



Hawaii Real Estate Commission

CONDORAMA XII

PRESENTED BY CAI HAWAII

A **Free** Education Program for Condominium Owners

Topics Include:

Impact of Lahaina Fires on Reserves Statewide,
Duties of Directors & Tips on Dealing with Difficult Owners,
and Security Services: What Do Community Associations
Have a Duty to Protect?



June 1, 2024

Program: 9:00 a.m. to 11:00 a.m.

Webinar



CONDORAMA XII

AGENDA

09:00 – 09:05 a.m. **Melanie Oyama** - Welcome & Introductions

09:05 – 09:35 a.m. **Ayres Christ** – Impact of Lahaina on Reserves Statewide

09:35 – 10:05 a.m. **Christopher St. Sure, Esq** – Duties of Directors & Tips on Dealing with Difficult Owners

10:05 – 10:55 a.m. **Bill Gourley, Esq.** - Security Services: What Do Community Associations Have a Duty to Protect?

10:55 – 11:00 a.m. **Melanie Oyama** - Closing



Mahalo

Krystyn Weeks

Insurance Associates



Milton Motooka

Motooka Rosenberg Lau & Oyama



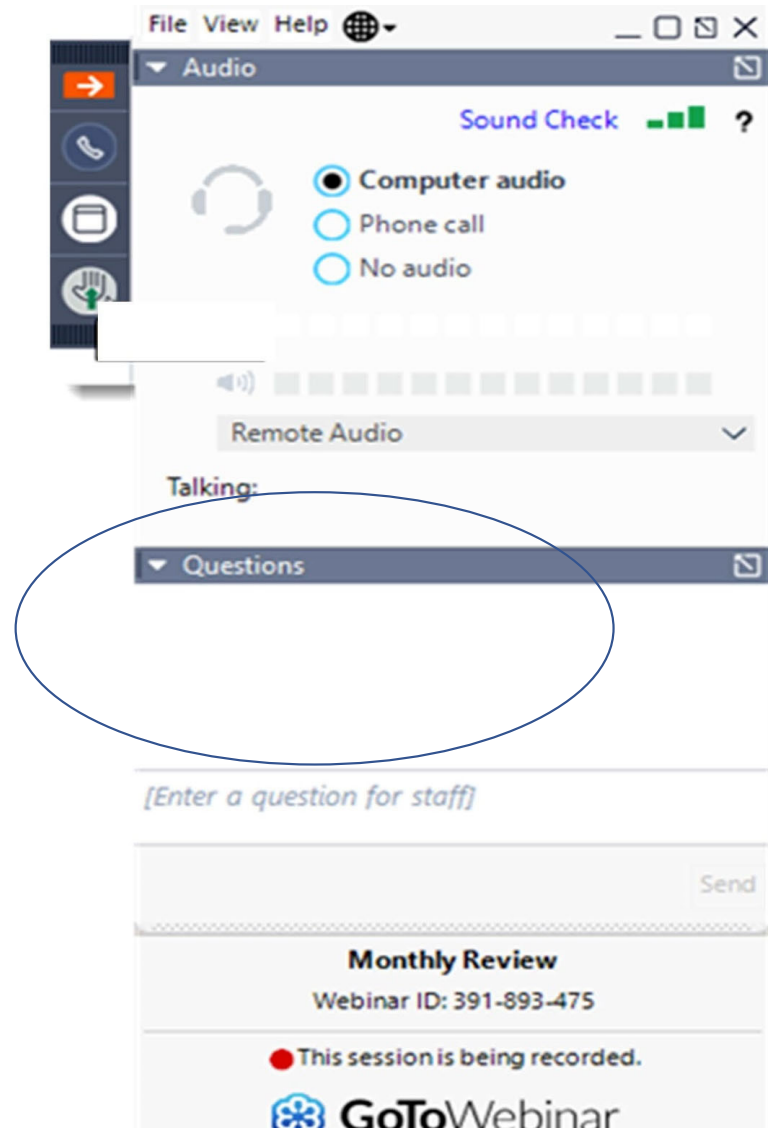
Richard Ma

Presentation Resources



QUESTIONS

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“Questions”





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This webinar is pending approval by the Community Association Managers International Certification Board (CAMICB) for 2 credit hours to fulfill continuing education requirements for CMCA[®] certification.

CED@CAIHAWAII.ORG

Our Speakers



Ayres Christ manages Associa Hawaii's Reserve Study Division. Associa Hawaii is the only property management company with an independent reserve study division dedicated to performing reserve studies for its clients as well as non-Associa associations. Ayres is an owner in associations and bring his homeowner perspective when working with clients. The division performs reserve studies and provides advice on capital expenditure planning for condominiums, townhomes, planned community associations, commercial properties, and non-profits, including UH-Manoa and the Salvation Army.

Our Speakers



Christopher St. Sure is a partner with Goodsill Anderson Quinn & Stifel LLP. Mr. St. Sure focuses his litigation practice primarily in business litigation, real estate, construction, premises liability, and condominium law. He routinely serves as appointed insurance defense counsel for associations.

Mr. St. Sure is the Hawaii Young Lawyers Division (“YLD”) Hawaii Delegate to the American Bar Association’s House of Delegates and a former President of the YLD. Born and raised in Hawaii, Mr. St. Sure received his B.A. from University of Hawaii and his law degree from the William S. Richardson School of Law in 2013..

Our Speakers



Bill Gourley, has over a decade of experience in community association law. His wide-ranging practice focuses on both general service and litigation, which gives him a unique perspective.

Bill defends associations, boards of directors, and property managers against breach of fiduciary duty and professional liability claims, breach of contract actions, tort claims, fair housing and discrimination complaints, condemnation actions and other corporate and real estate disputes. Bill has extensive experience defending complex, multi-party lawsuits involving allegations of water intrusion, structural deflection and mold. Bill also has experience representing associations in covenant enforcement actions against property owners.



Impact of Lahaina on Reserves Statewide

By Ayres Christ, Associa Hawaii Reserve Studies Division
reserves@associahawaii.com

Insurance

- Borrowing from reserves
- Don't let the reserve contribution be the punching bag of the budget
- Property inspections and appraisals

Grandfathered-in Systems

- Fire alarm systems
- Railing systems
- Other types of unexpected upgrades

Professional Consultations

- “Professional inspections, evaluations, or related building services qualify as reserve components if they otherwise meet the definition of “component.””
- Consultations often precede the capital expense
- These can also act as reminders

Preparing a reserve study

- What does 514B say?
- How often should you get a Level 1?
- What should you be doing between Level 1s?

New Budget Summary Requires Reserve Disclosures

§514B-148 Association fiscal matters; budgets and replacement reserves. (a) The budget required under section 514B-144(a) shall include a summary with at least the following details:

- (1) The estimated revenues and operating expenses of the association;
- (2) Disclosure as to whether the budget has been prepared on a cash or accrual basis;
- (3) The estimated costs of fire safety equipment or installations that meet the requirements of a life safety evaluation required by the applicable county for any building located in a county with a population greater than five hundred thousand; provided that the reserve study may forecast a loan or special assessment to fund life safety components or installation;
- (4) The balance of the total replacement reserves fund of the association as of the date of the budget;
- (5) The estimated replacement reserves assessments that the association will require to maintain the property based on a reserve study performed by or on behalf of the association; provided that the reserve study, if not prepared by an independent reserve study preparer, shall be reviewed by an independent reserve study preparer not less than every three years; provided further that a managing agent with industry reserve study designations shall not be considered as having a conflict of interest for purposes of this paragraph;
- (6) A general explanation of how the estimated replacement reserves assessments are computed and detailing:
 - (A) The identity, qualifications, and potential conflicts of interest of the person or entity performing the reserve study, update, or any review thereof;
 - (B) Disclosure of any component of association property omitted from the reserve study and the basis for the omission;
 - (C) Planned increases in the estimated replacement reserve assessments over the thirty-year plan; and
 - (D) Whether the actual estimated replacement reserves assessments for the prior year as defined in the study was less than the assessments provided for in the reserve study, and, if so, by how much, and explaining the impact of the lesser assessments on future estimated replacement reserves assessments;
- (7) The amount the association must collect for the fiscal year to fund the estimated replacement reserves assessments; and
- (8) Information as to whether the amount the association must collect for the fiscal year to fund the estimated replacement reserves assessments was calculated using a per cent funded or cash flow plan. The method or plan shall not circumvent the estimated replacement reserves assessments amount determined by the reserve study pursuant to paragraph (5).



Mahalo!

Ayres Christ, Associa Hawaii Reserve Studies Division
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Duties of Directors & Tips on Dealing with Difficult Owners



Agenda

1. Board of Directors: Responsibilities and Fiduciary Duties
2. Tips on Dealing with Difficult Owners
3. Closing Remarks

Board of Directors

Duties and Responsibilities

The Board of Directors

- An association's "board of directors" is comprised of persons elected to govern the condominium development. Because most associations are incorporated as nonprofit corporations, they are legally required to have a board to exercise corporate powers in the management of the association's affairs.
- The Association can only act by and through its Board of Directors.
- Board of Directors are elected by the Ownership at the Annual Meeting. They serve without compensation for the term set forth in the Bylaws.

The Board of Directors (cont.)

- The board is vital to the effective operation and management of the association, as well as to preserving the property values of the association's members. The primary responsibilities of the board are to: (1) manage the common areas, (2) enforce the governing documents, (3) manage the association's finances, and (4) set policies to assist the operation of the association. These responsibilities must be performed "in good faith, in a manner such director believes to be in the best interest of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." *See* HRS §414D-149

Duties of Directors (Generally)

- In their efforts to manage the condominium project, the directors of an association have numerous duties under Hawaii law and as specified in the association's governing documents. The general duties of directors generally include:
 - **Enforcement** – Enforce the governing documents through corrective measures and in some instances litigation.
 - **Maintenance** – Maintain and repair the common areas and other items which the association may have an obligation to manage under the governing documents or other contractual agreements.
 - **Financial Management** – Levy and collect assessments, pay the association's bills, review financial records, prepare budgets and financial statements, and manage the reserve account.
 - **Operations** – Manage the day-to-day operations of the association. This typically involves utilizing professional management, legal, accounting, landscape, pest control, and insurance services. In addition, the board must set policies to ensure the smooth operation of the association and to govern the use of the association's common area facilities and recreational amenities.

Fiduciary Duties of Directors

- Hawaii law provides that “[e]ach director shall owe the association of apartment owners a fiduciary duty in the performance of the director's responsibilities.” Haw. Rev. Stat. § 514B–106(a)(“officers and members of the board shall owe the association a fiduciary duty”).
- *See Chambliss v. Officers & Dirs. of Snapper Creek*, 743 So.2d 129 (Fla. Dist. Ct. App. 1999) (granting summary judgment in favor of homeowner's association and its officers where association's construction of a guardhouse, which was desired by a majority of the community, reduced the value of plaintiff's property)(“[The association had] a general obligation to protect the property of all the members of the association, and not the property of one member in particular, to the exclusion of the others.”)
- A fiduciary duty is a special type of relationship which arises when the confidence and trust of one party is placed upon the judgment and advice of another.
- As fiduciaries, directors are held to a higher standard of conduct and are required to uphold two (2) primary fiduciary duties: (1) the duty of care, and (2) the duty of loyalty.

Duty of Care

In exercising its fiduciary duties, Board members must act in good faith in the best interests of the Association, exercising the same degree of care and skill in making decisions or taking actions that would be expected of an ordinarily prudent person in a similar situation.

A “reasonably prudent” person would exercise reasonable care when making business decisions as a company steward. So, a fiduciary is responsible for investigating and asking questions and ensuring that they’re well-informed and fully understand issues surrounding their decisions. In a practical sense, this requires:

- Being interested in, and informed about, the association’s business.
 - Preparation before board and committee meetings (e.g., reviewing agenda, reports, etc.)
 - Active participation in meetings
 - Remaining alert to potential concerns and problems
 - Asking for more information (e.g., from management, accountants, attorneys, etc.) before making decisions
 - Investigating irregularities and/or violations in governance of the association
- An important part of a director’s fiduciary duty is to supervise those persons to whom the Board has delegated authority for the day-to-day operation.

Duty of Loyalty

- A director must not permit another duty or interest to prevent the director from making an independent decision based on the best interests of the Association.
- Directors must disclose any conflict of interest prior to a vote on the matter at the board meeting, and the disclosure must be recorded in the meetings. If a director has a conflict of interest, he or she may not cast a vote on that matter. *See* Haw. Rev. Stat. § 514B–125(g).
- “Conflict of interest” means “an issue in which a director has a direct personal or pecuniary interest not common to other members of the association.”

Dealing with Difficult Personalities

- For many associations, the Board's biggest challenge is not collecting assessments, it's dealing with difficult homeowners. Even the most even-tempered folks have "hot buttons," and dealing with the emotions entwined in ownership of one's home can push those buttons and create problems in an association.
- The behavior of difficult people tends to fall into certain categories. Knowing what type of person one is dealing with—and having strategies targeted toward certain behaviors—can be a significant benefit to the Board and assist it in reaching resolutions more quickly and with less discord.

General Strategies

1. Establish procedures for handling difficult owners before encountering such situations.
2. Cooler heads will always prevail. Even if the owner becomes angry, abusive, emotional, etc., it is important for Board members to remain calm.
3. No matter how the owner treats the Board/management, treat the owner professionally and respectfully.
4. If the Board says the Association will do something, do it—or be ready to explain why it didn't.
5. Set personalities aside. Each Board member must do his or her best to address the matter objectively, with confidence that each director would have reached the same decision regardless of whether the owner at issue was his close personal friend and neighbor or the community complainer.
6. Maintain transparency (while still respecting privacy). Owners who are not aware of what is going on—who think things are done “in secret”—assume then that the Board has “something to hide” and respond accordingly.
7. Treat complaints against Board members in the same manner as complaints against other owners. The affected director should not participate in the discussion or decision-making aspects of the process, but should be afforded the same rights/responsibilities and opportunities to address the complaints as any other homeowner. Board members should not receive any “special treatment” by virtue of their position as a member of the Board.

The Characters – Squidward the Complainer

- **Squidward Tentacles** from the animated series "SpongeBob SquarePants" is characterized by his pessimistic attitude, perpetual dissatisfaction, and tendency to gripe about his surroundings and the people around him.
- Squidward complains about everything, including the length of time it takes the Board to respond to his emails.



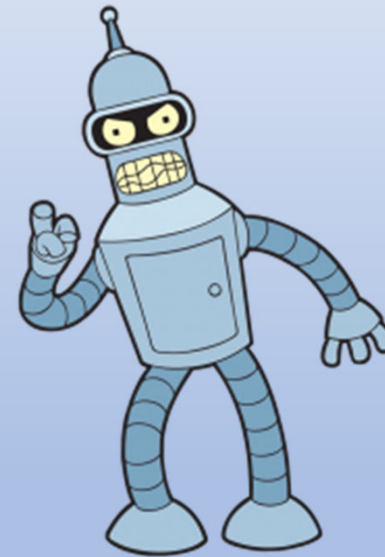
Strategies for Dealing with Squidward

- Acknowledge the complaint/communication in a reasonable amount of time. You need not have the solution at that point, but simply acknowledging that the Board received the complaint can ease Squidward's concerns.
- Consider adopting a policy that, except in true emergencies, all complaints must be submitted in writing.
- Sometimes, Squidward "just wants you to know," and no real action is necessary. In that case, thank him for the information.
- If Board action is warranted, let Squidward know approximately when the Board expects to address the matter (and let the person know when the matter is on a given Board meeting agenda). If Squidward attends the meeting, present the issue factually and address the matter professionally (no raised voices, name calling, etc.).
- If Squidward is raising the same issue over and over—particularly one that's already been addressed, but Squidward simply doesn't like the Board's decision—simply remind Squidward that the Board has already addressed the matter and made a decision; summarize that decision if needed.



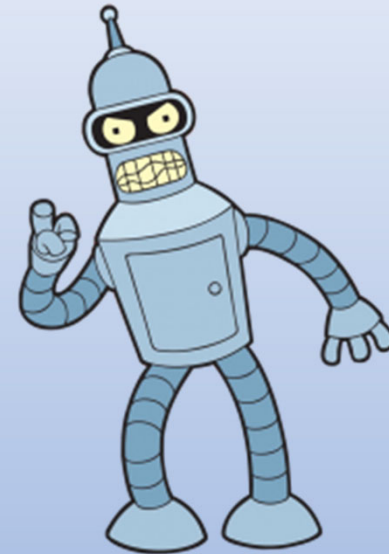
Bender – The Exception to the Rule

- **Bender** from the animated series "Futurama" can be seen as a classic example of a character who believes himself to be the exception to the rule. His confidence, disregard for authority, and tendency to bend (pun intended) the rules.
- Bender is the owner who has five dogs when the rules state you can only have one. If Bender receives a notice violation, he will



Strategies for Dealing with Bender

- Remind Bender that it is the Board's responsibility to enforce the rules against all homeowners equally.
- Remind Bender that all members of the Association must abide by the rules, including current Board members, past Board members, new residents and long-time members of the community.
- If Bender claims that the Board is not enforcing rules uniformly, ask for substantiation. If she advises the Board of another owner who is in violation, thank her for the information. (If further investigation is necessary, conduct that investigation. In many cases, the Board is already aware of the problem and is dealing with it—or has already dealt with it, but other owners may simply not be aware that action is being taken.)
- Set standardized practices and procedures for addressing violations so that homeowners know that everyone is subject to the same rules and the same enforcement practices.
- If appropriate, consider waiving the first fine levied against Bender—but make it clear that the waiver is a “one time only” action. If the waiver is granted at a Board meeting, send a written follow up letter to the owner, confirming that the fine has been waived this time only, and confirming that future violations will be subject to fine.
- Once a decision has been made, there is no need to revisit the issue. If other homeowners inquire—simply advise them that the Board is obligated to enforce all rules of the Association, and takes that responsibility seriously. Do not engage in discussions about Bender's matter with those other owners.
- If fines are assessed and not paid, the account should be referred for collection—but Bender should be advised that that is the intended course of action before the referral to collections is made so that Bender has one final opportunity to make payment before collection ensues.



Dudley Dursley – The Hawk

- In addition to bullying Harry, **Dudley Dursley**, from the "Harry Potter" series takes pride in reporting Harry's perceived infractions to his parents and other authority figures.
- Dudley has never served on the Board, but watches the Board like a hawk for violations. If the notice goes out a day late, Dudley will let the Board know.



Strategies for Dealing with Dudley

- Review the terms of the governing documents. If necessary, create a checklist/timeline for tasks that are repeated (e.g., annual meeting and related notices, notices regarding changes in annual assessment amounts, etc.) and calendar “ticklers” to ensure notices are sent in a timely manner.
- If the Association has missed something, acknowledge it and take steps to correct the issue.
- If appropriate, encourage Dudley to serve on the Board so he can better ensure the Board acts in accordance with the Association’s governing documents.



Biff Tannen – The Bully

- Biff Tannen from “Back to the Future” film series exhibits aggressive behavior, uses physical intimidation, and frequently humiliates others to assert his dominance.
- Biff is like Bender, but has a temper. Board members and other owners are frightened of Biff.



Strategies for Dealing with Biff

- If a “blow up” happens in person, ensure all directors’ personal safety. If the Board has advance notice that Biff will be attending a meeting, have a plan in place to deal with potential “blow ups”
- If Biff becomes a physical threat to any director, property manager, or other person, or if he becomes loud, argumentative or verbally abusive, the spokesperson can tell him that he needs to “back off” immediately or the meeting will be adjourned. If there is no change in behavior, the meeting should be adjourned.
- If face-to-face contact with the Biff cannot be done without undue confrontation, notify him that all communication to the Board must be in writing. Once such a condition is imposed, the Board must hold abide by that condition and require the Biff to abide by it as well.
- Respond to any communication in a reasonable amount of time, and avoid opinion or judgments. Stick to facts.
- If any director, resident manager, property manager, or any other agent of the Association fears for his or her physical safety, consult with the Association’s counsel about getting a restraining order against the owner.
- If Biff makes a credible threat to sue, notify the Association’s directors’ and officers’ liability carrier of a potential claim.



Tips on Handling Difficult Owners (Meeting)

Here are a few strategies to deal with upset or difficult owners at a Meeting:

- Establish and announce meeting procedures at the beginning of a board meeting, in a newsletter or in the meeting notice;
- Enforce established meeting procedures **uniformly**;
- Host a homeowner forum at the beginning of the board meeting with a strict time limit;
- Respond in a modulated, non-argumentative voice. Do not respond with anger, argue or trade insults. The board does not have to rebut the comments of any member;
- Utilize parliamentary control — by knowing when and how to: a) table a motion; b) postpone

Other Remedies

- Haw. Rev. Stat. 514B-161 – Mandatory Mediation of certain disputes between unit owner and the board, unit owner and the managing agent, board members and the board, or directors and the managing agents:
 - (1) The dispute involves the interpretation or enforcement of the association's declaration, bylaws, or house rules;
 - (2) The dispute falls outside the scope of subsection (b);
 - (3) The parties have not already mediated the same or a substantially similar dispute; and
 - (4) An action or an arbitration concerning the dispute has not been commenced.
- Haw. Rev. Stat. 514B-162 – Arbitration
- Declaratory Relief and Injunctive Relief (Court Action)
- Civil Harassment

Closing Remarks

- Do your homework. Review the Governing Documents.
- Help make meetings relevant and useful. Board Meetings are where things get accomplished. In order to ensure that the meetings are productive, prepare for the meeting beforehand and read the agenda and Board meeting packet.
- Focus on transparency. Have documents available online through portal or website.
- Parliamentary procedure applied. Better to limit comments from the floor uniformly and consistently instead of doing so for the first time on a disgruntled owner.

Security Considerations in Community Associations

Bill Gourley, Esq.

Condorama XII – June 1, 2024



NOWACKHOWARD
COMMUNITY ASSOCIATION ATTORNEYS



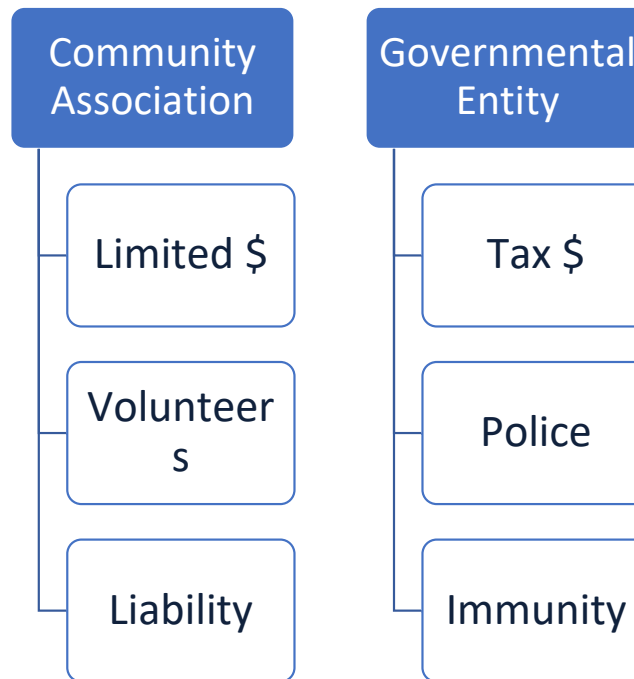
Aloha!

INTRODUCTION

- Do community associations have a duty to protect owners, residents and their guests from third-party criminal acts?
- It depends! This is a murky area of the law because of the unique ownership models of community associations.
- Owners and residents in community associations often look to their associations for security.
- However, even though community associations resemble governments in some ways, they are not equipped or designed to protect residents from third- party criminal acts.



Community Associations vs. Government



Types of Claims

- An owner, resident or guest could seek to hold an association liable for third-party criminal acts under a claim of negligence or premises liability.
- Plaintiff must demonstrate that the association owed a duty to the plaintiff, that the association breached that duty, that the plaintiff suffered damages, and that the defendant's breach of a duty was the proximate cause of the damages.
- The starting point is whether the association owed a duty.



How A Duty May Arise

- **Common Duty of Care**
- **Special Relationship**
- **Voluntary Undertaking**
- **Contractual Obligation**



Common Law Duty of Care

- Majority of jurisdictions determine whether a duty is owed to a victim based on the victim's status under common law as a trespasser, licensee, or invitee.
- Hawaii does not recognize the common law status of the person on the premises as determinative of the duty of the owner of the premises. The crucial fact is whether that person was reasonably anticipated to be upon the premises.



Special Relationship

- In some states, no duty generally exists unless a special relationship exists and the harm is foreseeable.
- Examples: common carrier and passenger; employer and employee; parent and child; and innkeeper and guest.
- These special relationships give rise to an affirmative duty to aid and protect.



Voluntary Undertaking

➤ Under the voluntary undertaking doctrine, a landowner may be held liable for the criminal acts of third parties when it voluntarily undertakes to provide security measures, but performs the undertaking negligently, if the negligence is the proximate cause of the injury to the plaintiff.



Contractual Obligations

- Contracts, including governing documents, can establish a basis for liability
- Contractual language can also protect a community association from liability

Read your governing documents!



Foreseeability

If a duty is owed, the question then turns to whether the crime was foreseeable

If the crime was foreseeable, the question is whether the association acted reasonably

“foreseeable” is more than “possible”

Where a community association has notice of crimes occurring in areas under its control, a future third-party criminal act may be found to have been foreseeable.





Duty of Care and Security

Vazquez v. Lago Grande Homeowners Ass'n

2004 District Court of Appeal of Florida



Vazquez v. Lago Grande Homeowners Ass'n

THE SITUATION:

- Lago Grande was initially marketed by the developer for its safety, with part of the Lago Grande association assessments dedicated to security provisions.
- Three gated entrances, each with a guardhouse and a 5-6' wall around the entire perimeter
- The Lago Grande association hired a professional security contractor "to protect the safety of residents and guests," and the Lago Grande association president "verified that the residents and guests had a right to expect that the complex would be safe, as promised."
- The Contractor was required to follow Post Orders (i.e., protocols) which required the guards at all three stations to stop everyone entering the complex, check the I.D. cards which all residents were given; and, in the case of visitors, call the resident being visited to obtain permission to let the visitor come in
- One evening the estranged husband of a woman visiting a resident entered Lago Grande in contravention of both the resident's request and the association's security protocols.
- Tragically, the estranged husband murdered his wife and shot the resident.



Vazquez v. Lago Grande Homeowners Ass'n

THE RESULTS:

- The Florida appellate court found that Lago Grande association assumed and contracted to fulfill a duty to protect the safety of its residents and guests.
- The developer's advertisement of Lago Grande as prioritizing security and charging for it, as well as the governing documents' requirement for professional security, were critical to liability.
- With a voluntary undertaking, negligence may be found either where "the harm to the other or his things results from the defendant's negligent conduct in the manner of his performance of the undertaking, or from his failure to exercise reasonable care to complete it or to protect the other when he discontinues it." [Restatement \(Second\) of Torts § 323](#).
- Thus, where a community association assumes responsibility for safety and security, it must adequately fulfill that responsibility and not simply abandon it without proper process, such as amending the governing documents to expressly disavow such responsibility.





Duty of Care and Security

Bradford Square Condominium Association, Inc. v. Miller

2002 Court of Appeals of Georgia



Bradford Square Condominium Ass'n, Inc. **v. Miller**

THE SITUATION:

- Two residents were attacked and carjacked in the parking lot one evening by three men that had followed them into the community; tragically, the husband died as a result of the attack.
- The surviving widow filed a wrongful death action alleging that the association was negligent in the performance of its duty to secure the parking lot/common element from third-party criminal acts.
- The widow contended that the installation of security gates and enhanced lighting, institution of security patrols, and the formation of a neighborhood watch would have deterred the attack.



Bradford Square Condominium Ass'n, Inc. v. Miller

THE SITUATION:

➤ The declaration had been amended to add the following provision:

Security. The Association may, from time to time, provide measures of security on the condominium property; however, the Association is not a provider of security and shall have no duty to provide any security on the condominium property. The obligation to provide security lies solely with each unit owner individually. The Association shall not be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.



Bradford Square Condominium Ass'n, Inc. v. Miller

THE RESULTS:

- The Court held that the Association did not owe the unit owners/association members a legal duty pursuant to O.C.G.A. § 51-3-1 to provide security for the common elements against the criminal acts of third parties.
- The amendment obviated any duty on the part of the association to provide security for the common elements.
- The association has a duty to exercise ordinary care to protect the unit owner from unreasonable risks related to the physical maintenance of the common elements.





Duty of Care and Security

Villages of Cascade Homeowners Association, Inc. v. Edwards

2022 Court of Appeals of Georgia



Villages of Cascade Homeowners Association, Inc. v. Edwards

THE SITUATION:

- Professionally managed, gated townhome community
- When the gate was broken, a tenant was robbed and shot when he returned home and parked in a visitor space.
- Association was sued for negligence, negligence per se, nuisance and premises liability.



Villages of Cascade Homeowners Association, Inc. v. Edwards

THE RESULTS:

- Court held that the duties in the covenants did not include providing security.
- The Association only owed the duty of ordinary care (i.e., reasonableness)
- A landowner has a duty to invitees to exercise ordinary care to keep its premises safe, but is not an insurer of an invitee's safety.
- The Association had no duty beyond the physical maintenance of the common roads, parking lots and access gates.
- When the Association was notified of the broken gate, it initiated remedial action the same day and approved an estimate for the repair work two days later; the gate, which needed refabrication, was fully repaired a mere eleven days later.





Duty of Care and Security

King v. Ilikai Properties, inc.

1981 Intermediate Court of Appeals of Hawaii



King v. Ilikai Properties, Inc.

THE SITUATION:

- A lessee and her guest were assaulted and robbed by three unidentified persons while staying in a condominium unit in the Tower Building of the Ilikai Hotel.
- The Tower Building included both a hotel and private condominium units.
- The assailants gained access to the unit when the lessee opened the door believing that she was about to receive a message from the hotel desk.
- The condominium units—including the unit that the victims were staying in—were a part of the Association of Owners of the Ilikai Apartment Building.
- The victims sued the hotel operator, the unit owner, and the Association alleging that the injuries they sustained in the assault were proximately caused by the failure of the hotel operator, unit owner and Association to make the premises safe.



King v. Ilikai Properties, Inc.

THE RESULTS:

- The Intermediate Court of Appeals affirmed summary judgment in favor of the Association.
- Held that the Association had no special relationship to the victims and therefore could not be liable for their injuries.





Duty of Care and Security

Moody v. Cawdrey & Associates, Inc.

1981 Hawaii Supreme Court



Moody v. Cawdrey & Associates, Inc.

THE SITUATION:

- Two guests were attacked by two unknown males during the early morning hours while staying in an apartment unit owned by their daughter and son-in-law
- There were no signs of forced entry and the exact method of entry into the apartment is unknown
- However, to get the apartment, the assailants had to use either the elevators or the stairways, which were common areas under the control of the Association
- The victims sued the Association of Apartment Owners of 1260 Richard Lane and its management agent Aaron M. Chaney, Inc. for negligence



Moody v. Cawdrey & Associates, Inc.

THE RESULTS:

- The Supreme Court of Hawaii reversed the Intermediate Court of Appeals and affirmed the trial court's granting of summary judgment on the basis of King
- The Association and its management company had no duty to protect the victims from third-party criminal acts because there was no special relationship between them based on the holding in King





Duty of Care and Security

Jason Field, a personal representative, et al. v. Highbridge Concierge, Inc. et al.

Superior Court of the Commonwealth of Massachusetts



Jason Field, a personal representative, et al. v. Highbridge Concierge, Inc. et al.

THE SITUATION:

- luxury midrise condominium governed by a trust.
- The building was professionally managed by an on-site management agent.
- It also had a fulltime concierge and runner.
- The lobby doors were access controlled.
- The concierge desk was located in the main lobby adjacent to the entry doors and had a computer monitor with feeds of the building's 14 cameras.
- There is an access-controlled parking garage in the bottom of the building.
- There are 2 elevators with access control features.



Jason Field, a personal representative, et al. v. Highbridge Concierge, Inc. et al.

THE SITUATION:

- There was a known flaw in the system that allowed person without a fob to gain access to any floor—including the Penthouse level on floor 11—by waiting inside the elevator for it to be called to a residential floor, riding the elevator to that floor, exiting the elevator, and then using one of the internal un-locked stairwells to access the other floors.
- Over the years, the building experienced security issues with the garage and unauthorized access to the building.
- Unit owner expressed concerns to the management agent about the stairwell door near his penthouse unit lacking a locking mechanism.
- The management agent indicated that the City building inspector required that the door remain unlocked.



Jason Field, a personal representative, et al. v. Highbridge Concierge, Inc. et al.

THE SITUATION:

- Former building concierge used his insider knowledge of the building—including how the elevator's operated and the building's vulnerabilities—to gain access and murder two penthouse unit owners.
- The trust, its management agent and its concierge contractor were sued for wrongful death.



Jason Field, a personal representative, et al. v. Highbridge Concierge, Inc. et al.

THE RESULTS:

- **In its 22-page Order denying the Trust's motion for summary judgment on the wrongful death claim, the trial court held that, like a landlord, the Trust had a duty to protect persons on the building's common area from reasonably foreseeable criminal acts by third parties, including opportunistic crime.**

- **The court noted that there was evidence that the Trust undertook to ensure the security of the building's common areas by:**
 1. entering into contracts with the management agent and concierge service, both of which had certain security responsibilities;
 2. monitoring security issues in and around the building;
 3. overseeing the maintenance of the building's security features, including cameras, key fobs, and garage door transponders; and,
 4. conducting condominium meetings on security issues.



Jason Field, a personal representative, et al. v. Highbridge Concierge, Inc. et al.

THE RESULTS:

- The Court noted that these efforts were evidence that the Trust foresaw that intruders could gain access to the common areas to commit criminal acts and understood that the owners were relying on the Trust and its agents to protect them.
- The trial court also noted that the type of criminal intrusion that occurred in this case was reasonably foreseeable to the Trust because:
 - (1) it was aware of the possibility of unlawful intrusion into the garage when the garage doors were open;
 - (2) criminal activity had resulted from such intrusions in the past;
 - (3) once an intruder accessed the garage, the intruder could access the residential floors by waiting on a someone to call Elevator 1; and,
 - (4) the Trust was on notice of the lack of a locking mechanism on the stairwell doors to Floor 11





Duty of Care and Security

Francis T. v. Vill. Green Owners Assn.

1986 California Supreme Court



Francis T. v. Vill. Green Owners Assn.

THE SITUATION:

- Plaintiff made repeated requests that the association improve the exterior lighting in the common area of her condominium to deter crime.
- When the association ignored her requests, the plaintiff installed her own new lighting without architectural approval from the association.
- The association compelled her to remove the unauthorized lighting.
- Tragically, she was then raped and robbed in her unit.

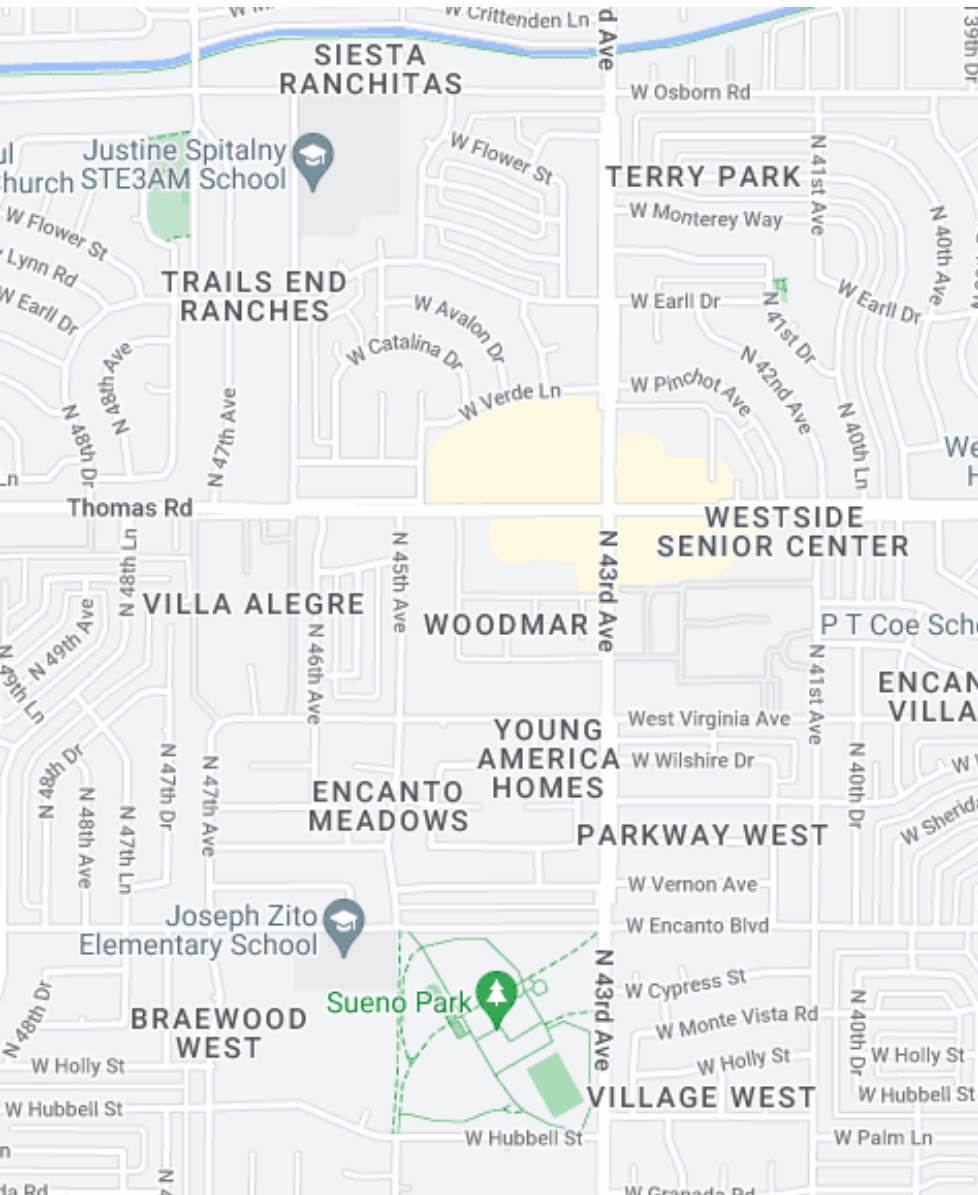


Francis T. v. Vill. Green Owners Assn.

THE RESULTS:

- Supreme Court of California held that the plaintiff stated a cause of action for negligence against the association and its individual directors.
- The Court noted that because the association maintained and controlled the common area, it should be held to the same standard of care as a landlord with respect to third-party criminal acts.





Duty of Care and Security

Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.

1997 Arizona Supreme Court



Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.

THE SITUATION:

- A tenant's guest was shot while attending a graduation party in the condominium parking lot.
- The association was aware of increased gang activity and had even been warned by its security guard that the project needed 24-hour security patrols



Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc.

THE RESULTS:

- The Court held that, with respect to the common area under its control, the association owed a duty like a landlord to maintain the property in a reasonably safe condition, which included the duty to take reasonable measures to protect against foreseeable activities creating danger on the land it controlled.
- The Court reversed the trial court's grant of summary judgment in favor of the association and concluded that the association did have a duty based on its relationship with those permissibly using common areas and a jury could find that the harm that befell Martinez was foreseeable.



Recommendations – Don't Create a Duty

- Associations should be mindful that their actions can create a duty where one doesn't exist.
- For example, the installation of cameras and license plate readers creates the perception that the association is actively monitoring the cameras and protecting people from crime.
- Community patrols may also create the appearance that the association is actively keeping residents and their guests safe.
- Remember the Lago Grande and Field cases.



Recommendations – Watch Your Language!

- Avoid using language like “security gates, “security cameras” or “security guards.”
- Instead, use more appropriate terms like “access gates”, “cameras” and “attendants” or “concierges.”
- These terms are less likely to suggest that the association is actively providing security.



Recommendations – Take Feedback Seriously

- Associations should not dismiss an owner's specific concerns about the common area.
- When reviewing a requests to install exterior lighting or cameras, associations must weigh the aesthetic and privacy considerations with potential liability.
- Remember the Francis T. and Field cases.



Recommendations – Educate Owners and Residents

- If an association undertakes any measures that could be perceived as security features, written notice should be sent to all owners and residents warning them that it does not protect them from crime.
- Associations should also make it clear that cameras and license plate readers are not being actively monitored.



Recommendations – Maintain and Repair the Common Area

- Associations must physically maintain and repair doors, gates, locks, lights and other features on the common area.
- Maintenance and repairs should be promptly initiated and diligently completed.
- Prompt remedial action can protect the association from liability.
- Remember the Villages of Cascade case.



Recommendations – Amend Governing Documents to Add Exculpatory Clause

- Exculpatory clauses are contractual provisions eliminate liability for future negligence and are generally enforceable in the absence of willful or wanton conduct.
- ***(A) SECURITY. The association may, but shall not be required to, from time to time, provide measures or take actions that directly or indirectly improve the security of the condominium; however, each owner, for himself, herself or itself, and his, her or its tenants, occupants, guests, licensees, and invitees, acknowledges and agrees that the association is not a provider of security and shall have no duty to provide security on or at the condominium. The gate is for vehicular access control only .The association does not guarantee that non- owners and non-occupants will not gain access to the condominium and commit criminal acts on the condominium nor does the association guarantee that criminal acts on the condominium will not be committed by other owners or occupants. It shall be the responsibility of each owner to protect his, her or its person and property and all responsibility to provide such security shall lie solely with each owner. The association shall not be held liable for any loss or damage by reason of its failure to provide adequate security or the ineffectiveness of measures undertaken.***
- Remember the Bradford Square case.



Recommendations – Purchase Quality Insurance

- Associations should invest in quality insurance coverage, including:
 1. commercial general liability policies;
 2. directors and officers policies; and,
 3. umbrella policies.

- Associations should consult with knowledgeable and experienced community association insurance professional.



A Hui Hou!



NOWACKHOWARD
COMMUNITY ASSOCIATION ATTORNEYS

Mahalo and Aloha

- Thank you to our speakers and to everyone who joined us today.
- Email us if you would like to review the recording: ced@caihawaii.org
- Evaluation and feedback – the form will also be emailed to you. We appreciate your input.
- Our 2024 programs are listed on the closing slide – if you would like to view the recordings for any of the listed programs, just email us.



2024 Calendar of Events



June 22, 29* – **Board Leadership Development Workshop** (two half day webinars covering the basics of board leadership responsibilities) – Melanie Oyama, Keven Whalen, Co-Chairs

July 18 – **Legislative Update** – presented by the Legislative Action Committee

August 22 – **Reserves and Budgets**—Jonathan Billings, Carol Rosenberg, Co-Chairs

September 26 – **Employment/Labor Law—Hiring, Firing, and Supervising** —Paul Ireland Koftinow, Melanie Oyama, Co-Chairs

October 24 – **Covenant Enforcement: Case Law Update** – Anne Anderson, Chair

November 1 – **Annual CAI Membership Meeting****This seminar or educational presentation is entirely or partly funded by funds from the*

**This seminar or educational presentation is entirely or partly funded by funds from the Condominium Education Trust Fund (CETF), for condominium unit owners whose associations are registered with the Real Estate Commission. The CETF is administered by the Real Estate Commission which is attached to the Department of Commerce and Consumer Affairs, State of Hawaii, through the Professional and Vocational Licensing Division.*