment procedures of this chapter. If an amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

# Part II. CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

- § \_\_\_: 2-1. Creation
- § \_\_\_: 2-2. Contents of Declaration
- § \_\_\_\_: 2-3. Condominium Map
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- § \_\_\_\_: 2-16. Merger of Increments
- § \_\_\_: 2-17. Removal from Provisions of This Chapter

# PART II. CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

§ \_\_\_: 2-1. Creation. [Source: HRS §§514A-11, 514A-20; *modified*.] (a) To create a condominium, all of the owners of the fee simple interest in land must execute a declaration submitting the land to the condominium and record the declaration in the bureau of conveyances or, if title to the land is registered pursuant to chapter 501, in the land court.

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

**§** \_\_\_\_: **2-2.** Contents of Declaration. [Source: **HRS §514A-11**; *modified*.] (a) A declaration must describe the following:

- (1) The land submitted to the condominium;
- (2) The number of the condominium map filed concurrently with the declaration;
- (3) The number of units in the condominium;
- (4) The unit number of each unit and common interest appurtenant to each unit;

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

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

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

(8) The condominium's common elements;

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

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

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

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

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

**§** \_\_\_\_: **2-3.** Condominium Map. [Source: **HRS §514A-12**; *partial*.] (a) A condominium map shall be recorded with the declaration. The condominium map must show the following:

(1) A site plan for the condominium, showing the location and layout of all buildings included in the condominium;

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

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

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

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

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

: 2-4. Same; Certification of Architect, Engineer, or Surveyor. [Source: HRS §514A-12; partial, § modified.] The condominium map must bear the statement of a licensed architect, engineer, or surveyor certifying that the condominium map is an accurate copy of portions of the plans of the condominium's building or buildings filed with the government official having jurisdiction over the issuance of permits for the construction of buildings in the county in which the condominium is located. If the buildings or buildings have been built at the time the condominium map is recorded, the certification must also state that, to the best of the architect's, engineer's, or surveyor's knowledge, the condominium map depicts the layout, location, dimensions and numbers of the units substantially as built. If the building or buildings have not been built at the time the condominium map is recorded, within thirty days from the date of completion of the building or buildings, as "date of completion" is defined in section 507-43, or from the date of occupancy of the building or buildings, whichever is earlier, the developer shall execute and record an amendment to the declaration accompanied by a certification of a licensed architect, engineer, or surveyor certifying that the condominium map previously recorded, as amended by the revised pages filed with such amendment, if any, fully and accurately depicts the layout, location, dimensions and numbers of the units substantially as built.

§ \_\_\_: 2-5. Unit Boundaries. [Source: UCA/UCIOA §2-102.] Except as provided by the declaration:

(1) If walls, floors or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings, if not a part of the unit, are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, if not part of the unit, any portion

thereof serving only that unit is a limited common element allocated solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

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

(4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the unit's boundaries, if not part of the unit, are limited common elements allocated exclusively to that unit.

§ \_\_\_\_: 2-6. Leasehold Units. [Source: HRS §514A-13(g); modified.] An undivided interest in the land that is subject to a condominium equal to a unit's common interest may be leased to the unit owner, and the unit and its common interest in the common elements exclusive of the land may be conveyed to the unit owner. The conveyance of the unit with an accompanying lease of an interest in the land shall not constitute a division or partition of the common elements, or a separation of the common interest from its unit. Where a deed of a unit is accompanied by a lease of an interest in the land, the deed shall not be construed as conveying title to the land included in the common elements.

§ \_\_\_: 2-7. Common Interest. [Source: HRS §514A-13(a), (b), and (c).] Each unit shall have the common interest percentage it is assigned in the declaration. Except as provided in sections \_\_\_: 2-2(12) and \_\_\_: 2-16, and except as provided in the declaration, a unit's common interest percentage shall be permanent and remain undivided, and may not be altered or partitioned without the consent of the owner of the unit and the owner's mortgagee, expressed in a duly executed and recorded declaration amendment. The common interest shall not be separated from the unit to which it appertains, and shall be deemed to be conveyed or encumbered with the unit even if the common interest is not expressly mentioned or described in the conveyance or other instrument.

**§** \_\_\_\_: **2-8.** Common Elements. [Source: HRS §514A-13(d); *modified*.] Each unit owner may use the common elements in accordance with the purposes permitted under the declaration, subject to:

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

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

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

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

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

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

§ \_\_\_: 2-9. Limited Common Elements. If the declaration designates any portion of the common elements as limited common elements, those limited common elements shall be subject to the exclusive use of the owner of the unit or units to which they are assigned, subject to the provisions of the declaration and bylaws.

§ \_\_\_: 2-10. Transfer of Limited Common Elements. [Source: HRS §514A-14; *modified*.] Except as provided in the declaration, any unit owner may transfer or exchange a limited common element that is assigned to the owner's unit to another unit. Such a transfer may be made by execution and recordation

of an amendment to the condominium's declaration. Such an amendment need only be executed by the owner of the unit whose limited common element is being transferred and the owner of the unit receiving the limited common element, provided that unit mortgages and leases may also require the consent of mortgagees or lessors, respectively, of the units involved. A copy of any such amendment shall be promptly delivered to the association.

§ \_\_\_: 2-11. Common Profits and Expenses. [Source: HRS §514A-15; modified.] (a) The common profits of the property shall be distributed among, and the common expenses shall be charged to, the unit owners, including the developer, in proportion to the common interest appurtenant to their respective units, except as otherwise provided in the declaration or bylaws. In a mixed-use project containing units for both residential and non-residential use, such charges and distributions may be apportioned in a fair and equitable manner as set forth in the declaration. Except as otherwise provided in the declaration or bylaws, all limited common element costs and expenses, including but not limited to, maint enance, repair, replacement, additions and improvements, shall be charged to the owner of the unit to which the limited common element is appurtenant in an equitable manner as set forth in the declaration.

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

§ \_\_\_\_: 2-12. Metering of Utilities. [Source: HRS §514A-15.5; modified.] (a) Units in a project that includes units designated for both residential and non-residential use shall have separate meters, or calculations shall be made, or both, as may be practicable, to determine the use by the non-residential units of utilities, including electricity, water, gas, fuel, oil, sewerage, air conditioning, chiller water, and drainage\_ and the cost of such utilities shall be paid by the owners of such non-residential units; provided that the apportionment of such charges among owners of non-residential units shall be done in a fair and equitable manner as set forth in the declaration or bylaws. The requirements of this paragraph shall not apply to projects for which construction commenced before January 1, 1978.

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

§ \_\_\_: 2-13. Liens Against Units. [Source: HRS §514A-16; *modified*.] (a) For purposes of this section, "visible commencement of operations" shall have the meaning it has under chapter 507, part II, and a "lien" as used herein means a lien created pursuant to chapter 507, part II.

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

(c) If the developer contracts for work on the common elements, either on its behalf or on behalf of the association prior to the first meeting of the association, then liens arising from such work shall attach to all

units owned by the developer described in the declaration at the time of visible commencement of operations.

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

§ \_\_\_: 2-14. Contents of Deeds or Leases of Units. [Source: HRS §514A-17; *modified*.] Deeds or leases of units adequately describe the property conveyed or leased if they contain the following information:

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

- (2) The unit number of the unit conveyed or leased;
- (3) The common interest of the unit conveyed or leased;

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

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

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

§ \_\_\_\_: 2-15. Blanket Mortgages and Other Blanket Liens Affecting a Unit at Time of First Conveyance or Lease. [Source: HRS §514A-18.] At the time of the first conveyance or lease of each unit, every mortgage and other lien, except any improvement district or utility assessment, affecting both the unit and any other unit shall be paid and satisfied of record, or the unit being conveyed or leased and its common interest shall be released therefrom by partial release duly recorded.

§ \_\_\_: 2-16. Merger of Increments. [Source: HRS §514A-19; modified.] (a) Two or more condominium projects, whether or not adjacent to one another, but which are part of the same incremental plan of development and in the same vicinity, may be merged together so as to permit the joint use of the common elements of the projects by all the owners of the units in the merged projects. A merger may be implemented with the vote or consent that the declaration requires for a merger, pursuant to any reserved rights set forth in the declaration, or upon vote of sixty-seven percent of the common interest.

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

(c) Upon the recording in the office of the assistant registrar of the land court of the State of Hawaii of a certificate of merger that indicates that the fee simple title to the lands of the merged projects are merged, the assistant registrar shall cancel all existing certificates of title for the units in the condominium projects being merged and shall issue new certificates of title for the units in the merged project, covering all of the land of the merged projects. The new certificates of title for the units in the merged condominium shall describe, among other things, each unit's new common interest. The certificate of merger shall at least

set forth all of the units of the merged condominium projects, their new common interests, and to the extent practicable, their current certificate of title numbers in the common elements of the merged condominium projects.

# § \_\_\_\_: 2-17. Removal from Provisions of This Chapter. [Source: HRS §514A-21; modified.] (a) If:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) [Source: HRS §514A-22.] The removal provided for in this section shall in no way bar the subsequent resubmission of the property to this chapter.

# Part III. ADMINISTRATION AND REGISTRATION OF CONDOMINIUMS

- § : 3-1. Administrative Agency
- § : 3-2. Registration Required; Exceptions
- § \_\_\_\_: 3-2.1. Application for Registration
- Inspection by Agency § \_\_\_\_: 3-3.
- § \_\_\_\_: 3-4. Public Report
- Same: Request for Effective Date or Hearing by Developer § \_\_\_\_: 3-5.
- Same; Amendments for Material Changes § \_\_\_\_: 3-6.
- § \_\_\_\_: 3-7. Annual Report
- § \_\_\_: 3-7.1 Expiration of Public Reports
- § \_\_\_\_: 3-8. No Misleading Information
- § \_\_\_\_: 3-9. General Powers and Duties of Agency
- § \_\_\_\_: 3-10. Deposit of Fees
- § : 3-11. Condominium Specialists; Appointment; Duties
- § \_\_\_\_: 3-12. Private Consultants
   § \_\_\_\_: 3-13. Agency Oversight of Public Report
- § \_\_\_\_: 3-14. Investigative Powers of Agency
- § \_\_\_\_: 3-15. Cease and Desist Orders
- § \_\_\_\_: 3-16. Revocation of Registration
- § \_\_\_\_: 3-17. Power to Enjoin
- § \_\_\_\_: 3-18. Penalties
- § \_\_\_\_: 3-19. Limitation of Action
- § \_\_\_\_: 3-20. Condominium Education Trust Fund
- § \_\_\_\_: 3-21. Same; Payments to Trust Fund by Unit Owners' Associations and Developers
- § : 3-22. Same; Management of Trust Fund

# PART III. ADMINISTRATION AND REGISTRATION OF CONDOMINIUMS

§ \_\_\_: 3-1. Administrative Agency. [Source: HRS §514A-3; UCA/UCIOA §5-101.] As used in this chapter, "commission" means the real estate commission of the state department of commerce and consumer affairs, which is an agency within the meaning of chapter 91.

#### : 3-2. Registration Required; Exceptions. [Source: HRS §514A-31; UCA/UCIOA §5-102; HAR § §16-107-2.1, Proposed Rules, Draft #6 (5/17/02).] (a) A developer may not offer or dispose of a unit unless the condominium and the unit are registered with the commission.

(b) Exceptions:

(1) Small condominiums. A condominium consisting of no more than five units and which is not subject to expansion is exempt from the requirements of this section and sections : 3-4, : 3-6, and \_\_\_\_: 3-7.

(2) Bulk sales. The registration requirement of this section shall not apply to the sale of units in bulk. "The sale of units in bulk" is a circumstance where a developer undertakes to develop and then sells a portion of or the developer's entire inventory of units to a purchaser who is not a prospective initial purchaser. The registration requirements of this section and the developer's amended public report requirements of section : 3-6 shall apply to any sale of units to the public following a sale of units in bulk.

§ \_\_\_\_: 3-2.1. Application for Registration. [Source: HRS §514A-32; UCA/UCIOA §5-103(a); modified.] (a) An application for registration must:

(1) be accompanied by a nonrefundable fee as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91; and

(2) contain such documents and information concerning the condominium as may be specified by the commission.

(b) A developer promptly shall file amendments to report any actual or expected material change in any document or information contained in the application.

§ \_\_\_\_: **3-3.** Inspection by Agency. [Source: HRS §§514A-33, -34, -35; *modified*.] (a) After appropriate notification has been made or additional information has been received pursuant to this part, an inspection of the condominium project may be made by the commission.

(b) When an inspection is to be made of projects, the developer shall be required to pay an amount estimated by the commission to be necessary to cover the actual expenses of the inspection, not to exceed \$500 a day for each day consumed in the examination of the project, plus reasonable transportation expenses.

**§**\_\_\_: **3-4. Public Report.** [Source: **HRS §514A-61**; *modified*; <u>see also</u>, *HRS* §§514A-36, 514A-40.] (a) Prior to the issuance of an effective date for a public report, the commission must have received the following:

(1) Nonrefundable fees as provided in rules adopted by the director of commerce and consumer affairs pursuant to Chapter 91.

(2) The public report prepared by the developer disclosing the information specified in section 4-3 and, if applicable, section 4-3.1.

(3) A copy of the deed, master lease, agreement of sale, or sales contract evidencing either that the developer holds the fee and/or leasehold interest in the property or has a right to acquire the same.

(4) Copies of the executed declaration, by laws and condominium map (or if such documents have not been executed, drafts of such documents) that meet the requirements of sections \_\_\_\_: 2-2, \_\_\_: 5-9, and \_\_\_\_: 2-3.

(5) A specimen copy of the proposed contract of sale for units.

(6) An executed copy of an escrow agreement with a third party depository for retention and disposition of purchasers' funds that meets the requirements of section \_\_\_\_: 4-10 (Escrow of Deposits).

(b) The public report may not be used for the purpose of selling any units in the project unless and until the commission issues an effective date for the public report. The commission's issuance of an effective date for a public report shall not be construed to constitute the commission's approval or disapproval of the project, or the commission's representation that all material facts concerning the project have been fully or adequately disclosed, or the commission's judgment of the value or merits of the project.

**§** \_\_\_\_: **3-5. Same; Request for Effective Date or Hearing by Developer.** [Source: HRS §514A-38; *modified.*] If an effective date for a public report is not issued within a reasonable time after compliance with registration requirements, or if the developer is materially grieved by the form or content of the public report, the developer may, in writing, request and shall be given a hearing by the commission within a reasonable time after receipt of such a request.

§ \_\_\_\_: **3-6. Same; Amendments.** [Source: **HRS §514A-41;** *modified.*] (a) After the effective date for a public report has been issued by the commission, if any circumstance occurs which would render the public report misleading to purchasers in any material respect, or if the developer desires to update or change the information set forth in the public report, the developer shall immediately submit to the commission an amendment to the public report, together with such supporting information as may be required by the commission, to update the information contained in the public report, accompanied by a nonrefundable fee as provided in rules adopted by the director of commerce and consumer affairs

pursuant to chapter 91. Within a reasonable period of time, the commission shall issue an effective date for the amended public report or take other appropriate action under this part.

(b) The submission of an amended public report shall not require the developer to suspend sales, however, subject to the power of the commission to order such sales to cease as set forth in section \_\_\_\_: 3-15.

(c) The developer shall provide all prospective purchasers with a true copy of (i) the amendment to the public report, if the prospective purchaser has received copies of the public report and all prior amendments, or (ii) a restated public report including all amendments.

(d) The filing of an amendment to the public report shall not, in and of itself, be grounds for a purchaser to cancel or rescind a sales contract. A purchaser's right to cancel or rescind a sales contract shall be governed by sections \_\_\_\_: 4-5 and \_\_\_\_: 4-6, the terms and conditions of the purchaser's contract for sale, and applicable common law.

**§** \_\_\_\_: **3-7. Annual Report.** [Source: **UCA/UCIOA §5-109**; *modified.*] (a) A developer shall file annually, within thirty days after the anniversary date of the effective date for a public report, a report to update the material contained in the public report. This provision does not relieve the developer of the obligation to file amendments to the public report pursuant to section \_\_\_\_: 3-6.

(b) The developer shall be relieved from filing annual reports pursuant to this section and amendments pursuant to section \_\_\_\_: 3-6 upon the occurrence of the following:

(1) The developer (A) owns or controls units representing less than twenty-five percent of the voting power in the association and has no power to override or veto the acts of the association, to increase the number of units in the project, to cause a merger or consolidation of the project with other projects, or to amend the project documents, (B) has no ownership interest in the project, or (C) has not sold any units in the project and elects not to sell units in the project; and

(2) The developer has filed a final annual report describing the conditions set forth subsection (1) above.

§ \_\_\_: 3-7.1. Expiration of Public Reports. [Source: *New*.] Except as otherwise provided in this chapter, upon issuance of an effective date for a public report or any amendment, the public report and amendment or amendments shall not expire until such time as the developer has sold all units in the project.

§ \_\_\_\_: 3-8. No Misleading Information. [Source: HRS §514A-42; modified.] All documents (including the public report) prepared by or for the developer and submitted to the commission in connection with the developer's registration of the project, and all information contained in such documents, shall be true, complete and accurate in all respects, and shall not contain any misleading information, or omit any information which would render the information or documents submitted to the commission misleading in any material respect.

**§** \_\_\_\_: **3-9.** General Powers and Duties of Agency. [Source: HRS §514A-99; UCA/UCIOA §5-107; *modified.*] (a) The commission may adopt, amend, and repeal rules, assess fees, and issue orders consistent with and in furtherance of the objectives of this chapter. The commission may prescribe forms and procedures for submitting information to the commission.

(b) If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of part III (Administration and Registration of Condominiums) or part IV (Protection of Condominium Purchasers) of this chapter or any of the commission's related rules or orders, the commission, without prior administrative proceedings, may maintain an action in the appropriate court to enjoin that act or practice or for other appropriate relief. The commission is not required to post a bond or prove that no adequate remedy at law exists.

(c) The commission may intervene in any action involving the powers or responsibilities of a developer in connection with any condominium for which an application for registration is on file.

(d) The commission may accept grants in aid from any governmental source and may contract with agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this chapter.

(e) The commission may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the commission's duties.

(f) In issuing any cease and desist order or order rejecting or revoking registration of a condominium, the commission shall state the basis for the adverse determination and the underlying facts.

(g) The commission, in its sound discretion, may require bonding (at appropriate levels over time), escrow of portions of sales proceeds, or other safeguards it may prescribe by its rules to guarantee completion of all improvements which a developer is obligated to complete.

§ \_\_\_: **3-10. Deposit of Fees.** [Source: **HRS §514A-44**; *essentially identical.*] Unless otherwise provided in this chapter, all fees collected under this chapter shall be deposited by the director of commerce and consumer affairs to the credit of the compliance resolution fund established pursuant to section 26-9(o).

§ \_\_\_\_: **3-11. Condominium Specialist; Appointment; Duties.** [Source: **HRS §514A-7**; *identical.*] There are established two permanent condominium specialist positions within the department of commerce and consumer affairs to assist consumers with information, advice, and referral on any matter relating to this chapter or otherwise concerning condominiums. There is also established a permanent secretarial position to provide assistance in carrying out these duties. The condominium specialists and secretary shall be appointed by the director of commerce and consumer affairs without regard to chapters 76 and 77. The condominium specialists and secretary shall be members of the employees retirement system of the State and shall be eligible to receive the benefits of any state or federal employee benefit program generally applicable to officers and employees of the State.

§ \_\_\_: **3-12. Private Consultants.** [Source: **HRS §514A-38**; *in pertinent part, identical.*] The director of commerce and consumer affairs may contract with private consultants for the review of documents and information submitted to the commission pursuant to this chapter. The cost of such review by private consultants shall be borne by the developer.

§ \_\_\_: **3-13.** Agency Oversight of Public Report. [Source: UCA/UCIOA §5-110; *modified*.] (a) The commission at any time may require a developer to alter or supplement the form or substance of a public report to assure adequate and accurate disclosure to prospective purchasers.

(b) The public report may not be used for any promotional purpose before registration and afterwards only if it is used in its entirety. No person may advertise or represent that the commission has approved or recommended the condominium, the public report, or any of the documents contained in the application for registration.

§ \_\_\_\_: 3-14. Investigative Powers. [Source: HRS §514A-46; modified.] If the commission has reason to believe that any person is violating or has violated part III (Administration and Registration of Condominiums) or part IV (Protection of Condominium Purchasers) of this chapter, or the rules of the commission adopted pursuant thereto, the commission may conduct an investigation of the matter and examine the books, accounts, contracts, records, and files of all relevant parties. For the purposes of this examination, the developer and the real estate broker shall keep and maintain records of all sales transactions and of the funds received by the developer and the real estate broker pursuant thereto, and shall make the records accessible to the commission upon reasonable notice and demand.

§ \_\_\_\_: 3-15. Cease and Desist Orders. [Source: HRS §514A-47; modified.] In addition to its authority under section \_\_\_\_: 3-17, whenever the commission has reason to believe that any person is violating or has violated part III (Administration and Registration of Condominiums) or part IV (Protection of Condominium Purchasers) of this chapter, or the rules of the commission adopted pursuant thereto, it may issue and serve upon the person a complaint stating its charges in that respect and containing a notice of a hearing at a stated place and upon a day at least thirty days after the service of the complaint. The person served has the right to appear at the place and time specified and show cause why an order

should not be entered by the commission requiring the person to cease and desist from the violation of the law or the rules of the commission charged in the complaint. If upon the hearing the commission is of the opinion that this chapter or the rules of the commission have been or are being violated, it shall make a report in writing stating its findings as to the facts and shall issue and cause to be served on the person an order requiring the person to cease and desist from the violations. The person, within thirty days after service upon the person of the report or order, may obtain a review thereof in the appropriate circuit court.

§ \_\_\_\_: **3-16.** Revocation of Registration. [Source: UCA/UCIOA §5-106; *essentially identical.*] (a) The commission, after notice and hearing, may issue an order revoking the registration of a condominium upon determination that a developer or any officer or principal of a developer has:

(1) failed to comply with a cease and desist order issued by the commission affecting that condominium;

(2) concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of units in that condominium;

(3) failed to perform any stipulation or agreement made to induce the commission to issue an order relating to that condominium;

(4) misrepresented or failed to disclose a material fact in the application for registration; or

(5) failed to meet any of the conditions described in this part necessary to qualify for registration.

(b) A developer may not convey, cause to be conveyed, or contract for the conveyance of any interest in a unit while an order revoking the registration of the condominium is in effect, without the consent of the commission.

(c) In appropriate cases the commission, in its discretion, may issue a cease and desist order in lieu of an order of revocation.

§ \_\_\_\_: 3-17. Power to Enjoin. [Source: HRS §514A-48; modified.] Whenever the commission believes from satisfactory evidence that any person has violated part III (Administration and Registration of Condominiums) or part IV (Protection of Condominium Purchasers) of this chapter, or the rules of the commission adopted pursuant thereto, it may conduct an investigation on the matter and bring an action in the name of the people of the State in any court of competent jurisdiction against the person to enjoin the person from continuing the violation or engaging therein or doing any act or acts in furtherance thereof.

**§**\_\_\_: **3-18. Penalties.** [Source: **HRS §514A-49**; *modified.*] (a) Any person who violates or fails to comply with part III (Administration and Registration of Condominiums) or part IV (Protection of Condominium Purchasers) of this chapter, is guilty of a misdemeanor and shall be punished by a fine not exceeding \$10,000 or by imprisonment for a term not exceeding one year, or both. Any person who violates or fails, omits, or neglects to obey, observe, or comply with any rule, order, decision, demand, or requirement of the commission under part III (Administration and Registration of Condominiums) or part IV (Protection of Condominium Purchasers) of this chapter shall be punished by a fine not exceeding \$10,000.

(b) In addition to any other actions authorized by law, any person who violates part III (Administration and Registration of Condominiums) or part IV (Protection of Condominium Purchasers) of this chapter or the rules of the commission adopted pursuant thereto shall also be subject to a civil penalty not exceeding \$10,000 for any violation. Each violation shall constitute a separate offense.

§ \_\_\_: 3-19. Limitation of Actions. [Source: HRS §514A-50; *identical*.] No civil or criminal actions shall be brought by the State pursuant to this chapter more than two years after the discovery of the facts upon which such actions are based or ten years after completion of the sales transaction involved, whichever has first occurred.

**§**\_\_\_: **3-20.** Condominium Education Trust Fund. [Source: HRS §514A-131; *essentially identical.*] (a) The commission shall establish a condominium education trust fund that the commission may use for educational purposes. Educational purposes shall include financing or promoting:

(1) Education and research in the field of condominium management, condominium registration, and real estate, for the benefit of the public and those required to be registered under this chapter;

(2) The improvement and more efficient administration of condominium associations; and

(3) Expeditious and inexpensive procedures for resolving condominium association disputes.

(b) The commission may use any and all moneys in the condominium education trust fund for purposes consistent with subsection (a).

**§**\_\_\_: **3-21.** Same; Payments to Trust Fund by Unit Owners' Associations and Developers. [Source: HRS §§514A-40(c), 514A-132; *modified*.] (a) Each project or unit owners' association with more than five units shall pay to the department of commerce and consumer affairs the condominium education trust fund fee on or before June 30 of every odd-numbered year or within thirty days of the unit owners' association first meeting or within one year after the recordation of the purchase of the first unit, as prescribed by rules adopted by the director of commerce and consumer affairs pursuant to chapter 91.

(b) Payments of any fees required under this section shall be due on or before the registration due date and shall be nonrefundable. Failure to pay the required fee by the due date shall result in a penalty assessment of ten per cent of the amount due and the unit owners' association shall not have standing to bring any action to collect or to foreclose any lien for common expenses or other assessments in any court of this State until the amount due, including any penalty, is paid. Failure of a unit owners' association to pay a fee required under this section shall not impair the validity of any claim of the unit owners' association for common expenses or other assessments, or prevent the unit owners' association from defending any action in any court of this State.

(c) [Source: **HRS §514A-40(c)**; *modified*.] Each developer shall pay into the condominium education trust fund a nonrefundable fee of \$5 for each unit in the project. Fees required by this subsection shall be subject to adjustment as prescribed by rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. The project shall not be registered and no effective date for a public report shall be issued until such payment is made.

(d) The department of commerce and consumer affairs shall allocate the fees collected to the condominium education trust fund established pursuant to section \_\_\_\_: 3-20.

**§** \_\_\_\_: **3-22. Same; Management of Trust Fund.** [Source: **HRS §514A-133;** *essentially identical.*] (a) The sums received by the commission for deposit in the condominium education trust fund shall be held by the commission in trust for carrying out the purpose of the fund.

(b) The commission and the director of commerce and consumer affairs may use moneys in the condominium education trust fund to employ necessary personnel not subject to chapters 76 and 77 for additional staff support, to provide office space, and to purchase equipment, furniture, and supplies required by the commission to carry out its responsibilities under this part.

(c) The moneys in the condominium education trust fund may be invested and reinvested together with the real estate education fund established under section 467-19 in the same manner as are the funds of the employees retirement system of the State. The interest from these investments shall be deposited to the credit of the condominium education trust fund.

(d) The commission shall annually submit to the legislature, prior to the convening of each regular session:

(1) A summary of the programs funded during the prior fiscal year and the amount of money in the fund, and

(2) A copy of the budget for the current fiscal year, including summary information on programs which were funded or are to be funded.

## Part IV. PROTECTION OF CONDOMINIUM PURCHASERS

§ \_\_\_\_: 4-1. Applicability; Exceptions § \_\_\_: 4-2. Sale of Units

- § \_\_\_\_: 4-3. Public Report
- § \_\_\_\_: 4-3.1. Same; Special Types of Condominiums
- § \_\_\_: 4-4. Pre-registration Solicitation
- § \_\_\_: 4-5. Requirements for Binding Sales Contracts; Purchaser's Right to Cancel
- § \_\_\_\_: 4-6. Rescission After Sales Contract Becomes Binding
- § \_\_\_: 4-7. Delivery
- § \_\_\_\_: 4-8. Sales Contracts Before Date of Completion
- § \_\_\_\_: 4-9. Refunds Upon Cancellation or Termination
- § \_\_\_\_: 4-10. Escrow of Deposits
- § \_\_\_\_: 4-11. Use of Purchaser Deposits to Pay Project Costs
- § \_\_\_: 4-12. Early Conveyance to Pay Project Costs
- § \_\_\_\_: 4-13. Misleading Statements and Omissions; Remedies

# PART IV. PROTECTION OF CONDOMINIUM PURCHASERS

**§** \_\_\_\_: **4-1. Applicability; Exceptions.** [Source: **UCA/UCIOA §4-101**.] (a) This part applies to all units subject to this chapter, except as provided in subsection (b).

- (b) No public report is required in the case of:
  - (1) a gratuitous disposition of a unit;
  - (2) a disposition pursuant to court order;
  - (3) a disposition by a government or governmental agency;
  - (4) a disposition by foreclosure or deed in lieu of foreclosure;
  - (5) exceptions to registration set forth in section \_\_\_\_: 3-2; or

(6) the sale of a timeshare interest in a timeshare project duly registered under chapter 514E and for which a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser.

**§**\_\_\_: **4-2. Sale of Units.** [Source: **New**; <u>see also</u>, *HRS* **§§514A-31 and 514A-62**.] Except as provided in section \_\_\_: 4-4, no sale or offer of sale of units in a condominium project by a developer shall be made prior to the registration of the project by the developer with the commission, the issuance of an effective date for the project's public report by the commission, and except as provided by law with respect to timeshare units, the delivery of the public report to prospective purchasers. Notwithstanding any other provision to the contrary, this section shall not apply to a time share project duly registered under chapter 514E and for which a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser.

§ \_\_\_: 4-3. Public Report. [Source: HRS §514A-61(a); *modified*; <u>see also</u>, HRS §§514A-36, 514A-40.] (a) A public report must contain:

(1) The name and address of the project, and the name, address, telephone number and electronic mail address (if any) of the developer or the developer's agent;

(2) A statement, pursuant to section \_\_\_\_: 4-8, of the project completion deadline, and the remedies available to the prospective purchaser (including, but not limited to, cancellation of the sales contract) if the date of completion does not occur on or before the completion deadline;

(3) A breakdown of the annual maintenance fees and the monthly estimated cost for each unit, certified to have been based on generally accepted accounting principles;

(4) A description of all warranties for the individual units and the common elements, including the date of initiation and expiration of any such warranties, or a statement that no warranties exist;

(5) A statement of the permitted uses of the units and, if applicable, the number of units planned to be devoted to a particular use;

(6) A description of any rights reserved to the developer or others, including any rights to merge or phase the project; and

(7) Any other facts that would have a material impact on the use or value of a unit or any appurtenant limited common elements or amenities of the project available for an owner's use, or that may be required by the commission.

(b) A developer shall promptly amend the public report to report any material change in the information required by this section.

§ \_\_\_: 4-3.1. Same; Special Types of Condominiums. (a) *Projects containing conversion buildings.* [Source: HRS §514A-61(b); *modified; see also, HRS §514A-40.*] In addition to the information required by section \_\_\_: 4-3, the public report for a project containing any existing structures being converted to condominium status must contain:

(1) Regarding residential units that have been in existence for more than five years:

(A) A statement by the developer, based upon a report prepared by a Hawaii licensed architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the units;

(B) A statement by the developer of the expected useful life of each item reported on in paragraph (A) or a statement that no representations are made in that regard; and

(C) A list of any outstanding notices of uncured violations of building code or other county regulations, together with the estimated cost of curing these violations.

(2) Regarding all structures that have been in existence for more than five years, a verified statement signed by an appropriate county official that:

(A) The structures are in compliance with all zoning and building ordinances and codes applicable to the project at the time it was built, and specifying, if applicable, (i) any variances which have been granted to achieve compliance, and (ii) whether the project contains any legal nonconforming uses or structures as a result of the adoption or amendment of any ordinances or codes; or

(B) Based on the available information, the county official cannot make a determination with respect to the matters described in paragraph (2)(A).

(3) Regarding all projects containing converted units, a statement whether the project is on a lot, or has structures or uses, which do not conform to present zoning requirements.

(b) *Projects on agricultural land*. [Source: **New**.] In addition to the information required by section \_\_\_\_: 4-3, the public report for a project on agricultural land must disclose:

(1) Whether the structures and uses anticipated by the developer's promotional plan for the project are in compliance with all applicable state and county land use laws; and

(2) Whether the structures and uses anticipated by the developer's promotional plan for the project are in compliance with all applicable county real property tax laws, and the penalties for noncompliance.

(c) *Projects containing assisted living facility units.* [Source: **New**.] In addition to the information required by section \_\_\_\_: 4-3, the public report for a project containing any assisted living facility units regulated or to be regulated pursuant to rules adopted under chapter 321-11(10) must disclose:

(1) Any licensing requirements and the impact of such requirements on the costs, operations, management, and governance of the project;

(2) The nature and scope of services to be provided;

(3) Additional costs, directly attributable to such services, to be included in the association's common expenses;

(4) The duration of the provision of such services; and

(5) Any other information the developer deems appropriate to describe the possible impacts on the project resulting from the provision of such services.

§ \_\_\_: 4-4. Pre-registration Solicitation. [Source: New.] Prior to the registration of the project by the developer with the commission, the issuance of an effective date for the project's public report by the commission, and the delivery of the public report to prospective purchasers, and subject to the limitations set forth in paragraphs (1) and (2), the developer may solicit prospective purchasers and enter into non-binding reservation agreements with such prospective purchasers with respect to units in the project. As used in this section, "solicit" means to advertise, to induce or to attempt in whatever manner to encourage a person to acquire an interest in a unit.

(1) Prior to registration of the project with the commission and the issuance of an effective date for the project's public report, the developer shall not collect any monies from prospective purchasers or anyone on behalf of prospective purchasers, whether or not such monies are to be placed in an escrow account, or whether or not such monies would be refundable at the request of the prospective purchaser.

(2) The developer shall not require nor request that a prospective purchaser execute any document other than a non-binding reservation agreement. The reservation agreement may, but need not, specify the unit number of a unit in the project to be reserved and may, but need not, include a price for the unit. The reservation agreement shall not incorporate the terms and provisions of the sales contract for the unit and shall not, by its terms, become a sales contract. Notwithstanding anything contained in the reservation agreement to the contrary, the reservation agreement may be cancelled at any time by either the developer or the prospective purchaser by written notice to the other. The commission may from time to time prepare a form of reservation agreement for use pursuant to this paragraph, and use of the commission-prepared form shall be deemed to satisfy the requirements of the reservation agreement as provided in this paragraph.

§ \_\_\_: 4-5. Requirements for Binding Sales Contracts; Purchaser's Right to Cancel. [Source: New; <u>see also</u>, *HRS* §514A-62.] (a) No sales contract for the purchase of a unit from a developer shall be binding on developer or prospective purchaser until:

(1) The developer has delivered to the prospective purchaser:

(A) a true copy of the public report, including all amendments, with an effective date issued by the commission;

(B) a copy of the recorded declaration and bylaws creating the project, showing the document number or land court document number, or both, as applicable; and

(C) a notice of the prospective purchaser's thirty-day cancellation right on a form prescribed by the commission, which the prospective purchaser can use to exercise the right to cancel or waive the right to cancel; and

(2) The prospective purchaser has waived the right to cancel or is deemed to have waived the right to cancel.

(b) Purchasers have the right to cancel a sales contract at any time up to midnight of the thirtieth day after (i) the date that the purchaser signs the contract, and (ii) all of the items specified in section 4-5(a)(1) have been delivered to the purchaser.

(c) The prospective purchaser may waive the right to cancel, or will be deemed to have waived the right to cancel, by:

- (1) Checking the waiver box on the cancellation notice and delivering it to the developer;
- (2) Doing nothing and letting the thirty day cancellation period expire; or
- (3) Closing the purchase of the unit before the cancellation period expires.

(d) The receipts, return receipts, or cancellation notices obtained under this section shall be kept on file in possession of the developer and shall be subject to inspection at a reasonable time by the commission or its staff or agents for a period of three years from the date the receipt or return receipt was obtained.

§ \_\_\_\_: 4-6. Rescission After Sales Contract Becomes Binding. [Source: HRS §514A-63.] (a) Purchasers shall have a thirty day right to rescind a binding sales contract for the purchase of a unit from a developer if there is a material change in the project which directly, substantially, and adversely affects the use or value of (i) such purchaser's unit or appurtenant limited common elements, or (ii) those amenities of the project available for such purchaser's use. This rescission right shall not apply, however, in the event of any additions, deletions, modifications and reservations including, without limitation, the merger or addition or phasing of a project, made pursuant to the terms of the declaration.

(b) Upon delivery to a prospective purchaser of a description of the material change on a form prescribed by the commission, such purchaser may waive the purchaser's rescission right provided in subsection (a) by (i) checking the waiver box on the option to rescind sales contract instrument, signing it and delivering it to the seller; (ii) doing nothing and letting the thirty-day rescission period expire; or (iii) closing the purchase of the unit before the thirty-day rescission period expires.

(c) In order to be valid, a rescission form must be signed by all purchasers of the affected unit, and be postmarked no later than midnight of the day that is thirty calendar days after the date that purchaser(s) received the rescission form from the seller. In the event of a valid exercise of a purchaser's right of rescission pursuant to this section, the purchaser(s) shall be entitled to a prompt and full refund of any moneys paid.

(d) The rescission form obtained by the seller under this section shall be kept on file in possession of the seller and shall be subject to inspection at a reasonable time by the commission or its staff or agents, for a period of three years from the date of the receipt or return receipt was obtained.

(e) This section shall not preclude a purchaser from exercising any rescission rights pursuant to a contract for the sale of a unit or any applicable common law remedies.

§ \_\_\_\_: 4-7. Delivery. [Source: New.] (a) Delivery to a prospective purchaser shall be made by:

(1) Personal delivery;

(2) Delivery by registered or certified mail with adequate postage, to the prospective purchaser's address; delivery will be considered made three days after deposit in the mail or on any earlier date upon which the return receipt is signed;

(3) Facsimile transmission, if the prospective purchaser has provided a fax number to the developer; delivery will be considered made upon sender's receipt of automatic confirmation of transmission; or

(4) In any other way prescribed by the commission.

(b) Delivery to the developer shall be made by:

(1) Personal delivery;

(2) Delivery by registered or certified mail with adequate postage, to the developer's address; delivery will be considered made upon deposit in the mail;

(3) Facsimile transmission, if the developer has provided a fax number to the prospective purchaser; delivery will be considered made upon sender's receipt of automatic confirmation of transmission; or

(4) In any other way prescribed by the commission.

§ \_\_\_: 4-8. Sales Contracts Before Date of Completion. [Source: New.] If a sales contract for a unit is signed before the date of completion, the sales contract shall contain an agreement of the developer that the date of completion shall occur on or before a completion deadline. The completion deadline may be a specific date, or the expiration of a period of time after the sales contract becomes binding, and may include a right of the developer to extend the completion deadline for *force majeure* as defined in the sales contract. The sales contract shall provide that the prospective purchaser may cancel the sales contract at any time prior to the date of completion, if the date of completion does not occur on or before the completion deadline. The sales contract may provide additional remedies to the prospective purchaser if the date of completion does not occur on or before the completion deadline.

As used in this section, "date of completion" for a unit means the earliest of:

(1) the issuance of a certificate of occupancy for the unit;

(2) the date of completion for the project (or the phase of the project that includes the unit) as defined in section 507-43;

(3) the recordation of the "as built" amendment to the declaration that includes the unit;

(4) the issuance of the architect's certificate of substantial completion for the project (or the phase of the project that includes the unit); or

(5) the date the unit is completed so as to permit normal occupancy.

§ \_\_\_: 4-9. Refunds Upon Cancellation or Termination. [Source: HRS §514A-62(c).] Upon any cancellation under section \_\_\_: 4-5 or \_\_\_: 4-8, the purchaser shall be entitled to a prompt and full refund of all moneys paid, less any escrow cancellation fee and other costs associated with the purchase, up to a maximum of \$250.

§ \_\_\_\_: 4-10. Escrow of Deposits. [Source: New; <u>see also</u>, *HRS* §§514A-40(a)(6) and 514A-65.] All monies paid by purchasers shall be deposited in trust under a written escrow agreement with an escrow depository licensed pursuant to chapter 449. An escrow depository shall not disburse purchaser deposits to or on behalf of the developer prior to closing except:

- (1) As provided in sections \_\_\_: 4-11 and \_\_\_: 4-12;
- (2) As provided in the purchaser's sales contract in the event the sales contract is cancelled.

An escrow depository shall not disburse a purchaser's deposits at closing unless the escrow depository has received satisfactory assurances that all blanket mortgages and liens have been released from the purchaser's unit in accordance with section \_\_\_\_: 2-15. Satisfactory assurances include a commitment by a title insurer licensed under chapter 431 to issue the purchaser a title insurance policy insuring the purchaser that the unit has been conveyed free and clear of such liens.

§ \_\_\_\_: 4-11. Use of Purchaser Deposits to Pay Project Costs. [Source: New; <u>see also</u>, *HRS* §§514A-40(a)(6), 514A-64.5, and 514A-67, 7/1/99 draft REC rules] (a) Subject to the conditions set forth in subsection (b), purchaser deposits that are held in escrow pursuant to a binding sales contract may be disbursed before closing to pay for costs of acquiring the project land and buildings, project construction costs, and architectural, engineering, finance and legal fees, and other incidental expenses of the project.

(b) Disbursement of purchaser deposits prior to closing shall be permitted only if:

- (1) The commission has issued an effective date for the project's public report;
- (2) The developer has recorded the project's declaration and bylaws;
- (3) The developer has submitted to the commission:

(A) A project budget showing all costs that must be paid in order to complete the project, including land acquisition or lease payments, real property taxes, construction costs, architect, engineering and legal fees, and financing costs;

(B) Evidence satisfactory to the commission of the availability of sufficient funds to pay all costs that must be paid in order to complete the project, which may include purchaser funds, equity funds, interim or permanent loan commitments, and other sources of funds;

(C) If purchaser funds are to be used to pay the cost of acquiring the project land or buildings, evidence satisfactory to the commission that the developer will, concurrently with the disbursement of purchaser funds, acquire title to the project land or buildings; and

(D) If purchaser funds are to be disbursed prior to completion of construction of the

project:

(i) A copy of the executed construction contract;

(ii) A copy of the building permit for the project; and

(iii) Satisfactory evidence of security for the completion of construction. Such evidence may include the following, in forms approved by the commission: a completion bond or a performance bond in an amount equal to one hundred percent of the cost of construction issued by a surety licensed in the State to issue such bonds; an irrevocable letter of credit issued by a federally insured financial institution in an amount equal to one hundred percent of the cost of construction; or such other substantially similar instrument or security approved by the commission.

(c) A purchaser's deposits may be disbursed prior to closing only to pay costs set forth in the project budget submitted pursuant to subsection (b)(3)(A) that are approved for payment by the project lender or an otherwise qualified, financially disinterested person. In addition, purchaser deposits may be disbursed prior to closing to pay construction costs only in proportion to the valuation of the work completed by the contractor, as certified by a licensed architect or engineer.

(d) If purchaser deposits are to be disbursed prior to closing, the following notice shall be prominently displayed in the public report for the project:

"Important Notice Regarding Your Deposits: Deposits that you make under your sales contract for the purchase of the unit may be disbursed before closing of your purchase to pay for project costs, including costs of acquiring the land and buildings (if any), construction costs, project architectural, engineering, finance, and legal fees, and other incidental expenses of the project. While the developer has submitted satisfactory evidence that the project should be completed, it is possible that the project may not be completed. If your deposits are disbursed to pay project costs and the project is not completed, there is a risk that your deposits will not be refunded to you. You should carefully consider this risk in deciding whether to proceed with your purchase."

§ \_\_\_: 4-12. Early Conveyance to Pay Project Costs [Source: New; HRS §514A-67; UCA/UCIOA §4-110.] (a) Subject to the conditions set forth in subsection (b), if units are conveyed or leased before the completion of construction of the building or buildings for the purpose of financing such construction, all moneys from the sale of such units, including any payments made on loan commitments from lending institutions, shall be deposited by the developer under an escrow arrangement into a federally-insured, interest-bearing account designated solely for that purpose, at a financial institution authorized to do business in the State. Disbursements from the escrow account may be made to pay for project construction costs, and architectural, engineering, finance and legal fees, and other incidental expenses of the project.

(b) Conveyance or leasing of units before completion of construction shall be permitted only if:

- (1) The commission has issued an effective date for the project's public report;
- (2) The developer has recorded the project's declaration and bylaws;
- (3) The developer has submitted to the commission:

(A) A project budget showing all costs that must be paid in order to complete the project, including real property taxes, construction costs, architect, engineering and legal fees, and financing costs;

(B) Evidence satisfactory to the commission of the availability of sufficient funds to pay all costs that must be paid in order to complete the project, which may include purchaser funds, equity funds, interim or permanent loan commitments, and other sources of funds;

- (C) A copy of the executed construction contract;
- (D) A copy of the building permit for the project; and

(E) Satisfactory evidence of security for the completion of construction. Such evidence may include the following, in forms approved by the commission: a completion bond or a performance bond in an amount equal to one hundred percent of the cost of construction issued by a surety licensed in the State to issue such bonds; an irrevocable letter of credit issued by a federally insured financial institution in an amount equal to one hundred percent of the cost of construction; or such other substantially similar instrument or security approved by the commission.

(c) Moneys from the conveyance or leasing of units before completion of construction may be disbursed only to pay costs set forth in the project budget submitted pursuant to subsection (b)(3)(A) that are approved for payment by the project lender or an otherwise qualified, financially disinterested person. In addition, such moneys may be disbursed to pay construction costs only in proportion to the valuation of the work completed by the contractor, as certified by a licensed architect or engineer. The balance of any purchase price may be disbursed to the developer only upon completion of construction of the project.

(d) If moneys from the conveyance or leasing of units before completion of construction are to be disbursed to pay for project costs, the following notice shall be prominently displayed in the public report for the project:

"Important Notice Regarding Your Funds: Payments that you make under your sales contract for the purchase of the unit may be disbursed upon closing of your purchase to pay for project costs, including construction costs, project architectural, engineering, finance, and legal fees, and other incidental expenses of the project. While the developer has submitted satisfactory evidence that the project should be completed, it is possible that the project may not be completed. If your payments are disbursed to pay project costs and the project is not completed, there is a risk that your payments will not be refunded to you. You should carefully consider this risk in deciding whether to proceed with your purchase."

§ \_\_\_\_: 4-13. Misleading Statements and Omissions; Remedies. [Source: HRS §514A-68, 514A-69; *combined, but essentially same.*] (a) No officer, agent, or employee of any company, and no other person may knowingly authorize, direct, or aid in the publication, advertisement, distribution, or circulation of any false statement or representation concerning any project offered for sale or lease, and no person may issue, circulate, publish, or distribute any advertisement, pamphlet, prospectus, or letter concerning any project which contains any written statement that is false or which contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements therein made in the light of the circumstances under which they are made not misleading.

(b) Every sale made in violation of this section is voidable at the election of the purchaser; and the person making such sale and every director, officer, or agent of or for such seller, if the director, officer, or agent has personally participated or aided in any way in making the sale, is jointly and severally liable to the purchaser in an action in any court of competent jurisdiction upon tender of the units sold or of the contract made, for the full amount paid by the purchaser, with interest, together with all taxable court costs and reasonable attorney's fees; provided that no action shall be brought for the recovery of the purchase price after two years from the date of the sale and provided further that no purchaser otherwise entitled shall claim or have the benefit of this section who has refused or failed to accept within thirty days an offer in writing of the seller to take back the unit in question and to refund the full amount paid by the purchaser, together with interest at six percent on such amount for the period from the date of payment by the purchaser down to the date of repayment.

## Part V. MANAGEMENT OF CONDOMINIUM

## Subpart 1. POWERS, DUTIES, AND OTHER GENERAL PROVISIONS

- § \_\_\_\_: 5-1. Applicability; Exceptions
- § \_\_\_\_: 5-2. Unit Owners' Association; Organization and Membership
- § \_\_\_\_: 5-3. Same; Registration
- § \_\_\_: 5-4. Same; Powers
- § \_\_\_\_: 5-5. Same; Limitations on Powers
- § \_\_\_\_: 5-6. Board of Directors; Powers and Duties
- § \_\_\_\_: 5-7. Same; Limitations
- [§ \_\_\_\_: 5-8. Same; Conflicts of Interest] (Moved into §\_\_\_: 5-20)
- § \_\_\_\_: 5-9. Bylaws
- § \_\_\_\_: 5-10. Restatement of Declaration and Bylaws
- § \_\_\_: 5-11. Bylaws Amendment Permitted; Mixed Use Property; Proportionate Representation on Board of Directors
- § \_\_\_\_: 5-12. Judicial Power to Excuse Compliance with Requirements of Declaration or Bylaws

§ \_\_\_\_: 5-13. Condominium Community Mutual Obligations

#### Subpart 2. GOVERNANCE – ELECTIONS AND MEETINGS

- : 5-14. Unit Owners' Association Meetings
- [§ : 5-15. Same; Quorums]
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- § \_\_\_\_: 5-22. Managing Agents
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- Tort and Contract Liability; Tolling of Limitation Period § : 5-29.
- [8 \_\_\_\_: 5-30. Conveyance or Encumbrance of Common Elements]
- § \_\_\_: 5-31. Insurance
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- § \_\_\_\_: 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
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- § \_\_\_\_: 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, Delinguent Assessments, and Expenses of Enforcement

## Subpart 4. ALTERNATIVE DISPUTE RESOLUTION

- § \_\_\_\_: 5-46. Mediation
- § : 5-47. Arbitration

## PART V. MANAGEMENT OF CONDOMINIUM

#### Subpart 1. POWERS, DUTIES, AND OTHER GENERAL PROVISIONS

**§** \_\_\_\_: **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.

§ \_\_\_: 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 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.

(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.

§ \_\_\_: 5-3 [5-2]. Same; Registration. [Source: HRS §514A-95.1; modified slightly.] (a) Each project or unit owners' association having more than five units shall:

(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;

(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;

(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

(4) Report promptly in writing to the commission any changes to the information contained on the registration or reregistration application or any other documents 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.

(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.

§ \_\_\_: 5-4 [5-3]. Same; Powers. [Source: UCA/UCIOA §3-102.] (a) Except as provided in section \_\_\_: 5-5, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may:

(1) adopt and amend bylaws and rules and regulations;

(2) adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners, subject to section \_\_\_\_: 5-36;

(3) hire and discharge managing agents and other independent contractors, agents, and employees;

(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; for the purposes of actions under chapter 480, associations shall be deemed to be "consumers";

(5) make contracts and incur liabilities;

(6) regulate the use, maintenance, repair, replacement, and modification of common elements;

(7) cause additional improvements to be made as a part of the common elements;

(8) acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property; [*The following language is from §514A-92.1* (*Designation of additional areas*).] 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 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;

(9) grant easements, leases, licenses, and concessions through or over the common elements and permit encroachments on the common elements;

(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 \_\_\_\_: 2-5(2) and (4), and for services provided to unit owners;

(11) impose charges and penalties, including late fees and interest, 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, either in accordance with the bylaws or, if the bylaws are silent, pursuant to a resolution adopted by the board;

(12) impose reasonable charges for the preparation and recordation of amendments to the declaration, documents requested for resale of units, or statements of unpaid assessments;

(13) provide for the indemnification of its officers, board of directors, and committee members and maintain directors' and officers' liability insurance;

(14) assign its right to future income, including the right to receive common expense assessments, but only to the extent section \_\_\_\_: 5-7(i) expressly so provides;

(15) exercise any other powers conferred by the declaration or bylaws;

(16) exercise all other powers that may be exercised in this State by legal entities of the same type as the association;

(17) exercise any other powers necessary and proper for the governance and operation of the association; and

(18) by regulation, subject to sections \_\_\_: 5-46, \_\_\_: 5-47, and \_\_\_5-34, 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.

(b) If a tenant of a unit owner violates the declaration, bylaws, or rules and regulations of the association, in addition to exercising any of its powers against the unit owner, the association may:

(1) exercise directly against the tenant the powers described in subsection (a)(11);

(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, 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; and

(3) enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease, including eviction, or which the association could lawfully have exercised directly against the unit owner, or both.

(c) The rights granted under subsection (b)(3) may only be exercised if the tenant or unit owner fails to cure the violation within ten days after the association notifies the tenant and unit owner of that violation.

(d) Unless a lease otherwise provides, this section does not:

(1) affect rights that the unit owner has to enforce the lease or that the association has under other law; or

(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.

**§** \_\_\_\_: **5-5** [5-4]. **Same; Limitations on Powers.** (a) Association dealing with developer. [Source: **UCA/UCIOA §3-102(b)**.] The declaration and bylaws 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.

(b) *Behavior in units*. [Source: **UCIOA §3-102(c)**.] Unless otherwise permitted by the declaration, bylaws, 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:

(1) prevent any use of a unit which violates the declaration or bylaws;

(2) regulate any behavior in or occupancy of a unit which violates the declaration or bylaws or unreasonably interferes with the use and enjoyment of other units or the common elements by other unit owners; or

(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.

Otherwise, the association may not regulate any use of or behavior in units by means of the rules and regulations.

(c) Prior written notice of assessment of late charges, legal fees, fines, and interest. [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, legal fees, fines, and interest (other than amounts remitted by a unit in payment of late fees, legal fees, fines, and interest) unless it delivers or mails a written notice to such unit owner, at least seven days prior to the first such deduction, which states that:

(1) Failure to pay late fees, legal fees, fines, and interest may result in the deduction of such late fees, legal fees, fines, and interest from future common expense payments, so long as a delinquency continues to exist.

(2) Late fees may be imposed against any future common expense payment that is less than the full amount owed due to the deduction of unpaid late fees, legal fees, fines, and interest from such payment.

(d) *Prior written notice of assessment of the cost of providing information.* [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.

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.

§ \_\_\_\_: 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.

(b) The board of directors may not act on behalf of the association to amend the declaration or bylaws (sections \_\_\_: 2-2(11) and \_\_\_: 5-9(a)(6)), to remove the condominium from the provisions of this chapter (section \_\_\_: 2-17), 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 \_\_\_: 5-6(f)); provided that nothing in this paragraph shall be construed to prohibit board members from voting proxies (section \_\_\_: 5-17) to elect members of the board; provided further that the board of directors may fill vacancies in its membership.

(c) Within thirty days after adoption of any proposed budget for the condominium, the board of directors shall make available a summary of the budget to all the unit owners.

(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:

(1) Sixty days after conveyance of seventy-five percent of the common interest appurtenant to units that may be created to unit owners other than a developer or affiliate of the developer;

(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.

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.

(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 of the board of directors must be elected by unit owners of the members of the board of directors must be elected by unit owners of the board of directors must be elected by unit owners other than the developer.

(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.

(g) Unless otherwise provided by the declaration or bylaws, the unit owners, by a vote of sixty-seven percent of unit owners present by person or proxy 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. [*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.

§ \_\_\_: 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.

(b) [Source: **HRS §514A-82(a)(1)(E)**.] The compensation, if any, of the directors, shall be specified in the bylaws.

(c) [Source: **HRS §514A-82(a)(12)**; *substantially modified.*] Members of the board of directors shall be unit owners or co-owners, vendees under an agreement of sale, the trustee or beneficiary of a trust which owns a 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.

(d) [Source: **HRS §514A-82(a)(14)**. No managing agent, resident manager, rental agent, or employee of a condominium shall serve on its board of directors.

(e) [Source: **HRS §514A-82(b)(7)**.] An owner shall not act as a director of an association and an employee of the managing agent employed by the association.

(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; provided that, with the approval of the board, directors may be reimbursed for actual expenditures on behalf of the association.

(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.

(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).

(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 and personal property\_of the project, or the making of any additions, alterations, and improvements thereto. 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. The cost of such borrowing, including, without limitation, all principal, interest, commitment fees, and other expenses payable with respect to such borrowing or the enforcement of the obligations under the borrowing, shall be a common expense of the project; provided that owners representing fifty percent of the common interest vote or give written consent to such borrowing, having been first notified of the purpose and use of the funds. 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.

# [§ \_\_\_\_: 5-8 [5-9]. Same; Conflicts of Interest.] [Moved into § \_\_\_\_: 5-20.]

§ \_\_\_: **5-9** [5-19]. Bylaws. (a) [Source: UCA/UCIOA §3-106; HRS §514A-81.] 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. The bylaws of the association must provide:

(1) the number of members of the board of directors and the titles of the officers of the association;

(2) election by the board of directors of a president, treasurer, secretary, and any other officers of the association the bylaws specify;

(3) the qualifications, powers and duties, terms of office, and manner of electing and removing board of directors members and offices and filling vacancies;

(4) which, if any, of its powers the board of directors or officers may delegate to other persons or to a managing agent;

(5) which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association;

(6) subject to subsection (c), a method for amending the bylaws; and

(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 lobby areas, swimming pools, recreation areas, saunas, storage areas, hallways, trash chutes, laundry chutes, and other similar common areas not located inside units shall not be cast at any association meeting, regardless of their designation in the declaration.

(b) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

(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 sixty-seven percent of all unit owners; provided that:

(1) Each one of the particulars set forth in this subsection shall be embodied in the bylaws always; and

(2) Any 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 be at least sixty-seven percent of all unit owners; provided that the vote or written consent must be obtained within three hundred sixty-five days 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.

This subsection shall not preclude any unit owner or voluntary unit owners' committee from proposing any bylaw amendment at any annual association meeting.

§ \_\_\_: 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.

(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.

Any declaration or bylaws restated pursuant to this subsection must:

(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.

(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 original declaration or bylaws and all prior amendments thereto.

(d) The restated declaration or bylaws must be recorded and, upon recordation, shall supersede the original declaration or bylaws and all prior amendments thereto.

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.

§ \_\_\_: 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.

(b) Any proposed bylaws amendment to modify the composition of the board in accordance with subsection (a) may be initiated by:

(1) A majority vote of the board of directors; or

(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.

(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, 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-seven percent of all unit owners; provided that each of the requirements set forth in this section shall be embodied in the bylaws.

(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.

(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).

(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.

(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.

(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.

§ \_\_\_: 5-12 [5-20.4]. Judicial Power to Excuse Compliance with Requirements of Declaration or Bylaws. [Source: *Restatement of the Law, Third, Property (Servitudes)* §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:

(1) A provision limiting the amount of any assessment that can be levied against individually owned property;

(2) A provision requiring that an amendment to the declaration or bylaws be approved by lenders;

(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:

(A) Prohibit or materially restrict the use or occupancy of, or behavior within, individually owned units;

- (B) Change the basis for allocating voting rights or assessments among unit owners; or
- (C) Apply to less than all of the unit owners;
- (4) A requirement that an amendment to the declaration be signed by members;
- (5) A quorum requirement for meetings of members.

**§** \_\_\_: **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.

(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.

(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.

# Subpart 2. GOVERNANCE – ELECTIONS AND MEETINGS

§ \_\_\_\_: 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.

(b) Special meetings of the association may be called by the president, a majority of the board of directors, [*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.

(c) Not less than fourteen days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be:

(1) Hand-delivered;

(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; or

(3) 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.

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, and any proposal to remove an officer or member of the board of directors. [*The following sentence is from HRS §514A-***82(b)(3)**] Notices of association meetings 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.

(d) [Source: **HRS §514A-82(a)(16)**.] All association meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. 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.

(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; provided that in the event of a natural disaster, such as a hurricane, an association meeting may be held outside the State.

[Deleted per stakeholders' comments.] [ § \_\_\_\_: 5-15 [5-24]. Same; Quorums. [Source: §UCA/UCIOA §3-109(a).]]

§ \_\_\_: 5-16 [5-25]. Same; Meeting Minutes. [Source: HRS §514A-83.4.] (a) Minutes of meetings of the association shall be approved at the next succeeding regular 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.

§ \_\_\_\_: 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. A unit owner may vote by mail or electronic transmission through a duly executed directed proxy. 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 secretary of the unit owners' association or the managing agent. A proxy is void if it purports to be revocable without notice.

(c) No votes allocated to a unit owned by the association may be cast for the election or re-election of directors.

(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) If it is a standard proxy form authorized by the association, contain boxes wherein the owner has indicated that the proxy is given:

(A) To the individual whose name is printed on a line next to this box;

(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

(C) To those directors present at the meeting and the vote to be shared with each board member receiving an equal percentage.

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.

(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.

(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.

(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.

(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 twenty-one days before 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:

(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

(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.

The statement shall not exceed one single-sided 8 ½" x 11" page, indicating the owner's qualifications to serve on the board or reasons for wanting to receive proxies.

(2) [*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.

(i) [Source: **HRS §514A-82(b)(4)**, *first sentence*.] No resident manager or managing agent, or their employees, 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.

(j) [Source: **HRS §514A-83.3**; *partial.*] 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.

§ \_\_\_\_: 5-18 [5-27]. Same; Good Faith Unintentional Failure to Comply. [Source: *New*.] 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.

§ \_\_\_: 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:

(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.

§ \_\_\_: 5-20 [5-10]. 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.

(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:

- (1) Concerning personnel;
- (2) Concerning litigation in which the association is or may become involved;

(3) [Source: **HRS §421J-5(d)**.] Necessary to protect the attorney-client privilege of the association; or

(4) [Source: **New**.] Necessary to protect the interests of the association while negotiating contracts, leases, and other commercial transactions.

The general nature of any business to be considered in executive session shall first be announced in open session.

(c) [Source: **HRS §514A-82(a)(16)**.] All board of directors meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. 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.

(d) [Source: **HRS §514A-82(b)(9)**.] The board of directors shall meet at least once a year. 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.

(e) [Source: HRS §421J-5(e).] A director shall not vote by proxy at board meetings.

(f) [Source: **HRS §514A-82(a)(13)**.] A director shall not vote at any board meeting on any issue in which the director has a conflict of interest.

(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.

"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.

§ \_\_\_: 5-21 [5-12]. Same; Meeting Minutes. [Source: HRS §514A-83.4.] (a) Minutes of meetings of the board of directors shall include the recorded vote of each board member on all motions except motions voted on in executive session.

(b) Minutes of meetings of the board of directors shall be approved no later than the second succeeding regular meeting.

(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.

#### Subpart 3. OPERATIONS

§ \_\_\_: 5-22 [5-14]. Managing Agents. [Source: §514A-95.] (a) Every managing agent shall:

(1) Be licensed as a real estate broker in compliance with chapter 467 and the rules of the commission or be a corporation, limited liability company, or limited partnership authorized to do business under article 8 of chapter 412;

(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;

(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 may adopt rules establishing the conditions and terms by which it may grant an exemption or a bond alternative, or permit deductibles;

(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 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:

(A) The loss is caused by the fraud, misrepresentation, or deceit of the managing agent or its employees;

(B) The managing agent is a licensed real estate broker; and

(C) The unit owners' association fulfills the requirements of sections 467-16 and 467-18 and any applicable rules of the commission;

(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

(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.

(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.

(c) Every managing agent shall be considered a fiduciary with respect to any property managed by that managing agent.

(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.

(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.

§ \_\_\_\_: 5-23 [5-15]. 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 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. 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. 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.

(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-seven percent of the membership.

§ \_\_\_: 5-24 [5-16]. Management and Contracts; Developer, Managing Agent, and Unit Owners' Association. [Source: § 514A-84.] (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 § \_\_\_: 5-37, : 5-37, and : 3-21, with the exception of the fidelity bond requirement for the unit owners'

association.

(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.

§ \_\_\_: 5-25 [5-17]. 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.

§ \_\_\_: 5-25.1 [5-18]. 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.

(b) Upon transfer of any special developer right, the liability of a transferor developer is as follows:

(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.

(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.

(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.

(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.

(c) Unless otherwise provided in a mortgage instrument, deed of trust, or other agreement creating a security 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.

(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:

(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.

(e) The liabilities and obligations of a person who succeeds to special developer rights are as follows:

(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:

(i) on a developer which relate to the successor's exercise or nonexercise of special developer rights; or

(ii) on his transferor, other than:

(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 and omissions under section \_\_\_\_: 5-6(d).

(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.

§ \_\_\_: 5-26 [5-21]. Upkeep of Condominium. (a) [Source: UCA/UCIOA §3-107(a); underscored phrase is from HRS §§514A-13(f)/514A-82(b)(6).] Except to the extent provided by the declaration, bylaws, or 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 the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, during reasonable hours, 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.

(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 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.

(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 estate subject to development rights inures to the developer.

**§**\_\_\_: **5-27** [**5-21.1**]. **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:

- (1) The board notifies the owner in writing of:
  - (A) The identity and location of the personalty, and
  - (B) The board of directors' intent to so sell, store, donate, or dispose of the personalty.

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

(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.

(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.

**§**\_\_\_: **5-28** [5-21.2]. Modifications and Additions to Condominium. [Source: **§514A-89**; *rewritten for clarity*.] (a) *Material structural additions*. A unit owner may add a material structure or excavate an additional basement or cellar if the owner first obtains the written consent of sixty-seven percent of the unit owners, together with the consent of all unit owners whose units or appurtenant limited common elements are directly affected.

(b) *Nonmaterial structural additions*. 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:

(1) the installation of solar energy devices; and

(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.

"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.

"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".

## (c) Telecommunications equipment. [Source: §514A-13.4.]

(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:

(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

(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.

(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:

(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

(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.

(3) As used in this subsection:

"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.

"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."

(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.

§ \_\_\_: 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 responsibility to maintain.

(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, the developer is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association.

(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).

# [Deleted per BRRAC.] [§ \_\_\_\_: 5-30. Conveyance or Encumbrance of Common Elements. [Source: UCA/UCIOA §3-112.]

§ \_\_\_: 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) *Required coverage*. Unless otherwise provided in the declaration or bylaws, and to the extent reasonably available, the association shall purchase and at all times maintain the following:

(1) *Property insurance.* Property insurance (i) on the common elements, (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.

(2) General liability insurance. 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 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.

### (3) Fidelity bond; directors and officers coverage.

(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.

(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.

(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.

(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 chapter 414D or the declaration and bylaws of the association.

(b) Attached units; improvements and betterments. In the case of a building containing attached units, 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.

For the purposes of this section, 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.

(c) *Deductibles.* 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.

(d) Other coverages. 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 two sentences are from HRS §514A-86(a)*.] 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.

(e) *Insured parties; waiver of subrogation.* Insurance policies carried pursuant to subsections (a) and (b) must include each of the following provisions:

(1) Each unit owner and secured party is an insured person under the policy with respect to liability arising out of the unit owner's interest in the common elements or membership in the association.

(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.

(3) The unit owner waives his or her right to subrogation under the association policy against the association and the board of directors.

(f) *Primary insurance.* 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.

(g) Adjustment of losses; distribution of proceeds. 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.

(h) *Mandatory unit owner coverage.* 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.

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.

(i) *Certificates of insurance.* 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.

(j) *Non-residential condominiums.* 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.

(k) Settlement of claims. 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.

**§**\_\_\_: **5-32.** Association Fiscal Matters; Assessments for Common Expenses. [Source: UCA/UCIOA §3-115; some language in subsection (a) is from HRS §514A-83.6(a).] (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 and distributed to unit owners at least annually by the board of directors.

(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 \_\_\_: 2-11. Any past due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding eighteen percent per year.

(c) Assessments to pay a judgment against the association (section \_\_\_\_: 5-35(a)) 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.

(d) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.

(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.

(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 board of directors, either directly or through its managing agent or resident manager, 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.

(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.

(h) [Source: **HRS §514A-92.2**.] The board of directors, either directly or through its managing agent or resident manager, shall notify the unit owners in writing of maintenance fee increases at least thirty days prior to such an increase.

§ \_\_\_\_: 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.

(b) 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:

(1) Be sent both by first-class and certified mail;

(2) Set forth the exact amount the association claims is due and owing by the unit owner; and

(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.

(c) The unit owner shall not take any retaliatory action against the tenant for payments made under this section.

(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.

(e) The board may not demand payment from the tenant pursuant to this section if:

(1) A commissioner or receiver has been appointed to take charge of the premises pending a mortgage foreclosure;

- (2) A mortgagee is in possession pending a mortgage foreclosure; or
- (3) The tenant is served with a court order directing payment to a third party.

(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.

(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.

§ \_\_\_: 5-34. Same; Lien for Assessments. [Source: HRS §514A-90; *Repeal and reenactment on December 31, 2007. L 2003, c 80, §2;* 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:

(1) Liens for taxes and assessments lawfully imposed by governmental authority against the unit; and

(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.

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, 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.

(b) Except as provided in subsection (g), when the mortgage 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 mortgage 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:

(1) Thirty-six days after the order confirming the sale to the purchaser has been filed with the court;

(2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser;

(3) Thirty days after the public sale in a nonjudicial power of sale foreclosure pursuant to section 667-5; or

(4) Upon the recording of the instrument of conveyance,

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 (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.

(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:

(1) The amount of common expenses included in the assessment, including the due date of each amount claimed;

(2) The amount of any penalty, late fee, lien filing fee, and any other charge included in the assessment;

(3) The amount of attorneys' fees and costs, if any, included in the assessment;

(4) That under Hawaii law, a unit owner has no right to withhold assessments for any reason;

(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 and keeps assessments current; and

(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.

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.

(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 section \_\_\_\_: 5-47; 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 may ask 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.

(e) In conjunction with or 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 but need not be restored until payment in full is received.

(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.

(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:

(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

(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 the mortgagee or subsequent purchaser may require the unit owners' association to provide at no charge a notice of the association's intent to claim lien against the delinquent unit for the 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.

(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 preceding the completion of the judicial or nonjudicial power of sale foreclosure. In no event shall the amount of the special assessment exceed the sum of \$1,800.

(i) For purposes of subsections (g) and (h), the following definitions shall apply:

(1) "Completion" means:

(A) In a nonjudicial power of sale foreclosure, when the affidavit required under section 667-5 is filed; and

(B) In a judicial foreclosure, when a purchaser is deemed to acquire title pursuant to subsection (b).

(2) "Regular monthly common assessments" shall not include:

(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;

(B) Late charges, fines, or penalties;

(C) Interest assessed by the unit owners' association;

(D) Any lien arising out of the assessment; or

(E) Any fees or costs related to the collection or enforcement of the assessment, including attorneys' fees and court costs; except that the cost of a release of any lien filed pursuant to this section shall be paid by the party requesting the release.

§ \_\_\_: 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.

(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 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.

(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.

§ \_\_\_: 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:

- (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;
- (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).

(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 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.

(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:

(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.

(d) No association or unit owner, director, officer, managing agent, or employee of an association who makes a good faith effort to calculate the estimated replacement reserves for an association shall be liable if the estimate subsequently proves incorrect.

(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.

(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. Before imposing or collecting an assessment under this paragraph that has not been approved by a majority of the unit owners, the board 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.

(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:

(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

(2) Any provisions relating to upgrading the common elements, such as additions, improvements, and alterations to the common elements.

(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.

(i) As used in this section:

"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.

"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 twentyyear 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.

"Emergency situation" means any extraordinary expenses:

(1) Required by an order of a court;

(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;

(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

(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.

(5) Necessary for the association to obtain adequate insurance for the property which the association must insure.

"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.

"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.

**§** \_\_\_\_: **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.

(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:

(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.

(c) All funds collected by an association, or by a managing agent for any association, shall be:

(1) Deposited in a financial institution, including a federal or community credit union, whose deposits:

(A) Are insured by an agency of the United States government, and

(B) Maintain a Community Reinvestment Act (U.S. Code, Title 12, Chapter 30) evaluation of "Outstanding" or "Satisfactory", and

(C) Maintain a Moody's Investors Service:

(i) Long-Term Bank Deposit Rating of "Baa" or better, or

(ii) Short-Term Bank Deposit Ratings of "Prime-3" or better, or

(iii) Bank Financial Strength Rating of "C" or better;

(2) Held by a corporation authorized to do business under article 8 of chapter 412 meeting the provisions of this section;

(3) Held by the United States Treasury; or

(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.

All funds collected by an association, or by a managing agent for any association, shall be invested only in:

(1) Demand deposits, investment certificates, and certificates of deposit;

(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

(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;

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.

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.

(d) A managing agent or board of directors shall not, by oral instructions over the telephone, transfer association funds between accounts, including but not limited to the general operating account and reserve fund account.

(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.

(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.

**§**\_\_\_: **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 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.

(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 not be required to submit a copy of the annual audit report to 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:

(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

(2) The annual audit to all owners at the annual meeting, or as soon as the audit is completed, whichever occurs later.

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.

§ \_\_\_\_: 5-39 [5-38.1]. 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.

(b) If some, but not all of the unit owners have already purchased the leased fee interest appurtenant to their units at the time of renegotiation, 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.

**§**\_\_\_\_: **5-40** [5-39]. Association Records; Generally. [Source: UCA/UCIOA §3-118.] The association shall keep financial and other records sufficiently detailed to enable the association to comply with requests for information and disclosures related to resale of units. Except as otherwise provided by law, all financial and other records must be made reasonably available for examination by any unit owner and the owner's authorized agents.

§ \_\_\_: 5-41 [5-40]. Same; Records to be Maintained. (a) [Source: HRS §514A-84.5; *partial.*] 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.

(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.

(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.

(d) [Source: **HRS §514A-84(c)**; *partial; 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.

(e) [Source: **HRS §514A-83.3**; *partial.*] 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.

**§** \_\_\_\_: **5-42** [5-41]. **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.

(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. 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.

(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:

(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

(2) Owners pay for administrative costs in excess of eight hours per year.

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.

(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:

(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

(2) Owners pay for administrative costs in excess of eight hours per year.

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.

(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.

(f) [Source: **HRS §514A-84(c)**; *partial; language also incorporated in* <u>§</u>: *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.

(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.

(h) [Source: **New**.] 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.

(i) *Disposal.* [Source: **HRS §514A-85(c)**.] A managing agent 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.

(j) *Prohibitions*. [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.

§ \_\_\_\_: 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 inquiry 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.

**§**\_\_\_: **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.

(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).

(c) [Source: **HRS §514A-82.5(a)(4)(5)**.] The bylaws may include reasonable restrictions or prohibitions 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.

(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:

- (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.

(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.

(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.

§ \_\_\_: 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:

- (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 this chapter; or the rules of the real estate commission;

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.

(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:

(1) The owner first shall have demanded and allowed reasonable time for the board of directors to pursue such enforcement; or

(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.

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 before filing the action in court the owner has first submitted the claim to mediation, or to arbitration under subpart 4, and made a good faith effort to resolve the dispute under any of those procedures.

### Subpart 4. ALTERNATIVE DISPUTE RESOLUTION

§ \_\_\_\_: 5-46 [5-5]. Mediation. (a) [Source: HRS §514A-121.5 as amended by Act 142 (SLH, 2002); *modified*.] If any party requests mediation of a 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 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. 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. If a party refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorney's fees.

(b) [Source: **HRS §421J-13(b)**.] Nothing in subsection (a) shall be interpreted to mandate the mediation of any dispute involving:

(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.

(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 parties.

**§** \_\_\_\_: **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 rules of the arbitration service conducting the arbitration 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.

(b) Nothing in subsection (a) shall be interpreted to mandate the arbitration of any dispute involving:

(1) The real estate commission;

(2) The mortgagee of a mortgage of record;

(3) The developer, general contractor, subcontractors, or design professionals for the project; provided that when any person exempted by this paragraph is also a unit owner, a director, or managing agent, such person 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 by arbitration.

(c) Determination of unsuitability. [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.

In determining whether the subject matter of a dispute is unsuitable for disposition by arbitration, a court may consider:

(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.

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.

(d) Determination of insurance coverage. [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.

(e) *Costs, expenses, and legal fees*. [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.

(f) Award; confirming award. [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.

(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.

(h) Trial de novo and appeal. [Source: HRS §514A-127.]

(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.

(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 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.

(3) The award of arbitration shall not be made known to the trier of fact at a trial de novo.

(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.

(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.