From:	Dale Head
To:	Kyle-Lee N. Ladao
Cc:	Lila Mower
Subject:	[EXTERNAL] Input for meeting Agenda topic "Barriers to mediation access"
Date:	Thursday, October 26, 2023 9:30:37 AM

DALE ARTHUR HEAD

[redacted]

TO: CONDOMINIUM PROPERTY REGIME TASK FORCE

Department of Commerce and Consumer Affairs State of Hawaii https://cca.hawaii.gov/ Meeting of October 27, 2023 2:00pm

For New Business under Agenda:

Subject: Barriers to mediation access.

Aloha:

1. I resided in a large condominium complex in Makaha (454 units) next to Waianae High School, for a period of 34 years & 10 months, and sold it on 17 September of 2021 due to unstoppable corruption. Also, I spent over a decade on its Board of Directors, whose members are mostly 'puppets' of the Managing Agents, and have some thoughts on the matter of fair and equal access to mediation. Oh, by the way, my former condominium complex recently discovered an embezzlement of over $330,000 by employees of the management company, Hawaiian Properties, to my non-surprise. As they were unhappy about that, the company gave them some reimbursement and a Notice of Termination of 'services', otherwise known as retaliation. [Link to Embezzlement story: https://www.civilbeat.org/2023/10/this-waianae-condo-development-has-lost-hundreds-of-thousands-of-dollars-to-embezzlement/ *]*

2. In the interest of fair play and justice, the current mediation fee of $375 should be instead on a PCI basis, that is of course the Percentage of Common Interest of the Mediation filing fee. So, for instance, if the HOA (Home Owners Association has 100 units, then the fee for a complainant should be $3.75.

3. Regarding attorney representation, while HOAs routinely engage services of lawyers in any Mediation, the Complainant should also be provided one, by the HOA. This is only fair. When Boards bully and sue individual owners, they do not first go

and get permission from owners, which should be a requirement on them.

Respectfully, Dale Arthur Head

Kyle-Lee N. Ladao

From: Dale Head <sunnymakaha@yahoo.com>
Sent: Thursday, October 26, 2023 12:11 PM
To: Kyle-Lee N. Ladao
Subject: [EXTERNAL] Imposition of 'Conditional' HOA Voting Rights via HRS514b-123
Attachments: R.Port(BRAC).pdf; R. PortHB35.pdf; Nerney 'Bucks'.JPEG; Nerney oppose HB1509.pdf

DALE ARTHUR HEAD
1637 Ala Mahina Place Honolulu, HI 96819
(808) 836-1016 sunnymakaha@yahoo.com

TO: CONDOMINIUM PROPERTY REGIME TASK FORCE

Department of Commerce and Consumer Affairs State of Hawaii https://cca.hawaii.gov/ ***Meeting of Friday October 27, 2023 @ 2:00pm***

Subject: Imposition of 'Conditional' HOA Voting Rights via HRS514b-123

1. *Perpetrated as an* ***attack*** *on the right to vote,* ***HRS514b-123*** *imposed a condition to be present at an annual HOA meeting for a member to cast their own vote. This is a predatory business model perpetrated by Developers of multiple dwelling units when they form Home Owners Associations. No big surprise that this trick was embedded into our Hawaii statute by a cabal of attorneys for property management companies, who, oddly, were basically deputized by Real Estate Commission to overhaul the statute decades ago. Buyers of dwelling units in HOA are not appraised of their reduced rights even though they provide profits to Developers and pay taxes. Unfortunately, neither the original US Constitution nor Hawaii's specified citizen have the 'right to vote'.*

2. However, the 14th Amendment to our US Constitution, its section 1, specifies - "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This is known as The Equal Protection Clause. *When Hawaii imposed conditional voting rights, a form of suppression, within HOAs, it blatantly, defied that requirement. This as it consigned HOA members to a form of '**servitude**' subordinating them to a small circle of other owners who may, or may not, have been 'elected' fairly by other owners.*

2. *A prime link in the web of corruption occurs when management companies encourage members who cannot attend a meeting in person, to make out a Proxy which has been designed to give advantage to an incumbent Board of Directors, by suggesting assigning voting rights to them. As the managing agent receives* ***ALL*** *returned Proxies, this puts them in a position to manipulate the election by wrongfully funneling 'Proxy/Votes' to candidates for election whom they prefer. This dishonest act has been uncovered by a few owners who take time to audit signed documents on a post election basis. As the state is unwilling to enforce the statute, it is then rendered 'voluntary', outside of a Courtroom. A manipulated election creates a Board which is a Puppet for the Managing Agent, an abrogation of basic democracy.*

3. *For brevity, to be concise, HRS514b can best be described as* ***The Bully Authorization Act*** *as it gives unfettered power to a Board of Directors without any accountability to the state, which designed the framework for their existence. This necessarily created a '2nd' class form of citizenship.*

4. *The 'Blue Ribbon Advisory Committee' (BRAC) of 2002 did not make itself known nor responsive to most HOA members when they overhauled HRS514a, rendering it to be so management friendly as to be 'anti-consumer', in my opinion. One of its members even filed an 'Objection' to its report prepared and conveyed to Hawaii Legislature. That fellow was Richard Port, who served for a time as Head of the Democratic Party of Hawaii. Please note the two attachments -* ***1*** *His objection to the BRAC report, and, secondly (****2****) his testimony on House Bill 35 in 2017, which I attended. Mr. Port made the same point in both appearances, that, the general public, specifically HOA members, were not informed nor consulted when their rights were abridged by BRAC.*

5. *To better 'connect the dots' on how our Capitol works, please note the third attachment, 'Nerney bucks', which is public information found on the website, 'Followthemoney'.* ***It reveals donations made to 19 politicians over 15 years****. Unless they were in a position to grant access and influence over legislation, I don't know why they were so favored, do you? The fourth attachment is* ***Mr. Nerney' opposing establishment of Condominium Property Regime Task Force****. Fine! Well, I asked to be on the Task Force and was ignored, but, did not funnel hundreds and thousands of dollars to politicians. Maybe that is why there was no response, not even a 'drop dead, sucker' message. Such truculent arrogance is now the norm, it seems.*

6. *Any thoughts on why attorney Gordon Arakaki and other BRAC attorneys opposed full voting rights in HOAs? The answer is obvious. When managing agents hijack elections through abuse of Proxy forms, it protects their bottom line of profits, has been my experience.*

Respectfully, ***Dale Arthur Head***
PS - I got two HOA voting rights Bills introduced this year, 2023, HB1298 / SB1512. Neither one got a Hearing. Nope, I am not going to bribe politicians for that to happen.

Richard J. Port
[redacted]
e-mail: [redacted]

Measure: HB 35 Relating to Condominiums
Date and Time of Hearing: 2:00 p.m. Tuesday, January 31, 2017
Committee: Committee on Consumer Protection & Commerce

Aloha Rep. McKelvey and Members of the Committee,

I believe the Department of the Attorney General will express strong disapproval of placing an Office of Condominium Complaints and Enforcement within the Department of the Attorney General. Therefore, I expect that your committee will be very reluctant to move HB 35 forward.

Having said that, I would ask your committee to consider HB 35 as a cry for help for 30% of our population who reside in condominiums. In that spirit, I ask that your Committee consider the concerns of the many condo owners in other condominium bills you will be considering.

More specifically, you need to know that condominium Boards have extraordinary powers over their owners. Boards have executive, legislative, and judicial powers over owners in their condos and control the media through their newsletters. Owners have very few opportunities to express their concern or dissent regarding condo Board decisions.

I speak to you with a lot of experience, having been president and/or a member of a condo Board for more than 35 years and have helped, and tried to help, Owners in other condos at their request. I know first hand where the problems exist. Although I have been less active in recent years, I have seen Boards able to get around various provisions of Chapter 514B. In this Legislative session, you have several bills that will help close some of the loopholes that currently exist and your committee can bring greater justice to condo owners by approving many of these bills.

Thank you for this opportunity to testify,

Richard Port
Richard Port

9:05 PM Sun Oct 8

100%

followthemoney.org

Contact | D | sophistry m... | 10 Stunning... | Campaign C... | Hawai'i Stat... | Russia's Bla... | Identifying a... | World - Bing... | Results - Fol... | NERNEY, PHI...

FollowTheMoney.org

Search entire site...

Support Us | Ask Anything | Register | Login

Entity Details

NERNEY, PHILIP

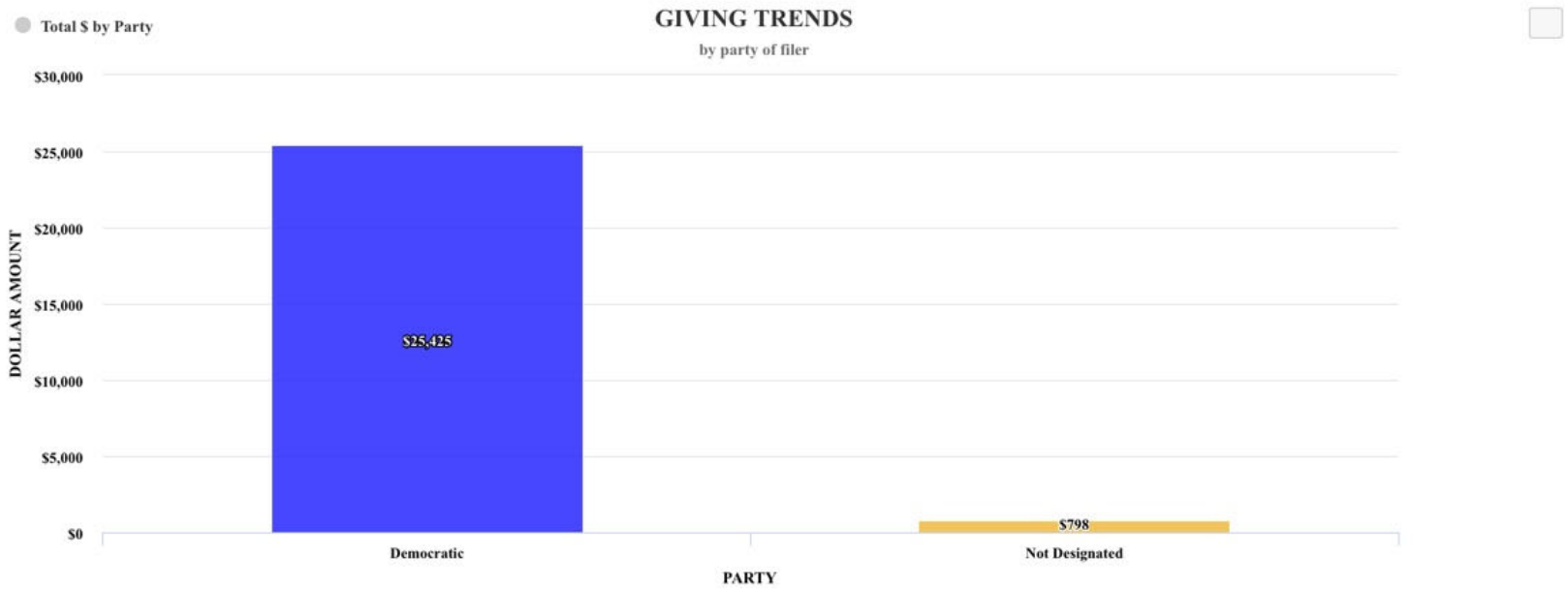
Individual

General Data

As a contributor

- Overview
- Industry
- Candidates
- Party Committees
- Ballot Measure Committees
- Independent Spenders
- Office Holders
- Giving Trends
- Employers Listed
- Occupations Listed

NERNEY, PHILIP has given $26,223 to 19 different filers spanning 15 years.



LAW OFFICES OF PHILIP S. NERNEY, LLLC
A LIMITED LIABILITY LAW COMPANY
335 MERCHANT STREET, #1534, HONOLULU, HAWAII 96806
PHONE: 808 537-1777

February 13, 2023

Chair Troy N. Hashimoto
Vice Chair Micah P.K. Aiu
Committee on Housing
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **HB 1509 OPPOSE**

Dear Chair Hashimoto, Vice Chair Aiu and Committee Members:

HB 1509 should not be passed by the Committee. This is so because the proposed oversight task force is unwarranted.

The rationale for the bill is that owners in planned community associations ("421J") and cooperative housing corporations ("421-I") "must privately resolve their disputes through their internal processes or judicial process." That is inaccurate.

The mediation of disputes is mandated pursuant to both Chapter 421-J and Chapter 421-I. Indeed, HRS §421I-9 effectively incorporates the mediation and arbitration requirements contained in the condominium statute.

Thus, the bill also inaccurately asserts that resort to internal processes or judicial process "may be costly to the owner in comparison to the gravity of the dispute and an alternative mechanism for oversight should be examined." Community mediation centers exist to provide low-cost alternative dispute resolution services to the public.

Cooperative housing corporations are relatively rare. It is difficult to perceive the public policy need to assert oversight by the department of commerce and consumer affairs.

As to planned community associations, the Supreme Court of Hawaii has noted: "a fundamental distinction between condominium property regimes and planned community associations — that condominium property regimes are creatures of statute, whereas planned community associations are primarily creatures of common law." Lee v. Puamana Community Association, 128 P.3d 874, 888

(Haw. 2006).[1] Lesser governmental involvement in planned community associations has been the norm.

Fundamental disruption to legal relationships should only be considered in relation to genuine need and pursuant to careful study. Such a study is unwarranted here, because the stated rationale is not based on genuine need.[2]

Very truly yours,

/s/ Philip Nerney

Philip S. Nerney

---

[1] Moreover, the contractual nature of planned community associations implicates significant liberty interests:

> [T]he right of private contract is no small part of the liberty of the citizen, and ... the usual and most important functions of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy.... [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.

Kutkowski v. Princeville Prince Golf Course, LLC, 129 Hawaii 350, 300 P.3d 1009, 1018 (Haw. 2013).

[2] If a need existed, HB 1509 would hardly be adequate to the task. The proposed task force could not reasonably be expected to be credible absent a much broader stakeholder base, such as was gathered in connection with the recodification of condominium law.

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.

Kyle-Lee N. Ladao

From: gordonarakaki@hawaiiantel.net
Sent: Tuesday, October 24, 2023 3:11 PM
To: Kyle-Lee N. Ladao
Subject: [EXTERNAL] For 10/27/2023 (2:00 PM) CPR Task Force meeting: "Overlooked Guidance in the Hawaii Real Estate Commission's 2003 Official Commentary to Hawaii's Recodified Condominium Law (enacted as HRS Chapter 514B)"
Attachments: November2023_v2-gordon arakaki's article.pdf

Hi Kyle:

From December 2000 through June 2004, I served as the Hawaii Real Estate Commission's Condominium Law Recodification Project Attorney. In that capacity, I worked with lawmakers, the Commission, a blue ribbon advisory committee, and stakeholders throughout the State to "update, clarify, organize, deregulate, and provide for consistency and ease of use" of Hawaii's then 44+ year old condominium law.

I see that Agenda Item #2.a. of the CPR Task Force meeting this Friday is 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." To help the CPR Task Force understand the importance of using the REC's 2003 Final Report to understand and interpret HRS Chapter 514B correctly, I've attached a pre-final draft of an article I wrote for the *Hawaii Bar Journal* that will have its first publication in the *Journal's* November 2023 issue ["Overlooked Guidance in the Hawaii Real Estate Commission's 2003 Official Commentary to Hawaii's Recodified Condominium Law (enacted as HRS Chapter 514B)"]. The bullets in endnote #3 still need to be formatted correctly, but the article is otherwise good to go.

I also plan to appear in person to explain the 2-1/2 year process the REC and I went through to craft and draft the REC's 2001 and 2002 interim reports/drafts and 2003 Final Report, and the additional year-and-a-half I spent working with the Legislature (*pro bono*, at the request of legislators) to pass Hawaii's recodified condominium law (HRS Chapter 514B).

Please let me know if you have any questions.

With Aloha,
Gordon

Gordon M. Arakaki
Attorney at Law, LLLC
Cell: (808) 542-1542
E-mail: gordonarakaki@hawaiiantel.net

Kyle-Lee N. Ladao

From: [redacted]
Sent: Tuesday, October 24, 2023 3:11 PM
To: Kyle-Lee N. Ladao
Subject: [EXTERNAL] For 10/27/2023 (2:00 PM) CPR Task Force meeting: "Overlooked Guidance in the Hawaii Real Estate Commission's 2003 Official Commentary to Hawaii's Recodified Condominium Law (enacted as HRS Chapter 514B)"
Attachments: November2023_v2-gordon arakaki's article.pdf

Hi Kyle:

From December 2000 through June 2004, I served as the Hawaii Real Estate Commission's Condominium Law Recodification Project Attorney. In that capacity, I worked with lawmakers, the Commission, a blue ribbon advisory committee, and stakeholders throughout the State to "update, clarify, organize, deregulate, and provide for consistency and ease of use" of Hawaii's then 44+ year old condominium law.

I see that Agenda Item #2.a. of the CPR Task Force meeting this Friday is 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." To help the CPR Task Force understand the importance of using the REC's 2003 Final Report to understand and interpret HRS Chapter 514B correctly, I've attached a pre-final draft of an article I wrote for the *Hawaii Bar Journal* that will have its first publication in the *Journal's* November 2023 issue ["Overlooked Guidance in the Hawaii Real Estate Commission's 2003 Official Commentary to Hawaii's Recodified Condominium Law (enacted as HRS Chapter 514B)"]. The bullets in endnote #3 still need to be formatted correctly, but the article is otherwise good to go.

I also plan to appear in person to explain the 2-1/2 year process the REC and I went through to craft and draft the REC's 2001 and 2002 interim reports/drafts and 2003 Final Report, and the additional year-and-a-half I spent working with the Legislature (*pro bono*, at the request of legislators) to pass Hawaii's recodified condominium law (HRS Chapter 514B).

Please let me know if you have any questions.

With Aloha,
Gordon

Gordon M. Arakaki
Attorney at Law, LLLC
Cell: [redacted]
E-mail: [redacted].

By Gordon M. Arakaki

Overlooked

Guidance in the Hawaii Real Estate Commission's 2003 Official Commentary to Hawaii's Recodified Condominium Law

(enacted as HRS Chapter 514B)

The [Hawaii Real Estate] commission's "Final Report to the Legislature, Recodification of Chapter 514A, Hawaii Revised Statutes (Condominium Property Regimes), in response to Act 213, Section 4 (SLR 2000)," dated December 31, 2003, should be used as an aid in understanding and interpreting this Act.
Excerpt from Section 1 of Act 164, *Session Laws of Hawaii*[1] (2004)

This article explicitly reviews some of the guidance included in the Hawaii Real Estate Commission's "Final Report to the Legislature, Recodification of Chapter 514A, Hawaii Revised Statutes (Condominium Property Regimes), in response to Act 213, Section 4 (SLH 2000)", dated December 31, 2003, ("Commission's 2003 Final Report"), which appears to have been overlooked over the years. The author hopes this article will encourage attorneys to follow the Legislature's statutory[2] instructions and use the Commission's 2003 Final Report as an aid in understanding and interpreting Hawaii's recodified condominium law, Hawaii Revised Statutes ("HRS") Chapter 514B.[3]

In addition to detailed explanatory comments in the Commission's 2003 Final Report, the Final Report explicitly references secondary sources that have detailed explanatory comments that should be used to correctly understand and interpret HRS Chapter 514B. As noted in the Commission's 2003 Final Report at pages 7-8:

> 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.

(Emphasis added.) The Real Estate Commission's ("Commission") final draft of the recodification was based on this structure and the statutory structure ultimately adopted in HRS Chapter 514B.

The bottom line is that using the Commission's 2003 Final Report and its cited references to correctly understand and interpret HRS Chapter 514B is important for Hawaii's condominium community. Indeed, because high-density housing is critical for the provision of housing for Hawaii's people, it is important for all of Hawaii. Many of Hawaii's condominium communities, which comprise approximately 30% of Hawaii's housing units,[4] are or will be facing challenges ranging from deferred maintenance, to evolving building requirements, to sea-level rise, all while trying to figure out: (i) who is responsible for what; (ii) who is responsible for paying for what; and (iii) how to resolve disputes and solve problems in a way that is fair and efficient for the condominium community and the people who live in them.

This article will cover the following:

- Identifying the sections of HRS Chapter 514B that are based on the Uniform Condominium Act (UCA) or the Uniform Common Interest Ownership Act (UCIOA) (1994)[5] and the Restatement 3rd (Servitudes) and explaining how the official commentary to those treatises can be used to help correctly understand and interpret the law.
- Two examples (from the author's opinions) of how one can use the Commission's 2003 Final Report to correctly understand and interpret HRS Chapter 514B.
- A cautionary example of an apparent failure to use the Commission's 2003 Final Report to help correctly understand and interpret HRS Chapter 514B.

I. Many sections of HRS Chapter 514B are based on the Uniform Condominium Act (UCA) or the Uniform Common Interest Ownership Act (UCIOA) (1994) and the Re-

statement 3rd (Servitudes) and the official commentary to those treatises can be used to help correctly understand and interpret HRS Chapter 514B

As shown by the table on page 26, many of HRS Chapter 514B's sections are based, in whole or in part, on the Uniform Condominium Act (UCA) (1980) or the Uniform Common Interest Ownership Act (UCIOA) (1994).

When crafting the Recodification, the Commission tried to build on the scholarly work of UCIOA and the Restatement 3rd (Servitudes). Each of those treatises have their own extensive explanatory comments that should be used to understand and interpret sections of HRS Chapter 514B which are based on those treatises.

For example, as noted in the table on page 26, HRS §514B-141 (Tort and contract liability; tolling of limitation period) is based on UCA/UCIOA §3-111. HRS §514B-141 reads in part as follows:

> **§514B-141 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. …

The Commission's 2003 Final Report's comment on HRS §514B-141 simply states "UCA/UCIOA §3-111, modified, is the source of this section." UCOIA's comment on its §3-111, however, contains much more information that helps to understand and interpret HRS §514B-141. Among other things:

> •UCIOA §3-111 changes the law in several states where plaintiffs were forced to name individual unit owners as the real parties in interest to any action brought against the association (rendering such a possibility in Hawaii moot).
>
> •The section recognizes the practical control that declarants ("developers" in HRS Chapter 514B, so that term is used for "declarant" going forward) can exercise over the affairs of the association during any period of developer control, and therefore provides that the association or any unit owner has a right of action against the developer for any losses suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any

period of developer control.

•To assure the decision to bring such an action can be made by an association's board free from the influence of the developer, UCIOA §3-111(c) provides any statute of limitations affecting such right of action by the association shall be tolled until the expiration of developer control.

•The form in which common elements are owned—whether in a condominium, planned community, or cooperative—should not impose joint and several personal responsibility on condominium owners, when no such liability exists for owners in planned communities. This rejects the decision in *Ruoff v. Harbor Creek Community Association*, 10 Cal.App.4th 1624, 13 Cal. Rptr 2d 755 (Cal.App. 1992).

As shown above, the extensive comments in UCIOA can be helpful in understanding and interpreting the provisions in HRS Chapter 514B that are based on UCIOA.

The Commission's 2003 Final Report favorably cites UCIOA and the Restatement 3rd (Servitudes), so attorneys and courts should use those treatises to correctly understand and interpret HRS Chapter 514B. Indeed, the introduction to Chapter 6 of the Restatement 3rd (Servitudes) was paraphrased in the Commission's 2003 Prefatory Comment to Part V (renumbered as Part VI in HRS Chapter 514B) (Management of Condominium) to set forth the philosophical underpinning of HRS Chapter 514B's management of condominium provisions.[6]

Finally, the Commission made it easy for people to identify the sources of each section of the Recodification with translation tables showing the sources of the proposed law [e.g., HRS Chapter 514A, Hawaii Administrative Rules, UCIOA, the Restatement 3rd (Servitudes), etc.]. The first table was sorted by Recodification section numbers, and the second table was sorted by the sources of the Recodification sections. These translation tables were included in the Commission's 2003 Final Report.

Once the Recodification was enacted in 2004-2006, the author updated the translation tables to include the sections as numbered in HRS Chapter 514B. The author has updated the translation tables (and much more) every year since then in his *Expert Statute Geek's Guide to Hawaii's Recodified Condominium Law (Chapter 514B, Hawaii Revised Statutes)*.

Recodification, Final REC Draft	Source	HRS Chapter 514B
___: 1-03	UCA 1-103(7), (10), (11), (16), (25)	514B-3 Definitions
___: 1-03	UCA/UCIOA 1-103(3), (4), (5)	514B-3 Definitions
___: 1-04	UCA/UCIOA 1-105(a), (b), (d)	514B-4 Separate titles and taxation
___: 1-07	UCA/UCIOA 1-109	514B-7 Construction against implicit repeal
___: 1-08	UCA/UCIOA 1-111	514B-8 Severability
___: 1-09	UCA/UCIOA 1-113	514B-9 Obligation of good faith
___: 1-10	UCA/UCIOA 1-114	514B-10 Remedies to be liberally administered
___: 2-05	UCA/UCIOA 2-102	514B-35 Unit boundaries
___: 5-02	UCA/UCIOA 3-101	514B-102 Association; organization and membership
___: 5-04	UCA/UCIOA 3-102	514B-104 Association; powers
___: 5-05	UCA/UCIOA 3-102(b), (c)	514B-105 Association; limitations on powers
___: 5-06	UCA/UCIOA 3-103	514B-106 Board; powers and duties
___: 5-24	UCA/UCIOA 3-104	514B-136 Transfer of developer rights
___: 5-23	UCA/UCIOA 3-105	514B-135 Termination of contracts and leases of developer
___: 5-08	UCA/UCIOA 3-106	514B-108 Bylaws
___: 5-25	UCA/UCIOA 3-107(a)	514B-137 Upkeep of condominium
___: 5-13	UCA/UCIOA 3-108	514B-121 Association meetings
___: 5-15	UCA/UCIOA 3-110	514B-123 Association meetings; voting; proxies
___: 5-29	UCA/UCIOA 3-111	514B-141 Tort and contract liability; tolling of limitation period
___: 5-32	UCA/UCIOA 3-115	514B-144 Association fiscal matters; assessments for common expenses
___: 5-35	UCA/UCIOA 3-117	514B-147 Association fiscal matters; other liens affecting the condominium
___: 5-40	UCA/UCIOA 3-118	514B-152 Association records; generally
___: 5-43	UCA/UCIOA 3-119	514B-155 Association as trustee
___: 4-01	UCA/UCIOA 4-101	514B-81 Applicability; exceptions
___: 4-13	UCA/UCIOA 4-110	514B-93 Early conveyance to pay project costs
___: 3-01	UCA/UCIOA 5-102	514B-51 Registration required; exceptions
___: 3-02	UCA/UCIOA 5-103(a)	514B-52 Application for registration
___: 3-17	UCA/UCIOA 5-106	514B-67 Termination of registration
___: 3-11	UCA/UCIOA 5-107	514B-61 General powers and duties of commission
___: 3-08	UCA/UCIOA 5-109	514B-58 Annual report
___: 3-07	UCA/UCIOA 5-110	514B-57 Commission oversight of developer's public report
___: 1-02	UCIOA 1-102	514B-2 Applicability
___: 1-03	UCIOA 1-103(16), (26)	514B-3 Definitions
___: 1-11	UCIOA 1-201	514B-21 Applicability to new condominiums
___: 1-12	UCIOA 1-204	514B-22 Repealed
___: 1-13	UCIOA 1-206	514B-23 Amendments to governing instruments

Source: *The Expert Statute Geek's Guide to Hawaii's Recodified Condominium Law (Chapter 514B, Hawaii Revised Statutes)—2022 Edition*, by Gordon M. Arakaki (in discussions to make the Guide available through the Hawaii State Bar Association), at pages 103-104 (Translation Tables—Sorted by Source).

II. Two examples (from the author's opinions) of how one can use the Commission's 2003 Final Report to correctly understand and interpret HRS Chapter 514B.

The following examples are from opinions written by the author based on his specialized knowledge of HRS Chapter 514B and the Commission's 2003 Final Report.

A. First example: Pursuant to HRS §514B-10(b) and the Commission's 2003 Final Report, *Hiner v. Hoffman*'s "strict construction" rule regarding restrictive covenants has not applied to condominiums since July 1, 2006; instead, the governing documents of condominiums must be liberally construed to facilitate the operation of condominiums.

To properly construe the provisions of condominium governing documents, it is important that attorneys and courts understand that the governing documents of condominium associations must be "liberally construed to facilitate the operation of the condominium property regime." [*See*, HRS §514B-10(b).]

HRS §514B-3 defines "operation of the property" as "the *administration*, *fiscal management*, and *physical operation* of the property,[7] and includes the maintenance, repair, and replacement of, and the making of any additions and improvements to, the common elements." (Emphasis added.) Consequently, the governing documents of condominiums must be liberally construed to facilitate the administration, fiscal management, and physical operation of condominiums.

For example, responsibility for the costs and expenses related to the repair of limited common elements, assessments for such costs and expenses, and priority of payment policies all relate to the fiscal management of condominium property regimes. Therefore, provisions in the governing documents of condominiums related to responsibility for limited common element repair costs and expenses, assessments for such costs and expenses, and priority of payments must be liberally construed to facilitate the fiscal management of the condominiums.

When the Commission crafted the recodification (enacted as HRS Chapter 514B), it recognized: (i) condominium associations were stepping into the shoes of developers and (ii) those developers drafted governing documents that generally protected very different interests than those of condominium associations (e.g., protecting features and processes that kept the projects and units attractive for initial sales and secure for construction lenders). For that and other reasons (explained in the Commission's official comment below), HRS §514B-10(b) was enacted. It reads: "Any deed, declaration, bylaw, or condominium map *shall be liberally construed to facilitate the operation of the condominium property regime*." (Emphasis added.)

As explained in the Commission's 2003 Final Report comment regarding HRS §514B-10(b):

> 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). …
>
> 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.

As is made clear above, when HRS §514B-10(b) was enacted, the Legislature statutorily overruled the Hawaii Supreme Court's holding regarding ambiguity in condominium governing documents and construing the governing documents strictly against the purported "drafter" of the governing documents (i.e., the condominium association that has stepped into the shoes of the developer that originally drafted the governing documents). Instead, *the Legislature adopted a "facilitate the operation of the condominium property regime" standard for construing a condominium's governing documents*.

Note also Chapter 6 of the *Restatement of the Law, Third, Property (Servitudes)* was favorably cited in the Commission's 2003 Final Report comment to HRS §514B-10(b).

All of this was done to help people correctly understand and interpret HRS Chapter 514B. None of this was done out of the public eye.

Indeed, the Commission relentlessly informed the public it was proposing to negate *Hiner* as it applied to condominiums. The proposal and detailed explanation were in the Commission's 2001, 2002, and 2003 (Final Report) reports to the Legislature. It was part of every draft of the Recodification (all of which were available online). And it was part of every presentation made by the author regarding the Recodification from 2001 on and every article written by the author about changes being made by the Recodification.[8]

Finally, common interest ownership community practitioners should be aware that pursuant to Act 70 (SLH 2008), the substance of HRS §514b-10(b) was adopted for planned community associations and enacted as HRS §421J-1.5. The rationale for HRS §514B-10(b) should apply equally to HRS §421J-1.5, which reads as follows:

> **[§421J-1.5] Interpretation.** This chapter and any association document subject thereto shall be liberally construed to facilitate the operation of the planned community association.

After a quick online search, however, it does not appear HRS §421J-1.5 has been cited in any Hawaii cases. On the other hand, *Hiner v. Hoffman has* been cited in a few recent cases involving the interpretation of restrictive covenants in planned community associations.[9]

B. Second Example: To properly understand and interpret HRS §514B-138 (Upkeep of condominium; high-risk components), you should read the article cited by the Commission in its 2003 Final Report as the basis for section.

As noted in the Commission's 2003 Final Report comment #1 for HRS §514B-138, the section is new (i.e., it had no counterpart in HRS Chapter 514A) and 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). In addition to a "Model Amendment" that served as the basis for HRS §514B-138, the article contains many practice pointers.

The main concept that was incorporated in HRS §514B-138 from the "High-Risk Components" article is in the article's first few paragraphs:

> When a domestic hot water heater breaks, it can cause thousands of dollars of *damage to* ***adjoining units***. The same can be said of a washing machine hose or a polybutalene (*sic*) pipe. A faulty smoke detector can lead to consequences that are even more severe.
>
> What all these "high-risk components" have in common is that they're usually located within the members' units. Because of their location, they belong to the members, and it's the members' responsibility to maintain, repair, and replace them. But most members will fix something only after it breaks, and with these high-risk components, that can be too late. …

> To ensure that the high-risk components located in your members' units are properly maintained, give your association the authority to compel proper care of them…

(Emphasis added.)

In one case for which the author provided an expert opinion, the plaintiffs spent a lot of time in depositions attempting to somehow establish that, pursuant to HRS §514B-138, the association was responsible for inspecting the windows and screens of privately owned units for safety and security. The windows and screens of privately owned units in that case, however, did not meet the criteria to be defined as "high-risk components" subject to HRS §514B-138.

HRS §514B-138(a) reads as follows:

> The board, after notice to all unit owners and an opportunity for owner comment, *may determine that certain portions of the units*, or certain objects or appliances within the units such as washing machine hoses and water heaters, *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*. Those items determined by the board to pose a particular risk are "high-risk components" for the purposes of this section.

(Emphasis added.)

The windows and screens of the condominium in that case did not pose any particular risk of *damage* to *other* units or the *common elements* if they were not properly inspected, maintained, repaired, or replaced by the owners. Regardless, while associations are *authorized* to designate certain portions of units (or certain objects or appliances within the units) as "high-risk components," they are not obligated to do so. The purpose of HRS §514B-138 is to help to prevent damage to other units or the common elements from things like broken washing machine hoses, water heaters, and toilet O-rings, which can damage an entire stack in a multi-story condominium.

Indeed, even if an association, acting through its board, were to designate a certain portion of the units in a condominium as a high-risk component, the association would not be liable if the owner failed to maintain, repair, or replace the high-risk component and the association did not do so itself. The Legislature made this clear in 2006 (the session before HRS Chapter 514B became effective on July 1, 2006), when it adopted an ad hoc stakeholders group's recommendation and amended HRS §514B-138(d) and changed "shall" to "may." The intent of the amendment was to clarify that, while the association is *authorized* to replace or repair high-risk components if an owner fails to do so, *the association is not subject to liability* if it fails to do so.[10]

III. Cautionary example of an apparent failure to use the Commission's 2003 Final Report to help correctly understand and interpret HRS Chapter 514B.

Failing to use the Commission's 2003 Final Report to help correctly understand and interpret HRS Chapter 514B can have serious consequences for everyone who lives in common interest ownership communities in Hawaii.

For example, in 2018, the Hawaii Intermediate Court of Appeals' ("ICA") somehow created a new requirement for condominium associations that wanted to use the nonjudicial foreclosure process to collect delinquent assessments. In *Sakal v. AOAO Hawaiian Monarch*, 426 P.3d 443 (Haw. Ct. App. 2018), the ICA ruled condominium associations were required to have language in their bylaws explicitly authorizing them to use the nonjudicial foreclosure process to collect delinquencies, notwithstanding statutory language in HRS §§514A-90 and 514B-146 providing (for the relevant time period) that "[t]he lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667"[11] and a provision in the association's bylaws stating that the association "shall have all remedies provided in Section 514A-90, HRS."

In a nutshell, the ICA construed an ambiguity it perceived in the Hawaiian Monarch's bylaws against the association as the purported "drafter" of the bylaws, and ruled the association did not have the authority to enforce its lien through the nonjudicial foreclosure process because the Hawaiian Monarch's bylaws did not explicitly state it had the authority to use the nonjudicial foreclosure process. [As noted above in section II.A, condominium *developers* actually draft the governing documents of condominiums, including the bylaws, and condominium associations step into the developer's shoes once the developer transitions out.]

After the Hawaii Supreme Court denied certiorari on the nonjudicial foreclosure for condominium associations issue,[12] the 2019 Hawaii Legislature amended HRS §514B-146 to correct the ICA's decision in *Sakal* and make it even clearer that condominium associations had the statutory authority to enforce their liens using the nonjudicial foreclosure process "regardless of the presence or absence of power of sale language in an association's governing documents."[13] [*See,* HRS §514B-146(a).]

The damage to Hawaii's common interest ownership community, however, had already been done. The ICA's decision in *Sakal* appears to have been a substantial factor in the rising costs and lack of availability of Directors & Officers (D&O) liability insurance for condominium and other common interest ownership associations.[14] And that affects everyone who lives in condominiums, planned communities, and cooperatives in Hawaii.

It is difficult to see how the ICA could have come up with their new rule (and the Hawaii Supreme Court refuse to overrule the ICA) if they had referenced the Commission's 2003 Final Report as statutorily directed to by the Legislature in Act 164 (SLH 2004).

Simply reviewing the condominium's governing documents in *Sakal* by the correct standard [i.e., not construing any perceived ambiguities against the purported drafter—the association—but instead following the mandate of HRS §514B-10(b) and liberally construing the condominium's governing documents "to facilitate the operation of the condominium property regime"] would necessarily result in the conclusion that both the statutes and the Hawaiian Monarch's governing documents gave the association the authority to enforce its lien using the nonjudicial foreclosure process.

As discussed above in section II.A, pursuant to HRS §514B-10(b) and the definition of "operation of the property" in HRS §514B-3, the governing documents of condominiums must be *liberally construed to facilitate the* administration, *fiscal management*, and physical operation of condominiums.

During the process of recodifying HRS Chapter 514A, no one expressed any doubt that the statute (i.e., HRS §514A-90, which was incorporated in HRS §514B-146) gave condominium associations the authority to conduct nonjudicial foreclosures. Indeed, the Real Estate Commission and parties involved in the management of condominiums were concerned about unnecessarily voluminous condominium governing documents, not mandating more requirements for what needed to be included in those documents. Voluminous condominium documents are the equivalent of the legal disclaimers for access to many websites; how many people actually read the full disclaimers before clicking "o.k." and accessing the website?

Condominium development attorneys have routinely (but unnecessarily) inserted statutory language in their declarations and bylaws. As HRS Chapter 514B is amended (and HRS Chapter 514A and its predecessors were amended), the now obsolete statutory language remains in the condominium's governing documents unless those documents are restated or amended. For these and many other reasons, even attorneys and judges sometimes have difficulty understanding and interpreting a condominium's governing documents correctly.

To address that problem, the Commission tried to minimize the amount of language that the condominium statute required be written into a condominium's governing documents.

As explained in the Real Estate Commission's Guiding Principle #3 in its Prefatory Comments to the "Management of Condominiums" Part in the Commission's 2003 Final Report:

> The recodified condominium law should enhance clarity of Condominium Property Act.
>
> … 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.

(Emphasis added.)

IV. Conclusion.

For the good of Hawaii's condo-

minium community and Hawaii as a whole, using the Commission's 2003 Final Report and its cited sources and references is important to correctly understand and interpret HRS Chapter 514B. To be consistent with HRS Chapter 514B, a condominium's governing documents must be liberally construed to facilitate the operation (i.e., administration, fiscal management, and physical operation) of the condominium property regime. As stated in the Commission's 2003 Final Report comment regarding HRS §514B-10(b): "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)."

Many of Hawaii's condominium communities are or will be facing challenges ranging from deferred maintenance, to evolving building requirements, to sea level rise, all while trying to figure out: (i) who is responsible for what; (ii) who is responsible for paying for what; and (iii) how to resolve disputes and solve problems in a way that is fair and efficient for the condominium community and the people who live in them. Using the Commission's 2003 Final Report to properly understand and interpret HRS Chapter 514B is the best place to start.

---

[1] As noted in the *Hawaii Legislative Drafting Manual*, 11th Edition (December 2022):

> The fact that an Act (or any part thereof) is not codified in the Hawaii Revised Statutes does not make that Act or provision any less a "statute" or "law." *Any provision in any of the Session Laws of Hawaii of any year … is a validly enacted statute*, regardless of whether it is codified in the Hawaii Revised Statutes.

(Emphasis added.)

The Hawaii Supreme Court has made it clear that:

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

State v. Sullivan, 97 Hawai`i 259, 262, 36 P.3d 803, 806 (2001).

[2] *Id.*

[3] To make it easier to research the Commission's 2003 Final Report and amendments made to HRS Chapter 514B since 2006, Mr. Arakaki wrote *The Expert Statute Geek's Guide to Hawaii's Recodified Condominium Law* (which he has updated every year since 2006). His "Expert Statute Geek's Guide" contains, among other things:

•Translation tables showing the sources of HRS Chapter 514B, with the first table sorted by HRS Chapter 514B section numbers and the second table sorted by the sources of HRS Chapter 514B. The section numbering of the Commission's Final Draft of the Recodification is also shown.

•Annotated individual Parts of HRS Chapter 514B, plus a list of Acts enacting and amending HRS Chapter 514B (2004-2022).

○Statutory language is presented in Ramseyer format (i.e., deletions are bracketed and lined-out and new material is underscored) to graphically show amendments made by the Legislature from 2006 through 2022.

○Individual Parts contain the Commission's 2003 Final Report comments. The Commission's 2003 Final Report comments are reproduced verbatim, except to fill in references to HRS Chapter 514B [since the actual chapter and section numbers were not inserted until after Acts 164 (SLH 2004) and 93 (SLH 2005) were enacted].

[4] State of Hawaii Data Book (2021); compare Table 21.10 ("Condominium Associations and Apartments Registered: 1990 to 2021") and Table 21.20 ("Housing Units, by County: 2007 to 2021").

[5] The Uniform Common Interest Ownership Act was originally promulgated in 1982. It was amended in 1994, 2008, 2014, and 2021.

[6] The Commission's 2003 Final Report "Prefatory Comment" to what was codified as Part VI (Management of Condominium) of HRS Chapter 514B reads in part as follows (please note that the *Community Associations Factbook* has been updated yearly since 2015, and its most current edition is 2021):

> "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."
>
> 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. …
>
> 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.

[7] HRS §514B-3 defines "property" as follows:

> "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.

[8] *See, e.g.*, Gordon Arakaki and Mitch Imanaka, "Hawaii's New Condominium Law Yields Important Changes," Hawaii Bar Journal (March 2006), pp. 4-12; Gordon M. Arakaki, "Hawaii's New Condominium Law: Facilitating the Fair and Efficient Functioning of Condominium Associations," Hawaii Bar Journal (June 2013), pp. 12-15.

[9] *See, e.g., Gailliard v. Rawsthorne*, 150 Haw. 169, 498 P.3d 700 (Haw. 2021).

[10] Memorandum dated March 30, 2006, from Gordon M. Arakaki to the Honorable Ron Menor, Chair, and Committee Members of the Senate Committee on Commerce, Consumer Protection & Housing, regarding H.B. 3225, H.D.1— Proposed S.D. 1, at page 16.

[11] In applying its newly created requirement against the association's authority to enforce its lien through the nonjudicial foreclosure process, the ICA appeared to ignore HRS §514A-82 (Contents of bylaws), subsection (b)(13), which stated that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale foreclosure procedures authorized by chapter 667." Pursuant to the explicit statutory language of HRS §514A-82, all provisions of HRS §514A-82, subsection (b) "… *shall be deemed incorporated into the bylaws of* ***all*** *condominium projects* existing as of January 1, 1988, and all condominium projects created after that date." (Emphasis added.)

[12] The Hawaii Supreme Court had at least two other chances to correct the ICA's *Sakal* ruling regarding nonjudicial foreclosures by condominium associations, but by 3-2 votes on this issue (with Chief Justice Recktenwald and Justice Nakayama dissenting), declined to do so. *See, Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 466 P.3d 399 (Haw. 2020); *Malabe v. Ass'n of Apartment Owners of Executive Ctr.*, 465 P.3d 777 (Haw. 2020).

[13] *See*, Act 282 (SLH 2019).

[14] One major insurance agency had eighty-eight D&O claims related to nonjudicial foreclosures by condominium associations after the ICA's decision in *Sakal*, and two major insurers [Continental Casualty (aka CNA) and Travelers Insurance] essentially withdrew from Hawaii.

From December 2000 through June 2004, Gordon M. Arakaki served as the Hawaii Real Estate Commission's Condominium Law Recodification Project Attorney. In that capacity, he worked with lawmakers, the Commission, a blue ribbon advisory committee, and stakeholders throughout the state to "update, clarify, organize, deregulate, and provide for consistency and ease of use" of Hawaii's then 44+ year old condominium law.

The author believes that the devastating Maui wildfires, which destroyed and damaged many condominiums, will raise legal issues that have not previously been considered in Hawaii. It is critical that such issues be examined with the guidance of the Commission's 2003 Final Report.

Kyle-Lee N. Ladao

From: Greg Misakian [redacted]
Sent: Thursday, October 26, 2023 1:51 PM
To: Kyle-Lee N. Ladao
Subject: [EXTERNAL] Condominium Property Regime Task Force Meeting - October 27, 2023 - Written Testimony from Gregory Misakian
Attachments: Condominium Property Regime Task Force Meeting - October 27, 2023 - [Testimony from Gregory Misakian].pdf

Aloha Kyle,

Attached, please find my written testimony for tomorrow's meeting.

Can you please confirm receipt.

Mahalo,

Greg

[redacted]

Testimony Submitted For
The Condominium Property Regime Task Force Meeting

Department of Commerce and Consumer Affairs
State of Hawaii

Date: October 27, 2023
Time: 2:00 PM

Queen Liliuokalani Conference Room
King Kalakaua Building
335 Merchant Street, 1st Floor
Honolulu, Hawaii 96813

Testimony In Support of:

1) Condominium Owner's Rights.

2) The need for a State Ombudsman's Office to address owner complaints of misconduct and malfeasance by condominium Association Board members, Management Companies and their agents, Site Managers, Resident Managers, General Managers, Attorneys, and others. And to address complaints owners have regarding the Department of Commerce and Consumer Affairs, The Regulated Complaints Industry Office, and others who engage in any improper acts or actions, fail to take complaints, or fail to address concerns or administer proper investigations with fair and equitable resolutions.

3) The need for HRS 514B Statute reforms, including in the areas of voting rights, Board member qualifications, education and training, Community Manager licensing and/or certification, and numerous other areas identified via the Task Force and past legislative testimony for condominium related bills (and future testimony).

4) The need for a two-sided communication flow of "accurate" information to condominium owners, and not a one-sided viewpoint tainted with conflict of interest (i.e., with all of the messaging coming from the condominium trade industry and attorneys who represent Management Companies and Association Boards).

Aloha Task Force Members,

My name is Gregory Misakian and I live in Waikiki in a high-rise condominium. I currently serve on three Boards in the State of Hawaii. I am the 2nd Vice President of the Kokua Council, an elder advocacy organization that works with State Legislators and other groups and agencies on behalf of our kupuna. I am the Subdistrict 2 Vice Chair of the Waikiki Neighborhood Board. And I serve as the Treasurer of my condominium Association, the Keoni Ana AOAO.

I also speak with many condominium owners in Hawaii and in other states regarding problems they are facing, reports of misconduct by those managing their associations and HOAs, and what needs to be done at the State level to enact legislation for better consumer protection laws (with enforcement).

In 2023 I co-authored two measures to establish a State Ombudsman's Office to help condominium owners and associations resolve disputes, and so homeowners had a state agency where they could address concerns of serious misconduct, malfeasance, and violations of HRS 514B statutes.

> **HB178** - To establish an Ombudsman's Office for all types of condominium associations (AOAOs/AOUOs, HOAs, Planned Community Associations, and Cooperatives).
>
> **HB1501** - To establish an Ombudsman's Office for condominium associations (AOAOs and AOUOs).

Two measures were submitted to address the different statutes that some associations fall under (i.e., HRS 421I and 421J, vs HRS 514B). Both measures do not require State funding.

This year three Neighborhood Boards have adopted Resolutions supporting better consumer protections for condominium owners.

1) The Ala Moana-Kakaako Neighborhood Board in February 2023.

2) The Waikiki Neighborhood Board in July, 2023.

3) The McCully-Moiliili Neighborhood Board in September 2023.

I am dealing with serious misconduct at my condominium association, and the number of issues and concerns and the abuse of power is literally overwhelming.

Just some of the issues and concerns.:

1) Associa Hawaii, our Management Company, was operating unlicensed from January 1st through April 10th of this year.
2) Abuse of power by the Board President and others.
3) Financial irregularities and long delays to provide the annual audit report.
4) Associa Hawaii not providing requested documents, reports, answers to questions, or getting on the phone to speak with me, an Officer of the Association (with concerns regarding the financials and other issues).
5) The Site Manager not compliant with his contract. Onsite Illegal gambling during work hours, possession and use of stolen property, misinforming the owners, and other serious concerns.
6) No permits for major projects requiring permits.
7) Concerns with a pay-to-play payment to DPP.
8) Large write-off of maintenance fees for an owner, and lack of proper financial accountability to address this. The Association needs to be indemnified.
9) Deferred Maintenance and contractor errors resulting in damage to the building and owner's units.
10) Two pending lawsuits and numerous unresolved or failed mediations. One lawsuit from a Board member suing the Keoni Ana AOAO and another where the Keoni Ana AOAO is suing an owner (for less than $5K), and we have already spent over $14K on attorney fees. Most concerning was that I was not even informed about this litigation, and I'm the Treasurer of the Association. This also highlights improper attorney actions.
11) Our Board President suspended our Maintenance Manager (with Pay) on July 18, 2023 without the Board's knowledge or authorization (after he was raising concerns to the Board via email about building issues and improper activities). Our governing documents are clear that only the Board can make employment decisions. He is still on suspension and we have spent a lot of association funds on this matter. There is much more to the story, and I hope to share more with our legislators in the future. All Board members need to fully understand HRS 514B-191 and other laws related to retaliation, as the liability placed on associations is a very serious concern when association Board Presidents or Boards abuse their power.

Questions for the Task Force

1) Why is an attorney who often sues condominium owners heading the Task Force? Mr. Nerney is also very vocal about "self-governance" and likes to say those words often, yet fails to state the logical and obvious conclusion about self-governance … it doesn't apply when the State of Hawaii; codifies the laws that "govern" condominium associations, requires associations to register with the DCCA and pay association funds to the DCCA, requires owners to mediate first, or risk additional attorney's fees if they lose their case.
2) Why is the meeting agenda not listing the Task Force members who should be in attendance at the meeting and any guest speakers?

Requests For The DCCA

I am requesting that Mr. Philip Nerney be replaced on the Task Force as the Chair, as there are obvious concerns regarding conflict of interest (clearly evident from Mr. Nerney's many cases in court against condominium owners, which can be seen at eCourt Kokua).

I'm aware that Ms. Yuriko (Jane) Sugimura tends to show-up often at these types of meetings and legislative hearings. Please be aware that Ms. Sugimura is also an attorney handling condominium cases and profits from these cases. Ms. Sugimura also makes many public statements opposing better consumer protection laws, especially ones like the Ombudsman's Office (that would place the resolution of condominium disputes in the hands of a State Agency and State Attorneys). If you watch some of Ms. Sugimura's ThinkTech Hawaii Condo Insider episodes, it's clear what her position is. I also would like to know where the money comes from to fund these "one-sided" viewpoints? Who is subsidizing these shows?

We need to move on to fair and balanced information for the public, and any Legislators who are often meeting with Ms. Sugimura and other condominium trade industry representatives, need to start meeting with their constituents and the many condominium owners who need your help.

Now and in 2024, the public expects better from our Legislators and those overseeing the laws that "govern" us.

I have a lot of information to provide to the Task Force in the coming weeks and months that will show the clear and urgent need for a State Ombudsman's Office.

Mahalo,

Gregory Misakian
Resident of Waikiki

From: Lourdes Scheibert
To: Kyle-Lee N. Ladao
Subject: [EXTERNAL] Testimony Task Force
Date: Thursday, October 26, 2023 8:28:20 AM
Attachments: 2023_1027 DCCA_CPM Testimony.pdf

Aloha Mr. Ladao,

I'm submitting my written testimony for tomorrow's meeting. CONDOMINIUM PROPERTY REGIME TASK FORCE meeting at 2:00pm

October 27, 2023

kladao@dcca.hawaii.gov
Condominium Property Regime Task Force

Oral Testimony

Lourdes Scheibert Opinions & offers solutions

1991 Gregory Tanaka:

2. Lack of education about rules and statutes—by owners and boards

5. An imbalance of power between the board and the owners. With Associations holding most of the cards and acting upon advice of counsel not to even discuss the matter. This results in even the most minor matters wind up in protracted litigation.

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 in relation to other two extremely important association functions- **Governing and community living.**

My opinion the condominium self-governance is based on “fear”. Management of the community by the board of directors are dependent on the property management company to communicate with the owners in between meetings. Boards have assigned daily management of the common elements, the community and the Resident Manager to the property management company. This provides the board directors a hammer to shield themselves in their duties to manage their community. Thus Mr Tanaka’s (refer to #5) are the same issues in 1991 which mirrors 2023 with exception of the increased volume of complaints and disputes between owners, board and management. So much so, *2022 Hawaii Revised Statutes Title 28. Property 514B. Condominiums 514B-191 Retaliation prohibited.* Socially the problems continues to escalate.

The corporate structure described in a 2011 Testimony by Richard Emery, CAI LAC committee [1] is top heavy with focus on punishment instead of focus of education of the board members and the owners. Tanaka in #9 The board structure itself may be an underlying source of many disputes.

This structure creates dependency of its board members to the property management companies & attorneys to bail them out.

SOLUTION:

Balance in condo self-governance to include Governing and community living. The most harmful legislation happened in 1984 by creating 2 proxies to the board in 'whole and shared.' I believe the 1984 Dinman Report's intent was not the use of the proxies for elections. Elections can be done with direct mail ballot instead of mailing proxies.

Implement a condominium ombudsman's office or the very least the Legislature should call for a task force to look into the pros and cons.

This task force has to find the solution to mitigate owner's dispute and their cost in legal fees because I believe the problem and issues escalated (Tanaka #9) when the board of directors pass the buck to the management company with quickness to hire the attorney to handle the owner and impose the legal fees. I believe the board of directors should pay for the legal fees because they failed the owners to be the first in line to manage their community. Why? FEAR driven by lack of education.

###

[1] 2011 Testimony Richard Emery CAI LAC Committee

Kyle-Lee N. Ladao

From: Lourdes Scheibert [redacted]
Sent: Friday, October 27, 2023 8:54 AM
To: Kyle-Lee N. Ladao
Subject: [EXTERNAL] Re: Testimony Task Force
Attachments: 2023 Oral testimony Task Force.pdf; 2011 HB939 28 Richard Emery.pdf

Aloha Mr. Ladao,

I will be attending the Task Force meeting today at 2pm and would like to submit oral testimony. I provided a pdf document for my oral testimony.

October 27, 2023

kladao@dcca.hawaii.gov
Condominium Property Regime Task Force

Oral Testimony

Lourdes Scheibert Opinions & offers solutions

1991 Gregory Tanaka:

2. Lack of education about rules and statutes—by owners and boards

5. An imbalance of power between the board and the owners. With Associations holding most of the cards and acting upon advice of counsel not to even discuss the matter. This results in even the most minor matters wind up in protracted litigation.

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 in relation to other two extremely important association functions- **Governing and community living.**

My opinion the condominium self-governance is based on “fear”. Management of the community by the board of directors are dependent on the property management company to communicate with the owners in between meetings. Boards have assigned daily management of the common elements, the community and the Resident Manager to the property management company. This provides the board directors a hammer to shield themselves in their duties to manage their community. Thus Mr Tanaka’s (refer to #5) are the same issues in 1991 which mirrors 2023 with exception of the increased volume of complaints and disputes between owners, board and management. So much so, *2022 Hawaii Revised Statutes Title 28. Property 514B. Condominiums 514B-191 Retaliation prohibited.* Socially the problems continues to escalate.
The corporate structure described in a 2011 Testimony by Richard Emery, CAI LAC committee is top heavy with focus on punishment instead of focus of education of the board members and the owners. Tanaka in #9 The board structure itself may be an underlying source of many disputes.

This structure creates dependency of its board members to the property management companies & attorneys to bail them out.

SOLUTION:

Balance in condo self-governance to include Governing and community living. The most harmful legislation happened in 1984 by creating 2 proxies to the board in 'whole and shared.' I believe the 1984 Dinman Report's intent was not the use of the proxies for elections. Elections can be done with direct mail ballot instead of mailing proxies.
Implement a condominium ombudsman's office or the very least the Legislature should call for a task force to look into the pros and cons.

This task force has to find the solution to mitigate owner's dispute and their cost in legal fees because I believe the problem and issues escalated (Tanaka #9) when the board of directors pass the buck to the management company with quickness to hire the attorney to handle the owner and impose the legal fees. I believe the board of directors should pay for the legal fees because they failed the owners to be the first in line to manage their community. Why? FEAR driven by lack of education.

###

Thank-you,

Lourdes Scheibert

On Oct 26, 2023, at 8:27 AM, Lourdes Scheibert [redacted] wrote:

Aloha Mr. Ladao,

I'm submitting my written testimony for tomorrow's meeting. CONDOMINIUM PROPERTY REGIME TASK FORCE meeting at 2:00pm
<2023_10:27 DCCA_CPM Testimony.pdf>

HAWAII FIRST

COMMUNITY ASSOCIATION MANAGEMENT
Queen's Court « 800 Bethel Street, Suite 501 « Honolulu, Hawaii 96813

February 4, 2011

TESTIMONY HB 939
Community Associations Institute
OPPOSITION

Association meetings are more comparable to stockholder meetings of a corporation where proxies are routinely used for voting. The similarities are as follows:

- ✓ Owners typically are voting their percentage of ownership similar to shares of stock owned.
- ✓ Owners live across the world, often cannot attend meetings, and are provided a proxy to let their voice be heard.
- ✓ Owners voluntarily appoint the Board of Directors as proxy holder as provided in corporate proxies probable because they are satisfied with the management of the community. Some owners particularly those not living in Hawaii may not know the individual names but be very happy with the Board majority's decision as a whole.
- ✓ Owners can voluntarily select "quorum only" or appoint a "person" if they do not want to appoint the Board as proxy holder.

Owners have a free choice on who to appoint as proxy holder. Eliminating the choices will have the exact opposite affect as the bill is intended. Owners who may not know the names of individual directors may simply not vote or participate in meetings.

Proxies are a long standing right for people to be heard in a business environment by exercising their right to vote through an appointed proxy holder.. Associations are businesses with the obligation to protect the association and care for its finances. The proxy as written today allows every owner their free choice to appoint their representative including attending the meeting and voting themselves.

National statistics support the view that the vast majority of owners are satisfied with the way their association is managed.

CAI opposes SB 939.

Warmest aloha,

Richard Emery
CAI LAC Committee

P 808/531.5566 « F 808/566.9939 « hawaiifirst.com

Lourdes Scheibert
920 Ward Ave #6D, Honolulu, Hawaii. 96814

October 26, 2023

kladao@dcca.hawaii.gov
Condominium Property Regime Task Force
335 Merchant Street, Room 310
Honolulu, Hawaii 96813

RE: Mediation a Failure

I filed for 2 mediations with my board of directors with the financial support from REC's CETF. I paid for my own attorney to attend the mediation. The first mediation was based on documents. The other on retaliation. Both issues were unresolved.

Prior to both mediations, I was given the mediator's name by my attorney. The mediator was chosen by my board's attorney. My attorney asked if I agreed. I agreed after reading their bios on the internet.

I was unaware if I should ask if there were any conflicts of interest with the mediators. I believed I was in a safe environment.

The first mediation (2016), the mediator spent more time with the board then she spent with me. When she finally returned, we had a short discussion. It was then, she disclosed that she was the teacher to the board's attorney and that she would continue to touch bases with him.

On the second mediation (2020), I requested for this first mediator to return because now it escalated to retaliation. She said she was unavailable. The second mediator did disclose a conflict of interest at the beginning of the mediation with his relationship with Royal Court. At this point, backing out of mediation was not an option because of cost to me for attorney's fees to reschedule.

I went back into my files from 1980 and found he represented Royal Court Association with the same problem named in my 2016 mediation.

This is so wrong on so many levels. This task force priority is to fix this for other owners to get a fair and impartial mediator.

Lourdes Scheibert
Condominium Owner