



Hawaii Condominium Bulletin

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Why Mediation? Why Not?

by Tracey Wiltgen

Across the country, mediation has become the first step in addressing conflicts of all types. Consumer complaints, employee grievances, construction disputes, corporate and family matters and more, are currently worked out in mediation.

No matter how simple or complex the issues, mediation is in the forefront as a tried and true process that enables disputing parties to negotiate customized solutions quickly and privately. It is far less formal, less intimidating and less confusing than going to court or a hearing. There are no strict rules of procedure and the people involved whether two or multiple, have the flexibility to find the best path to agreement. Additionally, the mediation process has proven to be exceptionally valuable for assisting participants with continuing relationships.

With all of its benefits and history of success, mediation is the perfect approach for addressing the myriad of conflicts that arise within condominium associations. In particular, because conflicts arising between owners and boards involve continuing relationships, mediation is a logical first step to address differences. If the participants come to the table prepared to invest the time, energy and commitment to reach a resolution, then the mediation will usually succeed.

For all of these reasons and more, the Hawai'i Revised Statutes (HRS 514B) requires mediation if a condominium owner or board of directors requests mediation of a dispute involving the interpretation or enforcement of an association's declaration, bylaws or house rules, or a dispute involving Part VI of HRS 514B. Unfortunately, the requirement to mediate is not always viewed as a positive step.

The different perspectives and responsibilities of the various players in condominium associations can lead them to believe that mediation is a "waste of time." For

example, some Property Managers and Boards feel it is their responsibility to vehemently enforce house rules and bylaws. Some owners believe they are not required to follow house rules and bylaws when they paid such a high price to purchase their unit.

People often get stuck in mind-sets such as "I'm right and they're wrong", "I don't want to listen to him/her/them anymore", "we just need someone to decide so we can get this over with." These attitudes not only create barriers to a successful mediation, they also fail to accept the reality that a "win" in a hearing is never guaranteed. Even when the ruling is in favor of one side, the lasting bad feelings created by the adversarial nature of the hearings process can result in continued discord within an association.

Mediation on the other hand, can provide the participants with the opportunity to "clear the air" as well as problem solve in a way that focuses on everyone's needs and concerns. To achieve positive outcomes, mediation participants must come to the table: 1) prepared with the information they need to address the issues; 2) committed to "listen" to the other participants (even if they feel they've heard it all before), and 3) open to discuss potential creative solutions.

It is also helpful for participants to consider how to best use the mediation process to work towards a resolution. For example:

- If there are multiple issues to be addressed, then consider prioritizing the issues and setting timelines regarding how much discussion is needed to address each one.
- If emotions are exceptionally high, then plan to spend more time in private meetings with the mediator to vent and de-escalate, before focusing on the substantive issues.

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Letter from the Chair

It doesn't seem long ago that I was wishing all of you a Happy New Year, and here we are at the end. 2010 began with Hawaii facing great economic challenges and much uncertainty about the future. Although we are not out of the woods yet, people seem optimistic that 2011 will be better. In this issue of the Hawaii Condominium Bulletin, we address some topics that our Condominium Specialists frequently encounter. Our "Ask the Condo Specialist" column covers questions about parking stalls and how owner delinquencies affect their tenants. We briefly explain how Chapter 514B (the "new" condominium statute) interfaces with Chapter 514A (the "old" condominium statute). Last, we examine how to make the best use of the mediation process in resolving disputes. If there are any issues you would like us to cover in future editions of the Bulletin, we encourage you to contact one of our Condominium Specialists.

As you know, the Condominium Review Committee has been working hard on drafting new Hawaii Administrative Rules for Chapters 514A and 514B of the Hawaii Revised Statutes. Most of the heavy lifting has been done by our Senior Condominium Specialist in preparing initial drafts of the new rules, so thank you to Cynthia Yee for her work. Drafting rules is a slow process, but an important one that must be approached methodically and with consistency. Rulemaking is a collaborative process, and we welcome suggestions.

Please take some time to read the article about mediation. In the context of condominium projects, all it takes is the right attitude by the parties and the understanding that in a condominium community, everyone is neighbors. Chapter 514B of the Hawaii Revised Statutes requires mediation under most circumstances; therefore, the process may as well be a productive one. The Real Estate Branch website has additional resource materials on mediation, and you can find them at: http://hawaii.gov/dcca/real/condo_ed/conco_med/.

Our on-site Educational Outreach Program for condo owners and board members has been in place for a few months. This is the pilot program that sends our Condominium Specialists to condo projects for the purposes of educating owners and providing information of interest to that particular community. Because it is a pilot program, we are offering it only on Oahu for now; if it is successful, we hope to expand it to other counties. We invite you to take advantage of this pilot program. The request form is available at the Real Estate Branch office, and on our website at www.hawaii.gov/hirec.

Finally, in November, we were pleased to hold our committee meetings on Maui, including our Specialists' Office for the Day. Many thanks to the Realtors® Association of Maui for providing us with the meeting venue. As the year winds to a close, please accept my warmest wishes for a safe and joyous holiday season.

Sincerely,



Michele Sunahara Loudermilk
Chair, Condominium Review Committee



Ask the Condo Specialist

Q: Can a management company assign a different parking stall to an owner? My condominium managing agent, through its on-site representative, has arbitrarily assigned a different parking stall to my unit. They have also assigned the same number of my original stall to the “new” stall. This is not the location of my stall as reflected on the condominium map. Is this legal?

A: Any unit owner may transfer or exchange a limited common element, e.g., parking stall, that is assigned to the owner’s unit, to another unit, unless otherwise provided in the declaration. HRS, § 514B-40. Any transfer shall be executed and recorded as an amendment to the declaration. No statutory right for such transfer or exchange is given to any other party, however, including your managing agent or its on-site representative.

In the case of a representative of a condominium managing agent making such a change, you may point out to the representative that such action is prohibited under the condominium law. Failing that, the dispute resolution methods of mediation, arbitration, or hiring a private attorney to stop further action are your recourse to correct the prohibited assignment.

Q: I am a tenant in a condominium association. The condominium board has sent me a written notice demanding that my monthly rent be paid to the association because my landlord, the owner of my unit, is delinquent in his payment of association maintenance fees. They are also threatening to shut off my utilities. Can they do this, and should I make my monthly rental check out to the association? Can my landlord bring an action against me for non-payment of rent?

A: HRS § 514B-145, allows an association to collect maintenance fees from a tenant where the owner is delinquent on maintenance fee payments with the proviso that “the amount shall not exceed the tenant’s rent due each month.” Before taking such action, however, the board must adopt a written policy regarding rent collection and have the policy approved by a majority vote of the unit owners. HRS § 514B-145(g). The board must also give written notice to the delinquent owner.

HRS § 514B-146(e), provides that where a unit is owner-occupied, the association, after sixty days’ written notice to the unit owner and the unit’s first mortgagee, may “cease supplying a delinquent unit with any and all services normally supplied or paid for by the association”, e.g., utilities.

With regard to an action by your landlord for non-payment of rent, HRS § 514B-145(a) states that a “tenant’s payment [to the association] 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.” Moreover, HRS § 514B-145(d) provides that payment by the tenant of any portion of the unit’s common expenses 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.”

This information is for general purposes only, and is not intended to replace specific legal advice from an attorney familiar with the condominium law, and/or the landlord tenant code. Readers are therefore strongly advised to consult with an attorney regarding their particular situation.

Does Chapter 514A, HRS, or Chapter 514B, HRS, Apply to my Condominium Association?

Most condominium governance disputes fall under the purview of HRS Chapter 514B, even if those associations were created under HRS Chapter 514A. Certain sections of HRS Chapter 514B apply automatically to all condominium associations, subject to certain conditions, regardless of whether the condominium was developed prior to the implementation of HRS Chapter 514B, on July 1, 2006. Therefore, while you may live in, or manage a condominium association that was created under HRS Chapter 514A, generally speaking, HRS Chapter 514B will govern most disputes that arise.

These provisions apply automatically.

The provisions which apply automatically are: HRS §§ 514B-3, Definitions (to the extent definitions are necessary in construing any of the following provisions); -4, Separate titles and taxation of condominium units; -5, Conformance with county land use laws; -35, Unit boundaries; -41(c), allows a board to determine that certain limited common element expenses will be assessed in accordance with the undivided common interest appurtenant to each unit; -46, Merger of projects or increments; -72, Payments into the condominium education trust fund; and all of Part VI of HRS Chapter 514B (Management of Condominiums). These sections apply only to events and circumstances occurring on or after July 1, 2006, which do not invalidate existing provisions of the condominium project documents if doing so would invalidate any reserved rights of the developer or constitute an unreasonable impairment of contract.

Part VI of HRS Chapter 514B now includes a definition of “fiduciary duty” (HRS § 514B-106), allows officers, partners, members or other persons authorized to act on behalf of a legal entity which owns a unit (HRS § 514B-107), defines “conflict of interest” (HRS § 514B-

125), and expands the reasons for entering into an executive session of the board to include protecting the attorney-client privilege of the association and to protect the interests of the association while negotiating contracts, leases and other commercial transactions (HRS § 514B-125). These are just a few examples of the changes contained in HRS Chapter 514B that apply automatically to all condominium associations.

Some provisions do not apply automatically but may be beneficial to your association.

Some of the provisions of HRS Chapter 514B do not automatically apply but may affect your association in a positive way. Examples of these are provisions that would require remedies provided by HRS Chapter 514B to be liberally administered (HRS § 514B-10), eliminate punitive damages except as specifically provided by HRS Chapter 514B or by some other law (HRS § 514B-10), and a provision that would reduce the amount required to amend the declaration to 67%, from 75% under HRS Chapter 514A (HRS § 514B-32).

Finally, some governance issues may not be covered by HRS Chapter 514B, in which case you would look to your project’s declaration, bylaws or house rules for guidance.

This is only a summary of some of the changes contained in HRS Chapter 514B and its effect on governance issues; it is not meant as an exhaustive analysis. We recommend consulting with an attorney familiar with the condominium law to assist you in determining the ways HRS Chapter 514B will affect your association and in deciding whether or not to “opt in” to HRS Chapter 514B.

Why Mediation? Why Not? (continued from page 1)

- If an impasse is reached, then ask the mediator for suggestions or even an evaluation of the strengths of each participants view to encourage more brainstorming and creative problem solving.
- If the issues being discussed impact other owners in the association, then discuss and agree on what information if any, will be shared with the other owners.

Committing a sufficient amount of time at the end of the mediation to craft a clear durable agreement is as important as preparing to participate in the mediation. It is also helpful to discuss and include in the agreement how the owner and board want to address potential differences in the future to avoiding misunderstandings and escalated battles again.

The mediation process is designed to provide people in almost any type of conflict with a private, flexible forum for talking and negotiat-

ing creative solutions. It is an ideal process for condominium owners and boards because of their ongoing relationship within the condo community. If approached with the right attitude, owners and boards can not only resolve the immediate issues that lead to the dispute, they can also pave the way for working and living together more harmoniously in the future.

Tracey Wiltgen is the Executive Director of The Mediation Center of the Pacific, Inc.

The opinions or viewpoints expressed in this article do not necessarily reflect those of the Real Estate Commission. This article is intended to provide general information only and is not a substitute for obtaining legal advice or other competent professional assistance to address specific circumstances.

Purchasing a Condominium Conversion Unit

by Kenneth D.H. Chong*

Thinking of purchasing a condominium conversion unit? Chapter 514B, HRS, defines a “conversion” as submitting a structure to the condominium property regime more than 12 months after the completion of construction. “Conversion” does not include a structure or structures used as sales offices or models for a project and later submitted to the condominium property regime. In recent years, more condominium conversion projects have come on the market. If you’re contemplating purchasing a condominium conversion unit, here are some things to consider before you make your purchase.

Relevant Laws

Section 514B-83, HRS, lists the information that must be contained in a public report. This includes section 514B-83(a)(8), HRS, relevant to conversions:

Any . . . information that would have a material impact on the use or value of a unit or any appurtenant limited common element or amenities of the project . . . or that may be required by the commission. Emphasis added.

In addition, for residential projects that have been in existence for five years or more, HRS 514B-84(a)(1)(A) requires:

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. Emphasis added.

Subsections (B) and (C) also require a statement by the developer on the expected useful life of each item in subsection (A) or a statement that no representations are made in that regard.

What to Look For

You know that there are some significant disclosures that must be provided under the condominium law to prospective purchasers of condominium conversions. Let’s connect the requirements to the practical matter of reviewing information on your prospective condominium purchase.

Initial sales of condominium conversion units require delivery of a current Developer’s Public Report to all prospective purchasers. A Seller’s Disclosure Statement is required in the case of a condominium residential resale pursuant to the State’s Mandatory Seller Disclosure law, Chapter 508D, HRS.

First and foremost, read the developer’s public report or the seller’s disclosure statement carefully! These documents may provide important information about the unit and common areas. Inspect the prospective unit and common areas. Inquire about the maintenance history of the condominium. Are any major repairs coming due? Has there been any cosmetic refurbishing, or hidden repairs? Will the elevator and heater need replacement or major maintenance? Do the projected budget and reserves seem reasonable for a building of a certain age? Ask to see any reports prepared by professionals relating to the condition of the real property and structures therein.

Careful inspection of the unit by the buyer is especially important because the initial sale of condominium conversions is usually “as-is”. Don’t accept general statements describing the project’s condition, for example, as “consistent with the building’s age”. What exactly does that mean? Ask questions of the developer’s representative, your real estate sales agent, or the professionals involved in the property.

Taking these steps should go a long way in avoiding disputes that may arise at the initial sale of condominium conversion units.

**Kenneth Chong is president of Pacific Realty Consultants LLC. He has been involved in real estate development, marketing, education and consulting since 1963 and has been a condominium consultant to the Real Estate Commission for many years.*

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When Selling or Buying a Condo Unit, Careful About that Parking Stall

When purchasing or selling a condominium unit, make sure you know which parking stall, if any, is attached to the condominium unit in question. A prospective purchaser and/or their real estate sales agent may rely on the property manager, or an onsite resident manager of a condominium association to advise them of which parking stall comes with a particular unit. The only positive way of determining what parking stall is legally attached to a unit is to review the Declaration of Condominium Property Regime (or in older buildings Horizontal Property Regime) and any amendments thereof.

Section 514B-40, Hawaii Revised Statutes, allows a unit owner, subject to the consent of any mortgagees or lessors of that unit, to transfer or exchange a limited common element (in this instance, a parking stall) that is assigned to the unit, to another unit. Any transfer shall be executed and recorded as an amendment to the Declaration. The amendment must be executed only by the owner of the unit whose limited common element is being transferred and the owner of the unit receiving the limited common element. Moreover, a copy of the executed amendment shall be delivered to the association.

Unit owners, however, occasionally enter into informal agreements among themselves to use another's parking stall because it is convenient to one or the other. These informal agreements become ingrained in the life of the association, i.e., association staff or other owners get used to seeing someone park in a particular stall and wrongly assume that the stall is attached to the unit. Owners may forget, or neglect to pass on critical information regarding the informal parking arrangements. It is not enough to rely on others for information concerning parking; a prospective purchaser should follow up with a review of the condominium documents. Confusion reigns when a buyer discovers that the stall he thought was his, and indeed considered before purchasing the unit, is not. Maybe he can't get the SUV into the stall or has physical requirements which are not met by the legal parking stall.

To avoid these potential problems, and the potential for litigation, always consult the Declaration and any current amendments to it beforehand to determine which parking stall is attached to a particular condominium unit. If unsure, seek advice from your real estate agent or an attorney.

The Real Estate Commission Welcomes Donna Apisa

The Real Estate Commission welcomes its newest member, Donna Apisa. Ms. Apisa represents the island of Kaua'i. She is the President and Principal Broker of Oceanfront Realty International, Inc. She has held her broker's license since 1981.

Ms. Apisa is currently the Kaua'i Director, CRS, Aloha Chapter, president of the Hale Mo'i Homeowners' Association, and a member of the Legislative Affairs Committee of the Kaua'i Chamber of Commerce. She is a past president of the Kaua'i Board of Realtors®, 1993.

Condominium Hotel Operator's Re-registration, 2011-2012

This is a reminder that current condominium hotel operator (CHO) registrations expire on December 31, 2010.

Those CHOs who are presently registered with the Commission and desire to continue short-term (less than 30 days) rentals of condominium units, and who do not possess a real estate broker's license, must re-register with the Real Estate Commission by November 30, 2010, pursuant to HRS § 467-30. Those failing to re-register must submit a new registration, and pay a new registration fee of \$305. (The timely re-registration fee is \$215.)

Re-registering by the November 30 date ensures a current CHO pocket card by December 31, 2010.

All currently registered CHOs were sent re-registration materials in October.

Mediation Case Summaries

Mediation Services of Maui (MSM)

Between April 2010 through September 2010, MSM conducted the following condominium-related mediations:

PARTIES	ISSUE	DISPOSITION
Board vs. Owner	Unpaid maintenance fees.	Parties resolved differences prior to mediation.
Owner vs. Board	Alleged failure of board to enforce house rules.	Mediated; no agreement.
Owner vs. Board	Owner questions regarding board spending.	No mediation.
Board vs. Owner	Tenants of owner incurring fines for violation of house rules.	Mediated; no agreement.
Owner vs. Board	Complaints about a condominium employee and improvements to common areas.	Mediated; reached written agreement.
Owner vs. Board	Late payment of maintenance fees.	Settlement reached prior to scheduled mediation.
Owner vs. Board	Issue of responsibility for water damage to unit.	Mediated; reached written agreement.

Mediation Center of the Pacific (MCP)

From April 2010 through September 2010, MCP conducted the following condominium-related mediations:

Owner vs. Board	Alleged selective enforcement of house rules.	Mediated; no agreement.
Owner vs. Board	Approval to install doors; ownership of parking stall.	Mediated; agreement.
Owner vs. Board	Board approval of windows approved by previous board.	Mediated; no agreement.
Board vs. Owners	On-going house rule violations.	Mediated; agreement.
Owner vs. Board	Neglect of common area.	Mediated; agreement.
Owner vs. Board	Alleged improper notice of board meeting; work performed on units without approval.	Board declined mediation.
Owner vs. Board	Attorney's fees assessed regarding alleged house rule violation concerning service dog.	Owner withdrew request for mediation.

From the period April 2010 through September 2010, West Hawaii Mediation, Kaua'i Economic Opportunity and Kuikahi Mediation Center did not conduct any condominium-related mediations.

2010/2011 Real Estate Commission Meeting Schedule

Laws & Rules Review Committee – 9:00 a.m.
Condominium Review Committee – Upon adjournment of the
Laws & Rules Review Committee Meeting

Education Review Committee – Upon adjournment of the
Condominium Review Committee Meeting

Real Estate Commission – 9:00 a.m.

Wednesday, December 8, 2010
Wednesday, January 12, 2011
Wednesday, February 9, 2011
Wednesday, March 9, 2011
Wednesday, April 13, 2011
Wednesday, May 11, 2011
Wednesday, June 8, 2011
Wednesday, July 13, 2011
Wednesday, August 10, 2011
Wednesday, September 7, 2011
Wednesday, October 12, 2011
Wednesday, November 9, 2011
Wednesday, December 7, 2011

Thursday, December 16, 2010
Thursday, January 27, 2011
Friday, February 25, 2011
Thursday, March 24, 2011
Thursday, April 28, 2011
Friday, May 27, 2011
Thursday, June 23, 2011
Friday, July 29, 2011
Friday, August 26, 2011
Friday, September 23, 2011
Friday, October 28, 2011
Wednesday, November 23, 2011
Friday, December 16, 2011

All meetings will be held in the Queen Liliuokalani Conference Room of the King Kalakaua Building, 335 Merchant Street, First Floor.

Meeting dates, locations and times are subject to change without notice. Please visit the Commission's website at www.hawaii.gov/hirec or call the Real Estate Commission Office at (808) 586-2643 to confirm the dates, times and locations of the meetings. This material can be made available to individuals with special needs. Please contact the Executive Officer at (808) 586-2643 to submit your request.

Real Estate Branch and Real Estate Commission's web page at: <http://www.hawaii.gov/hirec>
Address: 335 Merchant Street, Rm. 333; Honolulu, HI 96813; Phone: (808) 586-2643