CONDOMINIUM PROPERTY REGIME TASK FORCE
Department of Commerce and Consumer Affairs
State of Hawaii
https://cca.hawaii.gov/

AGENDA

Date:	October 27, 2023
Time:	2:00pm
In-Person Meeting Location:	Queen Liliuokalani Conference Room King Kalakaua Building 335 Merchant Street, 1st Floor Honolulu, Hawaii 96813
Agenda:	The agenda was posted to the State electronic calendar as required by Hawaii Revised Statutes ("HRS") section 92-7(b).
Virtual Participation:	Virtual Videoconference Meeting – Zoom Webinar (use link below) https://dcca-hawaii-gov.zoom.us/j/83731133824
Phone: Meeting ID:	+1 669 444 9171 US 837 3113 3824

If you wish to submit written testimony on any agenda item, please email your testimony to kladao@dcca.hawaii.gov or submit by hard copy mail to: Attn: Condominium Property Regime Task Force, 335 Merchant Street, Room 310, Honolulu, Hawaii 96813. We request submission of testimony at least 24 hours prior to the meeting to ensure that it can be distributed to the task force members.

INTERNET ACCESS:

To view the meeting and provide live oral testimony during the meeting, please use the above link. You will be asked to enter your name in order to access the meeting as an attendee. The Task Force requests that you enter your full name, but you may use a pseudonym or other identifier if you wish to remain anonymous. You will also be asked for an email address. You may fill in this field with any entry in an email format, e.g., *****@***mail.com.

Your microphone will be automatically muted. When the Chairperson asks for public testimony, you may click the Raise Hand button found on your Zoom

screen to indicate that you wish to testify about that agenda item. The Chairperson will individually enable each testifier to unmute their microphone. When recognized by the Chairperson, please unmute your microphone before speaking and mute your microphone after you finish speaking.

PHONE ACCESS:

If you cannot get internet access, you may get audio-only access by calling the Zoom Phone Number listed at the top on the agenda.

Upon dialing the number, you will be prompted to enter the Meeting ID which is also listed at the top of the agenda. After entering the Meeting ID, you will be asked to either enter your panelist number or wait to be admitted into the meeting. You will not have a panelist number. So, please wait until you are admitted into the meeting.

When the Chairperson asks for public testimony, you may indicate you want to testify by entering "*" and then "9" on your phone's keypad. After entering "*" and then "9", a voice prompt will let you know that the host of the meeting has been notified. When recognized by the Chairperson, you may unmute yourself by pressing "*" and then "6" on your phone. A voice prompt will let you know that you are unmuted. Once you are finished speaking, please enter "*" and then "6" again to mute yourself.

For both internet and phone access, when testifying, you will be asked to identify yourself and the organization, if any, that you represent. Each testifier will be limited to five minutes of testimony per agenda item

If connection to the meeting is lost for more than 30 minutes, the meeting will be continued on a specified date and time.

Instructions to attend State of Hawaii virtual board meetings may be found online at https://cca.hawaii.gov/pvl/files/2020/08/State-of-Hawaii-Virtual-Board-Attendee-Instructions.pdf

The Task Force may move into Executive Session to consult with the Task Force's attorney on questions and issues pertaining to the Task Force's powers, duties, privileges, immunities, and liabilities in accordance with Section 92-5(a)(4), HRS.

1. Call to Order

2. Old Business

    a. Review of Final Report to the Legislature
    Recodification of Chapter 514A, Hawaii Revised Statutes

(Condominium Property Regimes) In Response to Act 213, Section 4 (SLH 2000) December 31, 2003 (https://cca.hawaii.gov/reb/files/2022/06/2003-recod-report.pdf)

i. “As a consumer protection law, the primary purpose of Hawaii’s condominium property regimes law is to make sure that buyers can know what they are buying.” P.14

ii. Blue Ribbon Recodification Advisory Committee. P.72

iii. Selected excerpts.

b. DCCA overview of past and current ADR processes.

c. Discussion of on what basis government should take action on behalf of one party to a private condominium dispute.

3. New Business

a. Barriers to mediation access. Proposal to waive fee for low-income unit owners.

b. Examination and evaluation of issues regarding condominiums affected by Maui wildfire. Proposal to: 1) simplify obtaining approval of amendments by mortgagees; 2) allow judicial excusal of compliance for lender approval requirements; 3) revise requirements to remove a condominium from Chapter 514B; and 4) prevent price-gouging in an emergency.

4. Next Meeting: TBD

Virtual Videoconference Meeting – Zoom Webinar

And

In-Person Meeting Location: Queen Liliuokalani Conference Room, King Kalakaua Building 335 Merchant Street, 1st Floor Honolulu, Hawaii 96813

5. Adjournment

If you need an auxiliary aid/service or other accommodation due to a disability, contact Kyle Ladao, Administrative Assistant, at (808) 586-3025 or at kladao@dcca.hawaii.gov, as soon as possible, preferably by October 25, 2023. Requests made as early as possible have a greater likelihood of being fulfilled. Upon request, this notice is available in alternate/accessible formats.

CONDOMINIUM PROPERTY REGIME TASK FORCE

Department of Commerce and Consumer Affairs
State of Hawaii

MINUTES OF MEETING

Date:	September 11, 2023
Time:	1:30 p.m.
In-Person Meeting Location:	Queen Liliuokalani Conference Room HRH King Kalakaua Building 335 Merchant Street, First Floor Honolulu, Hawaii 96813
Virtual Participation:	Virtual Videoconference Meeting – Zoom Webinar https://dcca-hawaii-gov.zoom.us/j/85468546810
Present:	Senator Carol Fukunaga Keali'i Lopez Lila Mower Philip Nerney Elaine Panlilio Raelene Tenno Pattie Thiele Shari Wong, Deputy Attorney General Kedin Kleinhans (Administrative Staff) Marc Yoshimura (Technical Support)
Excused:	Representative Sean Quinlan Benedyne Stone (Administrative Staff) Dathan Choy (Administrative Staff)
Zoom Webinar Guest(s):	Representative Scott Saiki Sunshine David Tracy Lu Frank Ragozionski
Agenda:	The agenda for this meeting was posted to the State electronic calendar and filed with the Office of the Lieutenant Governor, as required by Hawaii Revised Statutes ("HRS") section 92-7(b).
Call to Order:	The meeting was called to order at 1:38 p.m., at which time quorum was established. Kedin Kleinhaus welcomed everyone to the meeting and proceeded with a roll call of the Task Force members.
Election of Officers:	Ms. Tenno moved to vote on electing either Mr. Nerney or Ms. Mower for Chair, which was seconded by Ms. Lopez.

There were four votes for Mr. Nerney (Fukunaga, Nerney, Panillio, and Thiele) and three votes for Ms. Mower (Mower, Lopez, and Tenno). The vote passed with Mr. Nerney as Chair.

Ms. Tenno moved to vote on electing a Vice Chair, which was seconded by Ms. Lopez and unanimously carried.

Chair Nerney opened the floor to nominations for Vice Chair to which he nominated Ms. Thiele and Ms. Tenno nominated Ms. Mower.

The nominations for Vice Chair were closed and a role call vote took place. With six votes for Ms. Mower (Fukunaga, Lopez, Mower, Panillio, Tenno, and Thiele) and one vote for Ms. Thiele (Nerney), Ms. Mower was elected as Vice Chair.

Overview of Sunshine Law Requirements:

Deputy Attorney General (DAG) Wong discussed the permitted interactions between members. Hawaii Revised Statutes chapter 92, commonly known as the Sunshine Law, pertains to open meetings in Hawaii's government. This statute specifies that meetings of government boards or commissions must be open to the public unless authorized to be held in private due to specific exceptions outlined in the law. It ensures transparency and public access to government proceedings, promoting accountability and open decision-making.

Members posed questions to gain more clarity on the permitted types of conversations that can be conducted when not in an open session meeting or what to do should there be possible conflicts with matters outside of the Task Force. Members can also reach out to the DCCA for assistance or if they have legal counsel questions, members are allowed to reach out to DAG Wong.

New Business:

Overview Act 189, Session Laws of Hawaii 2023 (HB1509, HD2, SD1, CD2) Relating to Common-Interest Developments

The Task Force will discuss, among other things, the purpose and objectives of the Task Force as referred to Section 3 of Act 189:

1) Examine and evaluate issues regarding condominium property regimes governed by chapter 514B, Hawaii Revised Statutes, and conduct an assessment of the alternative dispute resolution systems that have been established by the legislature;
2) Investigate whether additional duties and fiduciary responsibilities should be placed on members of the boards of directors of condominium property regimes; and
3) Develop any legislation necessary to effectuate the purposes of this subsection.

The Task Force discussed what is the problem to be solved through Act 189.

Ms. Lopez: It was recommended that the Task Force review the current processes in place and discuss the concerns related to the purpose of this task force. Perceived shortfalls of existing mechanisms will need to be discussed.

Ms. Lopez: Some of the current processes in place are not effective and should be reviewed. She was unsure whether they needed to conduct an assessment or whether an assessment had been done and they were to make recommendations based on that assessment.

Chair Nerney: As he understands, the Task Force was created in response to concerns expressed at the Legislature and that they should discuss perceived shortfalls of existing mechanisms and that anything looked at should be on an empirical basis. Then there's the question on the broader, vaguer segment on whether other fiduciary duties that should be looked at.

Vice Chair Mower: She conducted her own assessment based on her review of the Hawaii Condominium Bulletin from September 2015 to present. During this time, there were 350 mediation cases. Of these cases, 279 were owners filing against their association/board. 124 cases were mediated to agreement which means the balance of cases were mediated without agreement or mediation was declined. Problems with mediation is that mediators are not necessarily trained in condominium law and that there are no professional standards. She reported that condo court was ineffective due to the lack of publication and owners not being able to afford an attorney.

Senator Fukunaga: Requested that the DCCA provide an overview of past and current ADR processes to review and find ways to improve these programs.

Ms. Lopez: Raised a question on how this is a disincentive for board members to participate? An example about a dispute on assessment and if the board does not convene, they pay the assessment and the owner is not able to dispute this.

Ms. Tenno: When common assessment, pay first and mediate later.

Chair Nerney: Case law says otherwise; breach of fiduciary duty if they refuse a request for mediation. So, if an owner can prove that mediation was requested and refused, the board will have breached their fiduciary duties.

Vice Chair Mower: There are contradictions

Focus on mechanisms on collections relating to 514B.

Legislature created condominium form of ownership

Vice Chair Mower: 514B has dispute resolution mechanisms in place but we may be looking for other mechanisms that is fair and equitable to the majority of condo owners that can afford fees to enter into ADR.

Chair Nerney: Mediation, arbitration, and litigation are inadequate and another mechanism that is essentially of no cost or consequence to owners is favorable.

Vice Chair Mower: Shared that personal examples of retaliation and that ADR should address instances of retaliation.

Ms. Lopez: There should be focus on the consumer side of condominium ownership. We understand that owners relinquish autonomy to a board and we need to find ways to establish effect framework to mitigate certain issues.

Chair Nerney: Asked for a review "Final Report to the Legislature" that was created by a blue-ribbon committee" and why choices were made.

Ms. Tenno: From a consumer standpoint, if the initiative is done to take care of dispute, the board does not respond, and mediation is raised but not effective.
Chair: Mediation does not have a ruling but tries to reach a resolution between contending parties.

Vice Chair Mower: The cost for owners to go to court is not feasible with a high cost of a retainer for lawyers.

Ms. Tenno: Lawsuits are affecting insurance premiums.

The Task Force further discussed topics of discussion for upcoming meetings:

1) Collections and Dispute Resolution Mechanisms.
2) Identify data and resources needed to make informed decisions. Requested an overview from DCCA on processes used previously to address ADR. Understanding the volume and understanding how significant a problem we are addressing.
3) Suggested that there might be a need for funding to conduct a full study and independent assessment on the efficacy of these programs.
4) Focus on ADR, including past and/or legislative attempts, e.g. condo court, ombudsman.

5) Request mediation centers to provide more data on what the disputes are about such as topics such as architectural disputes, deferred maintenance, insurance issues, etc.

Next Meeting: TBD

Adjournment: The meeting adjourned at 3:32 p.m.

Reviewed and approved by:

/s/ Philip Nerney

(Mr.) Philip Nerney
Task Force Chairman

Taken and recorded by:

/s/ Kyle-Lee Ladao

(Mr.) Kyle-Lee Ladao
Administrative Assistant

KNL
10/03/23

( ) Minutes approved as is.

( ) Minutes approved with changes:

The Senate
Ka 'Aha Kenekoa

STATE CAPITOL
HONOLULU, HAWAI'I 96813

October 19, 2023

Mr. Kyle-Lee N. Ladao
Administrative Assistant to Director
Dept. of Commerce and Consumer Affairs
335 Merchant Street
Honolulu, Hawaii 96813

Aloha Mr. Ladao,

During the September 11, 2023 Condominium Property Regime Task Force meeting, considerable discussion focused on alternative dispute resolution procedures that may have been implemented by the department since the 2003 recodification of condominium laws (*Chapter 514B, Hawaii Revised Statutes superseded the previous Chapter 514A, Hawaii Revised Statutes*).

Two forms of alternative dispute resolution – e.g., involving "condo court" (e.g., having the issues heard before State Judiciary, similar to Small Claims Court) and mediation -- were identified as having yielded less-than-optimum results in recent years.

I would appreciate DCCA's providing the task force with a summary of the two alternative dispute resolution procedures (and any subsequent approaches) that DCCA has implemented since 2003, with a listing of the numbers of cases reviewed, their outcomes and any recommendations for improvements to the alternative dispute resolution procedures being used. If the alternative dispute resolution procedures were subject to Hawaii Administrative Rules, please provide a copy of the appropriate rules.

I apologize for my belated follow-up to information requests from September 11, 2023; and hope the information will be available at the October 27, 2023 task force meeting.

Mahalo for your assistance,

Carol Fukunaga

Senator Carol Fukunaga

CC Philip Nerney, Chair; Condominium Property Regime Task Force
and Condominium Property Regime Task Force Members
Shari Wong, Deputy Attorney General

Challenges to Condominium Self-Governance

by Philip S. Nerney

Condominiums have traditionally been self-governing. Recently, however, there have been legislative efforts to subject condominiums to direct operational control by government.

Advocates for executive branch control promoted substantially identical bills in 2016 (HB 1802) and 2017 (HB 35). The "Office of Self-Governance Oversight" was proposed in 2016. The office was to be headed by the "condominium czar."

The same concept was repackaged as the "Office of Condominium Complaints and Enforcement" in 2017. The office was to be headed by the "complaints and enforcement officer."

Those bills did not become law. Still, the interest in having a government employee regulate the specific functions of condominiums is significant.

Both bills were premised on essentially the same proposed "finding." As framed in HB 35:

> The legislature finds that while condominium self-governance has been successful in the State, there have been abuses as evidenced by the actions of certain condominium boards. The legislature also finds that a central enforcement body is needed to address the problems faced by many condominium owners who sometimes fear retribution from certain board members when challenging their governance.

There were 160,854 condominium units (aka apartments) within 1,693 registered condominium associations as of June 30, 2015;[1] so it is possible to imagine that abuses have occurred. The more interesting question is whether direct governmental control of approximately 29 percent of the housing units in the state[2] would be appropriate. Condominium units are private (and *not* public) housing.

Nonetheless, "condominiums are creatures of statute."[3] As noted in the Real Estate Commission's ("Commission") 2003 Final Report to the Legislature ("Final Report") concerning recodification of condominium law, "condominium property regimes law is essentially an *enabling* law," that: 1) allows the condominium form of ownership, 2) protects purchasers through adequate disclosures; and 3) allows for management of the ongoing affairs of the condominium com-munity.[4]

The first Hawaii statute enabling the condominium form of ownership was passed in 1961, more than half a century ago.[5] A premise of that form of ownership is that each condominium unit is a separate parcel of real estate that is separately taxed.[6]

> "Condominium" 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.[7]

Condominium projects entering the market must be registered with the Commission.[8] Disclosures about the project are part of the registration process.[9]

Purchasers, therefore, have an opportunity to understand that they are purchasing something quite different from a single-family dwelling. An understanding of condominium governance is relevant here.

I. The structure of condominium governance

Condominium governance is structured by statute. That structure begins with unit owners. The owners of all the units form an association.[10] The prime function of the association is to elect a board of directors ("Board"), and certain major decisions set forth in statute and in the association's governing documents are also reserved to the association.[11]

The governing documents are the declaration of condominium property regime ("Declaration"), the condominium map, By-laws and house rules. A condominium is created by the recordation of a Declaration. The land and improvements comprising the condominium are described in the condominium map. By-laws and house rules add operational detail to the governance structure.

The powers and duties of the Board are substantial.

> **§514B-106 Board; powers and duties.** (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the board shall owe the association a fiduciary duty and exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D.

Board power is limited by statute, by provisions of the governing documents, and by the owners' power to remove directors who perform poorly. Otherwise, the Board governs the association.

Legal and political restraints on director behavior are significant. Some owners consider such restraints to be inadequate though due to the financial and personal impacts that can result from the exercise of Board power.

Questions of power and control are at the heart of the differing perspectives regarding the sufficiency of existing condominium governance structures. There is no doubt that personal autonomy is burdened in the condominium setting; so those valuing personal autonomy over the benefits of condominium living may feel infringed upon or even powerless. One Florida court balanced the benefits and burdens this way:

> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180, 182 (Fla. App. 1975). The premise of majority rule is recognized in that often-cited formulation.

Legislation passed in 2000 resulted in a comprehensive review of Hawaii condominium law. Review was indicated because the legislature found that:

> Those who live and work with the law report that the condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micromanages condominium associations. The law is also overly regulatory, hinders development, and ignores technological changes and the present-day development process. However, the desire to modernize the law must be balanced by the need to protect the public and to allow the condominium community to govern itself.

Act 213 (2000). The review task was performed by an appointed committee of stakeholders with competing interests. The resulting Final Report was accompanied by proposed draft legislation.

The draft legislation was influenced by numerous sources and authorities. These include the 1980 Uniform Condominium Act, the 1994 Uniform Common Interest Ownership Act, the Restatement (Third) of Property: Servitudes (Am. Law Inst. 2000), then-current Hawaii law, the condominium law of other jurisdictions, and public input.[12]

The legislature thereafter enacted Chapter 514B of the Hawaii Revised Statutes ("Haw. Rev. Stat.") effective in 2006. Complaints about condominium governance have continued unabated since then.

The legislature did not repeal the prior condominium law (Chapter 514A) until 2017. Repeal will become effective on January 1, 2019, leaving certain developers additional time to bring projects approved under prior law to market.

Chapter 514B has controlled most aspects of condominium governance since it became effective, and Chapter 514A has largely been a dead letter since then. Some amount of study has nonetheless been necessary to achieve a proper understanding of what law applies in what circumstance.

The simple fact that a condominium home is not a castle is central to the debate over self-governance. Common expectations about the level of autonomy and self-determination that should accompany home ownership may go unmet in the condominium setting. Worse yet, condominium ownership means being involved in a substantial economic enterprise in common with strangers who may come and go at will.

The members of a condominium association form a *secondary* group, in sociological terms, suggesting one that is largely impersonal and transactional. Regulation of such groups tends to be more formal and structured than in *primary* groups, which tend to be regulated by deep, enduring interpersonal bonds and shared culture.[13]

And yet, individual owners want liberty. One owner's expression of liberty, though, sometimes sharply conflicts with some other owner's liberty interest. One owner's political and/or social values may be abhorrent to another owner. Nonetheless, condominium owners are stuck together all the same, whether they like it or not.

II. The governance tasks to be performed

Conspicuous governance tasks include budgeting for maintenance and repair, overseeing the use of the condominium project, and general administration. Each of these tasks present challenges relevant to the debate over self-governance.

A. Budgeting for maintenance and repair

As noted above, portions of condominium property, known as common elements, are held in common by unit owners. The maintenance and repair of these common elements is an operational aspect of condominium governance. The whole association must sustain the building or buildings in which the individually owned units exist and the grounds on which the condominium is located. Owners, by contrast, are individually obligated to maintain and to repair their respective *units*.

The maintenance and repair of the common elements entails expense. Common expenses are assessed to unit owners through the budgeting process. Owners are each assigned a percentage of the common expense "in proportion to the common interest appurtenant to their respective units, except as otherwise provided in the declaration or bylaws."[14]

"'Common interest' means the percentage of undivided interest in the common elements appurtenant to each unit, as expressed in the declaration, and any specified percentage of the common interest means such percentage of the undivided interests in the aggregate."[15] The aggregated common interests total 100 percent and the percentages of common interest assigned to specific units correspond to a prescribed scheme such as one based on unit size. Owners of larger units typically pay a greater portion of the common expenses than smaller units do, because the percentage of common interest allocated to a larger unit is usually greater than the percentage allocated to a smaller unit.

An operating budget must be adopted at least annually and made available to unit owners.[16] Some of the budget components, such as insurance, are prescribed by statute.[17] Other budget components may depend on the features and amenities of a given condominium.

Board members owe a fiduciary duty to the association; so they cannot in good faith satisfy the desire to limit assessments by keeping maintenance fees artificially low. The assessment of adequate replacement reserves, for example, is mandated by statute.[18]

Deferred maintenance can prove to be unwise in all events. Many industry professionals can recite examples of how something like the failure to paint

a building or to repair concrete spalling at an early stage has led to substantially increased costs when the work is finally performed.

B. Overseeing use of the condominium project

The use of a condominium project affects quality of life issues. The resale value of units may also be affected by how the project is used.

An association's Declaration and By-laws provide a basic structure for use of the project. House rules can also be adopted to further regulate use of the common elements. The use of house rules to regulate behavior within units is limited by statute.[19] In practical effect, that limited power often relates to preventing nuisances.

C. General administration

General administration is used herein to signify a broad array of tasks. Maintenance fees must be collected, books and records must be kept, contracts must be negotiated, and there must be a focal point for attending to ordinary and extraordinary events affecting the condominium. The Board performs these tasks.

Board officers are chosen by, and serve at the pleasure of, the Board. The President, Vice-President, Secretary, and Treasurer have assigned duties. Directors who are not officers only have a specific governance role during meetings or as assigned by the Board.

Most Boards are aided in governing the condominium by professional managing agents, serving as independent contractors. Managing agents add a significant layer of administrative support to a condominium. In particular, some functions of the offices of Secretary and Treasurer are often performed by the managing agent.

"Every managing agent shall be considered a fiduciary with respect to any property managed by that managing agent."[20] Managing agents must be licensed real estate brokers, register with the Commission, and carry a fidelity bond.

Property managers working for the managing agent need not be brokers themselves, but they often hold professional credentials supplied by industry. The Community Associations Institute ("CAI") enables property managers to earn various designations, for example, including its top designation of Professional Community Association Manager.

Resident managers are employees who provide day-to-day operational support for the condominium. Resident managers commonly interact with

owners and vendors. They may perform or supervise maintenance work and/or attend to other duties. Duties may vary significantly depending on the needs of the condominium.

Much of the administrative load associated with condominium governance is handled by Boards with the support of managing agents. Resident managers round out the administrative team.

III. The fiduciary duty

Board members are fiduciaries. This is stated in Haw. Rev. Stat. § 514B-106(a), and standards applicable to officers and directors of non-profit corporations are incorporated therein by reference. Based on Act 87 (2017), condominium directors (*see* Haw. Rev. Stat. § 414D-149) and officers (*see* Haw. Rev. Stat. § 414D-155) must discharge their respective duties: 1) in good faith; 2) consistent with the duty of loyalty; 3) with ordinary care; and 4) in the best interests of the condominium association. These requirements apply as a matter of *condominium* law, regardless of whether the condominium association is incorporated, and are consistent with common law requirements.

Unpaid volunteer Board members who serve faithfully are protected from personal liability by statute, and grossly negligent Board members are not.[21] In addition, condominium By-laws generally provide for the indemnification of Board members. Well-written indemnification provisions grant indemnification except in the events of gross negligence and willful misconduct. Directors' and officers' insurance further reduces the risk of service.

Service on a condominium Board entails at least some irreducible legal risk. That risk may not always be appreciated and can come as a surprise. Risk sometimes stems from resentment by owners who expect to live in their homes free from external control.

IV. The meaning of home

The importance of home to identity is easy to appreciate. It has been said that home is where the heart is. More philosophically, the establishment of a home has been described as "at the heart of the real."[22] The balance of power in a home, then, may be intensely felt and meaningful to many.

V. The balance of power

Advocates of government control rightly note that there are power imbalances in condominium governance. Broad power is vested in the Board, subject to meeting the standard of a fiduciary.

The system of electing representatives to govern a broader populace is familiar in America. That system is in effect at the municipal, state, and federal levels.

Elected officials do not, in that larger sphere, always receive the votes of all voters or enact policies favored by all. Elected officials have power all the same.

The power to elect and to remove Board members is held by condominium owners. Choosing wisely and monitoring the performance of Board members enables the reflection of majority preferences in condominium governance.

The power to remove directors is an important check on Board power. The decision to remove a director need not be for cause or even be rational. It need only be supported by owners holding more than fifty percent of the common interest.[23]

The power to amend the governing documents is also held by the owners. Under Chapter 514B, most Declaration and By-laws provisions can be amended with the approval of owners holding at least sixty-seven percent of the common interest.[24] Law and public policy seem to supply the only limits on what amendments can be made.[25]

The nature of condominium governance is further reflected in the fact that Board members owe a fiduciary duty to the *association* rather than to individual owners. The *membership* of an association consists of unit owners, but the association itself is more than the sum of its parts. The association has separate legal existence, regardless of whether it is incorporated or unincorporated.[26]

External control is a feature of condominium ownership that differs markedly from the ownership of other real property. Discrepancies between the expectations of owners and the reality of condominium ownership can lead to conflict in some situations.

VI. Conflict in condominiums

The sources of conflict in condominiums are manifold. Some conflict is simply explained, because conflict appears to be endemic to human society.

A complaint about condominium governance, therefore, may really be about something else. It is important to distinguish between real governance issues and issues that simply become manifest in the condominium setting.

For example, some conflict is interpersonal. Owner A dislikes owner B.

Some conflict is intrapersonal. Financial and/or personal stressors can overwhelm a person's normal coping mechanisms. Also, the National Institute of Mental Health reported for 2015 that 17.9 percent of all U.S. adults experienced a diagnosable mental illness within the previous year.[27]

Problems of governance can arise when interpersonal or intrapersonal conflicts become manifest in the condominium setting. This is not necessarily because of a clear nexus to some Board power or duty.

Some claims of abuse of power stem from dissatisfaction with a Board's response to an owner's demand. That is, a dissatisfied owner may either perceive Board action or inaction to be abusive, in and of itself, or an unsatisfactory experience may become a catalyst for challenging subsequent Board action. There are many points of potential friction in the condominium setting, some of which may be inevitable regardless of what governing authority is in place.

VII. The abuse of power

The real thrust of the case against self-governance is the allegation of serious malfeasance reflected in HB 35. In this view, Boards are venal. Board members oppress owners and retaliate against those who exercise their rights. Owners must live in fear.

The HB 35 finding (quoted above) was not the result of study, however. The extent of the alleged abuse was unquantified, and that finding was not supported by empirical data.

That is unfortunate, because empirical data is available. CAI has commissioned scientifically valid national surveys of satisfaction with association living in 2005, 2007, 2009, 2012, 2014, and 2016.[28] Those surveys have found that: "By large majorities, most residents rate their overall community experience as positive or, at worst, neutral."[29] The range of those who have reported negative perspectives in those surveys, from 2005 to 2016, was 8 percent to 12 percent. This is consistent with CAI survey results for Hawaii. A total of "87% of residents rate their community association experience as positive (65%) or neutral (22%)."[30]

CAI issued a Statement of Survey Integrity following what it termed "inaccurate statements" by an entity that developed different findings through an on-line self-report survey. CAI argued that its polling was conducted scientifically and that the competing findings lacked scientific validity.[31]

The prevalence of abuse of power by Boards has yet to be established. There is an objective basis for suggesting that only a small percentage of owners perceive Boards to be abusive.

There is also a question as to whether abuse of power would be eliminated by appointment of a government official to serve as "condominium czar." According to the FBI, "it is estimated that public corruption costs the U.S. government and the public billions of dollars each year."[32]

Power might be abused in various ways, by whomever is in charge. For example, money might be stolen. Bribes might be taken. Pet projects might be approved. Elections might be rigged. Mandates contained in law and the governing documents might be ignored.

A. Crime

Theft and bribery are crimes. Criminal law is an available remedy to address alleged crime in condominium governance.

The handling and the disbursement of association funds are directed by statute. Also, "Any person who embezzles or knowingly misapplies association funds received by a managing agent or association shall be guilty of a class C felony."[33] When a management company executive stole association funds several years ago, she was prosecuted and the funds were repaid.[34]

Owners are entitled to receive an annual audited financial statement,[35] as an aid to transparency. Owners are also entitled to a wide variety of financial, and other, documents of the association.[36]

Managing agents, being licensed real estate brokers, are subject to discipline by the Regulated Industries Complaints Office. Violation of Chapter 514B can subject a licensee to disciplinary action;[37] so administrative remedies are also available to facilitate transparency.

B. Pet projects

Board approval of someone's pet project means that at least a majority of a quorum of the Board supported the project. If that seems abusive, the political process itself is available to check moves in an unpopular direction, even in the absence of a specific violation of law or of the governing documents.

Owners have input into Board conduct. Owners can attend and participate in Board meetings. Executive sessions are allowed only for prescribed reasons.[38]

Board conduct that breaches fiduciary duty is an abuse of power. Board conduct that is merely unpopular with a minority of owners is not. The adage that elections have consequences applies to condominiums.

C. Election rigging

"But the election was rigged!" A common complaint is that the election is allegedly rigged because proxy voting is authorized by statute and Boards often hold many owner proxies.

Owners choose whether to give a proxy. They can choose to ignore the meeting or attend it and vote in person instead. Owners also choose the proxy holder if a proxy is given.

Standard proxy forms authorized by the association must contain boxes indicating whether the proxy is to be used for quorum purposes only, given to a named individual, or given to the Board. Owners giving a proxy to a Board can further choose that the proxy be voted based on the preference of the majority of the directors present at the meeting or, alternatively, voted by each director receiving an equal share of the proxy.[39]

A Board that intends to use common funds to solicit proxies must post notice of the intent to do so at least 21 days before making the solicitation and must then include the solicitations or statements of owners who timely request to be included. Board members seeking proxies individually are bound by the same limitations as other owners.[40] Owners are also free to solicit proxies at personal expense and they are entitled to request a list of owners for the purpose.

It is true that political action requires the investment of time, effort and money. Owners who want change must mount a campaign.

The argument that owners should not be allowed to give proxies to incumbents has been made to, but not adopted by, the legislature. Owners are free to consciously support or to passively accept the choices made by incumbents.

Some claims of vote rigging, then, merely reflect the frustration of those who have lost elections.

The legitimate question is whether condominium elections have integrity. Condominium vote fraud is possible. It is not probable.

Votes are usually tallied in the open by tally clerks employed by the managing agent. The tally clerks are usually watched by election tellers who are association members. It is the tellers who certify the election results.

Association members are entitled to examine proxies, tally sheets, ballots, owner check-in lists, and the certificate of election after the meeting at which the election takes place so that challenges can be made.[41] Examination requests are not uncommon, particularly at projects that are politically divided.

D. General misconduct

There can still be the matter of a Board's general failure, negligence or refusal to comply with legal or contractual requirements. Board members who breach fiduciary duty run risks because Chapter 514B expressly provides that "[a]ny right or obligation declared by this chapter is enforceable by judicial pro-ceeding."[42]

VIII. Remedies for the abuse of power

A fundamental aspect of the critique of self-governance is that the remedies for the abuse of power are inadequate. Boards have money, power, and counsel. Owners must pursue remedies at personal expense and risk.

The condominium czar model would be one in which owners need only complain to government. Government would investigate, advocate for the complainant, and adjudicate outcomes.

There is an obvious question about whether government should choose sides in a civil dispute involving privately owned real estate. Another obvious question is whether government should both advocate for one side to the dispute and adjudicate the outcome as well.

Remedies do exist under current law. In addition to criminal and administrative remedies to vindicate the rights of the public, available private remedies include mediation, arbitration, litigation, and taking political action.

A. Mediation

Condominium law mandates the mediation of most condominium disputes, upon request.[43] The cost of professional mediation services is subsidized[44] because of an industry-sponsored initiative.

Moreover, subsidized mediation is intended to be evaluative. Thus, the mediator can do more than facilitate process. The mediator can provide guidance.

One complaint about mediation is that Boards bring counsel. Fiduciary duty generally obliges a condominium Board to address legal disputes through

counsel. Nothing prevents owners from bringing counsel to mediation, apart from the cost of doing so.

Mediation is an affordable and available non-binding alternative dispute resolution mechanism. The frankly evaluative nature of subsidized condominium mediation is such that even unrepresented parties may benefit from participation.

B. Arbitration

Condominium law also mandates the arbitration of most condominium disputes, upon request.[45] Condominium arbitration awards can be rejected in favor of trial de novo, but the party who rejects the award and does not then prevail at trial will be assessed the fees and costs of the trial.[46] There is, therefore, a significant incentive to accept the arbitration award.

C. Litigation

Grievances can always be presented to the courts. As with the exercise of civil remedies in other contexts, litigating condominium claims requires effort, takes time, and costs money. The prevailing party in a condominium dispute is entitled to reasonable attorneys' fees and costs; so owners with meritorious claims should be able to retain counsel.[47] Of course, the owner must be able to afford counsel in the first instance and must bear the risk of loss.

D. Political action

The removal of offending directors and the election of new directors can remedy abuses of power. This remedy requires political action.

IX. The missing piece

The piece that is perceived to be missing in the remedial scheme is a remedy that does not entail risk or effort.

That missing piece must be understood to relate solely to the exercise of private civil remedies regarding privately owned real property, because the Commission already has substantial statutory and rulemaking authority to vindicate the public interest.[48] Laws of general application can be passed during annual legislative sessions as well.

It is the private grievances of individual condominium owners that owners must pursue on their own. The justification for government action in favor of one party to a private condominium dispute has yet to be established.

X. Recent legislative action

Legislative action in 2017 included targeted responses to several specific complaints about condominium governance. The repeal of Chapter 514A has already been noted.

Act 190 prohibits retaliation against persons who act lawfully to address, prevent or stop a violation of Chapter 514B or an association's governing documents. State district courts have jurisdiction over this new cause of action and may enjoin retaliatory conduct, award damages, or grant other relief that the court deems to be appropriate. As defined in Act 190:

> "Retaliate" means to take any action that is not made in good faith and is unsupported by the association's governing documents or applicable law and that is intended to, or has the effect of, being prejudicial in the exercise or enjoyment of any person's substantial rights under this chapter or the association's governing documents.

The cause of action works both ways. Board members and others who retaliate against owners are at risk. Owners who retaliate against Board members and others are also at risk.

Act 81 addresses multiple concerns. The concern that some Boards might resist participation in mandatory mediation or arbitration is addressed by providing that such resistance may be deemed to be a breach of fiduciary duty. The adoption of owner participation rules for Board meetings is provided for to ensure that owners can participate in deliberations and discussions of Board business. Agendas must now include expected items of business. An affirmative vote, rather than mere "approval," is required to go into executive session. Draft minutes must be available within thirty rather than sixty days.

Act 71 provides (among other things) for the disclosure of an on-site manager's contract. The redaction of certain personal information is allowed. This resolves tension between the call for disclosure and the employee's right to privacy.

XI. Democracy versus autocracy

There is a reasonable basis for suggesting that condominium self-governance is viable. Hawaii condominiums have governed themselves for more than half a century, and the condominium form of ownership has steadily grown over that period.[49]

Even so, the *number* of unhappy condominium owners may increase as more condominiums are built, regardless of whether the *percentage* of unhappy owners remains relatively constant. The condominium czar proposal is an indication that the mass of unhappy owners has become politically significant.

To do the greatest good for the greatest number of people, though, legislators may wish to base policy on objective facts discerned through reasonable and responsible investigation involving all stakeholders in an open process. That is how Chapter 514B was developed. No comparable process has been proposed to undo condominium self-governance.

Notes:

[1.] State of Hawaii, Dep't. of Bus., Econ. Dev. & Tourism, State of Hawaii Data Book 2016 ("Data Book"), Table 21.10, (http://dbedt.hawaii.gov/economic/databook/).

[2.] Compare *id.* with Data Book Table 21.20.

[3.] *Lee v. Puamana Community Association,* 109 Hawaii 561, 128 P.3d 874, 888 (2006).

[4.] Final Report at 5.

[5.] *Id.* at 1.

[6.] Haw. Rev. Stat. § 514B-4.

[7.] Haw. Rev. Stat. § 514B-3.

[8.] Haw. Rev. Stat. § 514B-51.

[9.] Haw. Rev. Stat. § 514B-82.

[10.] Haw. Rev. Stat. § 514B-102(b).

[11.] Haw. Rev. Stat. §§ 514B-105 and 514B-106.

[12.] Final Report at 7-8.

[13.] Jasmine Martirossian, Decision Making in Communities, 3, (Debra H. Lewin, ed. 2001).

[14.] Haw. Rev. Stat. § 514B-41(a).

15. Haw. Rev. Stat. § 514B-3.

16. Haw. Rev. Stat. §§ 514B-144(a) and 514B-106(c).

17. Haw. Rev. Stat. § 514B-143.

18. Haw. Rev. Stat. § 514B-148.

19. Haw. Rev. Stat. § 514B-105.

20. Haw. Rev. Stat. § 514B-132(c).

21. See, e.g., Haw. Rev. Stat. § 414D-149.

22. John Berger, And Our Faces, My Heart, Brief as Photos, 51, (1st Vintage International ed. 1984).

23. Haw. Rev. Stat. § 514B-106(f).

24. Haw. Rev. Stat. § 514B-32 (Declaration) and § 514B-108 (Bylaws).

25. *Lee,* 128 P.3d at 883-4.

26. Haw. Rev. Stat. § 414D-52 and §429-4.

27. Any Mental Illness (AMI) Among U.S. Adults, *https://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-ami-among-us-adults.shtml* (last visited September 9, 2017).

28. How Sweet HOA: A survey of satisfaction of community association living. Statement of Survey Integrity. CAI ("Statement of Survey Integrity").

29. *https://foundation.caioonline.org/wp-content/uploads/2017/06/2016NationalHomeownerSurvey.pdf* (last visited September 9, 2017).

30. Hawaii Community Associations facts & figures, CAI, *https://www.caionline.org/Advocacy/Resources/Pages/State-Facts-Figures.aspx* (last visited September 9, 2017).

31. Statement of Survey Integrity.

32. Public Corruption, *https://www.fbi.gov/investigate/public-corruption* (last visited September 9, 2017).

33. Haw. Rev. Stat. § 514B-149(f).

34. *See* eCourt Kokua case ID 1PC151000250, *http://jimspssl.courts.state.hi.us:8080/eCourt/ECC/CaseSearch.iface* (last visited September 9, 2017).

35. Haw. Rev. Stat. § 514B-150.

36. Haw. Rev. Stat. § 514B-154.5.

37. Haw. Rev. Stat. § 467-14.

38. Haw. Rev. Stat. § 514B-125.

39. Haw. Rev. Stat. § 514B-123.

40. *Id.*

41. Haw. Rev. Stat. § 514B-154.

42. Haw. Rev. Stat. § 514B-10(c).

43. Haw. Rev. Stat. § 514B-161.

44. Haw. Rev. Stat. § 514B-72.

45. Haw. Rev. Stat. § 514B-162.

46. Haw. Rev. Stat. § 514B-163.

47. Haw. Rev. Stat. § 514B-157.

48. Haw. Rev. Stat. §§ 514B-65 to 514B-69.

49. Table 21.10, Data Book.

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RELATING TO CONDOMINIUMS

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII

SECTION 1. Barriers to the use of mediation to address condominium-related disputes have been lessened by enabling use of the condominium education trust fund to subsidize the cost of mediation. Parties have nonetheless been required to pay a small portion of the cost in order to assure their stake in the process and to limit the assertion of vexatious mediation requests. It now appears that further accommodation should be made to lower the barrier further for those whom payment of a portion of the mediation cost is an unreasonable economic burden.

SECTION 2. Section 514B-161 of the Hawaii Revised Statutes, is amended to read as follows:

§514B-161 Mediation. (a) The mediation of a dispute between a unit owner and the board, unit owner and the managing agent, board members and the board, or directors and managing agents and the board shall be mandatory upon written request to the other party when:

(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.

(b) The mediation of a dispute between a unit owner and the board, unit owner and the managing agent, board members and the board, or directors and managing agents and the board shall not be mandatory when the dispute involves:

(1) Threatened property damage or the health or safety of unit owners or any other person;

(2) Assessments;

(3) Personal injury claims; or

(4) Matters that would affect the availability of any coverage pursuant to an insurance policy obtained by or on behalf of an association.

(c) If evaluative mediation is requested in writing by one of the parties pursuant to subsection (a), the other party cannot choose to do facilitative mediation instead, and any attempt to do so shall be treated as a rejection to mediate.

(d) A unit owner or an association may apply to the circuit court in the judicial circuit where the condominium is located for an order compelling mediation only when:

(1) Mediation of the dispute is mandatory pursuant to subsection (a);

(2) A written request for mediation has been delivered to and received by the other party; and

(3) The parties have not agreed to a mediator and a mediation date within forty-five days after a party receives a written request for mediation.

(e) Any application made to the circuit court pursuant to subsection (d) 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 $1,500.

(f) Each party to a mediation shall bear the attorneys' fees, costs, and other expenses of preparing for and participating in mediation incurred by the party, unless otherwise specified in:

(1) A written agreement providing otherwise that is signed by the parties;

(2) An order of a court in connection with the final disposition of a claim that was submitted to mediation;

(3) An award of an arbitrator in connection with the final disposition of a claim that was submitted to mediation; or

(4) An order of the circuit court in connection with compelled mediation in accordance with subsection (e).

(g) Any individual mediation supported with funds from the condominium education trust fund pursuant to section 514B-71:

(1) Shall include a fee of $375 to be paid by each party to the mediator; **provided that moneys from the condominium education trust fund may be used to pay the fee for each unit owner who demonstrates to the satisfaction of the commission that the fee will pose an unreasonable economic burden;**

(2) Shall receive no more from the fund than is appropriate under the circumstances, and in no event more than $3,000 total;

(3) May include issues and parties in addition to those identified in subsection (a); provided that a unit owner or a developer and board are parties to the mediation at all times and the unit owner or developer and the board mutually consent in writing to the addition of the issues and parties; and

(4) May include an evaluation by the mediator of any claims presented during the mediation.

(h) A court or an arbitrator with jurisdiction may consider a timely request to stay any action or proceeding concerning a dispute that would be subject to mediation pursuant to subsection (a) in the absence of the action or proceeding, and refer the matter to mediation; provided that:

(1) The court or arbitrator determines that the request is made in good faith and a stay would not be prejudicial to any party; and

(2) No stay shall exceed a period of ninety days.

SECTION 3. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

Some points relative to the July 12, 2016 memorandum provided today:

1) "The faulty laws they advocated" comment is timely. The Task Force can benefit from an understanding of the comprehensive recodification process that produced current condominium law.

2) Condominium directors have a fiduciary duty to the association, per HRS Section 514B-106(a):

> **§514B-106 Board; powers and duties.** (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the board shall owe the association a fiduciary duty and exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D. Any violation by a board or its officers or members of the mandatory provisions of section 514B-161 or 514B-162 may constitute a violation of the fiduciary duty owed pursuant to this subsection; provided that a board member may avoid liability under this subsection by indicating in writing the board member's disagreement with such board action or rescinding or withdrawing the violating conduct within forty-five days of the occurrence of the initial violation.

The applicable standards for directors are stated in HRS Section 414D-149(a):

> **§414D-149 General standards for directors.** (a) A director shall discharge the director's duties as a director, including the director's duties as a member of a committee:
> (1) In good faith;
> (2) In a manner that is consistent with the director's duty of loyalty to the corporation;
> (3) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
> (4) In a manner the director reasonably believes to be in the best interests of the corporation.

3) Managing agents have a fiduciary duty to the association, per HRS Section 514B-132(c):

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

4) According to the Final Report to the legislature on recodification;

> "As a consumer protection law, the primary purpose of Hawaii's condominium property regimes law is to make sure that buyers can know what they are buying." P.14

(https://cca.hawaii.gov/reb/files/2022/06/2003-recod-report.pdf)

5) Each condominium unit is a separate parcel of real estate:

> **[§514B-4] Separate titles and taxation.** (a) Each unit that has been created, together with its appurtenant interest in the common elements, constitutes, for all purposes, a separate parcel of real estate.

Owners of real property enjoy the benefits and burdens of real property ownership.

6) Condominium law provides remedies for breach of duty:

> **514B-10 Remedies to be liberally administered.** (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. Punitive damages may not be awarded, however, except as specifically provided in this chapter or by other rule of law.
> (b) Any deed, declaration, bylaw, or condominium map shall be liberally construed to facilitate the operation of the condominium property regime.
> (c) Any right or obligation declared by this chapter is enforceable by judicial proceeding.

7) Subsidized mediation is available for condominium owners, unlike owners of other property types.

8) Legal assistance for significant rights violations is available:

> https://hsba.org/HSBA_2020/Public/Legal_Assistance.aspx
> https://portal.ehawaii.gov/residents/legal-and-family-services/
> https://www.lawhelp.org/hi/portal
> https://www.legalaidhawaii.org/hawaii-legal-services-portal.html

9) The prevailing party in litigation is entitled to an award of attorney's fees and costs, which incentivizes the bringing of a well-founded claim.

10) The priority of payments statute presently in effect preserves "pay first, dispute later" only for common expenses, like maintenance fees.

> **§514B-105 Association; limitations on powers. *****
> (c) Any payments made by or on behalf of a unit owner shall first be applied to outstanding common expenses that are assessed to all unit owners in proportion to the common interest appurtenant to their respective units. Only after said outstanding common expenses have been paid in full may the payments be applied to other charges owed to the association, including assessed charges to the unit such as ground lease rent, utility sub-metering, storage lockers, parking stalls, boat slips, insurance deductibles, and cable. After these charges are paid, other charges, including unpaid late fees, legal fees, fines, and interest, may be assessed in accordance with an application of payment policy adopted by the board; provided that if a unit owner has designated that any payment is for a specific charge that is not a common expense as described in this subsection, the payment may be applied in accordance with the unit owner's designation even if common expenses remain outstanding.

11) Ask the condominium specialists at REC what "28,000 contacts" with the condominium specialists actually means.

Report to Condominium Property Regime Task Force

LINEAR ANALYSIS OF THE SUMMARIES OF
CONDOMINIUM EDUCATION TRUST FUND (CETF) SUBSIDIZED MEDIATION CASES
AS REPORTED IN
THE *HAWAII CONDOMINIUM BULLETIN* SINCE SEPTEMBER 2015

BACKGROUND. As of February 8, 2021, there were 1826 condominium associations which represent 173,026 units registered with the State.[1]

(Biennial registration with the DCCA is required of condominium associations with more than five units.[2] Although the aforementioned numbers may be outdated, the DCCA online database[3] reflecting association registrations that were due July 1, 2021, appeared to not have been fully updated, and as of today, the online database of registered condominiums associations due July 1, 2023, is still incomplete. E.g., the most recent biennial registration of The Pearl One reflects a registration date of July 1, 2019.)

Similar data is unavailable for planned community associations and cooperative housing corporations because they are not required to be registered with the State.

In contrast to Hawaii, the *2021-2022 U.S. National and State Statistical Review for Community Association Data* reports that California led the nation with 50,010 associations. Florida has the second-most associations with 49,420, followed by Texas (21,680), Illinois (19,010), North Carolina (14,440), and New York (14,170).[4]

Despite the significant differences in the number of associations between the more populous states and Hawaii, Surita "Sue" Savio, President of Insurance Associates which reportedly serves over 1000 associations throughout our state, has publicly stated that Hawaii has "*more [Directors and Officers insurance] claims than any other state...[and] the highest payout...D&O insurance companies don't like Hawaii.*" [5] [6]

Just a few months ago, Robin Martin of Insurance Factors similarly stated, *"Hawaii and New York are the two most litigious states for D&O,*" during an association's special meeting regarding insurance for homeowners.[7]

The remarks of these insurance brokers appear to coincide with the results of two national surveys:

(1) A month ago, an August 19, 2023 report[8] by Rocket Mortgage (the nation's largest residential mortgage lender by 2017[9]) of its survey of 1001 association governed community residents, including directors, revealed:

- only 43% of respondents say they "like" having an association;

[1] https://cca.hawaii.gov/reb/files/2021/02/AOUOContact2102.pdf
[2] Hawaii Revised Statutes 514B
[3] https://web.dcca.hawaii.gov/DPR.Net/Public/ShowPublicTable.aspx
[4] https://foundation.caionline.org/wp-content/uploads/2022/09/2021-2CAIStatsReviewWeb.pdf
[5] ThinkTech "Condo Insider" program, "How Condo Disputes Can Increase Your Maintenance Fees," September 19, 2019
[6] https://www.youtube.com/watch?v=8wOM10cgYS0&t=353s
[7] April 5, 2023, AOAO Nauru Tower Board Special Meeting
[8] https://www.rocketmortgage.com/learn/assessing-the-association
[9] https://www.rocketmortgage.com/about

- a shocking 37% of board members said that they disliked having a homeowner association;
- only 47% said that their neighborhood is better with a homeowner association;
- only 64% of owners surveyed felt that their association honestly handles its finances;
- 31% thought that their boards have too much power;
- 40% of homeowners and 19% of directors believe that their boards are incompetent;
- and 10% would go as far as *"consider selling their homes for reasons related to their HOA."*

Rocket Mortgage indicated a 3% margin of error in their data with a 95% confidence interval.

(2) The Coalition for Community Housing Policy in the Public Interest (CHPPI) reported of their last national survey that:

"65.9% [of respondents] are 'very dissatisfied' with and 15.1% are 'dissatisfied' because of transparency and communication issues...

72.6% of the condo and HOA owners surveyed said that they were generally 'very dissatisfied' (51.2%) or 'dissatisfied' (21.4%) with the whole concept of community association living...

60.8% of survey respondents urged that community associations should have more government oversight and regulation."[10]

"More than two-thirds of respondents have been involved in a significant dispute with an HOA, and 60% of those disputes were unresolved.

More than 1 in 4 respondents have been involved in legal dispute with their HOA, 23% have filed a complaint with a federal agency, and 38% have filed a complaint with a state agency." [11]

These two surveys may appear to contrast with the *2020 Homeowner Satisfaction Survey*[12] by the Foundation for Community Association Research of Community Associations Institute (CAI) which reported:

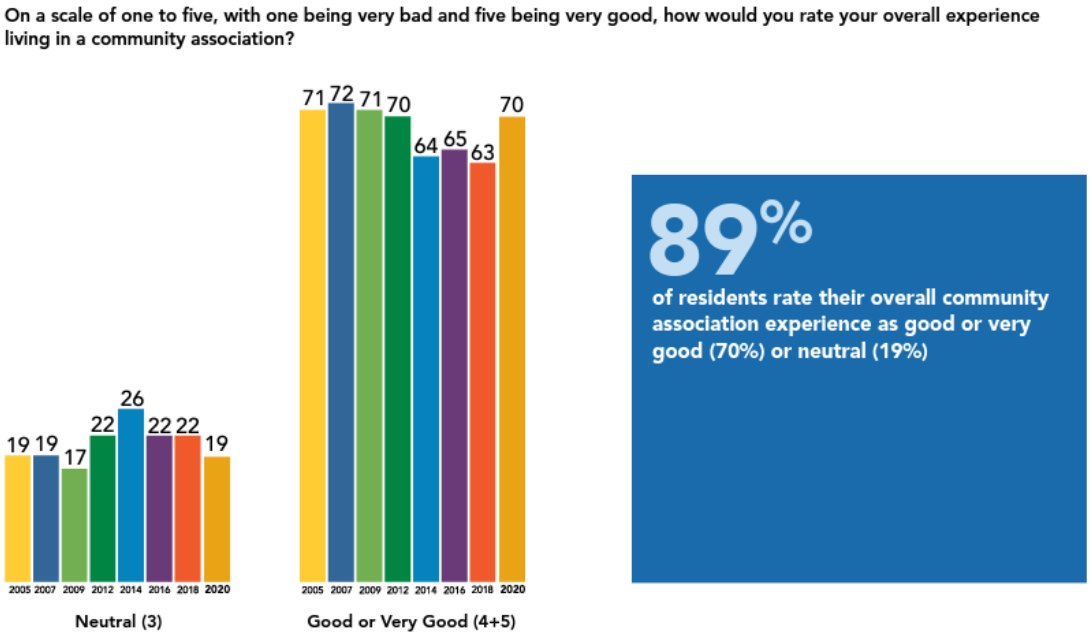
"89% of residents rate their overall community association experience as very good or good (70%) or neutral (19%)"

The latter part of the quotation, "*(70%) or neutral (19%),"* is often omitted to give the false impression that as many as 89% rated their "*association experience as very good or good*."

However, a review of the data and accompanying graphs allows another conclusion to be deduced: that 30% of the respondents to that survey did not "*rate their overall community association as very good or good (70%),*" results which may indicate significant displeasure with living in a community association.

[10] https://associationevaluation.com/many-condo-hoa-owners-are-dissatisfied-with-carefree-life/
[11] https://www.chppi.org/_files/ugd/1db237_c967f15803b742abb3b1300ae450f364.pdf
[12] https://www.caionline.org/PressReleases/Documents/2020HomeSatisfactionSurveyResults07.22.20final.pdf

The following is a copy of the graphs and data, copied directly from the *2020 Homeowner Satisfaction Survey,* and provided to allow readers to make their interpretation of the data:



THE STUDY. While a similar survey of Hawaii's condominium owners and/or residents could not be found online, a study of the Hawaii Real Estate Commission's quarterly report, the *Hawaii Condominium Bulletin*[13] [14] [15] since September 2015 revealed that nearly four out of every five of the mediation cases reported (78.631%) were initiated by owners against their association and/or board, which does not contradict the results of the three national surveys.

Of the 358 reported cases, only 35.056% were mediated to an agreement, leaving more than three out of every five mediation cases unresolved, withdrawn, refused, and/or elevated higher, a metric that appears to conflict with claims that "mediations are successful." (The study results are on page six of this document and a blank matrix that is modifiable is provided on the following page to allow participants to do their own study.)

Many condominium owners and residents who participate with Kokua Council and/or Hui Oiaio have alleged that mediation is not or was not a viable dispute solution for them because:

- Associations and their boards are usually represented by one or more attorneys (in one case, seven attorneys represented the association and its D&O carrier) compelling owners to feel that they must retain an attorney for some approximation of fair legal representation.

- However, the financial bar to retain legal representation is remarkably high. Roughly five years ago, owners complained of attorneys' retainers as much as $5000, which then increased to $10,000. But this last week, an owner reported that an attorney sought a retainer of $20,000.

[13] https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2011-2015/
[14] https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2016-2020/
[15] https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2021-2025/

(The redacted copy of that email from the owner regarding the exorbitant retainer request will be shared with the Senate and House committees that overlook condominium governance.)

- For many in Hawaii, condominiums are "entry-level" housing, and most urban "affordable homes" are built as condominiums. But those property owners' recourse to justice may be anything but affordable, extending justice to only those who can afford it.

  (An analogous situation may have occurred with nonjudicial foreclosures. A condominium owner alleged that most of the condominium units involved in nonjudicial foreclosures were modestly priced or less. Because a complete database of NJF properties was not readily available, *BENITA J. BROWN, ET AL., Plaintiffs, v. PORTER McGUIRE KIAKONA & CHOW, LLP, a Hawaii limited liability partnership, ET AL., Defendants. United States District Court, D. Hawaii* was reviewed for its 4-page list of condominium associations named in that class action suit alleging improper nonjudicial foreclosures. Although a few median-or-more-priced condominium associations were on that list, in general, the allegation appears irrefutable.)

- Although the mediation process may be subsidized by the Condo Education Trust Fund, each party must still initiate the process with $375, which discourages many owners from participating when there is no assurance of resolution.

  (The $375 "gamble" that owners may take to mediate should be juxtaposed against these:

  > "63% of Americans live paycheck to paycheck...60% of Americans can't cover the cost of a $1,000 emergency with cash from their savings."[16]
  >
  > In Hawaii, "what remains after living expenses is $186, or less than 7 percent of each paycheck. Hawaii is the only state with a single-digit percentage of disposable income."[17])

- Even when parties come to a written agreement, there enforcement of that agreement is not assured, thus making some resolutions ineffective unless the parties go to Court.

- Although mediation is mandatory in many cases, some associations/boards do not participate knowing that the owner must go to Court to enforce this mandate.

- Additionally, there is a clause in HRS 514B that serves to disincentive associations from participating as the association's nonparticipation obliges the owner to pay disputed fees, even if those fees are incorrect, unsubstantiated, or unfair:

  > *§514B-146 Association fiscal matters; lien forassessments. (g) … if the mediationis not completed within sixty days or the parties areunable to resolve the dispute by mediation, the association may proceed with collection of all amounts due from the unit owner for attorneys' fees and costs,penalties or fines, late fees, lien filing fees, or any other charge that is not imposed on all unit owners as a common expense.*

[16] https://www.zippia.com/advice/how-many-americans-live-paycheck-to-paycheck/
[17] http://www.staradvertiser.com/business/business-breaking/paycheck-to-paycheck-living-most-likely-in-hawaii/

- Further, anyone can be a mediator. The mediator does not need to be versed in condominium (or association) law. There are no professional standards for mediators. And mediators may not be neutral parties; some allegedly fail to disclose their conflict of interest.

INTERMEDIATE CONCLUSIONS. We note that Act 189 includes the common misconception that the DCCA--whether through the Real Estate Commission or its Regulated Industries Complaints Office—"*facilitates the resolution of or intervenes in disputes*." It does not.

Rather, the DCCA does not enforce HRS 514B except for provisions regarding owners' access to certain documents (sections 154 and 154.5) and providing education through the condominium owner-paid Condominium Education Trust Fund (sections 71 through 73) which also subsidizes mediation and arbitration (sections 161 and 162), but *subsidizing* differs from *facilitation* or *intervention* in dispute resolution.

Most of the data presented in this report was available prior to the 2023 Legislative year. Subsequently discovered data and owner contacts only reinforced our earlier conclusion that the alternative dispute resolution methods in HRS 514B were inadequate, blocking access to justice to only those who could afford those costs.

In early 2023, Hui Oiaio initiated and Kokua Council supported the introduction of two measures, HB 178[18] to create an Ombudsman's Office for all common-interest-associations and HB 1501[19]to create an Ombudsman's Office for condominium associations, with either proposal as an inexpensive and more efficient alternative to current HRS 514B CETF subsidized ADR (i.e., mediation, arbitration).

Neither proposal required the State's general funds (taxpayer funds) and proposed to be funded by association unit owners themselves, **a mere $1.04 per month per unit owner**.

(If only condominium owners' contributions are considered, almost $4.45 million total could be collected over two years to staff and operate an Ombudsman's Office. If other common interest association unit owners participated, the total would be magnified.)

Both proposals also required that board members satisfy educational requirements offered through the Ombudsman's Office, an apt reaction to the significant portion (93.575%) of all CETF-subsidized mediated disputes that were reported in the *Hawaii Condominium Bulletin* since July 1, 2015, that alleged violations of associations' governing documents.

While there are legal differences between condominium associations, planned community associations, and cooperative housing corporations, there are significant similarities including that owners' and residents' rights must be protected because their each of their associations are governed by a board without any check or balance against its centralized power. While these associations may be different, the problems experienced by their unit owners are similar.

HB 178 and HB 1501 are not perfect; however, these proposals are worthy of legislative review and re-consideration. Owners are entitled to due process that is not dependent on their ability to pay.

[18] https://www.capitol.hawaii.gov/sessions/session2023/bills/HB178_.htm
[19] https://www.capitol.hawaii.gov/sessions/session2023/bills/HB1501_.htm

Exhibit A: the tally results

HI Condo Bulletin	AOAO/BOD V	OWNER V	OWNER V	OWNER V	TOTAL	mediated	mediated	assn did not	owner did not	resolution	elevated	mentions allegation(s)* of violations of			water leak,
ISSUE MONTH	OWNER	AOAO/BOD	OWNER	CAM	CASES	to agreemnt	w/o agreemnt	mediate*	mediate**	outside medtn	to arbitration	514B	retaliation	gov docs	intrusion,etc*
September-23	0	8			8	3	4				1			8	
June-23	4	10			14	4	5	1.5	3.5			1		13	1
March-23	3	15			18	1	14		2	1				18	1
December-22	3	8			11	1	7	0.5	2.5			1	0.5	9.5	
September-22	2	4			6	3	1	0.5	0.5	1		2		4	
June-22	5	14			19	4.5	10.5			4		1	1	17	
March-22	2	15			17	8	4			4	1	1		16	4
December-21	1	8			9	3	4			2			0.5	8.5	2
September-21	3	13			16	8	5			3				16	3
June-21	5	12			17	8	5	2		2		1		16	1
March-21	1	9			10	4	3		2	1		1		9	
December-20	5	15			20	7	12		1				1	19	1
September-20	2	4			6	2	3	0.5	0.5					6	
June-20	1	2			3	3	0		.					3	
March-20	3	13			16	5	9		1	1				16	1
December-19	2	13		1	16	5	6		2	3		1		15	1
September-19	3	8			11	6	4			1		1		10	2
June-19	0	10			10	5	3	0.5	1.5			1		9	1
March-19	2	13			15	7	4	1	1	2		1		14	2
December-18	1	2			3	0	3							3	1
September-18	3	7			10	4	2	1.5	1.5	1		1		9	1
June-18	1	4.5	0.5		6	2	3	1						6	1
March-18	5	5	1		11	3	3	1.5	3.5				1	10	
December-17	3	13			16	5	6	3	2					16	5
September-17	1	10			11	3	5	2	1			1		10	2
June-17	0	6			6	3	3					1		5	2
March-17	2	4			6	4	2							6	
December-16	2	6			8	2	4	2						8	3
September-16	2	8			10	2	5	1	2			2		8	1
June-16	1	3	1		5	3	0	0.5	1.5					5	1
March-16	2	10			12	3	2	1.5	5.5			1		11	1
December-15	2	7			9	3	2	3	1			1		8	
September-15	0	2	1		3	1	1	1						3	1
total cases	72	281.5	3.5	1	358	125.5	144.5	24.5	35.5	26	2	19	4	335	39
total by percent	20.112%	78.631%	0.978%	0.279%	100.000%	35.056%	40.363%	6.844%	9.916%	7.263%	0.559%	5.307%	1.117%	93.575%	10.894%

*association declined, refused, nonresponsive, or withdrew **owner declined, refused, nonresponsive, or withdrew *based on interpretation of comments

(If numbers are not whole numbers, they indicate that the data was unclear as to which parties were responsible and/or if the dispute had multiple causes and could be attributable to more than one classification.)

DETAILS FROM THE CHART ABOVE:

Total number of Condo Education Trust Fund subsidized mediations reported since July 1, 2015: 358

WHO INITIATED THE MEDIATION:

owners against their association and/or board:	78.631%
the board or association against the owner(s):	20.112%
an owner against another owner:	0.978%
an owner against the community association manager:	0.279%

RESULTS OF THE MEDIATION CASE:

cases that were mediated to agreement:	35.056%
cases that were mediated without agreement:	40.363%
cases that were withdrawn/refused, settled outside, or elevated to arbitration:	24.581%

REPORTED CAUSES OF THE DISPUTES:

due to alleged HRS 514B violations other than 514B-191:	5.307%
due to alleged violations of HRS 514B-191 (retaliation):	1.117%
due to alleged governing document violations:	93.575%

ALSO NOTED: percentage of cases that mentioned water leak, intrusion, damage, etc.: 10.894%

(A statistical margin of error was not calculated as there was not enough data.)

Exhibit B

Exhibit B is a blank matrix which task force members may use to verify the data in Exhibit A for themselves. The left side of the matrix is based on clearly reported results while the right side of the matrix (with a grey background) is based on subjective interpretations of the case summaries.

Exhibit B

HI Condo Bulletin	AOAO/BOD	OWNER V	OWNER V	OWNER V	TOTAL	mediated	mediated	assn did not	owner did not	resolution	elevated	allegation(s)* of violations of		
ISSUE MONTH	V OWNER	AOAO/BOD	OWNER	CAM	CASES	to agreemnt	w/o agreemnt	mediate*	mediate**	outside medtn	to arbitration	514B	gov docs	retaliation
September-23														
June-23														
March-23														
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March-17														
December-16														
September-16														
June-16														
March-16														
December-15														
September-15														
total cases														
total by percent														

*association declined, refused, nonresponsive, or withdrew **owner declined, refused, nonresponsive, or withdrew *based on interpretation of comments

These are links to the online sites where digital copies of the Hawaii Condominium Bulletin may be accessed:

Bulletins from 2021 to present, https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2021-2025/

Bulletins from 2016 to 2020, https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2016-2020/

Bulletins from 2011 to 2015, https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2011-2015/

Hui `Oia`i`o
2051 Young Street #51
Honolulu, Hawaii 96826
Oiaio.coco@gmail.com
July 12, 2016

Real Estate Commission
Condominium Review Committee
King Kalakaua Building
335 Merchant Street, Rm 333
Honolulu, HI 96813

Re: THE END OF SELF-GOVERNANCE

Dear Sirs and Madams,

A CAI-HAWAII brochure cautions "*Topics. Threats to self-governance. Strong efforts have been made to substantially impair or to effectively end association self-governance. They will continue*."

A brochure advertising the quarterly HCCA (Hawaii Council of Community Associations) class presents as a "*Hot Topic," "The Future of Self Governance. Will an Ombudsman take away your authority to make decisions? Will Associations lose [their] right of self-governance?"*

The apocalyptic "end of self-governance" incitement is about as sincere as the calls of the boy who cried "wolf," which should be a warning to those heralds to temper their alarms.

THE FALSE ARGUMENT - The House Consumer Protection and Commerce Committee's efforts and that of the Hui's regarding HB1802, the "condo ombudsman" measure, were conflated in a recent CAI Hawaii article, "The End of Self-Governance?" as if we Condo Owners amended the original bill to create the provocative "Condo Czar" under the oxymoronic, "Office of Self-Governance Oversight."

With apologies to those Legislators who tried to assure that Condo Owners will have equal protection under the law, it was the House Committee who contrived that controversial amendment, the so-called "magic bullet" the author mentions.

We Condo Owners knew better than to conjure even the mere appearance of an absolutist authoritarian ("czar") when we ourselves are actively seeking a more egalitarian approach to dispute resolution, including relief from dictatorial Boards and/or Managers.

Our efforts to achieve a fairer and more protective justice system are undermined when dressed in the CAI-Hawaii author's fabrications threatening increased government oversight, loss of access to courts, and loss of ability and right to self-govern. The author suggests that our endeavor assaults the fundamental policy of self-governance, and claims, "*you could literally come to live in government run housing. Really. No joke.*"

ARGUMENTUM AD HOMINEM - The pre-emptive efforts to discredit Condo Owners and the manipulated conflation suggests that the author could not find a decent argument against what we represent. Maligned as "dissatisfied," "disgruntled," and now, "unhappy" people who make "unrealistic demands upon legislators," the Hui seeks to help outmatched, overwhelmed condominium Owners who are fighting for their basic rights under our condominium laws.

ONE OF OUR POSITIONS - As an example, the current law fails to address the costliest aspect for parties seeking justice, the "condo lawyers."

While a board must have access to legal counsel in order to discharge its duties, too often boards seek the costly services of a lawyer for matters which simply do not warrant the cost, such as to block an Owner who seeks to exercise his/her right to a copy of the Minutes of Board meetings or an employee's job description.

Owners must hire, at their own expense, a lawyer to enforce their rights and responsibilities, but the majority of Owners are not able to expend the large amounts of money and time required to assert their rights or to enforce compliance by their boards. The average minimum retainer a condominium lawyer requires from an Owner wishing legal representation is $3,000 to $5,000 for the simplest of matters. At an average cost of over $250 per hour, that retainer will not provide much assistance to an Owner.

On the other hand, boards have access to unlimited funds contributed by Owners. Condominium lawyers have an abundance of experience and skill at prolonging matters to the point where a unit Owner can simply no longer afford to continue his/her action or claim. A board could even assess its association for more money if its lawyer needed more.

Further, under the current law, many boards have passed a "priority of payments" such as the following:

> *At any time there are unpaid Legal Fees, Late Fees, Fines, Bad Check Charges, Agreement of Sale Payments, or Special Assessment Fees on an Association Member's account ledger, the next Association/Maintenance Fee payment received from that Association Member will be first applied to liquidating these fees in the order as stated above. After these fees are paid, the remaining amount, if any, will be credited to the Association's Association/Maintenance Fee assessment account. This procedure is sometimes referred to as "Priority of Payments".*

This order of payments, in conjunction with HRS514B-104, "*if the fine is paid, the unit owner shall have the right to initiate a dispute resolution process*,**"** makes it difficult for an Owner as swelling legal fees must be paid before the fine is even paid, thus forestalling dispute resolution. In one association alone, Owners' legal fees are claimed to be in the tens of thousands of dollars, all which started as $100, $200, and $300 fines over alleged violations, and which continue to balloon as the attorneys prolong resolution and add more attorneys to inflate their ranks. Some of these cases have been going on for years.

ON SEEKING CURES - Rather than recognize that systemic problems may require legislative action, our challengers will have you believe that legislators respond to isolated and peculiar incidents which involve marginalized constituents and warn of kneejerk reactions with lethal consequences of burdensome oversights.

Curiously, the condo industry go to legislators, too, through lobbyists to advocate for them. But their arrogance in being "experts" cannot shroud the faulty laws that they advocated, such as the aforementioned "pay first, dispute later" law.

Simply put, they advocate for their commercial benefit; we advocate for condo owners.

IN SUPPORT OF SELF-GOVERNANCE - Typical government responsibilities were transferred to associations to alleviate public governments from those costs and responsibilities. Condominiums and similar common-interest communities allow greater density and more efficient use of land. These communities can provide amenities and with certain internal controls, such as design or architectural, can protect, preserve and enhance property values. Many condo owners purchased with that knowledge, some even desired those controls, and thus are not averse to the policy of self-governance and appreciate its intent.

What most Condo Owners did not realize was that associations may arbitrarily impose written and unwritten rules on owners and residents, with or without justification, often without due process, and that those same

associations are shielded by attorneys and are nearly immune because applicable statutes are largely not enforceable or do not exist.

Requesting oversight is not the same as vacating the principle of self-governance. Private commercial entities are not exempt from laws and are subject to government oversight; the more risk to consumers, the greater the regulations. Except in the condo industry.

WHO WE ARE - Hui `Oia`i`o which, as an entity, did not exist even a year ago, now numbers in the hundreds, and many of us are, or have been, Board Directors. Many are accomplished professionals with prestigious successes as attorneys and judges, doctors and scientists, engineers, architects, educators, military officers, and business owners, and do not require the plebeian title, "Board Director," to feel fulfilled or acknowledged.

As of this date, we come from over a hundred condominium associations throughout Oahu; there are more but many Hui participants do not want to disclose their association's name for fear of retaliation. Even without a website and without advertisement, we continue to grow, our connections forming by word of mouth; we even have participants from as far away as Alaska, Florida, Japan, and Tahiti who own Hawaii properties.

SUMMARY - In the last two years, the REC itself reported that Condo Specialists received over 28,000 contacts per year from consumers; that simple statistic belies the illusion that all is well in the condo world.

Many Commissioners are Realtors and may have heard from clients of their condo woes. Complaints about rising maintenance fees are often dismissible until you hear that the increases are unmanageable. Complaints about rule violations can be handled with a little education, until you hear that there are no such written rules or the violation was fraudulently manufactured. Complaints about self-dealing, embezzlement, kick-backs, and other unconscionable acts alarm you into realizing that *something* must be done. That *something*—enforcement of existing laws and enhancement of consumer protections--does not abolish self-governance.

We ask that you look beyond those false alarmists "crying wolf," and that you calmly realize that seeking greater protection of ownership rights including a fairer justice system will not force us into government run housing and will not cause us to lose access to courts.

We did not decry mediation which the author defends, but reveal that the steps to getting there are often too arduous to surmount. And we ask that you recognize the fallacious hyperboles in the author's argument and wonder what his real motives are.

Beyond dispute resolution, there is so much that needs to be done for the nearly 40% of Hawaii residents who currently live in condominium and homeowners' associations. In about a dozen years, 80% of all new housing starts will be in community associations.

I leave you with two quotes and a cartoon:

"If all men were angels, there would be no need for government." ~~ James Madison

"If you are not a part of the solution, you are a part of the problem." ~~ Elridge Cleaver

Respectfully,

/s/

Lila Mower, ad hoc spokesperson for Hui `Oia`i`o

Condominium Dispute Resolution: Philosophical Considerations and Structural Alternatives

An Issues Paper

for the

Hawaii Real Estate Commission

Gregory K. Tanaka
January, 1991

TABLE OF CONTENTS

INTRODUCTION

The aim of this paper is to identify and discuss alternative methods for condominium dispute resolution.

Arising primarily between the condominium owner and the association's board, these disputes have more often than not travelled a very bumpy road. With litigation as the only commonly recognized means of settling disputes, there has been a growing need for speedier, less expensive and less traumatic means by which to solve these problems in the local community. The three case studies which appear in Appendix A represent what can happen when simple disputes have nowhere to go but court.

There is no clear precedent today telling us how to deal with condominium disputes. In fact, the Hawaii Real Estate Commission should be recognized for early efforts to reduce conflict and discover new resolution techniques. Without exception, every expert contacted on the mainland stated that Hawaii is leading the nation in this regard.

This report outlines several approaches by which to plan, build and support new condominium dispute resolution programs. It is based almost exclusively on interviews of persons having a stake in the outcome. The absence of hard data makes this more an issues paper than a true analytical study.

I. How Extensive Is the Problem?

A. GENERAL OBSERVATIONS:

A number of immediate observations should be made about the present environment for condominium dispute resolution:

1. Data: Hard data is mostly unavailable. As a result we don't know the severity of the problem. The number of phone inquiries to the Real Estate Commission each month since 1988 is shown at Appendix B. The number of cases entering arbitration is unavailable but has not apparently grown. The Judiciary does not keep data for cases arising from condominium disagreements. In general there are no formal mechanisms for acquiring and categorizing data about condominium disputes. Thus, one recommendation coming out of this report will be to generate hard data in a controlled manner.

Anecdotal data does indicate significant frustration between condominium owners and their boards--deriving from lack of information, imbalance of power, the absence of a quick and inexpensive means of dispute resolution, and other factors. (A breakdown of the ten most common categories of such disputes is shown at Appendix C.) For this reason this paper will focus on disputes that arise between the individual owner and the association or board.

2. Previous Studies: This report follows four excellent studies. In 1988, Mr. Yukio Naito conducted a thorough review of condominium laws. In 1989, Charlotte Carter Yamauchi of the Legislative Reference Bureau completed a report which indicated the need for licensing, education and possibly a bureau with broad powers, as exists in Florida. Condominium Specialist John Morris' Interim Report to the Legislature in 1989 reaffirmed the need for better education, information gathering and licensing. That report also broached the subject of urgent need for a quick, inexpensive means of resolving disputes.

Most recently Peter Behrens, a University of Hawaii business student, completed a study. It recommended mandatory use of a model management agreement to achieve better control over condominium matters generally, by focusing on the relationship between the association and the managing agent.

The present paper will examine specific alternatives for the narrow area of dispute resolution, with a broad timetable for infrastructure implementation.

3. Scheme. As in other jurisdictions, no time-tested system for resolving condominium disputes exists here in Hawaii. (To graphically visualize how limited present options are for parties in dispute, see

Appendix D, which is a schematic of the present pathways to dispute resolution.) Ideally, an array of different mechanisms--including focused education programs-- can be developed to allow disputes to find their way to the forum that best suits a particular problem. This report will provide a framework through which to identify and assess new mechanisms at different levels of severity.

4. Pilot Programs: It is still too early to evaluate the success of new programs in Hawaii. Several are designed to educate the public and one will experiment with mediation. These programs are just now being launched.

5. Long Range Plan: The Real Estate Commission has only been examining condominium disputes for a relatively short period of time. It has just begun to develop an infrastructure for this and so there has not yet been time for the Commission to develop a long range plan. Perhaps in a year or two--once sufficient data does become available--it would be timely to draft such a plan.

6. Formal Data Gathering Mechanism: It would also be appropriate to set up a feedback system for collecting, computerizing and cross-tabulating data on condominium disputes--now that there is a track record upon which to build such a system. Work on this need not await experimentation; it can begin immediately.

7. Causes of Disputes: To prepare for data gathering and to have an idea of how to structure new resolution mechanisms, the Commission has begun a process of categorizing the major factors underlying condominium disputes. This tentative "taxonomy" can later be revised as the data gets better and sheds more light on the subject. A taxonomy would give the Commission the ability to undertake a more focused approach to education and to dispute resolution experimentation in years to come.

B. SOME FACTORS UNDERLYING CONDOMINIUM DISPUTES

1. A tension between private rights and community rights is the basic underlying cause of many disputes. It pits the right of the individual to enjoy his or her own dwelling without outside interference--against the right of neighbors to enjoy the protection and certainty embodied typically in the house rules.

This is a philosophical concern which will take decades for the nation to weigh and resolve. No mechanism today can afford to ignore that tension, yet by the same token it remains difficult to imagine a way to find instant relief from it. (More discussion below.)

2. Lack of education about rules and statutes--by owners and boards both--is another frequent cause of disputes. This type of problem can be easily intercepted at system intake--and should be.

3. Condominium living is relatively new, so there are few

precedents telling us how to resolve disputes and actually build harmony in an environment where you are likely to see your "opponent" in the hallway the next day.

4. Quick, inexpensive and fair resolution of many smaller disagreements is not presently possible on a wide scale, with the result that minor disagreements are turning too often into full scale disputes that end up unnecessarily in court.

5. An imbalance of power between the board and the owner seems to be the perception among some condominium owners. With associations holding most of the cards and acting upon advice of counsel not to even discuss the matter, there does indeed seem to be an impasse to resolution. This results in even the most minor matters wind up in protracted litigation. (See three case studies at Appendix A.)

6. People relocating to Hawaii: One constant observation of those who work with condominium disputes is that a disproportionately high percentage of cases involve people who have recently moved to Hawaii from the mainland. This is a perception that ought to be tested early on. If it turns out to be true, education efforts could be tailored to fit the concern. Surveys could, for example, examine whether some people bring to Hawaii a different concept of space from the mainland, where land is more expansive. The adjustment from a detached single family house to close-quarter, shared condominium living in Hawaii could be difficult for anyone, regardless of their point of origin.

7. Developer-Stacked Boards may be the biggest hidden problem underlying condo disputes. This would apply to situations where one entity purchases a significant, if not controlling percentage of the units in a newly developed building. It may be necessary at some future date to address this overall problem through legislation that limits the percent of board positions that can be occupied by developer interests or others seeking to concentrate ownership. The same result may need to be applied to protect renters--but for different reasons.

8. Personality differences and other expressions of human nature will make it impossible to avoid or resolve all condominium disputes. Some cases involve important disagreements over procedural rules or other concerns, while other cases may involve a sore loser about some condominium election or house rule. No dispute resolution mechanism can save humanity from the latter problem.

9. The board structure itself may be an underlying source of many disputes. The present structure, modeled after corporate boards, is best suited to the financial or investment function. It is, however, an awkward structure vis-a-vis other two extremely important association functions--governing and community living.

It may be appropriate in this light to consider new models for an association's legal structure. One might be the "town meeting and city manager" model which would better match the governance and community

living functions without sacrificing control over finance and investment (done through a finance committee). Or it may be enough to suggest to boards that they establish at least three committees each having clear missions--one for finance/investment, one for governing, and one for community lifestyle/planning. (More discussion below.)

10. Condominium Managing Agents (CMA's) represent the system's first chance to engage in "fire control" over disputes. CMA's are being paid to manage. It would be important to do everything possible to assist them in performing this duty and to then hold them accountable for it. The same would apply to resident or general managers in some buildings.

II. In Consideration of Structural Alternatives

A. PRACTICAL CONSIDERATIONS:

1. Data: Given the need for formal mechanisms to gather data about condominium disputes, making major decisions about structural changes for dispute resolution would be premature at this time. Any efforts to systematically gather data in the future should include a clear view of information needed to erect new structures.

2. Taxonomy: As part of the effort to improve data gathering, one of the first priorities should be to identify categories of complaints. Once this is done, it will be easier to tailor dispute response mechanisms to fit the specific problem. Education programs can also be aimed at specific areas that give rise to disputes. In general it also seems important to set up a system or mechanisms which allow people to reach the underlying source of the problem quickly--and by doing so get that much closer to a solution. Time spent early in this can yield very practical benefits later--eg. easier training of new mediators and others who will do the work of dispute resolution.

3. Competing Interests: There are at least three overlapping functions in the management of condominium regimes: government, investment and community living. Often the three functions get confused or the distinctions remain overlooked. The result can easily be a scatter-gun response to what are really three separate problems.

A more deliberate response to the growing dispute resolution problem would be to place reforms within this larger framework--keeping in mind the three separate functions that associations perform. In this way the expectations of owners, directors, board presidents, property managers, condominium attorneys, renters and government officials will more nearly approximate the ability of the institution to perform in each of the areas.

4. ABC Analysis: Not all disputes are of the same complexity, seriousness or desired result. This suggests the need to divide condominium disputes into perhaps three different groupings according to degree of complexity and remedy sought. The most complex matters

would be considered "A" category problems, which would indicate certain avenues to education or dispute resolution. The "manini" disagreements would be considered "C" category problems, which would suggest a wholly different set of options. In between cases are the most difficult to define and treat, and the new dispute resolution mechanisms should take that into account.

5. Long Range Plan: A plan is needed to provide a wider view of necessary change and to provide order to the phasing-in of new programs. It is not too early for the foundation for this plan to be laid. It can be initiated and still preserve flexibility.

6. Something New: Anything reasonable would be an improvement over what now exists in the way of options for unhappy parties. (Again, see Appendix D.) It is harder to lay the groundwork for more permanent structural change, but this can come later if necessary.

7. Condominium Attorneys: As long as even one association attorney advises his or her clients to take everything to court there will be high costs to dispute resolution: special assessments to pay for attorneys fees, unnecessary overkill of small cases, insensitivity to the legitimate concern, a building up of institutional resentment and the high psychic cost of litigation. In practice, only a very small percentage of cases should wind up in the courts. Attorneys can do much to steer the balance of cases to a far less expensive avenue.

8. Inter-Agency Nature of the Problem: This problem of dispute resolution clearly cuts across jurisdictions to include the work of various agencies. Any long term solution to this problem must take this "inter-agency" trait into account and probably acknowledge that no one agency can realistically take the lead in reaching a long term solution. One possible mapping of future avenues of dispute resolution appears at Appendix E. There can be no question from this schematic that large scale structural change must involve significant discussion and planning between multiple agencies.

B. PHILOSOPHICAL CONSIDERATIONS:

1. Private vs. Community Rights: A tension naturally exists in community associations between private right and community right. When you buy a condominium you think, "I own something now." There is a tendency to feel you shouldn't have to abridge your use of this new purchase. With today's high prices, it is all the more difficult to resist the temptation to do whatever you want without regard to house rules or convention. At the same time, much of the value inherent in the unit is the expectation of order, safety, quiet and other norms which together comprise the community right. The conflict between a private right to enjoy and this community right is a difficult one and must be taken into account in any attempts to improve dispute resolution.

In fact, this conflict lies at the heart of shortcomings in

present efforts at condominium dispute resolution. The only heavily used mechanism today is the court system and the courts will generally enforce the written word. Under this construct, there is a natural bias toward protecting community rights. Individual owner claims may have merit yet be frustrated by the formality of litigation. (Still other owner claims may appear in court but not belong there because they are not well founded.) All such cases are treated the same way under the present system. It would be better to find a more friendly forum to take up the many concerns that do not belong in court. That kind of "decompression" may be one key to establishing a framework that allows private and community rights to peacefully co-exist.

The nature of this conflict is such that quick resolution will not likely appear. Some of the issues might later be resolved by thoughtful legislation. Others might disappear as we learn more about community living. Still other issues might simply die of triteness. But it may be generations before an easy alliance of these two competing rights can be discovered.

2. Adjustment to shared community living. People raised in detached single family dwellings tend to bring their expectations about privacy with them into the relatively more confined condominium association. When these wishes are defeated by a particular house rule, it is entirely natural for the people to become frustrated. Some may push aggressively for exception or vent their frustration indirectly. This is very likely a secular development over time--a one time problem which is striking modern living for the first time in this half century. If true, it could take another generation or two for many Hawaii residents to learn to live comfortably under clipped rights and freedoms. This has implications for both Hawaii's education effort and for the design of dispute resolution mechanisms. Perhaps, the element that holds the key to better condominium harmony is respect for others. This would apply to individual owners and association boards alike. Without respect, even the best new resolution mechanism would fall short of realistic expectations.

3. What is the purpose of the condominium association? The idea of shared community living raises this interesting question. As a backdrop it is interesting to hear of one account from California about two buildings. They are architecturally identical, but they are run in two contrasting styles. One association is run like a tight ship. No towels can be hung off the lanai. A $500 deposit is required for use of the party area, etc. The second building is run in a different way. You can hang towels off your lanai if you want. There is free use of the party area. If someone breaks a cue stick it is simply replaced the next week by the association. What is interesting is that units in the loosely run building sell for $30,000 more than those in tightly run building.

In this vein it is important to reiterate three basic functions an association performs for its membership. They are the governmental function, the financial-investment function, and the community planning

function. All three are different and yet they can each be paramount depending upon the nature of the complaint. Most often these duties overlap, and the board is stuck trying to preserve one interest at the expense of another.

It is interesting to note that most commentators see association functions from historical perspective only. In that regard, Natelson stresses the "property preservation" function of the association and downplays the government function. (Natelson, Robert G., Law of Property Owners Associations, Little, Brown & Co., 1989.) This view is obsolete not only because of the recognized importance of governance but also because for the typical association in Hawaii the prospect has been one of asset appreciation--not property preservation. One's decision-making posture under an "investment/appreciation" function can be very different from that under "preservation."

The inability of boards to respond quickly and fairly to owner inquiries may thus be related more to an inability to identify the exact source of responsibility within the board--a problem which is structural and not related at all to the real or imagined motives of a particular board member to block an owner. One of the first things the Real Estate Commission can do is articulate a clear statement of an association's functions and how these functions might be structured via committees to prevent disputes from arising.

Is the mission to make more money and have fun along the way? This is one expert's view. Or is the purpose to have the building appreciate faster than other buildings? Under either scenario the objective should be to do everything possible to avoid big, expensive law suits.

Another possibility exists. Is the mission of this association to promote the inspirational, humane side of life in the shared community? This could mean more celebrations or parties for all dwellers at a modest tangible cost to the association.

Or does the association see itself as primarily a mini-government? This association would clarify and build the importance of elections, house rules and board meetings.

More likely, it is the case that association boards will be expected to perform all three functions--governmental, financial/ investment, and community planning/lifestyle. It would be useful to keep these competing interests separate, at least mentally if not through actual restructuring of committees. Better understanding of these functions can provide a directed set of answers for better dispute resolution--and even more importantly, better education and better dispute avoidance.

4. Opportunity exists nonetheless to create a positive scheme for living. There is a tendency to overlook the positive. The condominium regime is new to world history. There is still time to imagine a whole

new set of beliefs and norms about shared communities--what they are, what their duties should be, and in what ways condominium living can be made quite desirable. We can use this opportunity to make the new scheme more positive. In another five or ten years, this opportunity may be lost.

III. Structural Alternatives and Pitfalls

A. PRESENT MECHANISMS ARE LIMITED

1. Litigation:

STATUS REPORT: For most members of the public, litigation is the only recourse they know. They also know it is expensive and time-consuming. With no other mechanism available, litigation brings with each new accretion to the statutes more frustration to the homeowner. For the lay homeowner who does not have ready access to high priced attorneys, there is no due process.

Of all the disputes that occur, probably only a small percentage should reach litigation. For practical and humanitarian reasons, litigation should be in most instances the mechanism of last resort.

DISCUSSION: The fate of having litigation as the sole broadly-available mechanism for condominium dispute resolution could not be better appreciated than through three recent cases shown in Appendix A.

The scars of litigation from these and other cases are all the more painful because they are borne by people who must see each other in the hallway every day. In condominium disputes therefore, a higher duty exists--to promote a way of life in harmony. At times attorneys who believe they are looking out for the client's best economic interests may need to be reminded of the importance of human values, too.

This discussion suggests the role of attorneys can be critical to the discovery of a low cost, low tension way of resolving or avoiding disputes. Attorneys hold great sway over association clients. Often they are the only professionals to whom the lay association will turn for advice. This has direct implications for an education strategy and for finding ways to reduce resort to litigation in condominium disputes.

Assessment: THE COURT SYSTEM CAN BE USED MORE

EFFICIENTLY BY SHIELDING IT FROM CASES THAT DON'T BELONG.

2. Arbitration:

STATUS REPORT: Despite being mandated by statute, arbitration has not caught on to the extent envisioned. In one recent year, 45 condominium disputes went to arbitration at the American Arbitration Association. The number have not climbed significantly since.

DISCUSSION: Arbitration may be under utilized in condominium disputes because many people in the community just don't know the option exists. Others have stated that costs are a little too high--at $300 to $400 just for filing and then the cost of an attorney--and asked for subsidy. Still others, who represent associations, believe that their clients preserve the greatest strength by not participating in alternative dispute resolution at all--thus forcing all disputes large and small to litigation where associations can enjoy greater due process rights.

Some say the arbitration process, once initiated, has too many requirements in the law Others report that some arbitrators are too cautious because they do not want to be overruled--taking as much as two extra months just to finish the process.

Other jurisdictions are looking into arbitration, including Illinois, South Florida and Montgomery County. In Miami, a study commission is about to recommend mandatory arbitration. They are concerned about cost (noting that they charge units $1 per year, compared to the $2 per year charged in Hawaii).

RECOMMENDATION: If arbitration is to catch on, it will need to be used more selectively in cases that are suited to its characteristics. Once these types of disputes are identified, all other agencies, including the courts, can be urged to direct appropriate cases to arbitration. In addition, DROA's could include a means for parties to indicate that they agree to participate in arbitration (or mediation) in the event of disagreement. As an inducement for appropriate cases to go to arbitration, this paper recommends the Real Estate Commission consider a limited subsidy, funds permitting.

Assessment: UNDER-UTILIZED; MUST IMPROVE ACCESS AND TAILOR REFERRALS.

3. Ombudsman: Condominium Specialists: Two condominium specialists have been assigned to the Real Estate Commission by the Legislature to address condominium education, policy and consumer needs. A lawyer was appointed to fill the first slot in 1988, and a second attorney joined him in July, 1990.

STATUS REPORT: There is unanimous high praise for the work of the Commission's condominium specialists. Owners, associations and

condominium attorneys alike have expressed appreciation for their accessibility--and for their ability to render a clear understanding of the law.

DISCUSSION: It appears important to fill these positions with lawyers, particularly lawyers who are reasonable and fair. Members of the public tend to listen to their advice. The only drawback may be their cost.

As more and more people find out about their existence, these specialists could very easily be overwhelmed--and burned out. With the launching of an upcoming public awareness campaign demand on their time could more than double. One answer--increasing the staff to four attorneys--would be too expensive. Unless paid from the General Fund, the additional specialists would eat up most of the income collected annually for the Education Fund and leave little room for education programs.

In addition, the condominium specialists have no real "teeth." They cannot award damages, impose liens or draw from other remedies more normally associated with the courts and some alternative dispute mechanisms. Because this is so, it does not seem wise in the long run to place too much of the load on this one small office--ie. to view them as the panacea for all the ills. Far better to leave to the specialists the functions they perform best and assign out to other agencies those duties the specialists would perform at high opportunity cost.

One special tool that can be used more frequently is the "letter ruling." This is somewhat akin to the letter rulings issued by the IRS. The staff has informally issued such letters in the past, but not often. This practice could be formally reviewed and made a part of the condominium specialists duties--so long as adequate staffing is available and the tool is used only where calculated to have an impact.

RECOMMENDATION: To protect this scarce resource this paper recommends the Commission externalize some of the duties of the condominium specialists by spinning off some of those duties to less expensive, non-profit agencies.

Assessment: GOOD INROADS MADE HERE

B. NEW MECHANISMS FOR DISPUTE RESOLUTION ARE UNPROVEN

1. <u>Mediation</u>:

STATUS REPORT: Mediation is being proposed as the low cost answer to the dispute problem. It is being investigated in some jurisdictions on the mainland. In Hawaii, there is a brand new experiment with mediation through the Neighborhood Justice Center (NJC). The program is sponsored by the Real Estate Commission and subsidized by the

Condominium Education Management Fund. Not enough cases have been completed under this pilot program, however, to give a reliable reading of results.

DISCUSSION: Pros: Mediation offers a quick resolution at a very low cost. Mediation works best when the parties have respect for each other and want to ensure harmony after the process has ended. If performed at the local community level, mediation is the external mechanism which can intercede at the point closest to where the problem occurs.

Cons: Mediation works best with cases that can end in compromise or where the winner's stake is low. Mediation does not work as well in disputes where parties are at war, or where one party is dragging it's feet. Mediation also does not have the "teeth" that is available through arbitration or litigation.

Making Mediation Mandatory: There are pros and cons to mandatory mediation. The best argument for mandatory mediation is the half million dollars in attorneys fees eaten up in the Marco Polo case described in Appendix A. There should at least have been an attempt to mediate before launching into massive and protracted litigation in that instance. The negative is that forced mediation seems impure and robs the process of the voluntariness that usually forms the basis for lasting results.

In other jurisdictions, mediation has had mixed results. In San Diego, volunteer mediators were used heavily, but without paid support staff they very quickly burned out and the program came to an end. In South Florida, mediators were motivated and rigorously trained but were little used because boards refused to sit down at the table.

One new option would be to experiment with "local community mediation panels." This could be managed by the Neighborhood Justice Center ("NJC") in Hawaii. It would employ volunteers who live in the sub-community where the panels meet. Meetings can take place during weekday nights--when parties are more likely to show up. Training must be rigorous. And if the experience of other jurisdictions is any measure, there must be a continual influx of new volunteers to replace those who need a rest.

One way to make both parties participate in mediation would be to award attorney's fees automatically in cases where the losing party in litigation had refused to participate in mediation or arbitration.

RECOMMENDATION: This paper recommends expanding the pilot mediation program through the Neighborhood Justice Center. This mechanism offers the best chance for a quick, inexpensive and fair resolution of a significant number of condominium disputes. It employs a proven, existing structure in the NJC. It avoids more "big government" as the answer to society's problems and it offers the advantage of being easily expanded or contracted--an option not

typically available after formal government intervention. Had the NJC not existed, it might be a different story. But the NJC exists for the specific purpose of rendering justice at the neighborhood level. Since many condominium disagreements are acutely factual and locally based, it is logical to rest authority for initial intervention with an organization who's raison d'etre matches the needs of condominium dispute resolution--the NJC.

Assessment: STILL TOO EARLY TO KNOW, HOWEVER, EXPANSION OF THIS PROJECT SEEMS PROMISING.

2. Education:

STATUS REPORT: The Commission is initiating a number of new programs to educate condominium boards and presidents. Booklets are being drafted on association and board meetings, boards' and owners' rights and responsibilities. Seminars will be sponsored for condominium associations, condominium owners, board presidents, condominium property managers and condominium attorneys. These programs are all relatively low cost efforts with potential for large returns.

DISCUSSION: One critical element of this campaign must be the education of attorneys about the desirability of avoiding disputes through better relations between board and owner--and through clear rules and notices. It may even prove cost beneficial for condominium attorneys to urge associations to do everything possible early in the dispute to avoid the high costs of litigation later. All persons interviewed about education were unanimous in supporting greater allocation of funding for education to avoid disputes and promote harmony.

There are limits to education. Even the best education efforts will not overcome the human capacity for disagreement. Education can address misunderstanding; education can teach the desirability of conciliation and harmony. But whenever large numbers of people live in close proximity to each other, some disagreement will occur. What is needed is an education segment that promotes the importance of "community," and realistically, this will take time to define. In the interim, owners and associations will have to do their best to learn, at a minimum, to listen to and accommodate the other side's point of view.

In addition, education is a deliberate, slow process in its best formulation. To reach all the players in the various sub-communities throughout the state would be a monumental task. Designing an operating plan to implement this massive effort in manageable stages may be worthwhile.

The education effort will likely take a year or two before it can fully take root. However, once begun it is likely to have a snowball

affect--eliminating some classes of disputes altogether and helping to direct parties to peaceful resolution of others.

Though it may be idealistic to hope for substantial gains from education, the potential for greater dispute avoidance through education makes it prudent not to rush headlong into expensive new dispute resolving mechanisms prematurely.

RECOMMENDATION: A two to three year period of intensive public education should be a high priority. Based on results from these programs, the Commission can make a more informed decision about whether to launch major structural change. Two additional recommendations: First, efforts at education should be tailored so that specific messages about dispute avoidance or resolution go out to specific audiences. When addressing boards or owners, for example, there could be some discussion about the characteristics of a good board member. Second, a timetable should be drafted that identifies those areas of greatest need first.

3. Technical Panels (like Medical Claims Conciliation Panel):

PROS: The best thing about technical panels is that they pay for themselves. This "pay as you go" mechanism charges each party $450 and then distributes $300 to each of the three panelists. A second advantage is that the panelists are by definition experts in the field. After the case is finished, the judges go their own way. Thus, there is no real cost to maintaining an overhead or infrastructure for the panels. This keeps government involvement to a minimum.

CONS: The biggest problem is that there is no system for flagging cases as they come into the system and directing them to panels. Only technical cases should go to technical panels--matters concerning modifications to the building or common elements, for example. We do not even know how many or what percentage of total condo disputes fall in this category. In addition, $450 may be too high for a homeowner to pay for a minor dispute.

DISCUSSION: This is by far the easiest new mechanism to construct. It can afford to await the appearance of better data. Time permitting, the Commission could undertake one or two pilot panels just to see how it goes with appropriate cases. Technical panels are in this regard almost like specialized forms of arbitration. ADR, the Medical Claims Panels and other agencies with experience in the area could assist in creating panels. This mechanism might be very good for the mid-level dispute--not minor but not so complicated as to require complex civil litigation.

4. Condominium Commission: Creating a condominium commission is not a new idea. For several years, measures have been introduced in the Legislature to create a body in the executive branch to entertain,

adjudicate and enforce decisions concerning condominium disputes. These measures have gone nowhere.

PROS: Without question, some governmental body could be useful in rendering quick judgments about condominium disputes. It would replace the current void. It would no doubt build upon the present successes of the condo specialists who serve in a similar but less formal capacity for the Real Estate Commission. This mechanism also offers the presumption of fairness that private organizations must earn.

Experts note that at least one model for this does exist on the east coast, at Montgomery County, Maryland. However, their commission is only getting underway now and is already losing funding. Closer examination reveals that the commission's staff will in fact be performing mediation and arbitration before matters ever reach the commission. If the staff cannot successfully resolve a dispute, it will be directed to a commission consisting of appointees, who may or may not be neutral. This program may fall under the weight of caseload and bias. The commission's ability to fine at the rate of $250 a day for noncompliance is a novel feature.

CONS: The problem is that the executive branch does not cleanly perform the adjudicative function--with the possible exception of cases where government permits and benefits are at issue. Certainly it does not have the authority to enforce through lien or the award of damages--remedies which are more properly a function of the courts. Without this ultimate enforcement power, it would be troublesome to place even partial adjudicative authority in the executive branch. It would also be awkward to eliminate the enforcement function from the adjudicative function. For general dispute resolution between two private parties, the executive branch must only be considered a mechanism of last resort.

Even if it became possible to imagine the creation of a commission to hear condominium related complaints, it might be better to place that function in a department (not yet existing) with jurisdiction over housing and community development. The DCCA is a regulatory body. What hearings and investigations it performs are related to one specific function--licensing. (Should condominium managing agents be licensed in years to come, then the DCCA has peculiar expertise in the revocation or renewal of such licenses.) For the resolution of disputes between private parties, the DCCA does not enjoy the same functional or legal jurisdiction.

DISCUSSION: While it would be simpler for the consumer to know that one place exists for dispute resolution, it would be awkward if this became a condominium commission and were placed in the DCCA. Should the state undertake at some future date to create a whole new department of housing and community development, then at least that would raise a new opportunity to fit in a new function like a condominium commission. This still does not avoid the problem of whether to give such a commission powers that are traditionally

reserved to the courts.

RECOMMENDATION: This report does not recommend creation of a condominium commission at this time.

5. Condominium Court: Other activists have been calling for the establishment of a separate Condominium Court somewhat akin to Traffic Court. For a number of reasons this will always be a difficult alternative.

PROS: It would be a plus to have one central place where complainants could obtain a hearing. To identify one specific courtroom would clarify the dispute resolution process for members of the public. It might be possible with one courtroom to better manage condominium cases and move them more quickly to disposition. Judges would quickly become specialists in these matters. Like the Traffic Court this specialized court could be an entry position for new judges.

CONS: A specialized condominium court would be a quantum leap in funding and infrastructure development, even with just a small handful of judges. There would need to be court clerks, a separate computer system, and a whole new documents system. The benefit to the public of a separate court system does not currently outweigh these costs.

DISCUSSION: The level of community need is presently high for increased clarity about how the court system should accommodate condominium matters, but this need results mostly from the absence of alternative mechanisms. Many condominium disputes--often about a dog or cat or about excessive noise--are not suitable to the court setting in the first place. In addition, the first generation advice from condominium lawyers to their association clients was often not to compromise but to force individual owners to resort to litigation--where house rules and the force of law would protect the association.

The condominium bar is now well aware that such advice may be correct as a matter of theory--but that there are other alternatives which would cost their clients far less than litigation in the long run. To a very great extent, the future of harmonious dealings between parties who are differing over some condominium matter will rest in the ability of attorneys to seize the moment and lead the way to new understanding and cheaper resolution mechanisms. This would be a lot easier than designing and funding a whole new court system.

In the very distant future a condominium court might become viable or desirable. With other new mechanisms being launched, however, it does not appear prudent to pursue this alternative at this time. Changing community needs and increasing caseloads may require a closer look at this option, but for now a condominium court is not recommended.

6. Condominium Managing Agents: There is movement afoot to regulate condominium managing agents, with the aim of improving many

aspects of condominium governance, security and financial control. This would entail licensing and certification--and the idea of "revocation" which comes along with that process. This is all predicated on a belief that the managing agent is the place to start: where problems can be avoided or quickly corrected.

This concept is bound to raise the qualifications of CMA's in the future. That would yield some benefits like increased professionalization and pay for the industry--but also bring increased legal liability to the profession. Insurance and training would be critical hurdles to negotiate before such a step can be taken.

PROS: Making CMA's wade in to resolve disputes quickly would be one of the least expensive methods. It would fit neatly within the duties of a CMA. They would need certification and training in mediation techniques, but that would not pose a problem. Some have observed that money managers charge 1% for managing a person's stock portfolio--and that today's real estate prices almost demand the same care and protection of our resident's "condominium portfolios." A 1% fee for managing agents, if they are top of the line professionals, would result in much better pay than the profession currently enjoys. The natural result would be high quality managers--and improved chances for avoiding expensive disputes.

CONS: Individual owners would be quick to perceive the CMA's as heavily biased towards the board. This perception would be based in fact: CMA's receive their paychecks from their client associations and they are charged with a clear duty to protect the association's interests. This could well dash all hopes of setting up effective mediation "in-house" at the association level. It might also forever sully the notion of mediation--even if it is later performed by a neutral outside entity. Whether CMA's could effectively perform conciliation in-house remains an open question, but it is worth investigating.

DISCUSSION: Peter Behrens, a student at the University of Hawaii Business School, has just completed a study on condominium property managers. Although this study supports the general notion of licensing and of focusing responsibility at the CMA level, it remains true that CMA's owe their first loyalty to their associations. Because of this fact, it is recommended that CMA's not engage in formal mediation but that some consideration be given to the idea of CMA's performing a function just short of that--reconciliation.

7. <u>In-house Association Mechanisms</u>: The cheapest way by far to resolve condominium disputes would be for associations to resolve them on their own within the building. The idea, according to people involved in this, would be to catch complaints before they fester or ripen into expensive litigation. Associations that try to solve their problems sensibly during board meetings seem to be able to avoid real disputes altogether. In this vein, it appears the most important thing is to force the parties to talk and listen with respect to each other

at the outset.

There are two particular concerns. One is the advice currently given by some attorneys to their associations not to conciliate with owners. This advice flows from a belief that the board has a fiduciary duty to protect the association's assets--and that anything short of complete enforcement of house rules via the courts would amount to abdication of that duty.

The second concern is the advice given by some attorneys to their associations that their right to trial is their best protection and being forced into mediation or arbitration or some other less expensive resolution technique would be an unconstitutional denial of that right.

These two concerns are simply not practical. Rigid worship of the law can be worse in the long run--not only because of the higher cost of litigation but also because of the human cost. It is difficult at this juncture to imagine how different associations might employ their own means of dispute resolution in house, but this is a very attractive idea. Perhaps, some associations might be willing to set up a committee just for the purpose of conciliation or conflict review. Larger buildings might make conciliation skill a qualification for hiring their resident managers.

8. An Associations' Mediation Council: Should associations get together to create a new organization which would coordinate mediation as well as other functions common to the membership? Some call this kind of entity "Master Associations."

PROS: This mechanism would be inexpensive, self-governed, and extra-governmental--and it addresses the growing desire to cut the costs of litigation for associations.

CONS: Coordination and staffing would be difficult to start up and manage. Follow through would be difficult. Attempts at mediation might be viewed with suspicion by owners who see this as nothing more than the associations' wish to control less formal resolution mechanisms. These are strong reasons why such an idea might not work in practice.

RECOMMENDATION: It would might better to ask existing organizations like HCCAO to assist further in dispute avoidance. This idea is worth further review but possibly after other mechanisms have already been tried. Too many new mechanisms launched at once could overtax the system.

9. Elections Commission: Should the Real Estate Commission supervise condominium elections? Screen for proper notice of that annual meeting? This would constitute the "pure answer" to a significant number of complaints that currently go unresolved and frustrate the electoral process. However, there are simply too many

condominiums for this to be viable. With over 1,000 condominium buildings holding annual elections, the Real Estate Commission could not possibly provide supervision.

The work load of the Lieutenant Governor's office sheds light on this issue. That office supervises less than 1,000 polling sites statewide. For the Real Estate Commission to even contemplate responsibility for elections oversight it would have to increase its staff to at least the size of the Lieutenant Governor's office.

A less expensive alternative does exist and that is focused education.

10. Condominium Attorneys: This is the most promising source of quick gains in the area of condominium disputes. The best role for attorneys, according to many participants in disputes, would be to give the initial advice and to educate boards on how to avoid disputes. The three cases in Appendix A are exemplary. One case involved a $2,000 law suit which resulted in $40,000 in attorney's fees. Another case resulted in over $30,000 in attorney's fees over a screen door installed without permission. A third case resulted in over $500,000 in attorney's fees over matters that might have been resolved in mediation or arbitration or by intervention of an ombudsman.

What is the attorney's proper role? The more modern view would be to urge boards to reach out to dissident owners, perhaps even allowing one to sit on the board. This would mean listening to others, holding open meetings, even mailing notices to owners about upcoming meetings and agendas. Where difficulty is anticipated, boards can best use their counsel by having them attend the board meeting--or at least review copies of the minutes and paperwork. Attorneys can also clarify bylaws and house rules. And they can give clear, forceful advice about insurance, particularly where there is some question about whether a policy will cover a certain improvement project.

It is easy to blame the lawyers. At the same time, lawyers in condominium matters represent society's best opportunity to effectuate positive change on a wide scale with minimum effort. There is great promise here and the Commission can achieve good gains by working in close cooperation with the bar.

11. Legislation and Rulemaking:

Legislation: It is not recommended that any significant new legislation be authored to relieve condominium disputes at this time. That should await formal data gathering which can yield a far more accurate understanding of the underlying problems in condominium disputes. In addition, the Real Estate Commission is in the middle of a significant start-up effort in education and alternative dispute resolution. Any new legislation now would not only be premature, it would also possibly preempt the creation of new mechanisms which might in the long run be far better suited to the problems than anything

designed prematurely.

When it does become time for the Legislature to take a fresh look at condominium laws, there are a number of larger questions that should be addressed as part of that process:

a. Whether to broaden condominium laws to govern "all community associations", including cooperatives and planned unit developments.

b. Whether a large number of disputes can't be avoided by simply placing a limit on percentage of board positions controlled by developers.

c. Whether to allow or encourage a restructuring of the association management model, for example, by switching from the pure corporate model (board of directors) to a modified town meeting model (with a resident manager serving as "city manager" and a finance committee governing budget and investment matters). This may only work for large associations.

d. A crisis in filling boards with quality directors may be looming over the horizon. It may be necessary to re-examine the extent of liability a lay board member should assume and along with that, the type of insurance available to protect that lay person.

Rulemaking: The advantage here is that it would be far easier to promulgate rules than to amend or re-write statutes. By putting a clear gloss on existing statutes, the Commission could very possibly eliminate some sources of condominium dispute. This might as an example include: rules for association meetings and elections, rules clarifying limits on board power to assess and spend, or rules spelling out board responsibility to maintain common elements.

This process, however, must be carefully conducted because it represents the slippery slope along which government action can easily and unwittingly intrude on private action. Unless the need for rules is clear, rulemaking should be preceded by significant study and legal analysis of the need for further statutory delegation of specific authority. A survey to owners and associations could be a simple first step in this process. It could contain some questions which might later help the Commission to make decisions about whether to use this most interesting trump card.

IV. Approaches to Implementation

A. IMPLEMENT MAJOR STRUCTURAL CHANGE NOW (ALTERNATIVE #1).

The idea here would be to implement major structural change to meet a public need for quick, inexpensive and fair resolution of disputes. The problem is that the extent and nature of the need are unknown. Further, it is readily evident from surveys of mainland jurisdictions that no one knows today what should be done to relieve the condominium dispute situation.

It is even unwise to launch full bore into massive statewide mediation--at a time when San Diego and South Florida have had disappointments. Far better to phase in our best programs to ensure their success--being careful to create a good first impression upon which to build a statewide reputation later.

B. WAIT UNTIL DATA GATHERING, EDUCATION AND LICENSING HAVE TAKEN ROOT BEFORE INTRODUCING NEW PROGRAMS (ALTERNATIVE #2).

The most conservative view would dictate doing nothing until data gathering mechanisms are first put in place, uniform categories are adopted by all agencies, surveys and seminars and even focus groups are conducted, licensing of CMA's has been initiated, and so forth.

A case can be made for keeping state action to a readily manageable size, emphasizing education and licensing and control.

The problem is that an unmet need exists now and the problems are not lessening. High profile litigation could even make the situation appear worse than it is, effectively confusing the public and preempting later state action.

This paper does not recommend "doing nothing" and there is a clear reason: these mechanisms themselves demand experimentation on a limited, controlled basis. The passing of additional time to experiment with new mechanisms--after having already waited for education to take hold--would simply be too much. If a way can be found of conducting both experimentation and education simultaneously, it should be done. This probably means taking the condominium specialists off some of their line duties and directing their attention to administration and planning.

C. PHASE IN CHANGE WHILE AWAITING RESULTS FROM FORMAL EDUCATION, LICENSING AND DATA GATHERING (ALTERNATIVE #3).

The best option would be the one that allows the state to address immediate sources of tension while at the same time planning longer range improvements.

Under this approach, promising pilot programs can be implemented--and then expanded when resources permit. This could mean a larger role for the Neighborhood Justice Center: assuming overall responsibility for inquiry intake, performing basic conciliation, referral to ombudsmen of appropriate cases, and start-up of local community mediation panels. These panels can be started first in sites like Makiki and Waikiki, then expanded to other sub-communities through-out the state.

Methods can be established to enhance entry into the arbitration process. This may have to include subsidy or discount, and it may mean the installation of new rules regarding time and cost. There is

continuing promise here and this mechanism is ripe for renewed viability.

At the same time education efforts can be aimed at places where results can be greatest--such as the condominium bar, condominium managing agents, and board officers.

The condominium specialists may lack the time to experiment with new concepts while still involved in ongoing education efforts or in implementing new programs. This paper recommends that a portion of a specialist's time (or of both specialists' time) be set aside consciously for planning and coordination--tasks which will yield fruit if performed in calm and with deliberation.

V. Conclusions and Recommendation

A. CONCLUSIONS:

1. Finding the nature of the problem is the first priority. The Commission has had a few years to learn about condominium disputes, so now is an appropriate time to construct a formal data gathering system:

(a) This means a written survey designed for owners, boards, presidents and CMA's. It may also mean focus groups to discuss ideas not yet defined. If conducted regularly on a bi-annual basis, this survey might yield excellent data about trends.

(b) Hand-in-hand with a survey should be a formal system for categorizing this data--a taxonomy which will allow the Commission to identify the source of disputes and know the magnitude of each of those problems. This categorization effort will allow the Commission to identify at least three separate groupings of complaints--the first step in being able to direct disputes to the proper forum as soon as they arise. Without a formal taxonomy, future efforts at dispute resolution may be destined to be "hit-or-miss." A taxonomy will be a foundation for a comprehensive system which tailors the forum to fit the complaint--thereby addressing the goal of having "quick, inexpensive and fair" resolution mechanisms.

(c) To further institutionalize data gathering there should also be a formal "Data Feedback Loop." This mechanism, diagrammed at Appendix E, will allow the Commission to obtain ongoing data about the outcome of disputes from the participating agencies--NJC, AAA, the Judiciary, and others.

2. Dispute avoidance must be the cornerstone of any formal effort to address the condominium dispute resolution problem. This means focused education. It means defining new roles. It probably even means structural change--associations coming to know their own purpose, separating in their own minds the competing responsibilities, and incorporating a committee system or other mechanism to perform each of these functions in a clean and balanced way. One of these functions

should be the development of a positive lifestyle for that shared community. This also means a new role for some condominium lawyers--becoming teachers about dispute avoidance rather than aggressive advocates of one legal authority or another. The context--the place where people live--dictates that harmony be the goal. If not, the warring parties must see each other in the hallway with no other prospect than to face mounting hostilities.

3. It will be important to remain experimental for 2 years at least. This means fighting the tendency to rush in to plug gaps with shiny new dispute resolution mechanisms. Far better in this period of uncertainty--where there is no clear precedent--to undertake pilot programs with the flexibility to either expand them or drop them as appropriate. This can begin with local community mediation conducted by the Neighborhood Justice Center. It can also include such things as a CMA-Condo Specialist hotline to intercept misunderstandings early. The idea is to bite off small projects that can be easily managed and use the time while we are awaiting better data to experiment with specific techniques.

4. Be prepared to take the long term view in 2 to 3 years. This problem will not be solved overnight and in the end the system will be worse off for having committed to quick solutions. The Commission has exhibited an interest in experimentation and addressing long range issues and this pattern should be continued. One point must be made here. The issue of condominium dispute resolution is not the domain of one agency or another--but the shared responsibility of several government and non-profit entities. In taking the long term view it will be advisable at some juncture--probably when data starts to come back--to form an inter-agency "omnibus task force." This task force could cull out the important issues, evaluate various options, and draft a long range plan that by definition has input and commitment from the players involved.

Some possible members for such a task force are: CAI as principal educator and party responsible for translating oral tradition into a technical, literate one (providing "how to binders", for example); the Legislature as principal agent for defining the nature of the association; NJC as principal coordinator of mediation panels in the communities; the Real Estate Commission's Condominium Specialists as resource persons for inquiries and as designers of programs to implement a clearer understanding of the role of associations, board presidents, CMA's, etc.; ADR and the Judiciary to train and to identify better ways to direct cases to the different dispute resolution forums; and condominium attorneys to inform client associations about future options for condominium governance. Lobbyist organizations should be consulted but not made a formal part of this process--which must remain balanced rather than a creature of advocacy.

5. Hold on to the philosophical questions. There is a real opportunity here to create new and positive community norms about condominium living. It is a given that community dwelling is becoming

the reality for a growing percentage of Hawaii residents. Rather than accepting shared living as a lesser alternative to single family living (which it is), there is the chance here to identify and promote new, positive impressions about this likely lifestyle of the twenty-first century. We have come a long way from caves; yet we are somehow approaching a scary analogy to it. This is a chance to show what we have learned about civility.

B. RECOMMENDATION:

The field is just too fast moving and unsettled to commit the state to any major structural change at this time. On the other hand, something more needs to be done soon to alleviate the immediate tension. This report therefore recommends alternative #3--putting into practice as we go the things we learn from contemplated education programs, experimental dispute resolution mechanisms, and formal data gathering systems.

A suggested tentative timetable for alternative #3 can be found at Appendix F.

Appendices

Appendix A

CASE #1:

A recent litigation matter in Hawaii resulted in $40,000 in attorney's fees over a dispute involving a screen door. The case reportedly arose after the condominium owner made several failed attempts to get an audience at board meetings. Not able to get an answer, the owner obtained a building permit and was sued by the association which sought to block construction.

The attorney's fees incurred in the initial suit have been compounded by the cost of suit brought by the association's attorney, who has been unable to get the board to pay the hefty price of litigating the screen door case.

CASE #2:

A second case reportedly arose over whether an owner should pay the association $400 or $600 for a prior disagreement. Blocked by the association and managing agent from making any payment at all for maintenance fees, the lay person ended up in court without counsel and there faced the relentless process of interrogatories, depositions, etc.--all alien to her. After further confusion, the lay person reportedly lost her case at the trial level without having her day in court and accordingly sought appeal. The simple matter of how to make payment of ongoing maintenance fees while disputing a $400 disagreement should have at least run through mediation or arbitration--which are ideally suited to such situations. Instead, the lay person received a bill for her last maintenance fee in the amount of $56,000.

CASE #3:

The most shocking case of all stands at this moment against the defendant association over improvements made to the lobby and swimming pool--reportedly in the interests of safety but allegedly without proper notice and prior approval of the board's actions by the owners. In all, a total of almost $800,000 in attorney's fees has been burned up in this case. There was no mediation. There was not arbitration. To ad insult to injury, the association cannot now obtain insurance from the normal carriers; instead, the prior annual premium for D & O insurance of $750 has been replaced by the only policy available after this massive lawsuit: a $23,000 a year policy from Lloyds of London.

CONCLUSION:

What these three case demonstrate graphically is the cost to society of minor suits ballooning into something far beyond reason. Certainly for the building facing a special assessment for potentially $800,000 in attorney's fees there has been a cloud on the property. This is nothing compared to the human cost for the officers of the board--and the owner who refused to yield.

There has to be a better way, and that's what alternative dispute resolution is all about.

Appendix B

Monthly Phone Log: Number of Condominium Inquiries and Complaints Received by the Real Estate Commission

Month	J Morris	S. Okumura	C. Kimura	R. Wong	C. Yee	Total
07/88	72		27	2		101
08/88	95		17	6		118
09/88	98		25	7		130
10/88	136		20	4		160
11/88	190		18	1		209
12/88	130		10			140
01/89	123		17			140
02/89*	118		12			130
03/89	208		26	1		235
04/89	217		23	2		242
05/89	152		19	2	1	174
06/89	163		21		2	186
07/89**	170		24			194
08/89	180		23	1		204
09/89	156		25	1	4	186
10/89	---		17		2	19
11/89	131		13	1	2	147
12/89	137		7	1		145
01/90	165		19	1	2	187
02/90+	136		23	2		161
03/90	177		31		1	209
04/90	142		28			170
05/90-1/4	40		25	4	3	72
06/90	144		31	3	2	180
07/90**	131		18		1	150
08/90	139	105	30	1		275
09/90	99	88	15			202
10/90	60	68	19	1	2	150
11/90	73	94	24			191

* Seminar held this month.
** Mass mailing this month.
\+ Mass registration and forms this period.
1/4 Means specialist on vacation 3 weeks in the month.

Note that activity increase noticeably in months following seminars or dissemination of materials to the public. This has implications for planning the use of scarce staff resources over the course of a year.

Appendix C

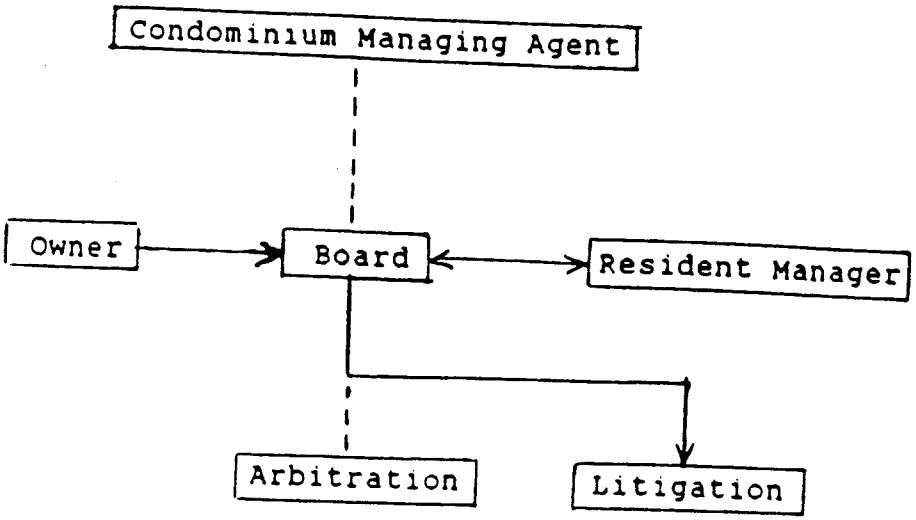
Ten Most Common Categories of Complaints and Disputes Received by the Real Estate Commission*

1. Association Meetings--Notice, Election and Proxies
2. Limits on Board Power To Assess and Spend
3. Boards Not Maintaining Common Elements
4. Board Meetings--Minutes, Accessibility
5. Who's Responsible When Something Goes Wrong With the Unit--Leaks, etc.
6. Owner Changes To Common Elements and Apartments
7. Fiduciary Duty of Board--Including Where To Invest Association Funds
8. Access To Information and Financial Records
9. Fair Housing and Occupancy Restrictions
10. Failure To Enforce House Rules--Parking, Noise, etc.

*These are listed in order of frequency with the most frequent type of complaint first.

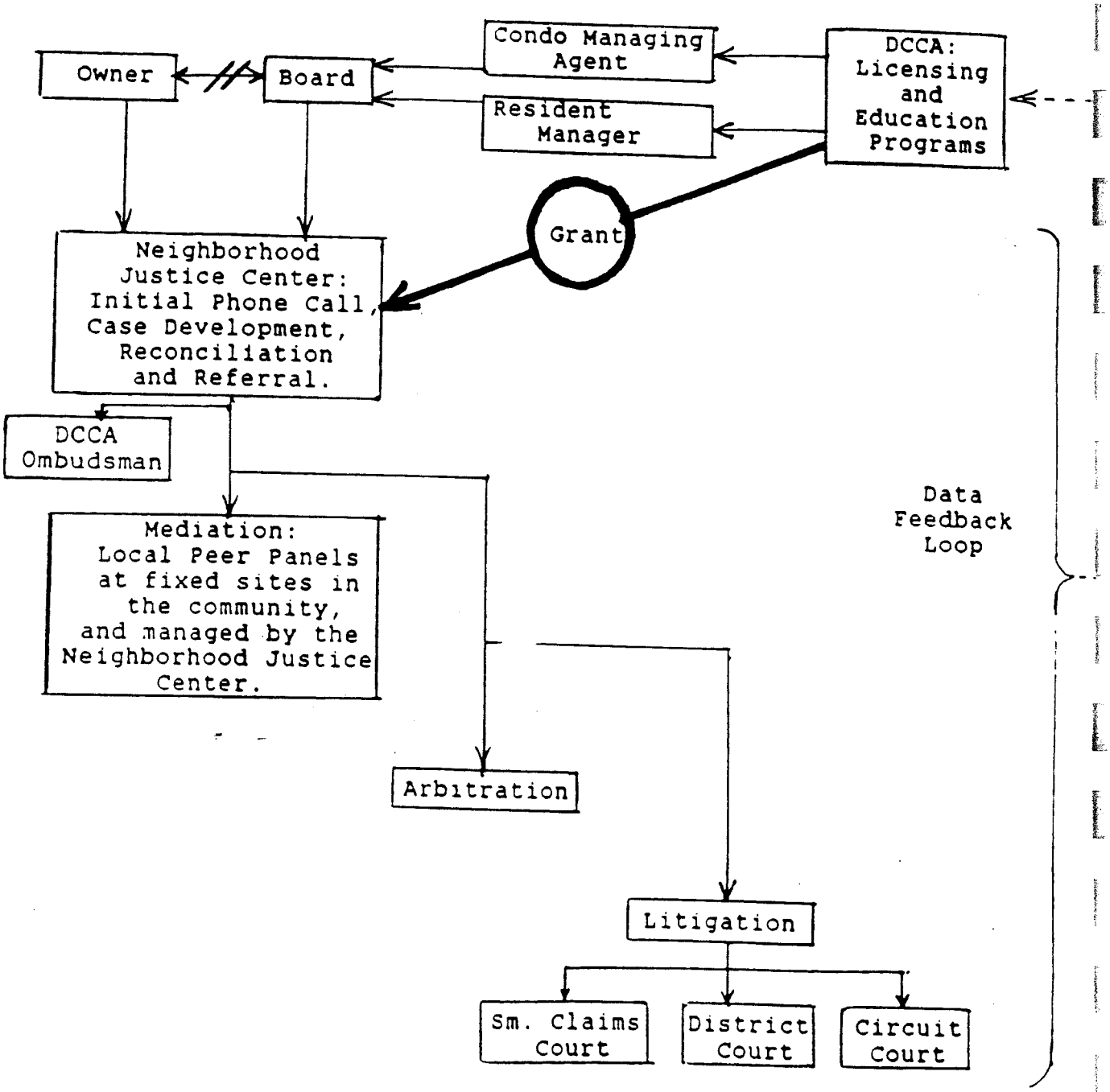
Appendix D

Present Structure
for
Dispute Resolution
1990



Appendix E

Possible Dispute Resolution Flowchart and Structure
(by 1992)



FINAL REPORT TO THE LEGISLATURE

RECODIFICATION OF CHAPTER 514A, HAWAII REVISED STATUTES (CONDOMINIUM PROPERTY REGIMES)

IN RESPONSE TO ACT 213, SECTION 4 (SLH 2000)

DECEMBER 31, 2003

Submitted by:

HAWAII REAL ESTATE COMMISSION
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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December 31, 2003

We are pleased to present the final report on the Hawaii Real Estate Commission's efforts to recodify Hawaii's condominium law.

Act 213, Session Laws of Hawaii (SLH) 2000, and Act 131, SLH 2003, required the Commission to conduct a review of Hawaii's condominium property regimes law (Chapter 514A, Hawaii Revised Statutes), make findings and recommendations for recodification of the law, and develop draft legislation consistent with its review and recommendations for submission to the 2004 Legislature.

Our report includes, among other things, the Commission's findings and recommendations, proposed legislation, and reference lists of recodification research materials. Pursuant to Act 231, SLH 2001, the report may be viewed electronically at: http://www.hawaii.gov/dcca/reports. The report and related materials are also available on the Commission's website at: http://www.hawaii.gov/hirec. This gives readers easy access to "point and click" hyperlinks to relevant laws and other resources.

The Commission appreciates the commitment of time, interest, and energy that many people and organizations have put into this important effort. In particular, the Commission thanks the volunteers of the Blue Ribbon Recodification Advisory Committee for the hundreds, perhaps thousands, of hours they have spent on this project.

The Commission is also grateful for the Administration's and the Legislature's continued support and commitment to its condominium programs. With everyone's help and cooperation, we look forward to the passage of a condominium property law that we can all live and work with for at least the next 40 years!

Sincerely,

John Ohama

John Ohama
Chair, Real Estate Commission

Mitchell Imanaka
Chair, Condominium Review Committee

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Appendices

I. Introduction

A. What is the Problem We're Trying to Fix?

In 1961, Hawaii became the first state to pass a law enabling the creation of condominiums.[1]

The 1961 "Horizontal Property Regime" law consisted of 33 sections covering a little more than 3 pages in the Revised Laws of Hawaii. Since that time, the law has been amended constantly. Entering the 2004 legislative session, Hawaii's "Condominium Property Regime" law consists of 122 sections taking up over 100 pages in the Hawaii Revised Statutes. As noted by the 2000 Legislature, "[t]he present law is the result of numerous amendments enacted over the years made in piecemeal fashion and with little regard to the law as a whole."[2]

The 2000 Legislature recognized that "[Hawaii's] condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micromanages condominium associations . . . [t]he law is also overly regulatory, hinders development, and ignores technological changes and the present day development process."[3] Consequently, the Legislature directed the Real Estate Commission of the State of Hawaii (Commission) to conduct a review of Hawaii's condominium property regimes law, and to submit draft legislation to the 2003 Legislature that will "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law."[4]

In January 2001, the Commission embarked on its ambitious effort to rewrite Hawaii's Condominium Property Act (HRS Chapter 514A).[5]

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[1] Kerr, William; "Condominium – Statutory Implementation," 38 St. John's L. Rev. 1 (1963) (hereinafter, "Kerr"), at page 5. *See also*, Act 180, Session Laws of Hawaii (SLH) 1961; codified as Chapter 170A, Revised Laws of Hawaii (RLH). In 1968, RLH Chapter 170A was redesignated Chapter 514, Hawaii Revised Statutes (HRS) (Act 16, SLH 1968). In 1977, HRS Chapter 514 was re-enacted as a restatement without substantive change and redesignated HRS Chapter 514A (Act 98, SLH 1977).

[2] Act 213, SLH 2000, attached to this report as Appendix A.

[3] *Id.*

[4] *Id.*

[5] The recodification workplan is attached to this report as Appendix C. It is also available on the Commission's website – http://www.hawaii.gov/hirec/ – along with a comparison of the 1994 Uniform Common Interest

B. Why Should We Care?

1. Prevalence of condominium ownership in Hawaii

25% of Hawaii's housing units are held in condominium ownership. For decades, Hawaii has had the highest percentage of condominium housing units in the United States of America.[6] This alone makes the recodification project extremely important for the citizens of Hawaii.

2. Importance to more efficient use of Hawaii's limited land resources

As a very flexible form of real estate ownership, condominiums (especially traditional ones going up rather than out), have helped policymakers to discourage sprawl while still providing home ownership opportunities for many in our urban areas. Consistent with State and local government land use policies, the condominium form of ownership is a valuable tool in helping to develop higher density/lower per-unit cost homeownership opportunities (i.e., creating more affordable housing). Of course, condominiums encompass the entire spectrum of homeownership opportunities – from affordable to luxury units. All of this is important for an island state with limited land area.

3. Importance to Hawaii's housing stock and growth policies (e.g., private provision of "public" facilities and services)

The rapid growth of common interest ownership communities (condominiums, cooperatives, and planned communities) since 1960 goes hand in hand with government policy for much of the past 30-40 years dictating that new development "pay its own way." Condominiums and other common interest ownership communities (with their regimes of privately enforceable use restrictions and financial obligations paying for formerly "public facilities" such as roads, trash collection, and recreational areas) have become a critical part of

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Ownership Act (UCIOA), 1980 Uniform Condominium Act (UCA), and HRS Chapter 514A), drafts of the recodified condominium law, and other recodification materials.

[6] Community Associations Factbook, by Clifford J. Treese (1999) (hereinafter, "CAI Factbook"), at page 18.

our land use fabric. Indeed, virtually all new development in Hawaii consists of common interest ownership communities.

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

C. What is in this Report?

This report consists of the following:

Part I presents introductory material explaining the genesis and importance of the Hawaii Real Estate Commission's ambitious effort to rewrite Hawaii's Condominium Property Act (HRS Chapter 514A).

Part II covers background information to help readers understand the complexity and limitations of the condominium law recodification.

Part III discusses the actual recodification efforts.

Part IV contains findings and recommendations.

Part V concludes the report and is followed by various appendices, including the proposed recodification of Hawaii's condominium law, with comments.

II. Background

A. Brief History of the Condominium

Someone once said that "history is argument without end." That is certainly true of the debate over the origin of condominiums. Some commentators have traced the first existence of condominiums to the ancient Hebrews in the Fifth Century B.C. Others have attributed the concept to the ancient Romans. Still others believe that Roman law was antithetical to condominium development and that the first proto-condominiums appeared in the Germanic states during the late Middle Ages. Suffice to say that the condominium property concept has a long, possibly ancient, history.[7]

While their first existence in fact is widely disputed, condominiums were first afforded statutory recognition by the Code of Napoleon in 1804.[8] The first sophisticated statute to authorize condominiums in the United States or its territories was the Puerto Rico Horizontal Property Act (so named because it contemplated a property regime of horizontally, as opposed to vertically, divided properties) in 1958.[9] The United States Congress recognized condominiums in 1961 when it amended the National Housing Act to provide for federal insurance on condominium mortgages whenever state law recognized condominium ownership. With Hawaii leading the way, every state in the union had a statute authorizing the condominium form of ownership by 1968.[10]

B. Basic Concepts

Preliminarily, it is useful to understand exactly what a "condominium property regimes law" is – and what it isn't. A condominium property regimes law is a land *ownership* law, a *consumer protection* law, and a community *governance* law. It is not a land *use*

[7] Kerr, *supra* note 1, at 3-4; CAI Factbook, *supra* note 6, at 5-6; Natelson, Robert G., Law of Property Owners Associations, (1989), at 3-35.

[8] Kerr, *supra* note 1, at 3.

[9] Kane, Richard J.; "The Financing of Cooperatives and Condominiums: A Retrospective," 73 St. John's L. Rev. 101 (Winter 1999), at 102.

[10] Schriefer, Donald L.; "Judicial Action and Condominium Unit Owner Liability: Public Interest Considerations," 1986 U. Ill. L. Rev. 255 (1986), at note 2.

law (i.e., it does not govern what structures may be built on real property; separate state and county land use laws control – or should control – land use matters).

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

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

- Protect purchasers through adequate disclosures; and

- Manage the ongoing affairs of the condominium community.

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

The 1961 Hawaii State Legislature expressly recognized that the condominium property regimes law was "an enabling vehicle" that primarily "(a) sets forth the legal basis for a condominium, and (b) spells out the means of recordation."[11]

The Legislature was also concerned about protecting Hawaii's consumers, noting that:

> The citizens of Honolulu have suffered during the past one or two years several unfortunate experiences in cooperative apartment buying. When several millions of dollars were lost through loose handling of funds representing down-payments on individual apartment units, it became clear that controls had to be developed in order (a) to protect the buying public, and (b) through a bolstering of public confidence, to create for the developer a better reception for his product.[12]

[11] Standing Committee Report 622, House Bill No. 1142 (1961). In 1968, however, the Hawaii Supreme Court commented that although the original condominium property regimes law was viewed as an enabling act, condominiums might have been cognizable under common law. *See,* State Savings & Loan Association v. Kauaian Development Company, Inc., et al., 50 Haw. 540, 547 (1968).

[12] Standing Committee Report 622, House Bill No. 1142 (1961).

To that end, the 1961 Legislature added a part providing for the regulation of condominium projects by the Hawaii Real Estate License Commission (including the registration of projects by developers and requiring the issuance of public reports before offering any condominium units for sale).

Finally, the 1961 Legislature provided for the internal administration of condominium projects. The 1961 condominium management provisions were minimized, however, because the Legislature believed that: 1) many details would more properly be included in bylaws to be passed by the council of co-owners; and 2) some details may have been contrary to F.H.A. regulations or to policies of lending institutions, making it impossible for prospective unit-purchasers to secure financing.[13]

Hawaii's "Horizontal Property Regimes" law of the early 1960s was typical of most "first generation" condominium laws. In the decades that followed, however, "[a]s the condominium form of ownership became widespread, . . . many states realized that these early statutes were inadequate to deal with the growing condominium industry. . . . In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums."[14]

[13] *Id*.

[14] Prefatory Note, Uniform Condominium Act, 1980. As noted by the Hawaii State Senate Judiciary Committee Vice-Chair in 1976: "[The condominium property regimes law] was originally intended to be a highly technical, legal vehicle for placing certain lands in the horizontal property regimes. It is becoming through our actions … a consumer protection section of the law. Anyone trying to use it in its technical sense will have extreme difficulty …" Standing Committee Report 939-76, Senate Resolution No. 439 (1976).

III. Recodification of Chapter 514A, Hawaii Revised Statutes

A. Evolving Approach to the Recodification of Hawaii's Condominium Law

1. Recodification Draft #1

In January 2002, the Commission completed its initial draft of the recodification (statutory text and explanatory commentary).[15] The 1980 Uniform Condominium Act (UCA), with appropriate changes incorporated from the 1994 Uniform Common Interest Ownership Act (UCIOA), served as the basis for the first draft of our recodified condominium law. Where appropriate, the Commission also incorporated provisions of HRS Chapter 514A,[16] other jurisdictions' laws, and the Restatement of the Law, Third, Property (Servitudes).

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

2. Recodification Draft #2

A Blue Ribbon advisory committee reviewed Recodification Draft #1.[17] Based on feedback the Commission received from the advisory committee, realtors, property managers, individual unit owners, and others, HRS Chapter 514A (rather than the uniform laws) was used as the basis for most of Recodification Draft #2 (i.e., general provisions; creation, alteration, and termination of condominiums; protection of purchasers; administration and registration of condominiums; and condominium management education fund). The Uniform Condominium Act and Uniform Common Interest Ownership Act – along with appropriate provisions of

[15] Recodification Draft #1, Preliminary Draft #2, and Public Hearing Discussion Draft (all with statutory text plus commentary) are available on the Commission's website at http://www.hawaii.gov/hirec/.

[16] Every provision of HRS Chapter 514A was analyzed for possible inclusion within the structure of the UCA.

[17] Members of the Blue Ribbon Recodification Advisory Committee are listed in Appendix D of this report.

HRS Chapter 514A, other jurisdictions' laws, and the Restatement of the Law, Third, Property (Servitudes) – was used as the basis for condominium governance matters. Recodification Draft #2 was attached to the Commission's progress report to the 2003 Legislature.

3. Recodification Final Draft

Following the 2003 legislative session, the Commission: (i) continued to work with affected members of the community and the Blue Ribbon Recodification Advisory Committee[18] to refine Recodification Draft #2; (ii) took the resulting draft ("Public Hearing Discussion Draft") to public hearing in each of Hawaii's counties; and (iii) worked with the Blue Ribbon Recodification Advisory Committee and others to incorporate appropriate changes and submit a final draft of the proposed condominium law recodification to the 2004 Legislature.

B. Scope of Recodification

The Commission considered expanding the scope of the recodification to include other Hawaii common interest ownership communities under a UCIOA-like law. [This would have included HRS Chapters 421H (Limited Equity Housing Cooperatives), 421I (Cooperative Housing Corporations),[19] and 421J (Planned Community Associations).] The Commission quickly decided, however, that recodification of HRS Chapter 514A (Condominium Property Regimes) alone makes the most practical sense at this time.

Condominium issues, in general, are substantially different from those of single-family detached units in planned communities. The unit owner mindsets, problems, and solutions are quite different for each type of common interest ownership community.

[18] In 2003, pursuant to Act 131 (SLH, 2003), the Blue Ribbon Recodification Advisory Committee was expanded to include representatives of the Hawaii Council of Associations of Apartment Owners, Hawaii Independent Condominium and Cooperative Owners Association, Community Associations Institute - Hawaii Chapter, Hawaii Association of Realtors®, and the Condominium Council of Maui.

[19] In conjunction with the Commission's 2003 public hearings on the recodification, some people requested that cooperatives be added to the community governance sections of the condominium law. (*See, e.g.*, testimony of Bobbie Jennings, received by the Commission on September 15, 2003.) The Commission ultimately decided to limit its efforts to recodifying Hawaii's condominium property regimes law and followed the philosophy that problems should be fixed in the statutory provisions that contain or created the problems in the first place.

A Florida court once observed that:

> [I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners . . . each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.[20]

Single-family detached unit homeowners in planned communities generally have different expectations than condominium owners regarding the degree of freedom they must give up when they buy their respective units. This is one of the factors that make it exceedingly difficult to reconcile the varying interests of unit owners in different forms of common interest ownership communities.[21]

Although condominiums can take many physical forms – from high-rise developments to townhouses to single-family detached units – the common perception that a condominium is a tall building consisting of many individual units within a common structure ("horizontal property regime") makes it easier for average people to understand the interdependence of unit owners in condominiums (as opposed to single-family detached homeowners in planned communities).

Therefore, the Commission limited its efforts to recodifying Hawaii's condominium property regimes law.

C. Public Outreach

The Commission attempted to make the recodification process as accessible and transparent as possible for everyone affected by Hawaii's condominium property regimes law. We wanted to make sure that everyone could understand what we were doing and why at every step in the process.

To that end, the Commission posted its recodification work plan and timetable, list of relevant laws, resource list, base working document (a comparison of the UCIOA, UCA, and HRS Chapter 514A), drafts of the recodified condominium law, and other related

[20] Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180, 181-182 (Fla. Dist. Ct. App. 1975).

[21] *See, e.g.*, the California Law Revision Commission's (CLRC) efforts to recodify California's common interest development law – the Davis-Stirling Act. You can access the CLRC Study H-850 online at: http://www.clrc.ca.gov/_H850.html.

documents on our website (http://www.hawaii.gov/hirec/). Wherever possible, we provided hyperlinks to our source materials for easy access by any interested parties. We hope that this will help people understand how and why the recodification took its ultimate form.

The Commission's Condominium Review Committee Chair and Recodification Attorney have also briefed and solicited input from many groups on the recodification, including the Hawaii State Bar Association Real Property & Financial Services Section Board of Directors, Condominium Council of Maui, Land Use Research Foundation of Hawaii, Community Associations Institute – Hawaii Chapter, Lambda Alpha International – Aloha Chapter (an honorary land economics society), Mortgage Bankers Association of Hawaii, Appraisal Institute – Hawaii Chapter, realtor organizations, and more. (*See*, Appendix C: HRS Chapter 514A Recodification Plan, at pages 8 - 9.) The Condominium Review Chair and Recodification Attorney have also met and talked with hundreds of interested individuals throughout the recodification process.

Finally, the Commission held public hearings on the proposed recodification of Hawaii's condominium law in each of Hawaii's counties.[22]

[22] Kauai – September 16, 2003 (1:00 - 4:30 p.m.), State Office Building; Maui – September 23, 2003 (3:00 - 6:30 p.m.), Kihei Community Center; Kona – September 29, 2003 (3:00 - 6:30 p.m.), Kona Civic Center; Hilo – September 30, 2003 (1:00 - 4:30 p.m.), State Building; Oahu – October 7, 2003 (6:00 - 9:30 p.m.), State Capitol.

IV. Findings and Recommendations

A. Recodification Final Draft, with Comments

The Final Draft of the Recodification, with Comments, is attached to this report as Appendix G. The Comments to almost every section of the draft provide a wealth of information about the source of the statutory language, what problems are meant to be addressed, and how the language should be interpreted. The Comments are essentially the Commission's section-by-section "findings and recommendations."

B. Selected Public Policy Findings and Recommendations

1. The condominium law should recognize that condominium projects must conform with underlying land use laws.

The Commission made many attempts to help solve the counties' problems regarding the need for condominium projects to conform with underlying land use laws.[23] Among other things, the Commission attempted to help prevent the inappropriate condominiumization of farm structures on agricultural lands[24] by proposing to

[23] Hawaii and Kauai counties have had problems regarding the conformance of condominium projects with underlying land use laws. Maui County raised some questions in a December 8, 2003 telephone call and e-mail with Mark E. Recktenwald, Director of the State Department of Commerce & Consumer Affairs. The City & County of Honolulu does not appear to have problems requiring the conformance of condominium projects with its Land Use Ordinance.

[24] The condominium form of ownership of agricultural lands has become a symbol of illegal and irresponsible development, particularly on the islands of Hawaii and Kauai. *See, e.g.,* testimony of Mark Van Pernis, Esq., dated September 29, 2003, in which Mr. Van Pernis recommends banning the submission of land designated "agriculture" or "conservation" to a condominium property regime. (Such suggestions ignore the fact that similar results could be achieved under forms of land ownership other than condominium.) Many of the problems faced by Hawaii County were, however, actually caused by the failure of the county under previous administrations to enforce the county's land use and real property tax laws.

Furthermore, true agricultural condominiums are valuable. As noted by the Department of Business, Economic Development & Tourism – Office of Planning ("DBEDT-OP") in its September 20, 2001 memorandum to Gordon M. Arakaki, while DBEDT-OP is very concerned about condominium property regimes used to create projects for primarily residential purposes on agricultural lands:

> [DBEDT-OP] would not support a blanket ban on CPRs on agricultural lands. The State created its agricultural park in Hamakua as a CPR. This permits farmers access to agricultural land and financing without having to subdivide or break up large agricultural parcels.

Finally, as long as a county's real property tax laws are not completely coordinated with its land use laws, the condominium form of land ownership can be quite useful in protecting and preserving agricultural lands by allowing the appropriate transition from one type of crop to another as well as from large scale agricultural operations to smaller boutique farms. (*See,* 1993 speech on real property taxation of agricultural lands by Gordon M. Arakaki, Deputy Director, Land Use Research Foundation of Hawaii, to the Hawaii State Association of Counties.)

specifically delegate power to the counties (in HRS §§205-4.5(a)(4) and 205-5(b)) to adopt "reasonable standards, including but not limited to, the form of ownership under which property may be held." This was provided, however, as an exception to the general rule that county laws not discriminate against the condominium form of ownership (adopted from UCA/UCIOA §1-106). In response, the Hawaii County Planning Director stated that he and other planning directors would oppose, on "homerule" grounds, any language that appeared to preempt the county in any way.[25]

In a letter received by the Commission on October 16, 2003 (dated October 2, 2003), the Department of Business, Economic Development & Tourism – Office of Planning ("DBEDT-OP") and the four counties requested that the Commission eliminate its Public Hearing Discussion Draft version of §___: 1.5 and retain the language of HRS §§514A-1.6 and 514A-45.[26] DBEDT-OP and the four counties also stated that they would be "discussing possible recommendations for specific language for amendments" that would be forwarded to the Commission "if and when they are developed."[27] Therefore, in the final draft of the recodification, the Commission incorporated the current language of HRS §§514A-1.6 and 514A-45, and also retained a provision (added in earlier recodification drafts) requiring special disclosures for condominium projects proposed to be built on agricultural land.[28]

Background

There appears to have been much confusion over the fact that condominium property is a land *ownership*, as opposed to a land *use*, concept. In response to the

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See also, e.g., testimony of Sheilah N. Miyake, Deputy Director, Department of Planning, County of Kauai, dated September 16, 2003, and testimony of Judy Dalton, Conservation Committee Member, Sierra Club Kauai Group, Hawaii Chapter.

[25] October 31, 2003 telephone conversation between Christopher J. Yuen and Gordon M. Arakaki.

[26] October 2, 2003 letter from DBEDT-OP to Mitchell A. Imanaka and Gordon M. Arakaki.

[27] *Id.* After a June 24, 2002 meeting, and by letter dated September 19, 2002, DBEDT-OP and the four counties had committed to drafting language for the recodification regarding conformance with county land use laws that would be acceptable to all four counties. No such language was ever given to the Commission by DBEDT-OP or any of the counties.

[28] In a telephone conversation with Commissioner Mitchell A. Imanaka in November 2003, Hawaii County Planning Director Christopher J. Yuen said that he would support the recodification if the provisions of HRS §§514A-1.6 and 514A-45 were kept "status quo." It should also be noted that some Blue Ribbon Recodification Advisory Committee members were concerned about what the counties might do with additional delegated powers.

Commission's requests for comments from the community, various parties have asked that Hawaii's condominium property regimes law be used to ensure compliance with land *use* laws (e.g., HRS Chapter 205 and county zoning, subdivision, and building ordinances).[29]

Hawaii's counties (particularly the Neighbor Island counties) have long complained that developers were using HRS Chapter 514A to circumvent underlying county land use laws. However, the counties have always had the power to regulate the *uses* of land pursuant to their police powers (i.e., their powers to protect the public health and safety – the legal basis for zoning laws) under HRS Chapter 46.[30] HRS §514A-1.6, passed by the Legislature in 2000, simply made this explicit in the condominium property regimes law.[31]

Analysis

The counties have raised legitimate concerns over the current interplay between HRS Chapter 514A and state and county land use laws. The question remains how to properly address the problem. In attempting to craft a provision to prevent abuse of the condominium property regimes law as it relates to underlying land use laws, the Commission considered the following factors:

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

In September 2002, the County of Hawaii passed an ordinance purporting to "regulate CPRs that are the equivalent of subdivisions of land." (Ordinance 02-111, effective 9/25/02.) Whether the ordinance can survive legal (e.g., denial of equal protection under the law) and practical challenges remains to be seen.

The counties, along with the Department of Business, Economic Development & Tourism – Office of Planning ("DBEDT-OP"), argue that "land ownership and land use are intertwined, especially when a [condominium property regime] is used to create what is, in material respect, a subdivision." (October 2, 2003 letter from DBEDT-OP to Mitchell A. Imanaka and Gordon M. Arakaki.) The counties have always had, however, the power to adopt land development codes and other measures to address physical development and infrastructure requirements without discriminating against the condominium form of land ownership (as opposed to other forms of ownership, such as cooperatives).

[30] *See*, HRS §§46-1.5(13) and 46-4.

[31] The Commission has incorporated HRS §514A-1.6 in §___: 1-5 of the final draft of the recodification.

- Purpose of Condominium Property Regimes Law. As previously noted, a condominium property regimes law is a land *ownership* law, a *consumer protection* law, and a community *governance* law. It is not a land *use* law. As a consumer protection law, the primary purpose of Hawaii's condominium property regimes law is to make sure that buyers can know what they are buying. Theoretically, if a sophisticated buyer wants to take a chance on being able to get government approval to build a structure that is not allowed under State or county land use laws at the time of purchase, that should be the buyer's choice. The key is to give the buyer a chance to make an informed decision (i.e., proper *disclosure* of material facts).

- Purpose of the Real Estate Commission. The Real Estate Commission is a consumer protection body established under HRS Chapter 467 (Real Estate Brokers and Salespersons) to regulate real estate licensees. The purpose of HRS Chapter 467 (and the Commission) is to protect the general public in its real estate transactions. Pursuant to HRS §467-3, the Real Estate Commission consists of nine members, at least four of whom must be licensed real estate brokers.

- Need for Appropriate and Consistent Lines of Authority. All parties need to make sure that the appropriate governmental entities enforce the appropriate laws. County land use agencies – i.e., planning and permitting departments – have the responsibility for ensuring that all proposed development projects comply with county land use laws. County councils have the authority to pass laws giving county land use agencies the tools to ensure that any proposed condominium development complies with county land use laws.

- Timing. Under Hawaii's condominium property regimes law, condominiums are created upon proper filing with Bureau of Conveyances or Land Court. The Real Estate Commission's involvement begins when condominium units are offered for sale. In other words, the *ownership* interest in condominium property may be created without any approval or involvement of the Real Estate Commission.

Throughout the recodification process, the Commission tried to keep the condominium law (and the Real Estate Commission itself) true to its purposes while making it clear that HRS Chapter 205 and county land use laws control land use matters. Indeed, one of the Commission's guiding principles in the recodification is that problems should be fixed in the statutory provisions that created the problems in the first place. It does not appear to be necessary or appropriate to have blanket requirements in the recodified Hawaii condominium law that make the recordation of all condominium property regime declarations or sale of all condominium units contingent upon county certification of compliance with county land use laws.

Finally, consistent with the principle that physically identical developments should be treated equally, the counties can simply draft land use ordinances governing the development of condominiums.[32] The ordinances should hold condominium developments to the same standards as physically identical developments under different forms of ownership.[33] In other words, the ordinances should require that condominium developments follow the same physical requirements (density, bulk, height, setbacks, water, sewerage, etc.) as physically identical developments under existing land use requirements (e.g., zoning, subdivision, building code, and cluster development laws). If a particular development proposal is inconsistent with state and county land use laws under forms of real estate ownership other than condominium ownership, the condominium property regimes law does not and will not somehow allow the project to be built.

[32] DBEDT – Office of Planning and the county planning directors object to the principal that physically identical developments should be treated equally. *See*, September 19, 2002, and October 2, 2003 letters from DBEDT – Office of Planning to Mitchell Imanaka and Gordon Arakaki. *See also*, County of Hawaii's Ordinance 02-111 (effective 9/25/02).

[33] An exception to the general rule that physically identical developments should be treated equally is the City and County of Honolulu's prohibition on condominiumizing Ohana units created pursuant to HRS §46-4. *See*, Revised Ordinances of Honolulu §21-8.20. An Ohana unit is a second home permitted on a lot where the underlying zoning normally allows only one house. Infrastructure adequacy and other conditions determine whether an Ohana unit may be built, and an applicant for an Ohana building permit must file a restrictive covenant agreeing *not* to register the property as a condominium and to abide by a family occupancy requirement. Ohana units are the result of the State Legislature's attempt to address a shortage of affordable housing by essentially forcing the counties to accept housing densities double that allowed by county zoning. Under this circumstance, it is appropriate for the counties to have the power to prohibit the condominiumization of Ohana units. The counties' authority to do so is made clear in HRS §46-4(c) (i.e., the specific delegation of power to adopt "reasonable standards" to achieve the purpose of the subsection), however, *not* the condominium property regimes law.

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

2. The condominium law should support the fair and efficient functioning of condominium communities while appropriately balancing the rights and responsibilities of individual unit owners and the association of unit owners as a whole.

At the Commission's October 7, 2003 public hearing on the recodification, a number of the members of Hawaii Independent Condominium & Cooperatives Owners ("HICCO") and several other individuals submitted essentially identical testimony, containing identical mistakes of fact and law, claiming that the recodification gives more power to association boards of directors at the expense of unit owners.[34] The Commission believes that the recodification actually supports the fair and efficient functioning of condominium communities while appropriately balancing the rights and responsibilities of individual unit owners and the association of unit owners as a whole.

The Commission addressed HICCO issues as follows (incorporating HICCO suggestions 13 out of 22 times, and incorporating parts of other suggestions):

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	**Decision/Rationale**	**Recodification Provision** (Ramseyered to reflect revisions to Sept Public Hearing Draft)
1. "The draft of section 2-8(6) ignores the interests of directly affected unit owners and allows changes to common elements and limited common elements which may make it difficult, if not impossible, for an owner of an affected unit to sell an apartment."	Modified per HICCO's suggestion.	2-8(6) The right of the board [~~of directors~~], on behalf of the association, to lease or otherwise use for the benefit of the association those common elements that the board determines are actually used by one or more unit owners for a purpose permitted in the declaration. Any such lease or use must be

[34] *See, e.g.,* testimony of Helen Inasaki, Richard Port, a petition containing signatures of some owners at Imperial Plaza, Alice Clay, Raelene Tenno, Mary Jane McMurdo, Amy Amuro, Daniel & Geraldine O'Leary, Rani Vargas, and Manny Dias.

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
		approved by the owners of at least sixty-seven percent of the common interest, including [~~the~~] all directly affected unit owners that the board reasonably determines actually use the common elements and such owners' mortgagees.
2. "The draft includes an amendment 5-3(8) [*actually 5-4(a)(8)*] that proposes to change the percentage required to change common elements from 90% to 67%. This proposal requires some serious and extensive discussion before approval. Since some changes to common elements may be far more significant than others and directly affect some owners' investments while not affecting others at all."	Disagree with changing beyond "at least sixty-seven percent." Condominiums, even under current law, can be terminated with the approval of eighty percent of the common interest. Any higher percentages specified in current declarations or bylaws would still apply (though the ninety percent requirement makes it virtually impossible to designate any additional areas as common elements), although associations may want to amend their governing documents to incorporate more reasonable approval requirements as allowed by the recodification. Case-by-case analysis can thus be done by individual projects rather than statutory fiat.	5-4(a) Except as provided in section ___: 5-5, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may: … (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 at least 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;
3. "The draft includes an amendment 5-4(11) which would allow a Board of Directors, by its own motion at a Board meeting and without any change to the by-laws, to impose charges, fines and other penalties upon owners. This change would be a "weapon of mass destruction" in the hands of the wrong Board and must be opposed. Chapter 514A-88 already provides a means of enforcing compliance with covenants, by-laws and administrative provisions."	Disagree with HICCO. Modified, with the agreement of Richard Port, to require the approval of a majority of unit owners (not a bylaws amendment). Virtually all condominiums created since the early 1980s have provisions in their bylaws permitting associations to impose fines and other penalties. HICCO states that associations without fining provisions in their bylaws must amend their bylaws or hire an attorney to send a letter demanding compliance. This makes little sense	5-4(a) Except as provided in section ___: 5-5, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may: … (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

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
	for the following reasons: 1. The failure to follow condominium rules and regulations disrupts the quiet enjoyment of condominium residents and ultimately affects the reputation of the building and the value of its units. Allowing boards to impose fines, by law, helps to encourage compliance with project documents. The application of fair and reasonable fining systems has been instrumental in gaining owners' attention, and action, to correct behavioral problems of the residents of their units. 2. Fining is an intermediate sanction, not a "weapon of mass destruction." If boards are prohibited from fining (as an early option) to resolve an issue, they must choose between two options: take legal action or do nothing. 3. Legal action is expensive and time-consuming. An attorney's letter to an owner can easily cost the owner $150 to $200 in legal charges. Boards must carefully weigh the merits of legal action for minor rules infractions. 4. In contrast, fines can act as an effective alternative and supplement to legal action. Fines can be imposed quickly and in much smaller increments than the cost of a letter from an attorney. Therefore, they are particularly effective for dealing with minor infractions. 5. Legal fees are out-of-pocket costs, and they cannot easily be waived as a means of compromising with a violator. 6. In contrast, fines are not out-of-pocket costs and the board can easily waive them if doing so will encourage the violator to comply. Indeed, suspending fines and penalties on the condition that violators "behave" is a common regulatory tool.	resolution adopted by the board and approved by a majority of all unit owners at an annual meeting of the association or by the written consent of a majority of all unit owners;

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
	7. As a further safeguard, the proposed law provides for notice and an opportunity to be heard (i.e., due process). 8. If fining is not an option, most fiscally responsible boards will do nothing until such time as the situation becomes unbearable, the violation spreads to other units, or other unit owners threaten the directors for inaction. 9. There is always a possibility that a board will impose an unreasonable fine, but that can occur whether the authority to fine is in the law or in the association's bylaws. Therefore, requiring associations to amend their bylaws to be able fine does not appear to serve any real purpose.	
4. "This draft includes an amendment 5-4(13) which would extend indemnification to members of committees appointed by the Board or Board president. Apart from the fact that this could increase insurance and legal costs for an association, it could also be abused by naming friends to committees to protect them from their personal negligence. This change to the current law should be deleted."	Disagree with HICCO. Indemnification of committee members (and managing agents) is consistent with HRS Chapter 414D (Nonprofit Corporations) and current industry practice.	5-4(a) Except as provided in section ___: 5-5, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may: … (13) Provide for the indemnification of its officers, board [~~of directors~~], [~~and~~] committee members, and agents, and maintain directors' and officers' liability insurance;
5. "The revised draft, 5-6(c) should require that a copy of any budget adopted by the Board of Directors, not just a summary, be available, upon request, to any owner, and owners should be notified that they can request a copy of the budget."	Modified per HICCO's suggestion.	5-6(c) Within thirty days after adoption of any proposed budget for the condominium, the board [~~of directors~~] shall make available a [~~summary~~] copy of the budget to all the unit owners and shall notify each unit owner that they may request a copy of the budget.
6. "The draft in 5-6(g) requires 67% of owners to remove a member of a Board of Directors. To increase the current 50% to 67% will virtually ensure that no member of a Board of Directors will ever be removed. This change is undemocratic and only strengthens Board control at the expense of owners."	Provision deleted per HICCO's suggestion (and the objections of some property managers). Note, however, that HICCO misstated current law and was incorrect in its assertion that the provision would have made it more difficult to remove board members. Current law has no percentage requirement for removal of directors except for HRS §514A-82.15, which	5-6[~~(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*]~~ (f) [Source: **HRS**

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
	permits initially changing the bylaws to allow proportionate representation on the board for mixed-use properties only. Removal of directors of Hawaii condominiums is governed by their project bylaws. Most bylaws require a vote of a majority of the total common interest. The now-deleted proposal required approval of sixty-seven percent of unit owners present and voting at the meeting in person or by proxy. As pointed out by professional registered parliamentarian Steve Glanstein, the proposal would have made it easier to remove directors since the following common interest votes would not count as "no" votes (i.e., against removal): 1) those physically absent without a proxy; 2) "quorum purposes only" proxies; and 3) unit owners wishing to be neutral who abstain from voting.	**§514A-82(b)(1)**.] At any regular or special meeting of the association, any member of the board may be removed and successors shall be elected for the remainder of the term to fill the vacancies thus created. 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~~],and, 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.~~], section ___: 5-13(b).
7. "The draft in 5-7(c) opens the door to non-owners serving on association Boards of Directors. This would mean that non-owners would be voting on financial and other matters which do not directly affect them, i.e., representation without taxation. …"	Provision deleted per HICCO's suggestion. The proposal to allow non-owners to serve on the board was an attempt to address the "aging in place" issue, where some (even many) unit owners lack the capacity to vote, serve on boards, etc.	5-7[~~(c)~~] (a) 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

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
		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.
8. "The revised draft in 5-7(i) increases the power of Boards of Directors to borrow money. It allows Boards to pledge reserve accounts intended for the maintenance of the association's property and for emergency expenses. This contradicts the intent of state law (Chapter 514A) which requires all associations to maintain reserves. … This change to current law should be deleted."	Provision deleted per HICCO's suggestion. Note: Subsection 5-7(i) was moved to subsection 5-5(e).	[~~5-7(i)~~] 5-5(e) 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. …
9. "A new section, 5-12, entitled Judicial Power to Excuse Compliance with Requirements of Declaration or Bylaws may be needed, but there needs to be an addition to this section which requires certified notification of all owners that a hearing is to held on this matter. Otherwise this addition to the condominium law should not be made."	Revised per HICCO's suggestion. Note: Section 5-12 was renumbered to section 5-11 in the final draft.	[~~5-12~~] 5-11(a) 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: …. (4) A requirement that an amendment to the declaration be

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
		signed by [~~members~~] unit owners; (5) A quorum requirement for meetings of [~~members~~] unit owners. (b) The board, on behalf of the association, shall by certified mail provide all unit owners with notice of the date, time, and place of any court hearing held pursuant to this section.
10. "The draft of section 5-14 must allow the owners not only to send out notices of special association meetings called by the owners if their Board fails to call the meeting within the required fourteen days, but also this section must be clear that the owners' group may also include a proxy form that is in compliance with state law. The Board must not be allowed to state that the proxy form had not been approved by the Board as might be implied in the words 'proxy form authorized by the Board' (last line of 5-14(c))."	Clarified per HICCO's suggestion. Note: Section 5-14 was renumbered to section 5-13 in the final draft.	[5-14] 5-13(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 date, 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.~~]
11. "A Board of Directors, as proposed in 5-16(a) of the draft, should not be allowed to approve the minutes of an association meeting. Roberts Rules of Order requires that minutes be approved by the body for which the meeting is held. Allowing Boards to approve association's	Provision initially deleted per HICCO's suggestion. After discussion with professional registered parliamentarian Steve Glanstein, however, Mr. Port agreed that the provision should remain in the recodification.	[~~5-16~~] 5-14(a) Minutes of meetings of the association shall be approved at the next succeeding regular meeting or by the board, within sixty days after the meeting, if authorized by the owners at an annual meeting. If approved by the board, owners shall be given a copy of the

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
meeting minutes would be a dangerous increase in Board power at the expense of owners. This change from current law should be eliminated."	HICCO is incorrect in its assertion regarding Robert's Rules of Order. As explained by Mr. Glanstein, permitting the association to authorize the board to approve association minutes is "consistent with all of the editions of Robert's Rules of Order since 1876." Furthermore, Robert's Rules of Order Newly Revised 10th edition, page 457 (lines 21-26) states that: "When the next regular business session will not be held within a quarterly time interval (see p. 88), and the session does not last longer than one day, or in an organization in which there will be a change or replacement of a portion of the membership, the executive board or a committee appointed for the purpose should be authorized to approve the minutes." (Emphasis added.) Note: Section 5-16 was renumbered to section 5-14 in the final draft.	approved minutes or notified of the availability of the minutes within thirty days after approval.
12. "The draft 5-17(3) deletes the current requirement that a proxy form include a box that permits an owner to give his proxy for quorum purposes only. This option is necessary when an owner (especially an absentee owner) doesn't know who to believe when owners are bombarded with communication from two factions. Without such an option, the Board, in its correspondence with owners, states that if the owner doesn't submit his/her proxy, the association may not be able to hold a meeting, causing extra expense for all owners. Thus the Board is in a command position to force owners to take a Board's side in a dispute. This change clearly strengthens the power of the Board and diminishes the opportunity of owners to elect members to the association's Board of directors. The current law should be maintained."	Disagree with HICCO. HICCO is mistaken regarding the proposed change. Unit owners can still execute a proxy stating that their proxy can only be used for quorum purposes; it just won't be a statutorily required box on the standard proxy form authorized by the association, which would tend to encourage "quorum purposes only" proxies. HICCO's position is actually anti-owner protection. "Quorum purposes only" proxies are not neutral. They count as "no" votes for any business at the association's meeting. So, the "quorum purposes only" proxies are used to "open the doors" for the association meeting, but it is much more difficult for any business to be done since all "quorum purposes only" proxies are counted against any proposal (including elections) actually voted on by the association. Note: Section 5-17 was renumbered	[~~5-17~~] 5-15(d)(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~~] with the vote to be shared with each [~~board member~~] director 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.

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
	to section 5-15 in the final draft.	
13. "The draft in 5-17(2) allows the Board an unfair advantage of sending out up to a nine page statement accompanying the Board's proxy while limiting individuals to a one page statement. Each individual, including individual Board members, should be allowed a one page statement. Would the proponents of this amendment want ten individual owners who oppose the Board's actions to combine their statements so that they can mail a ten page statement? Each individual owner, whether Board member or not, should be allowed a one page statement."	Modified per HICCO's suggestion. As a practical matter, however, both individual unit owners and board members can simply submit a one page statement concluding with: "Continued on so-and-so's statement." This is true under current law as well as the recodification. Note: Section 5-17 was renumbered to section 5-15 in the final draft.	[~~5-17~~] 5-15(h)(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.~~]
14. "The draft contains a new section, 5-18, entitled "Good Faith Unintentional Failure to Comply." The failure of a Board or managing agent to properly handle an annual or special association meeting cannot easily be excused. For example, the failure to send notices to all owners, or the failure to include proxies to some owners, or the failure to include an owner's statement will significantly impact an association meeting. The only solution is to start over and send out new notices, voiding proxies received previously."	Section deleted per HICCO's suggestion. Although the examples given by Mr. Port would not have been excused by this section, the possibility of constant controversy over its terms was enough to convince most advisory committee members to delete the section.	[~~**§ ___: 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.~~]
15. "The draft 5-20(e) is correct in excluding proxy voting at Board meetings, but should allow Board members to attend Board meetings by conference call."	Modified per HICCO's suggestion. Note: Section 5-20 was renumbered to section 5-17 in the final draft.	[~~5-20~~] 5-17(c) [Source: **HRS §514A-82(a)(16), 414D-143(c)**; *modified slightly*.] 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.~~] Unless otherwise provided in the

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
		declaration or bylaws, a board may permit any meeting to be conducted by any means of communication through which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. … (e) [Source: **HRS §421J-5(e)**.] A director shall not vote by proxy at board meetings.
16. "The draft 5-20(g) pertaining to conflict of interest differs from the current statute. A Board member who has a conflict of interest should not only disclose the conflict and the minutes reflect that a disclosure was made, but the minutes should also disclose the nature of the conflict as currently required in Chapter 514A. This appears to be another instance where owner right to information is being diminished." "In testimony pertaining to 5-20(g) testifiers expressed their concern. The language in 5-20(g) requires disclosure of the nature of the conflict of interest to Board members, but not to owners. This is ridiculous. …"	Disagree with HICCO. HICCO is mistaken regarding the current statute – HRS §514A-82(b)(5). Except for adding a definition of "conflict of interest," the recodification does not change existing law. Other stakeholders, citing privacy issues (e.g., issues involving AIDS or other health matters), disagree with HICCO's desire to have board member conflicts of interest recorded in the minutes, and note that the director with a conflict abstaining from voting is the key. More importantly, consistent with Robert's Rules of Order Newly Revised, minutes should reflect what was done at a meeting, not what was said. While it might be good practice for a director to protect himself or herself by providing written disclosure of a conflict of interest, it should not be mandated in State law. Note: Section 5-20 was renumbered to section 5-17 in the final draft, and the provisions of subsections (f) and (g) were combined.	[~~5-20(g)~~] 5-17(f) [Source: **HRS §514A-82(b)(5); Robert's Rules of Order Newly Revised**.] A director shall not vote at any board meeting on any issue in which the director has a conflict of interest. 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.
17. "The most dangerous section in the draft is in 5-37(c), B & C and (2) which allows Boards to speculate with association funds that have already been designated for current and future maintenance of the association's property and for emergency use. … The law should	Disagree with HICCO. HICCO is mistaken in its characterization of subsection 5-37(c). In all earlier versions of the recodification, the only change was removing the "in-State" deposit requirement and adding additional, stricter, requirements regarding the	5-37(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~~

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
specifically require that these funds be in CDs in the State of Hawaii or in demand deposits, investment certificates, certificates of deposit or obligations of the U.S. government, the State of Hawaii or their respective agencies. Speculating with association funds to achieve a higher rate of interest places association funds at risk and should never be allowed."	types of financial institutions into which association funds may be deposited. No "speculation with association funds" was ever allowed by changes made in subsection 5-37(c) [HRS §514A-97(c)]. The additional, stricter, requirements regarding the types of financial institutions into which association funds may be deposited have been deleted, however, in the final draft of the recodification because of the confusion caused by HICCO's mischaracterizations. The Commission also added a requirement that the board adopt a resolution if association funds are to be deposited in an out-of-State financial institution. Note that Jane Sugimura of the Hawaii Council of Associations of Apartment Owners has stated that she believes that "[s]ince the funds in the out of state financial institutions are covered by government insurance, … a resolution of the Board would be sufficient; however, … whether or not to deposit association funds in out-of-state banks … should be discussed … or at least announced at the annual meeting and … the Board can get feedback from the owners present."	~~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;~~] located in the State, or out-of-State pursuant to a resolution adopted by the board, and whose deposits are insured by an agency of the United States government; (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.
18. "The draft in 5-42, taken from Chapter 514A-85(c) allows a managing agent to dispose of records of any condominium association which are more than five years old. Since the IRS may request records up to seven years old, this change should be made so that some records are kept for seven years."	Modified per HICCO's suggestion.	5-42(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 – except for tax records, which must be kept for seven years – without liability if the managing agent first provides the board of directors of the

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
		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.
19. "The draft of section 5-47 pertaining to arbitration should be modified to eliminate de-novo review. If de-novo review is kept in the statute, 5-47(h)(3) should be eliminated. The trier of fact at a trial de-novo should have information regarding the original arbitration award."	The Commission recommends further examination of all alternative dispute resolution provisions of the condominium law.	No change, at this point, to 5-47(h), *Trial de novo and appeal*. [Source: **HRS §514A-127**.]
20. "The real solution to condominium problems rests in the establishment of a condo court, along the lines of a small claims court, where most disputes can be resolved quickly and at reasonable cost. …"	Since the beginning of the recodification process, one of the Commission's guiding principles has been that the recodification should not grow the size or cost of government. Therefore, the Commission will not, as a part of the recodification, recommend establishing a condominium court.	The Commission has included a provision directing the Legislative Reference Bureau to study the issue and make recommendations regarding, among other things: 1) jurisdiction, 2) appeals, 3) DCCA, judiciary, or private or Olelo "People's Court," 4) funding source, and 5) pilot program, if any. In any case, it is our understanding that a separate bill regarding "condo court" will introduced in the upcoming legislative session.
21. "In testimony at the public hearings pertaining to sections 5-6(f) and 5-14, testifiers pointed out the need to clarify that owners who qualify to request a special association meeting must have the right to send out proxies."	Modified per HICCO request.	
22. "In testimony pertaining to section 5-7(i), testifiers expressed their concern with the proposed draft of this section. No testimony was offered in support of your draft and no rationale has been provided by proponents. See Attachment 2 for possible compromise language."	Disagree with most changes proposed by HICCO. Clarified in response to one of Mr. Port's concerns. HICCO proposed to delete the only security that lenders, in practice, currently have (i.e., the association's assessment stream). HICCO also proposed to delete the provision allowing unit owners to vote on borrowing, leaving only "written consent" as a means to consent to borrowing. This would not make sense for a number of reasons (e.g.,	5-5(e) *Requirements for borrowing money*. [Source: **§514A-82.3**; *modified*.] Subject to any approval requirements and spending limits contained in the declaration or bylaws, the association may authorize the board to borrow money 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; provided that

HICCO Issue (from Richard Port's 10/7/03 testimony and 10/21/03 memo)	Decision/Rationale	Recodification Provision (Ramseyered to reflect revisions to Sept Public Hearing Draft)
	owners should have the option of voting on the issue at their annual meeting; in timeshare projects, irrevocable proxies are given to the manager to avoid the necessity of having thousands of timeshare owners submitting things like "written consents"). We have, however, clarified that written notice of the purpose and use of the funds to be borrowed must first be sent to all unit owners. Note: Subsection 5-7(i) was moved to subsection 5-5(e).	written notice of the purpose and use of the funds is first sent to all unit owners and owners representing fifty percent of the common interest vote or give written consent to such borrowing[~~, all owners having been first notified of the purpose and use of the funds~~]. In connection with such borrowing, the board 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. 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.

3. The condominium law (and the courts) should support the fair and efficient functioning of condominium communities.

Given the importance of condominiums to the quality of life of Hawaii's people, laws must support the fair and efficient functioning of our condominium communities (and other common interest ownership communities).

There is, however, a troubling line of recent Hawaii Supreme Court cases dealing with restrictive covenants/equitable servitudes.[35]

[35] *See*, Hiner v. Hoffman, 90 Haw. 188, 977 P.2d 878 (1999); Fong v. Hashimoto, 92 Haw. 568, 994 P.2d 500 (2000).

In Hiner v. Hoffman, defendants-appellants ("Hoffmans") constructed a three story house on a lot which was (along with 118 other lots) subject to a restrictive covenant prohibiting any dwelling "which exceeds two stories in height." The Hoffmans had actual knowledge of the restrictive covenant. After warning the Hoffmans of their violation of the restrictive covenant, neighboring homeowners and the community association sued to have the Hoffmans remove the third story of their house.

At the trial court level, the Hoffmans argued that their house consisted of "two stories and a basement." The trial court rejected the Hoffmans' argument and ordered them to remove the third (top) story of their house.

On appeal, the Hoffmans changed their argument and claimed that the term "two stories in height" was ambiguous. In a 3-2 decision, the Hawaii Supreme Court ruled that the term "two stories in height" was ambiguous since it did not provide any dimensions for the term "story" and was therefore unenforceable in light of the restrictive covenant's undisputed purpose (to protect views by restricting the height of homes within the neighborhood). The majority on the Court stated that it was following a "long-standing policy favoring the unrestricted use of property" when construing "instruments containing restrictions and prohibitions as to the use of property." Finally, the majority noted that "such 'free and unrestricted use of property' is favored only to the extent of applicable State land use and County zoning regulations."

In so doing, the majority appeared to ignore the massive growth of servitude regimes over the past forty years and the corresponding importance of ensuring the fair and efficient functioning of such communities (whether they be condominiums or, as in this case, planned communities). As noted by the dissent in Hiner, "where one hundred or more homeowners in the Pacific Palisades community have limited their own property rights in reliance that their neighbors will duly reciprocate, . . . it [is] manifestly unjust to sanction the Hoffmans' willful non-compliance based on the 'policy favoring the unrestricted use of

property.'" The dissent concluded with the observation that "the majority opinion over-emphasizes the rights of the Hoffmans without due regard to the rights of their neighbors."

Eight and a half months after deciding Hiner, the Hawaii Supreme Court in Fong v. Hashimoto invalidated as ambiguous a restrictive covenant limiting certain houses to "one-story in height." (The Court also found that there was no common scheme to support an equitable servitude and that the restrictive covenant was unenforceable since it was improperly created.)

The archaic body of servitudes law from which the Hawaii Supreme Court fashioned its decisions in Hiner and Fong evolved from rules developed to govern relatively small groupings of property owners (compared to today's condominium and planned development communities) in contexts largely unrelated to modern common interest ownership communities.[36]

Contrast the Hawaii Supreme Court's current approach regarding servitudes in common interest ownership communities with that of the *Restatement of the Law, Third, Property (Servitudes)*. As stated in the *Restatement's* introductory note to Chapter 6 – Common-Interest-Communities:

> The primary assumption underlying Chapter 6 is that common-interest communities provide a socially valuable means of providing housing opportunities in the United States. The law should facilitate the operation of common-interest communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their members.

The *Restatement's* position on servitudes should be used by courts as a guide in resolving disputes over servitudes in condominiums and other common interest ownership communities.

[36] The *Restatement of the Law, Third, Property (Servitudes)* defines "servitude" as "a legal device that creates a right or an obligation that runs with land or an interest in land." This covers "easements, profits, and covenants that run with the land," and encompasses both "restrictive covenants" and "equitable servitudes."

An earlier incarnation of the Hawaii Supreme Court said it well. In State Savings & Loan Association v. Kauaian Development Company, Inc., et al., the Court stated that:

> The [Horizontal Property Regimes Act] has profound social and economic overtones, not only in Hawaii but also in every densely populated area of the United States. Our construction of such legislation must be imaginative and progressive rather than restrictive.
>
> . . . .
>
> This court will not follow a common law rule relating to property where to do so would constitute a quixotic effort to conform social and economic realities to the rigid concepts of property law which developed when jousting was a favorite pastime.[37]

4. The condominium law should support the fair and efficient functioning of senior living/assisted living condominium communities.

One of the new century's major challenges for condominium associations nationwide is the aging of populations within condominium units and the problems that accompany diminishing health and capacity. Recent controversies in a condominium with assisted living facility services helped to direct the Commission's attention to this issue.[38]

More broadly, however, in addition to assisted living facilities in condominiums, a growing number of senior citizens are choosing to remain in their homes and familiar surroundings rather than moving to traditional retirement destinations. This trend is creating what has become known as "Naturally Occurring Retirement Communities" (NORCs). [39]

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[37] State Savings & Loan Association v. Kauaian Development Company, Inc., et al., *supra* note 11, at 552 and 555.

[38] *See*, "Raising Cane – Complaints fly at condo for seniors," Honolulu Star-Bulletin, Sunday, July 14, 2002. The article, by Rob Perez, details the problems of One Kalakaua, the condominium at the center of a number of disputes. (http://starbulletin.com/2002/07/14/news/perez.html)

[39] de Haan, Ellen Hirsch; "Aging in Place – Naturally Occurring Retirement Communities and Condominium Living," Law Offices of Becker & Poliakoff website (2000). (http://www.association-law.net/publications/article/aging_in_place.htm) It appears that this article was first published in Elder's Advisor, The Journal of Elder Law and Post Retirement Planning, Volume 1, Number 2, (Fall 1999). The article contains a number of suggestions regarding legal and management issues in this area.

Regardless of whether a condominium is an assisted living facility or NORC, "self-governance" may not truly work for aged and infirm condominium owners. Some such matters may be addressed in Hawaii's condominium law, while others may be better handled in the governing documents of condominiums. More questions in this area are sure to arise in the near future.

In the final draft of the recodification, three issues are addressed:

i) Consistent with the condominium law's consumer protection purpose, additional disclosures are required for projects containing assisted living facility units as follows:

> §___: 4-4(c) *Projects containing assisted living facility units.* 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;
>
> (5) Any other information the developer deems appropriate to describe the possible impacts on the project resulting from the provision of such services; and
>
> (6) Such other disclosures and information that the commission may require.

ii.) A new subsection was added to "Common Profits and Expenses" as follows:

> §___: 2-11(d) Unless made pursuant to rights reserved in the declaration and disclosed in the public report, if an association amends its declaration or bylaws to change the use of the condominium from residential to non-residential, all direct and indirect costs attributable to the newly permitted non-residential use shall be charged only to the unit owners using or

> directly benefiting from the new non-residential use, in a fair and equitable manner as set forth in the amendment to the declaration or bylaws.

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

iii.) A new section ("Aging in Place; Limitation on Liability") was added at the request of the working group convened pursuant to Act 185 (SLH, 2003). The purpose of the new section is:

> To limit the liability of Condominium Associations and their Directors and Condominium Owners and their agents and condominium residents, acting through an Association Board of Directors, regarding actions and assessments and recommendations by an Association's Board of Directors with respect to elderly condominium residents/(elderly being defined as age 62 and over) who, in order to live independently, appear to require services and assistance in order to maintain independence without posing any harm to oneself or to others, and without being disruptive to the condominium community.[40]

The Commission notes that associations should undertake assessments pursuant to this section only as a last resort after notice to the resident, next of kin, or other responsible party fails to gain the cooperation and behavior necessary to live independently in the condominium community.

5. The Legislature should direct the Legislative Reference Bureau to study ways to improve dispute resolution in condominium communities, including, but not limited to, considering the establishment of a condominium court.[41]

[40] *See,* e-mail testimony of Dianne M. Okumura, RN, MPH, Department of Health, Health Care Assurance, and Emmet T. White, Jr., dated October 7, 2003.

[41] For an excellent discussion of various condominium dispute resolution possibilities, *see*, Condominium Dispute Resolution: Philosophical Considerations and Structural Alternatives – An Issues Paper for the Hawaii Real Estate Commission, by Gregory K. Tanaka (January 1991).

Finding an alternative dispute resolution mechanism that works for condominium communities is an important and potentially enormous task that the Commission was unable to resolve, particularly in light of its guiding principle that the recodification should not grow the cost of government.[42] Stakeholders have commented that HRS Chapter 514A's system of dispute resolution is not working.[43] They note that the "mandatory" mediation provisions are essentially voluntary (with boards refusing to mediate or going through the motions to avoid the appearance of non-cooperation) and arbitration provisions are impractical and expensive in most cases – particularly with the trial de novo provision of HRS §514A-127.

Some members of the condominium community have strongly suggested that a "Condominium Court" be established to help resolve condominium disputes (either as small claims court is organized, as a part of district court, or as an administrative hearings office, like the existing DCCA hearings office).[44] Proponents believe that a condominium court would provide a means by which condominium disputes can be resolved quickly and at reasonable cost.[45] There is, however, a split of opinion on this issue in the community.[46]

The Commission recommends the following:

i.) The Legislature should direct the Legislative Reference Bureau ("LRB") to study ways to improve dispute resolution in condominium communities,

[42] The Commission's guiding principle that the recodified condominium law should not result in an increase in the cost of government is meant to limit the addition of new programs administered by government under the proposed recodification. It should be noted that, in the first three years of its review of California's common-interest-ownership law, the CLRC (*supra,* at note 21) has spent most of its time considering nonjudicial dispute resolution issues. In addition to the work of Mr. Tanaka (*supra,* at note 41), the Legislature can build on the substantial amount of work done by the CLRC.

[43] *See, e.g.,* October 7, 2003 testimony of Richard J. Port.

[44] *See, e.g.,* October 7, 2003 testimony of Helen Inasaki, Richard Port, a petition containing signatures of some owners at Imperial Plaza, Tom Berg, Alice Clay, Raelene Tenno, Edlynn Taira, Mary Jane McMurdo, Amy Amuro, Daniel & Geraldine O'Leary, Rani Vargas, Martha Black, and Manny Dias.

[45] *Id.*

[46] The Blue Ribbon Recodification Advisory Committee (*supra,* at note 17) was split on the issue of support for the establishment of a condominium court. *See also,* "Condo Court – Nay," by Philip Nerney, Esq., and "Condo Court – Yea," by Senator Willie Espero, Hawaii Community Associations (October 2003).

including, but not limited to, considering the establishment of a condominium court;[47]

ii.) LRB's review, findings, and recommendations should include ways to improve the current mediation and arbitration provisions of HRS Chapter 514A, if any; and

iii.) In considering the establishment of a condominium court, LRB's review, findings, and recommendations should include, but not be limited to:

- Jurisdiction of the condominium court (i.e., the kinds of cases that should be handled by the condominium court);
- Whether attorneys should be allowed to represent parties in condominium court;
- What rules of evidence should be followed by the condominium court;
- Whether decisions of the condominium court may be appealed, and the grounds for appeal;
- How decisions and orders of the condominium court will be enforced;
- Whether the condominium court should be part of the DCCA's Office of Administrative Hearings (and, if so, the extent of the involvement of the Real Estate Commission and the Real Estate Branch Staff, if any), the Judiciary's court system, or a private (or 'Olelo) "People's Court;"
- A needs assessment, including a projected case load;
- Cost, including overhead and staffing;
- Funding source; and
- An implementation plan for a pilot program, if any.

A provision containing the Commission's recommendation that the Legislature direct LRB to conduct the review outlined above is in the draft recodification legislation.

[47] LRB should review the work of Mr. Tanaka (*supra,* at note 41) and the CLRC (*supra,* at notes 21 and 42).

Finally, it is the understanding of the Commission that a separate bill regarding "condo court" will introduced in the 2004 legislative session.[48]

C. Continuation of HRS Chapter 514A Recodification Project funding and position to conduct post-bill passage education

The Commission recommends that the funding and position authorized by Act 213 (SLH, 2000) for the HRS Chapter 514A recodification project be extended to conduct post-bill passage educational activities (with the option of hiring a person as either an employee of the department or a consultant to the department). A provision to do so is contained in the draft recodification legislation.

D. The recodified Hawaii condominium law should have a delayed effective date of July 1, 2005

The Commission recommends that the recodified Hawaii condominium law should have a delayed effective date of July 1, 2005.[49] The vast majority of the public does not pay close attention to potential legislation until it is adopted. Considering the scope of the recodified Hawaii condominium law and the number of people, businesses, and agencies affected by the law, it makes sense to have a delayed effective date to give people (many of whom will not have followed the proposed legislation) a chance to become educated about the new law. It will also be possible to consider recommendations received during this educational period and to fine-tune the law in the next legislative session. A provision to do so is contained in the draft recodification legislation.

[48] "Condo Court – Yea," by Senator Willie Espero, Hawaii Community Associations (October 2003).

[49] Recodification §___: 5-34 (Association Fiscal Matters; Lien for Assessments), which incorporates the provisions of HRS §514A-90, should, however, retain its December 31, 2007 repeal and reenactment date as set forth in Act 80 (SLH, 2003).

V. Conclusion

The Commission appreciates the commitment of time, interest, and energy that many people and organizations have put into this important effort. In particular, the Commission thanks the volunteers of the Blue Ribbon Recodification Advisory Committee for the hundreds, perhaps thousands, of hours they have spent on this project. With everyone's help and cooperation, we look forward to the passage of a condominium property law that we can all live and work with for at least the next 40 years.

Appendix A

ACT 213

H.B. NO. 2222

A Bill for an Act Relating to Condominiums.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Condominium property regimes currently play a major role in Hawaii's housing and will play an even larger role in the next century. Act 180, Session Laws of Hawaii 1961, was the initial law relating to condominium property regimes. The condominium property regimes law, chapter 514A, Hawaii Revised Statutes, is now approximately thirty-nine years old. The present law is the result of numerous amendments enacted over the years made in a piecemeal fashion and with little regard to the law as a whole.

Those who live and work with the law report that the condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micro-manages condominium associations. The law is also overly regulatory, hinders development, and ignores technological changes and the present day development process. However, the desire to modernize the law must be balanced by the need to protect the public and to allow the condominium community to govern itself.

Accordingly, the purpose of this Act is to update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law. This Act appropriates funds for a review of the condominium property regimes law and related laws and issues.

SECTION 2. The real estate commission shall conduct a review of Hawaii's condominium property regimes law, make findings and formulate recommendations for recodification of the law, and develop draft legislation consistent with its review and recommendations. The review shall include an examination of the condominium and common interest laws of other states, the Uniform Common Interest Act, and other related laws and issues, such as those related to zoning, use of agricultural lands for condominiums, and subdivision of land. In addition, the commission shall:

(1) Consult with public and private organizations and individuals whose duties and interests are affected by the condominium property regimes

law, including the department of commerce and consumer affairs, and other state, county, and private agencies and individuals; and

(2) Conduct a public hearing for the purpose of receiving comments and input on the condominium property regimes law and related laws and issues.

SECTION 3. The funds appropriated by this Act shall be expended to establish a temporary full-time condominium specialist position, exempt from chapters 76 and 77, Hawaii Revised Statutes, that shall be filled by a licensed attorney. The condominium specialist shall have legal, professional, administrative, and analytical work experience, preferably in condominium law, statutory drafting, and dealing effectively with diverse organizations, and shall have demonstrated ability to plan and coordinate activities and deal effectively with others. The funds appropriated by this Act shall also be expended for administration, equipment, and supplies related to the review.

SECTION 4. The real estate commission shall submit a progress report, including any draft legislation to the legislature no later than twenty days prior to the convening of the regular sessions of 2001 and 2002. The real estate commission shall submit a final report of the review, including findings and recommendations of the commission, and draft legislation to the legislature no later than twenty days prior to the convening of the regular session of 2003.

SECTION 5. There is appropriated out of the condominium management education fund the sum of $85,000 or so much thereof as may be necessary for fiscal year 2000-2001 to conduct a comprehensive review of the condominium property regimes law, including the establishment of one full-time temporary condominium specialist position in the department of commerce and consumer affairs, and other current expenses.

SECTION 6. The sum appropriated shall be expended by the department of commerce and consumer affairs for the purposes of this Act.

SECTION 7. This Act shall take effect on July 1, 2000.

(Approved June 14, 2000.)

Appendix B

ACT 131

HOUSE OF REPRESENTATIVES
TWENTY-SECOND LEGISLATURE, 2003
STATE OF HAWAII

H.B. NO. 75 H.D. 2 S.D. 1

A BILL FOR AN ACT

RECEIVED
2003 JUN 18 A 8:30
DIRECTOR'S OFFICE
COMMERCE AND
CONSUMER AFFAIRS

RELATING TO CONDOMINIUMS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. In 2000, the legislature, pursuant to Act 213, Session Laws of Hawaii 2000, recognized that the condominium property regimes law codifed in chapter 514A, Hawaii Revised Statutes, needed to be updated, clarified, organized, deregulated, and made more consistent and easier to use. Accordingly, the legislature directed the real estate commission to conduct a review of Hawaii's condominium property regimes law, make findings and formulate recommendations for recodification of the law, and develop draft legislation consistent with its review and recommendations.

The purpose of this Act is to extend the deadline, staffing, and funding for the real estate commission's review and recommended recodification of Hawaii's condominium law, and to expand the membership of the recodification advisory committee.

SECTION 2. Act 213, Session Laws of Hawaii 2000, is amended by amending section 4 to read as follows:

"SECTION 4. The real estate commission shall submit a progress report, including any draft legislation to the legislature no later than twenty days prior to the convening of the regular sessions of 2001 [~~and~~], 2002[~~.~~], and 2003. The real estate commission shall submit a final report of the review, including findings and recommendations of the commission, and draft legislation to the legislature no later than twenty days prior to the convening of the regular session of [~~2003.~~] 2004."

SECTION 3. The membership of the real estate commission's recodification advisory committee shall be expanded to include representatives of the Hawaii Council of Associations of Apartment Owners, Hawaii Independent Condominium and Cooperative Owners, Community Associations Institute-Hawaii Chapter, Hawaii Association of Realtors, and the Condominium Council of Maui.

The recodification advisory committee shall meet to review the final version of the recodification draft to be presented at public hearings. The committee shall also meet after the public hearings to review the data from the hearings and to make recommendations to the real estate commission before the final recodification draft is submitted to the legislature.

SECTION 4. There is appropriated out of the condominium management education fund the sum of $95,000, or so much thereof

as may be necessary for fiscal year 2003-2004, to cover necessary expenses of the real estate commission to complete its comprehensive review of the condominium property regimes law, including the cost of continuing one full-time temporary condominium specialist position in the department of commerce and consumer affairs, and other related costs.

SECTION 5. The sum appropriated shall be expended by the department of commerce and consumer affairs for the purposes of this Act.

SECTION 6. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 7. This Act shall take effect on July 1, 2003.

Appendix C

HRS Chapter 514A Recodification Workplan

I. Purpose of Recodification

Pursuant to Act 213, Session Laws of Hawaii (SLH) 2000, the purpose of recodifying Hawaii Revised Statutes (HRS) Chapter 514A is to "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law."

II. Act 213, SLH 2000 – Basic Requirements

A. Review laws and uniform acts for guidance in the recodification process.

1. Examine condominium and common interest community laws of other jurisdictions.

2. Examine the Uniform Common Interest Ownership Act, the Uniform Condominium Act, the Uniform Planned Community Act, and other uniform laws that may be helpful in pursuing recodification.
[Note: Members of state and national organizations were consulted about their practical experience with the uniform common interest community laws.]

3. Examine other related laws and issues, such as those related to mandatory seller disclosures, zoning, use of agricultural lands for condominiums, and subdivision of land.

B. Solicit input from organizations and individuals affected by Hawaii's condominium property regimes (CPR) law.

1. Consult with public and private organizations and individuals whose duties and interests are affected by the CPR law (i.e., stakeholders), including the Department of Commerce and Consumer Affairs, and other state, county, and private agencies and individuals.

2. Conduct a public hearing for the purpose of receiving comments and input on the CPR law and related laws and issues.
[Note: As part of its original workplan (codified in Act 131, SLH 2003), the Real Estate Commission conducted a series of public hearings to better solicit input from stakeholders – particularly those on the Neighbor Islands.]

III. Additional Guidelines

A. Balance the desire to modernize Hawaii's CPR law with the need to protect the public and to allow the condominium community to govern itself.

B. Understand the historical perspective regarding the development of Hawaii's CPR law, and use that perspective to help fashion the new law.

C. Engage the participation of stakeholders early in the recodification process.

IV. Practical/Operational Considerations

A. Staffing

1. Act 213, SLH 2000, authorized the establishment of one full-time temporary condominium specialist position to conduct the CPR law recodification. The position was not filled until December 19, 2000.

2. The position and funding authorized by Act 213, SLH 2000, was extended by Act 131, SLH 2003, to complete the recodification project.

B. Timeframe

1. Act 131, SLH 2003, requires the Real Estate Commission to submit a final report on the CPR law review and draft legislation to the Legislature at least 20 days before the convening of the 2004 regular session.

2. A first draft of the recodified condominium law based on the Uniform Condominium and Uniform Common Interest Ownership Acts was completed in January 2002. Based on feedback the Commission received from its Blue Ribbon Recodification Advisory Committee, realtors, property managers, and others, HRS Chapter 514A (rather than the uniform laws) was used as the basis for most of draft #2 of the recodification (i.e., general provisions; creation, alteration, and termination of condominiums; protection of purchasers; administration and registration of condominiums; and condominium management education fund). The Uniform Condominium Act and Uniform Common Interest Ownership Act – along with appropriate provisions of HRS Chapter 514A, other jurisdictions' laws, and the Restatement of the Law, Third, Property (Servitudes) – remained as the basis for condominium governance matters. Following the 2003 legislative session, the Commission: (i) continued to work with affected members of the community and the Blue Ribbon Recodification Advisory Committee to refine Recodification Draft #2; (ii) took the resulting draft ("Public Hearing Discussion Draft") to public hearing in each of Hawaii's counties; and (iii) worked with the Blue Ribbon Recodification Advisory Committee and others to incorporate appropriate changes and submit a final draft of the proposed condominium law recodification to the 2004 Legislature.

Goals/Actions to be Taken	Target Dates	Comments
Goal I: Research Laws of Other Jurisdictions, Uniform Acts, and Commentary to gain an Understanding of Relevant Issues and Approaches to CPR Regulation		
A. Examine condominium and common interest community laws of other jurisdictions; compare with HRS Chapter 514A.	1/2/01 – 3/1/01; ongoing	See Attachment #1, "Selected Relevant Laws"

Goals/Actions to be Taken	Target Dates	Comments
B. Examine the Uniform Common Interest Ownership Act (UCIOA), Uniform Condominium Act (UCA), Uniform Planned Community Act (UCPCA); compare with HRS Chapter 514A.	1/2/01 – 3/1/01	Websites: http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ucioa94.htm http://www.law.upenn.edu/bll/ulc/fnact99/1980s/uca80.htm http://www.law.upenn.edu/bll/ulc/fnact99/1980s/upca80.htm *Section by section comparison of UCIOA, UCA, and HRS Chpt. 514A completed. (✓3/8/01; Word document)*
1. Examine other jurisdictions' practical experience with the uniform common interest community laws.	ongoing	Consult with representatives from state and national organizations having practical experience with the uniform common interest community laws. *Attended Community Associations Institute National Conferences and Forums 5/3-5/5/01, 10/18-10/20/01, and 5/2-5/4/02. Met with experts and practitioners from many other jurisdictions.*
C. Examine other related laws (including case law) and issues, such as those related to mandatory seller disclosures, zoning, use of agricultural lands for condominiums, and subdivision of land.	1/2/01 – 3/1/01; ongoing	See Attachment #1, "Selected Relevant Laws"
D. Research the policy basis for HRS 514A and its amendments.	1/2/01 – 3/1/01; ongoing	See Attachment #1, "Selected Relevant Laws"
E. Examine Attorney General's opinions relating to various sections of HRS Chapter 514A.	1/2/01 – 3/1/01	*Hard copy of AG opinions (8/8/77-present) in REC files reviewed. (✓2/20-2/21/01)* *Eventually, the Commission should scan and post AG opinions as part of its virtual bookshelf. Currently, only formal AG opinions are posted on the AG's website (1992-2000, http://www.state.hi.us/ag/optable/table.htm) and the Hawaii State Bar Association's website (1987-1992, http://hsba.org/Hawaii/Admin/Ag/agindex.htm). None of these formal opinions specifically relate to HRS Chapter 514A.* *✓2/7/02 – Hard copy of AG opinions (8/8/77-3/5/98) in REC files summarized and photocopied for distribution to Blue Ribbon Recodification Advisory Committee. Both the summary and actual AG opinions should be posted on the REC website.*
F. Research treatises, articles, commentary, and other such materials to gain insight into alternative approaches to CPR regulation.	1/2/01 – 3/1/01; ongoing	See Attachment #2, "Selected Resource List"

Goals/Actions to be Taken	Target Dates	Comments
Goal II: Determine and Prioritize Areas of Focus		Answer the question: What do we want to see in the recodified Hawaii CPR law?
A. Review relevant literature.	12/19/00 – 6/1/01; ongoing	See Attachment #2, "Selected Resource List"
B. Determine initial areas of focus; prioritize.	12/19/00 – 3/1/01	The 1995 Real Estate Commission's report to the Legislature on "A Plan to Recodify Chapter 514A, Hawaii Revised Statutes, Condominium Property Regime" identified (as a "partial listing") the following areas for research/statutory amendments:
		1. Registration Issues: Definition of "apartment;" definition of "developer;" contents of Declaration; circumstances requiring registration of a condominium project; exemptions from registration; circumstances requiring the issuance of public reports; disclosures on resales of apartments; agricultural condominiums and the respective county codes; performance bond.
		2. Management Issues: Association mailouts and notices of meetings (i.e., in removal of directors, board elections, proxy solicitations); retroactivity of certain statute provisions (i.e., bylaw requirements); bylaw amendments; managing agents competencies real estate brokers license requirement; directors' duties; directors' liability; voting in conflict of interests situations; budgeting and reserves (board's power to assess); election and removal of directors; renting common elements; proxy forms and solicitation; Robert's Rules of Order – Uniform Application; officers' requirements; owner's access to association records not specifically enumerated in the statute; financial controls and handling of association funds.
C. Work with DCCA management and staff, Real Estate Commission members, and other stakeholders to refine areas of focus and priorities. • Meet regularly with DCCA Real Estate Branch Supervising Executive Officer and/or Senior Condominium Specialist.	12/19/00 – 6/1/01 12/19/00 – 6/30/04	Make initial determinations, then adjust as necessary throughout the recodification process. Daily meetings for first six months. Meet as appropriate after that.

Goals/Actions to be Taken	Target Dates	Comments
• Meet regularly with Real Estate Commission Condominium Review Committee (CRC) Chair.	12/19/00 – 6/30/04	Bi-weekly meetings with CRC Chair for first six months. Meet as appropriate after that. Discussed possible additional goals: Examine interplay of Hawaii's CPR law with new technologies (e.g., Internet sales of timeshares); improve on-line capabilities in the condominium arena.
• Meet with deputy attorney generals (past and present) regarding their experience with HRS Chapter 514A.	12/19/00 – 6/1/01; ongoing	Spoke informally with past and present deputy attorney generals.
Goal III: Get input from organizations and individuals affected by the CPR law (i.e., stakeholders)		
A. Compile list of organizations and individuals to be contacted regarding recodification of HRS Chapter 514A.	1/2/01; ongoing updates	The 1995 Real Estate Commission's report to the Legislature on "A Plan to Recodify Chapter 514A, Hawaii Revised Statutes, Condominium Property Regime" identified (as a "partial listing") the following "interested stakeholders who should be consulted on the recodification": 1. Regulators directly involved with Chapter 514A (Real Estate Commission members, Real Estate Commission staff involved with condominium governance and project registration, DCCA Director, Professional and Vocational Licensing Division Administrator and staff who may be impacted by the recodification, Regulated Industries Complaints Office). 2. Other State and county agencies' regulators directly or indirectly involved with Chapter 514A (State and county departments including Planning and Land Utilization – now combined under Planning and Permitting, State Bureau of Conveyances, Hawaii Housing Authority – now combined under Housing and Development Corporation of Hawaii, other 49 state regulators (where applicable) involved with condominium governance and project registration. 3. Legislators (chairs of Senate and House Consumer Protection Committees, Housing Committees, Judiciary Committees, and Finance/Ways and Means Committees).

Goals/Actions to be Taken	Target Dates	Comments
		4. Representatives from various groups and organizations involved with condominium project registration and governance matters (Real Estate Commission's Condominium Project Review Consultants, Hawaii State Bar Association Real Property and Financial Services Section, Hawaii Chapter of the Community Association Institute, Hawaii Council of Association of Apartment Owners, Hawaii Independent Condominium and Cooperative Owners Association, Hawaii Real Estate Research and Education Center, Hawaii member of the National Conference of Commissioners on Uniform State Laws, Hawaii member of the Restatement of the Law of Property 3rd, Hawaii Association of Realtors® including its island boards, State lending institutions, mortgage companies, escrow companies, insurance companies). To the stakeholders listed by the Real Estate Commission in its 1995 recodification plan, we should add other representatives of state professional, industry, and trade organizations, such as the Building Industry Association, Land Use Research Foundation, Mortgage Bankers Association, Hawaii Bankers Association, Hawaii Developers Council, Condominium Council of Maui, and more.
B. Request comments of those organizations and individuals listed above regarding existing condominium law and practices and suggestions for change.	3/31/01; ongoing	This "request for comments" will be in addition to the input regularly solicited by the Real Estate Commission Condominium Review Committee as part of its monthly public meetings. ✓ *4/16/01, request for comments mailed out to condominium law recodification stakeholders.* *[See also, under Goal IV.E. below, various speaking engagements.]* Recodification of HRS Chapter 514A is (and has been for some time) a permanent agenda item for the Condominium Review Committee's meetings. The Committee continues to accept comments on the recodification from any organizations or individuals wishing to address the Committee at its regular meetings. In addition, comments are routinely requested in the *Hawaii Condominium Bulletin* and the *Hawaii Real Estate Commission Bulletin*.
C. Conduct public hearings to receive comments and input on the CPR law and related laws and issue.	Between 9/1/03 and 10/15/03	In addition to the single public hearing required by Act 213, SLH 2000, the Real Estate Commission conducted public hearings on each of the Neighbor Islands. (This was part of the Commission's original workplan. It was codified in Act 131, SLH 2003, which extended the

Goals/Actions to be Taken	Target Dates	Comments
		condominium law recodification project for one year.) Hearings were held as follows: Kauai – September 16, 2003 (1:00 - 4:30 p.m.), State Office Building; Maui – September 23, 2003 (3:00 - 6:30 p.m.), Kihei Community Center; Kona – September 29, 2003 (3:00 - 6:30 p.m.), Kona Civic Center; Hilo – September 30, 2003 (1:00 - 4:30 p.m.), State Building; Oahu – October 7, 2003 (6:00 - 9:30 p.m.), State Capitol.
Goal IV: Keep stakeholders informed of progress on the recodification of Hawaii's CPR law		
A. Use the Real Estate Commission's website as the primary means of keeping stakeholders informed of progress on recodification of HRS Chapter 514A.	1/2/01 – 6/30/04	Website: http://www.hawaii.gov/hirec/
B. Develop printed material for those who do not have access to the Internet.	1/2/01 – 6/30/04	Address the "digital divide" issue.
C. Use the *Hawaii Condominium Bulletin* as another vehicle for keeping stakeholders informed of progress on the recodification of HRS Chapter 514A.	1/2/01 – 6/30/04	*February 2001 issue at page 5* *June 2001 issue at page 5* *September 2001 issue at pages 1 and 7* *December 2001 issue at page 1* *March 2002 issue at page 1* *July 2002 issue at pages 1 and 6* *October 2002 issue at pages 1 and 7* *February 2003 issue at page 5* *June 2003 issue at page 7* *October 2003 issue at page 6*
C.1 Use the *Hawaii Real Estate Commission Bulletin* as another vehicle for keeping stakeholders informed of progress on the recodification of HRS Chapter 514A.	1/2/01 – 6/30/04	*February 2001 issue at page 11* *March 2002 issue at page 8* *October 2002 issue at page 3 ("The Chair's Message")* *February 2003 issue at page 3 ("The Chair's Message")* *May 2003 issue at page 11* *August 2003 issue at page 3 ("The Chair's Message")* *November 2003 issue at page 3 ("The Chair's Message")*

Goals/Actions to be Taken	Target Dates	Comments
D. Develop articles and opinion/editorial pieces for local newspapers when appropriate.	1/2/01 – 6/30/04	*"Rewriting Hawaii's Condominium Property Act," Ka Nu Hou – The Newsletter of the Real Property & Financial Services Section of the Hawaii State Bar Association, March 2001 at pages 1-2* *"Industry makes move to redefine 1960s condo law," Pacific Business News, June 8, 2001 at page 40* *"Commissioner's Corner – Condominium Recodification and New Condo Laws," Hawaii REALTOR® Journal, September 2002, at page 2* *"Public hearing on draft of condo law changes set Tuesday," The Maui News, September 22, 2003, at page A3*
E. Use the Real Estate Commission Condominium Review Committee's monthly public meetings, Condominium Speakership Program, Condominium Specialists Office for the Day (on Neighbor Islands) Program, and Interactive Participation with Organizations Program as means to keep stakeholders informed of progress on the recodification of HRS Chapter 514A.	Ongoing programs	*2/16/01 – Speak with Hawaii State Bar Association Real Property & Financial Services Section Board of Directors (approximately 20 regular attendees) [Note: Continue to sit in on monthly HSBA-RPFS Board meetings]* *3/28/01 – Speak at Condominium Council of Maui's Annual Meeting (approximately 120 attendees)* *7/2/01 – Speak at Land Use Research Foundation Board Meeting (approximately 35 attendees)* *7/13/01 – Speak at West Oahu Realty, Inc. Meeting (approximately 15 attendees)* *7/19/01 – Speak at Community Associations Institute – Hawaii Chapter Seminar (approximately 100 attendees)* *7/24/01 – Speak at Chun, Kerr, Dodd, Beaman & Wong in-house meeting (approximately 8 attendees)* *9/7/01 – Speak at Lambda Alpha International – Aloha Chapter (an honorary land economics society) Meeting (approximately 35 attendees)* *9/11/01 – Speak at Waianae Realtor/Lender Educational Presentation sponsored by Title Guaranty, Waipahu Branch (approximately 40 attendees)* *9/26/01 – Speak at Mortgage Bankers Association of Hawaii Meeting (approximately 10 attendees)* *9/28/01 – Speak at Herbert K. Horita Realty, Inc. Meeting (approximately 25 attendees)* *11/27/01 – Speak at Mortgage Bankers Association of Hawaii Meeting*

Goals/Actions to be Taken	Target Dates	Comments
		(approximately 50 attendees)
		1/4/02 – Speak at Real Estate Commission Community Outreach Meeting (and earlier committee meetings) on Maui (approximately 15 attendees) *3/22/02 – Speak at Condominium Council of Maui's Annual Meeting (approximately 100 attendees) [Note: Wrote article for Condominium Council of Maui's Summer 2002 Newsletter]* *5/23/02 – Speak at Business Development Meeting sponsored by City Bank (approximately 35 attendees)* *6/14/02 – Speak at Real Estate Commission Community Outreach Meeting on Kauai (approximately 10 attendees)* *6/24/02 – Speak at meeting with Land Use Commission, Dept. of Business, Economic Development, & Tourism – Office of Planning, and County Planning Directors (approximately 10 attendees)* *7/18/02 – Speak at Community Associations Institute – Hawaii Chapter Seminar (approximately 80 attendees)* *8/5/02 – Speak at Hawaii Developers Council Meeting (approximately 30 attendees) [Note: Primarily small developers]* *11/12/02 – Speak at Appraisal Institute-Hawaii Chapter Meeting (approximately 30 attendees)*
		1/10/03 – Speak at Real Estate Commission Community Outreach Meeting (and earlier committee meetings) on Maui (approximately 15 attendees) *3/18/03 – Speak at Condominium Council of Maui's Annual Meeting (approximately 100 attendees)* *(Also met with, and will continue to meet and talk with, various interested individuals.)*
Goal V: Draft Recodification Legislation for 2004 Regular Session		
A. Begin actual drafting – recodification of HRS Chapter 514A	7/1/01	The Commission is targeting production of a series of HRS Chapter 514A recodification drafts. Each draft will be posted/circulated for comment among stakeholders until a final draft is submitted to the

Goals/Actions to be Taken	Target Dates	Comments
		Legislature. *[Note: The Commission is submitting proposed legislation to the 2004 Legislature.]*
B. Post first draft of recodified HRS Chapter 514A.	1/1/02	Note: As initial drafts of individual sections are completed, they should be circulated among the DCCA Real Estate Branch Supervising Executive Officer, Senior Condominium Specialist, and CRC Chair for comment/revision. The draft should then be reviewed by the CRC and Real Estate Commission for approval to circulate/post as an initial "working draft." *✓1/31/02 – First draft of recodification posted on Real Estate Commission website.*
C. Convene Blue Ribbon Recodification Advisory Committee to review and revise drafts of HRS Chapter 514A recodification.	1/15/02 – 12/31/02; ongoing	The Commission plans to tap into our community's collective expertise by asking various individuals to carefully and critically review our drafts of the HRS Chapter 514A recodification. The first step in this process is the convening of a Blue Ribbon Recodification Advisory Committee (comprised of attorneys whose practices, collectively, cover the full spectrum of condominium law) to review and revise drafts of the recodification. The Blue Ribbon Recodification Advisory Committee will meet monthly from January through at least December 2002. The Commission plans to widen the breadth of our community reviewing the recodification with each successive draft. *✓1/31/02-12/26/02 – The Blue Ribbon Recodification Advisory Committee and separate subject matter subcommittees met at least once-a-month. In the month of October 2002, members met twice-a-week for half-day sessions to work on the second draft of the recodification.*
C.1 Post second draft of recodified HRS Chapter 514A.	1/15/03	*✓1/15/03 – Second preliminary draft of recodification posted on Real Estate Commission website as part of progress report to Legislature.*
D. Request that Legislature extend recodification project for one year (Commission's recommended legislation to be submitted to 2004 Legislature.)	1/2/03 – 5/1/03	*✓Act 131, SLH 2003.*
E. Public Hearings on second draft of HRS Chapter 514A recodification.	9/1/03 – 10/15/03	*In addition to the single public hearing required by Act 213, SLH 2000, the Real Estate Commission conducted public hearings on each of the Neighbor Islands. (This was part of the Commission's original workplan. It was codified in Act 131, SLH 2003, which extended the*

Goals/Actions to be Taken	Target Dates	Comments
		condominium law recodification project for one year.) Hearings were held as follows: Kauai – September 16, 2003 (1:00 - 4:30 p.m.), State Office Building; Maui – September 23, 2003 (3:00 - 6:30 p.m.), Kihei Community Center; Kona – September 29, 2003 (3:00 - 6:30 p.m.), Kona Civic Center; Hilo – September 30, 2003 (1:00 - 4:30 p.m.), State Building; Oahu – October 7, 2003 (6:00 - 9:30 p.m.), State Capitol. Recodification Project Attorney was slowed by surgery in May 2003.
E.1 Pre-Public Hearings meeting(s) and/or post-Public Hearings meeting(s) will be held with Blue Ribbon Recodification Advisory Committee.	3/1/03 – 7/31/03	The membership of the Blue Ribbon Recodification Advisory Committee will be expanded. Suggested additions to the advisory committee include representatives of the Hawaii Council of Associations of Apartment Owners, Hawaii Independent Condominium and Cooperative Owners Association, Community Association Institute – Hawaii Chapter, Hawaii Association of Realtors®, and the Condominium Council of Maui. *✓Done per Act 131, SLH 2003. Recodification Project Attorney had been meeting with representatives of those groups before Act 131 was enacted. Numerous pre- and post-hearing meetings were held.*
F. Post third draft of recodified HRS Chapter 514A.	7/31/03	*✓9/09/03 – Public Hearing Discussion Draft of recodification posted on Real Estate Commission website. Recodification Project Attorney was slowed by surgery in May 2003.*
G. Seek Attorney General's Office review of draft #3, HRS Chapter 514A recodification.	8/1/03	If the Commission's condominium law recodification is to be submitted to the Governor for inclusion in the Administration's legislative package, this review by the Attorney General's Office would be to flag any problems the Administration may have with the recodification. *[Note: The Commission is submitting the proposed legislation independently – directly to the Legislature.]*
H. Submit draft legislation to Governor for inclusion in Administration's 2004 legislative package.	10/1/03	The Attorney General's Office, the Department of Budget and Finance, and the Governor's executive staff will review the proposed legislation. They may suggest revisions. *[Note: The Commission is submitting the proposed legislation independently – directly to the Legislature.]*
I. Post final draft of recodified HRS Chapter 514A (i.e., draft that will be submitted to 2004 Legislature as part of Commission's final report).	12/31/03	
J. Final Report to Legislature, with proposed legislation, to be submitted to 2004 Legislature.	1/1/04	The 2004 State Legislature convenes on Wednesday, January 21, 2004. The final report to the Legislature is due twenty days before the Legislature convenes.

Selected Relevant Laws

("Point and click" hyperlinks to websites are available on electronic versions of this document.)

Hawaii Laws – State (http://www.capitol.hawaii.gov/hrscurrent/?press1=docs)

Chapter 514A, Hawaii Revised Statutes – Condominium Property Regimes

Chapter 414D, Hawaii Revised Statutes – Hawaii Nonprofit Corporations Act (effective 7/1/02)

Chapter 415B, Hawaii Revised Statutes – Nonprofit Corporation Act (effective until 6/30/02)

Chapter 421I, Hawaii Revised Statutes – Cooperative Housing Corporations

Chapter 421J, Hawaii Revised Statutes – Planned Community Associations

Chapter 484, Hawaii Revised Statutes – Uniform Land Sales Practices Act

Chapter 508D, Hawaii Revised Statutes – Mandatory Seller Disclosures in Real Estate Transactions

Chapter 514E, Hawaii Revised Statutes – Time Sharing Plans

Chapter 515, Hawaii Revised Statutes – Discrimination in Real Property Transactions

Act 180 (Session Laws of Hawaii, 1961) – (condominium enabling law, Chapter 170A, Revised Laws of Hawaii)

Act 101 (Session Laws of Hawaii, 1963) – (incorporated into Hawaii's Horizontal Property Act provisions recommended by the Federal Housing Administration condominium model state statute and recommendations from New York legislation)

Act 16 (Session Laws of Hawaii, 1968) – (condominium law renumbered to Chapter 514)

Act 98 (Session Laws of Hawaii, 1977) – (condominium law restatement without substantive change to Chapter 514; renumbered to Chapter 514A)

Act 116 (Session Laws of Hawaii, 1979) – (amended definition of "apartment owner")

Act 213 (Session Laws of Hawaii, 1984) – (added section regarding "managing agents")

Act 65 (Session Laws of Hawaii, 1988) – (condominium law renamed "Condominium Property Act")

Act 185 (Session Laws of Hawaii, 1995) – (Legislature directs Hawaii Real Estate Commission to establish a plan for recodifying condominium law to make it easier to understand and follow)

Act 303 (Session Laws of Hawaii, 1996) – (prohibiting restrictions on the use of residential property as family child care homes; exempts condominiums, coops, certain townhouses, etc.; directs Attorney General to submit report to 1997 Legislature discussing tort liability, Americans with Disabilities Act, and any constitutional concerns regarding exemptions)

Act 132 (Session Laws of Hawaii, 1997) – (establishing Hawaii's planned community associations law)

Act 135 (Session Laws of Hawaii, 1997) – (allowing for contingent final public reports)

Act 213 (Session Laws of Hawaii, 2000) – (directing Real Estate Commission to study Hawaii's HRS Chapter 514A and develop recommendations for recodification)

Act 251 (Session Laws of Hawaii, 2000) – (requiring condominiums to conform to county land use laws)

Act 105 (Session Laws of Hawaii, 2001) – (adopting new Hawaii Nonprofit Corporations Act, effective 7/1/2002)

Act 232 (Session Laws of Hawaii, 2001) – (requiring mediation of certain condominium disputes)

Act 265 (Session Laws of Hawaii, 2001) – (adopting Uniform Arbitration Act)

Act 131 (Session Laws of Hawaii, 2003) – (extending recodification project for one year)

Hawaii Laws – Counties

City & County of Honolulu

Revised Ordinances of the City & County of Honolulu 1990 (ROH) (Note that 1990 does not represent the frequency of update; it refers to the last time the ordinances were reorganized and reformatted.) – (http://www.co.honolulu.hi.us/refs/roh/index.htm)

ROH Chapter 21 – Land Use Ordinance (http://www.co.honolulu.hi.us/refs/roh/21_990.htm)

ROH Chapter 22 – Subdivision of Land (http://www.co.honolulu.hi.us/refs/roh/22.htm)

ROH Chapter 38 – Residential Condominium, Cooperative Housing and Residential Planned Development Leasehold (http://www.co.honolulu.hi.us/refs/roh/38.htm)

Hawaii County

1983 Hawaii County Code – Revised and Republished 1995 – (http://www.co.hawaii.hi.us/countycode/haw-toc.html) (website current through October 1999)

Kauai County

Kauai County Code 1987, as amended

Maui County

Maui County Code – (http://ordlink.com/codes/maui/index.htm) (website current through August 2000)

Uniform Laws

Uniform Common Interest Ownership Act – (http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ucioa94.htm)

Uniform Condominium Act – (http://www.law.upenn.edu/bll/ulc/fnact99/1980s/uca80.htm)

Uniform Planned Community Act –
(http://www.law.upenn.edu/bll/ulc/fnact99/1980s/upca80.htm)

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Aquarian Foundation v. AOAO of Waikiki Park Heights, 2001 Haw. LEXIS 97 (2001)

Arbitration of the Board of Directors of the AOAO of Tropicana Manor v. Jeffers, 73 Haw. 201, 830 P.2d 503 (1992)

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Kole v. Amfac, Inc., 69 Haw. 530, 750 P.2d 929 (1988)

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Pelosi v. Wailea Ranch Estates, 91 Haw. 522, 985 P.2d 1089 (Haw. Ct. App. 1999)

Penney v. AOAO of Hale Kaanapali, 70 Haw. 469, 776 P.2d 393 (1989)

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Sandstrom v. Larson, 59 Haw. 491, 583 P.2d 971 (1978)

Schmidt v. The Board of Directors of the AOAO of the Marco Polo Apartments, et al., 73 Haw. 526, 836 P.2d 479 (1992)

State Savings & Loan Association, A Corporation v. Kauaian Development Company, Inc., Kauaian Land Company, Inc., et al., 50 Haw. 540, 445 P.2d. 109 (1968)

State Savings & Loan Association, A Corporation v. Kauaian Development Company, Inc., Kauaian Land Company, Inc., et al., 62 Haw. 188, 613 P.2d 1315 (1980)

Other Jurisdictions' Laws

Arizona

Generally, *see* Title 33, Arizona Revised Statutes – Property
(http://www.azleg.state.az.us/ars/33/title33.htm)

Title 33, Chapter 9, Arizona Revised Statutes – Condominiums

Title 33, Chapter 16, Arizona Revised Statutes – Planned Communities

California

Generally, *search* California Codes – (http://www.leginfo.ca.gov/calaw.html)

(Note: The full text of all 29 California codes is available at this site. The primary statutes governing common interest developments in California are the Davis-Stirling Act (Civil Code §§1350-1376), the Nonprofit Corporation Law, and the Subdivided Lands Act. Do keyword searches to find other laws related to condominiums. In order to download the entire code, you would retrieve groupings of code sections based on the table of contents code structure.)

Florida

Generally, *see* Title XL, The 2000 Florida Statutes – Real and Personal Property (http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Index&Title_Request=XL#TitleXL)

Chapter 718, The 2000 Florida Statutes – Condominium Act (http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=Ch0718/titl0718.htm)

Chapter 719, The 2000 Florida Statutes – Cooperatives (http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=Ch0719/titl0719.htm&StatuteYear=2000&Title=%2D%3E2000%2D%3EChapter%20719)

Chapter 720, The 2000 Florida Statutes – Homeowners' Associations (http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=Ch0720/titl0720.htm&StatuteYear=2000&Title=%2D%3E2000%2D%3EChapter%20720)

Illinois

Generally, *see* Chapter 765, Illinois Compiled Statutes – Property (http://www.legis.state.il.us/ilcs/ch765/ch765actstoc.htm)

Chapter 765, ILCS 605, Illinois Compiled Statutes – Condominium Property Act (http://www.legis.state.il.us/ilcs/ch765/ch765act605.htm)

Maryland

Generally, Generally, *search* Maryland Code – (http://mlis.state.md.us/cgi-win/web_statutes.exe)

(Note: The full text of the Maryland Code is available at this site. Do keyword searches to find laws related to condominiums.)

Nevada

Generally, *see* Title 10, Nevada Revised Statutes – Property Rights and Transactions

Chapter 116, Nevada Revised Statutes – Common-Interest Ownership (Uniform Act) (http://www.leg.state.nv.us/NRS/NRS-116.html)

Chapter 117, Nevada Revised Statutes – Condominiums (http://www.leg.state.nv.us/NRS/NRS-117.html)

New York

Generally, *see* Chapter 50, New York State Consolidated Laws – Real Property Law (http://assembly.state.ny.us/cgi-bin/claws?law=99&art=1)

Article 9-B, New York State Consolidated Laws – Condominium Act (http://assembly.state.ny.us/cgi-bin/claws?law=99&art=12)

Virginia

Generally, *see* Title 55, Code of Virginia – Property and Conveyances (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC5500000)

Also, *search* Code of Virginia – (http://leg1.state.va.us/000/src.htm) (Results of "condominium" word search: http://leg1.state.va.us/000/lst/LS102369.HTM)

(Note: Virginia's condominium law served as a model law for UCIOA)

Title 55, Chapter 4.1, Code of Virginia – Horizontal Property Act (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC55000000004000010000000)

Title 55, Chapter 4.2, Code of Virginia – Condominium Act (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC55000000004000020000000)

Title 55, Chapter 26, Code of Virginia – Property Owners' Association Act (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC55000000026000000000000)

Title 55, Chapter 27, Code of Virginia – Virginia Residential Property Disclosure Act (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC55000000027000000000000)

Title 55, Chapter 29, Code of Virginia – Common Interest Community Management Information Fund (http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC55000000029000000000000)

Washington

(Note: You will probably need to copy and paste the links to Title 64, Chapters 64.32, 64.34, and 64.38 into the address line of your web browser. The website address' use of certain characters caused problems establishing a hyperlink in this document. It may be easier simply to click on the link to the entire Revised Code of Washington at: http://www.leg.wa.gov/pub/rcw/ and navigate your way to Title 64, Chapters 64.32 et seq.)

Generally, *see* Title 64, Revised Code of Washington – Real Property and Conveyances (http://www.leg.wa.gov/pub/rcw/rcw%20%2064%20%20TITLE/rcw%20%2064%20%20%20TITLE/rcw%20%2064%20%20%20TITLE.htm)

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Additional References (Hawaii Real Estate Commission website): http://www.hawaii.gov/hirec/.

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relations. Professor Callies is the author of *Preserving Paradise: Why Regulation Won't Work* and *Regulating Paradise: Land Use Controls in Hawai'i*, and author or co-author of numerous other publications relating to land use. He was also managing editor of the *Michigan Journal of Law Reform*. In 1982, Professor Callies received the Chancellor's Award for distinction in teaching, research, and service and was awarded a UHM Campus Merit Award in 1983. In both 1990 and 1991, he received the Outstanding Professor of Law Award. He is a past chairman of the American Bar Association's Section on State and Local Government Law, and co-chair of the Academics' Forum and council member of the Asia Pacific Forum, both of the International Bar Association, and a life member of Clare Hall, Cambridge University. In 1991 he was elected to the American Law Institute (ALI). Professor Callies received an A.B. from DePauw University in 1965, a J.D. from the University of Michigan in 1968, and a LLM from Nottingham University (England) in 1969.

KENNETH D.H. CHONG has been involved in real estate development, financing, marketing, management, litigation, and education for more than 30 years. Beginning in 1964, Mr. Chong held many key management positions with Kaiser Development Company, including President and General Manager of Kaiser Real Estate Services. He retired from Kaiser in 1990. Today, Mr. Chong is the President of his own company, Pacific Realty Consultants, and Principal Broker and Managing Director of Avalon Realty LLC. Mr. Chong has also taught graduate and undergraduate real estate courses for the University of Hawaii and continuing education classes for the Hawaii Association of Realtors for over 25 years. In 1993, Mr. Chong won the Association's "Outstanding Real Estate Educator Award". He has been a licensed real estate broker since 1970 and holds the CRB (Certified Real Estate Brokerage Manager) designation. He has also been a consultant to the Hawaii Real Estate Commission for over 25 years, a member of various State and County boards, and a member and President of various private organizations. Mr. Chong received a B.A. from the University of Hawaii and, after serving several years as an officer in the U.S. Air Force, a J.D. from Yale University, and an MBA (Finance) from Harvard Business School.

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STEVE GLANSTEIN is a Professional Registered Parliamentarian. He serves as the President of the Hawaii Chapter of CAI and a board member of the National Association of Parliamentarians. He is an experienced parliamentarian who has assisted over 850 association meetings during the past 20 years.

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RAYMOND S. IWAMOTO, a graduate of McKinley High School and the University of Hawaii, graduated Summa Cum Laude from the University of Santa Clara Law School and is the senior real estate partner at Goodsill Anderson Quinn & Stifel, L.L.P. He has focused on advising clients on real estate acquisition, development, financing and operations and on corporate/business planning acquisitions and operations. Mr. Iwamoto has been involved in many condominium projects starting in the mid 1970's as developer's or lender's counsel. He currently represents major property owners, developers, banks as well as small businesses. Besides numerous Hawaii and American clients, he has represented clients from the UK, Japan and Australia. He is a member of the American College of Real Estate Lawyers, a speaker at one of their conferences and a former Chairman of the Hawaii State Bar Real Property and Financial Services Section and has published several articles in The Practical Real Estate Lawyer, two of which have been selected for republication as part of the American Law Institute American Bar Association Real Estate Checklist Series. He serves on the Coast Guard Foundation Board.

LEONARD M. KACHER has been associated with condominium management in Hawaii for more than 22 years. He holds the designation of Professional Community Association Manager (PCAM) and Certified Manager of Community Associations (CMCA). He is the Founder of the Hawaii Chapter of the Community Associations Institute and Past President. He has served as Chairman of the Condominium Sub-Committee for Government Affairs for the Hawaii Association of Realtors, and as Panelist on the Hawaii Blue Ribbon Legislative Panel, an advisory group on property management issues. He holds a Hawaii Real Estate Broker License and is a Court-Approved Expert Witness for residential property management cases. He is also an Adviser to the Regulated Industries Complaints Office on real estate matters.

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JOHN A. MORRIS has been a member of the Hawaii Bar since 1984 and joined Ashford & Wriston in 2001. Mr. Morris focuses on representing condominiums, cooperatives and other types of homeowner associations. He served as the State's first condominium specialist from 1988-1991 and drafted a number of bills affecting condominiums which were subsequently enacted into law. He continues to be active in proposing and testifying on legislation as co-chair of the Community Associations Institute Legislative Action Committee. Mr. Morris has spoken on and written articles about homeowner associations and legislation affecting them. Each year, he publishes a *Director's Guide to Hawaii Community Association Law*, a handbook for directors which includes relevant laws and analysis for board members. Mr. Morris has an LLB from University College London, England, and a J.D. from the William S. Richardson School of Law, University of Hawaii.

MILTON M. MOTOOKA is a partner in the firm of Motooka Yamamoto & Revere and has been practicing law in Hawaii for over 31 years. His practice is devoted almost exclusively to the representation of community associations. Mr. Motooka is a member of the Charter Class of the College of Community Association Lawyers. The College is comprised of attorneys who have distinguished themselves in the field of community association law and community service. He was the only attorney selected from Hawaii for induction into the Charter Class. Mr. Motooka was the recipient of the Richard M. Gourley Distinguished Service Award for his contributions to Hawaii's community association industry in law.

JOYCE Y. NEELEY received a B.A., cum laude, from Weber State College in 1973 and a J.D., magna cum laude, from the University of San Diego School of Law in 1978. She is licensed to practice in the State of Hawaii, the State of California (inactive) and the State of Arizona (inactive) as well as several federal courts. Ms. Neeley is a member and former co-chair of the Condominium Property Regime Subcommittee of the Real Property & Financial Services Section of HSBA. Ms. Neeley is former President of the Hawaii Chapter of Community Associations Institute and has been an Area Advisor for CAI-National. Ms. Neeley has

published numerous articles on issues related to community association law and is a frequent lecturer on the topic at local and national seminars. She also developed and teaches the GRI course on condominium law for the Hawaii Association of Realtors and has written an article on Community Associations for the *Hawaii Real Estate Law Manual* published by the Hawaii Institute of Continuing Legal Education.

RICHARD J. PORT is the legislative chair for the Hawaii Independent Condominium and Co-op Owners (HICCO), an organization that helps condominium owners when their rights under the Condominium Property Regime are in conflict with actions of their boards of directors or management companies. Mr. Port has been a member of the Yacht Harbor Towers Board of Directors for twenty-two years, president of his board three times for a total of eight years, long time member of the Board of Directors of the Hawaii Council of Associations of Apartment Owners (HCAAO), a former member of the Hawaii Civil Rights Commission and has participated in leadership positions involving a broad range of consumer protection issues including the successful efforts to preserve two local airlines in Hawaii and two local daily newspapers.

HIROSHI SAKAI received an LLB and LLM from George Washington University Laws School in 1950. He is the current chair (and member since 1964) of the Hawaii Commission on Uniform State Laws, and has been a member of the National Conference of Commissioners on Uniform State Laws since 1964 (Vice President, 1986-1988). Mr. Sakai has been a member of drafting committees on various real estate laws and the chairman of the Uniform Disclaimer of Property Interests Act committee. He is a member of the American College of Real Estate Lawyers, (member 1982 to date). He has authored numerous articles relating to condominium projects, including "Leasehold Condominiums," *Connecticut Law Review* (1969); *Modern Condominium Forms*, a lawyers' handbook (co-author 1971); "Condominium Owners Handbook," a pamphlet for condominium owners (co-author 1974); and "Condominium Conversions," *Hawaii Bar Journal* (co-author, 1985). Mr. Sakai has practiced in the areas of acquisition, development, financing, sales and management of real estate subdivisions, condominiums, time sharing, multi-family apartments, and commercial real estate since 1965.

JANE SUGIMURA is a partner in the firm of Bendet, Fidell, Sakai & Lee. She graduated from Rutgers Law School and was admitted to the Hawaii bar in 1978. She concentrated her practice in commercial litigation and has been regularly practicing collection and landlord-tenant law since 1987. She has been a member of the Hawaii Council of Associations of Apartment Owners (HCAAO) since 1988 and is its current President.

TED WALKEY is a condominium resident, owner, and a board member since 1990. He has been a Real Estate Salesperson since 1992, an association manager since 1993, and a Professional Community Association Manager (PACM) since 1996. Mr. Walkey has been active in the Community Associations Institute – Hawaii Legislative Action Committee since 1987. He is Vice President Property Management Information Systems of Hawaiiana Management Co., Ltd.

CALVIN T. KIMURA has been the Supervising Executive Officer of the Hawaii Real Estate Commission since 1986. He previously served as Supervising Investigator of the Hawaii Regulated Industries Complaints Office, as a Labor Law Specialist for the State of Hawaii, and as an IRS agent. Mr. Kimura has been a real estate broker since 1979 (currently on inactive status). He is a graduate of the University of Hawaii.

CYNTHIA M.L.YEE is the Senior Condominium Specialist for the Hawaii State Real Estate Commission (1996-present). She also served the Commission as Senior Real Estate Specialist from 1990-1992, and Information Specialist from 1985-1992. From 1992-1996, she served as Managing Director – Condominium Management Education, for the Hawaii Real Estate Research and Education Center, University of Hawaii at Manoa. Ms. Yee received a B.Ed. from the University of Hawaii at Manoa, a M.Ed. from the University of Arizona, and a J.D. from Southwestern University School of Law.

GORDON M. ARAKAKI is the Recodification Project Attorney. He has a broad range of experience in both the public and private/nonprofit sectors, as well as substantial experience working with communities, businesses, and government. Mr. Arakaki has served as the Chief of Staff of the Senate Committee on Ways and Means and as Staff Attorney/Committee Clerk for the Senate Committee Education and Technology (1999) and Senate Committee on Commerce, Consumer Protection, and Information Technology (1997-1998). He also launched the Lt. Governor's "Slice Waste And (red) Tape" (SWAT) project and has worked in various capacities for the Honolulu City Council, Land Use Research Foundation of Hawaii, and Chamber of Commerce of Hawaii. Mr. Arakaki, a graduate of Pearl City High School, received a B.A. from Pomona College and a J.D. from the William S. Richardson School of Law, University of Hawaii.

Appendix E

STATEMENT OBJECTING TO THE DRAFT RECODIFICATION

By

Richard Port, Member, Blue Ribbon Recodification Advisory Committee

The purpose of this statement is to outline concerns regarding the process used in developing the revision of the Condominium Property Regime and the product being transmitted to the Hawaii State Legislature. The changes which are being proposed to the current law, Chapter 514A, are of such great import that it makes it unlikely that anyone fully understands the implications and impact these changes will have on the owners of condominiums in the state of Hawaii.

Background - Condominiums function in many ways like small cities or towns. Some condominiums, e.g. the Marco Polo (with over 500 units), are larger than some of our island communities, e.g. Hawi, Keanae, Kilohana, etc. On Oahu, it is estimated that one of every four residents lives in a condominium.

Condominiums are supervised by Boards of Directors that are generally composed of between five and nine members. These Boards have extraordinary executive, legislative, and judicial powers. They devise and approve condominium house rules, determine whether the house rules, the condominium by-laws and/or declaration have been violated and determine what fines or penalties shall be assessed to owners for violations. Boards also have significant control of the media through letters and newsletters that they send to condominium owners at owners' expense.

The Hawaii State Legislature has approved several laws over the last two decades which have responded to criticisms raised by owners regarding the abuse of powers by some Boards of Directors, sometimes with the approval of their management companies. Unfortunately, this revised draft of the condominium property regime eliminates some of the laws that have been enacted to protect owners from the excesses of their Boards of Directors and managing agents.

Concern 1 - The Blue Ribbon Recodification Advisory Committee consisted of attorneys who represent developers and attorneys and employees of condominium management companies, but failed to include representatives from groups that protect condominium owners' interests. In as much as condominium consumer groups testify

every year during hearings at the State Legislature, the failure to include these groups appeared to be deliberate and, in fact, I was informed by a Real Estate Commission staff member that a recommendation had been made to include consumer groups but that this recommendation was not followed.

Concern 2 - The 2003 Hawaii State Legislature insisted that consumer groups be added to the BRRAC and representatives of the Hawaii Council of Associations of Apartment Owners (HCAAO) and the Hawaii Independent Condominium and Co-op Owners (HICCO) were added to the BRRAC. However, the BRRAC and staff refused to allow significant changes to be made to the draft prepared for public hearing. I was told that changes I proposed would have to await the result of the testimony at the public hearings. Consequently, the revised draft of the Condominium Property Regime submitted for public hearing consisted of at least fourteen (14) sections in which owner rights were reduced and board authority was expanded. It is unlikely that any legislator intended such a massive increase of authority be granted to boards of directors, decreasing the rights of owners, when additional funding was provided by the legislature for the recodification in 2003. In fact, the Hawaii State Legislature has approved substantive legislation to protect the rights of condominium owners over the last two decades.

Concern 3 - The testimony at the public hearings indicated that there was broad agreement that owner protections contained in Chapter 514A needed to be preserved and that there is a need for a faster resolution of disputes between owners and their boards of directors and between owners and their management companies. Many testifiers recommended the establishment of a condo court which would be the one and only addition to the recodification that adds protection to owners. This testimony was ignored even though it was delivered by condo presidents, former presidents, board members, former board members and owners. These board presidents and board members, unlike the members of the BRRAC who work for management companies and boards of directors, have no conflict of interest in wanting to reduce their own authority.

Concern 4 - Much of the testimony delivered at the public hearings was ignored in the draft that was prepared and circulate subsequent to the public hearings. Recent meetings of the BRRAC have resulted in compromises for some of the less contentious

issues. However, at least two issues that would dramatically increase the power of boards are still included in the draft:

1) Currently, the law requires boards to amend their by-laws to grant boards the power to assess fines on owners for violations (alleged or real) of the house rules and by-laws. The revised draft would give boards, by their own resolution and without any authorization from the association owners, the power to meet out virtually unlimited fines for house rule and by-law violations. It has the potential to turn a condominium into a prison, with the board of directors as law makers, judges, and juries, and the resident manager as the warden. All of the testimony offered at the public hearing opposed this change;

2) The one recourse an owner currently has to make changes in a condominium is the association's annual meeting. When controversies occur, absentee owners, who sometimes live thousands of miles away, are urged to take sides through their proxies. The absentee owners often do not want to take sides because they are uncertain as to which side is right in a dispute. The boards and management companies write letters telling absentee owners if they don't turn in their proxies a meeting cannot be held, and there will be additional expenses to setting up a subsequent meeting, and they will be paying for these expenses. Under current law, owners can submit their proxies for "quorum purposes only". The recodification draft would remove this option in spite of the fact that all but one of the testifiers opposed this change. The result would be a dramatic increase in the power of boards and all but eliminate the ability of owners to stand up to a dictatorial board of directors. Moreover, no data has been presented to the BRRAC that demonstrate that this change is needed in spite of a specific request made to the BRRAC representative of one of the largest management companies who, of course, favors the elimination of the quorum option. What is not in the draft is the one consumer protection measure that would help condo owners, namely a condo court. The testimony on this issue has so far been ignored.

Concern 5 - Many changes are still being made to the draft recodification even as this minority report is being submitted. In effect, no one knows what is in the document. In as much as the recodification is a work in progress, it is critical that the condo public be informed what changes are in store for them. A survey to obtain the reactions of a sample of condo owners would provide the legislature with additional information on which to base its final decision in the 2005 legislature. The results of such a survey, I believe, would be very revealing.

Conclusion - I have additional concerns regarding the draft as an original member of Hawaii's Civil Rights Commission and someone who frequently receives calls from owners asking for help when their rights as owners are being denied by their boards and/or management companies, I am very aware of the consequences of approving this document as now drafted. The changes that have been made to Chapter 514A are massive. It is critical that the entire document be reviewed, not only by members of the BRRAC, but also by others, including condominium apartment owners, who may not have had the opportunity to participate in the review process.

Appendix F

Recodification of HRS Chapter 514A, Briefing Sheet

1. Purpose:

The 2000 Legislature recognized that "[Hawaii's] condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micromanages condominium associations . . . [t]he law is also overly regulatory, hinders development, and ignores technological changes and the present day development process." Consequently, the Legislature directed the Real Estate Commission of the State of Hawaii (Commission) to conduct a review of Hawaii's condominium property regimes law, and to submit draft legislation to the 2003 Legislature that will "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law."

2. Status:

Act 213 (SLH 2000), which set the Commission's recodification in motion, is the result of the Commission's 1995 study and report in response to Act 185, Section 4 (SLH 1995) – "A Plan to Recodify Chapter 514A, Hawaii Revised Statutes, Condominium Property Regime."

This past Legislative session, Act 213 (SLH 2000) was extended to June 30, 2004, to refine the discussion draft (available for review on the Commission's website) with a broader representation of the condominium community. From September 16, 2003 through October 7, 2003, the Commission held public hearings in each county. This was followed by additional meetings of the Blue Ribbon Recodification Advisory Committee and many refinements of the recodification.

3. Accomplishments and Issues:

- Updated, clarified, and organized Hawaii's condominium law.
- Simplified the disclosure to purchasers (i.e., public report) process.
- To the extent practicable and consistent with adequate consumer protection, avoided "one-size fits all" requirements in consumer protection and condominium management provisions.
- Organized condominium management provisions.
- Made changes, clarifications, and additions to support the fair and efficient functioning of Hawaii's condominium communities.
- Added new provisions dealing with "aging-in-place" issues, including a provision suggested by the Act 185 (SLH 2003) working group.
- Developed a process for receiving feedback to the various drafts and suggestions for improvement of Hawaii's condominium law that has been as important as the substance of what is in the recodification.
- Developed a structure for the Commission's recodification document – with both proposed statutory language and commentary explaining how the Commission chose to address particular problems (as well as rejected approaches in appropriate instances) – that easily allows for all stakeholders to have their views reflected in the recodification, even if those views end up being rejected.
- *See also*, Attachment #1 for a description of the Commission's recodification guiding principles and Attachment #2 for a summary of selected recodification issues.

Attachment #1

Guiding Principles, Generally

1. The Condominium Property Act should be construed in accordance with the purposes stated in Act 213 (SLH 2000) and this Prefatory Comment (i.e., to "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law"), and the Real Estate Commission's comments to the text of each section. The Act should also be construed to promote the in-state and interstate flow of funds to condominiums to facilitate the reasonable development and sales of units in such projects, and to protect consumers, purchasers, and borrowers against condominium practices that may cause unreasonable risk of loss to them. It should also help facilitate the development of this type of real estate in Hawaii, as Hawaii's land area is limited. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

2. The recodified condominium law should enhance the clarity of the Condominium Property Act.

Provisions on a single issue (e.g., proxies) should be consolidated or grouped together. The artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b) should be eliminated. And the statutory requirements for condominium governing documents should be minimized while incorporating certain provisions currently in HRS §514A-82(a) and (b) in more appropriate statutory sections.

3. The recodified condominium law should recognize the difficulty of a "one size fits all" approach to consumer protection and management provisions.

4. The Commission should require only information it will use or may find useful from a regulatory and consumer protection standpoint.

5. Problems should be fixed where they are created.

Some stakeholders asked that the condominium property regimes law be used to fix problems created by other provisions in HRS. Such problems should be fixed in the statutory provisions that created the problems in the first place.

6. To the extent practicable, approval percentage requirements should be standardized. When necessary, conform to Fannie Mae, Freddie Mac, or HUD requirements.

7. The recodified condominium law should not result in an increase in the cost of government.

This goal is meant to limit the addition of new programs administered by government under the condominium law. If the Legislature wishes to add such programs (e.g., condominium courts), means of funding the new programs must also be established. It is possible that revised consumer protection requirements will affect government costs. We will not actually know if the goal of maintaining the cost of government in this area has actually been achieved until after practical experience working with the recodified condominium law. If proper administration of the new law actually requires more resources, the responsible government agency should ask for more resources or ask that particular requirements be revised.

Attachment #2

Summary of Selected Recodification Issues

	Current Law (HRS Chpt. 514A)	Recodification Final Draft
Part I. General Provisions		
Definitions clarified		
"Common elements"	Long list, including facilities designated as common elements in the declaration and anything else "necessary or convenient to its existence, maintenance, and safety, or normally in common use."	Defines "Units" and "Limited common elements" with specificity and defines "Common elements" as everything else. Helps clarify who is responsible for what.
"Material change"	Not defined in Part I. Used in HRS §514A-63 (Rescission rights)	Ties definition to standard for rescission rights (direct, substantial, and adverse effect on the use or value of a purchaser's unit or appurtenant limited common elements or available project amenities).
"Material facts"	Not defined in Part I.	For consistency, uses definition of "material facts" in HRS §508D-1.
"Pertinent change"	Not defined in Part I. Used in HRS §514A-41 (Supplementary public report)	Ties required amended reports (disclosures) to changes in "material respect" while clarifying that not all such changes rise to the level of giving purchasers rescission rights.
"Property"	No similar provision in definition of "property."	Adds to existing definition of "property" to specifically allow for air/water space condominiums. Helps do away with "tool shed" condominiums on agricultural lands fiction.
Conformance with land use laws	Requires conformance with county land use ordinances. *(This has always been the case, but some counties have not enforced their own land use and real property tax laws.)*	Per "home rule" objections of the counties (particularly Hawaii County), status quo. Also added more disclosures for projects on agricultural land. Earlier versions of the recodification made very clear that: 1) State and county land *use* laws control (and have always controlled) land *use* issues; 2) the condominium law is a land *ownership*, *consumer protection*, and community *governance* law; and 3) the counties should not discriminate against the condominium form of ownership.
Remedies to be liberally administered	No similar provision.	Explicitly *negates* any implication that the Hawaii Supreme Court holdings regarding restrictive covenants/equitable servitudes in Hiner v. Hoffman, 90 Haw. 188, 977 P.2d 878 (1999), and Fong v. Hashimoto, 92 Haw. 568, 994 P.2d

	Current Law (HRS Chpt. 514A)	Recodification Final Draft
		500 (2000), apply to condominium communities. Supports the fair and efficient functioning of our condominium communities (and other common interest ownership communities).
Part II. Creation, Alteration, and Termination		
Contents of declaration	HRS §514A-11 contains long list of requirements for contents of declaration.	Enhances clarity of condominium law by minimizing the statutory requirements for condominium governing documents while incorporating certain provisions currently in HRS §514A-11, et seq., in more appropriate statutory sections.
Transfer of limited common elements	HRS §514A-14 limited to transfer of parking stalls.	Expands applicability to other limited common elements.
Part III. Registration and Administration		
Exceptions to registration and administration	Condominiums not offered for sale.	Condominiums not offered for sale; disposition of units excepted from public report requirements (i.e., gratuitous, pursuant to court order, by government, by foreclosure or deed in lieu of foreclosure, and bulk sales); and 100% nonresidential condominiums costing $1 million or more; ended up rejecting exception for small condominiums (i.e., no more than five units) based on objections from Supervising Executive Office Calvin Kimura and Kauai County.
Role of Commission	Commission has consumer protection, condominium stakeholder education, and limited condominium governance responsibilities. Some parties would have the Commission take some land *use* responsibilities as well.	Commission's role is fundamentally: a) to provide consumer protection through adequate disclosure to prospective condominium purchasers, and b) education of condominium community stakeholders (i.e., those who build, sell, buy, manage, live-in, etc. condominium projects). Commission's limited condominium governance responsibilities were retained in the final draft.
Jurisdiction of Commission	Commission has jurisdiction over provisions scattered throughout HRS Chapter 514A, including selected sections of Part V (Condominium Management).	For the sake of clarity, most provisions under the jurisdiction of the Commission placed in Parts III (Administration and Registration of Condominiums) and IV (Protection of Condominium Purchasers). Ended up keeping Commission's existing jurisdiction over a few

	Current Law (HRS Chpt. 514A)	Recodification Final Draft
		sections in Part V (Management of Condominium).
Consumer protection – Risk to purchasers' funds	Inconsistent and unclear at times.	Correlates risk to purchasers' funds with the rights and obligations of developers. Provisions in this part, in conjunction with Part IV (Protection of Condominium Purchasers), are meant to help assure that a developer is not able to obtain use of a purchaser's money until the purchaser is able to get a completed unit. Note, however, that some exceptions are allowed with appropriate disclosures.
Consumer protection – Disclosure statements	Requires numerous different disclosure documents, which expire at different times (Notifications of Intention, Disclosure Abstracts, Preliminary Public Reports, Contingent Final Public Reports, Final Reports, Supplementary Public Reports).	Requires a single public report, which does not expire, with an ongoing duty to amend the report whenever necessary to prevent the public report from becoming misleading in any material respect. Also requires an annual "update" report to the Commission. Note that the list of "across-the-board" (i.e., for all projects) required disclosures in the recodification is less than what is in HRS Chapter 514A.
Condominium Education Trust Fund	Misnames "Condominium Management Education Fund."	Renames the fund to "Condominium Education Trust Fund" to more accurately reflect its funding sources and permissible uses. The name change also highlights the fact that it would be illegal for the Legislature to raid this fund.
Part IV. Protection of Purchasers		
Exceptions to required public report.	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, or, pursuant to §514E-30, delivery of the §514E disclosure is not required because the offer and sale is made outside of Hawaii.	(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; and (5) Exceptions to registration set forth in Part III. A public report is not required to be delivered for 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. Note that subsection (4) addresses the problem, raised by various

	Current Law (HRS Chpt. 514A)	Recodification Final Draft
		stakeholders, of lenders being considered "successor developers" in foreclosure/deed in lieu of foreclosure situations.
Consumer protection – Disclosure statements	Requires numerous different disclosure documents (Disclosure Abstracts, Preliminary Public Reports, Contingent Final Public Reports, Final Reports, Supplementary Public Reports).	Adequate disclosure to prospective condominium purchasers is the foundation of Part IV.
Consumer protection – Disclosure statements for special types of condominiums	Additional disclosures for projects containing conversion buildings.	Additional disclosures for projects containing conversion buildings, projects on agricultural land, and projects containing assisted living facility units.
Consumer protection – Right to cancel vs. rescission rights	Confusing rights to cancel/rescind contracts to buy condominiums.	Clarifies that the purchaser's right to cancel is a one time right that is strictly tied to the statutory "cooling off" period of thirty days after the purchaser has received the public report and other required documents. Rescission rights are related to material changes (i.e., changes that directly, substantially, and adversely affect the use or value of a purchaser's unit or appurtenant limited common elements or available project amenities) and may be statutorily enforced up to thirty days after receiving notice of the material change. Common law rescission rights may always be enforced.
Part V. Management		
Guiding philosophy	The philosophy guiding Part V (Condominium Management) is **minimal government involvement** and **self-governance** by the condominium community.	The philosophy guiding Part V (Management of Condominium) continues to be **minimal government involvement** and **self-governance** by the condominium community. At the same time, the recodification seeks to ensure that the condominium community (both owners and management) has the tools with which to govern itself; it enhances self-governance (e.g., conduct of meetings, financial decisions, notice provisions).
Organization of Part V	Haphazard.	Reorganizes into four Subparts: 1) Powers, Duties, and Other General Provisions; 2) Governance – Elections and Meetings; 3) Operations; and 4) Alternative Dispute Resolution.
Clarity of Part V	Confusing.	Enhances clarity of Condominium

	Current Law (HRS Chpt. 514A)	Recodification Final Draft
		Property Act. Consolidates or groups together provisions on a single issues (e.g., proxies). Eliminates the artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b). Minimizes the statutory requirements for condominium governing documents while incorporating certain provisions currently in HRS §514A-82(a) and (b) in more appropriate statutory sections.
Exceptions	None.	If so provided in the declaration or bylaws: (1) Condominiums in which all units are restricted to non-residential purposes; or (2) Small condominiums (i.e., containing no more than five units.) These exceptions recognize the difficulty of a "one size fits all" approach to management provisions. Other changes (e.g., insurance provisions for detached condominium units) were made in recognition of this.
Help associations in their "business" and "governance" functions	Even with the best of intentions, accretion of layers of amendments over the decades has resulted in statutory provisions that are often inconsistent, outdated, or overly restrictive for most condominiums.	Made many changes supporting the fair and efficient functioning of condominium communities (e.g., clarifying powers, duties, and limitations of associations and boards; allowing judicial excuse of compliance with governing documents in certain situations; beefing up conflict-of-interest provisions; specifically allowing mail-in and Internet voting by directed proxy; allowing associations to deposit monies in out-of-state financial institutions; and much more).

Appendix G

Part I. General Provisions

Real Estate Commission's Prefatory Comment

What is the Problem We're Trying to Fix?

In 1961, Hawaii became the first state to pass a law enabling the creation of condominiums.[1]

The 1961 "Horizontal Property Regime" law consisted of 33 sections covering a little more than 3 pages in the Revised Laws of Hawaii. Since that time, the law has been amended constantly. Entering the 2004 legislative session, Hawaii's "Condominium Property Regime" law consists of 122 sections taking up over 100 pages in the Hawaii Revised Statutes. As noted by the 2000 Legislature, "[t]he present law is the result of numerous amendments enacted over the years made in piecemeal fashion and with little regard to the law as a whole."[2]

The 2000 Legislature recognized that "[Hawaii's] condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micromanages condominium associations . . . [t]he law is also overly regulatory, hinders development, and ignores technological changes and the present day development process."[3] Consequently, the Legislature directed the Real Estate Commission of the State of Hawaii (Commission) to conduct a review of Hawaii's condominium property regimes law, and to submit draft legislation to the 2003 Legislature that will "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law."[4]

In January 2001, the Commission embarked on its ambitious effort to rewrite Hawaii's Condominium Property Act (HRS Chapter 514A).[5]

Why Should We Care?

- **Prevalence of condominium ownership in Hawaii.** 25% of Hawaii's housing units are held in condominium ownership. For decades, Hawaii has had the highest percentage of condominium housing units in the United States of America.[6] This alone makes the recodification project extremely important for the citizens of Hawaii.

- **Importance to more efficient use of Hawaii's limited land resources.** As a very flexible form of real estate ownership, condominiums (especially traditional ones going up rather than out), have helped policymakers to discourage sprawl while still providing home ownership opportunities for many in our urban areas. Consistent with State and local government land use policies, the condominium form of ownership is a valuable tool in helping to develop higher density/lower per-unit cost homeownership opportunities (i.e., creating more affordable housing). Of course, condominiums encompass the entire spectrum of homeownership opportunities – from affordable to luxury units. All of this is important for an island state with limited land area.

- **Importance to Hawaii's housing stock and growth policies (e.g., private provision of "public" facilities and services).** The rapid growth of common interest ownership communities (condominiums, cooperatives, and planned communities) since 1960 goes hand in hand with government policy for much of the past 30-40 years dictating that new development "pay its own way." Condominiums and other common interest ownership communities (with their regimes of privately enforceable use restrictions and financial obligations paying for formerly "public facilities" such as roads, trash collection, and recreational areas) have become a critical part of our land use fabric. Indeed, virtually all new development in Hawaii consists of common interest ownership communities.

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

Brief History of the Condominium

Someone once said that "history is argument without end." That is certainly true of the debate over the origin of condominiums. Some commentators have traced the first existence of condominiums to the ancient Hebrews in the Fifth Century B.C. Others have attributed the concept to the ancient Romans. Still others believe that Roman law was antithetical to

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[1] Kerr, William; "Condominium – Statutory Implementation," 38 St. John's L. Rev. 1 (1963) (hereinafter, "Kerr"), at page 5. *See also*, Act 180, Session Laws of Hawaii (SLH) 1961; codified as Chapter 170A, Revised Laws of Hawaii (RLH). In 1968, RLH Chapter 170A was redesignated Chapter 514, Hawaii Revised Statutes (HRS) (Act 16, SLH 1968). In 1977, HRS Chapter 514 was re-enacted as a restatement without substantive change and redesignated HRS Chapter 514A (Act 98, SLH 1977).

[2] Act 213, SLH 2000.

[3] *Id.*

[4] *Id.*

[5] The recodification workplan is available on the Commission's website – http://www.hawaii.gov/hirec/ – along with a comparison of the 1994 Uniform Common Interest Ownership Act (UCIOA), 1980 Uniform Condominium Act (UCA), and HRS Chapter 514A), drafts of the recodified condominium law, and other recodification materials.

[6] Community Associations Factbook, by Clifford J. Treese (1999) (hereinafter, "CAI Factbook"), at page 18.

condominium development and that the first proto-condominiums appeared in the Germanic states during the late Middle Ages. Suffice to say that the condominium property concept has a long, possibly ancient, history.[7]

While their first existence in fact is widely disputed, condominiums were first afforded statutory recognition by the Code of Napoleon in 1804.[8] The first sophisticated statute to authorize condominiums in the United States or its territories was the Puerto Rico Horizontal Property Act (so named because it contemplated a property regime of horizontally, as opposed to vertically, divided properties) in 1958.[9] The United States Congress recognized condominiums in 1961 when it amended the National Housing Act to provide for federal insurance on condominium mortgages whenever state law recognized condominium ownership. With Hawaii leading the way, every state in the union had a statute authorizing the condominium form of ownership by 1968.[10]

Basic Concepts

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

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

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

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

The 1961 Hawaii State Legislature expressly recognized that the condominium property regimes law was "an enabling vehicle" that primarily "(a) sets forth the legal basis for a condominium, and (b) spells out the means of recordation."[11]

The Legislature was also concerned about protecting Hawaii's consumers, noting that:

The citizens of Honolulu have suffered during the past one or two years several unfortunate experiences in

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[7] Kerr, *supra* note 1, at 3-4; CAI Factbook, *supra* note 6, at 5-6; Natelson, Robert G., Law of Property Owners Associations, (1989), at 3-35.
[8] Kerr, *supra* note 1, at 3.
[9] Kane, Richard J.; "The Financing of Cooperatives and Condominiums: A Retrospective," 73 St. John's L. Rev. 101 (Winter 1999), at 102.
[10] Schriefer, Donald L.; "Judicial Action and Condominium Unit Owner Liability: Public Interest Considerations," 1986 U. Ill. L. Rev. 255 (1986), at note 2.
[11] Standing Committee Report 622, House Bill No. 1142 (1961). In 1968, however, the Hawaii Supreme Court commented that although the original condominium property regimes law was viewed as an enabling act, condominiums might have been cognizable under common law. *See,* State Savings & Loan Association v. Kauaian Development Company, Inc., et al., 50 Haw. 540, 547 (1968).
[12] Standing Committee Report 622, House Bill No. 1142 (1961).
[13] *Id*.
[14] Prefatory Note, Uniform Condominium Act, 1980. As noted by the Hawaii State Senate Judiciary Committee Vice-Chair in 1976: "[The condominium property regime law] was originally intended to be a highly technical, legal vehicle for placing certain lands in the horizontal property regimes. It is becoming through our actions … a consumer protection section of the law. Anyone trying to use it in its technical sense will have extreme difficulty …" Standing Committee Report 939-76, Senate Resolution No. 439 (1976).
[15] Recodification Draft #1, Preliminary Draft #2, and Public Hearing Discussion Draft (all with statutory text plus commentary) are available on the Commission's website at http://www.hawaii.gov/hirec/.
[16] Every provision of HRS Chapter 514A was analyzed for possible inclusion within the structure of the UCA.
[17] In 2003, pursuant to Act 131 (SLH, 2003), the Blue Ribbon Recodification Advisory Committee was expanded to include representatives of the Hawaii Council of Associations of Apartment Owners, Hawaii Independent Condominium and Cooperative Owners Association, Community Associations Institute - Hawaii Chapter, Hawaii Association of Realtors®, and the Condominium Council of Maui.
[18] In conjunction with the Commission's 2003 public hearings on the recodification, some people requested that cooperatives be added to the community governance sections of the condominium law. (*See, e.g.*, testimony of Bobbie Jennings, received by the Commission on September 15, 2003.) The Commission ultimately decided to limit its efforts to recodifying Hawaii's condominium property regimes law and followed the philosophy that problems should be fixed in the statutory provisions that contain or created the problems in the first place.
[19] Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180, 181-182 (Fla. Dist. Ct. App. 1975).
[20] *See, e.g.*, the California Law Revision Commission's (CLRC) efforts to recodify California's common interest development law – the Davis-Stirling Act. You can access the CLRC Study H-850 online at: http://www.clrc.ca.gov/_H850.html.

> cooperative apartment buying. When several millions of dollars were lost through loose handling of funds representing down-payments on individual apartment units, it became clear that controls had to be developed in order (a) to protect the buying public, and (b) through a bolstering of public confidence, to create for the developer a better reception for his product.[12]

To that end, the 1961 Legislature added a part providing for the regulation of condominium projects by the Hawaii Real Estate License Commission (including the registration of projects by developers and requiring the issuance of public reports before offering any condominium units for sale).

Finally, the 1961 Legislature provided for the internal administration of condominium projects. The 1961 condominium management provisions were minimized, however, because the Legislature believed that: 1) many details would more properly be included in by-laws to be passed by the council of co-owners; and 2) some details may have been contrary to F.H.A. regulations or to policies of lending institutions, making it impossible for prospective unit-purchasers to secure financing.[13]

Hawaii's "Horizontal Property Regimes" law of the early 1960s was typical of most "first generation" condominium laws. In the decades that followed, however, "[a]s the condominium form of ownership became widespread, . . . many states realized that these early statutes were inadequate to deal with the growing condominium industry. . . . In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums."[14]

Evolving Approach to the Recodification of Hawaii's Condominium Law

- **Recodification Draft #1.** In January 2002, the Commission completed its initial draft of the recodification (statutory text and explanatory commentary).[15] The 1980 Uniform Condominium Act (UCA), with appropriate changes incorporated from the 1994 Uniform Common Interest Ownership Act (UCIOA), served as the basis for the first draft of our recodified condominium law. Where appropriate, the Commission also incorporated provisions of HRS Chapter 514A,[16] other jurisdictions' laws, and the Restatement of the Law, Third, Property (Servitudes). Recodification Draft #1 provided a starting point and framework from which to: 1) work on specific problems, and 2) continue discussions on improving Hawaii's condominium law. Some portions were more complete than others, with Article 3 (Management of Condominium) needing a lot more work integrating provisions of HRS Chapter 514A and suggestions from stakeholders.

- **Recodification Draft #2.** A Blue Ribbon advisory committee reviewed Recodification Draft #1. Based on feedback the Commission received from the advisory committee, realtors, property managers, individual unit owners, and others, HRS Chapter 514A (rather than the uniform laws) was used as the basis for most of Recodification Draft #2 (i.e., general provisions; creation, alteration, and termination of condominiums; protection of purchasers; administration and registration of condominiums; and condominium management education fund). The Uniform Condominium Act and Uniform Common Interest Ownership Act – along with appropriate provisions of HRS Chapter 514A, other jurisdictions' laws, and the Restatement of the Law, Third, Property (Servitudes) – was used as the basis for condominium governance matters. Recodification Draft #2 was attached to the Commission's progress report to the 2003 Legislature.

- **Final Draft.** Following the 2003 legislative session, the Commission: (i) continued to work with affected members of the community and the Blue Ribbon Recodification Advisory Committee[17] to refine Recodification Draft #2; (ii) took the resulting draft ("Public Hearing Discussion Draft") to public hearing in each of Hawaii's counties; and (iii) worked with the Blue Ribbon Recodification Advisory Committee and others to incorporate appropriate changes and submit a final draft of the proposed condominium law recodification to the 2004 Legislature.

Scope of Recodification

The Commission considered expanding the scope of the recodification to include other Hawaii common interest ownership communities under a UCIOA-like law. [This would have included HRS Chapters 421H (Limited Equity Housing Cooperatives), 421I (Cooperative Housing Corporations),[18] and 421J (Planned Community Associations).] The Commission quickly decided, however, that recodification of HRS Chapter 514A (Condominium Property Regimes) alone makes the most practical sense at this time.

Condominium issues, in general, are substantially different from those of single-family detached units in planned communities. The unit owner mindsets, problems, and solutions are quite different for each type of common interest ownership community.

A Florida court once observed that:

> [I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners . . . each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.[19]

Single-family detached unit homeowners in planned communities generally have different expectations than condominium owners regarding the degree of freedom they must give up when they buy their respective units. This is one of the factors that make it

exceedingly difficult to reconcile the varying interests of unit owners in different forms of common interest ownership communities.[20]

Although condominiums can take many physical forms – from high-rise developments to townhouses to single-family detached units – the common perception that a condominium is a tall building consisting of many individual units within a common structure ("horizontal property regime") makes it easier for average people to understand the interdependence of unit owners in condominiums (as opposed to single-family detached homeowners in planned communities).

Therefore, the Commission limited its efforts to recodifying Hawaii's condominium property regimes law.

Guiding Principles, Generally

1. The Condominium Property Act should be construed in accordance with the purposes stated in Act 213 (SLH 2000) and this Prefatory Comment (i.e., to "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law"), and the Real Estate Commission's comments to the text of each section. The Act should also be construed to promote the in-state and interstate flow of funds to condominiums to facilitate the reasonable development and sales of units in such projects, and to protect consumers, purchasers, and borrowers against condominium practices that may cause unreasonable risk of loss to them. It should also help facilitate the development of this type of real estate in Hawaii, as Hawaii's land area is limited. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

2. The recodified condominium law should enhance the clarity of the Condominium Property Act.

Provisions on a single issue (e.g., proxies, assessments) should be consolidated or grouped together. The artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b) should be eliminated. And the statutory requirements for condominium governing documents should be minimized while incorporating certain provisions currently in HRS §514A-82(a) and (b) in more appropriate statutory sections.

3. The recodified condominium law should recognize the difficulty of a "one size fits all" approach to consumer protection and management provisions.

4. The Commission should require only information it will use or may find useful from a regulatory and consumer protection standpoint.

5. Problems should be fixed where they are created.

Some stakeholders asked that the condominium property regimes law be used to fix problems created by other provisions in HRS. Such problems should be fixed in the statutory provisions that created the problems in the first place.

6. To the extent practicable, approval percentage requirements should be standardized. When necessary, conform to Fannie Mae, Freddie Mac, or HUD requirements.

7. The recodified condominium law should not result in an increase in the cost of government.

This goal is meant to limit the addition of new programs administered by government under the condominium law. If the Legislature wishes to add such programs (e.g., condominium courts), means of funding the new programs must also be established. It is possible that revised consumer protection requirements will affect government costs. We will not actually know if the goal of maintaining the cost of government in this area has actually been achieved until after practical experience working with the recodified condominium law. If proper administration of the new law actually requires more resources, the responsible government agency should ask for more resources or ask that particular requirements be revised.

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PART I. GENERAL PROVISIONS

Subpart 1. DEFINITIONS AND OTHER GENERAL PROVISIONS

§ ___: 1-1. Short Title. This chapter may be cited as the Condominium Property Act.

§ ___: 1-2. Applicability. Applicability of this chapter is governed by subpart 2 of this part.

§ ___: 1-3. Definitions. In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this chapter:

Real Estate Commission's Comment

1. In Lewis Carroll's *Through the Looking Glass*, Alice meets up with Humpty Dumpty sitting on his wall. In the course of their conversation, the following exchange takes place:

> "There are three hundred and sixty-four days when you might get un-birthday presents," [said Humpty Dumpty] "and only *one* for birthday presents, you know. There's glory for you!"
>
> "I don't know what you mean by 'glory,'" Alice said.
>
> "Humpty Dumpty smiled contemptuously. "Of course you don't – till I tell you. I meant, 'there's a nice knock-down argument for you!'"
>
> "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.
>
> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."

Definitions – what we mean by the words we use – are critical in "Condoland." Through interpretation and amendment, some definitions in HRS have gotten "curiouser and curiouser" over the years. With common understanding as our master, the recodified condominium law uses definitions contained in HRS Chapter 514A with, however, appropriate modifications and additions from the proposed Hawaii Administrative Rules (Title 16, Chapter 107), UCA/UCIOA, and other sources.

2. UCA/UCIOA §1-103 and HRS §514A-3 are the sources of the first sentence in this section. As noted in the official comments to §1-103 of UCA (1980) and UCIOA (1994):

> The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.
>
> **Example**: A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

3. HRS §514A-3, HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02), and UCA/UCIOA §1-103, sometimes modified, are the sources of most of the definitions in this section.

"Affiliate of a developer" is a person that directly or indirectly controls, is controlled by, or is under common control with, the developer.

Real Estate Commission's Comment

1. HRS §514A-84(a) is the source of the definition of "affiliate of a developer".

"Association" means the unit owners' association organized under section ___: 5-2.

"Board" and "board of directors" means the body, regardless of name, designated in the declaration or bylaws

to act on behalf of the association.

"Commission" means the real estate commission of the State.

"Common elements" 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.

Real Estate Commission's Comment

1. UCA/UCIOA §1-103(4) is the source of the definition of "common elements". The recodification defines "units" and "limited common elements" with specificity and defines "common elements" as everything else. As noted in UCIOA Comment #1 to §2-102: "It is important for title purposes, for purposes of defining maintenance responsibilities, and other reasons to have a clear guide as to precisely which parts of a condominium constitute the units and which parts constitute the common elements.

"Common expenses" means expenditures made by, or financial liabilities of, the association for operation of the property, and shall include any allocations to reserves.

"Common interest" means the percentage of undivided interest in the common elements appurtenant to each unit, as expressed in the declaration, and any specified percentage of the common interest means such percentage of the undivided interests in the aggregate.

"Common profits" means the balance of all income, rents, profits, and revenues from the common elements or other property owned by the association remaining after the deduction of the common expenses.

"Completion of construction" 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.

"Condominium" 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.

Real Estate Commission's Comment

1. UCA §1-103(7) is the source of the definition of "condominium".

2. As noted in the official comment to UCA (1980) §1-103(7), unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium.

"Condominium map" means a map or plan of the building or buildings containing the information required by section ___: 2-3.

"Converted" and "conversion" means the submission of a structure to a condominium property regime more than twelve months after the completion of construction; provided that structures used as sales offices or models for a project and later submitted to a condominium property regime shall not be considered to be converted structures.

"Declaration" means any instrument, however denominated, that creates a condominium, including any amendments to such instrument.

"Developer" 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" means any right or combination of rights reserved by a developer in the declaration to:

(1) Add real estate to a condominium;

(2) Create units, common elements, or limited common elements within a condominium;

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

(4) Withdraw real estate from a condominium;

(5) Merge projects or increments of a project; or

(6) Otherwise alter the condominium.

"Limited common element" means a portion of the common elements designated 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" means the owners of units to which are appurtenant more than fifty percent of the common interests. Any specified percentage of the unit owners means the owners of units to which are appurtenant such percentage of the common interest.

"Managing agent" means any person retained, as an independent contractor, for the purpose of managing the operation of the property.

"Master deed" or "master lease" means any deed or lease showing the extent of the interest of the person submitting the property to the condominium property regime.

"Material change" means any change that directly, substantially, and adversely affects the use or value of:

(1) A purchaser's unit or appurtenant limited common elements; or

(2) Those amenities of the project available for such purchaser's use.

"Material fact" means any fact, defect, or condition, past or present, that, to a reasonable person, would be expected to measurably affect the value of the project, unit, or property being offered or proposed to be offered for sale.

Real Estate Commission's Comment

1. HRS §514A-63, modified slightly, is the source of the definition of "material change". The definition of "material change" is tied to the standard for rescission rights.

2. HRS §508D-1, modified slightly to address condominium property, is the source of the definition of "material fact".

"Operation of the property" means the administration, fiscal management, and physical operation of the property, and includes the maintenance, repair, and replacement of, and the making of any additions and improvements to, the common elements.

"Person" means an individual, firm, corporation, partnership, association, trust, or other legal entity, or any combination thereof.

"Pertinent change" means, as determined by the commission, a change not previously disclosed in the most recent public report that renders the information contained in the public report or in any disclosure statement inaccurate, including, but not limited to:

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

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

(3) The common interest appurtenant to the unit.

A pertinent change does not necessarily constitute a material change.

Real Estate Commission's Comment

1. The definition of "material respect" in HAR §16-107-2, Proposed Rules, Draft #6 (5/17/02), modified, is the source of the definition of "pertinent change". "Pertinent change" refers to a change that would require disclosure in an amended public report. It does not automatically give a prospective purchaser the right to rescind a contract to purchase a condominium. In order to give rise to rescission rights, a material change in a project must "directly, substantially, and adversely" affect the use or value of (i) the purchaser's unit or appurtenant limited common elements, or (ii) those amenities of the project available for such purchaser's use.

"Project" 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 created.

"Property" means the land, whether or not contiguous and including more than one parcel of land, but located

within the same vicinity, the building or buildings, all improvements and all structures thereon, and all easements, rights, and appurtenances intended for use in connection with the condominium, 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.

Real Estate Commission's Comment

1. The last sentence of the UCIOA (1994) §1-103(26) definition of "real estate" has been added to HRS §514A-3's definition of "property." UCIOA §1-103(26) reads as follows:

> "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests that by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

As noted in the official comments to UCA §1-103(21)/UCIOA §1-103(26):

> Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend *ab solo usque ad coelum* (*"from the center of the earth to the heavens"*), because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

2. The definition of "property" specifically allows for the creation of "air space" condominiums and overrules In re: The Krieg Condominium, REC-DR-93-1 (2/10/95), in which the Commission prohibited such condominiums. Among other things, this helps to provide clearer and more accurate disclosures by doing away with the need to create "tool shed" condominiums on agricultural lands – a fiction driven by the need, under Krieg, for a physical structure to submit to the condominium property regime. (*See also,* the additional disclosures for projects on agricultural lands required by §___: 4-4.)

"Record, recordation, recorded, recording, etc." means to record in the bureau of conveyances in accordance with chapter 502, or to register in the land court in accordance with chapter 501.

"Resident manager" means any person retained as an employee by the association to manage, on-site, the operation of the property.

"Time share unit" means the actual and promised accommodations, and related facilities, that are the subject of a time share plan as defined in chapter 514E.

"Unit" means a physical or spatial portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described in the declaration or pursuant to section ___: 2-5, with an exit to a public road or to a common element leading to a public road.

"Unit owner" 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 recorded lease, 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.

Real Estate Commission's Comment

1. The recodified condominium law uses the term "unit" instead of "apartment" since, as understood by the general public, "unit" more accurately reflects the fact that ownership interests in condominiums can consist of commercial spaces, parking spaces, boat slips, and other non-residential spaces.

§ ___: 1-4. Separate Titles and Taxation. (a) Each unit that has been created, together with its appurtenant interest in the common elements, constitutes, for all purposes, a separate parcel of real estate.

(b) 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) 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.

Real Estate Commission's Comment

1. UCA/UCIOA §1-105 and HRS §§514A-4, 514A-5, and 514A-6, combined and modified, are the sources of this section.

§ ___: 1-5. Conformance with County Land Use Laws. Any condominium property regime established under this chapter shall conform to the existing underlying county zoning for the property and all applicable county permitting requirements adopted by the county in which the property is located, including any supplemental rules adopted by the county, pursuant to section ___: 1-6, to ensure the conformance of condominium property regimes to the purposes and provisions of county zoning and development ordinances and chapter 205. 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 ___: 2-2(13) or section ___: 4-4(a).

Real Estate Commission's Comment

1. This section is identical to HRS §514A-1.6.

2. The Commission made many attempts to help solve the counties' problems regarding the need for condominium projects to conform with underlying land use laws.[21] Among other things, the Commission attempted to help prevent the inappropriate condominiumization of farm structures on agricultural lands[22] by proposing to specifically delegate power to the counties (in HRS §§205-4.5(a)(4) and 205-5(b)) to adopt "reasonable standards, including but not limited to, the form of ownership under which property may be held." This was provided, however, as an exception to the general rule that county laws not discriminate against the condominium form of ownership (adopted from UCA/UCIOA §1-106). In response, the Hawaii County Planning Director stated that he and other planning directors would oppose, on "homerule" grounds, any language that appeared to preempt the county in any way.[23]

In a letter received by the Commission on October 16, 2003 (dated October 2, 2003), the Department of Business, Economic Development & Tourism – Office of Planning ("DBEDT-OP") and the four counties requested that the Commission eliminate its Public Hearing Discussion Draft version of §___: 1.5 and retain the language of HRS §§514A-1.6 and 514A-45.[24] DBEDT-OP and the four counties also stated that they would be "discussing possible recommendations for specific language for amendments" that would be forwarded to the Commission "if and when they are developed."[25] Therefore, in the final draft of the recodification, the Commission

[21] Hawaii and Kauai counties have had problems regarding the conformance of condominium projects with underlying land use laws. Maui County raised some questions in a December 8, 2003 telephone call and e-mail with Mark E. Recktenwald, Director of the State Department of Commerce & Consumer Affairs. The City & County of Honolulu does not appear to have problems requiring the conformance of condominium projects with its Land Use Ordinance.

[22] The condominium form of ownership of agricultural lands has become a symbol of illegal and irresponsible development, particularly on the islands of Hawaii and Kauai. *See, e.g.,* testimony of Mark Van Pernis, Esq., dated September 29, 2003, in which Mr. Van Pernis recommends banning the submission of land designated "agriculture" or "conservation" to a condominium property regime. (Such suggestions ignore the fact that similar results could be achieved under forms of land ownership other than condominium.) Many of the problems faced by Hawaii County were, however, actually caused by the failure of the county under previous administrations to enforce the county's land use and real property tax laws.

Furthermore, true agricultural condominiums are valuable. As noted by the Department of Business, Economic Development & Tourism – Office of Planning ("DBEDT-OP") in its September 20, 2001 memorandum to Gordon M. Arakaki, while DBEDT-OP is very concerned about condominium property regimes used to create projects for primarily residential purposes on agricultural lands:

> [DBEDT-OP] would not support a blanket ban on CPRs on agricultural lands. The State created its agricultural park in Hamakua as a CPR. This permits farmers access to agricultural land and financing without having to subdivide or break up large agricultural parcels.

Finally, as long as a county's real property tax laws are not completely coordinated with its land use laws, the condominium form of land ownership can be quite useful in protecting and preserving agricultural lands by allowing the appropriate transition from one type of crop to another as well as from large scale agricultural operations to smaller boutique farms. (*See,* 1993 speech on real property taxation of agricultural lands by Gordon M. Arakaki, Deputy Director, Land Use Research Foundation of Hawaii, to the Hawaii State Association of Counties.)

See also, e.g., testimony of Sheilah N. Miyake, Deputy Director, Department of Planning, County of Kauai, dated September 16, 2003, and testimony of Judy Dalton, Conservation Committee Member, Sierra Club Kauai Group, Hawaii Chapter.

[23] October 31, 2003 telephone conversation between Christopher J. Yuen and Gordon M. Arakaki.

[24] October 2, 2003 letter from DBEDT-OP to Mitchell A. Imanaka and Gordon M. Arakaki.

[25] *Id.* After a June 24, 2002 meeting, and by letter dated September 19, 2002, DBEDT-OP and the four counties had committed to drafting language for the recodification regarding conformance with county land use laws that would be acceptable to all four counties. No such language was ever given to the Commission by DBEDT-OP or any of the counties.

incorporated the current language of HRS §§514A-1.6 and 514A-45, and also retained a provision (added in earlier recodification drafts) requiring special disclosures for condominium projects proposed to be built on agricultural land.[26]

Background

There appears to have been much confusion over the fact that condominium property is a land *ownership*, as opposed to a land *use*, concept. In response to the Commission's requests for comments from the community, various parties have asked that Hawaii's condominium property regimes law be used to ensure compliance with land *use* laws (e.g., HRS Chapter 205 and county zoning, subdivision, and building ordinances).[27]

Hawaii's counties (particularly the Neighbor Island counties) have long complained that developers were using HRS Chapter 514A to circumvent underlying county land use laws. However, the counties have always had the power to regulate the *uses* of land pursuant to their police powers (i.e., their powers to protect the public health and safety – the legal basis for zoning laws) under HRS Chapter 46.[28] HRS §514A-1.6, passed by the Legislature in 2000, simply made this explicit in the condominium property regimes law.[29]

Analysis

The counties have raised legitimate concerns over the current interplay between HRS Chapter 514A and state and county land use laws. The question remains how to properly address the problem. In attempting to craft a provision to prevent abuse of the condominium property regimes law as it relates to underlying land use laws, the Commission considered the following factors:

- Purpose of Condominium Property Regimes Law. As previously noted, a condominium property regimes law is a land *ownership* law, a *consumer protection* law, and a community *governance* law. It is not a land *use* law. As a consumer protection law, the primary purpose of Hawaii's condominium property regimes law is to make sure that buyers can know what they are buying. Theoretically, if a sophisticated buyer wants to take a chance on being able to get government approval to build a structure that is not allowed under State or county land use laws at the time of purchase, that should be the buyer's choice. The key is to give the buyer a chance to make an informed decision (i.e., proper *disclosure* of material facts).

- Purpose of the Real Estate Commission. The Real Estate Commission is a consumer protection body established under HRS Chapter 467 (Real Estate Brokers and Salespersons) to regulate real estate licensees. The purpose of HRS Chapter 467 (and the Commission) is to

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[26] In a telephone conversation with Commissioner Mitchell A. Imanaka in November 2003, Hawaii County Planning Director Christopher J. Yuen said that he would support the recodification if the provisions of HRS §§514A-1.6 and 514A-45 were kept "status quo." It should also be noted that some Blue Ribbon Recodification Advisory Committee members were concerned about what the counties might do with additional delegated powers.

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

In September 2002, the County of Hawaii passed an ordinance purporting to "regulate CPRs that are the equivalent of subdivisions of land." (Ordinance 02-111, effective 9/25/02.) Whether the ordinance can survive legal (e.g., denial of equal protection under the law) and practical challenges remains to be seen.

The counties, along with the Department of Business, Economic Development & Tourism – Office of Planning ("DBEDT-OP"), argue that "land ownership and land use are intertwined, especially when a [condominium property regime] is used to create what is, in material respect, a subdivision." (October 2, 2003 letter from DBEDT-OP to Mitchell A. Imanaka and Gordon M. Arakaki.) The counties have always had, however, the power to adopt land development codes and other measures to address physical development and infrastructure requirements without discriminating against the condominium form of land ownership (as opposed to other forms of ownership, such as cooperatives).

[28] *See*, HRS §§46-1.5(13) and 46-4.

[29] The Commission has incorporated HRS §514A-1.6 in §___: 1-5 of the final draft of the recodification.

[30] DBEDT – Office of Planning and the county planning directors object to the principal that physically identical developments should be treated equally. *See*, September 19, 2002, and October 2, 2003 letters from DBEDT – Office of Planning to Mitchell Imanaka and Gordon Arakaki. *See also*, County of Hawaii's Ordinance 02-111 (effective 9/25/02).

[31] An exception to the general rule that physically identical developments should be treated equally is the City and County of Honolulu's prohibition on condominiumizing Ohana units created pursuant to HRS §46-4. *See*, Revised Ordinances of Honolulu §21-8.20. An Ohana unit is a second home permitted on a lot where the underlying zoning normally allows only one house. Infrastructure adequacy and other conditions determine whether an Ohana unit may be built, and an applicant for an Ohana building permit must file a restrictive covenant agreeing *not* to register the property as a condominium and to abide by a family occupancy requirement. Ohana units are the result of the State Legislature's attempt to address a shortage of affordable housing by essentially forcing the counties to accept housing densities double that allowed by county zoning. Under this circumstance, it is appropriate for the counties to have the power to prohibit the condominiumization of Ohana units. The counties' authority to do so is made clear in HRS §46-4(c) (i.e., the specific delegation of power to adopt "reasonable standards" to achieve the purpose of the subsection), however, *not* the condominium property regimes law.

protect the general public in its real estate transactions. Pursuant to HRS §467-3, the Real Estate Commission consists of nine members, at least four of whom must be licensed real estate brokers.

● Need for Appropriate and Consistent Lines of Authority. All parties need to make sure that the appropriate governmental entities enforce the appropriate laws. County land use agencies – i.e., planning and permitting departments – have the responsibility for ensuring that all proposed development projects comply with county land use laws. County councils have the authority to pass laws giving county land use agencies the tools to ensure that any proposed condominium development complies with county land use laws.

● Timing. Under Hawaii's condominium property regimes law, condominiums are created upon proper filing with Bureau of Conveyances or Land Court. The Real Estate Commission's involvement begins when condominium units are offered for sale. In other words, the *ownership* interest in condominium property may be created without any approval or involvement of the Real Estate Commission.

Throughout the recodification process, the Commission tried to keep the condominium law (and the Real Estate Commission itself) true to its purposes while making it clear that HRS Chapter 205 and county land use laws control land use matters. Indeed, one of the Commission's guiding principles in the recodification is that problems should be fixed in the statutory provisions that created the problems in the first place. It does not appear to be necessary or appropriate to have blanket requirements in the recodified Hawaii condominium law that make the recordation of all condominium property regime declarations or sale of all condominium units contingent upon county certification of compliance with county land use laws.

Finally, consistent with the principle that physically identical developments should be treated equally, the counties can simply draft land use ordinances governing the development of condominiums.[30] The ordinances should hold condominium developments to the same standards as physically identical developments under different forms of ownership.[31] In other words, the ordinances should require that condominium developments follow the same physical requirements (density, bulk, height, setbacks, water, sewerage, etc.) as physically identical developments under existing land use requirements (e.g., zoning, subdivision, building code, and cluster development laws). If a particular development proposal is inconsistent with state and county land use laws under forms of real estate ownership other than condominium ownership, the condominium property regimes law does not and will not somehow allow the project to be built.

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

§ ___: 1-6. Supplemental County Regulations Governing a Condominium Property Regime. Whenever they deem it proper, each county may adopt supplemental rules and regulations governing condominium property regimes established under this chapter in order to implement this program; provided that any of the supplemental rules and regulations adopted shall not conflict with this chapter or with any of the rules and regulations adopted by the commission to implement this chapter.

Real Estate Commission's Comment

1. This section, edited for clarity, is essentially identical to HRS §514A-45. The Commission believed that HRS §514A-45 heightened confusion over land *use* and land *ownership* issues, so it was not incorporated it in earlier drafts of the recodification. The provision has been reinserted at the request of the counties and DBEDT-OP. (*See,* Comment #2 to §___: 1-5.)

§ ___: 1-7. Construction Against Implicit Repeal. 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.

Real Estate Commission's Comment

1. UCA/UCIOA §1-109 is the source of this section.

§ ___: 1-8. Severability. 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.

Real Estate Commission's Comment

1. UCA/UCIOA §1-111 is the source of this section.

§ ___: 1-9. Obligation of Good Faith. Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

Real Estate Commission's Comment

1. UCA/UCIOA §1-113 is the source of this section.

§ ___: 1-10. Remedies To Be Liberally Administered. (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) Any deed, declaration, bylaw, or condominium map shall be liberally construed to facilitate the operation of the condominium property regime.

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

Real Estate Commission's Comment

1. UCA/UCIOA §1-114 and California Civil Code §1370 are the sources of this section.

2. Subsection (b) is intended to *negate* any implication that the Hawaii Supreme Court holdings regarding restrictive covenants/equitable servitudes in Hiner v. Hoffman, 90 Haw. 188, 977 P.2d 878 (1999), and Fong v. Hashimoto, 92 Haw. 568, 994 P.2d 500 (2000), apply to condominium communities. Given the importance of condominiums to the quality of life of Hawaii's people, laws must support the fair and efficient functioning of our condominium communities (and other common interest ownership communities).

In Hiner, defendants-appellants ("Hoffmans") constructed a three story house on a lot which was (along with 118 other lots) subject to a restrictive covenant prohibiting any dwelling "which exceeds two stories in height." The Hoffmans had actual knowledge of the restrictive covenant. After warning the Hoffmans of their violation of the restrictive covenant, neighboring homeowners and the community association sued to have the Hoffmans remove the third story of their house.

At the trial court level, the Hoffmans argued that their house consisted of "two stories and a basement." The trial court rejected the Hoffmans' argument and ordered them to remove the third (top) story of their house.

On appeal, the Hoffmans changed their argument and claimed that the term "two stories in height" was ambiguous. In a 3-2 decision, the Hawaii Supreme Court ruled that the term "two stories in height" was ambiguous since it did not provide any dimensions for the term "story" and was therefore unenforceable in light of the restrictive covenant's undisputed purpose (to protect views by restricting the height of homes within the neighborhood). The majority on the Court stated that it was following a "long-standing policy favoring the unrestricted use of property" when construing "instruments containing restrictions and prohibitions as to the use of property." Finally, the majority noted that "such 'free and unrestricted use of property' is favored only to the extent of applicable State land use and County zoning regulations."

In so doing, the majority appeared to ignore the massive growth of servitude regimes over the past forty years and the corresponding importance of ensuring the fair and efficient functioning of such communities (whether they be condominiums or, as in this case, planned communities). As noted by the dissent in Hiner, "where one hundred or more homeowners in the Pacific Palisades community have limited their own property rights in reliance that their neighbors will duly reciprocate, . . . it [is] manifestly unjust to sanction the Hoffmans' willful non-compliance based on the 'policy favoring the unrestricted use of property.'" The dissent concluded with the observation that "the majority opinion over-emphasizes the rights of the Hoffmans without due regard to the rights of their neighbors."

Eight and a half months after deciding Hiner, the Hawaii Supreme Court in Fong invalidated as ambiguous a restrictive covenant limiting certain houses to "one-story in height." (The Court also found that there was no common scheme to support an equitable servitude and that the restrictive covenant was unenforceable since it was improperly created.)

The archaic body of servitudes law from which the Hawaii Supreme Court fashioned its decisions in Hiner and Fong evolved from rules developed to govern relatively small groupings of property owners (compared to today's condominium and planned development communities) in contexts largely unrelated to modern common interest ownership communities.[32]

Contrast the Hawaii Supreme Court's current approach regarding servitudes in common interest ownership communities with that of the *Restatement of the Law, Third, Property (Servitudes)*. As stated in the *Restatement's* introductory note to Chapter 6 – Common-Interest-Communities:

> The primary assumption underlying Chapter 6 is that common-interest communities provide a socially valuable means of providing housing opportunities in the United States. The law should facilitate the operation of common-interest communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their

[32] The *Restatement of the Law, Third, Property (Servitudes)* defines "servitude" as "a legal device that creates a right or an obligation that runs with land or an interest in land." This covers "easements, profits, and covenants that run with the land," and encompasses both "restrictive covenants" and "equitable servitudes."

members.

The *Restatement's* position on servitudes should be used by courts as a guide in resolving disputes over servitudes in condominiums and other common interest ownership communities.

An earlier incarnation of the Hawaii Supreme Court said it well. In State Savings & Loan Association v. Kauaian Development Company, Inc., et al., the Court stated that:

> The [Horizontal Property Regimes Act] has profound social and economic overtones, not only in Hawaii but also in every densely populated area of the United States. Our construction of such legislation must be imaginative and progressive rather than restrictive.
>
> . . . .
>
> This court will not follow a common law rule relating to property where to do so would constitute a quixotic effort to conform social and economic realities to the rigid concepts of property law which developed when jousting was a favorite pastime.[33]

Subpart 2. APPLICABILITY

§ ___: 1-11. Applicability to New Condominiums. 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.

Real Estate Commission's Comment

1. UCIOA §1-201 is the source of this section.

§ ___: 1-12. Applicability to Pre-Existing Condominiums. Sections ___: 1-4 (Separate Titles and Taxation), ___: 1-5 (Conformance with County Land Use Laws), ___: 2-16 (Merger of Projects or Increments), ___: 3-22 (Condominium Education Trust Fund; Payments by Associations and Developers), and part V (Management of Condominium), and section ___: 1-3 (Definitions) to the extent definitions are necessary in construing any of those provisions, 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 interpreting 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 owner"; and the term "association of apartment owners" shall be deemed to correspond to the term "association".

Real Estate Commission's Comment

1. UCIOA §1-204, modified by the addition of the second paragraph (similar to §55-79.40 of the Virginia Condominium Act), is the source of this section.

§ ___: 1-13. Amendments to Governing Instruments. (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.

Real Estate Commission's Comment

1. UCIOA §1-206 is the source of this section.

[33] State Savings & Loan Association v. Kauaian Development Company, Inc., et al., *supra* note 11, at 552 and 555.

Real Estate Commission's Comment

1. HRS §514A-2 (Chapter not exclusive), which reads as follows, has been deleted:

> "This chapter is in addition and supplemental to all other provisions of the Revised Statutes; provided that this chapter shall not change the substantive law relating to land court property, and provided further that if this chapter conflicts with chapters 501 and 502, chapters 501 and 502 shall prevail."

HRS §514A-2 makes Hawaii's condominium law "supplemental" to other laws, with potentially disastrous results. A good example is the 2001 Nonprofit Corporations Act (Act 105, SLH 2001), as passed that year, if it were to be applied to nonprofit corporation condominium associations (or any other common interest ownership community associations).

§ -88 of the law as originally enacted would have allowed members of nonprofit corporations to resign at any time. This is clearly impossible for common interest ownership communities, where membership in the community association (with all of its rights and obligations) is mandatory and runs with the land. As defined in §1.8 of the *Restatement of the Law, Third, Property (Servitudes)*:

> A "common-interest community" is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawl
>
> (1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or
>
> (2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

Other sections of the new nonprofit corporation law required notice that may have been different from existing provisions in declarations and bylaws. Many other provisions would have been inappropriate for nonprofit corporation condominium (and community) associations, but § -321 (a transition provision) could have been read to mandate application of the new law to all nonprofit corporations in existence on the effective date of the Act.

2. HRS §514A-7 (Condominium specialist; appointment; duties) has been moved from Part I (General Provisions) to Part III (Administration and Registration of Condominiums), §___: 3-11.

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Part II. CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

PART II. CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

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

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

Real Estate Commission's Comment

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

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

(1) The land submitted to the condominium;

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

(3) The number of units in the condominium;

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

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

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

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

(8) The condominium's common elements;

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

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

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

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

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

Real Estate Commission's Comment

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

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

Part II. Creation, Alteration, and Termination of Condominiums

Real Estate Commission's Comment

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

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

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

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

Real Estate Commission's Comment

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

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

§ ___: 2-10. Transfer of Limited Common Elements. Except as provided in the declaration, any unit owner may transfer or exchange a limited common element that is assigned to the owner's unit to another unit. Such a transfer may be made by execution and recordation of an amendment to the declaration. Such an amendment need only be executed by the owner of the unit whose limited common element is being transferred and the owner of the unit receiving the limited common element, provided that unit mortgages and leases may also require the consent of mortgagees or lessors, respectively, of the units involved. A copy of any such amendment shall be promptly delivered

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

to the association.

Real Estate Commission's Comment

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

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

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

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

(1) The amount at issue;

(2) The difficulty of segregating such costs;

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

Real Estate Commission's Comment

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

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

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

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

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

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

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

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

Real Estate Commission's Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Real Estate Commission's Comment

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

Real Estate Commission's Comment

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

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

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

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

Part III. Administration and Registration of Condominiums

Real Estate Commission's Prefatory Comment to Part III

Many states with widespread condominium activity – such as Hawaii, California, Florida, Virginia, and New York – regulate condominiums to protect consumers. Other states with substantial condominium activity – such as Illinois and Maryland – have chosen not to regulate condominiums, relying instead on the private market and lenders for consumer protection. The Commission continues to believe that adequate protection of Hawaii's condominium purchasers requires public oversight of private compliance with law. The ability of government to adopt new regulations to meet new and changing circumstances is also valuable and should continue.

Guiding Principles:

1. The Commission's role is fundamentally: a) to provide consumer protection through adequate disclosures to prospective condominium purchasers, and b) education of condominium community stakeholders (i.e., those who build, sell, buy, manage, live-in, etc. condominium projects).

2. Risk to purchasers' funds should be correlated with the rights and obligations of developers.

3. The recodified condominium law should not result in an increase in the cost of government.

This goal is meant to limit the addition of new programs administered by government under the condominium law. It is possible that revised consumer protection requirements will affect government costs. We will not actually know if the goal of maintaining the cost of government in this area has actually been achieved until after practical experience working with the recodified condominium law. If proper administration of the new law actually requires more resources, the responsible government agency should ask for more resources or ask that particular requirements be revised.

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Part III. REGISTRATION AND ADMINISTRATION OF CONDOMINIUMS

PART III. REGISTRATION AND ADMINISTRATION OF CONDOMINIUMS

§ ___: 3-1. Registration Required; Exceptions. (a) A developer may not offer for sale any units in a project unless the project is registered with the commission and an effective date for the public report is issued by the commission.

(b) The registration requirement of this section shall not apply to:

(1) The disposition of units exempted from public report requirements pursuant to subsection ___: 4-1(b);

(2) Projects in which all units are restricted to non-residential uses and all units are to be sold for $1,000,000 or more; or

(3) The sale of units in bulk. "The sale of units in bulk" is a circumstance where a developer undertakes to

develop and then sells all or a portion of the developer's entire inventory of units to a purchaser who is a developer. 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.

Real Estate Commission's Comment

1. HRS §514A-31, UCA/UCIOA §5-102, and HAR §16-107-2.1, Proposed Rules, Draft #6 (5/17/02), combined and modified, are the sources of this section.

2. Under HRS Chapter 514A, the requirement for a public report is triggered by an "offer for sale". Because the Commission's definition of an "offer for sale" has been so strict, a public report is required for activities involving no risk to the consumer. When a developer is "testing the market" without taking any purchasers funds (e.g., taking names and addresses of interested persons, or even accepting nonbinding, no deposit reservations), the consumer is not at risk. Therefore, "testing the market" should not trigger the requirement of a public report and should be excluded from the Commission's definition of "offer for sale".

3. To lessen the regulatory burden on Hawaii's people, earlier drafts of the recodification exempted small condominium projects (projects of five or less units) from most of the law's requirements (unless they choose to "opt-in" to its provisions). Real Estate Branch Supervising Executive Officer Calvin Kimura objected to the exemption for small condominiums since the Real Estate Branch receives many complaints about such projects. Kauai County Deputy Planning Director Sheilah Miyake raised similar concerns.[1] In response, the Commission deleted the exemption for small condominium projects.

§ ___: 3-2. Application for Registration. (a) An application for registration of a project 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 set forth in sections ___: 3-4, ___: 4-3, and ___: 4-4, as applicable, and as may otherwise be specified by the commission.

(b) The commission need not process any incomplete application and may return such an application to the developer and require that the developer submit a new application, including fees. If an incomplete application is not completed within six months of the date of the original submission, it shall be deemed abandoned and registration of the project shall require the submission of a new application, including fees.

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

Real Estate Commission's Comment

1. HRS §514A-32 and UCA/UCIOA §5-103(a), modified, are the sources of this section.

2. The questionnaire required by HRS §514A-32(2) appears to be an unnecessary remnant of Hawaii's 1961 Horizontal Property Regimes Act (RLH §170A-17). It has not been included in the recodification.

§ ___: 3-3. Inspection by Commission. (a) After appropriate notification has been made or additional information has been received pursuant to this part, an inspection of the project may be made by the commission.

(b) When an inspection is to be made of a project, 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.

Real Estate Commission's Comment

1. HRS §§514A-33 and -34, modified slightly, are the sources of this section. HRS §514A-35 (Waiver of Inspection) has been deleted as unnecessary since the Commission inspection pursuant to subsection (a) is discretionary.

§ ___: 3-4. Public Report; Requirements for Issuance of Effective Date. (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 ___: 4-4;

[1] *See,* October 7, 2003 testimony of Sheilah Miyake.

(3) A copy of the deed, master lease, agreement of sale, or sales contract evidencing either that the developer holds the fee 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 that meet the requirements of sections ___: 2-2, ___: 5-8, 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 ___: 4-11 (Escrow of Deposits);

(7) As applicable, the documents and information required in sections ___: 4-12 or ___: 4-13;

(8) A declaration, subject to the penalties set forth in section ___: 3-19(b), that the project is in compliance with all county zoning and building ordinances and codes, and all other county permitting requirements applicable to the project, pursuant to sections ___: 1-5 and ___: 2-2(a)(13); and

(9) Such other documents and information that the commission may require.

(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.

Real Estate Commission's Comment

1. HRS § 514A-61, substantially modified, with elements of HRS §§514A-36 and 514A-40 are the sources of this section.

2. Under the recodified condominium law, developers can "test the market" without a public report as there is no risk of consumer harm when no money changes hands and no binding contracts are made. *See*, §___: 4-5. Therefore, HRS §514A-37 (Preliminary public reports) is no longer necessary and has been deleted.

3. Consistent with the UCA, UCIOA, and the laws of many other jurisdictions, a single public report ("public offering statement" in the UCA/UCIOA) is required in Hawaii's recodified condominium law. Therefore, HRS §514A-39.5 (Contingent final public report) is no longer necessary and has been deleted.

4. HRS §§514A-40(b) and 514A-61(b) use the undefined term "declarant." "Developer" is used in the recodification instead of "declarant."

5. HRS §§514A-40(b)(2) and 514A-61(b)(1) incorrectly use the term "registered" architect or engineer. The correct term is "licensed." *See*, HRS Chapter 464 (Professional Engineers, Architects, Surveyors and Landscape Architects).

6. HRS §514A-40(c), requiring developers to pay $5 per project unit into the Condominium Education Trust Fund, is incorporated in §___: 3-22.

§ ___: 3-5. Public Report; Request for Hearing by Developer. 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.

Real Estate Commission's Comment

1. HRS §514A-38, modified, is the source of this section. The first sentence in HRS §514A-38 is incorporated in §___: 3-14 (Private Consultants).

§ ___: 3-6. Public Report; Amendments. (a) After the effective date for a public report has been issued by the commission, if there is any pertinent change regarding the information contained in the public report, 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 or an amended public report clearly reflecting the change, 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 amendment to the public report or an amended public report shall not require the developer to suspend sales, subject to the power of the commission to order such sales to cease as set forth in section ___: 3-16;

provided that the developer shall advise the appropriate real estate broker or brokers, if any, of the change and disclose to purchasers any change in the information contained in the public report pending the issuance of an effective date for any amendment to the public report or amended public report; provided further that if the amended public report is not issued within thirty days after its submission to the commission, the commission may order a suspension of sales pending the issuance of an effective date for the amended public report. Nothing in this section shall diminish the rights of purchasers under section ___: 4-14.

(c) The developer shall provide all purchasers with a true copy of:

(1) The amendment to the public report, if the purchaser has received copies of the public report and all prior amendments, if any; or

(2) A restated public report including all amendments.

(d) The filing of an amendment to the public report or an amended 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 ___: 4-6 and ___: 4-7, the terms and conditions of the purchaser's contract for sale, and applicable common law.

Real Estate Commission's Comment

1. HRS §514A-41, modified, is the source of this section.

2. The Commission seeks to encourage disclosure of changes to projects. Developers, however, are often reluctant to amend public reports because of the fear that buyers may attempt to rescind their purchase contracts since HRS Chapter 514A has inconsistent provisions regarding when changes in a project may give a buyer the right of rescission. The Commission believes that HRS §514A-63 contains the correct standard for determining rescission rights (i.e., a change in circumstances that directly, substantially, and adversely affects the use or value of a purchaser's unit or appurtenant limited common elements or project elements available for the purchaser's use). A particular change in a project may meet this standard for some buyers and not others. For example, internal changes in some types of units might not adversely affect buyers of different unit types. HRS §514A-41 requires a supplementary public report for any change which makes the public report misleading as to purchasers in any material respect. Once a supplementary public report is issued, the Commission appears to have required that it be provided to *all* unit buyers with a form of receipt that includes a notice of right of rescission. The Commission now believes as follows:

- The provisions of HRS §514A-63 should be the standard for rescission and is the standard incorporated in §___: 4-7 (Rescission After Sales Contract Becomes Binding).

- An amended public report should disclose any pertinent change or updates; it should not automatically give every buyer a right of rescission, only those buyers who meet the rescission standard.

- The receipt for a public report or amended public report should be separate from the notice of right of rescission. All buyers would receipt for the report (or be deemed to receipt). Only buyers meeting the rescission standard would receive the notice of right of rescission.

- The developer should make the initial decision that the rescission standard is met. If a developer decides the standard has not been met, it will not send a notice of right of rescission, but if the developer is wrong the buyer may rescind anyway and be upheld by an arbitrator or court. So the developer will have a motive for erring on the side of caution and giving the notice in doubtful cases, to avoid a prolonged period during which the right of rescission could be exercised.

- Provided the buyers were notified of the change, the statutory right of rescission would terminate at closing. Thereafter the buyer would have any contractual or common law rights of rescission.

3. Subsection (b) is a substantial departure from current practice in that it allows sales in a project to continue subject to the Commission's issuance of an effective date for a supplemental public report. Consumers are still protected and still have appropriate remedies, if necessary. Prospective purchasers will have information regarding the amended public report pending the Commission's issuance of an effective date, and the sale would be voidable if the Commission does not issue an effective date for the amended public report.

§ ___: 3-7. Commission Oversight of Public Report. (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.

Part III. Administration and Registration of Condominiums

Real Estate Commission's Comment

1. UCA/UCIOA §5-110, modified, is the source of this section. UCA/UCIOA §5-110(c) was deleted. As noted by Senior Condominium Specialist Cynthia Yee, an Attorney General's Office opinion states that HRS Chapter 514A only applies to real estate in Hawaii because only real estate in Hawaii can be recorded here.

2. This section makes it clear that, to assure that adequate and accurate disclosures are made to consumers, the Commission may require a developer to alter or supplement a public report.

§ ___: 3-8. Annual Report. (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. If there is no change to the public report, the developer shall so state. This subsection does not relieve the developer of the obligation to file amendments to the public report pursuant to section ___: 3-6. Failure to file the annual report required by this section may subject the developer to the penalties set forth in section ___: 3-19(b).

(b) The developer shall be relieved from filing annual reports pursuant to this section if the developer has no ownership interest in any unit in the project.

Real Estate Commission's Comment

1. UCA/UCIOA §5-109, modified, is the source of this section.

2. Under the recodified condominium law, public reports do not expire until the developer has sold all units in the project. Hence, there are no provisions comparable to HRS §514A-43 (Automatic expiration of public reports; exceptions). Annual reports as well as promptly amended public reports are required instead.

3. This section requires annual reports from a developer to the Commission in order to keep the information filed with the Commission current. This requirement parallels the developer's obligation to provide a current public report to unit owners. *See*, §___: 4-3(b).

§ ___: 3-9. Expiration of Public Reports. 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.

Real Estate Commission's Comment

1. This is a new section.

§ ___: 3-10. No False or Misleading Information. It shall be unlawful for any person or person's agent to testify falsely or make a material misstatement of fact before the commission or to file with the commission any document required by this chapter that is false, contains a material misstatement of fact, or contains forgery. 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 pertinent change in the information or documents submitted to the commission.

Real Estate Commission's Comment

1. HRS §§514A-98 and 514A-42, modified, are the sources of this section.

§ ___: 3-11. General Powers and Duties of Commission. (a) The commission may:

(1) Adopt, amend, and repeal rules;

(2) Assess fees;

(3) Issue orders consistent with and in furtherance of the objectives of this chapter;

(4) Prescribe forms and procedures for submitting information to the commission; and

(5) Prescribe the form and content of any documents required to be submitted to the commission by this chapter.

(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 (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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 in order to maintain such action.

(c) The commission may intervene in any action involving the powers or responsibilities of a developer under part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42.

(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 the 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 assure completion of all improvements which a developer is obligated to complete, or has represented that it will complete.

Real Estate Commission's Comment

1. HRS §514A-99 and UCA/UCIOA §5-107, modified, are the sources of this section.

2. Prohibition of Commission intervention in the internal activities of unit owners associations (in UCA/UCIOA §5-107(a)) was deleted to avoid any implication that the Commission will involve itself in curing violations of the condominium management provisions of this chapter.

3. The parenthetical "(at appropriate levels over time)" was added to subsection (g) to allow the Commission to adjust bonding requirements over time (e.g., reduction of bond).

§ ___: 3-12. Deposit of Fees. 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).

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-44.

§ ___: 3-13. Condominium Specialists; Appointment; Duties. The director of commerce and consumer affairs may appoint condominium specialists, not subject to chapter 76, to assist consumers with information, advice, and referral on any matter relating to this chapter or otherwise concerning condominiums. The director may also appoint secretaries, not subject to chapter 76, to provide assistance in carrying out these duties. The condominium specialists and secretaries 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.

Real Estate Commission's Comment

1. HRS §514A-7, modified, is the source of this section.

§ ___: 3-14. Private Consultants. 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.

Real Estate Commission's Comment

1. HRS §514A-38, in pertinent part, identical, is the source of this section.

§ ___: 3-15. Investigative Powers. If the commission has reason to believe that any person is violating or has violated part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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 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.

Real Estate Commission's Comment

Part III. Administration and Registration of Condominiums

1. This section is essentially identical to HRS §514A-46.

§ ___: 3-16. Cease and Desist Orders. In addition to its authority under sections ___: 3-17 and ___: 3-18, whenever the commission has reason to believe that any person is violating or has violated part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-47.

§ ___: 3-17. Revocation of Registration. (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, or any affiliate of the 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.

Real Estate Commission's Comment

1. This section is essentially identical to UCA/UCIOA §5-106.

2. Although there is no comparable provision in HRS Chapter 514A, HRS Chapters 484 (Uniform Land Sales Practices Act) and 514E (Time Sharing Plans) allow for revocation of registration. (*See*, HRS §§484-13 and 514E-12.) Administrative revocation of registration is an appropriate intermediate means of enforcing provisions relating to the sale of condominium units.

§ ___: 3-18. Power to Enjoin. Whenever the commission believes from satisfactory evidence that any person has violated part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-48.

§ ___: 3-19. Penalties. (a) Any person who violates or fails to comply with part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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 (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___:

5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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 (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-49.

§ ___: 3-20. Limitation of Actions. 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.

Real Estate Commission's Comment

1. This section is identical to HRS §514A-50.

§ ___: 3-21. Condominium Education Trust Fund. (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 associations; and

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

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

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-131.

2. The name of the fund was changed from "Condominium Management Education Fund" to "Condominium Education Trust Fund" to more accurately reflect its funding sources and permissible uses.

3. The provisions for the "Condominium Management Education Fund" are currently found in a separate part (HRS Chapter 514A, Part VIII).

§ ___: 3-22. Condominium Education Trust Fund; Payments by Associations and Developers. (a) Each project or 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 association's 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 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 an association to pay a fee required under this section shall not impair the validity of any claim of the association for common expenses or other assessments, or prevent the association from defending any action in any court of this State.

(c) Each developer shall pay into the condominium education trust fund a nonrefundable fee for each unit in the project, 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 ___: 3-21.

Real Estate Commission's Comment

1. HRS §514A-132 is the main source of this section. Subsection (c) above is a slightly modified version of HRS §514A-

40 (Final Reports), subsection (c).

2. HRS Chapter 514A sometimes uses the term "condominium project." Since the term "project" is defined in HRS §514A-3 as "a real estate condominium project; a plan or project whereby a condominium of two or more apartments located within the condominium property regime are offered or proposed to be offered for sale," it is redundant to use the term "condominium project;" "project" will suffice.

§ ___: 3-23. Condominium Education Trust Fund; Management. (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 chapter 76 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.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-133.

2. HRS §514A-134 (False statement) has not been included in the recodification. It is redundant and its criminal penalty is impractical.

3. HRS §514A-135 (Rules) has not been included in the recodification. It is redundant.

Part IV. Protection of Condominium Purchasers

Real Estate Commission's Prefatory Comment to Part IV

Guiding Principles:

1. Adequate disclosure to prospective condominium purchasers is the foundation of Part IV.

As noted in the Uniform Condominium Act (1980) and Uniform Common Interest Ownership Act (1994), "[t]he best 'consumer protection' that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing." (*See*, Comment to UCA/UCIOA §4-103.)

2. "Adequate disclosure" to prospective condominium purchasers involves more than disclosures involving the sale of real property in non-common interest ownership community projects.

Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. As noted in the Uniform Condominium Act (1980) and Uniform Common Interest Ownership Act (1994), "[f]or this reason, the Act, adopting the approach of many so-called 'second generation' condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law." (*See*, Comment to UCA/UCIOA §4-103.)

3. Risk to purchasers' funds should be correlated with the rights and obligations of developers.

4. The recodified condominium law should not result in an increase in the cost of government.

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PART IV. PROTECTION OF CONDOMINIUM PURCHASERS

§ ___: 4-1. Applicability; Exceptions. (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; or

(5) The sale of units in bulk, as defined in subsection ___: 3-1(b); provided that the requirements of this part shall apply to any sale of units to the public following the sale of units in bulk.

Real Estate Commission's Comment

1. UCA/UCIOA §4-101, modified, is the source of this section. The Commission decided not to incorporate UCA/UCIOA's "resale certificate" provisions as two standard Hawaii Association of Realtor disclosure forms generally used in connection with the resale of condominium units (i.e., the RR105C, which associations complete, and the seller disclosure form)

already adequately serve that purpose.

2. Paragraph (b)(4) addresses the problem, raised by various stakeholders, of lenders being considered "successor developers" in foreclosure/deed in lieu of foreclosure situations.

§ ___: 4-2. Sale of Units. Except as provided in section ___: 4-5, no sale or offer of sale of units in a 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, where a time share project is duly registered under chapter 514E and a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser, the public report need not be delivered to the purchaser or prospective purchaser.

Real Estate Commission's Comment

1. This is a new section based on some of the concepts contained in HRS §§514A-31 and 514A-62.

§ ___: 4-3. Public Report. (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 of the deadline, pursuant to section ___: 4-9, for completion of construction or, in the case of a conversion, for the completion of any repairs required to comply with section ___: 1-5, and the remedies available to the purchaser (including, but not limited to, cancellation of the sales contract) if the completion of construction or repairs 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, and a statement regarding when a purchaser shall become obligated to start paying such fees pursuant to section ___: 2-11(b);

(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 summary 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 development rights reserved to the developer or others;

(7) A declaration, subject to the penalties set forth in section ___: 3-19(b), that the project is in compliance with all county zoning and building ordinances and codes, and all other county permitting requirements applicable to the project, pursuant to sections ___: 1-5 and ___: 2-2(a)(13); and

(8) Any other facts, documents, or information 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 pertinent change in the information required by this section.

Real Estate Commission's Comment

1. HRS § 514A-61, substantially modified, with elements of HRS §§514A-36 and 514A-40 are the sources of this section.

2. Under the recodified condominium law, developers can "test the market" without a public report as there is minimal risk of consumer harm when no money changes hands and no binding contracts are made. *See*, §___: 4-5.

3. Consistent with the UCA, UCIOA, and the laws of many other jurisdictions, a single public report ("public offering statement" in the UCA/UCIOA) is required in the recodified condominium law.

4. HRS §§514A-40(b) and 514A-61(b) use the undefined term "declarant." "Developer" is used in the recodification instead of "declarant."

5. HRS §§514A-40(b)(2) and 514A-61(b)(1) incorrectly use the term "registered" architect or engineer. The correct term is "licensed." *See*, HRS Chapter 464 (Professional Engineers, Architects, Surveyors and Landscape Architects).

Part IV. Protection of Condominium Purchasers

§ ___: 4-4. Public Report; Special Types of Condominiums. (a) *Projects containing converted structures.* 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 units that may be occupied for residential use and have been in existence for five years or more:

(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 subparagraph (1)(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 projects containing converted structures, 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 or other permits that have been granted to achieve compliance, (ii) whether the project contains any legal nonconforming uses or structures as a result of the adoption or amendment of any ordinances or codes, and (iii) any violations of current zoning or building ordinances or codes and the conditions required to bring the structure into compliance; or

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

(3) Such other disclosures and information that the commission may require.

(b) *Projects on agricultural land*. 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;

(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; and

(3) Such other disclosures and information that the commission may require.

(c) *Projects containing assisted living facility units.* 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;

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

(6) Such other disclosures and information that the commission may require.

Real Estate Commission's Comment

1. HRS §514A-61(b), modified, and elements of HRS §514A-40 are the basic sources of subsection (a), regarding condominium conversion projects. Since condominium conversions involve existing structures and a county might not otherwise have the opportunity to address land *use* matters in these situations, it is appropriate to require county certification of compliance with its land *use* laws when converting existing structures to the condominium form of *ownership*.

2. Subsections (b), regarding projects on agricultural land, and (c), regarding projects containing assisted living facility units, are new.

3. Consistent with the condominium law's consumer protection purpose, subsection (c) requires additional disclosures for projects containing assisted living facility units.

One of the new century's major challenges for condominium associations nationwide is the aging of populations within condominium units and the problems that accompany diminishing health and capacity. Recent controversies in a condominium with assisted living facility services helped to direct the Commission's attention to this issue.[1] More broadly, however, in addition to assisted living facilities in condominiums, a growing number of senior citizens are choosing to remain in their homes and familiar surroundings rather than moving to traditional retirement destinations. This trend is creating what has become known as "Naturally Occurring Retirement Communities" (NORCs).[2] Regardless of whether a condominium is an assisted living facility or NORC, "self-governance" may not truly work for aged and infirm condominium owners. Some such matters may be addressed in Hawaii's condominium law, while others may be better handled in the governing documents of condominiums. More questions in this area are sure to arise in the near future.

[*See also*, Act 185 (SLH, 2003), which directs the State Department of Health and the Real Estate Commission to conduct a study and report to the Legislature on the impact and feasibility of allowing condominium and cooperative housing corporation projects to become licensed as assisted living facilities to provide such services for its residents. §___: 5-30 (Aging In Place, Limitation on Liability) was added to the recodification at the request of the Act 185 (SLH, 2003) working group.]

§ ___: 4-5. Pre-registration Solicitation. (a) 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 subsection (b), the developer may solicit prospective purchasers and enter into non-binding pre-registration 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 a unit.

(b) Limitations:

(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 moneys from prospective purchasers or anyone on behalf of prospective purchasers, whether or not such moneys are to be placed in an escrow account, or whether or not such moneys 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 pre-registration agreement. The pre-registration 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 pre-registration 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 pre-registration agreement to the contrary, the pre-registration agreement may be cancelled at any time by either the developer or the prospective purchaser by written notice to the other. The commission may prepare a form of pre-registration agreement for use pursuant to this section, and use of the commission-prepared form shall be deemed to satisfy the requirements of the pre-registration agreement as provided in this section.

Real Estate Commission's Comment

1. This is a new section.

§ ___: 4-6. Requirements for Binding Sales Contracts; Purchaser's Right to Cancel. (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;

[1] *See*, "Raising Cane – Complaints fly at condo for seniors," Honolulu Star-Bulletin, Sunday, July 14, 2002. The article, by Rob Perez, details the problems of One Kalakaua, the condominium at the center of a number of disputes. (http://starbulletin.com/2002/07/14/news/perez.html)

[2] de Haan, Ellen Hirsch; "Aging in Place – Naturally Occurring Retirement Communities and Condominium Living," Law Offices of Becker & Poliakoff website (2000). (http://www.association-law.net/publications/article/aging_in_place.htm) It appears that this article was first published in Elder's Advisor, The Journal of Elder Law and Post Retirement Planning, Volume 1, Number 2, (Fall 1999). The article contains a number of suggestions regarding legal and management issues in this area.

(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 paragraph (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 any 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.

Real Estate Commission's Comment

1. This is a new section based on concepts contained in HRS §514A-62.

2. The purchaser's right to cancel is a one time right that is strictly tied to the statutory "cooling off" period.

3. Rather than set the purchaser's right to cancel document in statute, the recodification allows the Real Estate Commission to prescribe the form and content of the document (which must still, of course, be consistent with statutory requirements). This will allow the Commission to react more quickly in clarifying any ambiguities in the form.

4. Many small developers have objected to HRS §514A-62's 30-day right to cancel period as a "free 30-day option to purchase" ripe for abuse by speculators. In response to this concern (and consistent with the UCA, UCIOA, and the laws of many other jurisdictions) the right to cancel ("cooling off") period was reduced from 30 to 15 days in earlier drafts of the recodification. As a practical matter under HRS Chapter 514A, large developers have encouraged prospective purchasers to close early or to waive their right to cancel. Reducing the prospective purchaser's one-time "cooling off" right to cancel period to 15 days appeared to provide for adequate consumer protection without unduly burdening small developers. The Commission's advisory committee and Real Estate Branch staff, however, recommended keeping the right to cancel period at 30 days. Real Estate Branch staff stated that, "besides the public report, there are a number of exhibits attached that are voluminous to review." The "right to cancel" period of 30 days was kept in the final draft of the recodification.

§ ___: 4-7. Rescission After Sales Contract Becomes Binding. (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. 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 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.

Real Estate Commission's Comment

1. HRS §514A-63, modified, is the source of this section.

2. "Cancellation " under the "cooling off" period of §___: 4-6 differs from "rescission" under §___: 4-7 in that cancellation under §___: 4-6 can be for any reason, while rescission under §___: 4-7 must be based on a material change in circumstances that "directly, substantially, and adversely" affects the purchaser's use or value of the purchaser's unit or appurtenant limited common elements or the project amenities available to the purchaser.

3. As made clear by subsection (e), purchasers may still exercise all applicable common law remedies (including common law rescission rights).

§ ___: 4-8. Delivery. In this part, delivery shall be made by:

(1) Personal delivery;

(2) Delivery by registered or certified mail with adequate postage, to the recipient'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 recipient has provided a fax number to the sender; delivery will be considered made upon sender's receipt of automatic confirmation of transmission; or

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

Real Estate Commission's Comment

1. This is a new section.

§ ___: 4-9. Sales Contracts Before Completion of Construction. If a sales contract for a unit is signed before the completion of construction or, in the case of a conversion, the completion of any repairs required to comply with section ___: 1-5, the sales contract shall contain an agreement of the developer that the completion of construction shall occur on or before a completion deadline, and the completion deadline shall be referenced in the public report. 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 purchaser may cancel the sales contract at any time after the specified completion deadline, if completion of construction does not occur on or before the completion deadline, as the same may have been extended. The sales contract may provide additional remedies to the purchaser if the actual completion of construction does not occur on or before the completion deadline as set forth in the contract.

Real Estate Commission's Comment

1. This is a new section.

§ ___: 4-10. Refunds Upon Cancellation or Termination. Upon any cancellation under section ___: 4-6 or ___: 4-9, 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.

Real Estate Commission's Comment

1. This is a new section based on HRS §514A-62(c).

§ ___: 4-11. Escrow of Deposits. All moneys 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 ___: 4-12 and ___: 4-13;

(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.

Part IV. Protection of Condominium Purchasers

Real Estate Commission's Comment

1. This is a new section based on HRS §§514A-40(a)(6) and 514A-65.

§ ___: 4-12. Use of Purchaser Deposits to Pay Project Costs. (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 (including, in the case of a conversion, repairs necessary to cure violations of county zoning and building ordinances and codes), 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 and content approved by the commission: a completion or performance bond issued by a surety licensed in the State in an amount equal to one hundred percent of the cost of construction; a completion or performance bond issued by a material house in an amount equal to one hundred percent of the cost of construction; 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. A completion or performance bond issued by a surety or by a material house, an irrevocable letter of credit, and any alternatives shall contain a provision that the commission shall be notified in writing before any payment is made to beneficiaries of the bond. Adequate disclosures shall be made in the public report concerning the developer's use of a completion or performance bond issued by a material house instead of a surety, and the impact of any restrictions on the developer's use of purchaser's funds.

(c) A purchaser's deposits may be disbursed prior to closing only to pay costs set forth in the project budget submitted pursuant to subparagraph (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."

Part IV. Protection of Condominium Purchasers

Real Estate Commission's Comment

1. This is a new section based on HRS §§514A-40(a)(6), 514A-64.5, and 514A-67, and 7/1/99 draft REC rules.

2. Regarding paragraph (b)(3)(D)(iii):

- The requirement was originally changed from "performance bond" (which is typically issued in conjunction with a payment bond and insures the performance of the contractor) to "completion bond" (which insures the performance of the developer and is the format required to obtain a final subdivision approval prior to completion of construction). However, after further debate, "performance bond" was added back to this paragraph.

- Since financial institutions on the mainland can issue letters of credit that are enforceable anywhere, and since anyone can issue letters of credit, the language has been changed to simply require that it be issued by a federally insured financial institution.

- Rather than going into detail as to the requirements of the bond forms and letter of credit forms, the revisions simply provides for the forms to be as approved by the Commission.

§ ___: 4-13. Early Conveyance to Pay Project Costs. (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 (including, in the case of a conversion, repairs necessary to cure violations of county zoning and building ordinances and codes), 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 and content approved by the commission: a completion or performance bond issued by a surety licensed in the State in an amount equal to one hundred percent of the cost of construction; a completion or performance bond issued by a material house in an amount equal to one hundred percent of the cost of construction; 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. A completion or performance bond issued by a surety or by a material house, an irrevocable letter of credit, and any alternatives shall contain a provision that the commission shall be notified in writing before any payment is made to beneficiaries of the bond. Adequate disclosures shall be made in the public report concerning the developer's use of a completion or performance bond issued by a material house instead of a surety, and the impact of any restrictions on the developer's use of purchaser's funds.

(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 subparagraph (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 and the satisfaction of any mechanics' and materialmen's liens.

(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."

Real Estate Commission's Comment

1. This is a new section based on HRS §514A-67, UCA/UCIOA §4-110, and § ___: 4-11, Recodification Draft #2.

§ ___: 4-14. Misleading Statements and Omissions; Remedies. (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.

Real Estate Commission's Comment

1. HRS §§514A-68 and 514A-69, combined, but essentially identical, are the sources of this section.

2. Under Hawaii caselaw, proof of scienter is not required and proof of reliance is not an element of the cause of action under HRS §§514A-68 and 69.[3]

Real Estate Commission's Comment

1. HRS §514A-70 (Warranty against structural and appliance defects; notice of expiration required) has been deleted. It is overly paternalistic, adds unnecessary costs ("notice by certified mail to all members" of the AOAO, etc.), provides unclear parameters ("normal one-year period"), and results in little additional consumer protection, if any. Appropriate disclosure of warranties is the key.

[3] *See*, DiSandro v. Makahuena Corp., 588 F.Supp. 889 (D.Hawaii 1984).

Part V. Management of Condominium

Real Estate Commission's Prefatory Comment to Part V

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

~ Community Associations Factbook (1999)

As explained in the *Community Associations Factbook (1999)*, the business, governance, and community functions of community associations (including condominium unit owners' associations) have evolved over time. Early in the history of community associations, "business" meant "austerity", "governance" meant "compliance", and "community" meant "conformity". As the movement matured, "business" has come to mean "prudence", "governance" has come to mean "justice", and "community" has come to mean "harmony".

"Community/harmony" is obviously not something we can mandate by State law. Just as obviously, State law can help (or hinder) associations in their "business" and "governance" functions. The Commission has kept these functions and principles in mind as it has crafted the provisions for management of condominiums.

To paraphrase the *Restatement of the Law, Third, Property (Servitudes)* introductory note to Chapter 6:

> The law of residential condominium communities reflects tensions between protecting freedom of contract, protecting private and public interests in the home both as a personal base and as a financial asset, and protecting the public interest in the ongoing financial stability of condominium communities. It also reflects the tensions between protecting the democratic process at work in condominium communities and protecting the interests of individual community members from imposition by those who control the association. This Chapter should balance such concerns with the overall purpose of enabling condominium communities to carry out their potential for creating enduring and desirable communities.
>
> Determining the law that applies to unit owners' associations has proven to be challenging at times because the associations share some characteristics of business corporations, nonprofit organizations, local governments, and private trusts, but differ significantly from all of them. Often incorporated under nonprofit corporation statutes (HRS Chapter 414D in Hawaii), most associations are managed by a board of directors (usually unpaid volunteers) elected by the members. Like business corporations, votes are allocated on the basis of the number of units owned. The votes assigned to condominium units may be equal or weighted in accord with an initial allocation or specified formula. The developer may hold special voting rights. Unlike most corporations, but like municipal governments, associations have the power to raise funds by levying assessments on individually owned properties and charging fees. Like a private trust, the purpose of an association is to manage property for the benefit of its members, but unlike trustees, the directors are elected by popular vote and answer to political considerations. Like business organizations and municipalities, associations often manage substantial property and handle significant cash flows, but unlike businesses, their purpose is not to make money by taking entrepreneurial risks. Unlike the boards of either business or nonprofit charitable corporations, association board members have strong personal as well as financial stakes in the success of the association, because it is usually their home as well as a significant investment.
>
> Like local governments, associations have the power to make rules governing some behavior within the community, and the power to enforce the servitudes through judicial action. Like local governments, associations often administer land use regulations and provide utility services to their members. Unlike local governments, however, association charters are created by private contract and, absent other circumstances, the associations' actions are not state action sufficient to subject them to challenge under the U.S. Constitution or §1983 liability.
>
> Ultimately, this Chapter should facilitate the operation of condominium communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their members.

Guiding Principles:

1. The philosophy guiding Part V (Management of Condominium) continues to be **minimal government involvement** and **self-governance** by the condominium community.

This also means that the condominium community (both owners and management) should have the tools with which to govern itself. Self-governance (e.g., conduct of meetings, voting) should be enhanced. This does not mean that every problem and contingency should be addressed in State law (as happened too often in the past, one of the causes of the need to recodify Hawaii's condominium law). Addressing problems in State law is appropriate in some areas. Other problems may more appropriately be handled in condominium governing documents or through other private mechanisms. And some matters simply must be resolved in court.

2. The recodified condominium law should recognize the difficulty of a "one size fits all" approach to management provisions.

3. The recodified condominium law should enhance clarity of Condominium Property Act.

Provisions on a single issue (e.g., proxies) should be consolidated or grouped together. The artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b) should be eliminated. And the statutory requirements for condominium governing documents should be minimized while incorporating certain provisions currently in HRS §514A-82(a) and (b) in more appropriate statutory sections.

4. The recodified condominium law should not result in an increase in the cost of government.

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PART V. MANAGEMENT OF CONDOMINIUM

Subpart 1. POWERS, DUTIES, AND OTHER GENERAL PROVISIONS

§ ___: 5-1. Applicability; Exceptions. (a) This part applies to all condominiums subject to this chapter, except as provided in subsection (b).

(b) If so provided in the declaration or bylaws, this part shall not apply to:

(1) Condominiums in which all units are restricted to non-residential uses; or

(2) Condominiums, not subject to any continuing development rights, containing no more than five units;

provided that section ___: 5-20 (Managing Agents) shall not be subject to these exceptions.

Real Estate Commission's Comment

1. This is a new section.

2. 100% non-residential condominiums may choose to exempt themselves from the provisions of this Part by so providing in their declarations or bylaws. (Earlier drafts of the recodification exempted such condominiums from the entire Chapter unless they chose to "opt-in" to its provisions.)

§ ___: 5-2. Association; Organization and Membership. (a) The first meeting of the 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.

Real Estate Commission's Comment

1. HRS §514A-82(a)(11) is the source of subsection (a).[1] UCA/UCIOA §3-101 is the source of subsection (b).

2. From a legal standpoint, an association (and its powers and duties) exists at recordation of the legal documents creating the condominium. While the developer inevitably acts as the association for some period of time, nevertheless, the association exists as an entity independent of the developer and the developer has a fiduciary obligation to act on behalf of the association from the time the declaration is recorded.[2]

3. As noted in the official commentary to UCA/UCIOA §3-101: "The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium even during a period of declarant control …"

§ ___: 5-3. Association; Registration. (a) Each project or 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

[1] For background regarding the use of first recordation of a unit conveyance versus certificate of occupancy, *see*, A Study of Problems in the Condominium Owner-Developer Relationship, by Office of Consumer Protection, Office of the Legislative Reference Bureau, and Real Estate Commission, State of Hawaii (December 1976) at page 16.

[2] *See*, State Savings & Loan Association v. Kauaian Development Company, Inc., et al., 50 Haw. 540, 445 P.2d 109 (1968); Hawaii Real Estate Law Manual, "Community Associations," by J. Neeley (1997).

additional information set forth by the commission. Any project or association that has not met the submission requirements by the deadline date shall be considered a new applicant for registration and be subject to initial registration requirements. Any new project or association shall register within thirty days of the association's first meeting. If the 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 association and shall comply with this section, except for the fidelity bond requirement for 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 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 association where the officer can be contacted directly;

(2) Pay a nonrefundable application fee and, upon approval, an initial registration fee – subsequently, a reregistration fee – and the condominium education trust 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 association to initial registration requirements.

(b) The commission may reject or terminate any registration submitted by a project or an association that fails to comply with this section. Any 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 an association to register, or rejection or termination of its registration, shall not impair the validity of any contract or act of the association nor prevent the association from defending any action or proceeding in any court in this State.

Real Estate Commission's Comment

1. HRS §514A-95.1 is the source of this section. In pertinent part, it has been modified slightly. HRS §514A-95.1 contains both registration requirements and fidelity bond requirements for associations. The fidelity bond provisions of HRS §514A-95.1(1) have been incorporated in a separate insurance section. *See*, §___: 5-31.

2. Keeping the association registration requirement is important to continued support of alternative dispute resolution and condominium education efforts.

3. Requiring associations to register with the Commission is not meant to imply that the Commission has jurisdiction over condominium governance matters. (The Commission's powers and duties are described in Part III, §___: 3-11.) As provided in subsection (b) above, failure of a unit owners' association to register results in a self-enforcing sanction – the association's lack of standing to maintain actions in State court until properly registered with the Commission.

§ ___: 5-4. Association; Powers. (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 the declaration, 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; provided that designation of additional areas to be common elements or subject to common expenses after

the initial filing of the declaration or bylaws shall require the approval of at least 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 paragraph shall not apply to the purchase of a unit for a resident manager;

(9) Subject to section ___: 2-8, 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 and approved by a majority of all unit owners at an annual meeting of the association or by the written consent of a majority of all unit owners;

(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, committee members, and agents, 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 ___: 5-5(e) 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, except to the extent inconsistent with this chapter;

(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 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 paragraph (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 paragraph (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; provided that no notice shall be required when the breach by the tenant causes or threatens to cause damage to any person or constitutes a violation of section 521-51(1) or 521-51(6).

(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.

Part V. Management of Condominium

Real Estate Commission's Comment

1. UCA/UCIOA §3-102 is the source of this section. Some provisions have been modified using language of similar provisions in HRS Chapter 514A. Others have been modified to address problems that have arisen over time. [For example, paragraph (a)(9) helps correct problems created by encroachments on common elements.] UCA/UCIOA §3-102 (b) and (c) have been moved to §___: 5-5 (Limitations on Powers).

2. Under paragraph (a)(4), associations are deemed to be "consumers" for the purposes of HRS Chapter 480 (Unfair and Deceptive Practices) actions. Although associations are collections of "consumers," they have sometimes been denied rights to pursue claims under HRS Chapter 480 (a powerful consumer protection statute) that are enjoyed by owners of single family houses.

3. Some stakeholders opposed paragraph (a)(11) as originally drafted (i.e., without the requirement that the board's resolution to establish a fining system be approved by a majority of all unit owners), and claimed that it would be a "weapon of mass destruction" in the hands of the wrong board.[3] They stated that associations without fining provisions in their bylaws should amend their bylaws or hire an attorney to send a letter demanding compliance. This makes little sense for the following reasons:

- The failure to follow condominium rules and regulations disrupts the quiet enjoyment of condominium residents and ultimately affects the reputation of the building and the value of its units. Allowing boards to impose fines, by law, helps to encourage compliance with project documents. The application of fair and reasonable fining systems has been instrumental in gaining owners' attention, and action, to correct behavioral problems of the residents of their units.
- Fining is an intermediate sanction, not a "weapon of mass destruction." If boards are prohibited from fining (as an early option) to resolve an issue, they must choose between two options: take legal action or do nothing.
- Legal action is expensive and time-consuming. An attorney's letter to an owner can easily cost the owner $150 to $200 in legal charges. Boards must carefully weigh the merits of legal action for minor rules infractions.
- In contrast, fines can act as an effective alternative and supplement to legal action. Fines can be imposed quickly and in much smaller increments than the cost of a letter from an attorney. Therefore, they are particularly effective for dealing with minor infractions.
- Legal fees are out-of-pocket costs, and they cannot easily be waived as a means of compromising with a violator.
- In contrast, fines are not out-of-pocket costs and the board can easily waive them if doing so will encourage the violator to comply. Indeed, suspending fines and penalties on the condition that violators "behave" is a common regulatory tool.
- As a further safeguard, the proposed law provides for notice and an opportunity to be heard (i.e., due process).
- If fining is not an option, most fiscally responsible boards will do nothing until such time as the situation becomes unbearable, the violation spreads to other units, or other unit owners threaten the directors for inaction.
- There is always a possibility that a board will impose an unreasonable fine, but that can occur whether the authority to fine is in the law or in the association's bylaws. Therefore, requiring associations to amend their bylaws to be able fine does not appear to serve any real purpose.

The Commission believes that paragraph (a)(11), in its final form (i.e., with the additional language requiring that that the board's resolution to establish a fining system be "approved by a majority of all unit owners at an annual meeting of the association or by the written consent of a majority of all unit owners") is a satisfactory resolution to the concerns raised.

4. "Notice and hearing" requirements such as those in paragraph (b)(2) are not meant to prohibit the association from taking immediate corrective action in appropriate situations. Just as traffic citations are given at the time of the infraction and may be contested at a later date, so may fines pursuant to paragraph (b)(2) be assessed at the time of infraction, with the opportunity to contest the fine at a later date. [A stakeholder expressed concern that paragraph (b)(2) might be read to prohibit associations from exercising "immediate fine" systems for unit owner/tenant actions that are hazardous and not immediately stopped, e.g., throwing items off balconies.]

§ ___: 5-5. Association; Limitations on Powers. (a) *Association dealing with developer*. 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*. 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

[3] *See, e.g.,* October 7, 2003 testimony of Richard J. Port.

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 condominiums 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 deduction of common expense payments for unpaid late charges, legal fees, fines, and interest*. No 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 the board adopts and distributes to all owners a policy stating 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*. No unit owner who requests legal or other information from the association, the board, 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.

(e) *Requirements for borrowing money*. Subject to any approval requirements and spending limits contained in the declaration or bylaws, the association may authorize the board to borrow money 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; provided that written notice of the purpose and use of the funds is first sent to all unit owners and owners representing fifty percent of the common interest vote or give written consent to such borrowing. In connection with such borrowing, the board 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. 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.

Real Estate Commission's Comment

1. UCA/UCIOA §3-102(b) is the source of subsection (a). UCIOA §3-102(c) is the source of subsection (b). HRS §514A-15.1, clarified, is the source of subsection (c). Subsection (d) is identical to HRS §514A-92.5. HRS §514A-82.3, modified, is the source of subsection (e).

2. In subsection (b), the term "adversely affects" (from UCIOA §3-102(c)) was changed to "unreasonably interferes with" (from HRS §514A-82(10)).

3. Subsection (c) is intended to require prior written notice of assessment of all costs of collection.

4. Although some stakeholders object to the broadening of the authority of associations to borrow money under subsection (e), others note that borrowing money is a very consumer/association friendly way of getting funds (as opposed to raising annual fees or special assessments).

§ ___: 5-6. Board; Powers and Duties. (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the board shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D.

(b) The board may not act on behalf of the association to amend the declaration or bylaws (sections ___: 2-2(11) and ___: 5-8(a)(6)), to remove the condominium from the provisions of this chapter (section ___: 2-17), or to elect members of the board or determine the qualifications, powers and duties, or terms of office of board members (section ___: 5-

6(e)); provided that nothing in this paragraph shall be construed to prohibit board members from voting proxies (section ___: 5-15) to elect members of the board; provided further that the board may fill vacancies in its membership.

(c) Within thirty days after the adoption of any proposed budget for the condominium, the board shall make available a copy of the budget to all the unit owners and shall notify each unit owner that they may request a copy of the budget.

(d) The declaration may provide for a period of developer control of the association, during which a developer, or persons designated by the developer, may appoint and remove the officers and members of the board. 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 the developer has 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 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, as described in a recorded instrument executed by the developer, be approved by the developer before they become effective.

(e) Not later than the termination of any period of developer control, the unit owners shall elect a board of at least three members, at least a majority of whom must be unit owners. The board shall elect the officers. Board members and officers shall take office upon election.

(f) At any regular or special meeting of the association, any member of the board may be removed and successors shall be elected for the remainder of the term to fill the vacancies thus created. 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, and, if removal and replacement is to occur at a special meeting, section ___: 5-13(b).

Real Estate Commission's Comment

1. UCA/UCIOA §3-103, modified, is the source of this section. HRS §514A-82(b)(1) is the source of subsection (f).

2. HRS §514A-82.4 (Duty of directors) states that "[e]ach director shall owe the association of apartment owners a fiduciary duty in the performance of the director's responsibilities." Subsection (a), by referencing HRS Chapter 414D and using the nonprofit corporate model, allows board members to obtain the benefits of the business judgment rule, now commonly applied by courts in the nonprofit context.[4]

3. The official comments to UCIOA (1994) §3-103 explains subsection (d), regarding transition of developer control to unit owner control of the association, as follows:

> [Subsection (d) recognizes] the practical necessity for the declarant to control the association during the developmental phases of a project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity. … Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner. …. Subsection (d) has been amended in the 1994 amendment to add a new fourth category regarding voluntary relinquishment of retained rights to control any aspect of the affairs of the association. This category frequently has been written into declarations under the Act. The amendment incorporates this practice and is important in order to track the time when statutes of limitation involving the declarant begin to run.

4. Subsection (e) requires that a board consist of a minimum of three members. The requirement in HRS §514A-82(a)(1)(B) that: "condominiums with more than one hundred individual apartment units shall have an elected board of not less

[4] *See, e.g.,* Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530 (1990).

than nine members unless not less than sixty-five per cent of all apartment owners vote by mail ballot, or at a special or annual meeting, to reduce the minimum number of directors" has not been incorporated in the recodified condominium law. The minimum nine-member board requirement has been problematic for resort projects and projects with a substantial number of off-island owners.

§ ___: 5-7. Board; Limitations. (a) Members of the board 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. 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.

(b) No resident manager or employee of a condominium shall serve on its board.

(c) An owner shall not act as a director of an association and an employee of the managing agent retained by the association.

(d) 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 incurred on behalf of the association.

(e) 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.

(f) 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 (d).

Real Estate Commission's Comment

1. Consistent with the goal of eliminating the artificial approach regarding bylaws in HRS §514A-82(a) and (b), and to help reduce the statutory requirements for condominium governing documents, appropriate provisions have been consolidated under separate sections (i.e., separate from the bylaws section). The following provisions from HRS Chapter 514A have been consolidated in this section: HRS §§514A-82(a)(12), modified, -82(a)(14), modified, -82(b)(7), modified, -82(b)(10), modified, -82(b)(11), identical, and -82(b)(12), identical.

2. Some stakeholders suggested that (in addition to resident managers, who are already prohibited from serving on the boards of their associations) managing agents, rental agents, any employees of associations, and their spouses be prohibited from serving on the boards of those associations because of potential conflicts of interest. Others pointed out that conflict of interest provisions are already in statute and should be enforced, it is not fair to turn these individuals into second class citizens when they have an ownership interest and the owners have elected them to the board, and the federal Fair Housing Act would prohibit discrimination against spouses. In the final draft of the recodification, employees of the association (including, but not limited to, resident managers) and owners who are employees of the managing agent retained by the association are prohibited from serving on the boards of those associations.

§ ___: 5-8. Bylaws. (a) A true copy of the bylaws shall be recorded in the same manner as the declaration. No amendment to the bylaws is valid unless the amendment is duly recorded.

(b) The bylaws shall provide for at least the following:

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

(2) Election by the board 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 directors and officers and the filling of vacancies;

(4) Which, if any, of its powers the board 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) The compensation, if any, of the directors;

(7) Subject to subsection (d), a method for amending the bylaws; and

(8) 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.

(c) The bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform.

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

(e) The bylaws may be amended at any time by the vote or written consent of at least sixty-seven percent of all unit owners. Any proposed bylaws with the rationale for the proposal may be submitted by the board or by a volunteer unit owners group. If submitted by that group, 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 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. The vote or written consent, to be valid, must be obtained within three hundred sixty-five days after mailing for a proposed bylaw submitted by either the board or a volunteer unit owners group. If the bylaw is duly adopted, then the board shall cause the bylaw amendment to be recorded. The volunteer unit owners group 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 three hundred sixty-five days after the original petition was submitted to the board.

This subsection shall not preclude any unit owner or volunteer unit owners group from proposing any bylaw amendment at any annual association meeting.

Real Estate Commission's Comment

1. HRS §514A-81, in part, is the source of subsection (a). UCA/UCIOA §3-106, modified, and HRS §§514A-82(a)(1)(E), identical, and 514A-82(a)(2), in part, are the sources of subsections (b) and (d). HRS §414D-136 is the source of subsection (c). 514A-82(b)(2), essentially identical, is the source of subsection (e). Consistent with the goal of eliminating the artificial approach regarding bylaws in HRS §514A-82(a) and (b), and to help reduce the statutory requirements for condominium governing documents, certain provisions currently in HRS §514A-82(a) and (b) have been incorporated in more appropriate statutory sections.

2. Regarding subsection (a), a stakeholder noted that there has sometimes been confusion between "recording" bylaws with the Bureau of Conveyances (or Land Court) versus the Department of Commerce and Consumer Affairs. There should have been no confusion. "To record", in HRS §514A-3, means "to record in accordance with chapter 502 *(Bureau of Conveyances)*, or to register in accordance with chapter 501 *(Land Court)*." In any case, the recodified condominium law leaves no room for confusion, as "Record, recordation, recorded, recording, etc." is defined in §___: 1-3 as "to record in the bureau of conveyances in accordance with chapter 502, or to register in the land court in accordance with chapter 501."

3. Regarding subsection (e), a property manager noted that, where time share owners are "owners," 1500 time share owners may own 10% of the project. It is important to remember, however, that time share governance issues are covered by HRS Chapter 514E, related administrative rules, and the time share governing documents.

§ ___: 5-9. Restatement of Declaration and Bylaws. (a) Notwithstanding any other provision of this chapter or of any other statute or instrument, an association may at any time restate the declaration or bylaws of the association to set forth all amendments thereto by a resolution adopted by the board.

(b) Subject to section ___: 1-13, an 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. 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 or 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 or bylaws and all prior amendments thereto.

Real Estate Commission's Comment

1. HRS §514A-82.2, essentially identical, is the source of this section.

§ ___: 5-10. Bylaws Amendment Permitted; Mixed Use Property; Representation on Board. (a) The bylaws of an association may be amended to provide that the composition of the board reflect the proportionate number of units for a particular use, as set forth in the declaration. For example, an association may provide that for a nine-member board where two-thirds of the units are for residential use and one-third is for non-residential 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 non-residential use units.

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

(1) A majority vote of the board; or

(2) A submission of the proposed bylaw amendment to the board from a volunteer unit owners group 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 bylaw amendment, the board shall mail a ballot with the proposed bylaw amendment to all of the unit owners of record. For purposes of this section only, the bylaws may initially be amended by a vote or written consent of the majority of the unit owners; and thereafter by at least 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.

(e) Election of the new board in accordance with an amendment adopted pursuant to this section shall be held at the next regular meeting of the association or at a meeting called in accordance with section ___: 5-13(b) for this purpose.

(f) As permitted in the declaration or bylaws, the vote of a non-residential unit owner shall be cast and counted only for the non-residential seats available on the board and the vote of a residential unit owner shall be cast and counted only for the residential seats available on the board.

(g) No petition for a bylaw amendment pursuant to paragraph (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 paragraph.

(h) This section shall not preclude the removal and replacement of any one or more members of the board pursuant to section ___: 5-6(f). Any removal and replacement shall not affect the proportionate composition of the board as prescribed in the bylaws as amended pursuant to this section.

Real Estate Commission's Comment

1. HRS §514A-82.15, modified slightly, is the source of this section. Rather than requiring election of the new board to be held within 60 days of the recordation of the amended bylaws, subsection (e) has been modified to allow the election to be held at the next regular meeting of the association or by special meeting in accordance with §___: 5-13(b).

§ ___: 5-11. Judicial Power to Excuse Compliance with Requirements of Declaration or Bylaws. (a) 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 ___: 5-8(d); 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 unit owners;

(5) A quorum requirement for meetings of unit owners.

(b) The board, on behalf of the association, shall by certified mail provide all unit owners with notice of the date, time, and place of any court hearing held pursuant to this section.

Real Estate Commission's Comment

1. The *Restatement of the Law, Third, Property (Servitudes)* §6.12, modified, is the source of this section.

2. Several practitioners, management companies, and unit owners have commented on the virtual impossibility of changing obsolete provisions (among others) contained in condominium declarations.

For example, in one old condominium, the elevator was so small that no one could fit any furniture bigger than a love seat into the elevator. The majority of unit owners (over 70%) wanted to modify the elevator so they could move bigger pieces of furniture up to their apartments. However, the declaration contained an owner-approval requirement for spending more than $2,000. Since first and second floor owners and others (for various reasons, including apathy) didn't care to approve spending for enlarging the elevator, it was not possible to get the necessary 75% unit owners' consent.[5] Ultimately, while such "spending limit" provisions might have had appeal to a buyer (initially) or to a developer who believes that it is the right "democratic" thing to do, it makes little sense in the long run for the people who have to live in the condominium since it becomes virtually impossible to change the declaration (even with its outdated dollar figure limits).

The *Restatement of the Law, Third, Property (Servitudes)*, recognizes this problem and addresses it in §6.12 – Judicial Power to Excuse Compliance with Requirements of the Governing Documents.[6] In its comments to §6.12, the Restatement explains its rationale as follows:

> The public and the property owners have substantial interests in the long-term viability of the common-interest community. The declaration, the foundational document setting the parameters of the community's authority, is usually drafted by the developer for whom the project's immediate financial success is generally more important than creation of a community that will function successfully in the long term. Through ignorance, inadvertence, reliance on poorly drafted forms, or lack of foresight, many declarations include provisions that impair the ability of the community or its association to function over the long term. The resulting problems have sometimes been corrected or ameliorated by legislation. However, remedial legislation is not yet available in many states and may not apply to some common-interest communities. A court has a general dispensing power, under principles of equity jurisdiction, to excuse compliance with requirements that significantly impede the functioning of common-interest communities and their associations. The interests of property owners and lenders who relied on the provisions of the declaration are protected by the requirement that the court find that compliance with the provision in question is unnecessary to protect their legitimate interests.

3. Restatement §6.12 is patterned after California Civil Code §§1356 and 1366. It also finds some support in case law (listed in Reporter's Note). Florida also has provisions allowing for the courts to excuse compliance with condominium governing documents under very specific circumstances.

§ ___: 5-12. Condominium Community Mutual Obligations. (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

[5] HRS §514A-11(11) allows declarations to be amended if at least 75% of the unit owners consent.

[6] Restatement §6.10, referenced in §6.12, deals with the common interest community's power to amend the declaration. The extensive comments, illustrations, Reporter's notes, and cross-references to §6.12 provide an excellent analysis of the issues surrounding the amendment of common interest community declarations.

submitted to this chapter are subject to this chapter and to the declaration and bylaws of the association adopted pursuant to this chapter.

(b) All agreements, decisions, and determinations lawfully made by the association in accordance with the voting percentages established in this chapter, the declaration, or the bylaws are binding on all unit owners.

(c) Each unit owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the covenants, conditions, and restrictions set forth in the declaration, the bylaws, and the house rules adopted pursuant thereto. 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 managing agent, resident manager, or board on behalf of the association or, in a proper case, by an aggrieved unit owner.

Real Estate Commission's Comment

1. This section is identical to HRS §§514A-87 and 514A-88.

Subpart 2. GOVERNANCE – ELECTIONS AND MEETINGS

§ ___: 5-13. Association Meetings. (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, 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 and proxies for the special meeting in accordance with the requirements of the bylaws and of this part.

(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 date, time, and place of the meeting and the items on the agenda, including the general nature and rationale of any proposed amendment to the declaration or bylaws, and any proposal to remove a member of the board; provided that this subsection shall not preclude any unit owner from proposing an amendment to the declaration or bylaws or to remove a member of the board at any annual association meeting.

(d) All association meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. If so provided in the declaration or bylaws, meetings may be conducted by any means that allow participation by all unit owners in any deliberation or discussion.

(e) All association meetings shall be held at the address of the condominium or elsewhere within the State as determined by the board; provided that in the event of a natural disaster, such as a hurricane, an association meeting may be held outside the State.

Real Estate Commission's Comment

1. UCA/UCIOA §3-108, modified, is the source of subsections (a), (b), and (c). Subsection (b) includes language from HRS §514A-82(b)(1), slightly modified. HRS §§514A-82(a)(16) and 514A-82(a)(17) – edited to separate association and board meetings – are the sources subsections (d) and (e), respectively.

2. Subsection (c) makes it clear that no prior notice is required for proposed bylaws amendments and board removals at annual association meetings. Professional registered parliamentarian Steve Glanstein notes that bylaws amendments and board removals can be considered at the annual meeting under new business. If this were not the case, boards could prevent bylaws amendments and board removals from being considered by simply not placing the proposals on the annual meeting agendas.

3. The Modern Rules of Order was initially added to subsection (d). After further consideration, reference to the Modern Rules of Order was deleted. Parliamentarian Glanstein notes that: "The Modern Rules of Order presents numerous problems. It fails to include numerous important parliamentary points that are relevant to any organization. It has incomplete methodology for handling points of order, appeals, and the motion to amend, and provides minimal guidance for interpreting bylaws."

4. Subsection (c) permits electronic mail (Internet) notice of unit owners' association meetings at the option of the unit

owner. [Note: The Commission also considered, but did not incorporate, HRS §414D-105 (Notice of Meeting), which allows nonprofit corporations to "give notice consistent with its bylaws of meetings of members in a fair and reasonable manner" and goes on to define "fair and reasonable."]

5. Subsection (d) authorizes conducting association meetings by teleconference, videoconference, or other means of conducting remote meetings if it is provided for in the declaration or bylaws. Associations (especially larger associations) should exercise caution in adopting such a provision in their declaration or bylaws, however, because allowing such meetings may interfere with the conduct of business. In addition, some bylaws require secret ballots for elections, which would not be possible in teleconference or videoconference meetings.

§ ___: 5-14. Association Meetings; Minutes. (a) Minutes of meetings of the association shall be approved at the next succeeding regular meeting or by the board, within sixty days after the meeting, if authorized by the owners at an annual meeting. If approved by the board, owners shall be given a copy of the approved minutes or notified of the availability of the minutes within thirty days after approval.

(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.

Real Estate Commission's Comment

1. HRS §514A-83.4 – edited to separate association and board meetings – is the source of this section.

2. Subsection (a) has been modified to allow boards to approve minutes of association meetings if authorized by the owners at an annual meeting. Permitting the association to authorize the board to approve association minutes is consistent with all of the editions of Robert's Rules of Order since 1876. Robert's Rules of Order Newly Revised 10th edition, page 457 (lines 21-26) states that: "When the next regular business session will not be held within a quarterly time interval (see p. 88), and the session does not last longer than one day, or in an organization in which there will be a change or replacement of a portion of the membership, the executive board or a committee appointed for the purpose should be authorized to approve the minutes." (Emphasis added.)

§ ___: 5-15. Association Meetings; Voting; Proxies. (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 by any of the other owners of the unit to the person presiding over the meeting before the polls are closed.

(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 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) A proxy, to be valid, must:

(1) Be delivered to the secretary of the 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 association, the date of the meeting of the association, the printed names and signatures of the persons giving the proxy, the units for which the proxy is given, to whom 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 as a whole and that the vote be made on the basis of the preference of the majority of the directors present at the meeting; or

(C) To those directors present at the meeting with the vote to be shared with each director 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) 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) 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) 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) *Use of association funds to distribute proxies*.

(1) Any board 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) A board 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).

(i) No managing agent or resident manager, or their employees, shall solicit, for use by the managing agent or resident manager, any proxies from any unit owner of the association that retains the managing agent or employs the resident manager, nor shall the managing agent or resident manager cast any proxy vote at any association meeting except for the purpose of establishing a quorum.

(j) No board 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 may adopt rules regulating reasonable time, place, and manner of such solicitations or distributions, or both.

Real Estate Commission's Comment

1. UCA/UCIOA §3-110, modified, is the source of subsections (a), (b), and (c). HRS §514A-83.2, modified, is the source of subsections (d), (e), (f), and (g). HRS §514A-82(b)(4), modified, is the source of subsections (h) and (i). HRS §514A-83.3, in part, is the source of subsection (j).

2. Voting processes should, in addition to being fundamentally fair, be practical. To that end, subsection (b) explicitly allows voting by mail and electronic transmission (i.e., Internet voting). Requiring votes by mail or electronic transmission to be done through "duly executed directed proxies" resolves procedural concerns relating to mail-in and electronic voting (e.g., ability to revoke the proxy) raised by some stakeholders. Some stakeholders are uncomfortable with electronic voting, but as long as security, validation, and auditing concerns are addressed, it makes no sense to prohibit such a valuable tool of democracy. Ultimately, permitting voting by mail and electronic transmission encourages participation by as many association members as possible.

3. The statutory requirement for a "for quorum purposes only" box on the standard proxy form authorized by the association (HRS §514A-83.2(a)(3)(A)), which tends to encourage the submission of "for quorum purposes only" proxies, has been deleted. Such proxies often result in "opening meeting doors" but not allowing any business to be done. Associations suffer almost pointless additional mailing and meeting expenses because of this. Contrary to the assertion of some stakeholders, "for quorum purposes only" proxies are not neutral.[7] They count as "no" votes for any business at the association's meeting, making it much more difficult for any business to be done since all "for quorum purposes only" proxies are counted against any proposal (including elections) actually voted on by the association. It should be noted that unit owners will still be able to execute a proxy

[7] *See, e.g.,* October 7, 2003 testimony of Richard J. Port.

stating that their proxy can only be used for quorum purposes; it just won't be a statutorily required box on the standard proxy form authorized by the association.

4. Note that unit owners, including directors, using their own funds are not restricted by the provisions of subsection (h).

5. Subsection (h) codifies a property manager's suggestion that the 100 word limit to proxy solicitation statements be eliminated in favor of providing that the association will mail a single-sided 8 ½" x 11" proxy solicitation at the association's expense. This is consistent with the provision's original intent (i.e., limiting the cost of producing large amounts of information for an owner at the association's expense).

6. Some stakeholders suggested that (in addition to managing agents and resident managers, who are already prohibited from soliciting proxies) rental agents, any employees of associations, and their spouses be prohibited from soliciting proxies because of potential conflicts of interest. Others pointed out that it is not fair to turn these individuals into second class citizens when they have an ownership interest and the federal Fair Housing Act would prohibit discrimination against spouses. In the final draft of the recodification, employees of the managing agent and resident manager retained by the association are prohibited from soliciting proxies.

§ ___: 5-16. Association Meetings; Purchaser's Right to Vote. The purchaser of a unit pursuant to a recorded agreement of sale 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 or bylaws;

(9) Any removal of the project from the provisions of this chapter; and

(10) Any other matter that would substantially affect the security interest of the seller.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-83.

§ ___: 5-17. Board Meetings. (a) All meetings of the board, other than executive sessions, shall be open to all members of the association, and association members who are not on the board may participate in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the board votes otherwise.

(b) The board, 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) Necessary to protect the attorney-client privilege of the association; or

(4) 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) All board meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. Unless otherwise provided in the declaration or bylaws, a board may permit any meeting to be conducted by any means of communication through which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. If

permitted by the board, any unit owner may participate in a meeting conducted by a means of communication through which all participants may simultaneously hear each other during the meeting, provided that the board may require that the unit owner pay for the costs associated with such participation.

(d) The board shall meet at least once a year. Notice of all board meetings shall be posted by the managing agent, 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.

(e) A director shall not vote by proxy at board meetings.

(f) A director shall not vote at any board meeting on any issue in which the director has a conflict of interest. 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 subsection, means an issue in which a director has a direct personal or pecuniary interest not common to other members of the association.

Real Estate Commission's Comment

1. Subsection (a) is identical to HRS §514A-83.1(a). HRS §§514A-83.1(b) and 421J-5(d), modified, are the sources of subsection (b). HRS §§514A-82(a)(16) and 414D-143(c) are the sources of subsection (c). HRS §514A-82(b)(9), modified, is the source of subsection (d). Subsection (e) is identical to HRS §421J-5(e). Subsection (f) is identical to the pertinent provisions of HRS §§514A-82(a)(13), 514A-82(b)(5), and Robert's Rules of Order Newly Revised.

2. Paragraph (b)(4) recognizes that, in addition to personnel and litigation matters, it is appropriate to allow boards to go into executive session to discuss and vote on matters dealing with contracts, leases, and other commercial transactions while they are being negotiated. Such negotiations often involve confidential information (e.g., an association's appraiser's estimates and advice during lease-to-fee negotiations, and review of competing bids from vendors during a sealed bidding process). Paragraph (b)(4) allows associations to protect their interests during the pendency of these negotiations.

3. Some stakeholders suggested that the Commission make it clear that directors have the right to attend any committee meetings, whether they sit on the committee or not, unless they have a conflict of interest on the subject matter. Others disagree. They point out that associations could be damaged by such a requirement.

Example: A director (otherwise very helpful) is known for asking questions of prospective employees that are illegal under current law. The director has no conflict of interest, but the director's participation in the interview process would subject the association to significant liability. Should State law force the association to allow this director's participation in its personnel committee's interview process? The Commission does not believe so.

4. The Modern Rules of Order was initially added to subsection (c). After further consideration, reference to the Modern Rules of Order was deleted. Parliamentarian Glanstein notes that: "The Modern Rules of Order presents numerous problems. It fails to include numerous important parliamentary points that are relevant to any organization. It has incomplete methodology for handling points of order, appeals, and the motion to amend, and provides minimal guidance for interpreting bylaws."

5. Subsection (c) authorizes teleconferencing, videoconferencing, and other means of conducting remote meetings.

6. Stakeholders questioned the qualifier "practicable" in HRS §514A-82(b)(9). It is deleted from the language of subsection (d)

7. Regarding subsection (g), some stakeholders proposed that the "nature of the conflict of interest" be recorded in meeting minutes, not just the fact that a disclosure was made. Others disagreed, citing privacy issues (e.g., issues involving AIDS or other health matters), and noted that the director with a conflict abstaining from voting is the key. More importantly, consistent with Robert's Rules of Order Newly Revised, minutes should reflect what was done at a meeting, not what was said. While it might be good practice for a director to protect himself or herself by providing written disclosure of a conflict of interest, it should not be mandated in State law.

§ ___: 5-18. Board Meetings; Minutes. (a) Minutes of meetings of the board 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 shall be approved no later than the second succeeding regular meeting.

(c) Minutes of all meetings of the board 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.

Part V. Management of Condominium

Real Estate Commission's Comment

1. HRS §514A-83.4 – edited to separate association and board meetings – is the source of this section.

Subpart 3. OPERATIONS

§ ___: 5-19. Operation of the Property. The operation of the property shall be governed by this chapter and the declaration and bylaws.

Real Estate Commission's Comment

1. HRS §514A-81, modified, is the source of this section.

§ ___: 5-20. Managing Agents. (a) Every managing agent shall:

(1) Be a:

(A) Licensed real estate broker in compliance with chapter 467 and the rules of the commission. With respect to any requirement for a corporate managing agent in any declaration or bylaws recorded before the effective date of this chapter, any managing agent organized as a limited liability company shall be deemed to be organized as a corporation for the purposes of this paragraph, unless the declaration or bylaws are expressly amended after the effective date of this chapter to require that the managing agent be organized as a corporation and not as a limited liability company; or

(B) Corporation 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 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 association managed by the managing agent; provided that the amount of the fidelity bond shall not be less than $20,000 nor greater than $500,000. 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 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 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;

(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 an association, and apply the fidelity bond proceeds, if any, to reduce the association's loss. If more than one association suffers a loss, the managing agent shall divide the proceeds among the associations in proportion to each association's loss. An association may request a court order requiring the managing agent to act promptly and diligently to recover from the fidelity bond. If an association cannot recover its loss from the fidelity bond proceeds of the managing agent, the 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 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) The registration 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.

Real Estate Commission's Comment

1. HRS §514A-95, modified, is the source of this section. Subsection (e) is new.

2. Paragraph (a)(1) has been amended to allow a managing agent to organize as limited liability company or a limited partnership. The Uniform Limited Liability Company Act was not enacted until 1996, and many of the largest condominium management firms in recent years have organized as limited liability companies or limited partnerships.

3. After further consideration, the Commission does not believe that the change made by Act 129 (SLH, 2002) was wise. At least part of the theory behind exempting licensed, active, real estate brokers from the registration and fidelity bond requirements of this section is that victims of such real estate brokers would have recourse against the Real Estate Recovery Fund. *See*, HRS §467-16, et seq. Such a remedy, however, is woefully inadequate as a few "bad acts" involving large condominiums managed by such real estate brokers could easily result in claims exceeding available Recovery Fund monies. The exemption from the fidelity bond requirement for licensed, active real estate brokers has been deleted in subsection (d).

4. The 2003 Legislature passed a resolution (SCR 62) directing the Auditor to conduct a "sunrise review" regarding certification or licensure of condominium managing agents.

§ ___: 5-21. Association Employees; Background Check; Prohibition. (a) The board, managing agent, or resident manager, upon the written authorization of an applicant for employment as a security guard or resident manager or for a position that 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, managing agent, or resident 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 purposes of this section, the criminal history disclosure made by the applicant may be verified by the board, managing agent, resident manager, or other responsible party, if so directed by the board, managing agent, or resident 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 an association, managing agent, or resident 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, managing agent, or resident manager for acts and omissions of the employee hired.

(b) 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 sixty-seven percent of the unit owners.

Real Estate Commission's Comment

Part V. Management of Condominium

1. Subsection (a) is essentially identical to HRS §514A-82.1. Subsection (b) is essentially identical to HRS §514A-82(b)(8).

§ ___: 5-22. Management and Contracts; Developer, Managing Agent, and Association. (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 association, shall comply with the requirements of sections §___: 5-3, ___: 5-37, and ___: 3-22.

(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 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.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-84(b) and (c). HRS §514A-84(a) has been replaced by the provisions of §___: 5-23.

§ ___: 5-23. Termination of Contracts and Leases of Developer. If entered into before the board elected by the unit owners pursuant to section ___: 5-6(e) 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 within a period of one hundred eighty days after the board elected by the unit owners pursuant to section ___: 5-6(e) takes office, upon not less than ninety days notice to the other party. This section does not apply to: (i) any lease or other agreement 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.

Real Estate Commission's Comment

1. UCA/UCIOA §3-105, modified, is the source of this section.

§ ___: 5-24. Transfer of Developer Rights. (a) A 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 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 the transferor by this chapter, if any. 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 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 developer rights, but transfers other 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 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 developer right by a successor developer who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument 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 request, succeeds to all developer rights related to that property held by that developer. The judgment or instrument conveying title must provide for the transfer of only the 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 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 developer rights held by that developer to a successor developer.

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

(1) A successor to any 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 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:

(A) On a developer which relate to the successor's exercise or nonexercise of developer rights; or

(B) On the transferor, other than:

(i) Misrepresentations by any previous developer;

(ii) Warranty obligations on improvements made by any previous developer, or made before the condominium was created;

(iii) Breach of any fiduciary obligation by any previous developer or the developer's appointees to the board; or

(iv) 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, and who may not exercise any other developer right, is not subject to any liability or obligation as a developer, except the obligation to provide a public report, any liability arising as a result thereof, and the obligations under part III.

(4) A successor to all 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 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 the transferor to control the board 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 developer rights under this subsection, the successor developer is not subject to any liability or obligation as a developer other than liability for the developer's acts and omissions under section ___: 5-6(d).

(f) Nothing in this section subjects any successor to a 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.

Real Estate Commission's Comment

1. UCA/UCIOA §3-104, modified slightly, is the source of this section.

§ ___: 5-25. Upkeep of Condominium. (a) Except to the extent provided by the declaration or bylaws, the association is responsible for the operation of the property, 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 the owner's 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; provided that the association shall not be responsible to pay the costs of removing any finished surfaces or other barriers that impede its ability to maintain and repair the common elements.

(b) The unit owners shall have the irrevocable right, to be exercised by the board, to have access to each unit at any time as may be necessary for making emergency repairs to prevent damage to the common elements or to another unit or units.

Real Estate Commission's Comment

1. UCA/UCIOA §3-107, modified, is the source of subsection (a). HRS §§514A-13(f) and 514A-82(b)(6), clarified, are

the sources of subsection (b).

2. Earlier drafts of the recodification incorporated UCA/UCIOA §3-107(b), which among other things mandates that "the developer alone is liable for all expenses in connection with real estate subject to development rights," as subsection (c). The subsection has been deleted in the final draft because it may create confusion (regarding who is responsible for what) where none exists now.

§ ___: 5-26. Upkeep of Condominium; High Risk Components. (a) The board may, after notice to all unit owners and an opportunity for owner comment, determine that certain portions of the units, or certain objects or appliances within the units, pose a particular risk of damage to other units or the common elements if they are not properly inspected, maintained, repaired or replaced by owners. For example, these items might include washing machine hoses and water heaters. Those items determined by the board to pose a particular risk are referred to in this section as "high-risk components."

(b) With regard to items designated as high-risk components, the board may require any or all of the following:

(1) Inspection (i) at specified intervals or (ii) upon replacement or repair by the association or by inspectors designated by the association.

(2) Replacement or repair at specified intervals whether or not the component is deteriorated or defective.

(3) Replacement or repair (i) meeting particular standards or specifications established by the board, (ii) including additional components or installations specified by the board, or (iii) using contractors with specific licensing, training, or certification approved by the board.

(c) The imposition of requirements by the board under subsection (b) above shall not relieve unit owners of obligations regarding high-risk components as set forth in the declaration or bylaws including, without limitation, the obligation to maintain, repair and replace such components.

(d) If a unit owner fails to follow requirements imposed by the board pursuant to this section, the association shall, after reasonable notice, have the right to enter the unit to perform said requirements with regard to such high-risk components at the sole cost and expense of the unit owner, which costs and expenses shall be a lien on the unit as provided in section ___: 5-34. Nothing in this section shall be deemed to limit the remedies of the association for damages, or injunctive relief, or both.

Real Estate Commission's Comment

1. This is a new section. It is based on an article entitled "Create Policy to Deal with 'High-Risk Components' Before Disaster Strikes" from the Community Association Management Insider (July 2003).

§ ___: 5-27. Upkeep of Condominium; Disposition of Unclaimed Possessions. (a) When personalty in or on the common elements of a project has been abandoned, the board 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's 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 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 association.

Real Estate Commission's Comment

1. This section is identical to HRS §514A-93.5.

§ ___: 5-28. Additions to and Alterations of Condominium. (a) *Certain work prohibited*. No unit owner shall do

any work that could jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement, as reasonably determined by the board.

(b) *Material additions and alterations*. Subject to the provisions of the declaration, no unit owner may make or allow any material addition or alteration, or excavate an additional basement or cellar, without first obtaining the written consent of sixty-seven percent of the unit owners, the consent of all unit owners whose units or appurtenant limited common elements are directly affected, and the approval of the board, which shall not unreasonably withhold such approval. The declaration may limit the board's ability to approve or condition a proposed addition or alteration, provided that the board shall always have the right to disapprove a proposed addition or alteration that the board reasonably determines could jeopardize the soundness or safety of the property, impair any easement, or interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of the property.

(c) *Nonmaterial additions and alterations*. Subject to the provisions of the declaration, nonmaterial additions to or alterations of the common elements or units, including, without limitation, the installation of solar energy devices, or 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, shall require approval only by the board, which shall not unreasonably withhold such approval, and such percentage, number, or group of unit owners as may be required by the declaration or bylaws.

"Nonmaterial additions and alterations", as used in this section, means an addition to or alteration of the common elements or a unit that does not jeopardize the soundness or safety of the property, reduce the value thereof, impair any easement, 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 be ready to be made operational in order to qualify as a "solar energy device".

(d) *Telecommunications equipment*.

(1) Notwithstanding any other provisions to the contrary in this chapter or in any declaration or bylaws:

(A) The board 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, common elements, and easements appurtenant to each unit, or to be a structural alteration or addition to any building constituting a material change in the plans of the project filed in accordance with sections ___: 2-3 and ___: 2-4; provided that no such installation shall directly affect any nonconsenting unit owner.

(2) Notwithstanding any other provision to the contrary in this chapter or in any declaration or bylaws:

(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, common elements, and easements appurtenant to each unit or to be a structural alteration or addition to any building constituting a material change in the plans of the project filed in accordance with sections ___: 2-3 and ___: 2-4.

(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.

Part V. Management of Condominium

Real Estate Commission's Comment

1. HRS §514A-89, rewritten for clarity and modified slightly, is the source of subsections (a), (b), and (c). Subsection (d) is essentially identical to HRS §514A-13.4.

2. HRS §514A-89's mandate that solar energy devices are, by definition, "nonmaterial structural additions to the common elements" (incorporated in the recodification), has the laudable goal of increasing use of alternative energy sources and lessening Hawaii's dependence on fossil fuels. Some stakeholders have stated, however, that allowing unit owners to install solar energy devices at condominium projects with just the approval of the board and such other owners as may be required by the declaration or bylaws creates serious problems. For example, such installations can and do invalidate roof warranties for entire buildings, increase maintenance costs, and create the potential of roof problems that all owners will have to pay for. Moreover, it is virtually impossible to reasonably decide which owner gets which portion of the common element rooftop for installation of his or her solar energy device. The United States Supreme Court has held that a state statute that allowed a cable operator to install its cable facilities on a landlord's property constituted a taking under the Fifth Amendment.[8] A similar analysis applies here. One owner is taking the common element rooftop for his or her exclusive use without compensation to other owners and with the potential for creating serious problems for the association. Ultimately, this is a matter of legitimate, but competing, public policies that the Legislature should consider further and resolve. The Real Estate Commission is not the proper body to make this decision.

§ ___: 5-29. Tort and Contract Liability; Tolling of Limitation Period. (a) A unit owner is not liable, solely by reason of being a unit owner, for any 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, as the same may be established through adjudication. Whenever the developer is liable to the association under this section, the developer is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association.

(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 or she 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).

Real Estate Commission's Comment

1. UCA/UCIOA §3-111, modified, is the source of this section.

§ ___: 5-30. Aging in Place; Limitation on Liability. (a) The association, its directors, unit owners, and their agents and tenants, acting through the board, shall not have any legal responsibility or legal liability, with respect to any actions and recommendations the board takes on any report, observation, or complaint made, or with respect to any recommendation or referral given, which relates to an elderly unit owner who, because of the problems of aging and aging in place enumerated below may require services and assistance to maintain independent living in the unit in which the elderly owner resides so that the resident will not pose any harm to self or to others, and will not be disruptive to the condominium community:

(1) Being unable to clean and maintain an independent unit.

(2) Being mentally confused.

(3) Being abusive to others.

(4) Being unable to care appropriately for oneself.

(5) Being unable to arrange for home care.

(6) Feeling alone and neglected.

(7) Making inappropriate requests of others for assistance.

[8] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

For purposes of this section, "elderly" means age sixty-two and older.

(b) *No liability for assessments and recommendations.* Upon a report, observation or complaint relating to an elderly owner aging or aging in place which notes a problem similar in nature to the problems enumerated in subsection (a), the board may, in good faith, and without legal responsibility or liability, request a functional assessment regarding the condition of an elderly unit owner as well as recommendations for the services which the elderly owner may require to maintain a level of independence that enables such owner to avoid any harm to self or to others, and to avoid disruption to the condominium community. The board may, upon request, or unilaterally, and without legal responsibility or liability, recommend available services to an elderly owner which might enable such elderly owner to maintain a level of independent living with assistance, enabling in turn, such elderly owner to avoid any harm to self or others, and to avoid disruption to the condominium community.

(c) *No affirmative duty regarding assessments and recommendations.* There is no affirmative duty on the part of the association, its board, the unit owners, or their agents or tenants to request or require an assessment and recommendations with respect to an elderly unit owner when the owner may be experiencing the problems related to aging and aging in place enumerated in subsection (a). The association, its board, unit owners, and their agents and tenants are not legally responsible or liable for not requesting or declining to request a functional assessment of, and recommendations for, an elderly owner regarding problems relating to aging and aging in place.

(d) *No liability for actions filed.* In the event an elderly unit owner ignores or rejects a request for, or the results from, an assessment and recommendations, the association, with no liability for cross-claims or counterclaims, may file appropriate information, pleadings, notices, or the like, with appropriate agencies or courts to seek an appropriate resolution for the condominium community and for the elderly owner.

(e) Costs and fees for assessments, recommendations, and actions contemplated in this section shall be as set forth in the declaration or bylaws.

(f) This section shall not be applicable to any condominium that seeks to become licensed as an assisted living facility pursuant to chapter 90, title 11, Hawaii Administrative Rules, as amended.

Real Estate Commission's Comment

1. This is a new section. It was added at the request of the working group convened pursuant to Act 185 (SLH, 2003).[9] The Commission notes that associations should undertake assessments pursuant to this section only as a last resort after notice to the resident, next of kin, or other responsible party fails to gain the cooperation and behavior necessary to live independently in the condominium community.

§ ___: 5-31. Insurance. (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, managing agent or resident 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, in an amount equal to $500 multiplied by the number of units; provided that the amount of the fidelity bond required by this paragraph shall not be less than $20,000 nor greater than $200,000.

(B) All management companies that are responsible for the funds held or administered by the

[9] *See,* e-mail testimony of Dianne M. Okumura, RN, MPH, Department of Health, Health Care Assurance, and Emmet T. White, Jr., dated October 7, 2003.

association must be covered by a fidelity bond as provided in section ___: 5-20(a)(3). The association shall have standing to make a loss claim against the bond of the managing agent as a party covered under the bond.

(C) The board 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.

(b) *Attached units; improvements and betterments*. If a building contains attached units, the insurance maintained under paragraph (a)(1), to the extent reasonably available, must include the units, the limited common elements, except as otherwise determined by the board, 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, "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) *Detached units.* If a project contains detached units, then notwithstanding the requirement that associations obtain the requisite coverage, the insurance to be maintained under paragraph (a)(1) may be obtained separately for each unit by the unit owners; provided that the requirements of paragraph (a)(1) shall be met, and provided further that evidence of such insurance coverage shall be delivered annually to the association. In such event, the association shall be named as an additional insured.

(d) *Deductibles.* The board 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.

(e) *Other coverages.* The declaration or bylaws may require the association to carry any other insurance, including workers compensation, employment practices, environmental hazards, and equipment breakdown, the board considers appropriate to protect the association, the unit owners, or officers, directors, or agents of the association. 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.

(f) *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.

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

(g) *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.

(h) *Adjustment of losses; distribution of proceeds.* Any loss covered by the property policy under paragraph (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.

(i) *Mandatory unit owner coverage.* The board may, under the declaration or bylaws, require 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 the owner's guests, tenants, or invitees, or regardless of any negligence originating from the unit. The personal liability of a unit owner 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.

(j) *Certificates of insurance.* Contractors and vendors (except public utilities) doing business with an association must provide certificates of insurance naming the association, its board, and its managing agent as additional insured parties.

(k) *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 non-residential use.

(l) *Settlement of claims.* Any insurer defending a liability claim against an 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.

Real Estate Commission's Comment

1. §765 Illinois Compiled Statutes (ILCS) 605/12, modified, is the basic source of this section. Paragraph (a)(3)(A) incorporates the language of HRS §514A-95.1(a)(1) regarding fidelity bonds, modified by raising the maximum amount of the fidelity bond required by law from $100,000 to $200,000. Subsection (e) incorporates language from HRS §514A-86(a) regarding flood insurance.

2. Subsections (b) and (c) distinguish between buildings containing attached and detached units.[10]

§ ___: 5-32. Association Fiscal Matters; Assessments for Common Expenses. (a) Except as provided in section ___: 2-11, 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 or made available to unit owners at least annually by the board.

(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 such owner's 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) In the case of 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. Any such grantor or grantee is, however, entitled to a statement from the board, 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) No unit owner may exempt himself or herself from liability for his or her contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of the owner's unit. Subject to

[10] For an excellent discussion of the issue, *see,* the official comment to UCA/UCIOA §3-113(b). The Acts do not mandate association insurance on units in town house or other arrangements in which there are no stacked units. If the developer wishes, however, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units. UCA/UCIOA §3-113 and their official comments also attempt to clarify the complex issue of what is a common element and what is a unit with respect to insurance coverage.

such terms and conditions as may be specified in the bylaws, any unit owner may, by conveying his or her unit and common interest to the board on behalf of all other unit owners, exempt himself or herself from common expenses thereafter accruing.

(h) The board, 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.

Real Estate Commission's Comment

1. UCA/UCIOA §3-115, modified, is the source of subsections (a) through (e).

2. Subsections (f) through (h) are essentially identical to HRS §§514A-91, 514A-92, and 514A-92.2, respectively.

§ ___: 5-33. Association Fiscal Matters; Collection of Unpaid Assessments from Tenants. (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, 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 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 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 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.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-90.5.

§ ___: 5-34. Association Fiscal Matters; Lien for Assessments. [*Repeal and reenactment on December 31, 2007. L 2003, c 80, §2.*] (a) All sums assessed by the 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 association, and costs and expenses including attorneys' fees provided in such mortgages.

The lien of the 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, acting on behalf of the 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, acting on behalf of the association, unless prohibited by the declaration, may bid on the unit at foreclosure sale, and acquire and hold, lease, mortgage, and convey the unit. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.

(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or assessments by the association chargeable to the unit which became due prior to the acquisition of title to the unit by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the unit shall be deemed to acquire title and shall be required to pay the unit's share of common expenses and assessments beginning:

(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 (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the unit shall be deemed to acquire title upon recordation of the instrument of conveyance.

(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 pays all association assessments within thirty days of the date of suspension, the unit owner may ask the arbitrator to recommence the arbitration proceedings. If the owner fails to pay all association assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The unit owner shall be entitled to a refund of any amounts paid to the association which are not owed.

(e) In conjunction with or as an alternative to foreclosure proceedings under subsection (a), where a unit is owner-occupied, the association may authorize its managing agent or board 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 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 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 may specially assess the amount of the unpaid regular monthly common assessments for common 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 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 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 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.

Real Estate Commission's Comment

1. HRS §514A-90, as amended and re-enacted by the 2003 Legislature, is the source of this section.

2. The condominium association "priority of lien" issue has been a contentious one for years. The first draft of the recodification incorporated the provisions of UCA/UCIOA § 3-116 (Lien for Assessments).[11] A number of stakeholders opposed the provisions of UCA/UCIOA §3-116,[12] and the existing provisions of HRS §514A-90 were incorporated without change.

[11] For an excellent discussion of the issues involved with the UCA/UCIOA limited lien priority, *see*, Winokur, James L., "Meaner Lienor Community Associations: The 'Super Priority' Lien and Related Reforms Under the Uniform Common Interest Ownership Act," 27 *Wake Forest L. Rev.*353 (1992).

Part V. Management of Condominium

§ ___: 5-35. Association Fiscal Matters; Other Liens Affecting the Condominium. (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 the common expense funds of the association. 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 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 the owner's 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.

Real Estate Commission's Comment

1. UCA/UCIOA §3-117, modified, is the source of this section.

§ ___: 5-36. Association Fiscal Matters; Budgets and Reserves. (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 that 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) 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.

[12] *See, e.g.*, May 18, 2001 letter from the Hawaii Bankers Association to Gordon M. Arakaki.

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

(f) 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.

(g) 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 that has not prepared an annual operating budget and reserve study shall have the burden of proving it has complied with this section.

(h) 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 twenty-year period, except in an emergency; provided that it does not include a projection of special assessments or loans during that twenty-year period, except in an emergency.

"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;

(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; or

(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.

Real Estate Commission's Comment

1. HRS §514A-83.6, modified slightly, is the source of this section.

2. Some property managers strongly recommended that only accrual basis accounting be allowed. They believe that a cash system does not reflect the true financial position of an association. They believe that receivables and payables must be recorded and that, essentially, is part of an accrual accounting system.[13] Others cautioned that there must be a clear distinction between "budget" and "reporting". Accrual budgets provide that all income and charges be recorded in the period in which they occur, while cash budgets may not account for everything and that would be a problem. Monthly financial reports are a different matter. Proponents of cash basis month financial reports state that it takes much more work to prepare an accrual basis financial

[13] *See also,* CAI Best Practices publication: http://www.cairf.org/research/bpfinancial.pdf). For another fairly good explanation of cash basis accounting, accrual basis accounting, and tax basis accounting, see: http://www.commercialcarrieruniversity.com/book1/bk1_ch6.htm.

report. They say that, if accrual reporting is required, the cost of accounting will increase and it will take longer to get reports out (i.e., instead of getting financial reports in three weeks, it could take twice as long to get a true accrual report). Late reports are of less value in managing a property. Finally, most small condominiums do not need to know about things like depreciation on a monthly basis. Ultimately, proponents of cash basis financial reports worry that accounting purists want GAAP,[14] no matter what the practical concerns or cost. Paragraph (a)(2) incorporates, without change, the language of HRS §514A-83.6(a)(2) regarding the use of cash or accrual basis.

3. There may be potential to use community facilities district bond financing in some situations. (*See*, HRS §46-80.1.) The philosophical basis for bond financing of public facilities is that those who use such facilities should pay for them. When government builds a public facility, money is borrowed through the sale of bonds secured by the full faith and credit of the governmental body. The bond is repaid with tax dollars over a period of time that roughly corresponds to the life of the public facility. The bottom line is that taxpayers are paying for the public facility during the time they are using the facility.

§ ___: 5-37. Association Fiscal Matters; Handling and Disbursement of Funds. (a) The funds in the general operating account of the 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, located in the State, or out-of-state pursuant to a resolution adopted by the board, and whose deposits are insured by an agency of the United States government;

(2) Held by a corporation authorized to do business under article 8 of chapter 412;

(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

[14]Generally accepted accounting principles (GAAP) are those principles established by the Financial Accounting Standards Board (FASB), the AICPA, and other published literature. These principles set forth how specific transactions should be reported; i.e., investments should be reported at fair value, while property and equipment should be reported at depreciated cost. In contrast to other forms of accounting, such as the cash basis, GAAP financial statements are prepared on the accrual basis. Certain standards and disclosures are additionally required.

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. 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.

(d) A managing agent or board 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 association shall be guilty of a class C felony.

Real Estate Commission's Comment

1. HRS §514A-97, modified, is the source of this section.

2. Some stakeholders mistakenly characterized changes to subsection 5-37(c) contained in earlier drafts of the recodification as allowing "speculation with association funds." In all earlier versions of the recodification, the only change was removing the "in-State" deposit requirement and adding additional, stricter, requirements regarding the types of financial institutions into which association funds may be deposited. No "speculation with association funds" was ever allowed by changes made in subsection 5-37(c) [HRS §514A-97(c)]. The additional, stricter, requirements regarding the types of financial institutions into which association funds may be deposited have been deleted, however, in the final draft of the recodification because of the confusion caused by the mischaracterizations. The Commission also added a requirement that the board adopt a resolution if association funds are to be deposited in an out-of-state financial institution.

3. It was also been suggested that State law explicitly allow a prudent percentage of association funds to be invested in higher yielding instruments. Some stakeholders, however, strongly object to allowing association funds to be deposited or invested in anything other than banks, credit unions, and Treasury bills.

4. Subsection (d) was amended to clarify that only unverifiable orally instructed transfers over the telephone are prohibited. Facsimile and e-mail transfers, as well as properly set up automatic bill payments through electronic transfers are obviously permitted. The key is to have a verifiable "paper trail."

§ ___: 5-38. Association Fiscal Matters; Audits, Audited Financial Statement, Transmittal. (a) The 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 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 ___: 5-15(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.

Real Estate Commission's Comment

1. HRS §514A-96, clarified, is the source of this section.

§ ___: 5-39. Association Fiscal Matters; Lease Rent Renegotiation. (a) Notwithstanding any provision in the declaration or bylaws, 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 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; provided that the association's representation in the renegotiation of lease rent must be on behalf of at least two lessees. All costs and expenses incurred in such representation shall be a common expense of the association.

(b) Notwithstanding subsection (a), 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.

(c) In any project where the association is a lessor or sublessor, the association shall fulfill its obligations under this section by appointing independent counsel to represent the lessees in the negotiations and proceedings related to the rent renegotiation. Said counsel shall then act on behalf of the lessees in accordance with the vote or written consent of a majority of the lessees casting ballots or submitting written consents (as determined by the ratio that the common interest appurtenant to each lessee's unit bears to the total common interest appurtenant to the units of participating lessees). Nothing in this subsection shall be interpreted to preclude the lessees from making a decision (by the vote or written consent of a majority of the lessees as described above) to retain other counsel or additional professional advisors as may be reasonably necessary or appropriate to complete the negotiations and proceedings. In the event of a deadlock among the lessees or other inability to proceed with the rent renegotiation on behalf of the lessees, said counsel shall be permitted to apply to the circuit court of the judicial circuit in which the condominium is located for instructions. The association shall not instruct or direct said counsel or other professional advisors. All costs and expenses incurred under this subsection shall be assessed by the association to the lessees as provided in subsection (a) or (b), as may be applicable.

Real Estate Commission's Comment

1. HRS §514A-90.6, modified, is the source of this section.

§ ___: 5-40. Association Records; Generally. 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. Association records shall be stored on the island on which the association's project is located; provided that if original records, including, but not limited to, invoices, are required to be sent off-island, copies of such records shall be maintained on the island on which the association's project is located.

Real Estate Commission's Comment

1. UCA/UCIOA §3-118, modified, is the source of this section.

2. Access to association documents and records is a key to self-governance by the condominium community. This section incorporates the suggestion of a member of the Condominium Council of Maui that association records be stored on the island on which the association's project is located. Since some original records, such as invoices (which are typically required for payments to be made), might have to be sent off-island, maintaining copies of such records on-island is sufficient.

§ ___: 5-41. Association Records; Records to be Maintained. (a) An accurate copy of the declaration, bylaws, house rules, if any, 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) The managing agent or board 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 shall also keep monthly statements indicating the total current delinquent dollar amount of any unpaid assessments for common expenses.

(c) Subject to section ___: 5-40, 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.

(d) 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) The managing agent or resident manager or board shall keep an accurate and current list of members of the 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, 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 managing agent or resident manager or the board 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 for 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. A board may prohibit commercial solicitations.

Real Estate Commission's Comment

1. Subsections (a), (d), and (e) are, in pertinent part, identical to HRS §§514A-84.5, 514A-84(c), and 514A-83.3, respectively. Subsection (b) is identical to HRS §514A-85(a). 514A-85(b), modified, is the source of subsection (c).

§ ___: 5-42. Association Records; Availability; Disposal; Prohibitions. (a) The association's most current financial statement and minutes of the board's meetings, once approved, shall be available to any unit owner at no cost or on twenty-four hour loan, at a convenient location designated by the board.

(b) Minutes of meetings of the board 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) Financial statements, general ledgers, the accounts receivable ledger, accounts payable ledgers, check ledgers, insurance policies, contracts, and invoices of the 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) After any association meeting, and not earlier, unit owners shall be permitted to examine proxies, tally sheets, ballots, owners' check-in lists, and the certificate of election; provided that:

(1) Owners must request to examine such documents within thirty days after the association meeting;

(2) 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

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

If there are no requests to examine proxies and ballots, such documents may be destroyed thirty days after the association meeting. If there are requests to examine proxies and ballots, such documents shall be kept for an additional sixty days, after which they may be destroyed. 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) The managing agent shall provide copies of association records maintained pursuant to this section and sections ___: 5-40 and ___: 5-41 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 association, to whom this function is delegated.

(f) Prior to the organization of the association, any unit owner shall be entitled to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.

(g) 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) An association may comply with this section by making information available to unit owners, at the option of each unit owner, and at no cost, through an Internet site.

(i) *Disposal*. A managing agent retained by one or more associations may dispose of the records of any association which are more than five years old – except for tax records, which must be kept for seven years – without liability if the managing agent first provides the board of the association affected with written notice of the managing agent's intent to dispose of the records if not retrieved by the board within sixty days, which notice shall include an itemized list of the records which the managing agent intends to dispose of.

(j) *Prohibitions*. 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.

Real Estate Commission's Comment

1. Subsections (a), (b), (c), (g), and (j) are identical to HRS §§514A-83.5 (a), (b), (c), and (e), and 514A-85(d), respectively. HRS §514A-83.5(d), modified, is the source of subsection (d). Subsections (e) and (f) are, in pertinent part, identical to HRS §§514A-84.5 and 514A-84(c), respectively. Subsection (h) is new. HRS §514A-85(c), modified, is the source of subsection (i).

2. Subsection (d) has been amended to make it clear that no one (except the secretary and managing agent pursuant to §___: 5-17(d)) is permitted to view proxies and tally sheets before the meeting at which they are to be used.

3. Subsection (h) permits association documents and records to be made available on-line, at the option of the unit owner. (All Hawaii public libraries have computers with Internet access.) This should help end most "access to association documents and records" disputes and should be encouraged.

§ ___: 5-43. Association as Trustee. 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.

Real Estate Commission's Comment

1. This section is identical to UCA/UCIOA §3-119, and, as noted in the official comments to UCA (1980), is based on Section 7 of the Uniform Trustees' Powers Act. The section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under provisions regarding insurance proceeds, or following termination of the condominium.

§ ___: 5-44. Pets. (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) 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) 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) 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) 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) Nothing in this section shall prevent an association from immediately acting to remove vicious animals to protect persons or property.

Real Estate Commission's Comment

1. Subsections (a) through (e) are identical to the provisions of HRS §§514A-82.5 and 514A-82.6. Subsection (f) is new.

2. HRS Chapter 515 (Discrimination in Real Property Transactions), which allows a resident to keep a guide, signal, or service dog in a "no pets" apartment as long as the resident provides, to the apartment management or board of directors of the owners association, medical evidence or a physician's certification that:

- The resident has a physical or mental impairment that substantially limits one or more of the resident's major life activities;
- Has a record of having such impairment; or
- Is regarded as having such impairment and that allowing the resident to have a pet would be a reasonable and necessary accommodation for the resident's equal opportunity to use and enjoy the apartment.

The federal Fair Housing Act has similar provisions. Finally, in 2000, the State House passed HR 98, HD 1, "Urging Landlords, Associations of Apartment Owners, and Tenants With and Without Pets, to Respect Each Others' Rights and to Work Together to Provide for the Needs of All Owners and Tenants."

§ ___: 5-45. Attorneys' Fees, Delinquent Assessments, and Expenses of Enforcement. (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 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 to pursue such enforcement; or

(2) The owner demonstrates to the satisfaction of the court that a demand for enforcement made to the board 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 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.

Real Estate Commission's Comment

1. HRS §514A-94, modified, is the source of this section.

2. Some members may feel that because they are members of the association, and because the attorney represents the association, the attorney represents them too. The association attorney is, however, actually general corporate counsel whose client

is the corporation/association, not the board of directors or any of the association's membership.

3. A stakeholder was concerned about deleting the reference to Small Claims Court in subsection (c). Note, however, that Small Claims Court does not award attorneys' fees. Furthermore, Small Claims Court does not have jurisdiction over equity claims; it only awards money damages (e.g., it does not order injunctions).

4. HRS §514A-94(c) has been deleted since the federal Fair Debt Collection Practices Act and HRS §§443B (Collection Agencies) and 480D (Collection Practices) regulate this area.

Subpart 4. ALTERNATIVE DISPUTE RESOLUTION

§ ___: 5-46. Mediation. (a) At the request of any party to a dispute concerning or involving one or more unit owners and an association, its board, 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, the parties to the dispute shall be required to participate in mediation. Each party shall be wholly responsible for its own costs of participating in mediation; unless 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) 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, 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 would be unavailable for defense or judgment because mediation was pursued.

(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.

Real Estate Commission's Comment

1. HRS §514A-121.5, modified, is the source of subsection (a). HRS §421J-13 (Planned Community Associations, Mediation of disputes) is the source of subsections (b) and (c). These provisions have been modified to allow any party to request mediation under this section.

2. It should be noted that, pursuant to HRS §514A-131(a)(3) (Condominium Education Trust Fund), the Commission has established a special condominium mediation program with the Mediation Center of the Pacific for the mediation of condominium disputes. Parties must pay a nominal fee to use the program.

§ ___: 5-47. Arbitration. (a) At the request of any party, any dispute concerning or involving one or more unit owners and an association, its board, 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 an association, a board, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association or its board 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*. 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*. In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under paragraph (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*. 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*. 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. 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*.

(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 thirty days 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.

Real Estate Commission's Comment

1. HRS §§514A-121 (Arbitration of disputes), 514A-122 (Determination of unsuitability), 514A-123 (Determination of insurance coverage), 514A-124 (Costs, expenses and legal fees), 514A-125 (Award; confirming award), 514A-126 (Findings of fact and conclusions of law), and 514A-127 (Trial de novo and appeal) are the sources, modified slightly, of this section.

2. Real Estate Branch Senior Condominium Specialist Cynthia Yee believes that, before commencement of proceedings, the arbitrator should provide the parties with an explanation of nonbinding arbitration and the resulting impact on trial de novo.

3. Since the adoption of the Revised Uniform Arbitration Act (RUAA), there has been growing concern and discomfort with the potential impact and uncertainty of some of its provisions.[15] Any revisions to the arbitration provisions of the condominium law should consider concerns raised by the Ad Hoc RUAA Group.

4. Finding an alternative dispute resolution mechanism that works for condominium communities is an important and potentially enormous task that the Commission was unable to resolve, particularly in light of its guiding principle that the recodification should not grow the cost of government.[16] Stakeholders have commented that HRS Chapter 514A's system of dispute resolution is not working.[17] They note that the "mandatory" mediation provisions are essentially voluntary (with boards refusing to mediate or going through the motions to avoid the appearance of non-cooperation) and arbitration provisions are impractical and expensive in most cases – particularly with the trial de novo provision of HRS §514A-127.

Some members of the condominium community have strongly suggested that a "Condominium Court" be established to help resolve condominium disputes (either as small claims court is organized, as a part of district court, or as an administrative hearings office, like the existing DCCA hearings office).[18] Proponents believe that a condominium court would provide a means by which condominium disputes can be resolved quickly and at reasonable cost.[19] There is, however, a split of opinion on this issue in the community.[20]

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[15] *See,* fax received on October 17, 2003 by Mitchell A. Imanaka from the Ad Hoc RUAA Group (Jim Paul, Ted Tsukiyama, Keith Hunter, Jerry Clay, and Louis Chang).

[16] The Commission's guiding principle that the recodified condominium law should not result in an increase in the cost of government is meant to limit the addition of new programs administered by government under the proposed recodification. It should be noted that, in the first three years of its review of California's common-interest-ownership law, the California Law Revision Commission ("CLRC") has spent most of its time considering nonjudicial dispute resolution issues. For an excellent discussion of various condominium dispute resolution possibilities, *see*, Condominium Dispute Resolution: Philosophical Considerations and Structural Alternatives – An Issues Paper for the Hawaii Real Estate Commission, by Gregory K. Tanaka (January 1991). In addition to the substantial amount of work done by the CLRC, the Legislature can build on the work of Mr. Tanaka.

[17] *See, e.g.,* October 7, 2003 testimony of Richard J. Port.

[18] *See, e.g.,* October 7, 2003 testimony of Helen Inasaki, Richard Port, a petition containing signatures of some owners at Imperial Plaza, Tom Berg, Alice Clay, Raelene Tenno, Edlynn Taira, Mary Jane McMurdo, Amy Amuro, Daniel & Geraldine O'Leary, Rani Vargas, Martha Black, and Manny Dias.

[19] *Id.*

Part V. Management of Condominium

The Commission recommends the following:

i.) The Legislature should direct the Legislative Reference Bureau ("LRB") to study ways to improve dispute resolution in condominium communities, including, but not limited to, considering the establishment of a condominium court;[21]

ii.) LRB's review, findings, and recommendations should include ways to improve the current mediation and arbitration provisions of HRS Chapter 514A, if any; and

iii.) In considering the establishment of a condominium court, LRB's review, findings, and recommendations should include, but not be limited to:

- Jurisdiction of the condominium court (i.e., the kinds of cases that should be handled by the condominium court);
- Whether attorneys should be allowed to represent parties in condominium court;
- What rules of evidence should be followed by the condominium court;
- Whether decisions of the condominium court may be appealed, and the grounds for appeal;
- How decisions and orders of the condominium court will be enforced;
- Whether the condominium court should be part of the DCCA's Office of Administrative Hearings (and, if so, the extent of the involvement of the Real Estate Commission and the Real Estate Branch Staff, if any), the Judiciary's court system, or a private (or 'Olelo) "People's Court;"
- A needs assessment, including a projected case load;
- Cost, including overhead and staffing;
- Funding source; and
- An implementation plan for a pilot program, if any.

Finally, it is the understanding of the Commission that a separate bill regarding "condo court" will introduced in the 2004 legislative session.[22]

Real Estate Commission's Comment

1. HRS §514A-99 (Rules) is deleted from Part V since it is covered by §___: 3-11(a)(1), under "General Powers and Duties of Commission."

[20] The Real Estate Commission's Blue Ribbon Recodification Advisory Committee was split on the issue of support for the establishment of a condominium court. *See also,* "Condo Court – Nay," by Philip Nerney, Esq., and "Condo Court – Yea," by Senator Willie Espero, Hawaii Community Associations (October 2003).

[21] LRB should review the work of Mr. Tanaka and the CLRC (*supra,* at note 16).

[22] "Condo Court – Yea," by Senator Willie Espero, Hawaii Community Associations (October 2003).

Miscellaneous Matters

Real Estate Commission's Comment

1. **HRS Chapter 514A Part VI (Sales to Owner-Occupants)** has not been included in the recodification.

Part VI of HRS Chapter 514A ("Part VI") was enacted in 1980 to require developers to offer to owner-occupants, at least 50% of a representative sampling of units in a project before offering them to the public. The intent of the law was to prevent speculation by investors at the expense of owner-occupants.

Part VI, however, only applies to condominiums. Hawaii law does not require owner-occupants to be given any preference in the sale of single-family homes, subdivisions, planned-unit developments or cooperatives.

Also, of the states where condominiums are common, Hawaii appears to be the only state which mandates this preference. The requirement does not appear in the condominium/common interest ownership acts of Florida, California, New York or Virginia, nor in the Uniform Condominium Act or the Uniform Common Interest Ownership Act.

Since its enactment, the intended benefits of Part VI have been outweighed by resulting problems, and a repeal of Part VI would not adversely affect the consumer protections contained in Chapter 514A.

The requirements of Part VI are complicated, cumbersome and expensive. Developers must publish special owner-occupant advertisements and hold a public lottery or use a chronological system to determine which owner-occupants can purchase which units. Also, since the law does not specify how to contend with certain issues, such as back-up offers, developers end up using their own methods, which may or may not be correct. In addition, the costs for complying with these requirements are passed on to buyers through increased sales prices.

Part VI is ineffective because compliance is virtually impossible to monitor and enforce. There is substantial anecdotal evidence of cheating by investors who pose as owner-occupants. Because the Real Estate Commission does not have sufficient personnel to monitor compliance with the owner-occupant requirements, there is nothing to prevent this cheating from continuing. And although there are civil and criminal penalties for violating these laws, there is no record of any civil or criminal enforcement action having been brought against any developer or buyer. If Part VI cannot be enforced, its purpose is defeated.

2. **HRS Chapter 514A Part VII (Arbitration; Mediation)** is incorporated in Recodification Part V (Management of Condominium) in §§___: 5-46 (Mediation) and 5-47 (Arbitration).

3. **HRS Chapter 514A Part VIII (Condominium Management Education Fund)** has been incorporated in Part III (Registration and Administration of Condominiums) under §___: 3-21, et seq. (Condominium Education Trust Fund).

4. The Commission recommends that the funding and position authorized by Act 213 (SLH, 2000) for the HRS Chapter 514A recodification project be extended to conduct post-bill passage educational activities (with the option of hiring a person as either an employee of the department or a consultant to the department).

5. The Commission recommends that the recodified Hawaii condominium law should have a delayed effective date of July 1, 2005.[1] The vast majority of the public does not pay close attention to potential legislation until it is adopted. Considering the scope of the recodified Hawaii condominium law and the number of people, businesses, and agencies affected by the law, it makes sense to have a delayed effective date to give people (many of whom will not have followed the proposed legislation) a chance to become educated about the new law. It will also be possible to consider recommendations received during this educational period and to fine-tune the law in the next legislative session.

[1] Recodification §___: 5-34 (Association Fiscal Matters; Lien for Assessments), which incorporates the provisions of HRS §514A-90, should, however, retain its December 31, 2007 repeal and reenactment date as set forth in Act 80 (SLH, 2003).

Appendix H

__.B. NO._____

A BILL FOR AN ACT

RELATING TO CONDOMINIUMS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. 1961, Hawaii became the first state to pass a law enabling the creation of condominiums.

The 1961 "Horizontal Property Regime" law consisted of 33 sections covering a little more than 3 pages in the Revised Laws of Hawaii. Since that time, the law has been amended constantly. Entering the 2004 legislative session, Hawaii's "Condominium Property Regime" law consists of 122 sections taking up over 100 pages in the Hawaii Revised Statutes. As noted by the 2000 Legislature in Act 213, Session Laws of Hawaii (SLH), "[t]he present law is the result of numerous amendments enacted over the years made in piecemeal fashion and with little regard to the law as a whole."

The 2000 Legislature recognized that "[Hawaii's] condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micromanages condominium associations . . . [t]he law is also overly regulatory, hinders development, and ignores technological changes and the present day development process." (Act 213, SLH 2000.) The purpose of this Act is to "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law," as directed by Act 213 (SLH 2000).

Guiding Principles, Generally

1. The Condominium Property Act should be construed in accordance with the purposes stated in Act 213 (SLH 2000) and this Prefatory Comment (i.e., to "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law"), and the Real Estate Commission's comments to the text of each section. The Act should also be construed to promote the in-state and interstate flow of funds to condominiums to facilitate the reasonable development and sales of units in such projects, and to protect consumers, purchasers, and borrowers against condominium practices that may cause unreasonable risk of loss to them. It should also help facilitate the development of this type of real estate in Hawaii, as Hawaii's land area is limited. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

2. The recodified condominium law should enhance the clarity of the Condominium Property Act.

3. The recodified condominium law should recognize the difficulty of a "one size fits all" approach to consumer protection and management provisions.

4. The Commission should require only information it will use or may find useful from a regulatory and consumer protection standpoint.

5. Problems should be fixed in the statutory provisions where they are created.

6. To the extent practicable, approval percentage requirements should be standardized. When necessary, conform to Fannie Mae, Freddie Mac, or HUD requirements.

7. The recodified condominium law should not result in an increase in the cost of government.

This goal is meant to limit the addition of new programs administered by government under the condominium law. If the Legislature wishes to add such programs (e.g., condominium courts), means of funding the new programs must also be established. It is possible that revised consumer protection requirements will affect government costs. If proper administration of the new law actually requires more resources, the responsible government agency should ask for more resources or ask that particular requirements be revised.

SECTION 2. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

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PART I. GENERAL PROVISIONS

Subpart 1. DEFINITIONS AND OTHER GENERAL PROVISIONS

§ ___: 1-1. Short Title. This chapter may be cited as the Condominium Property Act.

§ ___: 1-2. Applicability. Applicability of this chapter is governed by subpart 2 of this part.

§ ___: 1-3. Definitions. In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this chapter:

"Affiliate of a developer" is a person that directly or indirectly controls, is controlled by, or is under common control with, the developer.

"Association" means the unit owners' association organized under section ___: 5-2.

"Board" and "board of directors" means the body, regardless of name, designated in the declaration or bylaws to act on behalf of the association.

"Commission" means the real estate commission of the State.

"Common elements" 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" means expenditures made by, or financial liabilities of, the association for operation of the property, and shall include any allocations to reserves.

"Common interest" means the percentage of undivided interest in the common elements appurtenant to each unit, as expressed in the declaration, and any specified percentage of the common interest means such percentage of the undivided interests in the aggregate.

"Common profits" means the balance of all income, rents, profits, and revenues from the common elements or other property owned by the association remaining after the deduction of the common expenses.

"Completion of construction" 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.

"Condominium" 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" means a map or plan of the building or buildings containing the information required by section ___: 2-3.

"Converted" and "conversion" means the submission of a structure to a condominium property regime more than twelve months after the completion of construction; provided that structures used as sales offices or models for a project and later submitted to a condominium property regime shall not be considered to be converted structures.

"Declaration" means any instrument, however denominated, that creates a condominium, including any amendments to such instrument.

"Developer" 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" means any right or combination of rights reserved by a developer in the declaration to:

(1) Add real estate to a condominium;

(2) Create units, common elements, or limited common elements within a condominium;

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

(4) Withdraw real estate from a condominium;

(5) Merge projects or increments of a project; or

(6) Otherwise alter the condominium.

"Limited common element" means a portion of the common elements designated 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" means the owners of units to which are appurtenant more than fifty percent of the common interests. Any specified percentage of the unit owners means the owners of units to which are appurtenant such percentage of the common interest.

"Managing agent" means any person retained, as an independent contractor, for the purpose of managing the operation of the property.

"Master deed" or "master lease" means any deed or lease showing the extent of the interest of the person submitting the property to the condominium property regime.

"Material change" means any change that directly, substantially, and adversely affects the use or value of:

(1) A purchaser's unit or appurtenant limited common elements; or

(2) Those amenities of the project available for such purchaser's use.

"Material fact" means any fact, defect, or condition, past or present, that, to a reasonable person, would be expected to measurably affect the value of the project, unit, or property being offered or proposed to be offered for sale.

"Operation of the property" means the administration, fiscal management, and physical operation of the property, and includes the maintenance, repair, and replacement of, and the making of any additions and improvements to, the common elements.

"Person" means an individual, firm, corporation, partnership, association, trust, or other legal entity, or any combination thereof.

"Pertinent change" means, as determined by the commission, a change not previously disclosed in the most recent public report that renders the information contained in the public report or in any disclosure statement inaccurate, including, but not limited to:

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

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

(3) The common interest appurtenant to the unit.

A pertinent change does not necessarily constitute a material change.

"Project" 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 created.

"Property" means the land, whether or not contiguous and including more than one parcel of land, but located within the same vicinity, the building or buildings, all improvements and all structures thereon, and all easements, rights, and appurtenances intended for use in connection with the condominium, 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.

"Record, recordation, recorded, recording, etc." means to record in the bureau of conveyances in accordance with chapter 502, or to register in the land court in accordance with chapter 501.

"Resident manager" means any person retained as an employee by the association to manage, on-site, the operation of the property.

"Time share unit" means the actual and promised accommodations, and related facilities, that are the subject of a time share plan as defined in chapter 514E.

"Unit" means a physical or spatial portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described in the declaration or pursuant to section ___: 2-5, with an exit to a public road or to a common element leading to a public road.

"Unit owner" 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 recorded lease, 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) Each unit that has been created, together with its appurtenant interest in the common elements, constitutes, for all purposes, a separate parcel of real estate.

(b) 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) 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 County Land Use Laws.** Any condominium property regime established under this chapter shall conform to the existing underlying county zoning for the property and all applicable county permitting requirements adopted by the county in which the property is located, including any supplemental rules adopted by the county, pursuant to section ___: 1-6, to ensure the conformance of condominium property regimes to the purposes and provisions of county zoning and development ordinances and chapter 205. 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 ___: 2-2(13) or section ___: 4-4(a).

§ ___: 1-6. **Supplemental County Regulations Governing a Condominium Property Regime.** Whenever they deem it proper, each county may adopt

supplemental rules and regulations governing condominium property regimes established under this chapter in order to implement this program; provided that any of the supplemental rules and regulations adopted shall not conflict with this chapter or with any of the rules and regulations adopted by the commission to implement this chapter.

§ ___: 1-7. **Construction Against Implicit Repeal.** 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.** 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.** 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.** (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) Any deed, declaration, bylaw, or condominium map shall be liberally construed to facilitate the operation of the condominium property regime.

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

Subpart 2. APPLICABILITY

§ ___: 1-11. **Applicability to New Condominiums.** 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. **Applicability to Pre-Existing Condominiums.** Sections ___: 1-4 (Separate Titles and Taxation), ___: 1-5 (Conformance with County Land Use Laws), ___: 2-16 (Merger of Projects or Increments), ___: 3-22 (Condominium Education Trust Fund; Payments by Associations and Developers), and part V (Management of Condominium), and section ___: 1-3 (Definitions) to the extent definitions are necessary in construing any of those provisions, 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 interpreting 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 owner"; and the term "association of apartment owners" shall be deemed to correspond to the term "association".

§ ___: 1-13. **Amendments to Governing Instruments.** (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.** (a) To create a condominium, all of the owners of the fee simple interest in land must execute and record a declaration submitting the land to the condominium property regime. Upon recordation of the declaration, the condominium shall be deemed created.

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

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

(1) The land submitted to the condominium;

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

(3) The number of units in the condominium;

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

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

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

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

(8) The condominium's common elements;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ ___: 2-4. **Condominium Map; Certification of Architect, Engineer, or Surveyor.** The condominium map must bear the statement of a licensed architect, engineer, or surveyor certifying that the condominium map is

consistent with the plans of the condominium's building or buildings filed or to be filed with the government official having jurisdiction over the issuance of permits for the construction of buildings in the county in which the condominium is located. If the building or buildings have been built at the time the condominium map is recorded, the certification must state that, to the best of the architect's, engineer's, or surveyor's knowledge, the condominium map depicts the layout, location, dimensions and numbers of the units substantially as built. If the building or buildings, or portions thereof, have not been built at the time the condominium map is recorded, within thirty days from the completion of construction, the developer shall execute and record an amendment to the declaration accompanied by a certification of a licensed architect, engineer, or surveyor certifying that the condominium map previously recorded, as amended by the revised pages filed with such amendment, if any, fully and accurately depicts the layout, location, boundaries, dimensions, and numbers of the units substantially as built. If the condominium is a conversion and the government official having jurisdiction over the issuance of permits for the construction of buildings in the county in which the condominium is located is unable to locate the original permitted construction plans, the certification need only state that the condominium map depicts the layout, location, boundaries, dimensions, and numbers of the units substantially as built. If there are no buildings, no certification shall be required.

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

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

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

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

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

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

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

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

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

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

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

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

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

(6) The right of the board, on behalf of the association, to lease or otherwise use for the benefit of the association those common elements that the board determines are actually used by one or more unit owners for a purpose permitted in the

declaration. Any such lease or use must be approved by the owners of at least sixty-seven percent of the common interest, including all directly affected unit owners that the board reasonably determines actually use the common elements, and such owners' mortgagees.

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

§ ___: 2-10. **Transfer of Limited Common Elements.** Except as provided in the declaration, any unit owner may transfer or exchange a limited common element that is assigned to the owner's unit to another unit. Such a transfer may be made by execution and recordation of an amendment to the declaration. Such an amendment need only be executed by the owner of the unit whose limited common element is being transferred and the owner of the unit receiving the limited common element, provided that unit mortgages and leases may also require the consent of mortgagees or lessors, respectively, of the units involved. A copy of any such amendment shall be promptly delivered to the association.

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

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

owners, the association, and the managing agent, if any, at least thirty days before the specified date.

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

(1) The amount at issue;

(2) The difficulty of segregating such costs;

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

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

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

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

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

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

(b) Subject to any approval requirements and spending limits contained in a project's declaration or bylaws, an association's board may authorize the installation of meters to determine the use by the individual units of utilities, including electricity, water, gas, fuel, oil, sewerage, air conditioning, chiller water and drainage. The cost of

metered utilities shall be paid by the owners of such units based on actual consumption and, to the extent not billed directly to the unit owner by the utility provider, may be collected in the same manner as common expense assessments. Owners' maintenance fees shall be adjusted as necessary to avoid any duplication of charges to owners for the cost of metered utilities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

shall be subject to the provisions set forth in the respective declarations with respect to merger.

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

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

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

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

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

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

(b) All of the unit owners may remove a property, or a part of a property, from this chapter by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the units consent thereto, by instruments duly recorded. Upon such removal

from this chapter, the property, or the part of the property designated in the instrument, ceases to be the subject of a condominium or subject to this chapter, and is deemed to be owned in common by the unit owners in proportion to their respective common interests.

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

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

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

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

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

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

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

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

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

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

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

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

Part III. REGISTRATION AND ADMINISTRATION OF CONDOMINIUMS

§ ___: 3-1. Registration Required; Exceptions. (a) A developer may not offer for sale any units in a project unless the project is registered with the commission and an effective date for the public report is issued by the commission.

(b) The registration requirement of this section shall not apply to:

(1) The disposition of units exempted from public report requirements pursuant to subsection ___: 4-1(b);

(2) Projects in which all units are restricted to non-residential uses and all units are to be sold for $1,000,000 or more; or

(3) The sale of units in bulk. "The sale of units in bulk" is a circumstance where a developer undertakes to develop and then sells all or a portion of the developer's entire inventory of units to a purchaser who is a developer. 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. Application for Registration. (a) An application for registration of a project 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 set forth in sections ___: 3-4, ___: 4-3, and ___: 4-4, as applicable, and as may otherwise be specified by the commission.

(b) The commission need not process any incomplete application and may return such an application to the developer and require that the developer submit a new application, including fees. If an incomplete application is not completed within six months of the date of the original submission, it shall be deemed abandoned and registration of the project shall require the submission of a new application, including fees.

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

§ ___: 3-3. **Inspection by Commission.** (a) After appropriate notification has been made or additional information has been received pursuant to this part, an inspection of the project may be made by the commission.

(b) When an inspection is to be made of a project, 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; Requirements for Issuance of Effective Date.** (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 ___: 4-4;

(3) A copy of the deed, master lease, agreement of sale, or sales contract evidencing either that the developer holds the fee 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 that meet the requirements of sections ___: 2-2, ___: 5-8, 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 ___: 4-11 (Escrow of Deposits);

(7) As applicable, the documents and information required in sections ___: 4-12 or ___: 4-13;

(8) A declaration, subject to the penalties set forth in section ___: 3-19(b), that the project is in compliance with all county zoning and building ordinances and codes, and all other county permitting requirements applicable to the project, pursuant to sections ___: 1-5 and ___: 2-2(a)(13); and

(9) Such other documents and information that the commission may require.

(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. **Public Report; Request for Hearing by Developer.** 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. **Public Report; Amendments.** (a) After the effective date for a public report has been issued by the commission, if there is any pertinent change regarding the information contained in the public report, 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 or an amended public report clearly reflecting the change, 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 amendment to the public report or an amended public report shall not require the developer to suspend sales, subject to the power of the commission to order such sales to cease as set forth in section ___: 3-16; provided that the developer shall advise the appropriate real estate broker or brokers, if any, of the change and disclose to purchasers any change in the information contained in the public report pending the issuance of an effective date for any amendment to the public report or amended public report; provided further that if the amended public report is not issued within thirty days after its submission to the commission, the commission may order a suspension of sales pending the issuance of an effective date for the amended public report. Nothing in this section shall diminish the rights of purchasers under section ___: 4-14.

(c) The developer shall provide all purchasers with a true copy of:

(1) The amendment to the public report, if the purchaser has received copies of the public report and all prior amendments, if any; or

(2) A restated public report including all amendments.

(d) The filing of an amendment to the public report or an amended 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 ___: 4-6 and ___: 4-7, the terms and conditions of the purchaser's contract for sale, and applicable common law.

§ ___: 3-7. Commission Oversight of Public Report. (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.

§ ___: 3-8. Annual Report. (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. If there is no change to the public report, the developer shall so state. This subsection does not relieve the developer of the obligation to file amendments to the public report pursuant to section ___: 3-6. Failure to file the annual report required by this section may subject the developer to the penalties set forth in section ___: 3-19(b).

(b) The developer shall be relieved from filing annual reports pursuant to this section if the developer has no ownership interest in any unit in the project.

§ ___: 3-9. Expiration of Public Reports. 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.

§ ___: 3-10. No False or Misleading Information. It shall be unlawful for any person or person's agent to testify falsely or make a material misstatement of fact before the commission or to file with the commission any document required by this chapter that is false, contains a material misstatement of fact, or contains forgery. 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 pertinent change in the information or documents submitted to the commission.

§ ___: 3-11. General Powers and Duties of Commission. (a) The commission may:

(1) Adopt, amend, and repeal rules;

(2) Assess fees;

(3) Issue orders consistent with and in furtherance of the objectives of this chapter;

(4) Prescribe forms and procedures for submitting information to the commission; and

(5) Prescribe the form and content of any documents required to be submitted to the commission by this chapter.

(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 (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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 in order to maintain such action.

(c) The commission may intervene in any action involving the powers or responsibilities of a developer under part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42.

(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 the 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 assure completion of all improvements which a developer is obligated to complete, or has represented that it will complete.

§ **___: 3-12. Deposit of Fees.** 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).

§ ___: **3-13. Condominium Specialists; Appointment; Duties.** The director of commerce and consumer affairs may appoint condominium specialists, not subject to chapter 76, to assist consumers with information, advice, and referral on any matter relating to this chapter or otherwise concerning condominiums. The director may also appoint secretaries, not subject to chapter 76, to provide assistance in carrying out these duties. The condominium specialists and secretaries 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.

§ ___: **3-14. Private Consultants.** 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.

§ ___: **3-15. Investigative Powers.** If the commission has reason to believe that any person is violating or has violated part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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 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.

§ ___: **3-16. Cease and Desist Orders.** In addition to its authority under sections ___: 3-17 and ___: 3-18, whenever the commission has reason to believe that any person is violating or has violated part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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.

§ ___: **3-17. Revocation of Registration.** (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, or any affiliate of the 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.

§ ___: **3-18. Power to Enjoin.** Whenever the commission believes from satisfactory evidence that any person has violated part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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.

§ ___: **3-19. Penalties.** (a) Any person who violates or fails to comply with part III (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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 (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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 (Registration and Administration of Condominiums), part IV (Protection of Condominium Purchasers), or section ___: 5-3, ___: 5-20, ___: 5-22, ___: 5-37, ___: 5-40, ___: 5-41, ___: 5-42, 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.

§ ___: 3-20. **Limitation of Actions.** 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.

§ ___: 3-21. **Condominium Education Trust Fund.** (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 associations; and

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

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

§ ___: 3-22. **Condominium Education Trust Fund; Payments by Associations and Developers.** (a) Each project or 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 association's 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 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 an association to pay a fee required under this section shall not impair the validity of any claim of the association for common expenses or other assessments, or prevent the association from defending any action in any court of this State.

(c) Each developer shall pay into the condominium education trust fund a nonrefundable fee for each unit in the project, 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 ___: 3-21.

§ ___: 3-23. **Condominium Education Trust Fund; Management.** (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 chapter 76 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.** (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; or

(5) The sale of units in bulk, as defined in subsection ___: 3-1(b); provided that the requirements of this part shall apply to any sale of units to the public following the sale of units in bulk.

§ **___: 4-2. Sale of Units.** Except as provided in section ___: 4-5, no sale or offer of sale of units in a 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, where a time share project is duly registered under chapter 514E and a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser, the public report need not be delivered to the purchaser or prospective purchaser.

§ **___: 4-3. Public Report.** (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 of the deadline, pursuant to section ___: 4-9, for completion of construction or, in the case of a conversion, for the completion of any repairs required to comply with section ___: 1-5, and the remedies available to the purchaser (including, but not limited to, cancellation of the sales contract) if the completion of construction or repairs 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, and a statement regarding when a purchaser shall become obligated to start paying such fees pursuant to section ___: 2-11(b);

(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 summary 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 development rights reserved to the developer or others;

(7) A declaration, subject to the penalties set forth in section ___: 3-19(b), that the project is in compliance with all county zoning and building ordinances and codes, and all other county permitting requirements applicable to the project, pursuant to sections ___: 1-5 and ___: 2-2(a)(13); and

(8) Any other facts, documents, or information 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 pertinent change in the information required by this section.

§ ___: **4-4. Public Report; Special Types of Condominiums.** (a) *Projects containing converted structures.* 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 units that may be occupied for residential use and have been in existence for five years or more:

(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 subparagraph (1)(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 projects containing converted structures, 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 or other permits that have been granted to achieve compliance, (ii) whether the project contains any legal nonconforming uses or structures as a result of the adoption or amendment of any ordinances or codes, and (iii) any violations of current zoning or building ordinances or codes and the conditions required to bring the structure into compliance; or

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

(3) Such other disclosures and information that the commission may require.

(b) *Projects on agricultural land.* 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;

(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; and

(3) Such other disclosures and information that the commission may require.

(c) *Projects containing assisted living facility units.* 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;

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

(6) Such other disclosures and information that the commission may require.

§ **___: 4-5. Pre-registration Solicitation.** (a) 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 subsection (b), the developer may solicit prospective purchasers and enter into non-

binding pre-registration 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 a unit.

(b) Limitations:

(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 moneys from prospective purchasers or anyone on behalf of prospective purchasers, whether or not such moneys are to be placed in an escrow account, or whether or not such moneys 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 pre-registration agreement. The pre-registration 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 pre-registration 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 pre-registration agreement to the contrary, the pre-registration agreement may be cancelled at any time by either the developer or the prospective purchaser by written notice to the other. The commission may prepare a form of pre-registration agreement for use pursuant to this section, and use of the commission-prepared form shall be deemed to satisfy the requirements of the pre-registration agreement as provided in this section.

§ **___: 4-6. Requirements for Binding Sales Contracts; Purchaser's Right to Cancel.** (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 paragraph (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 any 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.

§ ___: 4-7. **Rescission After Sales Contract Becomes Binding.** (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. 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 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.

§ ___: **4-8. Delivery.** In this part, delivery shall be made by:

(1) Personal delivery;

(2) Delivery by registered or certified mail with adequate postage, to the recipient'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 recipient has provided a fax number to the sender; delivery will be considered made upon sender's receipt of automatic confirmation of transmission; or

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

§ ___: **4-9. Sales Contracts Before Completion of Construction.** If a sales contract for a unit is signed before the completion of construction or, in the case of a conversion, the completion of any repairs required to comply with section ___: 1-5, the sales contract shall contain an agreement of the developer that the completion of construction shall occur on or before a completion deadline, and the completion deadline shall be referenced in the public report. 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 purchaser may cancel the sales contract at any time after the specified completion deadline, if completion of construction does not occur on or before the completion deadline, as the same may have been extended. The sales contract may provide additional remedies to the purchaser if the actual completion of construction does not occur on or before the completion deadline as set forth in the contract.

§ ___: **4-10. Refunds Upon Cancellation or Termination.** Upon any cancellation under section ___: 4-6 or ___: 4-9, 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.

§ ___: **4-11. Escrow of Deposits.** All moneys 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 ___: 4-12 and ___: 4-13;

(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.

§ ___: 4-12. Use of Purchaser Deposits to Pay Project Costs. (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 (including, in the case of a conversion, repairs necessary to cure violations of county zoning and building ordinances and codes), 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 and content approved by the commission: a completion or performance bond issued by a surety licensed in the State in an amount equal to one hundred percent of the cost of construction; a completion or performance bond issued by a material house in an amount equal to one hundred percent of the cost of construction; 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. A completion or performance bond issued by a surety or by a material house, an irrevocable letter of credit, and any alternatives shall contain a provision that the commission shall be notified in writing before any payment is made to beneficiaries of the bond. Adequate disclosures shall be made in the public report concerning the developer's use of a completion or performance bond issued by a material house instead of a surety, and the impact of any restrictions on the developer's use of purchaser's funds.

(c) A purchaser's deposits may be disbursed prior to closing only to pay costs set forth in the project budget submitted pursuant to subparagraph (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."

§ ___: **4-13. Early Conveyance to Pay Project Costs.** (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 (including, in the case of a conversion, repairs necessary to cure violations of county zoning and building ordinances and codes), 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 and content approved by the commission: a completion or performance bond issued by a surety licensed in the State in an amount equal to one hundred percent of the cost of construction; a completion or performance bond issued by a material house in an amount equal to one hundred percent of the cost of construction; 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. A

completion or performance bond issued by a surety or by a material house, an irrevocable letter of credit, and any alternatives shall contain a provision that the commission shall be notified in writing before any payment is made to beneficiaries of the bond. Adequate disclosures shall be made in the public report concerning the developer's use of a completion or performance bond issued by a material house instead of a surety, and the impact of any restrictions on the developer's use of purchaser's funds.

(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 subparagraph (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 and the satisfaction of any mechanics' and materialmen's liens.

(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."

§ ___: 4-14. Misleading Statements and Omissions; Remedies. (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.** (a) This part applies to all condominiums subject to this chapter, except as provided in subsection (b).

(b) If so provided in the declaration or bylaws, this part shall not apply to:

(1) Condominiums in which all units are restricted to non-residential uses; or

(2) Condominiums, not subject to any continuing development rights, containing no more than five units;

provided that section ___: 5-20 (Managing Agents) shall not be subject to these exceptions.

§ ___: 5-2. **Association; Organization and Membership.** (a) The first meeting of the 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. **Association; Registration.** (a) Each project or 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 association that has not met the submission requirements by the deadline date shall be considered a new applicant for registration and be subject to initial registration requirements. Any new project or association shall register within thirty days of the association's first meeting. If the 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 association and shall comply with this section, except for the fidelity bond requirement for 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 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 association where the officer can be contacted directly;

(2) Pay a nonrefundable application fee and, upon approval, an initial registration fee – subsequently, a reregistration fee – and the condominium education trust 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 association to initial registration requirements.

(b) The commission may reject or terminate any registration submitted by a project or an association that fails to comply with this section. Any 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 an association to register, or rejection or termination of its registration, shall not impair the validity of any contract or act of the association nor prevent the association from defending any action or proceeding in any court in this State.

§ ___: **5-4. Association; Powers.** (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 the declaration, 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; provided that designation of additional areas to be common elements or subject to common expenses after the initial filing of the declaration or bylaws shall require the approval of at least 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) Subject to section ___: 2-8, 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 and approved by a majority of all unit owners at an annual meeting of the association or by the written consent of a majority of all unit owners;

(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, committee members, and agents, 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 ___: 5-5(e) 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, except to the extent inconsistent with this chapter;

(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 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 paragraph (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 the owner's 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 paragraph (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; provided that no notice shall be required when the breach by the tenant causes or threatens to cause damage to any person or constitutes a violation of section 521-51(1) or 521-51(6).

(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. Association; Limitations on Powers.** (a) *Association dealing with developer*. 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*. 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 condominiums 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 deduction of common expense payments for unpaid late charges, legal fees, fines, and interest*. No 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 the board adopts and distributes to all owners a policy stating 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*. No unit owner who requests legal or other information from the association, the board, 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.

(e) *Requirements for borrowing money*. Subject to any approval requirements and spending limits contained in the declaration or bylaws, the association may authorize the board to borrow money 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; provided that written notice of the purpose and use of the funds is first sent to all unit owners and owners representing fifty percent of the common interest vote or give written consent to such borrowing. In connection with such borrowing, the board 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. 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.

§ ___: 5-6. **Board; Powers and Duties.** (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the board shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D.

(b) The board may not act on behalf of the association to amend the declaration or bylaws (sections ___: 2-2(11) and ___: 5-8(a)(6)), to remove the condominium from the provisions of this chapter (section ___: 2-17), or to elect members of the board or determine the qualifications, powers and duties, or terms of office of board members (section ___: 5-6(e)); provided that nothing in this paragraph shall be construed to prohibit board members from voting proxies (section ___: 5-15) to elect members of the board; provided further that the board may fill vacancies in its membership.

(c) Within thirty days after the adoption of any proposed budget for the condominium, the board shall make available a copy of the budget to all the unit owners and shall notify each unit owner that they may request a copy of the budget.

(d) The declaration may provide for a period of developer control of the association, during which a developer, or persons designated by the developer, may appoint and remove the officers and members of the board. 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 the developer has 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 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, as

described in a recorded instrument executed by the developer, be approved by the developer before they become effective.

(e) Not later than the termination of any period of developer control, the unit owners shall elect a board of at least three members, at least a majority of whom must be unit owners. The board shall elect the officers. Board members and officers shall take office upon election.

(f) At any regular or special meeting of the association, any member of the board may be removed and successors shall be elected for the remainder of the term to fill the vacancies thus created. 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, and, if removal and replacement is to occur at a special meeting, section ___: 5-13(b).

§ ___: **5-7. Board; Limitations.** (a) Members of the board 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. 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.

(b) No resident manager or employee of a condominium shall serve on its board.

(c) An owner shall not act as a director of an association and an employee of the managing agent retained by the association.

(d) 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 incurred on behalf of the association.

(e) 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.

(f) 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 (d).

§ ___: **5-8. Bylaws.** (a) A true copy of the bylaws shall be recorded in the same manner as the declaration. No amendment to the bylaws is valid unless the amendment is duly recorded.

(b) The bylaws shall provide for at least the following:

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

(2) Election by the board 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 directors and officers and the filling of vacancies;

(4) Which, if any, of its powers the board 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) The compensation, if any, of the directors;

(7) Subject to subsection (d), a method for amending the bylaws; and

(8) 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.

(c) The bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform.

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

(e) The bylaws may be amended at any time by the vote or written consent of at least sixty-seven percent of all unit owners. Any proposed bylaws with the rationale for the proposal may be submitted by the board or by a volunteer unit owners group. If submitted by that group, 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 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. The vote or written consent, to be valid, must be obtained within three hundred sixty-five days after mailing for a proposed bylaw submitted by either the board or a volunteer unit owners group. If the bylaw is duly adopted, then the board shall cause the bylaw amendment to be recorded. The volunteer unit owners group 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 three hundred sixty-five days after the original petition was submitted to the board.

This subsection shall not preclude any unit owner or volunteer unit owners group from proposing any bylaw amendment at any annual association meeting.

§ ___: 5-9. **Restatement of Declaration and Bylaws.** (a) Notwithstanding any other provision of this chapter or of any other statute or instrument, an association may at any time restate the declaration or bylaws of the association to set forth all amendments thereto by a resolution adopted by the board.

(b) Subject to section ___: 1-13, an 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. 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 or 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 or bylaws and all prior amendments thereto.

§ ___: 5-10. Bylaws Amendment Permitted; Mixed Use Property; Representation on Board. (a) The bylaws of an association may be amended to provide that the composition of the board reflect the proportionate number of units for a particular use, as set forth in the declaration. For example, an association may provide that for a nine-member board where two-thirds of the units are for residential use and one-third is for non-residential 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 non-residential use units.

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

(1) A majority vote of the board; or

(2) A submission of the proposed bylaw amendment to the board from a volunteer unit owners group 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 bylaw amendment, the board shall mail a ballot with the proposed bylaw amendment to all of the unit owners of record. For purposes of this section only, the bylaws may initially be amended by a vote or written consent of the majority of the unit owners; and thereafter by at least 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.

(e) Election of the new board in accordance with an amendment adopted pursuant to this section shall be held at the next regular meeting of the association or at a meeting called in accordance with section ___: 5-13(b) for this purpose.

(f) As permitted in the declaration or bylaws, the vote of a non-residential unit owner shall be cast and counted only for the non-residential seats available on the board and the vote of a residential unit owner shall be cast and counted only for the residential seats available on the board.

(g) No petition for a bylaw amendment pursuant to paragraph (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(f). Any removal and replacement shall not affect the proportionate composition of the board as prescribed in the bylaws as amended pursuant to this section.

§ ___: 5-11. **Judicial Power to Excuse Compliance with Requirements of Declaration or Bylaws.** (a) 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 ___: 5-8(d); 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 unit owners;

(5) A quorum requirement for meetings of unit owners.

(b) The board, on behalf of the association, shall by certified mail provide all unit owners with notice of the date, time, and place of any court hearing held pursuant to this section.

§ ___: 5-12. **Condominium Community Mutual Obligations.** (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 association adopted pursuant to this chapter.

(b) All agreements, decisions, and determinations lawfully made by the association in accordance with the voting percentages established in

this chapter, the declaration, or the bylaws are binding on all unit owners.

(c) Each unit owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the covenants, conditions, and restrictions set forth in the declaration, the bylaws, and the house rules adopted pursuant thereto. 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 managing agent, resident manager, or board on behalf of the association or, in a proper case, by an aggrieved unit owner.

Subpart 2. GOVERNANCE – ELECTIONS AND MEETINGS

§ ___: 5-13. Association Meetings. (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, 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 and proxies for the special meeting in accordance with the requirements of the bylaws and of this part.

(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 date, time, and place of the meeting and the items on the agenda, including the general nature and rationale of any proposed amendment to the declaration or bylaws, and any proposal to remove a member of the board; provided that this subsection shall not preclude any unit owner from proposing an amendment to the declaration or bylaws or to remove a member of the board at any annual association meeting.

(d) All association meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. If so provided in the declaration or bylaws, meetings may be conducted by any

means that allow participation by all unit owners in any deliberation or discussion.

(e) All association meetings shall be held at the address of the condominium or elsewhere within the State as determined by the board; provided that in the event of a natural disaster, such as a hurricane, an association meeting may be held outside the State.

§ ___: 5-14. **Association Meetings; Minutes.** (a) Minutes of meetings of the association shall be approved at the next succeeding regular meeting or by the board, within sixty days after the meeting, if authorized by the owners at an annual meeting. If approved by the board, owners shall be given a copy of the approved minutes or notified of the availability of the minutes within thirty days after approval.

(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.

§ ___: 5-15. **Association Meetings; Voting; Proxies.** (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 by any of the other owners of the unit to the person presiding over the meeting before the polls are closed.

(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 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) A proxy, to be valid, must:

(1) Be delivered to the secretary of the 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 association, the date of the meeting of the association, the printed names and signatures of the persons giving the proxy, the units for which the proxy

is given, to whom 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 as a whole and that the vote be made on the basis of the preference of the majority of the directors present at the meeting; or

(C) To those directors present at the meeting with the vote to be shared with each director 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) 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) 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) 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) *Use of association funds to distribute proxies.*

(1) Any board 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) A board 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).

(i) No managing agent or resident manager, or their employees, shall solicit, for use by the managing agent or resident manager, any proxies from any unit owner of the association that retains the managing agent or employs the resident manager, nor shall the managing agent or resident manager cast any proxy vote at any association meeting except for the purpose of establishing a quorum.

(j) No board 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 may adopt rules regulating reasonable time, place, and manner of such solicitations or distributions, or both.

§ ___**: 5-16. Association Meetings; Purchaser's Right to Vote.** The purchaser of a unit pursuant to a recorded agreement of sale 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 or bylaws;

(9) Any removal of the project from the provisions of this chapter; and

(10) Any other matter that would substantially affect the security interest of the seller.

§ ___: 5-17. **Board Meetings.** (a) All meetings of the board, other than executive sessions, shall be open to all members of the association, and association members who are not on the board may participate in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the board votes otherwise.

(b) The board, 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) Necessary to protect the attorney-client privilege of the association; or

(4) 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) All board meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. Unless otherwise provided in the declaration or bylaws, a board may permit any meeting to be conducted by any means of communication through which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. If permitted by the board, any unit owner may participate in a meeting conducted by a means of communication through which all participants may simultaneously hear each other during the meeting, provided that the board may require that the unit owner pay for the costs associated with such participation.

(d) The board shall meet at least once a year. Notice of all board meetings shall be posted by the managing agent, 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.

(e) A director shall not vote by proxy at board meetings.

(f) A director shall not vote at any board meeting on any issue in which the director has a conflict of interest. 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 subsection, means an issue in which a director has a direct personal or pecuniary interest not common to other members of the association.

§ ___: 5-18. **Board Meetings; Minutes.** (a) Minutes of meetings of the board 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 shall be approved no later than the second succeeding regular meeting.

(c) Minutes of all meetings of the board 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

§ ___: 5-19. **Operation of the Property.** The operation of the property shall be governed by this chapter and the declaration and bylaws.

§ ___: 5-20. **Managing Agents.** (a) Every managing agent shall:

(1) Be a:

(A) Licensed real estate broker in compliance with chapter 467 and the rules of the commission. With respect to any requirement for a corporate managing agent in any declaration or bylaws recorded before the effective date of this chapter, any managing agent organized as a limited liability company shall be deemed to be organized as a corporation for the purposes of this paragraph, unless the declaration or bylaws are expressly amended after the effective date of this chapter to require that the managing agent be organized as a corporation and not as a limited liability company; or

(B) Corporation 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 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 association managed by the managing agent; provided that the amount of the fidelity bond shall not be less than $20,000 nor greater than $500,000. 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 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 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;

(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 an association, and apply the fidelity bond proceeds, if any, to reduce the association's loss. If more than one association suffers a loss, the managing agent shall divide the proceeds among the associations in proportion to each association's loss. An association may request a court order requiring the managing agent to act promptly and diligently to recover from the fidelity bond. If an association cannot recover its loss from the fidelity bond

proceeds of the managing agent, the 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 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) The registration 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.

§ ___: 5-21. **Association Employees; Background Check; Prohibition.** (a) The board, managing agent, or resident manager, upon the written authorization of an applicant for employment as a security guard or resident manager or for a position that 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, managing agent, or resident 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 purposes of this section, the criminal history disclosure made by the applicant may be verified by the board, managing agent, resident manager, or other responsible party, if so directed by the board, managing agent, or resident 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 an association, managing agent, or resident 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, managing agent, or resident manager for acts and omissions of the employee hired.

(b) 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 sixty-seven percent of the unit owners.

§ ___: 5-22. Management and Contracts; Developer, Managing Agent, and Association. (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 association, shall comply with the requirements of sections §___: 5-3, ___: 5-37, and ___: 3-22.

(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 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.

§ ___: 5-23. Termination of Contracts and Leases of Developer. If entered into before the board elected by the unit owners pursuant to section ___: 5-6(e) 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 within a period of one hundred eighty days after the board elected by the unit owners pursuant to section ___: 5-6(e) takes office, upon not less than ninety days notice to the other party. This section does not apply to: (i) any lease or other agreement 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.

§ ___: 5-24. **Transfer of Developer Rights.** (a) A 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 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 the transferor by this chapter, if any. 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 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 developer rights, but transfers other 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 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 developer right by a successor developer who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument 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 request, succeeds to all developer rights related to that property held by that developer. The judgment or instrument conveying title must provide for the transfer of only the 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 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 developer rights held by that developer to a successor developer.

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

(1) A successor to any 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 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:

(A) On a developer which relate to the successor's exercise or nonexercise of developer rights; or

(B) On the transferor, other than:

(i) Misrepresentations by any previous developer;

(ii) Warranty obligations on improvements made by any previous developer, or made before the condominium was created;

(iii) Breach of any fiduciary obligation by any previous developer or the developer's appointees to the board; or

(iv) 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, and who may not exercise any other developer right, is not subject to any liability or obligation as a developer, except the obligation to provide a public report, any liability arising as a result thereof, and the obligations under part III.

(4) A successor to all 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 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 the transferor to control the board 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 developer rights under this subsection, the successor developer is not subject to any liability or obligation as a developer other than liability for the developer's acts and omissions under section ___: 5-6(d).

(f) Nothing in this section subjects any successor to a 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.

§ ___: 5-25. **Upkeep of Condominium.** (a) Except to the extent provided by the declaration or bylaws, the association is responsible for the operation of the property, 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 the owner's 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; provided that the association shall not be responsible to pay the costs of removing any finished surfaces or other barriers that impede its ability to maintain and repair the common elements.

(b) The unit owners shall have the irrevocable right, to be exercised by the board, to have access to each unit at any time as may be necessary for making emergency repairs to prevent damage to the common elements or to another unit or units.

§ ___: 5-26. **Upkeep of Condominium; High Risk Components.** (a) The board may, after notice to all unit owners and an opportunity for owner comment, determine that certain portions of the units, or certain objects or appliances within the units, pose a particular risk of damage to other units or the common elements if they are not properly inspected, maintained, repaired or replaced by owners. For example, these items might include washing machine hoses and water heaters. Those items determined by the board to pose a particular risk are referred to in this section as "high-risk components."

(b) With regard to items designated as high-risk components, the board may require any or all of the following:

(1) Inspection (i) at specified intervals or (ii) upon replacement or repair by the association or by inspectors designated by the association.

(2) Replacement or repair at specified intervals whether or not the component is deteriorated or defective.

(3) Replacement or repair (i) meeting particular standards or specifications established by the board, (ii) including additional components or installations specified by the board, or (iii) using contractors with specific licensing, training, or certification approved by the board.

(c) The imposition of requirements by the board under subsection (b) above shall not relieve unit owners of obligations regarding high-risk components as set forth in the declaration or bylaws including, without limitation, the obligation to maintain, repair and replace such components.

(d) If a unit owner fails to follow requirements imposed by the board pursuant to this section, the association shall, after reasonable notice, have the right to enter the unit to perform said requirements with regard to such high-risk components at the sole cost and expense of the unit owner, which costs and expenses shall be a lien on the unit as provided in section ___: 5-34. Nothing in this section shall be deemed to limit the remedies of the association for damages, or injunctive relief, or both.

§ ___: 5-27. Upkeep of Condominium; Disposition of Unclaimed Possessions. (a) When personalty in or on the common elements of a project has been abandoned, the board 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's 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 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 association.

§ ___: 5-28. Additions to and Alterations of Condominium. (a) *Certain work prohibited.* No unit owner shall do any work that could jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement, as reasonably determined by the board.

(b) *Material additions and alterations*. Subject to the provisions of the declaration, no unit owner may make or allow any material addition or alteration, or excavate an additional basement or cellar, without first obtaining the written consent of sixty-seven percent of the unit owners, the consent of all unit owners whose units or appurtenant limited common elements are directly affected, and the approval of the board, which shall not unreasonably withhold such approval. The declaration may limit the board's ability to approve or condition a proposed addition or alteration, provided that the board shall always have the right to disapprove a proposed addition or alteration that the board reasonably determines could jeopardize the soundness or safety of the property, impair any easement, or interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of the property.

(c) *Nonmaterial additions and alterations*. Subject to the provisions of the declaration, nonmaterial additions to or alterations of the common elements or units, including, without limitation, the installation of solar energy devices, or 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, shall require approval only by the board, which shall not unreasonably withhold such approval, and such percentage, number, or group of unit owners as may be required by the declaration or bylaws.

"Nonmaterial additions and alterations", as used in this section, means an addition to or alteration of the common elements or a unit that does not jeopardize the soundness or safety of the property, reduce the value thereof, impair any easement, 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 be ready to be made operational in order to qualify as a "solar energy device".

(d) *Telecommunications equipment*.

(1) Notwithstanding any other provisions to the contrary in this chapter or in any declaration or bylaws:

(A) The board 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, common elements, and easements appurtenant to each unit, or to be a structural alteration or addition to any building constituting a material change in the plans of the project filed in accordance with sections ___: 2-3 and ___: 2-4; provided that no such installation shall directly affect any nonconsenting unit owner.

(2) Notwithstanding any other provision to the contrary in this chapter or in any declaration or bylaws:

(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, common elements, and easements appurtenant to each unit or to be a structural alteration or addition to any building constituting a material change in the plans of the project filed in accordance with sections ___: 2-3 and ___: 2-4.

(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.

§ ___: 5-29. Tort and Contract Liability; Tolling of Limitation Period. (a) A unit owner is not liable, solely by reason of being a unit owner, for any 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, as the same may be established through adjudication. Whenever the developer is liable to the association under this section, the developer is also liable for all expenses of litigation, including reasonable attorney's fees, incurred by the association.

(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 or she 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).

§ ___: 5-30. Aging in Place; Limitation on Liability. (a) The association, its directors, unit owners, and their agents and tenants, acting through the board, shall not have any legal responsibility or legal liability, with respect to any actions and recommendations the board takes on any report, observation, or complaint made, or with respect to any recommendation or referral given, which relates to an elderly unit owner who, because of the problems of aging and aging in place enumerated below may require services and assistance to maintain independent living in the unit in which the elderly owner resides so that the resident will not pose any harm to self or to others, and will not be disruptive to the condominium community:

(1) Being unable to clean and maintain an independent unit.

(2) Being mentally confused.

(3) Being abusive to others.

(4) Being unable to care appropriately for oneself.

(5) Being unable to arrange for home care.

(6) Feeling alone and neglected.

(7) Making inappropriate requests of others for assistance.

For purposes of this section, "elderly" means age sixty-two and older.

(b) *No liability for assessments and recommendations.* Upon a report, observation or complaint relating to an elderly owner aging or aging in place which notes a problem similar in nature to the problems enumerated in subsection (a), the board may, in good faith, and without legal responsibility or liability, request a functional assessment regarding the condition of an elderly unit owner as well as recommendations for the services which the elderly owner may require to maintain a level of independence that enables such owner to avoid any harm to self or to others, and to avoid disruption to the condominium community. The board may, upon request, or unilaterally, and without legal responsibility or liability, recommend available services to an elderly owner which might enable such elderly owner to maintain a level of independent living with assistance, enabling in turn, such elderly owner to avoid any harm to self or others, and to avoid disruption to the condominium community.

(c) *No affirmative duty regarding assessments and recommendations.* There is no affirmative duty on the part of the association, its board, the unit owners, or their agents or tenants to request or require an assessment and recommendations with respect to an elderly unit owner when the owner may be experiencing the problems related to aging and aging in place enumerated in subsection (a). The association, its board, unit owners, and their agents and tenants are not legally responsible or liable for not requesting or declining to request a functional assessment of, and recommendations for, an elderly owner regarding problems relating to aging and aging in place.

(d) *No liability for actions filed.* In the event an elderly unit owner ignores or rejects a request for, or the results from, an assessment and recommendations, the association, with no liability for cross-claims or counterclaims, may file appropriate information, pleadings, notices, or the like, with appropriate agencies or courts to seek an appropriate resolution for the condominium community and for the elderly owner.

(e) Costs and fees for assessments, recommendations, and actions contemplated in this section shall be as set forth in the declaration or bylaws.

(f) This section shall not be applicable to any condominium that seeks to become licensed as an assisted living facility pursuant to chapter 90, title 11, Hawaii Administrative Rules, as amended.

§ ___: **5-31. Insurance.** (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, managing agent or resident 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, in an amount equal to $500 multiplied by the number of units; provided that the amount of the fidelity bond required by this paragraph shall not be less than $20,000 nor greater than $200,000.

(B) All management companies that are responsible for the funds held or administered by the association must be covered by a fidelity bond as provided in section ___: 5-20(a)(3). The association shall have standing to make a loss claim against the bond of the managing agent as a party covered under the bond.

(C) The board 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.

(b) *Attached units; improvements and betterments.* If a building contains attached units, the insurance maintained under paragraph (a)(1), to the extent reasonably available, must include the units, the limited common elements, except as otherwise determined by the board, 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, "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) *Detached units.* If a project contains detached units, then notwithstanding the requirement that associations obtain the requisite coverage, the insurance to be maintained under paragraph (a)(1) may be obtained separately for each unit by the unit owners; provided that the requirements of paragraph (a)(1) shall be met, and provided further that evidence of such insurance coverage shall be delivered annually to the association. In such event, the association shall be named as an additional insured.

(d) *Deductibles.* The board 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.

(e) *Other coverages.* The declaration or bylaws may require the association to carry any other insurance, including workers compensation, employment practices, environmental hazards, and equipment breakdown, the board considers appropriate to protect the association, the unit owners, or officers, directors, or agents of the association. 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.

(f) *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.

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

(g) *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.

(h) *Adjustment of losses; distribution of proceeds.* Any loss covered by the property policy under paragraph (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.

(i) *Mandatory unit owner coverage.* The board may, under the declaration or bylaws, require 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 the owner's guests, tenants, or invitees, or regardless of any negligence originating from the unit. The personal liability of a unit owner 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.

(j) *Certificates of insurance.* Contractors and vendors (except public utilities) doing business with an association must provide certificates of insurance naming the association, its board, and its managing agent as additional insured parties.

(k) *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 non-residential use.

(l) *Settlement of claims.* Any insurer defending a liability claim against an 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. (a) Except as provided in section ___: 2-11, 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 or made available to unit owners at least annually by the board.

(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 such owner's 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) In the case of 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. Any such grantor or grantee is, however, entitled to a statement from the board, 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) No unit owner may exempt himself or herself from liability for his or her contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of the owner's unit. Subject to such terms and conditions as may be specified in the bylaws, any unit owner may, by conveying his or her unit and common interest to the board on behalf of all other unit owners, exempt himself or herself from common expenses thereafter accruing.

(h) The board, 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. Association Fiscal Matters; Collection of Unpaid Assessments from Tenants. (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, 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 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 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 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. Association Fiscal Matters; Lien for Assessments.** (a) All sums assessed by the 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 association, and costs and expenses including attorneys' fees provided in such mortgages.

The lien of the 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, acting on behalf of the 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, acting on behalf of the association, unless prohibited by the declaration, may bid on the unit at foreclosure sale, and acquire and hold, lease, mortgage, and convey the unit. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.

(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or assessments by the association chargeable to the unit which became due prior to the acquisition of title to the unit by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the unit shall be deemed to acquire title and shall be required to pay the unit's share of common expenses and assessments beginning:

(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 (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the unit shall be deemed to acquire title upon recordation of the instrument of conveyance.

(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 pays all association assessments within thirty days of the date of suspension, the unit owner may ask the arbitrator to recommence the arbitration proceedings. If the owner fails to pay all association assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The unit owner shall be entitled to a refund of any amounts paid to the association which are not owed.

(e) In conjunction with or as an alternative to foreclosure proceedings under subsection (a), where a unit is owner-occupied, the association may authorize its managing agent or board 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 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 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 may specially assess the amount of the unpaid regular monthly common assessments for common 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 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 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 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. **Association Fiscal Matters; Other Liens Affecting the Condominium.** (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 the common expense funds of the association. 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 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 the owner's 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. **Association Fiscal Matters; Budgets and Reserves.** (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 that 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) 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 adopt 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.

(f) 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.

(g) 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 that has not prepared an annual operating budget and reserve study shall have the burden of proving it has complied with this section.

(h) 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 twenty-year period, except in an emergency; provided that it does not include a projection of special assessments or loans during that twenty-year period, except in an emergency.

"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;

(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; or

(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. Association Fiscal Matters; Handling and Disbursement of Funds. (a) The funds in the general operating account of the 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, located in the State, or out-of-state pursuant to a resolution adopted by the board, and whose deposits are insured by an agency of the United States government;

(2) Held by a corporation authorized to do business under article 8 of chapter 412;

(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. 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.

(d) A managing agent or board 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 association shall be guilty of a class C felony.

§ ___: 5-38. Association Fiscal Matters; Audits, Audited Financial Statement, Transmittal. (a) The 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 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 ___: 5-15(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. **Association Fiscal Matters; Lease Rent Renegotiation.** (a) Notwithstanding any provision in the declaration or bylaws, 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 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; provided that the association's representation in the renegotiation of lease rent must be on behalf of at least two lessees. All costs and expenses incurred in such representation shall be a common expense of the association.

(b) Notwithstanding subsection (a), 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.

(c) In any project where the association is a lessor or sublessor, the association shall fulfill its obligations under this section by appointing independent counsel to represent the lessees in the

negotiations and proceedings related to the rent renegotiation. Said counsel shall then act on behalf of the lessees in accordance with the vote or written consent of a majority of the lessees casting ballots or submitting written consents (as determined by the ratio that the common interest appurtenant to each lessee's unit bears to the total common interest appurtenant to the units of participating lessees). Nothing in this subsection shall be interpreted to preclude the lessees from making a decision (by the vote or written consent of a majority of the lessees as described above) to retain other counsel or additional professional advisors as may be reasonably necessary or appropriate to complete the negotiations and proceedings. In the event of a deadlock among the lessees or other inability to proceed with the rent renegotiation on behalf of the lessees, said counsel shall be permitted to apply to the circuit court of the judicial circuit in which the condominium is located for instructions. The association shall not instruct or direct said counsel or other professional advisors. All costs and expenses incurred under this subsection shall be assessed by the association to the lessees as provided in subsection (a) or (b), as may be applicable.

§ ___**: 5-40. Association Records; Generally.** 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. Association records shall be stored on the island on which the association's project is located; provided that if original records, including, but not limited to, invoices, are required to be sent off-island, copies of such records shall be maintained on the island on which the association's project is located.

§ ___**: 5-41. Association Records; Records to be Maintained.** (a) An accurate copy of the declaration, bylaws, house rules, if any, 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) The managing agent or board 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 shall also keep monthly statements indicating the total current delinquent dollar amount of any unpaid assessments for common expenses.

(c) Subject to section ___: 5-40, 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.

(d) 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) The managing agent or resident manager or board shall keep an accurate and current list of members of the 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, 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 managing agent or resident manager or the board 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 for 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. A board may prohibit commercial solicitations.

§ ___: 5-42. Association Records; Availability; Disposal; Prohibitions. (a) The association's most current financial statement and minutes of the board's meetings, once approved, shall be available to any unit owner at no cost or on twenty-four hour loan, at a convenient location designated by the board.

(b) Minutes of meetings of the board 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) Financial statements, general ledgers, the accounts receivable ledger, accounts payable ledgers, check ledgers, insurance policies, contracts, and invoices of the 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) After any association meeting, and not earlier, unit owners shall be permitted to examine proxies, tally sheets, ballots, owners' check-in lists, and the certificate of election; provided that:

(1) Owners must request to examine such documents within thirty days after the association meeting;

(2) 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

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

If there are no requests to examine proxies and ballots, such documents may be destroyed thirty days after the association meeting. If there are requests to examine proxies and ballots, such documents shall be kept for an additional sixty days, after which they may be destroyed. 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) The managing agent shall provide copies of association records maintained pursuant to this section and sections ___: 5-40 and ___: 5-41 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 association, to whom this function is delegated.

(f) Prior to the organization of the association, any unit owner shall be entitled to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.

(g) 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) An association may comply with this section by making information available to unit owners, at the option of each unit owner, and at no cost, through an Internet site.

(i) *Disposal*. A managing agent retained by one or more associations may dispose of the records of any association which are more than five years old – except for tax records, which must be kept for seven years – without liability if the managing agent first provides the board of the association affected with written notice of the managing agent's intent to dispose of the records if not retrieved by the board within

sixty days, which notice shall include an itemized list of the records which the managing agent intends to dispose of.

(j) *Prohibitions*. 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. **Association as Trustee.** 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.

§ ___: 5-44. **Pets.** (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) 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) 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) 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) 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) Nothing in this section shall prevent an association from immediately acting to remove vicious animals to protect persons or property.

§ ___: 5-45. Attorneys' Fees, Delinquent Assessments, and Expenses of Enforcement. (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 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 to pursue such enforcement; or

(2) The owner demonstrates to the satisfaction of the court that a demand for enforcement made to the board 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 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. Mediation.** (a) At the request of any party to a dispute concerning or involving one or more unit owners and an association, its board, 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, the parties to the dispute shall be required to participate in mediation. Each party shall be wholly responsible for its own costs of participating in mediation; unless 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) 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, 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 would be unavailable for defense or judgment because mediation was pursued.

(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. Arbitration.** (a) At the request of any party, any dispute concerning or involving one or more unit owners and an association, its board, 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 an association, a board, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association or its board 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*. 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.* In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under paragraph (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.* 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.* 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. 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*.

(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 thirty days 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."

SECTION 3. Section 521-3, Hawaii Revised Statutes, is amended to read as follows:

"[**[**]§**521-3**[**]**] **Supplementary general principles of law, other laws, applicable.** (a) Unless displaced by the particular provisions of this chapter, the principles of law and equity, including the law relative to capacity to contract, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.

(b) Every legal right, remedy, and obligation arising out of a rental agreement not provided for in this chapter shall be regulated and determined under chapter 666, and in the case of conflict between any provision of this chapter and a provision of chapter 666, this chapter shall control.

(c) Nothing in this chapter shall be applied to interfere with any right, obligation, duty, requirement, or remedy of a landlord or tenant which is established as a condition or requirement of any program receiving subsidy from the government of the United States. To the extent that any provision of this chapter is inconsistent with such a federal condition or requirement then as to such subsidized project the federal condition or requirement shall control.

(d) A unit owners' association under chapter ___ shall have standing to initiate and prosecute a summary proceeding for possession as against a tenant residing in the condominium project who repeatedly violates the association's governing documents or the rights of other occupants to quiet enjoyment and whose landlord refuses to act; provided that in such cases, the landlord shall be named as an additional party defendant."

SECTION 4. Chapter 514A, Hawaii Revised Statutes, is repealed.

SECTION 5. The Legislature finds as follows:

Developing an alternative dispute resolution mechanism that works for condominium communities is an important and potentially enormous task that should be examined carefully. Many stakeholders have commented that the system of dispute resolution currently required by chapter 514A, Hawaii Revised Statutes, is not working. They note that the "mandatory" mediation provisions are essentially voluntary (with boards refusing to mediate or going through the motions to avoid the appearance of non-cooperation) and arbitration provisions are impractical and expensive in most cases – particularly with the trial de novo provision of section 514A-127, Hawaii Revised Statutes.

Some members of the condominium community have strongly suggested that a "condominium court" be established to help resolve condominium disputes (either as small claims court is organized, as a part of district court, or as an administrative hearings office, like the existing department of commerce and consumer affairs hearings office). Proponents believe that a condominium court would provide a means by which condominium disputes can be resolved quickly and at reasonable cost. There is, however, a split of opinion on this issue in the community.

Therefore, the legislative reference bureau is requested to conduct a study of ways to improve dispute resolution in condominium communities, including, but not limited to, considering the establishment of a condominium court. The legislative reference bureau's review, findings, and recommendations should include ways to improve the current mediation and arbitration provisions of chapter 514A, Hawaii Revised Statutes, if any. Any proposed revisions to the arbitration provisions of the condominium law should consider concerns raised by members of the legal community regarding the Revised Uniform Arbitration Act.

In considering the establishment of a condominium court, the legislative reference bureau's review, findings, and recommendations should include, but not be limited to:

(1) Jurisdiction of the condominium court (i.e., the kinds of cases that should be handled by the condominium court);

(2) Whether attorneys should be allowed to represent parties in condominium court;

(3) What rules of evidence should be followed by the condominium court;

(4) Whether decisions of the condominium court may be appealed, and the grounds for appeal;

(5) How decisions and orders of the condominium court will be enforced;

(6) Whether the condominium court should be part of the department of commerce and consumer affairs' office of administrative hearings (and, if so, the extent of the involvement of the real estate commission and the real estate branch staff, if any), the Judiciary's court system, or a private (or 'Olelo) "People's Court;"

(7) A needs assessment, including a projected case load;

(8) Cost, including overhead and staffing;

(9) Funding source; and

(10) An implementation plan for a pilot program, if any.

SECTION 6. There is appropriated out of the condominium management education fund the sum of $150,000 or so much thereof as may be necessary for fiscal year 2004-2005 to conduct post-bill passage educational activities, including the continuation of one full-time temporary condominium specialist position in the department of commerce and consumer affairs (with the option of hiring a person as either an employee of the department or a consultant to the department), and other current expenses.

SECTION 7. The sum appropriated shall be expended by the department of commerce and consumer affairs for the purposes of this Act.

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect on July 1, 2005; provided that section ___: 5-34 shall be repealed on December 31, 2007; provided further that section ___: 5-34 shall reenacted in the form in which it read, as section 514A-90, Hawaii Revised Statutes, on the day before the approval of Act 39, Session Laws of Hawaii, 2000.

INTRODUCED BY: _____