Part VI. Management of Condominiums

Real Estate Commission's Prefatory Comment to Part VI

"Every [unit owners' association] has three functions –
to serve as a business, a governance structure, and a community."

~ Community Associations Factbook (1999)

As explained in the *Community Associations Factbook (1999)*, the business, governance, and community functions of community associations (including condominium unit owners' associations) have evolved over time. Early in the history of community associations, "business" meant "austerity", "governance" meant "compliance", and "community" meant "conformity". As the movement matured, "business" has come to mean "prudence", "governance" has come to mean "justice", and "community" has come to mean "harmony".

"Community/harmony" is obviously not something we can mandate by State law. Just as obviously, State law can help (or hinder) associations in their "business" and "governance" functions. The Commission has kept these functions and principles in mind as it has crafted the provisions for management of condominiums.

To paraphrase the *Restatement of the Law, Third, Property (Servitudes)* introductory note to Chapter 6:

> The law of residential condominium communities reflects tensions between protecting freedom of contract, protecting private and public interests in the home both as a personal base and as a financial asset, and protecting the public interest in the ongoing financial stability of condominium communities. It also reflects the tensions between protecting the democratic process at work in condominium communities and protecting the interests of individual community members from imposition by those who control the association. This Chapter should balance such concerns with the overall purpose of enabling condominium communities to carry out their potential for creating enduring and desirable communities.
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> Determining the law that applies to unit owners' associations has proven to be challenging at times because the associations share some characteristics of business corporations, nonprofit organizations, local governments, and private trusts, but differ significantly from all of them. Often incorporated under nonprofit corporation statutes (HRS Chapter 414D in Hawaii), most associations are managed by a board of directors (usually unpaid volunteers) elected by the members. Like business corporations, votes are allocated on the basis of the number of units owned. The votes assigned to condominium units may be equal or weighted in accord with an initial allocation or specified formula. The developer may hold special voting rights. Unlike most corporations, but like municipal governments, associations have the power to raise funds by levying assessments on individually owned properties and charging fees. Like a private trust, the purpose of an association is to manage property for the benefit of its members, but unlike trustees, the directors are elected by popular vote and answer to political considerations. Like business organizations and municipalities, associations often manage substantial property and handle significant cash flows, but unlike businesses, their purpose is not to make money by taking entrepreneurial risks. Unlike the boards of either business or nonprofit charitable corporations, association board members have strong personal as well as financial stakes in the success of the association, because it is usually their home as well as a significant investment.
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> Like local governments, associations have the power to make rules governing some behavior within the community, and the power to enforce the servitudes through judicial action. Like local governments, associations often administer land use regulations and provide utility services to their members. Unlike local governments, however, association charters are created by private contract and, absent other circumstances, the associations' actions are not state action sufficient to subject them to challenge under the U.S. Constitution or §1983 liability.
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> Ultimately, this Chapter should facilitate the operation of condominium communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their members.

Guiding Principles:

1. The philosophy guiding Part VI (Management of Condominium) continues to be **minimal government involvement** and **self-governance** by the condominium community.

This also means that the condominium community (both owners and management) should have the tools with which to govern itself. Self-governance (e.g., conduct of meetings, voting) should be enhanced. This does not mean that every problem and contingency should be addressed in State law (as happened too often in the past, one of the causes of the need to recodify Hawaii's condominium law). Addressing problems in State law is appropriate in some areas. Other problems may more appropriately be handled in condominium governing documents or through other private mechanisms. And some matters simply must be resolved in court.

2. The recodified condominium law should recognize the difficulty of a "one size fits all" approach to management provisions.

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

Provisions on a single issue (e.g., proxies) should be consolidated or grouped together. The artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b) should be eliminated. And the statutory requirements for condominium governing documents should be minimized while incorporating certain provisions currently in HRS §514A-82(a) and (b) in more appropriate statutory sections.

4. The recodified condominium law should help to make sure that the right people pay for the right things.

5. The recodified condominium law should not result in an increase in the cost of government.

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PART VI. MANAGEMENT OF CONDOMINIUM

A. POWERS, DUTIES, AND OTHER GENERAL PROVISIONS

§ -101 Applicability; exceptions. (a) This part applies to all condominiums subject to this chapter, except as provided in subsection (b).

(b) If so provided in the declaration or bylaws, this part shall not apply to:

(1) Condominiums in which all units are restricted to nonresidential uses; or

(2) Condominiums, not subject to any continuing development rights, containing no more than five units;

provided that section -132 shall not be subject to these exceptions.

Real Estate Commission's Comment

1. This is a new section.

2. 100% non-residential condominiums may choose to exempt themselves from the provisions of this Part by so providing in their declarations or bylaws. (Earlier drafts of the recodification exempted such condominiums from the entire Chapter unless they chose to "opt-in" to its provisions.)

§ -102 Association; organization and membership. (a) The first meeting of the association shall be held not later than one hundred eighty days after recordation of the first unit conveyance; provided that forty per cent or more of the project has been sold and recorded. If forty per cent of the project is not sold and recorded at the end of one year after recordation of the first unit conveyance, an annual meeting shall be called if ten per cent of the unit owners so request.

(b) The membership of the association shall consist exclusively of all the unit owners. Following termination of the condominium, the membership of the association shall consist of all former unit owners entitled to distributions of proceeds under section -47, or their heirs, successors, or assigns.

Real Estate Commission's Comment

1. HRS §514A-82(a)(11) is the source of subsection (a).[1] UCA/UCIOA §3-101 is the source of subsection (b).

2. From a legal standpoint, an association (and its powers and duties) exists at recordation of the legal documents creating the condominium. While the developer inevitably acts as the association for some period of time, nevertheless, the association exists as an entity independent of the developer and the developer has a fiduciary obligation to act on behalf of the association from the time the declaration is recorded.[2]

3. As noted in the official commentary to UCA/UCIOA §3-101: "The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium even during a period of declarant control …"

§ -103 Association; registration. (a) Each project or association having more than five units shall:

(1) Register with the commission through approval of a completed registration application, payment of fees, and submission of any other additional information set forth by the commission. The registration shall be for a biennial period with termination on June 30 of each odd-numbered year. The commission shall

[1] For background regarding the use of first recordation of a unit conveyance versus certificate of occupancy, *see*, A Study of Problems in the Condominium Owner-Developer Relationship, by Office of Consumer Protection, Office of the Legislative Reference Bureau, and Real Estate Commission, State of Hawaii (December 1976) at page 16.

[2] *See*, State Savings & Loan Association v. Kauaian Development Company, Inc., et al., 50 Haw. 540, 445 P.2d 109 (1968); Hawaii Real Estate Law Manual, "Community Associations," by J. Neeley (1997).

prescribe a deadline date prior to the termination date for the submission of a completed reregistration application, payment of fees, and any other additional information set forth by the commission. Any project or association that has not met the submission requirements by the deadline date shall be considered a new applicant for registration and be subject to initial registration requirements. Any new project or association shall register within thirty days of the association's first meeting. If the association has not held its first meeting and it is at least one year after the recordation of the purchase of the first unit in the project, the developer or developer's affiliate or the managing agent shall register on behalf of the association and shall comply with this section, except for the fidelity bond requirement for associations required by section -143(a)(3). The public information required to be submitted on any completed application form shall include but not be limited to evidence of and information on fidelity bond coverage, names and positions of the officers of the association, the name of the association's managing agent, if any, the street and the postal address of the condominium, and the name and current mailing address of a designated officer of the association where the officer can be contacted directly;

(2) Pay a nonrefundable application fee and, upon approval, an initial registration fee, a reregistration fee upon reregistration and the condominium education trust fund fee, as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91;

(3) Register or reregister and pay the required fees by the due date. Failure to register or reregister or pay the required fees by the due date shall result in the assessment of a penalty equal to the amount of the registration or reregistration fee; and

(4) Report promptly in writing to the commission any changes to the information contained on the registration or reregistration application or any other documents required by the commission. Failure to do so may result in termination of registration and subject the project or the association to initial registration requirements.

(b) The commission may reject or terminate any registration submitted by a project or an association that fails to comply with this section. Any association that fails to register as required by this section or whose registration is rejected or terminated shall not have standing to maintain any action or proceeding in the courts of this State until it registers. The failure of an association to register, or rejection or termination of its registration, shall not impair the validity of any contract or act of the association nor prevent the association from defending any action or proceeding in any court in this State.

Real Estate Commission's Comment

1. HRS §514A-95.1 is the source of this section. In pertinent part, it has been modified slightly. HRS §514A-95.1 contains both registration requirements and fidelity bond requirements for associations. The fidelity bond provisions of HRS §514A-95.1(1) have been incorporated in a separate insurance section. *See*, § -143.

2. Keeping the association registration requirement is important to continued support of alternative dispute resolution and condominium education efforts.

3. Requiring associations to register with the Commission is not meant to imply that the Commission has jurisdiction over condominium governance matters. (The Commission's powers and duties are described in Part IV, § -61.) As provided in subsection (b) above, failure of a unit owners' association to register results in a self-enforcing sanction – the association's lack of standing to maintain actions in State court until properly registered with the Commission.

§ -104 Association; powers. (a) Except as provided in section -105, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may:

(1) Adopt and amend the declaration, bylaws, and rules and regulations;

(2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners, subject to section -148;

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

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium. For the purposes of actions under chapter 480, associations shall be deemed to be "consumers";

(5) Make contracts and incur liabilities;

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

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

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property; provided that designation of additional areas to be common elements or subject to common expenses after the initial filing of the declaration or bylaws shall require the approval of at least sixty-seven per cent of the unit owners; provided further that if the developer discloses to the initial buyer in writing that additional areas will be designated as common elements whether pursuant to an incremental or phased project or otherwise, this requirement shall not apply as to those additional areas; and provided further that this paragraph shall not apply to the purchase of a unit for a resident manager;

(9) Subject to section -38, grant easements, leases, licenses, and concessions through or over the common elements and permit encroachments on the common elements;

(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in section -35(2) and (4), and for services provided to unit owners;

(11) Impose charges and penalties, including late fees and interest, for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules, and regulations of the association, either in accordance with the bylaws or, for condominiums created after May 17, 1983, if the bylaws are silent, pursuant to a resolution adopted by the board and approved by sixty-seven per cent of all unit owners at an annual meeting of the association or by the written consent of sixty-seven per cent of all unit owners;

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

(13) Provide for cumulative voting;

(14) Provide for the indemnification of its officers, board, committee members, and agents, and maintain directors' and officers' liability insurance;

(15) Assign its right to future income, including the right to receive common expense assessments, but only to the extent section -105(e) expressly so provides;

(16) Exercise any other powers conferred by the declaration or bylaws;

(17) Exercise all other powers that may be exercised in this State by legal entities of the same type as the association, except to the extent inconsistent with this chapter;

(18) Exercise any other powers necessary and proper for the governance and operation of the association; and

(19) By regulation, subject to sections -146, -161, and -162, require that disputes between the board and unit owners or between two or more unit owners regarding the condominium be submitted to nonbinding alternative dispute resolution in the manner described in the regulation as a prerequisite to commencement of a judicial proceeding.

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

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

(2) After giving notice to the tenant and the unit owner and an opportunity to be heard, levy reasonable fines against the tenant for the violation, provided that a unit owner shall be responsible for the conduct of the owner's tenant and for any fines levied against the tenant or any legal fees incurred in enforcing the declaration, bylaws, or rules and regulations of the association against the tenant; and

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

(c) The rights granted under subsection (b)(3) may only be exercised if the tenant or unit owner fails to cure the violation within ten days after the association notifies the tenant and unit owner of that violation; provided that no notice shall be required when the breach by the tenant causes or threatens to cause damage to any person or constitutes a violation of section 521-51(1) or 521-51(6).

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

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

(2) Permit the association to enforce a lease to which it is not a party in the absence of a violation of the declaration, bylaws, or rules and regulations.

Real Estate Commission's Comment

1. UCA/UCIOA §3-102 is the source of this section. Some provisions have been modified using language of similar provisions in HRS Chapter 514A. Others have been modified to address problems that have arisen over time. [For example, paragraph (a)(9) helps correct problems created by encroachments on common elements.] UCA/UCIOA §3-102 (b) and (c) have been moved to § -105 (Limitations on Powers).

2. Under paragraph (a)(4), associations are deemed to be "consumers" for the purposes of HRS Chapter 480 (Unfair and Deceptive Practices) actions. Although associations are collections of "consumers," they have sometimes been denied rights to pursue claims under HRS Chapter 480 (a powerful consumer protection statute) that are enjoyed by owners of single family houses.

3. Some stakeholders opposed paragraph (a)(11) as originally drafted (i.e., without the requirement that the board's resolution to establish a fining system be approved by a majority of all unit owners), and claimed that it would be a "weapon of mass destruction" in the hands of the wrong board.[3] They stated that associations without fining provisions in their bylaws should amend their bylaws or hire an attorney to send a letter demanding compliance. This makes little sense for the following reasons:

- The failure to follow condominium rules and regulations disrupts the quiet enjoyment of condominium residents and ultimately affects the reputation of the building and the value of its units. Allowing boards to impose fines, by law, helps to encourage compliance with project documents. The application of fair and reasonable fining systems has been instrumental in gaining owners' attention, and action, to correct behavioral problems of the residents of their units.
- Fining is an intermediate sanction, not a "weapon of mass destruction." If boards are prohibited from fining (as an early option) to resolve an issue, they must choose between two options: take legal action or do nothing.
- Legal action is expensive and time-consuming. An attorney's letter to an owner can easily cost the owner $150 to $200 in legal charges. Boards must carefully weigh the merits of legal action for minor rules infractions.
- In contrast, fines can act as an effective alternative and supplement to legal action. Fines can be imposed quickly and in much smaller increments than the cost of a letter from an attorney. Therefore, they are particularly effective for dealing with minor infractions.
- Legal fees are out-of-pocket costs, and they cannot easily be waived as a means of compromising with a violator.
- In contrast, fines are not out-of-pocket costs and the board can easily waive them if doing so will encourage the violator to comply. Indeed, suspending fines and penalties on the condition that violators "behave" is a common regulatory tool.
- As a further safeguard, the proposed law provides for notice and an opportunity to be heard (i.e., due process).
- If fining is not an option, most fiscally responsible boards will do nothing until such time as the situation becomes unbearable, the violation spreads to other units, or other unit owners threaten the directors for inaction.
- There is always a possibility that a board will impose an unreasonable fine, but that can occur whether the authority to fine is in the law or in the association's bylaws. Therefore, requiring associations to amend their bylaws to be able fine does not appear to serve any real purpose.

[The Commission believes that paragraph (a)(11), in its final form (i.e., with the additional language requiring that that the board's resolution to establish a fining system be "approved by a majority of all unit owners at an annual meeting of the association or by the written consent of a majority of all unit owners") is a satisfactory resolution to the concerns raised.] *Rewrite to explain change made by 2004 Legislature and reason for applying only to condominiums created after May 27, 1983.*

4. "Notice and hearing" requirements such as those in paragraph (b)(2) are not meant to prohibit the association from taking immediate corrective action in appropriate situations. Just as traffic citations are given at the time of the infraction and may be contested at a later date, so may fines pursuant to paragraph (b)(2) be assessed at the time of infraction, with the opportunity to contest the fine at a later date. [A stakeholder expressed concern that paragraph (b)(2) might be read to prohibit associations from exercising "immediate fine" systems for unit owner/tenant actions that are hazardous and not immediately stopped, e.g., throwing items off balconies.]

5. [Add comment re: paragraph (a)(13) on cumulative voting (i.e., that the provision is *permissive*, ***not*** *mandatory*.]

§ -105 Association; limitations on powers. (a) The declaration and bylaws may not impose limitations on the

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

power of the association to deal with the developer which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

(b) Unless otherwise permitted by the declaration, bylaws, or this chapter, an association may adopt rules and regulations that affect the use of or behavior in units that may be used for residential purposes only to:

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

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

(3) Restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders who regularly lend money secured by first mortgages on units in condominiums or regularly purchase those mortgages.

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

(c) No association shall deduct and apply portions of common expense payments received from a unit owner to unpaid late fees, legal fees, fines, and interest (other than amounts remitted by a unit in payment of late fees, legal fees, fines, and interest) unless the board adopts and distributes to all owners a policy stating that:

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

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

(d) No unit owner who requests legal or other information from the association, the board, the managing agent, or their employees or agents, shall be charged for the reasonable cost of providing the information unless the association notifies the unit owner that it intends to charge the unit owner for the reasonable cost. The association shall notify the unit owner in writing at least ten days prior to incurring the reasonable cost of providing the information, except that no prior notice shall be required to assess the reasonable cost of providing information on delinquent assessments or in connection with proceedings to enforce the law or the association's governing documents.

After being notified of the reasonable cost of providing the information, the unit owner may withdraw the request, in writing. A unit owner who withdraws a request for information shall not be charged for the reasonable cost of providing the information.

(e) Subject to any approval requirements and spending limits contained in the declaration or bylaws, the association may authorize the board to borrow money for the repair, replacement, maintenance, operation, or administration of the common elements and personal property of the project, or the making of any additions, alterations, and improvements thereto; provided that written notice of the purpose and use of the funds is first sent to all unit owners and owners representing fifty per cent of the common interest vote or give written consent to the borrowing. In connection with the borrowing, the board may grant to the lender the right to assess and collect monthly or special assessments from the unit owners and to enforce the payment of the assessments or other sums by statutory lien and foreclosure proceedings. The cost of the borrowing, including, without limitation, all principal, interest, commitment fees, and other expenses payable with respect to the borrowing or the enforcement of the obligations under the borrowing, shall be a common expense of the project. For purposes of this section, no lease shall be deemed a loan if it provides that at the end of the lease the association may purchase the leased equipment for its fair market value.

Real Estate Commission's Comment

1. UCA/UCIOA §3-102(b) is the source of subsection (a). UCIOA §3-102(c) is the source of subsection (b). HRS §514A-15.1, clarified, is the source of subsection (c). Subsection (d) is identical to HRS §514A-92.5. HRS §514A-82.3, modified, is the source of subsection (e).

2. In subsection (b), the term "adversely affects" (from UCIOA §3-102(c)) was changed to "unreasonably interferes with" (from HRS §514A-82(10)).

3. Subsection (c) is intended to require prior written notice of assessment of all costs of collection.

4. The 2004 Legislature added the qualifier "reasonable" to all references to the cost of providing information to unit owners requesting such information. This was in response to the complaints by some unit owners that they were being overcharged for the provision of information. [*Explain "reasonable cost" further.*]

5. Although some stakeholders object to the broadening of the authority of associations to borrow money under

subsection (e), others note that borrowing money is a very consumer/association friendly way of getting funds (as opposed to raising annual fees or special assessments).

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

(b) The board may not act on behalf of the association to amend the declaration or bylaws (sections -32(a)(11) and -108(b)(7)), to remove the condominium from the provisions of this chapter (section -47), or to elect members of the board or determine the qualifications, powers and duties, or terms of office of board members (subsection (e)); provided that nothing in this subsection shall be construed to prohibit board members from voting proxies (section -123) to elect members of the board; and provided further that the board may fill vacancies in its membership to serve until the next annual or special association meeting.

(c) Within thirty days after the adoption of any proposed budget for the condominium, the board shall make available a copy of the budget to all the unit owners and shall notify each unit owner that the unit owner may request a copy of the budget.

(d) The declaration may provide for a period of developer control of the association, during which a developer, or persons designated by the developer, may appoint and remove the officers and members of the board. Regardless of the period provided in the declaration, a period of developer control terminates no later than the earlier of:

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

(2) Two years after the developer has ceased to offer units for sale in the ordinary course of business;

(3) Two years after any right to add new units was last exercised; or

(4) The day the developer, after giving written notice to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association.

A developer may voluntarily surrender the right to appoint and remove officers and members of the board before termination of that period, but in that event the developer may require, for the duration of the period of developer control, that specified actions of the association or board, as described in a recorded instrument executed by the developer, be approved by the developer before they become effective.

(e) Not later than the termination of any period of developer control, the unit owners shall elect a board of at least three members; provided that condominiums created after May 17, 1984, with one hundred individual units, shall have an elected board of at least nine members unless at least sixty-seven per cent of all unit owners vote by mail ballot, or at a special or annual meeting, to reduce the number of directors; and provided further that condominiums with more than one hundred individual units where at least seventy-five per cent of the unit owners reside outside of the State may have an elected board of at least three members. The board shall elect the officers. Board members and officers shall take office upon election.

(f) At any regular or special meeting of the association, any member of the board may be removed and successors shall be elected for the remainder of the term to fill the vacancies thus created. The removal and replacement shall be in accordance with all applicable requirements and procedures in the bylaws for the removal and replacement of directors, including any provision relating to cumulative voting, and, if removal and replacement is to occur at a special meeting, section -121(b).

Real Estate Commission's Comment

1. UCA/UCIOA §3-103, modified, is the source of this section. HRS §514A-82(b)(1) is the source of subsection (f).

2. HRS §514A-82.4 (Duty of directors) states that "[e]ach director shall owe the association of apartment owners a fiduciary duty in the performance of the director's responsibilities." Subsection (a), by referencing HRS Chapter 414D and using the nonprofit corporate model, allows board members to obtain the benefits of the business judgment rule, now commonly applied by courts in the nonprofit context.[4]

3. The official comments to UCIOA (1994) §3-103 explains subsection (d), regarding transition of developer control to unit owner control of the association, as follows:

[4] *See, e.g.,* Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530 (1990).

[Subsection (d) recognizes] the practical necessity for the declarant to control the association during the developmental phases of a project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity. … Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner. …. Subsection (d) has been amended in the 1994 amendment to add a new fourth category regarding voluntary relinquishment of retained rights to control any aspect of the affairs of the association. This category frequently has been written into declarations under the Act. The amendment incorporates this practice and is important in order to track the time when statutes of limitation involving the declarant begin to run.

4. [Subsection (e) requires that a board consist of a minimum of three members. The requirement in HRS §514A-82(a)(1)(B) that: "condominiums with more than one hundred individual apartment units shall have an elected board of not less than nine members unless not less than sixty-five per cent of all apartment owners vote by mail ballot, or at a special or annual meeting, to reduce the minimum number of directors" has not been incorporated in the recodified condominium law. The minimum nine-member board requirement has been problematic for resort projects and projects with a substantial number of off-island owners.] *Rewrite to explain changes made by 2004 Legislature and reason for applying only to condominiums created after May 17, 1984.*

§ -107 Board; limitations. (a) Members of the board shall be unit owners or co-owners, vendees under an agreement of sale, a trustee or beneficiary of a trust which owns a unit, an officer of any corporate owner--including a limited liability corporation--of a unit, or a representative of any other legal entity which owns a unit. The partners in a general partnership and the general partners of a limited partnership or limited liability partnership shall be deemed to be the owners of a unit for the purpose of serving on the board. There shall not be more than one representative on the board from any one unit.

(b) No resident manager or employee of a condominium shall serve on its board.

(c) An owner shall not act as a director of an association and an employee of the managing agent retained by the association.

(d) Directors shall not expend association funds for their travel, directors' fees, and per diem, unless owners are informed and a majority approve of these expenses; provided that, with the approval of the board, directors may be reimbursed for actual expenditures incurred on behalf of the association. The minutes shall reflect in detail the items and amounts of the reimbursements.

(e) Associations at their own expense shall provide all board members with a current copy of the association's declaration, bylaws, house rules, and, annually, a copy of this chapter with amendments.

(f) The directors may expend association funds, which shall not be deemed to be compensation to the directors, to educate and train themselves in subject areas directly related to their duties and responsibilities as directors; provided that the approved annual operating budget shall include these expenses as separate line items. These expenses may include registration fees, books, videos, tapes, other educational materials, and economy travel expenses. Except for economy travel expenses within the State, all other travel expenses incurred under this subsection shall be subject to the requirements of subsection (d).

Real Estate Commission's Comment

1. Consistent with the goal of eliminating the artificial approach regarding bylaws in HRS §514A-82(a) and (b), and to help reduce the statutory requirements for condominium governing documents, appropriate provisions have been consolidated under separate sections (i.e., separate from the bylaws section). The following provisions from HRS Chapter 514A have been consolidated in this section: HRS §§514A-82(a)(12), modified, -82(a)(14), modified, -82(b)(7), modified, -82(b)(10), modified, -82(b)(11), identical, and -82(b)(12), identical.

2. Some stakeholders suggested that (in addition to resident managers, who are already prohibited from serving on the boards of their associations) managing agents, rental agents, any employees of associations, and their spouses be prohibited from serving on the boards of those associations because of potential conflicts of interest. Others pointed out that conflict of interest provisions are already in statute and should be enforced, it is not fair to turn these individuals into second class citizens when they have an ownership interest and the owners have elected them to the board, and the federal Fair Housing Act would prohibit discrimination against spouses. In the final draft of the recodification, employees of the association (including, but not limited to,

resident managers) and owners who are employees of the managing agent retained by the association are prohibited from serving on the boards of those associations.

3. The 2004 Legislature further amended subsection (d) to specify that the minutes must "reflect in detail the items and amounts of the reimbursements"

§ -108 Bylaws. (a) A true copy of the bylaws shall be recorded in the same manner as the declaration. No amendment to the bylaws is valid unless the amendment is duly recorded.

(b) The bylaws shall provide for at least the following:

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

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

(3) The qualifications, powers and duties, terms of office, and manner of electing and removing directors and officers and the filling of vacancies;

(4) Designation of the powers the board or officers may delegate to other persons or to a managing agent;

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

(6) The compensation, if any, of the directors;

(7) Subject to subsection (d), a method for amending the bylaws; and

(8) The percentage, consistent with this chapter, that is required to adopt decisions binding on all unit owners; provided that votes allocated to lobby areas, swimming pools, recreation areas, saunas, storage areas, hallways, trash chutes, laundry chutes, and other similar common areas not located inside units shall not be cast at any association meeting, regardless of their designation in the declaration.

(c) The bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform.

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

(e) The bylaws may be amended at any time by the vote or written consent of at least sixty-seven per cent of all unit owners. Any proposed bylaws together with the detailed rationale for the proposal may be submitted by the board or by a volunteer unit owners group. If submitted by that group, the proposal shall be accompanied by a petition signed by not less than twenty-five per cent of the unit owners as shown in the association's record of ownership. The proposed bylaws, rationale, and ballots for voting on any proposed bylaw shall be mailed by the board to the owners at the expense of the association for vote or written consent without change within thirty days of the receipt of the petition by the board. The vote or written consent, to be valid, must be obtained within three hundred sixty-five days after mailing for a proposed bylaw submitted by either the board or a volunteer unit owners group. If the bylaw is duly adopted, the board shall cause the bylaw amendment to be recorded. The volunteer unit owners group shall be precluded from submitting a petition for a proposed bylaw that is substantially similar to that which has been previously mailed to the owners within three hundred sixty-five days after the original petition was submitted to the board.

This subsection shall not preclude any unit owner or volunteer unit owners group from proposing any bylaw amendment at any annual association meeting.

Real Estate Commission's Comment

1. HRS §514A-81, in part, is the source of subsection (a). UCA/UCIOA §3-106, modified, and HRS §§514A-82(a)(1)(E), identical, and 514A-82(a)(2), in part, are the sources of subsections (b) and (d). HRS §414D-136 is the source of subsection (c). 514A-82(b)(2), essentially identical, is the source of subsection (e). [Note: In subsection (e), the 2004 Legislature added the qualifier "detailed" to rationale for proposed bylaws amendments.] Consistent with the goal of eliminating the artificial approach regarding bylaws in HRS §514A-82(a) and (b), and to help reduce the statutory requirements for condominium governing documents, certain provisions currently in HRS §514A-82(a) and (b) have been incorporated in more appropriate statutory sections.

2. Regarding subsection (a), a stakeholder noted that there has sometimes been confusion between "recording" bylaws with the Bureau of Conveyances (or Land Court) versus the Department of Commerce and Consumer Affairs. There should have been no confusion. "To record", in HRS §514A-3, means "to record in accordance with chapter 502 *(Bureau of Conveyances)*, or

to register in accordance with chapter 501 *(Land Court)*." In any case, the recodified condominium law leaves no room for confusion, as "Record, recordation, recorded, recording, etc." is defined in § -3 as "to record in the bureau of conveyances in accordance with chapter 502, or to register in the land court in accordance with chapter 501."

3. Regarding subsection (e), a property manager noted that, where time share owners are "owners," 1500 time share owners may own 10% of the project. It is important to remember, however, that time share governance issues are covered by HRS Chapter 514E, related administrative rules, and the time share governing documents.

§ -109 Restatement of declaration and bylaws. (a) Notwithstanding any other provision of this chapter or of any other statute or instrument, an association at any time may restate the declaration or bylaws of the association to set forth all amendments thereto by a resolution adopted by the board.

(b) Subject to section -23, an association at any time may restate the declaration or bylaws of the association to amend the declaration or bylaws as may be required in order to conform with the provisions of this chapter or of any other statute, ordinance, or rule enacted by any governmental authority, by a resolution adopted by the board. The restated declaration or bylaws shall be as fully effective for all purposes as if adopted by a vote or written consent of the unit owners.

Any declaration or bylaws restated pursuant to this subsection shall:

(1) Identify each portion so restated;

(2) Contain a statement that those portions have been restated solely for purposes of information and convenience;

(3) Identify the statute, ordinance, or rule implemented by the amendment; and

(4) Contain a statement that, in the event of any conflict, the restated declaration or bylaws shall be subordinate to the cited statute, ordinance, or rule.

(c) Upon the adoption of a resolution pursuant to subsection (a) or (b), the restated declaration or bylaws shall set forth all of the operative provisions of the declaration or bylaws, as amended, together with a statement that the restated declaration or bylaws correctly sets forth without change the corresponding provisions of the declaration or bylaws, as amended, and that the restated declaration or bylaws supersede the original declaration or bylaws and all prior amendments thereto..

(d) The restated declaration or bylaws must be recorded and, upon recordation, shall supersede the original declaration or bylaws and all prior amendments thereto. In the event of any conflict, the restated declaration or bylaws shall be subordinate to the original declaration or bylaws and all prior amendments thereto.

Real Estate Commission's Comment

1. HRS §514A-82.2, essentially identical, is the source of this section.

§ -110 Bylaws amendment permitted; mixed use property; representation on board. (a) The bylaws of an association may be amended to provide that the composition of the board reflect the proportionate number of units for a particular use, as set forth in the declaration. For example, an association may provide that for a nine-member board where two-thirds of the units are for residential use and one-third is for nonresidential use, sixty-six and two-thirds per cent of the nine-member board, or six members, shall be owners of residential use units and thirty-three and one-third per cent, or three members, shall be owners of nonresidential use units.

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

(1) A majority vote of the board; or

(2) A submission of the proposed bylaw amendment to the board from a volunteer unit owners group accompanied by a petition from twenty-five per cent of the unit owners of record.

(c) Within thirty days of a decision by the board or receipt of a petition to initiate a bylaw amendment, the board shall mail a ballot with the proposed bylaw amendment to all of the unit owners of record. For purposes of this section only, the bylaws may initially be amended by a vote or written consent of the majority of the unit owners; and thereafter by at least sixty-seven per cent of all unit owners; provided that each of the requirements set forth in this section shall be embodied in the bylaws.

(d) The bylaws, as amended pursuant to this section, shall be recorded.

(e) Election of the new board in accordance with an amendment adopted pursuant to this section shall be held at the

next regular meeting of the association or at a meeting called in accordance with section -121(b) for this purpose.

(f) As permitted in the declaration or bylaws, the vote of a nonresidential unit owner shall be cast and counted only for the nonresidential seats available on the board and the vote of a residential unit owner shall be cast and counted only for the residential seats available on the board.

(g) No petition for a bylaw amendment pursuant to subsection (b)(2) to modify the composition of the board shall be distributed to the unit owners within one year of the distribution of a prior petition to modify the composition of the board pursuant to subsection (b)(2).

(h) This section shall not preclude the removal and replacement of any one or more members of the board pursuant to section -106(f). Any removal and replacement shall not affect the proportionate composition of the board as prescribed in the bylaws as amended pursuant to this section.

Real Estate Commission's Comment

1. HRS §514A-82.15, modified slightly, is the source of this section. Rather than requiring election of the new board to be held within 60 days of the recordation of the amended bylaws, subsection (e) has been modified to allow the election to be held at the next regular meeting of the association or by special meeting in accordance with § -121(b).

§ -111 Judicial power to excuse compliance with requirements of declaration or bylaws. (a) The circuit court of the judicial circuit in which a condominium is located may excuse compliance with any of the following provisions in a declaration or bylaws if it finds that the provision unreasonably interferes with the association's ability to manage the common property, administer the condominium property regime, or carry out any other function set forth in the declaration or bylaws, and that compliance is not necessary to protect the legitimate interests of the members or lenders holding security interests:

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

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

(3) A provision requiring approval of at least sixty-seven per cent of the common interest to adopt an amendment pursuant to section -32(a)(11) or section -108(e); provided that the amendment does not:

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

(B) Change the basis for allocating voting rights or assessments among unit owners; or

(C) Apply to less than all of the unit owners;

(4) A requirement that an amendment to the declaration be signed by unit owners; or

(5) A quorum requirement for meetings of unit owners.

(b) The board, on behalf of the association, shall by certified mail provide all unit owners with notice of the date, time, and place of any court hearing to be held pursuant to this section.

Real Estate Commission's Comment

1. The *Restatement of the Law, Third, Property (Servitudes)* §6.12, modified, is the source of this section.

2. Several practitioners, management companies, and unit owners have commented on the virtual impossibility of changing obsolete provisions (among others) contained in condominium declarations.

For example, in one old condominium, the elevator was so small that no one could fit any furniture bigger than a love seat into the elevator. The majority of unit owners (over 70%) wanted to modify the elevator so they could move bigger pieces of furniture up to their apartments. However, the declaration contained an owner-approval requirement for spending more than $2,000. Since first and second floor owners and others (for various reasons, including apathy) didn't care to approve spending for enlarging the elevator, it was not possible to get the necessary 75% unit owners' consent.[5] Ultimately, while such "spending limit" provisions might have had appeal to a buyer (initially) or to a developer who believes that it is the right "democratic" thing to do, it makes little sense in the long run for the people who have to live in the condominium since it becomes virtually impossible to

[5] HRS §514A-11(11) allows declarations to be amended if at least 75% of the unit owners consent.

change the declaration (even with its outdated dollar figure limits).

The *Restatement of the Law, Third, Property (Servitudes)*, recognizes this problem and addresses it in §6.12 – Judicial Power to Excuse Compliance with Requirements of the Governing Documents.[6] In its comments to §6.12, the Restatement explains its rationale as follows:

> The public and the property owners have substantial interests in the long-term viability of the common-interest community. The declaration, the foundational document setting the parameters of the community's authority, is usually drafted by the developer for whom the project's immediate financial success is generally more important than creation of a community that will function successfully in the long term. Through ignorance, inadvertence, reliance on poorly drafted forms, or lack of foresight, many declarations include provisions that impair the ability of the community or its association to function over the long term. The resulting problems have sometimes been corrected or ameliorated by legislation. However, remedial legislation is not yet available in many states and may not apply to some common-interest communities. A court has a general dispensing power, under principles of equity jurisdiction, to excuse compliance with requirements that significantly impede the functioning of common-interest communities and their associations. The interests of property owners and lenders who relied on the provisions of the declaration are protected by the requirement that the court find that compliance with the provision in question is unnecessary to protect their legitimate interests.

3. Restatement §6.12 is patterned after California Civil Code §§1356 and 1366. It also finds some support in case law (listed in Reporter's Note). Florida also has provisions allowing for the courts to excuse compliance with condominium governing documents under very specific circumstances.

§ -112 Condominium community mutual obligations. (a) All unit owners, tenants of owners, employees of owners and tenants, or any other persons that may in any manner use property or any part thereof submitted to this chapter are subject to this chapter and to the declaration and bylaws of the association adopted pursuant to this chapter.

(b) All agreements, decisions, and determinations lawfully made by the association in accordance with the voting percentages established in this chapter, the declaration, or the bylaws are binding on all unit owners.

(c) Each unit owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the covenants, conditions, and restrictions set forth in the declaration, the bylaws, and the house rules adopted pursuant thereto. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the managing agent, resident manager, or board on behalf of the association or, in a proper case, by an aggrieved unit owner.

Real Estate Commission's Comment

1. This section is identical to HRS §§514A-87 and 514A-88.

B. GOVERNANCE – ELECTIONS AND MEETINGS

§ -121 Association meetings. (a) A meeting of the association shall be held at least once each year.

(b) Special meetings of the association may be called by the president, a majority of the board, or by a petition to the secretary or managing agent signed by not less than twenty-five per cent of the unit owners as shown in the association's record of ownership; provided that if the secretary or managing agent fails to send out the notices for the special meeting within fourteen days of receipt of the petition, the petitioners shall have the authority to set the time, date, and place for the special meeting and to send out the notices and proxies for the special meeting in accordance with the requirements of the bylaws and of this part.

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

(1) Hand-delivered;

(2) Sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner; or

(3) At the option of the unit owner, expressed in writing, by electronic mail to the electronic mailing address designated in writing by the unit owner.

[6] Restatement §6.10, referenced in §6.12, deals with the common interest community's power to amend the declaration. The extensive comments, illustrations, Reporter's notes, and cross-references to §6.12 provide an excellent analysis of the issues surrounding the amendment of common interest community declarations.

The notice of any meeting must state the date, time, and place of the meeting and the items on the agenda, including the general nature and rationale of any proposed amendment to the declaration or bylaws, and any proposal to remove a member of the board; provided that this subsection shall not preclude any unit owner from proposing an amendment to the declaration or bylaws or to remove a member of the board at any annual association meeting.

(d) All association meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. If so provided in the declaration or bylaws, meetings may be conducted by any means that allow participation by all unit owners in any deliberation or discussion.

(e) All association meetings shall be held at the address of the condominium or elsewhere within the State as determined by the board; provided that in the event of a natural disaster, such as a hurricane, an association meeting may be held outside the State.

Real Estate Commission's Comment

1. UCA/UCIOA §3-108, modified, is the source of subsections (a), (b), and (c). Subsection (b) includes language from HRS §514A-82(b)(1), slightly modified. HRS §§514A-82(a)(16) and 514A-82(a)(17) – edited to separate association and board meetings – are the sources subsections (d) and (e), respectively.

2. Subsection (c) makes it clear that no prior notice is required for proposed bylaws amendments and board removals at annual association meetings. Professional registered parliamentarian Steve Glanstein notes that bylaws amendments and board removals can be considered at the annual meeting under new business. If this were not the case, boards could prevent bylaws amendments and board removals from being considered by simply not placing the proposals on the annual meeting agendas.

3. The Modern Rules of Order was initially added to subsection (d). After further consideration, reference to the Modern Rules of Order was deleted. Parliamentarian Glanstein notes that: "The Modern Rules of Order presents numerous problems. It fails to include numerous important parliamentary points that are relevant to any organization. It has incomplete methodology for handling points of order, appeals, and the motion to amend, and provides minimal guidance for interpreting bylaws."

4. Subsection (c) permits electronic mail (Internet) notice of unit owners' association meetings at the option of the unit owner. [Note: The Commission also considered, but did not incorporate, HRS §414D-105 (Notice of Meeting), which allows nonprofit corporations to "give notice consistent with its bylaws of meetings of members in a fair and reasonable manner" and goes on to define "fair and reasonable."]

5. Subsection (d) authorizes conducting association meetings by teleconference, videoconference, or other means of conducting remote meetings if it is provided for in the declaration or bylaws. Associations (especially larger associations) should exercise caution in adopting such a provision in their declaration or bylaws, however, because allowing such meetings may interfere with the conduct of business. In addition, some bylaws require secret ballots for elections, which would not be possible in teleconference or videoconference meetings.

§ -122 Association meetings; minutes. (a) Minutes of meetings of the association shall be approved at the next succeeding regular meeting or by the board, within sixty days after the meeting, if authorized by the owners at an annual meeting. If approved by the board, owners shall be given a copy of the approved minutes or notified of the availability of the minutes within thirty days after approval.

(b) Minutes of all meetings of the association shall be available within seven calendar days after approval, and unapproved final drafts of the minutes of a meeting shall be available within sixty days after the meeting.

(c) An owner shall be allowed to offer corrections to the minutes at an association meeting.

Real Estate Commission's Comment

1. HRS §514A-83.4 – edited to separate association and board meetings – is the source of this section.

2. Subsection (a) has been modified to allow boards to approve minutes of association meetings if authorized by the owners at an annual meeting. Permitting the association to authorize the board to approve association minutes is consistent with all of the editions of Robert's Rules of Order since 1876. Robert's Rules of Order Newly Revised 10th edition, page 457 (lines 21-26) states that: "When the next regular business session will not be held within a quarterly time interval (see p. 88), and the session does not last longer than one day, or in an organization in which there will be a change or replacement of a portion of the membership, the executive board or a committee appointed for the purpose should be authorized to approve the minutes." (Emphasis added.)

3. Subsection (c) was added by the 2004 Legislature.

§ -123 Association meetings; voting; proxies. (a) If only one of several owners of a unit is present at a meeting of the association, that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners is

present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration expressly provides otherwise. There is majority agreement if any one of the owners casts the votes allocated to that unit without protest being made by any of the other owners of the unit to the person presiding over the meeting before the polls are closed.

(b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. A unit owner may vote by mail or electronic transmission through a duly executed directed proxy. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the secretary of the association or the managing agent. A proxy is void if it purports to be revocable without notice.

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

(d) A proxy, to be valid, shall:

(1) Be delivered to the secretary of the association or the managing agent, if any, no later than 4:30 p.m. on the second business day prior to the date of the meeting to which it pertains;

(2) Contain at least the name of the association, the date of the meeting of the association, the printed names and signatures of the persons giving the proxy, the unit numbers for which the proxy is given, the names of persons to whom the proxy is given, and the date that the proxy is given; and

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

(A) For quorum purposes only;

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

(C) To the board as a whole and that the vote is to be made on the basis of the preference of the majority of the directors present at the meeting; or

(D) To those directors present at the meeting with the vote to be shared with each director receiving an equal percentage.

The proxy form shall also contain a box wherein the owner may indicate that the owner wishes to obtain a copy of the annual audit report required by section -150.

(e) A proxy shall only be valid for the meeting to which the proxy pertains and its adjournments, may designate any person as proxy, and may be limited as the unit owner desires and indicates; provided that no proxy shall be irrevocable unless coupled with a financial interest in the unit.

(f) A copy, facsimile telecommunication, or other reliable reproduction of a proxy may be used in lieu of the original proxy for any and all purposes for which the original proxy could be used; provided that any copy, facsimile telecommunication, or other reproduction shall be a complete reproduction of the entire original proxy.

(g) Nothing in this section shall affect the holder of any proxy under a first mortgage of record encumbering a unit or under an agreement of sale affecting a unit.

(h) With respect to the use of association funds to distribute proxies:

(1) Any board that intends to use association funds to distribute proxies, including the standard proxy form referred to in subsection (d)(3), shall first post notice of its intent to distribute proxies in prominent locations within the project at least twenty-one days before its distribution of proxies. If the board receives within seven days of the posted notice a request by any owner for use of association funds to solicit proxies accompanied by a statement, the board shall mail to all owners either:

(A) A proxy form containing the names of all owners who have requested the use of association funds for soliciting proxies accompanied by their statements; or

(B) A proxy form containing no names, but accompanied by a list of names of all owners who have requested the use of association funds for soliciting proxies and their statements.

The statement, which shall be limited to black text on white paper, shall not exceed one single-sided 8-1/2" x 11" page, indicating the owner's qualifications to serve on the board or reasons for wanting to receive proxies; and

(2) A board or member of the board may use association funds to solicit proxies as part of the distribution of

proxies. If a member of the board, as an individual, seeks to solicit proxies using association funds, the board member shall proceed as a unit owner under paragraph (1).

(i) No managing agent or resident manager, or their employees, shall solicit, for use by the managing agent or resident manager, any proxies from any unit owner of the association that retains the managing agent or employs the resident manager, nor shall the managing agent or resident manager cast any proxy vote at any association meeting except for the purpose of establishing a quorum.

(j) No board shall adopt any rule prohibiting the solicitation of proxies or distribution of materials relating to association matters on the common elements by unit owners; provided that a board may adopt rules regulating reasonable time, place, and manner of the solicitations or distributions, or both.

Real Estate Commission's Comment

1. UCA/UCIOA §3-110, modified, is the source of subsections (a), (b), and (c). HRS §514A-83.2, modified, is the source of subsections (d), (e), (f), and (g). HRS §514A-82(b)(4), modified, is the source of subsections (h) and (i). HRS §514A-83.3, in part, is the source of subsection (j).

2. Voting processes should, in addition to being fundamentally fair, be practical. To that end, subsection (b) explicitly allows voting by mail and electronic transmission (i.e., Internet voting). Requiring votes by mail or electronic transmission to be done through "duly executed directed proxies" resolves procedural concerns relating to mail-in and electronic voting (e.g., ability to revoke the proxy) raised by some stakeholders. Some stakeholders are uncomfortable with electronic voting, but as long as security, validation, and auditing concerns are addressed, it makes no sense to prohibit such a valuable tool of democracy. Ultimately, permitting voting by mail and electronic transmission encourages participation by as many association members as possible.

3. [The statutory requirement for a "for quorum purposes only" box on the standard proxy form authorized by the association (HRS §514A-83.2(a)(3)(A)), which tends to encourage the submission of "for quorum purposes only" proxies, has been deleted. Such proxies often result in "opening meeting doors" but not allowing any business to be done. Associations suffer almost pointless additional mailing and meeting expenses because of this. Contrary to the assertion of some stakeholders, "for quorum purposes only" proxies are not neutral.[7] They count as "no" votes for any business at the association's meeting, making it much more difficult for any business to be done since all "for quorum purposes only" proxies are counted against any proposal (including elections) actually voted on by the association. It should be noted that unit owners will still be able to execute a proxy stating that their proxy can only be used for quorum purposes; it just won't be a statutorily required box on the standard proxy form authorized by the association.] *Rewrite to explain that the 2004 Legislature reinserted the "quorum purposes only" box requirement, but that the old law required that any proxies without the "quorum purposes only" box had to be disqualified while the recodification limits the requirement to standard proxy forms authorized by the association..*

4. Note that unit owners, including directors, using their own funds are not restricted by the provisions of subsection (h).

5. Subsection (h) codifies a property manager's suggestion that the 100 word limit to proxy solicitation statements be eliminated in favor of providing that the association will mail a single-sided 8 ½" x 11" proxy solicitation at the association's expense. This is consistent with the provision's original intent (i.e., limiting the cost of producing large amounts of information for an owner at the association's expense). To "level the playing field" regarding the physical appearance of the proxy solicitations, the 2004 Legislature added language limiting the statement to black text on white paper.

6. Some stakeholders suggested that (in addition to managing agents and resident managers, who are already prohibited from soliciting proxies) rental agents, any employees of associations, and their spouses be prohibited from soliciting proxies because of potential conflicts of interest. Others pointed out that it is not fair to turn these individuals into second class citizens when they have an ownership interest and the federal Fair Housing Act would prohibit discrimination against spouses. In the final draft of the recodification, employees of the managing agent and resident manager retained by the association are prohibited from soliciting proxies.

§ -124 Association meetings; purchaser's right to vote. The purchaser of a unit pursuant to a recorded agreement of sale shall have all the rights of a unit owner, including the right to vote; provided that the seller may retain the right to vote on matters substantially affecting the seller's security interest in the unit, including but not limited to, the right to vote on:

(1) Any partition of all or part of the project;

(2) The nature and amount of any insurance covering the project and the disposition of any proceeds thereof;

(3) The manner in which any condemnation of the project shall be defended or settled and the disposition of

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

any award or settlement in connection therewith;

(4) The payment of any amount in excess of insurance or condemnation proceeds;

(5) The construction of any additions or improvements, and any substantial repair or rebuilding of any portion of the project;

(6) The special assessment of any expenses;

(7) The acquisition of any unit in the project;

(8) Any amendment to the declaration or bylaws;

(9) Any removal of the project from the provisions of this chapter; and

(10) Any other matter that would substantially affect the security interest of the seller.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-83.

§ -125 Board meetings. (a) All meetings of the board, other than executive sessions, shall be open to all members of the association, and association members who are not on the board may participate in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the board votes otherwise.

(b) The board, with the approval of a majority of a quorum of its members, may adjourn a meeting and reconvene in executive session to discuss and vote upon matters:

(1) Concerning personnel;

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

(3) Necessary to protect the attorney-client privilege of the association; or

(4) Necessary to protect the interests of the association while negotiating contracts, leases, and other commercial transactions.

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

(c) All board meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. Unless otherwise provided in the declaration or bylaws, a board may permit any meeting to be conducted by any means of communication through which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. If permitted by the board, any unit owner may participate in a meeting conducted by a means of communication through which all participants may simultaneously hear each other during the meeting, provided that the board may require that the unit owner pay for the costs associated with the participation.

(d) The board shall meet at least once a year. Notice of all board meetings shall be posted by the managing agent, resident manager, or a member of the board, in prominent locations within the project seventy-two hours prior to the meeting or simultaneously with notice to the board.

(e) A director shall not vote by proxy at board meetings.

(f) A director shall not vote at any board meeting on any issue in which the director has a conflict of interest. A director who has a conflict of interest on any issue before the board shall disclose the nature of the conflict of interest prior to a vote on that issue at the board meeting, and the minutes of the meeting shall record the fact that a disclosure was made.

"Conflict of interest", as used in this subsection, means an issue in which a director has a direct personal or pecuniary interest not common to other members of the association.

Real Estate Commission's Comment

1. Subsection (a) is identical to HRS §514A-83.1(a). HRS §§514A-83.1(b) and 421J-5(d), modified, are the sources of subsection (b). HRS §§514A-82(a)(16) and 414D-143(c) are the sources of subsection (c). HRS §514A-82(b)(9), modified, is the source of subsection (d). Subsection (e) is identical to HRS §421J-5(e). Subsection (f) is identical to the pertinent provisions of HRS §§514A-82(a)(13), 514A-82(b)(5), and Robert's Rules of Order Newly Revised.

2. Paragraph (b)(4) recognizes that, in addition to personnel and litigation matters, it is appropriate to allow boards to go into executive session to discuss and vote on matters dealing with contracts, leases, and other commercial transactions while they

are being negotiated. Such negotiations often involve confidential information (e.g., an association's appraiser's estimates and advice during lease-to-fee negotiations, and review of competing bids from vendors during a sealed bidding process). Paragraph (b)(4) allows associations to protect their interests during the pendency of these negotiations.

3. Some stakeholders suggested that the Commission make it clear that directors have the right to attend any committee meetings, whether they sit on the committee or not, unless they have a conflict of interest on the subject matter. Others disagree. They point out that associations could be damaged by such a requirement.

Example: A director (otherwise very helpful) is known for asking questions of prospective employees that are illegal under current law. The director has no conflict of interest, but the director's participation in the interview process would subject the association to significant liability. Should State law force the association to allow this director's participation in its personnel committee's interview process? The Commission does not believe so.

4. The Modern Rules of Order was initially added to subsection (c). After further consideration, reference to the Modern Rules of Order was deleted. Parliamentarian Glanstein notes that: "The Modern Rules of Order presents numerous problems. It fails to include numerous important parliamentary points that are relevant to any organization. It has incomplete methodology for handling points of order, appeals, and the motion to amend, and provides minimal guidance for interpreting bylaws."

5. Subsection (c) authorizes teleconferencing, videoconferencing, and other means of conducting remote meetings.

6. Stakeholders questioned the qualifier "practicable" in HRS §514A-82(b)(9). It is deleted from the language of subsection (d)

7. Regarding subsection (g), some stakeholders proposed that the "nature of the conflict of interest" be recorded in meeting minutes, not just the fact that a disclosure was made. Others disagreed, citing privacy issues (e.g., issues involving AIDS or other health matters), and noted that the director with a conflict abstaining from voting is the key. More importantly, consistent with Robert's Rules of Order Newly Revised, minutes should reflect what was done at a meeting, not what was said. While it might be good practice for a director to protect himself or herself by providing written disclosure of a conflict of interest, it should not be mandated in State law.

§ -126 Board meetings; minutes. (a) Minutes of meetings of the board shall include the recorded vote of each board member on all motions except motions voted on in executive session.

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

(c) Minutes of all meetings of the board shall be available within seven calendar days after approval, and unapproved final drafts of the minutes of a meeting shall be available within sixty days after the meeting; provided that the minutes of any executive session may be withheld if their publication would defeat the lawful purpose of the executive session.

Real Estate Commission's Comment

1. HRS §514A-83.4 – edited to separate association and board meetings – is the source of this section.

C. OPERATIONS

§ -131 Operation of the property. The operation of the property shall be governed by this chapter and the declaration and bylaws.

Real Estate Commission's Comment

1. HRS §514A-81, modified, is the source of this section.

§ -132 Managing agents. (a) Every managing agent shall:

(1) Be a:

(A) Licensed real estate broker in compliance with chapter 467 and the rules of the commission. With respect to any requirement for a corporate managing agent in any declaration or bylaws recorded before the effective date of this chapter, any managing agent organized as a limited liability company shall be deemed to be organized as a corporation for the purposes of this paragraph, unless the declaration or bylaws are expressly amended after the effective date of this chapter to require that the managing agent be organized as a corporation and not as a limited liability company; or

(B) Corporation authorized to do business under article 8 of chapter 412;

(2) Register with the commission prior to conducting managing agent activity through approval of a completed registration application, payment of fees, and submission of any other additional information

set forth by the commission. The registration shall be for a biennial period with termination on December 31 of an even-numbered year. The commission shall prescribe a deadline date prior to the termination date for the submission of a completed reregistration application, payment of fees, and any other additional information set forth by the commission. Any managing agent who has not met the submission requirements by the deadline date shall be considered a new applicant for registration and subject to initial registration requirements. The information required to be submitted with any application shall include the name, business address, phone number, and names of associations managed;

(3) Obtain and keep current a fidelity bond in an amount equal to $500 multiplied by the aggregate number of units of the association managed by the managing agent; provided that the amount of the fidelity bond shall not be less than $20,000 nor greater than $500,000. Upon request by the commission, the managing agent shall provide evidence of a current fidelity bond or a certification statement from an insurance company authorized by the insurance division of the department of commerce and consumer affairs certifying that the fidelity bond is in effect and meets the requirements of this section and the rules adopted by the commission. The managing agent shall permit only employees covered by the fidelity bond to handle or have custody or control of any association funds, except any principals of the managing agent that cannot be covered by the fidelity bond. The fidelity bond shall protect the managing agent against the loss of any association's moneys, securities, or other properties caused by the fraudulent or dishonest acts of employees of the managing agent. Failure to obtain or maintain a fidelity bond in compliance with this chapter and the rules adopted pursuant thereto, including failure to provide evidence of the fidelity bond coverage in a timely manner to the commission, shall result in nonregistration or the automatic termination of the registration, unless an approved exemption or a bond alternative is presently maintained. A managing agent who is unable to obtain a fidelity bond may seek an exemption from the fidelity bond requirement from the commission;

(4) Act promptly and diligently to recover from the fidelity bond, if the fraud or dishonesty of the managing agent's employees causes a loss to an association, and apply the fidelity bond proceeds, if any, to reduce the association's loss. If more than one association suffers a loss, the managing agent shall divide the proceeds among the associations in proportion to each association's loss. An association may request a court order requiring the managing agent to act promptly and diligently to recover from the fidelity bond. If an association cannot recover its loss from the fidelity bond proceeds of the managing agent, the association may recover by court order from the real estate recovery fund established under section 467-16, provided that:

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

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

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

(5) Pay a nonrefundable application fee and, upon approval, an initial registration fee, and subsequently pay a reregistration fee, as prescribed by rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. A compliance resolution fee shall also be paid pursuant to section 26-9(o) and the rules adopted pursuant thereto; and

(6) Report immediately in writing to the commission any changes to the information contained on the registration application or any other documents provided for registration. Failure to do so may result in termination of registration and subject the managing agent to initial registration requirements.

(b) The commission may deny any registration or reregistration application or terminate a registration without hearing if the fidelity bond and supporting documents fail to meet the requirements of this chapter and the rules adopted pursuant thereto.

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

(d) The registration requirements of this section shall not apply to active real estate brokers in compliance with and licensed under chapter 467.

(e) If a managing agent receives a request from the commission to distribute any commission-generated information, printed material, or documents to the association, its board, or unit owners, the managing agent shall make the distribution within a reasonable period of time after receiving the request. The requirements of this subsection apply to

all managing agents, including unregistered managing agents.

Real Estate Commission's Comment

1. HRS §514A-95, modified, is the source of this section. Subsection (e) is new.

2. Paragraph (a)(1) has been amended to allow a managing agent to organize as limited liability company or a limited partnership. The Uniform Limited Liability Company Act was not enacted until 1996, and many of the largest condominium management firms in recent years have organized as limited liability companies or limited partnerships.

3. After further consideration, the Commission does not believe that the change made by Act 129 (SLH, 2002) was wise. At least part of the theory behind exempting licensed, active, real estate brokers from the registration and fidelity bond requirements of this section is that victims of such real estate brokers would have recourse against the Real Estate Recovery Fund. *See*, HRS §467-16, et seq. Such a remedy, however, is woefully inadequate as a few "bad acts" involving large condominiums managed by such real estate brokers could easily result in claims exceeding available Recovery Fund monies. The exemption from the fidelity bond requirement for licensed, active real estate brokers has been deleted in subsection (d).

4. In 2003, the Senate Committee on Commerce, Consumer Protection and Housing and the House Committee on Consumer Protection and Commerce passed a resolution (SCR 62) directing the Auditor to conduct a "sunrise review" regarding certification or licensure of condominium managing agents.

As noted in Senate Stand. Com. Rep. No. 1220 (2003):

> S.B. No. 1454 (2003) proposes the certification of condominium association managers by the REC. The Hawaii Regulatory Licensing Act declares that the State's policy is to regulate professions and vocations only when reasonably necessary to protect the health, safety, or welfare of consumers. Accordingly, before regulation of a profession or vocation can be legislated, the Auditor is required to analyze the probable effects of the proposed regulation, assess whether regulation is consistent with the Act's policies, and assess alternative forms of regulation. This measure authorizes the required sunrise review.

SCR 62 did not, however, pass out of the House Finance Committee. Therefore, SB 1454 (2003) could not be taken up by the 2004 Legislature.

§ -133 Association employees; background check; prohibition. (a) The board, managing agent, or resident manager, upon the written authorization of an applicant for employment as a security guard or resident manager or for a position that would allow the employee access to the keys of or entry into the units in the condominium or access to association funds, may conduct a background check on the applicant or direct another responsible party to conduct the check. Before initiating or requesting a check, the board, managing agent, or resident manager shall first certify that the signature on the authorization is authentic and that the person is an applicant for such employment. The background check, at a minimum, shall require the applicant to disclose whether the applicant has been convicted in any jurisdiction of a crime which would tend to indicate that the applicant may be unsuited for employment as an association employee with access to association funds or the keys of or entry into the units in the condominium, and the judgment of conviction has not been vacated.

For purposes of this section, the criminal history disclosure made by the applicant may be verified by the board, managing agent, resident manager, or other responsible party, if so directed by the board, managing agent, or resident manager, by means of information obtained through the Hawaii criminal justice data center. The applicant shall provide the Hawaii criminal justice data center with personal identifying information, which shall include, but not be limited to, the applicant's name, social security number, date of birth, and gender. This information shall be used only for the purpose of conducting the criminal history record check authorized by this section. Failure of an association, managing agent, or resident manager to conduct or verify or cause to have conducted or verified a background check shall not alone give rise to any private cause of action against an association, managing agent, or resident manager for acts and omissions of the employee hired.

(b) An association's employees shall not engage in selling or renting units in the condominium in which they are employed, except association-owned units, unless such activity is approved by sixty-seven per cent of the unit owners.

Real Estate Commission's Comment

1. Subsection (a) is essentially identical to HRS §514A-82.1. Subsection (b) is essentially identical to HRS §514A-82(b)(8).

§ -134 Management and contracts; developer, managing agent, and association. (a) Any developer or affiliate of the developer or a managing agent, who manages the operation of the property from the date of recordation of the first unit conveyance until the organization of the association, shall comply with the requirements of sections -72,

-103, and -149.

(b) The developer or affiliate of the developer, board, and managing agent shall ensure that there is a written contract for managing the operation of the property, expressing the agreements of all parties including, but not limited to, financial and accounting obligations, services provided, and any compensation arrangements, including any subsequent amendments. Copies of the executed contract and any amendments shall be provided to all parties to the contract. Prior to the organization of the association, any unit owner may request to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-84(b) and (c). HRS §514A-84(a) has been replaced by the provisions of § -135.

§ -135 Termination of contracts and leases of developer. (a) If entered into before the board elected by the unit owners pursuant to section -106(e) takes office:

(1) Any management contract, employment contract, or lease of recreational or parking areas or facilities;

(2) Any other contract or lease between the association and a developer or an affiliate of a developer; or

(3) Any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing;

may be terminated without penalty by the association within a period of one hundred eighty days after the board elected by the unit owners pursuant to section -106(e) takes office, upon not less than ninety days notice to the other party.

(b) This section does not apply to:

(1) Any lease or other agreement the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section; or

(2) A proprietary lease.

Real Estate Commission's Comment

1. UCA/UCIOA §3-105, modified, is the source of this section.

§ -136 Transfer of developer rights. (a) A developer right created or reserved under this chapter may be transferred only by a recorded instrument evidencing the transfer. The instrument is not effective unless executed by the transferee.

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

(1) A transferor is not relieved of any obligation or liability arising before the transfer, and remains liable for warranty obligations imposed upon the transferor by this chapter, if any. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor;

(2) If a successor to any developer right is an affiliate of a developer, the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the condominium;

(3) If a transferor retains any developer rights, but transfers other developer rights to a successor who is not an affiliate of the developer, the transferor is liable for any obligations or liabilities imposed on a developer by this chapter or by the declaration relating to the retained developer rights and arising after the transfer; and

(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a developer right by a successor developer who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under bankruptcy code or receivership proceedings, of any units owned by a developer or real estate in a condominium subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon request, succeeds to all developer rights related to that property held by that developer. The judgment or instrument conveying title must provide for the transfer of only the developer rights requested.

(d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under bankruptcy code or receivership proceedings, of all interests in a condominium owned by a developer:

(1) The developer ceases to have any developer rights; and

(2) The period of developer control under section -106(d) terminates unless the judgment or instrument conveying title provides for transfer of all developer rights held by that developer to a successor developer.

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

(1) A successor to any developer right who is an affiliate of a developer is subject to all obligations and liabilities imposed on the transferor by this chapter or by the declaration;

(2) A successor to any developer right, other than a successor described in paragraph (3) or (4) or a successor who is an affiliate of a developer, is subject to the obligations and liabilities imposed by this chapter or the declaration:

(A) On a developer which relate to the successor's exercise or nonexercise of developer rights; or

(B) On the transferor, other than:

(i) Misrepresentations by any previous developer;

(ii) Warranty obligations on improvements made by any previous developer, or made before the condominium was created;

(iii) Breach of any fiduciary obligation by any previous developer or the developer's appointees to the board; or

(iv) Any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer;

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs, and who may not exercise any other developer right, is not subject to any liability or obligation as a developer, except the obligation to provide a public report, any liability arising as a result thereof, and the obligations under part IV; and

(4) A successor to all developer rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all developer rights to any person acquiring title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by the transferor to control the board in accordance with section -106(d) for the duration of any period of developer control, and any attempted exercise of those rights is void. So long as a successor developer may not exercise developer rights under this subsection, the successor developer is not subject to any liability or obligation as a developer other than liability for the developer's acts and omissions under section -106(d).

(f) Nothing in this section subjects any successor to a developer right to any claims against or other obligations of a transferor developer, other than claims and obligations arising under this chapter or the declaration.

Real Estate Commission's Comment

1. UCA/UCIOA §3-104, modified slightly, is the source of this section.

§ -137 Upkeep of condominium. (a) Except to the extent provided by the declaration or bylaws, the association is responsible for the operation of the property, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, during reasonable hours, access through the owner's unit reasonably necessary for those purposes. If damage is inflicted on the common elements or on any unit through which access is taken, the unit owner responsible for the damage, or the association, if it is responsible, is liable for the prompt repair thereof; provided that the association shall not be responsible to pay the costs of removing any finished surfaces or other barriers that impede its ability to maintain and repair the common elements.

(b) The association shall have the irrevocable right, to be exercised by the board, to have access to each unit at any time as may be necessary for making emergency repairs to prevent damage to the common elements or to another unit or units.

Real Estate Commission's Comment

1. UCA/UCIOA §3-107, modified, is the source of subsection (a). HRS §§514A-13(f) and 514A-82(b)(6), clarified, are the sources of subsection (b).

2. Earlier drafts of the recodification incorporated UCA/UCIOA §3-107(b), which among other things mandates that "the developer alone is liable for all expenses in connection with real estate subject to development rights," as subsection (c). The subsection has been deleted in the final draft because it may create confusion (regarding who is responsible for what) where none exists now.

§ -138 Upkeep of condominium; high-risk components. (a) 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.

(b) With regard to items designated as high-risk components, the board may require any or all of the following:

(1) Inspection:

(A) At specified intervals; or

(B) Upon replacement or repair by the association or by inspectors designated by the association;

(2) Replacement or repair at specified intervals whether or not the component is deteriorated or defective; and

(3) Replacement or repair:

(A) Meeting particular standards or specifications established by the board;

(B) Including additional components or installations specified by the board; or

(C) Using contractors with specific licensing, training, or certification approved by the board.

(c) The imposition of requirements by the board under subsection (b) shall not relieve unit owners of obligations regarding high-risk components as set forth in the declaration or bylaws including, without limitation, the obligation to maintain, repair, and replace the components.

(d) If a unit owner fails to follow requirements imposed by the board pursuant to this section, the association, after reasonable notice, shall enter the unit to perform the requirements with regard to such high-risk components at the sole cost and expense of the unit owner, which costs and expenses shall be a lien on the unit as provided in section -146. Nothing in this section shall be deemed to limit the remedies of the association for damages, or injunctive relief, or both.

Real Estate Commission's Comment

1. This is a new section. It is based on an article entitled "Create Policy to Deal with 'High-Risk Components' Before Disaster Strikes" from the Community Association Management Insider (July 2003).

§ -139 Upkeep of condominium; disposition of unclaimed possessions. (a) When personalty in or on the common elements of a project has been abandoned, the board may sell the personalty in a commercially reasonable manner, store the personalty at the expense of its owner, donate the personalty to a charitable organization, or otherwise dispose of the personalty in its sole discretion; provided that no sale, storage, or donation shall occur until sixty days after the board complies with the following:

(1) The board notifies the owner in writing of:

(A) The identity and location of the personalty; and

(B) The board's intent to so sell, store, donate, or dispose of the personalty.

Notification shall be by certified mail, return receipt requested, to the owner's address as shown by the records of the association or to an address designated by the owner for the purpose of notification or, if neither of these is available, to the owner's last known address, if any; or

(2) If the identity or address of the owner is unknown, the board shall first advertise the sale, donation, or disposition at least once in a daily paper of general circulation within the circuit in which the personalty is located.

(b) The proceeds of any sale or disposition of personalty under subsection (a), after deduction of any accrued costs of mailing, advertising, storage, and sale, shall be held for the owner for thirty days. Any proceeds not claimed within this period shall become the property of the association.

Real Estate Commission's Comment

1. This section is identical to HRS §514A-93.5.

§ -140 Additions to and alterations of condominium. (a) No unit owner shall do any work that may jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement, as reasonably determined by the board.

(b) Subject to the provisions of the declaration, no unit owner may make or allow any material addition or alteration, or excavate an additional basement or cellar, without first obtaining the written consent of sixty-seven per cent of the unit owners, the consent of all unit owners whose units or appurtenant limited common elements are directly affected, and the approval of the board, which shall not unreasonably withhold such approval. The declaration may limit the board's ability to approve or condition a proposed addition or alteration; provided that the board shall always have the right to disapprove a proposed addition or alteration that the board reasonably determines could jeopardize the soundness or safety of the property, impair any easement, or interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of the property.

(c) Subject to the provisions of the declaration, nonmaterial additions to or alterations of the common elements or units, including, without limitation, the installation of solar energy devices, or additions to or alterations of a unit made within the unit or within a limited common element appurtenant to and for the exclusive use of the unit, shall require approval only by the board, which shall not unreasonably withhold such approval, and such percentage, number, or group of unit owners as may be required by the declaration or bylaws.

"Nonmaterial additions and alterations", as used in this subsection, means an addition to or alteration of the common elements or a unit that does not jeopardize the soundness or safety of the property, reduce the value thereof, impair any easement, detract from the appearance of the project, interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of property, or directly affect any nonconsenting owner.

"Solar energy device", for purposes of this subsection, means any new identifiable facility, equipment, apparatus, or the like which makes use of solar energy for heating, cooling, or reducing the use of other types of energy dependent upon fossil fuel for its generation; provided that if the equipment sold cannot be used as a solar device without its incorporation with other equipment, it shall be installed in place and be ready to be made operational in order to qualify as a "solar energy device".

(d) Notwithstanding any other provisions to the contrary in this chapter or in any declaration or bylaws:

(1) Regarding the installment of telecommunications equipment:

(A) The board shall have the authority to install or cause the installation of antennas, conduits, chases, cables, wires, and other television signal distribution and telecommunications equipment upon the common elements of the project; provided that the same shall not be installed upon any limited common element without the consent of the owner or owners of the unit or units for the use of which the limited common element is reserved; and

(B) The installation of antennas, conduits, chases, cables, wires, and other television signal distribution and telecommunications equipment upon the common elements by the board shall not be deemed to alter, impair, or diminish the common interest, common elements, and easements appurtenant to each unit, or to be a structural alteration or addition to any building constituting a material change in the plans of the project filed in accordance with sections -33 and -34; provided that no such installation shall directly affect any nonconsenting unit owner; and

(2) Regarding the abandonment of telecommunications equipment:

(A) The board shall be authorized to abandon or change the use of any television signal distribution and telecommunications equipment due to technological or economic obsolescence or to provide an equivalent function by different means or methods; and

(B) The abandonment or change of use of any television signal distribution or telecommunications

equipment by the board due to technological or economic obsolescence or to provide an equivalent function by different means or methods shall not be deemed to alter, impair, or diminish the common interest, common elements, and easements appurtenant to each unit or to be a structural alteration or addition to any building constituting a material change in the plans of the project filed in accordance with sections -33 and -34.

As used in this subsection:

"Directly affect" means the installation of television signal distribution and telecommunications equipment in a manner which would specially, personally, and adversely affect a unit owner in a manner not common to the unit owners as a whole.

"Television signal distribution" and "telecommunications equipment" shall be construed in their broadest possible senses in order to encompass all present and future forms of communications technology.

Real Estate Commission's Comment

1. HRS §514A-89, rewritten for clarity and modified slightly, is the source of subsections (a), (b), and (c). Subsection (d) is essentially identical to HRS §514A-13.4.

2. HRS §514A-89's mandate that solar energy devices are, by definition, "nonmaterial structural additions to the common elements" (incorporated in the recodification), has the laudable goal of increasing use of alternative energy sources and lessening Hawaii's dependence on fossil fuels. Some stakeholders have stated, however, that allowing unit owners to install solar energy devices at condominium projects with just the approval of the board and such other owners as may be required by the declaration or bylaws creates serious problems. For example, such installations can and do invalidate roof warranties for entire buildings, increase maintenance costs, and create the potential of roof problems that all owners will have to pay for. Moreover, it is virtually impossible to reasonably decide which owner gets which portion of the common element rooftop for installation of his or her solar energy device. The United States Supreme Court has held that a state statute that allowed a cable operator to install its cable facilities on a landlord's property constituted a taking under the Fifth Amendment.[8] A similar analysis applies here. One owner is taking the common element rooftop for his or her exclusive use without compensation to other owners and with the potential for creating serious problems for the association. Ultimately, this is a matter of legitimate, but competing, public policies that the Legislature should consider further and resolve. The Real Estate Commission is not the proper body to make this decision. [*Explain further, particularly the significance of the form of ownership and getting the approval of the owners of the roof; note that proposals before the 2004 Legislature essentially sought to remove the requirement that the owners of the roof – i.e., the unit owners collectively – approve the addition/alteration.*]

3. *Subsection (d) and -37 (Common interest) should be amended by the 2005 Legislature to conform to Act 72 (SB 2009, SD 1, HD 1) (SLH 2004). Explain.*

§ -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. Neither the association nor any unit owner except the developer is liable for that developer's torts in connection with any part of the condominium that that developer has the responsibility to maintain.

(b) An action alleging a wrong done by the association, including an action arising out of the condition or use of the common elements, may be maintained only against the association and not against any unit owner. If the wrong occurred during any period of developer control and the association gives the developer reasonable notice of and an opportunity to defend against the action, the developer who then controlled the association is liable to the association or to any unit owner for:

(1) All tort losses not covered by insurance suffered by the association or that unit owner; and

(2) All costs that the association would not have incurred but for a breach of contract or other wrongful act or omission, as the same may be established through adjudication.

Whenever the developer is liable to the association under this section, the developer is also liable for all expenses of litigation, including reasonable attorneys' fees, incurred by the association.

(c) Any statute of limitation affecting the association's right of action against a developer under this chapter is tolled until the period of developer control terminates. A unit owner is not precluded from maintaining an action contemplated by this section because the unit owner is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by section -147.

[8] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

Part VI. Management of Condominiums

Real Estate Commission's Comment

1. UCA/UCIOA §3-111, modified, is the source of this section.

§ -142 Aging in place; limitation on liability. (a) The association, its directors, unit owners, and their agents and tenants, acting through the board, shall not have any legal responsibility or legal liability, with respect to any actions and recommendations the board takes on any report, observation, or complaint made, or with respect to any recommendation or referral given, which relates to an elderly unit owner who, may require services and assistance to maintain independent living in the unit in which the elderly unit owner resides so that the elderly unit owner will not pose any harm to self or to others, and will not be disruptive to the condominium community because of the following problems of aging and aging in place:

(1) The inability to clean and maintain an independent unit;

(2) Mental confusion;

(3) Abusing others;

(4) Inability to care for oneself;

(5) Inability to arrange for home care;

(6) Loneliness and neglect; or

(7) Inappropriate requests of others for assistance.

For purposes of this section, "elderly" means age sixty-two and older.

(b) Upon a report, observation, or complaint relating to an elderly unit owner aging or aging in place which notes a problem similar in nature to the problems enumerated in subsection (a), the board, in good faith, and without legal responsibility or liability, may request a functional assessment regarding the condition of an elderly unit owner as well as recommendations for the services which the elderly unit owner may require to maintain a level of independence that enables the owner to avoid any harm to self or to others, and to avoid disruption to the condominium community. The board, upon request or unilaterally, and without legal responsibility or liability, may recommend available services to an elderly unit owner which might enable the elderly unit owner to maintain a level of independent living with assistance, enabling in turn, the elderly unit owner to avoid any harm to self or others, and to avoid disruption to the condominium community.

(c) There is no affirmative duty on the part of the association, its board, the unit owners, or their agents or tenants to request or require an assessment and recommendations with respect to an elderly unit owner when the elderly unit owner may be experiencing the problems related to aging and aging in place enumerated in subsection (a). The association, its board, unit owners, and their agents and tenants shall not be legally responsible or liable for not requesting or declining to request a functional assessment of, and recommendations for, an elderly unit owner regarding problems relating to aging and aging in place.

(d) If an elderly unit owner ignores or rejects a request for or the results from an assessment and recommendations, the association, with no liability for cross-claims or counterclaims, may file appropriate information, pleadings, notices, or the like, with appropriate agencies or courts to seek an appropriate resolution for the condominium community and for the elderly unit owner.

(e) Costs and fees for assessments, recommendations, and actions contemplated in this section shall be as set forth in the declaration or bylaws.

(f) This section shall not be applicable to any condominium that seeks to become licensed as an assisted living facility pursuant to chapter 90, title 11, Hawaii Administrative Rules, as amended.

Real Estate Commission's Comment

1. This is a new section. It was added at the request of the working group convened pursuant to Act 185 (SLH, 2003).[9] The Commission notes that associations should undertake assessments pursuant to this section only as a last resort after notice to the resident, next of kin, or other responsible party fails to gain the cooperation and behavior necessary to live independently in the condominium community.

§ -143 Insurance. (a) Unless otherwise provided in the declaration or bylaws, and to the extent reasonably

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

available, the association shall purchase and at all times maintain the following:

(1) Property insurance:

(A) On the common elements;

(B) Providing coverage for special form causes of loss; and

(C) In a total amount of not less than the full insurable replacement cost of the insured property, less deductibles, but including coverage for the increased costs of construction due to building code requirements, at the time the insurance is purchased and at each renewal date;

(2) Commercial general liability insurance against claims and liabilities arising in connection with the ownership, existence, use, or management of the property in a minimum amount of $1,000,000, or a greater amount deemed sufficient in the judgment of the board, insuring the board, the association, the management agent, and their respective employees and agents and all persons acting as agents. The developer shall be included as an additional insured in its capacity as a unit owner, managing agent or resident manager, board member, or officer. The unit owners shall be included as additional insured parties but only for claims and liabilities arising in connection with the ownership, existence, use, or management of the common elements. The insurance shall cover claims of one or more insured parties against other insured parties.

(3) A fidelity bond, as follows:

(A) An association with more than five dwelling units shall obtain and maintain a fidelity bond covering persons, including the managing agent and its employees who control or disburse funds of the association, in an amount equal to $500 multiplied by the number of units; provided that the amount of the fidelity bond required by this paragraph shall not be less than $20,000 nor greater than $200,000;

(B) All management companies that are responsible for the funds held or administered by the association shall be covered by a fidelity bond as provided in section -132(a)(3). The association shall have standing to make a loss claim against the bond of the managing agent as a party covered under the bond; and

(C) The board shall obtain directors and officers liability coverage at a level deemed reasonable by the board, if not otherwise established by the declaration or bylaws. Directors and officers liability coverage shall extend to all contracts and other actions taken by the board in their official capacity as directors and officers, but shall exclude actions for which the directors are not entitled to indemnification under chapter 414D or the declaration and bylaws.

(b) If a building contains attached units, the insurance maintained under subsection (a)(1), to the extent reasonably available, shall include the units, the limited common elements, except as otherwise determined by the board, and the common elements. The insurance need not cover improvements and betterments to the units installed by unit owners, but if improvements and betterments are covered, any increased cost may be assessed by the association against the units affected.

For the purposes of this section, "improvements and betterments" means all decorating, fixtures, and furnishings installed or added to and located within the boundaries of the unit, including electrical fixtures, appliances, air conditioning and heating equipment, water heaters, or built-in cabinets installed by unit owners.

(c) If a project contains detached units, then notwithstanding the requirement that associations obtain the requisite coverage, the insurance to be maintained under subsection (a)(1) may be obtained separately for each unit by the unit owners; provided that the requirements of subsection (a)(1) shall be met; and provided further that evidence of such insurance coverage shall be delivered annually to the association. In such event, the association shall be named as an additional insured.

(d) The board, in the case of a claim for damage to a unit or the common elements, may:

(1) Pay the deductible amount as a common expense;

(2) After notice and an opportunity for a hearing, assess the deductible amount against the owners who caused the damage or from whose units the damage or cause of loss originated; or

(3) Require the unit owners of the units affected to pay the deductible amount.

(e) The declaration or bylaws may require the association to carry any other insurance, including workers'

compensation, employment practices, environmental hazards, and equipment breakdown, that the board considers appropriate to protect the association, the unit owners, or officers, directors, or agents of the association. Flood insurance shall also be maintained if the property is located in a special flood hazard area as delineated on flood maps issued by the Federal Emergency Management Agency. The flood insurance policy shall comply with the requirements of the National Flood Insurance Program and the Federal Insurance Administration.

(f) Insurance policies carried pursuant to subsections (a) and (b) shall include each of the following provisions:

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

(2) The insurer waives its right to subrogation under the policy against any unit owner of the condominium or members of the unit owner's household and against the association and members of the board; and

(3) The unit owner waives the unit owner's right to subrogation under the association policy against the association and the board.

(g) If at the time of a loss under the policy there is other insurance in the name of a unit owner covering the same property covered by the policy, the association's policy shall be the primary insurance.

(h) Any loss covered by the property policy under subsection (a)(1) shall be adjusted by and with the association. The insurance proceeds for that loss shall be payable to the association, or to an insurance trustee designated by the association for that purpose. The insurance trustee or the association shall hold any insurance proceeds in trust for unit owners and secured parties as their interests may appear. The proceeds shall be disbursed first for the repair or restoration of the damaged common elements, the bare walls, ceilings, and floors of the units, and then to any improvements and betterments the association may insure. Unit owners shall not be entitled to receive any portion of the proceeds unless there is a surplus of proceeds after the common elements and units have been completely repaired or restored or the association has been terminated as trustee.

(i) The board, under the declaration or bylaws, may require unit owners to obtain reasonable levels of insurance covering their personal liability and compensatory but not consequential damages to another unit caused by the negligence of the owner or the owner's guests, tenants, or invitees, or regardless of any negligence originating from the unit. The personal liability of a unit owner shall include the deductible of the owner whose unit was damaged, any damage not covered by insurance required by this subsection, as well as the decorating, painting, wall and floor coverings, trim, appliances, equipment, and other furnishings.

If the unit owner does not purchase or produce evidence of insurance requested by the board, the directors may, in good faith, purchase the insurance coverage and charge the reasonable premium cost back to the unit owner. In no event is the board liable to any person either with regard to its decision not to purchase the insurance, or with regard to the timing of its purchase of the insurance or the amounts or types of coverages obtained.

(j) Contractors and vendors, except public utilities doing business with an association, shall provide certificates of insurance naming the association, its board, and its managing agent as additional insured parties.

(k) The provisions of this section may be varied or waived in the case of a condominium community in which all units are restricted to nonresidential use.

(l) Any insurer defending a liability claim against an association shall notify the association of the terms of the settlement no less than ten days before settling the claim. The association may not veto the settlement unless otherwise provided by contract or statute.

Real Estate Commission's Comment

1. §765 Illinois Compiled Statutes (ILCS) 605/12, modified, is the basic source of this section. Paragraph (a)(3)(A) incorporates the language of HRS §514A-95.1(a)(1) regarding fidelity bonds, modified by raising the maximum amount of the fidelity bond required by law from $100,000 to $200,000. Subsection (e) incorporates language from HRS §514A-86(a) regarding flood insurance.

2. Subsections (b) and (c) distinguish between buildings containing attached and detached units.[10]

[10] For an excellent discussion of the issue, *see,* the official comment to UCA/UCIOA §3-113(b). The Acts do not mandate association insurance on units in town house or other arrangements in which there are no stacked units. If the developer wishes, however, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units. UCA/UCIOA §3-113 and their official comments also attempt to clarify the complex issue of what is a common element and what is a unit with respect to insurance coverage.

3. *Subsection (g) (association policy primary) should be explained a bit, along with subsections (d) (deductibles) and (i) (mandatory unit owner coverage). Note Rep. Hiraki's insertion in subsection (i) of "reasonable levels", "good faith", and "reasonable" premium cost because of his concern regarding force-placed insurance.*

§ -144 Association fiscal matters; assessments for common expenses. (a) Except as provided in section -41, until the association makes a common expense assessment, the developer shall pay all common expenses. After an assessment has been made by the association, assessments shall be made at least annually, based on a budget adopted and distributed or made available to unit owners at least annually by the board.

(b) Except for assessments under subsections (c), (d), and (e), all common expenses shall be assessed against all the units in accordance with the allocations under section -41. Any past due common expense assessment or installment thereof shall bear interest at the rate established by the association, provided that the rate shall not exceed eighteen per cent per year.

(c) Assessments to pay a judgment against the association under section -147(a) may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense allocations under section -41.

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

(e) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

(f) In the case of a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the latter for the grantor's share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. Any such grantor or grantee is, however, entitled to a statement from the board, either directly or through its managing agent or resident manager, setting forth the amount of the unpaid assessments against the grantor, and except as to the amount of subsequently dishonored checks mentioned in such statement as having been received within the thirty-day period immediately preceding the date of such statement, the grantee is not liable for, nor is the unit conveyed subject to a lien for, any unpaid assessments against the grantor in excess of the amount therein set forth.

(g) No unit owner may exempt the unit owner from liability for the unit owner's contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of the unit owner's unit. Subject to such terms and conditions as may be specified in the bylaws, any unit owner, by conveying the unit owner's unit and common interest to the board on behalf of all other unit owners, may exempt the unit owner's self from common expenses thereafter accruing.

(h) The board, either directly or through its managing agent or resident manager, shall notify the unit owners in writing of maintenance fee increases at least thirty days prior to such an increase.

Real Estate Commission's Comment

1. UCA/UCIOA §3-115, modified, is the source of subsections (a) through (e).
2. Subsections (f) through (h) are essentially identical to HRS §§514A-91, 514A-92, and 514A-92.2, respectively.

§ -145 Association fiscal matters; collection of unpaid assessments from tenants. (a) If the owner of a unit rents or leases the unit and is in default for thirty days or more in the payment of the unit's share of the common expenses, the board, for as long as the default continues, may demand in writing and receive each month from any tenant occupying the unit, an amount sufficient to pay all sums due from the unit owner to the association, including interest, if any, but the amount shall not exceed the tenant's rent due each month. The tenant's payment under this section shall discharge that amount of payment from the tenant's rent obligation, and any contractual provision to the contrary shall be void as a matter of law.

(b) Before taking any action under this section, the board shall give to the delinquent unit owner written notice of its intent to collect the rent owed. The notice shall:

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

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

(3) Indicate the intent of the board to collect such amount from the rent, along with any other amounts that become due and remain unpaid.

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

(d) The payment of any portion of the unit's share of common expenses by the tenant pursuant to a written demand by the board is a complete defense, to the extent of the amount demanded and paid by the tenant, in an action for nonpayment of rent brought by the unit owner against a tenant.

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

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

(2) A mortgagee is in possession pending a mortgage foreclosure; or

(3) The tenant is served with a court order directing payment to a third party.

(f) In the event of any conflict between this section and any provision of chapter 521, the conflict shall be resolved in favor of this section; provided that if the tenant is entitled to an offset of rent under chapter 521, the tenant may deduct the offset from the amount due to the association, up to the limits stated in chapter 521. Nothing herein precludes the unit owner or tenant from seeking equitable relief from a court of competent jurisdiction or seeking a judicial determination of the amount owed.

(g) Before the board may take the actions permitted under subsection (a), the board shall adopt a written policy providing for the actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a majority of the unit owners.

Real Estate Commission's Comment

1. This section is essentially identical to HRS §514A-90.5.

§ -146 Association fiscal matters; lien for assessments. [*Repeal and reenactment on December 31, 2007. L 2003, c 80, §2.*] (a) All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit with priority over all other liens, except:

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

(2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association, and costs and expenses including attorneys' fees provided in such mortgages.

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association, in like manner as a mortgage of real property. In any such foreclosure, the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed. The managing agent or board, acting on behalf of the association, unless prohibited by the declaration, may bid on the unit at foreclosure sale, and acquire and hold, lease, mortgage, and convey the unit. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.

(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or assessments by the association chargeable to the unit which became due prior to the acquisition of title to the unit by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the unit shall be deemed to acquire title and shall be required to pay the unit's share of common expenses and assessments beginning:

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

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

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

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

whichever occurs first; provided that the mortgagee of record or other purchaser of the unit shall not be deemed to acquire title under paragraph (1), (2), or (3), if transfer of title is delayed past the thirty-six days specified in paragraph (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to

confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the unit shall be deemed to acquire title upon recordation of the instrument of conveyance.

(c) No unit owner shall withhold any assessment claimed by the association. A unit owner who disputes the amount of an assessment may request a written statement clearly indicating:

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

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

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

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

(5) That a unit owner has a right to demand mediation or arbitration to resolve disputes about the amount or validity of an association's assessment, provided the unit owner immediately pays the assessment in full and keeps assessments current; and

(6) That payment in full of the assessment does not prevent the owner from contesting the assessment or receiving a refund of amounts not owed.

Nothing in this section shall limit the rights of an owner to the protection of all fair debt collection procedures mandated under federal and state law.

(d) A unit owner who pays an association the full amount claimed by the association may file in small claims court or require the association to mediate to resolve any disputes concerning the amount or validity of the association's claim. If the unit owner and the association are unable to resolve the dispute through mediation, either party may file for arbitration under section -162; provided that a unit owner may only file for arbitration if all amounts claimed by the association are paid in full on or before the date of filing. If the unit owner fails to keep all association assessments current during the arbitration, the association may ask the arbitrator to temporarily suspend the arbitration proceedings. If the unit owner pays all association assessments within thirty days of the date of suspension, the unit owner may ask the arbitrator to recommence the arbitration proceedings. If the owner fails to pay all association assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The unit owner shall be entitled to a refund of any amounts paid to the association which are not owed.

(e) In conjunction with or as an alternative to foreclosure proceedings under subsection (a), where a unit is owner-occupied, the association may authorize its managing agent or board to, after sixty days' written notice to the unit owner and to the unit's first mortgagee of the nonpayment of the unit's share of the common expenses, terminate the delinquent unit's access to the common elements and cease supplying a delinquent unit with any and all services normally supplied or paid for by the association. Any terminated services and privileges shall be restored upon payment of all delinquent assessments but need not be restored until payment in full is received.

(f) Before the board or managing agent may take the actions permitted under subsection (e), the board shall adopt a written policy providing for such actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a majority of the unit owners.

(g) Subject to this subsection, and subsections (h) and (i), the board may specially assess the amount of the unpaid regular monthly common assessments for common expenses against a person who, in a judicial or nonjudicial power of sale foreclosure, purchases a delinquent unit; provided that:

(1) A purchaser who holds a mortgage on a delinquent unit that was recorded prior to the filing of a notice of lien by the association and who acquires the delinquent unit through a judicial or nonjudicial foreclosure proceeding, including purchasing the delinquent unit at a foreclosure auction, shall not be obligated to make, nor be liable for, payment of the special assessment as provided for under this subsection; and

(2) A person who subsequently purchases the delinquent unit from the mortgagee referred to in paragraph (1) shall be obligated to make, and shall be liable for, payment of the special assessment provided for under this subsection; and provided further that the mortgagee or subsequent purchaser may require the association to provide at no charge a notice of the association's intent to claim lien against the delinquent unit for the amount of the special assessment, prior to the subsequent purchaser's acquisition of title to the delinquent unit. The notice shall state the amount of the special assessment, how that amount was calculated, and the legal description of the unit.

(h) The amount of the special assessment assessed under subsection (g) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the six months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure. In no event shall the amount of the special assessment exceed the sum of $1,800.

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

"Completion" means:

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

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

"Regular monthly common assessments" does not include:

(1) Any other special assessment, except for a special assessment imposed on all units as part of a budget adopted pursuant to section -148;

(2) Late charges, fines, or penalties;

(3) Interest assessed by the association;

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

(5) Any fees or costs related to the collection or enforcement of the assessment, including attorneys' fees and court costs.

(j) The cost of a release of any lien filed pursuant to this section shall be paid by the party requesting the release.

Real Estate Commission's Comment

1. HRS §514A-90, as amended and re-enacted by the 2003 Legislature and as further amended for style by the 2004 Legislature, is the source of this section.

2. The condominium association "priority of lien" issue has been a contentious one for years. The first draft of the recodification incorporated the provisions of UCA/UCIOA § 3-116 (Lien for Assessments).[11] A number of stakeholders opposed the provisions of UCA/UCIOA §3-116,[12] and the existing provisions of HRS §514A-90 were incorporated without change.

§ -147 Association fiscal matters; other liens affecting the condominium. (a) Except as provided in subsection (b), a judgment for money against the association, if recorded, is not a lien on the common elements, but is a lien in favor of the judgment lienholder against the common expense funds of the association. No other property of a unit owner is subject to the claims of creditors of the association.

(b) Whether perfected before or after the creation of the condominium, if a lien, other than a mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium), becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to the owner's unit, and the lienholder, upon receipt of payment, shall promptly deliver a release of the lien covering that unit. The amount of the payment shall be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(c) A judgment against the association shall be indexed in the name of the condominium and the association and, when so indexed, is notice of the lien against the units.

Real Estate Commission's Comment

1. UCA/UCIOA §3-117, modified, is the source of this section.

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

(1) The estimated revenues and operating expenses of the association;

[11] For an excellent discussion of the issues involved with the UCA/UCIOA limited lien priority, *see*, Winokur, James L., "Meaner Lienor Community Associations: The 'Super Priority' Lien and Related Reforms Under the Uniform Common Interest Ownership Act," 27 *Wake Forest L. Rev.*353 (1992).

[12] *See, e.g.*, May 18, 2001 letter from the Hawaii Bankers Association to Gordon M. Arakaki.

(2) Information as to whether the budget has been prepared on a cash or accrual basis;

(3) The total replacement reserves of the association as of the date of the budget;

(4) The estimated replacement reserves the association will require to maintain the property based on a reserve study performed by the association;

(5) A general explanation of how the estimated replacement reserves are computed;

(6) The amount the association must collect for the fiscal year to fund the estimated replacement reserves; and

(7) Information as to whether the amount the association must collect for the fiscal year to fund the estimated replacement reserves was calculated using a per cent funded or cash flow plan. The method or plan shall not circumvent the estimated replacement reserves amount determined by the reserve study pursuant to paragraph (4).

(b) The association shall assess the unit owners to either fund a minimum of fifty per cent of the estimated replacement reserves or fund one hundred per cent of the estimated replacement reserves when using a cash flow plan; provided that a new association need not collect estimated replacement reserves until the fiscal year which begins after the association's first annual meeting. For each fiscal year, the association shall collect the amount assessed to fund the estimated replacement for that fiscal year reserves, as determined by the association's plan.

(c) The association shall compute the estimated replacement reserves by a formula that is based on the estimated life and the estimated capital expenditure or major maintenance required for each part of the property. The estimated replacement reserves shall include:

(1) Adjustments for revenues which will be received and expenditures which will be made before the beginning of the fiscal year to which the budget relates; and

(2) Separate, designated reserves for each part of the property for which capital expenditures or major maintenance will exceed $10,000. Parts of the property for which capital expenditures or major maintenance will not exceed $10,000 may be aggregated in a single designated reserve.

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

(e) Except in emergency situations or with the approval of a majority of the unit owners, a board may not exceed its total adopted annual operating budget by more than twenty per cent during the fiscal year to which the budget relates. Before imposing or collecting an assessment under this subsection that has not been approved by a majority of the unit owners, the board shall adopt a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment.

(f) The requirements of this section shall override any requirements in an association's declaration, bylaws, or any other association documents relating to preparation of budgets, calculation of reserve requirements, assessment and funding of reserves, and expenditures from reserves with the exception of:

(1) Any requirements in an association's declaration, bylaws, or any other association documents which require the association to collect more than fifty per cent of reserve requirements; or

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

(g) Subject to the procedures of section -157 and any rules adopted by the commission, any unit owner whose association board fails to comply with this section may enforce compliance by the board. In any proceeding to enforce compliance, a board that has not prepared an annual operating budget and reserve study shall have the burden of proving it has complied with this section.

(h) As used in this section:

"Capital expenditure" means an expense that results from the purchase or replacement of an asset whose life is greater than one year, or the addition of an asset that extends the life of an existing asset for a period greater than one year.

"Cash flow plan" means a minimum twenty-year projection of an association's future income and expense requirements to fund fully its replacement reserves requirements each year during that twenty-year period, except in an

emergency; provided that it does not include a projection of special assessments or loans during that twenty-year period, except in an emergency.

"Emergency situation" means any extraordinary expenses:

(1) Required by an order of a court;

(2) Necessary to repair or maintain any part of the property for which the association is responsible where a threat to personal safety on the property is discovered;

(3) Necessary to repair any part of the property for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget;

(4) Necessary to respond to any legal or administrative proceeding brought against the association that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget; or

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

"Major maintenance" means an expenditure for maintenance or repair that will result in extending the life of an asset for a period greater than one year.

"Replacement reserves" means funds for the upkeep, repair, or replacement of those parts of the property, including but not limited to roofs, walls, decks, paving, and equipment, that the association is obligated to maintain.

Real Estate Commission's Comment

1. HRS §514A-83.6, modified slightly, is the source of this section.

2. Some property managers strongly recommended that only accrual basis accounting be allowed. They believe that a cash system does not reflect the true financial position of an association. They believe that receivables and payables must be recorded and that, essentially, is part of an accrual accounting system.[13] Others cautioned that there must be a clear distinction between "budget" and "reporting". Accrual budgets provide that all income and charges be recorded in the period in which they occur, while cash budgets may not account for everything and that would be a problem. Monthly financial reports are a different matter. Proponents of cash basis month financial reports state that it takes much more work to prepare an accrual basis financial report. They say that, if accrual reporting is required, the cost of accounting will increase and it will take longer to get reports out (i.e., instead of getting financial reports in three weeks, it could take twice as long to get a true accrual report). Late reports are of less value in managing a property. Finally, most small condominiums do not need to know about things like depreciation on a monthly basis. Ultimately, proponents of cash basis financial reports worry that accounting purists want GAAP,[14] no matter what the practical concerns or cost. Paragraph (a)(2) incorporates, without change, the language of HRS §514A-83.6(a)(2) regarding the use of cash or accrual basis.

3. There may be potential to use community facilities district bond financing in some situations. (*See*, HRS §46-80.1.) The philosophical basis for bond financing of public facilities is that those who use such facilities should pay for them. When government builds a public facility, money is borrowed through the sale of bonds secured by the full faith and credit of the governmental body. The bond is repaid with tax dollars over a period of time that roughly corresponds to the life of the public facility. The bottom line is that taxpayers are paying for the public facility during the time they are using the facility.

§ -149 Association fiscal matters; handling and disbursement of funds. (a) The funds in the general operating account of the association shall not be commingled with funds of other activities such as lease rent collections and rental operations, nor shall a managing agent commingle any association funds with the managing agent's own funds.

(b) For purposes of subsection (a), lease rent collections and rental operations shall not include the rental or leasing of common elements that is conducted on behalf of the association or the collection of ground lease rents from individual unit owners of a project and the payment of such ground lease rents to the ground lessor if:

(1) The collection is allowed by the provisions of the declaration, bylaws, master deed, master lease, or individual unit leases of the project;

[13] *See also,* CAI Best Practices publication: http://www.cairf.org/research/bpfinancial.pdf). For another fairly good explanation of cash basis accounting, accrual basis accounting, and tax basis accounting, see: http://www.commercialcarrieruniversity.com/book1/bk1_ch6.htm.

[14] Generally accepted accounting principles (GAAP) are those principles established by the Financial Accounting Standards Board (FASB), the AICPA, and other published literature. These principles set forth how specific transactions should be reported; i.e., investments should be reported at fair value, while property and equipment should be reported at depreciated cost. In contrast to other forms of accounting, such as the cash basis, GAAP financial statements are prepared on the accrual basis. Certain standards and disclosures are additionally required.

(2) A management contract requires the managing agent to collect ground lease rents from the individual unit owners and pay the ground lease rents to the ground lessor;

(3) The system of lease rent collection has been approved by a majority vote of all unit owners at a meeting of the association; and

(4) The managing agent or association does not pay ground lease rent to the ground lessor in excess of actual ground lease rent collected from individual unit owners.

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

(1) Deposited in a financial institution, including a federal or community credit union, located in the State, pursuant to a resolution adopted by the board, and whose deposits are insured by an agency of the United States government;

(2) Held by a corporation authorized to do business under article 8 of chapter 412;

(3) Held by the United States Treasury; or

(4) Purchased in the name of and held for the benefit of the association through a securities broker that is registered with the Securities and Exchange Commission, that has an office in the State, and the accounts of which are held by member firms of the New York Stock Exchange or National Association of Securities Dealers and insured by the Securities Insurance Protection Corporation; provided that deposits and certificates of deposit shall not be purchased through a securities broker.

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

(1) Deposits, investment certificates, savings accounts, and certificates of deposit, of an institution as defined in subsection (c)(1);

(2) Obligations of the United States government, the State of Hawaii, or their respective agencies; provided that those obligations shall have stated maturity dates no more than ten years after the purchase date unless approved otherwise by a majority vote of the unit owners at an annual or special meeting of the association or by written consent of a majority of the unit owners; or

(3) Mutual funds comprised solely of investments in the obligations of the United States government, the State of Hawaii, or their respective agencies; provided that those obligations shall have stated maturity dates no more than ten years after the purchase date unless approved otherwise by a majority vote of the unit owners at an annual or special meeting of the association or by written consent of a majority of the unit owners;

provided that before any investment longer than one year is made by an association, the board must approve the action; and provided further that the board must clearly disclose to owners all investments longer than one year at each year's association annual meeting.

Records of the deposits and disbursements shall be disclosed to the commission upon request. All funds collected by an association shall only be disbursed by employees of the association under the supervision of the association's board. All funds collected by a managing agent from an association shall be held in a client trust fund account and shall be disbursed only by the managing agent or the managing agent's employees under the supervision of the association's board.

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

(f) A managing agent shall keep and disburse funds collected on behalf of the condominium owners in strict compliance with any agreement made with the condominium owners, chapter 467, the rules of the commission, and all other applicable laws.

(g) Any person who embezzles or knowingly misapplies association funds received by a managing agent or association shall be guilty of a class C felony.

Real Estate Commission's Comment

1. HRS §514A-97, modified, is the source of this section.

2. Some stakeholders mistakenly characterized proposed changes to HRS §514A-97(c) [subsection (c) above; §___: 5-37(c) in the Commission's final draft of the recodification] contained in earlier drafts of the recodification as allowing "speculation with association funds." In all earlier versions of the recodification, the only change was removing the "in-State" deposit

requirement and adding additional, stricter, requirements regarding the types of financial institutions into which association funds may be deposited. No "speculation with association funds" was ever allowed by changes made in §___: 5-37(c). The additional, stricter, requirements regarding the types of financial institutions into which association funds may be deposited was deleted, however, in the Commission's final draft of the recodification because of the confusion caused by the mischaracterizations. The Commission also added a requirement that the board adopt a resolution if association funds are to be deposited in an out-of-state financial institution.

[*Note 2004 Legislature's deletion of provision allowing associations to deposit funds in federally-insured, out-of-state financial institutions, as well as changes made in subsection (d) above.*]

3. It has also been suggested that State law explicitly allow a prudent percentage of association funds to be invested in higher yielding instruments. Some stakeholders, however, strongly object to allowing association funds to be deposited or invested in anything other than banks, credit unions, and Treasury bills.

4. Subsection (e) [formerly HRS §514A-97(d)] was amended to clarify that only unverifiable orally instructed transfers over the telephone are prohibited. Facsimile and e-mail transfers, as well as properly set up automatic bill payments through electronic transfers are obviously permitted. The key is to have a verifiable "paper trail."

§ -150 Association fiscal matters; audits, audited financial statement. (a) The association shall require an annual audit of the association financial accounts and no less than one annual unannounced verification of the association's cash balance by a public accountant; provided that if the association is comprised of less than twenty units, the annual audit and the annual unannounced cash balance verification may be waived by a majority vote of all unit owners taken at an association meeting.

(b) The board shall make available a copy of the annual audit to each unit owner at least thirty days prior to the annual meeting which follows the end of the fiscal year. The board shall not be required to submit a copy of the annual audit report to an owner if the proxy form issued pursuant to section -123(d) is not marked to indicate that the owner wishes to obtain a copy of the report. If the annual audit has not been completed by that date, the board shall make available:

(1) An unaudited year end financial statement for the fiscal year to each unit owner at least thirty days prior to the annual meeting; and

(2) The annual audit to all owners at the annual meeting, or as soon as the audit is completed, but not later than six months after the annual meeting.

(c) If the association's fiscal year ends less than two months prior to the convening of the annual meeting, the year-to-date unaudited financial statement may cover the period from the beginning of the association's fiscal year to the end of the month preceding the date on which notice of the annual meeting is mailed.

Real Estate Commission's Comment

1. HRS §514A-96, clarified, is the source of this section.

§ -151 Association fiscal matters; lease rent renegotiation. (a) Notwithstanding any provision in the declaration or bylaws, any lease or sublease of the real estate or of a unit, or of an undivided interest in the real estate to a unit owner, whenever any lease or sublease of the real estate, a unit, or an undivided interest in the real estate to a unit owner provides for the periodic renegotiation of lease rent thereunder, the association shall represent the unit owners in all negotiations and proceedings, including but not limited to appraisal or arbitration, for the determination of lease rent; provided that the association's representation in the renegotiation of lease rent shall be on behalf of at least two lessees. All costs and expenses incurred in such representation shall be a common expense of the association.

(b) Notwithstanding subsection (a), if some, but not all of the unit owners have already purchased the leased fee interest appurtenant to their units at the time of renegotiation, all costs and expenses of the renegotiation shall be assessed to the remaining lessees in the same proportion that the common interest appurtenant to each lessee's unit bears to the common interest appurtenant to all lessees' units. The unpaid amount of this assessment shall constitute a lien upon the lessee's unit, which may be collected in accordance with section -146 in the same manner as an unpaid common expense.

(c) In any project where the association is a lessor or sublessor, the association shall fulfill its obligations under this section by appointing independent counsel to represent the lessees in the negotiations and proceedings related to the rent renegotiation. The lessees' counsel shall act on behalf of the lessees in accordance with the vote or written consent of a majority of the lessees casting ballots or submitting written consents as determined by the ratio that the common interest appurtenant to each lessee's unit bears to the total common interest appurtenant to the units of participating lessees. Nothing in this subsection shall be interpreted to preclude the lessees from making a decision

(by the vote or written consent of a majority of the lessees as described above) to retain other counsel or additional professional advisors as may be reasonably necessary or appropriate to complete the negotiations and proceedings. In the event of a deadlock among the lessees or other inability to proceed with the rent renegotiation on behalf of the lessees, the lessees' counsel may apply to the circuit court of the judicial circuit in which the condominium is located for instructions. The association shall not instruct or direct the lessees' counsel or other professional advisors. All costs and expenses incurred under this subsection shall be assessed by the association to the lessees as provided in subsection (a) or (b), as may be applicable.

Real Estate Commission's Comment

1. HRS §514A-90.6, modified, is the source of subsections (a) and (b). Subsection (c) is new.

2. [*Add explanation of subsection (c).*]

§ -152 Association records; generally. The association shall keep financial and other records sufficiently detailed to enable the association to comply with requests for information and disclosures related to resale of units. Except as otherwise provided by law, all financial and other records shall be made reasonably available for examination by any unit owner and the owner's authorized agents. Association records shall be stored on the island on which the association's project is located; provided that if original records, including but not limited to invoices, are required to be sent off-island, copies of the records shall be maintained on the island on which the association's project is located.

Real Estate Commission's Comment

1. UCA/UCIOA §3-118, modified, is the source of this section.

2. Access to association documents and records is a key to self-governance by the condominium community. This section incorporates the suggestion of a member of the Condominium Council of Maui that association records be stored on the island on which the association's project is located. Since some original records, such as invoices (which are typically required for payments to be made), might have to be sent off-island, maintaining copies of such records on-island is sufficient.

§ -153 Association records; records to be maintained. (a) An accurate copy of the declaration, bylaws, house rules, if any, master lease, if any, a sample original conveyance document, all public reports and any amendments thereto, shall be kept at the managing agent's office.

(b) The managing agent or board shall keep detailed, accurate records in chronological order, of the receipts and expenditures affecting the common elements, specifying and itemizing the maintenance and repair expenses of the common elements and any other expenses incurred. The managing agent or board shall also keep monthly statements indicating the total current delinquent dollar amount of any unpaid assessments for common expenses.

(c) Subject to section -152, all records and the vouchers authorizing the payments and statements shall be kept and maintained at the address of the project, or elsewhere within the State as determined by the board.

(d) The developer or affiliate of the developer, board, and managing agent shall ensure that there is a written contract for managing the operation of the property, expressing the agreements of all parties including but not limited to financial and accounting obligations, services provided, and any compensation arrangements, including any subsequent amendments. Copies of the executed contract and any amendments shall be provided to all parties to the contract.

(e) The managing agent or resident manager or board shall keep an accurate and current list of members of the association and their current addresses, and the names and addresses of the vendees under an agreement of sale, if any. The list shall be maintained at a place designated by the board, and a copy shall be available, at cost, to any member of the association as provided in the declaration or bylaws or rules and regulations or, in any case, to any member who furnishes to the managing agent or resident manager or the board a duly executed and acknowledged affidavit stating that the list:

(1) Will be used by such owner personally and only for the purpose of soliciting votes or proxies, or for providing information to other owners with respect to association matters; and

(2) Shall not be used by the owner or furnished to anyone else for any other purpose.

A board may prohibit commercial solicitations.

Real Estate Commission's Comment

1. Subsections (a), (d), and (e) are, in pertinent part, identical to HRS §§514A-84.5, 514A-84(c), and 514A-83.3, respectively. Subsection (b) is identical to HRS §514A-85(a). 514A-85(b), modified, is the source of subsection (c).

§ -154 Association records; availability; disposal; prohibitions. (a) The association's most current financial statement and minutes of the board's meetings, once approved, shall be provided to any interested unit owner at no cost or on twenty-four hour loan, at a convenient location designated by the board.

(b) Minutes of meetings of the board and the association for the current and prior year shall be available for examination by unit owners at convenient hours at a place designated by the board. A copy of meeting minutes shall be provided to any owner upon the owner's request provided that the owner pays a reasonable fee for duplication and postage.

(c) Financial statements, general ledgers, the accounts receivable ledger, accounts payable ledgers, check ledgers, insurance policies, contracts, and invoices of the association for the current and prior year and delinquencies of ninety days or more shall be available for examination by unit owners at convenient hours at a place designated by the board; provided that:

(1) The board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interests of the association or its members or both; and

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

Copies of these items shall be provided to any owner upon the owner's request, provided that the owner pays a reasonable fee for duplicating, postage, stationery, and other administrative costs associated with handling the request.

(d) After any association meeting, and not earlier, unit owners shall be permitted to examine proxies, tally sheets, ballots, owners' check-in lists, and the certificate of election; provided that:

(1) Owners shall make a request to examine the documents within thirty days after the association meeting;

(2) The board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interest of the association or its members or both; and

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

If there are no requests to examine proxies and ballots, the documents may be destroyed thirty days after the association meeting. If there are requests to examine proxies and ballots, the documents shall be kept for an additional sixty days, after which they may be destroyed. Copies of tally sheets, owners' check-in lists, and the certificates of election from the most recent association meeting shall be provided to any owner upon the owner's request, provided that the owner pays a reasonable fee for duplicating, postage, stationery, and other administrative costs associated with handling the request.

(e) The managing agent shall provide copies of association records maintained pursuant to this section and sections -152 and -153 to owners, prospective purchasers and their prospective agents during normal business hours, upon payment to the managing agent of a reasonable charge to defray any administrative or duplicating costs. If the project is not managed by a managing agent, the foregoing requirements shall be undertaken by a person or entity, if any, employed by the association, to whom this function is delegated.

(f) Prior to the organization of the association, any unit owner shall be entitled to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.

(g) Owners may file a written request with the board to examine other documents. The board shall give written authorization or written refusal with an explanation of the refusal within thirty calendar days of receipt of the request.

(h) An association may comply with this part by making information available to unit owners, at the option of each unit owner, and at no cost, for downloading the information through an Internet site.

(i) A managing agent retained by one or more associations may dispose of the records of any association which are more than five years old, except for tax records, which shall be kept for seven years, without liability if the managing agent first provides the board of the association affected with written notice of the managing agent's intent to dispose of the records if not retrieved by the board within sixty days, which notice shall include an itemized list of the records proposed to be disposed.

(j) No person shall knowingly make any false certificate, entry, or memorandum upon any of the books or records of any managing agent or association. No person shall knowingly alter, destroy, mutilate, or conceal any books or records of a managing agent or association.

Part VI. Management of Condominiums

Real Estate Commission's Comment

1. HRS §514A-83.5(a), modified, is the source of subsection (a). The 2004 Legislature modified the provision to require that the association's most current financial statement and board minutes be *provided*, not just be *available*.

2. HRS §514A-83.5(b), modified, is the source of subsection (b). The 2004 Legislature modified the provision to require that "*a copy*" – not "*copies*" – of meeting minutes be provided to any owner for a reasonable fee. The 2004 Legislature also deleted "stationery" and "other administrative costs associated with handling the request" from the list of reasonable fees. Note that, pursuant to subsection (h), the information can be provided through an Internet site, at the option of the unit owner.

3. Subsection (c) is identical to HRS §514A-83.5(c).

4. HRS §514A-83.5(d), modified, is the source of subsection (d). HRS §514A-83.5(d) was modified to make it clear that no one (except the secretary and managing agent pursuant to § -125(d)) is permitted to view proxies and tally sheets before the meeting at which they are to be used.

5. Subsections (e) and (f) are, in pertinent part, identical to HRS §§514A-84.5 and 514A-84(c), respectively.

6. Subsection (g) is identical to HRS §514A-83.5(e).

7. Subsection (h) is new. Subsection (h) permits association documents and records to be made available on-line, at the option of the unit owner. (All Hawaii public libraries have computers with Internet access.) This should help end most "access to association documents and records" disputes and should be encouraged. The 2004 Legislature modified the provision to allow for compliance with *Part VI (Management of Condominiums)* – not just this *section* – through provision of information on-line, and to clarify that "no cost" means "no cost for downloading the information" and does not relate to costs associated with setting up and maintaining the website.

8. HRS §514A-85(c), modified to require that tax records be kept for seven years, is the source of subsection (i).

9. Subsection (j) is identical to HRS §514A-85(d).

§ -155 Association as trustee. With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person shall not be bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, shall be fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person shall not be bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

Real Estate Commission's Comment

1. This section is identical to UCA/UCIOA §3-119, and, as noted in the official comments to UCA (1980), is based on Section 7 of the Uniform Trustees' Powers Act. The section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under provisions regarding insurance proceeds, or following termination of the condominium.

§ -156 Pets. (a) Any unit owner who keeps a pet in the owner's unit pursuant to a provision in the bylaws which allows owners to keep pets or in the absence of any provision in the bylaws to the contrary, upon the death of the animal, may replace the animal with another and continue to do so for as long as the owner continues to reside in the owner's unit or another unit subject to the same bylaws.

(b) Any unit owner who is keeping a pet pursuant to subsection (a), as of the effective date of an amendment to the bylaws which prohibits owners from keeping pets in their units, shall not be subject to the prohibition but shall be entitled to keep the pet and acquire new pets as provided in subsection (a).

(c) The bylaws may include reasonable restrictions or prohibitions against excessive noise or other problems caused by pets on the property and the running of pets at large in the common areas of the property. No animals described as pests under section 150A-2, or animals prohibited from importation under section 141-2, 150A-5, or 150A-6 shall be permitted.

(d) Whenever the bylaws do not prohibit unit owners from keeping animals as pets in their units, the bylaws shall not prohibit the tenants of the unit owners from keeping pets in the units rented or leased from the owners; provided that:

(1) A unit owner consents in writing to allow the unit owner's tenant to keep a pet in the unit;

(2) A tenant keeps only those types of pets that may be kept by unit owners.

The bylaws may allow each owner or tenant to keep only one pet in the unit.

(e) Any amendments to the bylaws that provide for exceptions to pet restrictions or prohibitions for preexisting circumstances shall apply equally to unit owners and tenants.

(f) Nothing in this section shall prevent an association from immediately acting to remove vicious animals to protect persons or property.

Real Estate Commission's Comment

1. Subsections (a) through (e) are identical to the provisions of HRS §§514A-82.5 and 514A-82.6. Subsection (f) is new.

2. HRS Chapter 515 (Discrimination in Real Property Transactions), which allows a resident to keep a guide, signal, or service dog in a "no pets" apartment as long as the resident provides, to the apartment management or board of directors of the owners association, medical evidence or a physician's certification that:

- The resident has a physical or mental impairment that substantially limits one or more of the resident's major life activities;
- Has a record of having such impairment; or
- Is regarded as having such impairment and that allowing the resident to have a pet would be a reasonable and necessary accommodation for the resident's equal opportunity to use and enjoy the apartment.

The federal Fair Housing Act has similar provisions. Finally, in 2000, the State House passed HR 98, HD 1, "Urging Landlords, Associations of Apartment Owners, and Tenants With and Without Pets, to Respect Each Others' Rights and to Work Together to Provide for the Needs of All Owners and Tenants."

§ -157 Attorneys' fees, delinquent assessments, and expenses of enforcement. (a) All costs and expenses, including reasonable attorneys' fees, incurred by or on behalf of the association for:

(1) Collecting any delinquent assessments against any owner's unit;

(2) Foreclosing any lien thereon; or

(3) Enforcing any provision of the declaration, bylaws, house rules, and this chapter, or the rules of the real estate commission;

against an owner, occupant, tenant, employee of an owner, or any other person who may in any manner use the property, shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association.

(b) If any claim by an owner is substantiated in any action against an association, any of its officers or directors, or its board to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an owner shall be awarded to such owner; provided that no such award shall be made in any derivative action unless:

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

(2) The owner demonstrates to the satisfaction of the court that a demand for enforcement made to the board would have been fruitless.

If any claim by an owner is not substantiated in any court action against an association, any of its officers or directors, or its board to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an association shall be awarded to the association, unless before filing the action in court the owner has first submitted the claim to mediation, or to arbitration under subpart D, and made a good faith effort to resolve the dispute under any of those procedures.

Real Estate Commission's Comment

1. HRS §514A-94, modified, is the source of this section.

2. Some members may feel that because they are members of the association, and because the attorney represents the association, the attorney represents them too. The association attorney is, however, actually general corporate counsel whose client is the corporation/association, not the board of directors or any of the association's membership.

3. A stakeholder was concerned about deleting the reference to Small Claims Court in subsection (c). Note, however, that Small Claims Court does not award attorneys' fees. Furthermore, Small Claims Court does not have jurisdiction over equity claims; it only awards money damages (e.g., it does not order injunctions).

4. HRS §514A-94(c) has been deleted since the federal Fair Debt Collection Practices Act and HRS §§443B (Collection Agencies) and 480D (Collection Practices) regulate this area.

D. ALTERNATIVE DISPUTE RESOLUTION

§ -161 Mediation. (a) At the request of any party to a dispute concerning or involving one or more unit owners and an association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of this chapter or the association's declaration, bylaws, or house rules, the parties to the dispute shall be required to participate in mediation. Each party shall be wholly responsible for its own costs of participating in mediation, unless both parties agree that one party shall pay all or a specified portion of the mediation costs. If a party refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorneys' fees.

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

(1) Actions seeking equitable relief involving threatened property damage or the health or safety of association members or any other person;

(2) Actions to collect assessments;

(3) Personal injury claims; or

(4) Actions against an association, a board, or one or more directors, officers, agents, employees, or other persons for amounts in excess of $2,500 if insurance coverage under a policy of insurance procured by the association or its board would be unavailable for defense or judgment because mediation was pursued.

(c) If any mediation under this section is not completed within two months from commencement, no further mediation shall be required unless agreed to by the parties.

Real Estate Commission's Comment

1. HRS §514A-121.5, modified, is the source of subsection (a). HRS §421J-13 (Planned Community Associations, Mediation of disputes) is the source of subsections (b) and (c). These provisions have been modified to allow any party to request mediation under this section.

2. It should be noted that, pursuant to HRS §514A-131(a)(3) (Condominium Education Trust Fund), the Commission has established a special condominium mediation program with the Mediation Center of the Pacific for the mediation of condominium disputes. Parties must pay a nominal fee to use the program.

§ -162 Arbitration. (a) At the request of any party, any dispute concerning or involving one or more unit owners and an association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of this chapter or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and of chapter 658A; provided that the rules of the arbitration service conducting the arbitration shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658A, chapter 658A shall prevail; and provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect.

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

(1) The real estate commission;

(2) The mortgagee of a mortgage of record;

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

person in those capacities, shall be subject to the provisions of subsection (a);

(4) Actions seeking equitable relief involving threatened property damage or the health or safety of unit owners or any other person;

(5) Actions to collect assessments which are liens or subject to foreclosure; provided that a unit owner who pays the full amount of an assessment and fulfills the requirements of section -146 shall have the right to demand arbitration of the owner's dispute, including a dispute about the amount and validity of the assessment;

(6) Personal injury claims;

(7) Actions for amounts in excess of $2,500 against an association, a board, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association or its board would be unavailable because action by arbitration was pursued; or

(8) Any other cases which are determined, as provided in subsection (c), to be unsuitable for disposition by arbitration.

(c) At any time within twenty days of being served with a written demand for arbitration, any party so served may apply to the circuit court in the judicial circuit in which the condominium is located for a determination that the subject matter of the dispute is unsuitable for disposition by arbitration.

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

(1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute;

(2) Problems referred to the court where court regulated discovery is necessary;

(3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter;

(4) The fact that the matter to be arbitrated is only part of a dispute involving other parties or issues which are not subject to arbitration under this section; and

(5) Any matters of dispute where disposition by arbitration, in the absence of complete judicial review, would not afford substantial justice to one or more of the parties.

Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed $200.

(d) In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under subsection (b)(7), any party to an arbitration may file a complaint for declaratory relief against the involved insurer or insurers for a determination of whether insurance coverage is unavailable due to the pursuit of action by arbitration. The complaint shall be filed with the circuit court in the judicial circuit in which the condominium is located. The insurer or insurers shall file an answer to the complaint within twenty days of the date of service of the complaint and the issue shall be disposed of by the circuit court at a hearing to be held at the earliest available date; provided that the hearing shall not be held within twenty days from the date of service of the complaint upon the insurer or insurers.

(e) Notwithstanding any provision in this chapter to the contrary, the declaration, or the bylaws, the award of any costs, expenses, and legal fees by the arbitrator shall be in the sole discretion of the arbitrator and the determination of costs, expenses, and legal fees shall be binding upon all parties.

(f) The award of the arbitrator shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and shall be served by the arbitrator on each of the parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court of the judicial circuit in which the condominium is located for an order confirming the award. The court shall grant the order confirming the award pursuant to section 658A-22, unless the award is vacated, modified, or corrected, as provided in sections 658A-20, 658A-23, and 658A-24, or a trial de novo is demanded under subsection (h), or the award is successfully appealed under subsection (h). The record shall be filed with the motion to confirm award, and notice of the motion shall be served upon each other party or their respective attorneys in the manner required for service of notice of a motion.

(g) Findings of fact and conclusions of law, as requested by any party prior to the arbitration hearing, shall be promptly provided to the requesting party upon payment of the reasonable cost thereof.

(h) Any party to an arbitration under this section may apply to vacate, modify, or correct the arbitration award for the grounds set out in chapter 658A. All reasonable costs, expenses, and attorneys' fees on appeal shall be charged to the nonprevailing party.

Real Estate Commission's Comment

1. HRS §§514A-121 (Arbitration of disputes), 514A-122 (Determination of unsuitability), 514A-123 (Determination of insurance coverage), 514A-124 (Costs, expenses and legal fees), 514A-125 (Award; confirming award), 514A-126 (Findings of fact and conclusions of law), and 514A-127(e) (Trial de novo and appeal) are the sources, modified slightly, of this section.

§ -163 Trial de novo and appeal. (a) The submission of any dispute to an arbitration under section -162 shall in no way limit or abridge the right of any party to a trial de novo.

(b) Written demand for a trial de novo by any party desiring a trial de novo shall be made upon the other parties within ten days after service of the arbitration award upon all parties and the trial de novo shall be filed in circuit court within thirty days of the written demand. Failure to meet these deadlines shall preclude a party from demanding a trial de novo.

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

(d) In any trial de novo demanded under this section, if the party demanding a trial de novo does not prevail at trial, the party demanding the trial de novo shall be charged with all reasonable costs, expenses, and attorneys' fees of the trial. When there is more than one party on one or both sides of an action, or more than one issue in dispute, the court shall allocate its award of costs, expenses, and attorneys' fees among the prevailing parties and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity.

Real Estate Commission's Comment

1. HRS §514A-127 (Trial de novo and appeal) is the source, modified slightly, of this section. The section was separated from § -162 by the 2004 Legislature, and HRS §514A-127(e) was moved to § -162(h).

2. Real Estate Branch Senior Condominium Specialist Cynthia Yee believes that, before commencement of proceedings, the arbitrator should provide the parties with an explanation of nonbinding arbitration and the resulting impact on trial de novo.

3. Since the adoption of the Revised Uniform Arbitration Act (RUAA), there has been growing concern and discomfort with the potential impact and uncertainty of some of its provisions.[15] Any revisions to the arbitration provisions of the condominium law should consider concerns raised by the Ad Hoc RUAA Group.

4. Finding an alternative dispute resolution mechanism that works for condominium communities is an important and potentially enormous task that the Commission was unable to resolve, particularly in light of its guiding principle that the recodification should not grow the cost of government.[16] Stakeholders have commented that HRS Chapter 514A's system of dispute resolution is not working.[17] They note that the "mandatory" mediation provisions are essentially voluntary (with boards refusing to mediate or going through the motions to avoid the appearance of non-cooperation) and arbitration provisions are impractical and expensive in most cases – particularly with the trial de novo provision of HRS §514A-127.

Some members of the condominium community strongly suggested that a "Condominium Court" be established to help resolve condominium disputes (either as small claims court is organized, as a part of district court, or as an administrative hearings office, like the existing DCCA hearings office).[18] Proponents believe that a condominium court would provide a means by which condominium disputes can be resolved quickly and at reasonable cost.[19] There is, however, a split of opinion on this issue in the community.[20]

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[15] *See,* fax received on October 17, 2003 by Mitchell A. Imanaka from the Ad Hoc RUAA Group (Jim Paul, Ted Tsukiyama, Keith Hunter, Jerry Clay, and Louis Chang).

[16] The Commission's guiding principle that the recodified condominium law should not result in an increase in the cost of government is meant to limit the addition of new programs administered by government under the proposed recodification. It should be noted that, in the first three years of its review of California's common-interest-ownership law, the California Law Revision Commission ("CLRC") has spent most of its time considering nonjudicial dispute resolution issues. For an excellent discussion of various condominium dispute resolution possibilities, *see*, Condominium Dispute Resolution: Philosophical Considerations and Structural Alternatives – An Issues Paper for the Hawaii Real Estate Commission, by Gregory K. Tanaka (January 1991). In addition to the substantial amount of work done by the CLRC, the Legislature can build on the work of Mr. Tanaka.

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

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

[19] *Id.*

Part VI. Management of Condominiums

The Commission recommended the following to the 2004 Legislature:

i.) The Legislature should direct the Legislative Reference Bureau ("LRB") to study ways to improve dispute resolution in condominium communities, including, but not limited to, considering the establishment of a condominium court;[21]

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

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

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

A separate bill regarding "condo court" (SB 2105) was introduced in the 2004 legislative session. The bill died in the House Committee on Finance, but the concept was incorporated in SB 2210, SD 2, HD 1, CD 1 as a two-year pilot program and study. [*Describe further.*]

Real Estate Commission's Comment

1. HRS §514A-99 (Rules) is deleted from Part V since it is covered by § -61(a)(1), under "General Powers and Duties of Commission."

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

[21] The Commission recommended that LRB review the work of Mr. Tanaka and the CLRC (*supra,* at note 16).