

Article 1. General Provisions (Recodification Draft #1)

Hawaii Condominium Law Recodification Draft #1 [Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]	Hawaii's Present Condominium Law Chapter 514A, Hawaii Revised Statutes (HRS) (Compare with Proposed Recodified Condominium Law in left-hand column)
<p style="text-align: center;">UCA (1980) PREFATORY NOTE</p> <p>This Act contains comprehensive provisions designed to unify and modernize the law of condominiums, which has undergone great change in the last 16 years. As a result of the increasing usefulness and flexibility of the condominium concept, condominiums have become one of the most common forms of community ownership of property in the United States.</p> <p>All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and most of the present state statues are patterned after that 1958 statute, or after the 1962 Federal Housing Administration model condominium statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have recently enacted more detailed and comprehensive "second generation" statutes.</p> <p>The statutes governing condominiums in the various states use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national lender to assess the appropriateness of condominium documents and of condominium financing arrangements in those states. Moreover, the varying statutes, creating different "bundles of rights" for purchasers of condominiums in the various states, also make it difficult for the increasingly mobile consumer to become educated in this very complex area. Finally, many actual or potential problems involving such matters as termination of condominiums, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, have not been satisfactorily addressed by any existing statute. It is primarily to resolve these various problems that the Uniform Condominium Act was drafted.</p> <p>Article 1 of the Act contains definitions and general provisions applicable throughout the Act. The article deals with such matters as applicability, separate titles and taxation, eminent domain, applicability of other statutes, and other general matters.</p> <p>Article 2 provides for the creation, alteration, and termination of the condominium. The article provides great flexibility to a developer in crating a condominium project designed to meet the needs of a modern real estate market, while imposing reasonable restrictions on developers' practices which have a potential for harm to unit purchasers.</p> <p>Article 3 concerns the administration of the unit owners' association, a matter which has received very limited attention in the statutes of the various states. This article provides broad-ranging powers to the association, and covers such matters as insurance, tort and contract liability of the association, and other matters often not dealt with in current statutes.</p> <p>Article 4 deals with consumer protection for condominium unit purchasers. In addition to treating specific abuses which have developed in the condominium industry in the past, the article requires very substantial disclosure by developers, which must be made available to consumers before conveyance of a unit. To further promote disclosure, the</p>	<p style="text-align: center;">Condominium Recodification Attorney's Prefatory Note</p> <p>In 1961, Hawaii became the first state to pass a law enabling the creation of condominiums. [See, Act 180, Session Laws of Hawaii (SLH) 1961; codified as Chapter 170A, Revised Laws of Hawaii (RLH). In 1968, RLH Chapter 170A was redesignated Chapter 514, Hawaii Revised Statutes (HRS) (Act 16, SLH 1968). In 1977, HRS Chapter 514 was re-enacted as a restatement without substantive change and redesignated HRS Chapter 514A (Act 98, SLH 1977).]</p> <p>The 1961 "Horizontal Property Regime" law consisted of 33 sections covering a little more than 3 pages in the Revised Laws of Hawaii. Since that time, the law has been amended constantly. Entering the 2001 legislative session, Hawaii's "Condominium Property Regime" law consisted of 116 sections taking up over 96 pages in the Hawaii Revised Statutes. As noted by the 2000 Legislature, "[t]he present law is the result of numerous amendments enacted over the years made in piecemeal fashion and with little regard to the law as a whole." (See, Act 213, SLH 2000.)</p> <p>The 2000 Legislature recognized that "[Hawaii's] condominium property regimes law is unorganized, inconsistent, and obsolete in some areas, and micromanages condominium associations . . . [t]he law is also overly regulatory, hinders development, and ignores technological changes and the present day development process." (Act 213, SLH 2000) Consequently, the Legislature directed the Real Estate Commission of the State of Hawaii (Commission) to conduct a review of Hawaii's condominium property regimes law, and to submit draft legislation to the 2003 Legislature that will "update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law." (Act 213, SLH 2000) This is the first draft of Hawaii's recodified condominium property regimes law.</p> <p>[Note: The recodification workplan and timetable is available on the Commission's website - http://www.state.hi.us/hirec/.]</p> <p style="text-align: center;">*****</p> <p>Brief History of the Condominium</p> <p>Someone once said that "history is argument without end." That is certainly true of the debate over the origin of condominiums. Some commentators have traced the first existence of condominiums to the ancient Hebrews in the Fifth Century B.C. Others have attributed the concept to the ancient Romans. Still others believe that Roman law was antithetical to condominium development and that the first proto-condominiums appeared in the Germanic states during the late Middle Ages. Suffice to say that the condominium property concept has a long, possibly ancient, history.</p> <p>[Note (7/31/01): This section will be appropriately endnoted later.]</p> <p>While their first existence in fact is widely disputed, condominiums were first afforded statutory recognition by the Code of Napoleon in 1804. The first sophisticated statute to authorize condominiums in the United States or its territories was the Puerto Rico Horizontal Property Act (so named because it contemplated a property regime of horizontally, as opposed to vertically, divided properties) in 1958. The United States</p>

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<p>article also requires that all owners of units in residential condominiums provide resale certificates to subsequent purchasers, regardless of when the condominium was created.</p> <p>Article 5 is an optional article which establishes an administrative agency to supervise a developer's activities. The article is so drafted that it may be included in the Act in those states where an agency is thought desirable, and deleted from the Act in those states which desire to have the Act enforced by private action. In the event that a state determines to delete Article 5 from the Act, other provisions of the Act, indicated in the text by brackets, should also be deleted. A list of these sections appears in the Prefatory Note to Article 5.</p> <p>The Uniform Condominium Act was originally a part of the Uniform Land Transactions Act, but was separated from that Act for further consideration at the 1975 annual meeting of the National Conference of Commissioners on Uniform State Laws. This Act was approved at the annual meeting of the Conference in Vail, Colorado in August 1977.</p> <p>Since promulgation of the Act in 1977, and approval by the American Bar Association in 1978, the Act has received widespread legislation attention. The Act was enacted in its uniform version in Minnesota, Pennsylvania, and West Virginia during the 1979-80 legislative year, and was enacted with substantial amendments in Louisiana in 1978-79. By 1980, it had also been introduced in the legislatures of Arizona, Colorado, Connecticut, Idaho, Illinois, Massachusetts, Missouri, Tennessee, Vermont, and Wyoming.</p> <p>During this same period, the National Conference appointed a Drafting Committee to draft a Uniform Planned Community Act (UPCA), and that Act was promulgated by the Conference at its 1980 annual meeting. UPCA applies to a wide variety of other forms of multiple ownership real estate regimes which are similar in legal structure to condominiums, but do not meet the definition of "condominium" either, under present state law or the Uniform Condominium Act.</p> <p>As a result of the legislative process in the various states considering the Act, and review of the Act by the Drafting Committee on UPCA, a large number of amendments to the 1977 Act were proposed to the Conference.</p> <p>Many of the amendments were adopted at the 1980 annual meeting of the Conference, and have been included in this edition of the Act. Most of them are of a minor non-substantial nature; they are intended to resolve insignificant technical questions, or to clarify the meaning of provisions susceptible to misinterpretation. A few amendments were adopted which result in more significant changes, either on particular matters of substance, or in the use of terms throughout the Act which simplify the structure and readability of the Act. A summary of the more significant amendments can be obtained from the Headquarters Office of NCCUSL, Suite 510, 645 North Michigan Avenue, Chicago, Illinois 60611.</p> <p>A second category of changes results from a decision of the Conference at its 1978 annual meeting that the Condominium and Planned Community Acts should contain identical provisions wherever possible, in order to facilitate the consolidation of the two Acts in those states desiring a single Uniform Act covering both forms of multiple ownership developments. This required a large number of textual changes with no</p>	<p>Congress recognized condominiums in 1961 when it amended the National Housing Act to provide for federal insurance on condominium mortgages whenever state law recognized condominium ownership. With Hawaii leading the way, every state in the union had a statute authorizing the condominium form of ownership by 1968.</p> <p>Basic Concepts</p> <p>Preliminarily, it is useful to understand exactly what a "condominium property regimes law" is – and what it isn't. A condominium property regimes law is a land <i>ownership</i> law, a <i>consumer protection</i> law, and a <i>community governance</i> law. It is not a land <i>use</i> law (i.e., it does not govern what structures may be built on real property; separate state and county land use laws control – or should control – land use matters). (See, comments to Hawaii Condominium Law Recodification Draft #1, §1-106, below.)</p> <p>A condominium property regimes law is essentially an <i>enabling</i> law, allowing people to:</p> <ul style="list-style-type: none"> • Own real estate under the condominium form of property ownership (i.e., a form of real property ownership where each individual member holds title to a specific unit and an undivided interest as a "tenant-in-common" with other unit owners in common elements such as the exterior of buildings, structural components, grounds, amenities, and internal roads and infrastructure); • Protect purchasers through adequate disclosures; and • Manage the ongoing affairs of the condominium community. <p>The ability to build, sell, buy, borrow/lend money, insure title, insure property, and more are all part of real property ownership and, therefore, part of condominium law.</p> <p>The 1961 Hawaii State Legislature expressly recognized that the condominium property regime law was "an enabling vehicle" that primarily "(a) sets forth the legal basis for a condominium, and (b) spells out the means of recordation." [See, Standing Committee Report 622, House Bill No. 1142 (1961).] [Note: In 1968, the Hawaii Supreme Court commented that, although the original condominium property regime law was viewed as an enabling act, condominiums might have been cognizable under common law. See, <u>State Savings & Loan Association v. Kauaian Development Company, Inc., et al.</u>, 50 Haw. 540, 547 (1968).]</p> <p>The Legislature was also concerned about protecting Hawaii's consumers, noting that:</p> <p style="padding-left: 2em;">The citizens of Honolulu have suffered during the past one or two years several unfortunate experiences in cooperative apartment buying. When several millions of dollars were lost through loose handling of funds representing down-payments on individual apartment units, it became clear that controls had to be developed in order (a) to protect the buying public, and (b) through a bolstering of public confidence, to create for the developer a better reception for his product.</p> <p style="padding-left: 2em;">[Standing Committee Report 622, House Bill No. 1142 (1961).]</p> <p>To that end, the 1961 Legislature added a part providing for the regulation of condominium projects by the Hawaii Real Estate License Commission (including the registration of</p>

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<p>substantive effect. As a result, however, there are very few differences between the two Acts, and consolidation would be a simple and desirable approach in states desiring uniform coverage of both forms of ownership. An analysis of the differences between the Acts, and a general description of how the Acts might be consolidated, appear in the Prefatory Note to UPCA. However, at this time, the Conference has not prepared a consolidated text, because of its continuing consideration of the co-operative form of ownership, and the possibility that a consolidated Act might be applicable to co-operatives as well.</p>	<p>projects by developers and requiring the issuance of public reports before offering any condominium units for sale).</p> <p>Finally, the 1961 Legislature provided for the internal administration of condominium projects. The 1961 condominium management provisions were minimized, however, because the Legislature believed that: 1) many details would more properly be included in by-laws to be passed by the council of co-owners; and 2) some details may have been contrary to F.H.A. regulations or to policies of lending institutions, making it impossible for prospective unit-purchasers to secure financing. [See, Standing Committee Report 622, House Bill No. 1142 (1961).]</p> <p>Hawaii's "Horizontal Property Regimes" law of the early 1960s was typical of most "first generation" condominium laws. In the decades that followed, however, "[a]s the condominium form of ownership became widespread, . . . many states realized that these early statutes were inadequate to deal with the growing condominium industry. . . . In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums." (Prefatory Note, Uniform Condominium Act, 1980.)</p> <p>Basic Approach to the Recodification of Hawaii's Condominium Law</p> <p>The 1980 Uniform Condominium Act (UCA), with appropriate changes incorporated from the 1994 Uniform Common Interest Ownership Act (UCIOA), serves as the basis for our recodified condominium law. Where appropriate, we have also incorporated provisions of HRS Chapter 514A, other jurisdictions' laws, and the Restatement of the Law, Third, Property (Servitudes). <i>[Note (7/31/01): Every provision of HRS Chapter 514A will be analyzed for possible inclusion within the structure of the UCA.]</i></p>
<p style="text-align: center;">UCIOA (1994) PREFATORY NOTE</p> <p>The Uniform Common Interest Ownership Act ("UCIOA") was adopted at the 1982 Annual Meeting of the National Conference of Commissioners on Uniform State Laws (the "ULC"). It combined, in a single comprehensive law, prior uniform laws in this area (the Uniform Condominium Act (1980), the Uniform Planned Community Act (1980), and the Model Real Estate Cooperative Act (1981)). By 1994, UCIOA had become the law in at least five States, while the Uniform Condominium Act, or substantially similar laws, exist in 21 States. The Uniform Planned Community Act is the law in one State.</p> <p>In 1994, the ULC adopted significant amendments to UCIOA. Following an intensive study of UCIOA by the Joint Editorial Board for Real Property Acts, the ULC appointed a Drafting Committee to write the necessary amendments and additions. Changes to UCIOA should result in corresponding changes in these prior laws; consequently, practitioners in approximately half the American jurisdictions need to have a basic understanding of the changes.</p> <p>The following is a brief summary of the proposed changes:</p> <ol style="list-style-type: none"> 1. The definition of "common elements" (Section 1-103(4)), which is a very basic concept, has been amended to clarify that (a) the common elements may include easements, including easements for the benefit of unit owners and (b) real estate may be owned or 	<p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>Scope of Recodification</p> <p>The Commission considered expanding the scope of the recodification to include other Hawaii common interest ownership communities under a UCIOA-like law. [This would have included HRS Chapters 421H (Limited Equity Housing Cooperatives), 421I (Cooperative Housing Corporations), and 421J (Planned Community Associations).] We quickly decided, however, that recodification of HRS Chapter 514A (Condominium Property Regimes) alone makes the most practical sense at this time.</p> <p>Condominium issues, in general, are substantially different from those of single-family detached units in planned communities. The unit owner mindsets, problems, and solutions are quite different for each type of common interest ownership community.</p> <p>A Florida court once observed that:</p> <p>[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners . . . each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.</p> <p><u>Hidden Harbour Estates, Inc. v. Norman</u>, 309 So.2d 180, 181-182 (Fla. Dist. Ct.</p>

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<p>leased by the association and not be subject to the declaration.</p> <p>2. A fundamental precept of UCIOA is that full and adequate disclosure to purchasers is a viable alternative to governmental registration and supervision. Declarants are bound by representations made in the declaration, by the models or samples they use, and by the public offering statements, and are held to statutory limitations and standards to protect consumers. Among the basic representations made by declarants are those which describe the scope of development rights and their duration. See, Section 2-105(a)(7), (8), (9), and (10).</p> <p>However, in very large projects, a declarant's ability to predict the future of a project to be built out over a longer period of time is very limited. Changes in market conditions, the economy, and demographics can occur without warning, forcing changes in even the most preliminary of plans. For that reason, a new Section 2-123 has been added. By its terms, if the declaration identifies the community as a "master planned community," reserving the right to create at least 500 units for residential purposes and the declarant owns or controls more than 500 acres on which those units may be built, then much of the information which otherwise must appear in the declaration from the outset is not required until the declaration is amended as units are created. Further, the public offering statement requirements apply only to units being offered or which have been declared. Finally, the provisions of Section 3-103 regarding transition of control of the unit owners association are amended to permit longer declarant control. As a result, additional flexibility is given for "master planned communities," but the declarant continues to be subject to the obligations of good faith and the standards of unconscionability.</p> <p>3. Section 2-105(a)(12), as originally crafted, required that a declaration must contain "any restrictions (i) on use, occupancy, and alienation of units" Taken literally, if a declaration does not contain any restrictions, none could be imposed by rule or regulation of the association. <i>But compare</i> Section 3-102(a)(1) (an association may adopt "rules and regulations") and Section 3-102(a)(6) (an association may "regulate the use, maintenance, repair, replacement, and modification of common elements").</p> <p>In considering the implications of this result, the ULC agreed that uses or occupancy of a unit which affect other units or the common elements are appropriate for regulation, and that unit uses or occupancies with no measurable impact on other units or the common elements should be subject to a different approach to regime regulation as detailed in new Section 3-102(c).</p> <p>For these reasons, Section 2-105 has been amended to (a) permit (rather than mandate) the declaration to contain restrictions on use and occupancy of units and (b) permit the association to adopt rules and regulations of units to prevent uses which violate the declaration, and to adopt reasonable rules and regulations regarding occupancy of or behavior in units insofar as the occupancy or behavior might affect other unit owners. Section 3-102 has been amended to add subsection (c).</p> <p>4. As originally drafted, only the most basic provisions of UCIOA Section 1-203 applied if a planned community contained no more than 12 units and was not subject to development rights or if the declaration limited the common expense liability to a relatively</p>	<p>App. 1975).</p> <p>Single-family detached unit homeowners in planned communities generally have different expectations than condominium owners regarding the degree of freedom they must give up when they buy their respective units. This is one of the factors that make it exceedingly difficult to reconcile the varying interests of unit owners in different forms of common interest ownership communities. [See, e.g., the California Law Revision Commission's (CLRC) efforts to recodify California's common interest development law – the Davis-Stirling Act. You can access the CLRC Study H-850 online at: http://clrc.ca.gov/pub/Study-H-RealProperty/H850-CommonInterestDevel/.]</p> <p>Although condominiums can take many physical forms – from high-rise developments to townhouses to single-family detached units – the common perception that a condominium is a tall building consisting of many individual units within a common structure ("horizontal property regime") makes it easier for average people to understand the interdependence of unit owners in condominiums (as opposed to single-family detached homeowners in planned communities).</p> <p>In any case, using UCA/UCIOA as a basis for our recodification of HRS Chapter 514A will make it easier to incorporate provisions for cooperatives and planned communities in the future, should the Legislature so desire. But, for now, we will limit our efforts to recodifying Hawaii's condominium property regimes law.</p> <p>Public Policy Considerations</p> <ul style="list-style-type: none"> • Prevalence of condominium ownership in Hawaii 25% of Hawaii's housing units are held in condominium ownership. For decades, Hawaii has had the highest percentage of condominium housing units in the United States of America. [See, <u>Community Associations Factbook</u>, by Clifford J. Treese (1999), at page 18.] This alone makes the recodification project extremely important for the citizens of Hawaii. • Importance to more efficient use of Hawaii's limited land resources As a very flexible form of real estate ownership, condominiums (especially traditional ones going up rather than out) have helped policymakers to discourage sprawl while still providing home ownership opportunities for many in our urban areas. Consistent with State and local government land use policies, the condominium form of ownership is a valuable tool in helping to develop higher density/lower per-unit cost homeownership opportunities (i.e., creating more affordable housing). Of course, condominiums encompass the entire spectrum of homeownership opportunities – from affordable to luxury units. All of this is important for an island state with limited land area. • Importance to Hawaii's housing stock and growth policies (e.g., private provision of "public" facilities and services) The rapid growth of common interest ownership communities (condominiums, cooperatives, and planned communities) since 1960 goes hand in hand with government policy for much of the past 30-40 years dictating that new development

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<p>small amount. Further, if a planned community contained more than 12 units or was subject to development rights, but the declaration limited the common expense liability to a slightly higher amount, no public offering statement was required to be delivered to an original buyer and no resale certificate was required on resale. See UCIOA (1982) Section 4-101(b)(7).</p> <p>The 1994 Act has deleted Section 4-101(b)(7). An amendment to Section 1-203 expands that provision so that only the very basic provisions of the Act will apply if a planned community is not subject to development rights and either (1) contains no more than 12 units or (2) is of any size so long as the annual average common expense liability, exclusive of optional user fees and insurance premiums paid the association, does not exceed \$300 (subject to the adjustment provisions of Section 1-115).</p> <p>5. UCIOA's thrust in the area of consumer protection is to protect residential purchasers. Revised Section 1-207(a) provides that a common interest community is not subject to UCIOA at all if it contains only units restricted to nonresidential use, unless the developer elects otherwise. Nonetheless, developers of some commercial and industrial regimes might want the UCIOA's benefits, subject to its burdens. Section 1-207 also provides that the declaration may explicitly opt into UCIOA or only the basic three provisions of Sections 1-105, 1-106, and 1-107, and gives commercial developers greater flexibility.</p> <p>6. Unlike most laws which, when enacted, contain repealer provisions for laws on the same subject, UCIOA contemplates that pre-existing laws governing common interest communities will remain in effect. Section 1-206 contains provisions allowing "old Act" regimes to come under the provisions of UCIOA and describes the procedures that must be followed. Amendments to the section clarify the original intent of UCIOA in this regard.</p> <p>7. The role of surveyors and architects may be lessened by amendments to Section 2-109. In some instances, approximations will suffice and, if the declaration contains a narrative description, unit boundaries and common elements need not be shown on plats and plans.</p> <p>8. Amendments to Section 2-112 permit relocation of boundaries between units and common elements in order to accommodate additions to units.</p> <p>9. As originally crafted, UCIOA mandated that the declaration set forth a time limit within which reserved development rights and other special declarant rights must be exercised. See UCIOA (1982) Section 2-105(a)(8). UCIOA (1994) has added a provision which will permit the time limit to be extended.</p> <p>10. Unruly and disruptive tenants have been a significant problem in association administration. Revised Section 3-102 gives rights to associations to enforce the declaration, bylaws, and rules and regulations not only against the unit owner but also the tenant. Associations may now levy fines against tenants and enforce the rights of the unit owner as landlord.</p> <p>11. UCIOA and its predecessors distinguished between the standards of conduct applicable to executive board members appointed by the declarant and elected by the unit owners. Section 3-103(a). Experience under this Act demonstrates that the stated</p>	<p>"pay its own way." Condominiums and other common interest ownership communities (with their regimes of privately enforceable use restrictions and financial obligations paying for formerly "public facilities" such as roads, trash collection, and recreational areas) have become a critical part of our land use fabric. Indeed, virtually all new development in Hawaii consists of common interest ownership communities.</p> <ul style="list-style-type: none"> • Need for laws (and the courts) to support the fair and efficient functioning of condominium communities <p>Given the importance of condominiums to the quality of life of Hawaii's people, laws must support the fair and efficient functioning of our condominium communities (and other common interest ownership communities).</p> <p>However, there is a troubling line of recent Hawaii Supreme Court cases dealing with restrictive covenants/equitable servitudes. [See, <u>Hiner v. Hoffman</u>, 90 Haw. 188, 977 P.2d 878 (1999); <u>Fong v. Hashimoto</u>, 92 Haw. 568, 994 P.2d 500 (2000).]</p> <p>In <u>Hiner</u>, defendants-appellants ("Hoffmans") constructed a three story house on a lot which was (along with 118 other lots) subject to a restrictive covenant prohibiting any dwelling "which exceeds two stories in height." The Hoffmans had actual knowledge of the restrictive covenant. After warning the Hoffmans of their violation of the restrictive covenant, neighboring homeowners and the community association sued to have the Hoffmans remove the third story of their house.</p> <p>At the trial court level, the Hoffmans argued that their house consisted of "two stories and a basement." The trial court rejected the Hoffmans' argument and ordered them to remove the third (top) story of their house.</p> <p>On appeal, the Hoffmans changed their argument and claimed that the term "two stories in height" was ambiguous. In a 3-2 decision, the Hawaii Supreme Court ruled that the term "two stories in height" was ambiguous since it did not provide any dimensions for the term "story" and was therefore unenforceable in light of the restrictive covenant's undisputed purpose (to protect views by restricting the height of homes within the neighborhood). The majority on the Court stated that it was following a "long-standing policy favoring the unrestricted use of property" when construing "instruments containing restrictions and prohibitions as to the use of property." Finally, the majority noted that "such 'free and unrestricted use of property' is favored only to the extent of applicable State land use and County zoning regulations."</p> <p>In so doing, the majority ignored the massive growth of servitude regimes over the past forty years and the corresponding importance of ensuring the fair and efficient functioning of such communities (whether they be condominiums or, as in this case, planned communities). As noted by the dissent in <u>Hiner</u>, "where one hundred or more homeowners in the Pacific Palisades community have limited their own property rights in reliance that their neighbors will duly reciprocate, . . . it [is] manifestly unjust to sanction the Hoffmans' willful non-compliance based on the 'policy favoring the unrestricted use of property.'" The dissent concluded with the observation that "the majority opinion over-emphasizes the rights of the Hoffmans without due regard to the</p>

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<p>standards require further clarity. As amended, UCIOA sets out clearer (and more easily understood) standards: members of the executive board appointed by the declarant will be subject to the standard of care applicable to trustees, and members elected by the unit owners will be subject to the degree of care required of a director of a nonprofit corporation, subject to the business judgment rule.</p> <p>12. Revised Section 3-111 clarifies that no period of limitation regarding an association's claims against the declarant will run against the association, including warranty claims, until the period of declarant control terminates.</p> <p>However, because a declarant ought not to warrant the common elements for an inordinate period of time (which may be the result if the period of declarant control is substantial), Section 4-116(d) authorizes the declarant to cause an independent committee of the executive board, during the period of declarant control, to evaluate and enforce warrant claims involving the common elements.</p> <p>This section has also been amended to require that a tort claim based on ownership of common elements be brought against the association, and not against individual unit owners.</p> <p>13. UCIOA permitted a condominium association or a planned community association to convey or encumber common elements under the restrictions of Section 3-112(a). Subsection (g) stated the general rule that a conveyance or encumbrance would not affect the priority or validity of pre-existing encumbrances. UCIOA (1994) better protects the rights of the holders of those interests.</p> <p>14. In order to ensure that association rights in bankruptcy are protected, Section 3-116 provides that the association's lien is a statutory lien and makes clear that the lien for unpaid assessments arises, as a matter of law, upon adoption of the statutory amendment for all existing associations and from the creation of the regime for all regimes created after adoption of the amendments.</p> <p>15. The contents of the resale certificate have been revised. All too often, preparers of these certificates have been unsure about the degree and extent of information required to be provided. The changes make more objective the information to be provided.</p> <p style="text-align: center;">The Underlying Concept of UCIOA</p> <p>Nearly without exception, UCIOA achieves the goal of uniformity among all three forms of ownership simply by consolidating the three prior Acts of the Conference and adding a very few generic definitions. The principal new definition is "common interest community."</p> <p>Because of the use of consistent definitions and policies in the three Acts preceding UCIOA, consolidation of the three in the merged Act was a relatively simple task. The section numbering system of UCIOA is entirely parallel with the other three Acts, and the language of UCIOA tracks, as applicable, with the cognate sections of those three Acts. Differences in result between the three Acts are preserved where appropriate. At the same time, during the drafting of UCIOA, in a few instances, it became clear that some</p>	<p>rights of their neighbors."</p> <p>Eight and a half months after deciding <u>Hiner</u>, the Hawaii Supreme Court in <u>Fong</u> invalidated as ambiguous a restrictive covenant limiting certain houses to "one-story in height." (The Court also found that there was no common scheme to support an equitable servitude and that the restrictive covenant was unenforceable since it was improperly created.)</p> <p>The archaic body of servitudes law from which the Hawaii Supreme Court fashioned its decisions in <u>Hiner</u> and <u>Fong</u> evolved from rules developed to govern relatively small groupings of property owners (compared to today's condominium and planned development communities) in contexts largely unrelated to modern common interest ownership communities. [Note: The <i>Restatement of the Law, Third, Property (Servitudes)</i> defines "servitude" as "a legal device that creates a right or an obligation that runs with land or an interest in land." This covers "easements, profits, and covenants that run with the land," and encompasses both "restrictive covenants" and "equitable servitudes."]</p> <p>Contrast the Hawaii Supreme Court's current approach regarding servitudes in common interest ownership communities with that of the <i>Restatement of the Law, Third, Property (Servitudes)</i>. As stated in the <i>Restatement's</i> introductory note to Chapter 6 – Common-Interest-Communities:</p> <p style="padding-left: 40px;">The primary assumption underlying Chapter 6 is that common-interest communities provide a socially valuable means of providing housing opportunities in the United States. The law should facilitate the operation of common-interest communities at the same time as it protects their long-term attractiveness by protecting the legitimate expectations of their members.</p> <p>To guide the courts in resolving disputes over servitudes in condominiums (and, at least by analogy, other common interest ownership communities), we should incorporate the <i>Restatement's</i> position on servitudes in our recodification of Hawaii's condominium law.</p> <p>An earlier incarnation of the Hawaii Supreme Court said it well. In <u>State Savings & Loan Association v. Kauaian Development Company, Inc., et al.</u>, <i>supra</i> at 552 and 555, the Court stated that:</p> <p style="padding-left: 40px;">The [Horizontal Property Regimes Act] has profound social and economic overtones, not only in Hawaii but also in every densely populated area of the United States. Our construction of such legislation must be imaginative and progressive rather than restrictive.</p> <p style="text-align: center;">. . . .</p> <p>This court will not follow a common law rule relating to property where to do so would constitute a quixotic effort to conform social and economic realities to the rigid concepts of property law which developed when jousting was a favorite pastime.</p>

Article 1. General Provisions (Recodification Draft #1)

<p style="text-align: center;">Hawaii Condominium Law Recodification Draft #1 [Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]</p>	<p style="text-align: center;">Hawaii's Present Condominium Law Chapter 514A, Hawaii Revised Statutes (HRS) <i>(Compare with Proposed Recodified Condominium Law in left-hand column)</i></p>
<p>differences in result were of form rather than legitimate substance. In those cases, the substantive result of one or more of the three Acts was changed to reflect a policy generally applicable in all forms.</p> <p>The result is that a State wishing to consider legislation in the common interest ownership field has a range of choices from which to select. Many States will wish to adopt comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights. In those States, the consolidated Act is a workable and desirable long-term solution. Other States may wish simply to adopt a modern condominium statute to replace an existing but plainly outdated, statutory structure. In those States, UCA alone is the obvious choice. Finally, in States where existing "second" or "third" generation condominium statutes are seen as satisfactory, but a need for additional certainty and structure is desirable for planned communities or cooperatives, the two Acts governing those forms of ownership are available. Following adoption of one of the three constituent Acts, it would be very feasible, by a few carefully considered amendments, to adopt UCIOA and thereby extend coverage to include all forms of ownership in the field.</p>	
<p style="text-align: center;">TABLE OF CONTENTS</p> <p style="text-align: center;">ARTICLE 1. GENERAL PROVISIONS</p> <p style="text-align: center;">PART 1. DEFINITIONS AND OTHER GENERAL PROVISIONS</p> <p>§ 1-101. Short Title</p> <p>§ 1-102. Applicability</p> <p>§ 1-103. Definitions</p> <p>§ 1-104. Variation by Agreement</p> <p>§ 1-105. Separate Titles and Taxation</p> <p>§ 1-106. Applicability of <u>State Land Use Law and Local Ordinances, Regulations, and Building Codes</u></p> <p>§ 1-107. Eminent Domain</p> <p>§ 1-108. Supplemental General Principles of Law Applicable</p> <p>§ 1-109. Construction Against Implicit Repeal</p> <p>§ 1-110. Uniformity of Application and Construction</p> <p>§ 1-111. Severability</p> <p>§ 1-112. Unconscionable Agreement or Term of Contract</p> <p>§ 1-113. Obligation of Good Faith</p> <p>§ 1-114. Remedies to be Liberally Administered</p> <p>§ 1-115. Adjustment of Dollar Amounts (Reserved)</p> <p style="text-align: center;">PART 2. APPLICABILITY</p> <p>§ 1-201. Applicability to New Condominiums</p> <p>§ 1-202. Same; Exception for Small Cooperatives (Reserved)</p> <p>§ 1-203. Same; Exception for Small Condominiums</p> <p>§ 1-204. Applicability to Pre-existing Condominiums</p> <p>§ 1-205. Same; Exception for Small Pre-existing Condominiums</p>	<p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>The provisions of HRS Chapter 514A below are meant to be used for comparison with the provisions of Hawaii Condominium Law Recodification Draft #1. If you do not see a comparable recodification provision immediately to the left of the HRS provision, that means that we have chosen not to incorporate the HRS provision in our new law.</p>

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<p>§ 1-206. Same; Amendments to Governing Instruments</p> <p>§ 1-207. Applicability to Nonresidential Condominiums</p> <p>§ 1-208. Applicability to Out-of-State Condominiums</p>	
ARTICLE 1. GENERAL PROVISIONS	PART I. GENERAL PROVISIONS AND DEFINITIONS
PART 1. DEFINITIONS AND OTHER GENERAL PROVISIONS	
§ 1-101. Short Title. This chapter may be cited as the Modified Uniform Condominium Act.	§514A-1 Title. This chapter shall be known as the Condominium Property Act.
§ 1-102. Applicability. Applicability of this chapter is governed by Part 2 of this article.	[§514A-1.5] Applicability of chapter. [See, adjacent to Article 1, Part 2, of UCIOA below]
	[§514A-1.6] Conformance with county land use ordinances. [See, §1-106 of UCIOA and UCA below]
	§514A-2 Chapter not exclusive. [See, Article 1, Part 2, of UCIOA below]
§ 1-103. Definitions. In the declaration and bylaws (Section 3-106), unless specifically provided otherwise or the context otherwise requires, and in this chapter:	§514A-3 Definitions. Unless it is plainly evident from the context that a different meaning is intended, as used herein:
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p> <p>1. The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.</p> <p>Example: A declarant might vary the definition of “unit owner” in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.</p>	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>In Lewis Carroll’s <i>Through the Looking Glass</i>, Alice meets up with Humpty Dumpty sitting on his wall. In the course of their conversation, the following exchange takes place:</p> <p>“There are three hundred and sixty-four days when you might get un-birthday presents,” [said Humpty Dumpty] “and only <i>one</i> for birthday presents, you know. There’s glory for you!”</p> <p>“I don’t know what you mean by ‘glory,’” Alice said.</p> <p>“Humpty Dumpty smiled contemptuously. “Of course you don’t – till I tell you. I meant, ‘there’s a nice knock-down argument for you!’”</p> <p>“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’” Alice objected.</p> <p>“When <i>I</i> use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”</p> <p>“The question is,” said Alice, “whether you <i>can</i> make words mean so many different things.”</p> <p>“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”</p> <p>Definitions – what we mean by the words we use – are critical in “Condoland.” Through interpretation and amendment, definitions in HRS have gotten “curiouser and curiouser” over the years. With common understanding as our master, our recodified condominium law will primarily be using definitions contained in UCA with appropriate modifications and additions from UCIOA and HRS.</p>
“Affiliate of a declarant” means any person who controls, is controlled by, or is under common control with a declarant. A person “controls” a declarant if the person:	

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<p>(1) is a general partner, officer, director, or employer of the declarant;</p> <p>(2) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the declarant;</p> <p>(3) controls in any manner the election of a majority of the directors of the declarant; or</p> <p>(4) has contributed more than 20 percent of the capital of the declarant.</p> <p>A person "is controlled by" a declarant if the declarant:</p> <p>(1) is a general partner, officer, director, or employer of the person;</p> <p>(2) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than 20 percent of the voting interest in the person;</p> <p>(3) controls in any manner the election of a majority of the directors of the person; or</p> <p>(4) has contributed more than 20 percent of the capital of the person.</p> <p>Control does not exist if the powers described in this definition are held solely as security for an obligation and are not exercised.</p>	
<p style="text-align: center;">UCIOA (1994) Comment [UCA (1980) Comment essentially same]</p> <p>2. The definition of "Affiliate of a declarant" (Section 1-103(1)) is similar to the definition of 12 U.S.C. Section 1730a, which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. Section 78c(a)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.</p> <p>The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. Section 1730a(a)(2)(B), no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.</p> <p>As a result of this definition, the association may, in some instances, be a declarant. Under the definition of "Affiliate of a declarant," it is possible that 20% of the unit owners may "act in concert" to control the activities of the association. While the mere casting of these votes at an association meeting would not normally constitute "concerted action" by those unit owners, other acts by individual unit owners might constitute such concerted action. The consequences of that result are determined under Section 3-104.</p>	
<p>"Allocated Interests" means the undivided interest in the common elements, the common expense liability, and votes in the association allocated to each unit.</p>	
<p>UCA (1980) Comment</p>	

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<p>3. Definition (2), "allocated interests," refers to all of the interests which this Act requires the declaration to allocate. <i>See</i> Section 2-107.</p> <p style="text-align: center;">UCIOA (1994) Comment (relevant portion)</p> <p>The common element or ownership interest has limited significance. One situation in which the common element interest allocation would be important, however, is the distribution of insurance proceeds following a loss where an entire condominium project is not repaired or replaced and insurance proceeds are distributed to unit owners. <i>See</i> Section 3-113(h). <i>See also</i> Section 2-118(j)(2).</p>	
	"Apartment" means a part of the property intended for any type of use or uses, and with an exit to a public street or highway or to a common element or elements leading to a public street or highway, and may include such appurtenances as garage and other parking space, storage room, balcony, terrace, and patio.
	Condominium Recodification Attorney's Comment <p>[(7/31/01) For discussion: Portions of the definition of "apartment" (e.g., the requirement that an apartment/unit have access to a public street or highway) may be incorporated in the definition of "unit" or in another appropriate section. Were there problems in the past with developers selling condominiums without access to public roadways?]</p>
	"Apartment owner" means the person owning, or the persons owning jointly or in common, an apartment and the common interest appertaining thereto; provided that to such extent and for such purposes, including the exercise of voting rights, as shall be provided by lease registered under chapter 501 or recorded under chapter 502, a lessee of an apartment shall be deemed to be the owner thereof.
"Association" or "unit owners' association" means the unit owners' association organized under Section 3-101.	"Association of apartment owners" means all of the apartment owners acting as a group in accordance with the bylaws and declaration.
"Commission" means the real estate commission of the state department of commerce and consumer affairs.	"Commission" means the real estate commission of the state department of commerce and consumer affairs.
"Common elements" means: <p>(1) all portions of a condominium other than the units; and</p> <p>(2) any other interests in real estate for the benefit of unit owners which are subject to the declaration.</p>	"Common elements", unless otherwise provided in the declaration , means and includes: <p>(1) The land included in the condominium property regime, whether leased or in fee simple;</p> <p>(2) The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building or buildings;</p> <p>(3) The basements, flat roofs, yards, gardens, recreational facilities, parking areas, and storage spaces;</p> <p>(4) The premises for the lodging or use of janitors and other persons employed for the operation of the property;</p> <p>(5) Central and appurtenant installations for services such as power, light, gas, hot</p>

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	<p>and cold water, heating, refrigeration, air conditioning, and incinerators;</p> <p>(6) The elevators, escalators, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use;</p> <p>(7) Such facilities as may be designated as common elements in the declaration; and</p> <p>(8) All other parts of the property necessary or convenient to its existence, maintenance, and safety, or normally in common use.</p>
<p style="text-align: center;">UCA (1980) Comment</p> <p>4. Definitions (4) and (25), treating “common elements” and “units,” should be examined in light of Section 2-102, which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real estate in the condominium not designated as part of the units.</p> <p style="text-align: center;">UCIOA (1994) Comment</p> <p>6. The 1994 amendment to the definition of common elements in Section 1-103(4) addresses and clarifies a real estate arrangement found in some common interest planned communities – that is, easements or other forms of servitudes which benefit the community and which run either to the unit owners association or to all the unit owners in the association. Examples of such interests include access easements to a land locked parcel on which the community is located, easements for shared parking, etc. This easement, as any commonly held interest in real estate, is and should be a common element. In reciprocal easement communities, the easements may be the only common elements.</p> <p>7. The drafters also seek to distinguish between real estate owned or leased by the unit owners association which is subject to the declaration, and similar real estate which is not subject to the declaration.</p> <p>In a planned community, if that real estate is subject to the declaration – that is, it is “within the planned community” – it meets the definition of a common element. If that real estate is not within the planned community, title may be held by the association, but it is not a common element unless the declaration is amended in accordance with this Act to incorporate that real estate as part of the real estate subject to the declaration.</p> <p>Most common interest communities are not likely to experience a need to acquire real estate in addition to the land originally submitted to the declaration. However, it is not difficult to envision cases where that result would be desirable to the unit owners – for example, to acquire additional parking areas or open space. There is no reason to either prohibit the association from securing this result, or to require the formalities of an amendment of the declaration to redefine the boundaries of the common interest community; this would typically require a two-thirds vote of the unit owners under Section 2-117(a).</p>	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>1. Regarding HRS §514A-3’s definition of “common element,” Senior Condominium Specialist Cynthia Yee noted that the phrase “unless otherwise provided in the declaration” has been very useful. The UCA and UCIOA recognize this. UCA/UCIOA §1-103 (Definitions) begins by stating: “In the declaration and bylaws (Section 3-106), unless specifically provided otherwise or the context otherwise requires, and in this chapter . . .” (various definitions follow). Further, the Comments to UCA/UCIOA §1-104 (Variation by Agreement) note that: “The following sections permit variation: . . . Section 1-103. [Definitions.] All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.” Therefore, we have kept the UCA/UCIOA definition of “common element” as is.</p> <p>2. As noted in the adjacent UCIOA comment:</p> <p style="padding-left: 40px;">[I]t is not difficult to envision cases where [acquiring real estate in addition to the land originally submitted to the declaration] would be desirable to the unit owners – for example, to acquire additional parking areas or open space. There is no reason to either prohibit the association from securing this result, or to require the formalities of an amendment of the declaration to redefine the boundaries of the common interest community; this would typically require a two-thirds vote of the unit owners under Section 2-117(a).</p> <p style="text-align: center;">. . . .</p> <p style="padding-left: 40px;">[T]he drafters contemplate that [a] condominium . . . association could also acquire title to real estate which is physically located outside the condominium . . . boundaries, in its own name, which would not automatically become a common element.</p> <p>There are condominiums in Hawaii that currently need to acquire additional “common element” property. For example, a Maui condominium is threatened by beach erosion and seeks to acquire an interest over additional property on which to build t-head groins or man-made breakwater reefs. However, HRS §514A-92.1 requires the approval of 90% of the apartment owners (nearly impossible to get) to designate “additional areas to be common elements or subject to common expenses after the initial filing of the bylaws or declaration.”</p> <p>Additionally, in instances where a unit has not been reserved for a resident manager, it may be desirable for the condominium association to acquire a unit for use by the resident manager.</p>

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<p>This distinction will have practical consequences. For example, real estate which is not a common element may be taxed by the local assessor, unless exempt under other state law, notwithstanding the rule in Section 1-104 of the Act that the common elements may not be separately taxed. Further, non-common element real estate may be bought and sold by the association without the need to observe the requirements for conveying or encumbering common elements stated in Section 3-112.</p> <p>In a condominium, fee title to the common elements is vested in the unit owners, not the unit owners association. Thus, in the condominium, all the real estate subject to the declaration, except the units, is a "portion of the common interest community" and therefore is a common element. Real estate which is not subject to the declaration is neither a unit nor a common element.</p> <p>However, the desired substantive result discussed above is the same for all forms of common interest communities. Accordingly, the drafters contemplate that the condominium or cooperative association could also acquire title to real estate which is physically located outside the condominium or cooperative boundaries, in its own name, which would not automatically become a common element.</p>	<p>The reasoning and provisions of UCIOA are sound and should be part of Hawaii's recodified condominium law.</p>
<p>"Common expenses" means expenditures made by, or financial liabilities of, the association, together with any allocations to reserves.</p>	<p>"Common expense" means and includes:</p> <ol style="list-style-type: none"> (1) Expenses of operation of the property; and (2) All sums designated common expenses by or pursuant to this chapter, the declaration or the bylaws.
<p>"Common expense liability" means the liability for common expenses allocated to each unit pursuant to Section 2-107.</p>	
	<p>"Common interest" means the percentage of undivided interest in the common elements appertaining to each apartment, as expressed in the declaration, and any specified percentage of the common interests means such percentage of the undivided interests in the aggregate.</p>
	<p>"Common profits" means the balance of all income, rents, profits, and revenues from the common elements remaining after the deduction of the common expenses.</p>
	<p>"Completion of construction" means the issuance by the appropriate county official of a certificate of completion.</p>
<p>"Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.</p>	<p>"Condominium" means the ownership of single units, with common elements, located on property within the condominium property regime.</p>
<p style="text-align: center;">UCA (1980) Comment</p> <p>5. Definition (7), "condominium," makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each</p>	

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<p>unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.</p> <p style="text-align: center;">UCIOA (1994) Comment</p> <p>9. Definition (8), "Condominium" makes clear that, unless the real estate title to the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if title to the common elements is in an association in which each unit owner is a member, the project is not a condominium, but a planned community.</p>	
<p>"Conversion building" means a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.</p>	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p> <p>6. Definition (8), "conversion building," is important because of the protection which the Act provides in Section 4-112 for tenants of buildings which are being converted into a condominium. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the condominium form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.</p>	
<p>"Dealer" means a person in the business of selling units for his own account.</p>	
<p style="text-align: center;">UCIOA (1994) Comment</p> <p>12. Definition (11), "Dealer," is a newly defined term in UCIOA. It was not used in any of the three separate Acts. It replaces, in many sections, the words "person in the business of selling (either) real estate (or) cooperative interests for his own account." Use of the term in UCIOA does not change the substantive results in any of the three Acts.</p>	
<p>"Declarant" means any person or group of persons acting in concert who:</p> <ul style="list-style-type: none"> (1) as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of; or (2) reserves or succeeds to any special declarant right; or (3) applies for registration of a condominium under Article 5. 	
<p style="text-align: center;">UCA (1980) Comment</p> <p>7. Definition (9), "declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. (Of course, such a person could become a declarant by subsequently succeeding to a special declarant right.) Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners</p>	

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<p>reselling their units are not declarants because their units were “previously disposed of” when originally conveyed.</p> <p style="text-align: center;">UCIOA (1994) Comment (relevant portions)</p> <p>If the association, itself, or in conjunction with another declarant, is offering units for sale to others, and if those units have not previously been sold or otherwise disposed of, then the association itself is a declarant.</p> <p>Finally, a person who, while in control of the association, chooses not to exercise that control, is still a declarant.</p>	
<p>“Declaration” means any instruments, however denominated, that create a condominium, including any amendments to those instruments.</p>	<p>"Declaration" means the instrument by which the property is submitted to this chapter, as hereinafter provided, and such declaration as from time to time amended.</p>
<p style="text-align: center;">UCIOA (1994) Comment (relevant portions) [No UCA (1980) Comment]</p> <p>14. Definition (13), “Declaration,” is defined as “any instruments, however denominated, that create a common interest community, including any amendments to those instruments.” Thus, the term would not only include the traditional condominium declaration with which most practitioners are familiar, or the declaration of covenants, conditions, and restrictions (CC & R’s) so common in planned unit developments. It would also include, for example, a series of deeds to units with common mutually beneficial restrictions, or to any other instruments which create the relationship which constitutes a common interest community. If those recorded instruments create that relationship, then those documents constitute a declaration and must contain, for new projects, the information required by Section 2-105.</p> <p style="text-align: center;">. . . .</p> <p>Similarly, the definition of “declaration” of any common interest community does not refer to the bylaws of the association or the documents creating the association. Such documents do not “create” the common interest community, but merely regulate its use after creation. The bylaws may, but need not, be an exhibit to the declaration.</p>	
	<p>"Developer" means a person who undertakes to develop a real estate condominium project.</p>
<p>“Development rights” means any right or combination of rights reserved by a declarant in the declaration to</p> <ul style="list-style-type: none"> (1) add real estate to a condominium; (2) create units, common elements, or limited common elements within a condominium; (3) subdivide units or convert units into common elements; or (4) withdraw real estate from a condominium. 	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p> <p>8. Definition (11), “development rights,” includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and</p>	

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<p style="text-align: center;"><u>Hawaii Condominium Law Recodification Draft #1</u> [Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]</p>	<p style="text-align: center;"><u>Hawaii's Present Condominium Law</u> Chapter 514A, Hawaii Revised Statutes (HRS) <i>(Compare with Proposed Recodified Condominium Law in left-hand column)</i></p>
<p>which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974.</p> <p>Some of these techniques relate to the phased (or incremental) development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than he is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to “expand” the condominium by adding an additional building on Parcel B, containing additional units, as part of the same condominium. If he reserves the right to do so, <i>i.e.</i>, to “add real estate to a condominium,” he has reserved a “development right.”</p> <p>In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the condominium from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will extend into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the condominium from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the condominium and devote it to some other use, he may do so if he has reserved such a development right “to withdraw real estate from a condominium.” The portion of the garage which extends into Parcel B may be left in the condominium (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.</p> <p>The right “to create units, common elements, or limited common elements” is frequently useful in commercial or mixed-use condominiums where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the condominium has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchaser will want to buy the whole floor as a single units or whether several purchasers will want the floor divided into several units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential condominiums, especially those designed to appeal to affluent buyers. Similarly, the development rights “to subdivide units or convert units into common elements” is most often of value in commercial condominiums, but can occasionally be useful in certain kinds of residential condominiums as well.</p>	
<p>“Dispose” or “disposition” means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but the term does not include the transfer or release of a security interest.</p>	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p> <p>9. Definition (12), “dispose” or “disposition,” includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a “disposition,” nor is any transfer of</p>	

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any interest to a person who is excluded from the definition of "purchaser," <i>infra</i> . However, the term includes more than conveyances and would, for example, cover contracts of sale.	
"Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.	
"Identifying number" means a symbol or address that identifies only one unit in a condominium.	
"Leasehold condominium" means a condominium in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the condominium or reduce its size.	
<p style="text-align: center;">UCA (1980) Comment</p> <p>10. Definition (15), "leasehold condominium," should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, real estate which has been subjected to the condominium form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real estate underlying the unit would be removed from the condominium if the lease were not extended or renewed. On the other hand, real estate may not be subjected to condominium ownership, but may be leased directly to the association or to one or more unit owners for a term of years.</p> <p>This distinction is very significant. Under Section 3-105, the unit owners' association is empowered, following expiration of the period of declarant control, to cancel any lease of recreational or parking areas or facilities to which it is a party, regardless of who the lessor is. The association also has the power to cancel any lease for any land if the declarant or an affiliate of the declarant is a party to that lease. If the leased real estate, however, is subjected by the declarant to condominium form of ownership, that lease may not be cancelled unless it is unconscionable or unless the real estate was submitted to the condominium regime for the purpose of avoiding the right to terminate the lease. <i>See</i> Section 3-105.</p> <p>While the subjective test of declarant's "purpose" may not always be clear, the rights of the association to cancel a lease depend upon the test. Thus, for example, a declarant who wishes to lease a swimming pool to the unit owners would have a choice of subjecting the pool for, say, a term of 20 years to the condominium form of ownership as a common element. At the end of the term, the lease would terminate and the real estate containing the pool would be automatically removed from the condominium unless there were a right to renew the lease. During the 20-year term, the lease would not be cancellable, regardless of the terms, unless it were found to be unconscionable under Section 1-112, or cancellable because submitted for the purpose of avoiding the right to cancel. On the other hand, if the pool were not submitted to the condominium form of ownership and was leased directly to the association for a 20-year term, the association could cancel that lease 90 days after the period of declarant control expired, even if, for example, 18 years remained of the term.</p> <p>In either case, the terms of the lease would have to be disclosed in the public offering</p>	

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statement.	
"Limited common element" means a portion of the common elements allocated by the declaration or by operation of Section 2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.	"Limited common elements" means and includes those common elements designated in the declaration as reserved for the use of a certain apartment or certain apartments to the exclusion of the other apartments; provided that no amendment of the declaration affecting any of the limited common elements shall be effective without the consent of the owner or owners of the apartment or apartments for the use of which such limited common elements are reserved.
"Majority" or "majority of unit owners" means the owners of units to which are appurtenant more than fifty per cent of the common interests, and any specified percentage of the unit owners means the owners of units to which are appurtenant such percentage of the common interests.	"Majority" or "majority of apartment owners" means the owners of apartments to which are appurtenant more than fifty per cent of the common interests, and any specified percentage of the apartment owners means the owners of apartments to which are appurtenant such percentage of the common interests.
	"Managing agent" means any person employed or retained for the purposes of managing the operation of the property.
"Master association" means an organization described in Section 2-120, whether or not it is also an association described in Section 3-101.	
"Master deed" or "master lease" means any deed or lease showing the extent of the interest of the person submitting the property to the condominium property regime.	"Master deed" or "master lease" means any deed or lease showing the extent of the interest of the person submitting the property to the condominium property regime.
"Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a condominium not located in this State, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the condominium is located.	
	"Operation of the property" means and includes the administration, fiscal management, and operation of the property and the maintenance, repair, and replacement of, and the making of any additions and improvements to, the common elements.
"Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity. [In the case of a land trust, however, "person" means the beneficiary of the trust rather than the trust or the trustee.]	"Person" means an individual, firm, corporation, partnership, association, trust, or other legal entity, or any combination thereof.
	"Project" means a real estate condominium project; a plan or project whereby a condominium of two or more apartments located within the condominium property regime are offered or proposed to be offered for sale.
	"Property" means and includes the land, whether or not contiguous and including more than one parcel of land, but located within the same vicinity, whether leasehold or in fee simple, to the extent of the interest held therein by the owner or lessee submitting such interest to the condominium property regime, the building or buildings, all improvements and all structures thereon, and all easements, rights,

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	and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been or are intended to be submitted to the regime established by this chapter.
<p>“Purchaser” means a person, other than a declarant or a dealer, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than:</p> <p style="padding-left: 40px;">(1) a leasehold interest (including renewal options) of less than 20 years; or (2) as security for an obligation.</p>	
<p style="text-align: center;">UCA (1980) Comment</p> <p>11. Definition (20), “purchaser,” includes a person who acquires any interest in a unit, even as a tenant, if his tenancy entitles him to occupy the premises for more than 20 years. This would include a tenant who holds a lease of a unit in a fee simple condominium for one year, if the lease entitles the tenant to renew the lease for more than 4 additional years. Excluded from the definition, however, are mortgagees, declarants, and people in the business of selling real estate for their account (“dealers” under UCIOA (1994)). Persons excluded from the definition of “purchaser” do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4-102(c)) and the right to rescind (Section 4-108).</p>	
<p>“Real estate” means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests that by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. “Real estate” includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.</p>	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) essentially same]</p> <p>12. Definition (21), “real estate,” is very broad, and is very similar to the definition of “real estate” in Section 1-201(16) of the Uniform Land Transactions Act.</p> <p>Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth’s surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called “air rights” projects, ownership does not extend <i>ab solo usque ad coelum</i> (“from the center of the earth to the heavens”), because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.</p>	
<p>“Residential purposes” means use for dwelling or recreational purposes, or both.</p>	
UCIOA (1994) Comment	

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<p>22. The definition of “residential purposes” includes “recreational purposes.” This common sense definition is used in order to avoid repeated use of a lengthier defined term, such as “residential or consumer owned recreational purposes.”</p> <p>The Act contemplates that “recreational purposes” would be “consumer owned” recreational purposes commonly marketed for sale to individual owners – uses such as dock spaces for boats, campgrounds, airplane tie downs, etc. By including these kinds of uses within the definition, the Act intends to provide the same consumer protections which it offers to individual residential purchasers – persons who typically buy for their own use – as distinguished from commercial users. Thus, the definition would exclude commercial recreational facilities which are operated as a business or available to the public on a fee for use basis, such as movie theaters, athletic or country clubs, golf courses, and the like.</p> <p>Further, the definition is not intended to override, and thus perhaps expand on, existing local zoning ordinances which permit only “residential” use.</p> <p>However, by including these recreational purposes within the defined term “residential purposes,” no change in the plain and traditional meaning of the word “residential” is intended. Thus, the drafters recognize that owners of residential units – <i>i.e.</i>, a unit which is designed for use as a residential dwelling – may hold those units for investment purposes, or that individual owners may occasionally or regularly rent their units on an individual or rental pool basis. This is a common practice, for example, with residential communities built near ski or ocean resort areas. Rental occupancy does not change the residential character of the common interest community, or the consumer protections that must be offered to purchasers.</p>	
<p>“Security interest” means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in an association, and any other consensual lien or title retention contract intended as security for an obligation.</p>	
<p style="text-align: center;">UCIOA (1994) Comment</p> <p>23. Definition (28), “Security interest,” encompasses any interest in real or personal property which secures payment or performance of an obligation. Thus, for example, regardless of whether or not the units in a cooperative are treated as real or personal property pursuant to Section 1-105(a), a lender’s interest in a unit securing the debt is a “security interest.” This definition is adapted from Sections 3-102 and 3-103 of the Uniform Land Transactions Act.</p>	
<p>“Special declarant rights” means rights reserved for the benefit of a declarant to:</p> <ul style="list-style-type: none"> (1) complete improvements indicated on plats and plans filed with the declaration (Section 2-109); (2) exercise any development right (Section 2-110); 	

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<p>(3) maintain sales offices, management offices, signs advertising the condominium, and models (Section 2-115);</p> <p>(4) use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (Section 2-116);</p> <p>(5) make the condominium part of a larger condominium or a planned community (Section 2-121);</p> <p>(6) make the condominium subject to a master association (Section 2-120); or</p> <p>(7) appoint or remove any officer of the association or any master association or any executive board member during any period of declarant control (Section 3-103(c)) (Section 3-103(d)?).</p>	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p> <p>13. Definition (23), “special declarant rights,” seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.</p> <p>Any person who possesses a special declarant right would be a “declarant”, including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.</p>	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>[(7/31/01) For discussion: We need to review terminology for condominium documents and instruments for consistency and clarity. Parallel/equivalent terms may be defined as such.]</p>
<p>“Time share” means a right to occupy a unit or any of several units during [five] or more separated time periods over a period of at least [five] years, including renewal options, whether or not coupled with an estate or interest in a condominium or a specified portion thereof.</p>	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>UCA/UCIOA definition of “time share” deleted.</p>
<p>“Time share unit” means the actual and promised accommodations, and related facilities, which are the subject of a time share plan as defined in chapter 514E.</p>	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>Used HRS Chapter 514E-1 definition of “time share unit” with added reference to Chapter 514E (“Time Sharing Plans”).</p>
<p style="text-align: center;">UCA (1980) Comment</p> <p>14. Definition (24), “time share,” is based on Section 1-102(14) and (18) of the Uniform Law Commissioners’ Model Real Estate Time-Share Act.</p> <p style="text-align: center;">UCIOA (1994) Comment</p> <p>25. Definition (30), “Time share,” is based on Section 1-102(14) and (18) of the Model Real Estate Time-Share Act.</p> <p>When this Act was first promulgated in 1982, such concepts as “time share” and “interval ownership” were relatively new; they were neither fully developed nor generally accepted in the marketplace. Moreover, the nature of the relationship between the various forms of common interest ownership and time fractionalization of real estate was not at all</p>	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>[(7/31/01) For discussion: Generally, should we take a minimalist approach to time sharing in our condominium law – with HRS Chapter 514E governing time shares and the condominium law applying only to the extent that it doesn’t conflict with HRS Chapter 514E? (That would be my recommendation.)]</p>

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<p>clearly understood.</p> <p>In these circumstances, the Conference adopted a “minimalist” approach in dealing with the concept of time sharing. To that end, the Act simply defined the term “time share” in Section 1-103(24) and then required disclosure of any time share provisions in the common interest community; <i>see</i> Section 4-105. Otherwise, this Act did not attempt to regulate time sharing or any of the other forms of interval ownership. That task was left to the Model Real Estate Time Sharing Act.</p> <p>Experience over the intervening dozen years suggests that this minimalist approach remains appropriate. Without a doubt, the evolving field of interval ownership of both personal and real property poses important issues of public policy. However, this Act does not regulate those substantive issues. Instead, whether or not a particular interval ownership project must comply with this Act depends on whether or not the ownership arrangement meets the definition of a “common interest community.” If it does, then the Act would apply in the same degree as it would to any common interest community.</p>	
<p>“To record” means to record in accordance with chapter 502, or to register in accordance with chapter 501.</p>	<p>“To record” means to record in accordance with chapter 502, or to register in accordance with chapter 501.</p>
<p>“Unit” means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to Section 2-105(a)(5).</p>	
<p>UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p> <p>15. Definition (25), “unit,” describes a tangible, physical part of the project, rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a “time-share” arrangement in which a unit is sold to 12 different persons each of whom has the right to occupy the unit for one month does not create 12 new units—there are, rather, 12 owners of the unit. (Under the section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the votes assigned to that unit.)</p> <p>While a separately described part of the project is not a unit unless it is designed for, and is subject to, separate ownership by persons other than the association, the association developer can hold or acquire units unless otherwise provided in the declaration.</p>	
<p>“Unit owner” means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation. The declarant is the owner of any unit created by the declaration until that unit has been conveyed to another person.</p>	
<p>UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p> <p>16. Definition (26), “unit owners,” contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities might be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.</p>	<p>Condominium Recodification Attorney’s Comment</p> <p>The last sentence of the definition of “unit owner” (“The declarant is the owner of any unit created by the declaration until that unit has been conveyed to another person.”) was added in UCIOA (1994).</p>

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The definition makes it clear that declarants, so long as they own units in the condominium, are unit owners and are therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments against those units. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.	
All pronouns used in this chapter include the male, female, and neuter genders and include the singular or plural numbers, as the case may be.	All pronouns used herein include the male, female, and neuter genders and include the singular or plural numbers, as the case may be.
§ 1-104. Variation by Agreement. Except as expressly provided in this chapter, its provisions may not be varied by agreement, and rights conferred by it may not be waived. Except as provided in Section 1-207, a declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration.	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) changes noted]</p> <p>1. The Act is generally designed to provide great flexibility in the creation of condominiums and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants. Accordingly, this section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.</p> <p>2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the Act or of the declaration.</p> <p>3. [Renumbered "4" in UCIOA (1994).] The following sections permit variation: [Section 1-102. [Applicability.] Preexisting condominiums may elect to conform to the Act.] [Incorporated in Article 1, Part 2, in UCIOA (1994).] Section 1-103. [Definitions.] All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act. Section 1-107. [Eminent Domain.] The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied. Article 1, Part 2, Sections 1-202, 1-203, 1-205, 1-206, and 1-207, permit a variety of elections to declarants and unit owners with respect to applicability. [UCIOA (1994) Comment.] Section 2-102. [Unit Boundaries.] The declaration may vary the distinctions as to what constitutes the units and common elements. Section 2-105. [Contents of Declaration.] A declarant may add any information he desires to the required content of the declaration.</p>	

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<p>Section 2-107. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities.] A declarant may allocate the interests in any way desired, subject to certain limitations. [Left out of UCIOA (1994) Comment. However, a review of §2-107 in both uniform acts shows that this was probably an inadvertent omission.]</p> <p>Section 2-108. [Limited Common Elements.] The Act permits reallocation of limited common elements unless prohibited by the declaration.</p> <p>Section 2-109. [Plats and Plans.] There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.</p> <p>Section 2-111. [Alterations Within Units.] Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.</p> <p>Section 2-112. [Relocation of Boundaries Between Adjoining Units.] Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.</p> <p>Section 2-113. [Subdivision of Units.] If the declaration expressly so permits, a unit may be subdivided into two or more units.</p> <p>Section 2-115. [Use for Sales Purposes.] The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.</p> <p>Section 2-116. [Easement to Facilitate Exercise of Special Declarant Rights.] Subject to the provisions of the declaration, the declarant has an easement for these purposes.</p> <p>Section 2-117. [Amendment of Declaration.] The declaration of a non-residential condominium may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.</p> <p>Section 2-118. [Termination of Condominium.] The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential condominium, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.</p> <p>Section 2-119. [Rights of Secured Lenders.] The declaration may require lender approval of specified actions of unit owners or the association. [Added to UCIOA (1994) Comment.]</p> <p>Section 2-120. [Master Associations.] The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.</p> <p>Section 3-102. [Powers of the Association.] The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.</p> <p>Section 3-103. [Executive Board Members and Officers.] Except as limited by the declaration or bylaws, the Executive Board may act for the association.</p> <p>Section 3-106. [Bylaws.] Subject to the provisions of the declaration, the bylaws may</p>	

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<p>contain any matter in addition to that required by the Act.</p> <p>Section 3-107. [Upkeep of the Condominium.] Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.</p> <p>Section 3-108. [Meetings.] The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.</p> <p>Section 3-109. [Quorums.] This section permits statutory quorum requirements to be varied by the bylaws.</p> <p>Section 3-110. [Voting; Proxies.] A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.</p> <p>Section 3-112. [Conveyance or Encumbrance of Common Elements.] The declaration may vary the percentages of unit owners whose approval is required to convey or encumber common elements. The declaration may also provide that a conveyance or encumbrance of common elements defeats prior encumbrances on those common elements. [Added to UCIOA (1994) Comment.]</p> <p>Section 3-113. [Insurance.] The declaration may vary the provisions of this section in non-residential condominiums, and may require additional insurance in any condominium.</p> <p>Section 3-114. [Surplus Funds.] Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to common expense liability.</p> <p>Section 3-115. [Assessments for Common Expenses.] To the extent otherwise provided in the declaration, common expenses for limited common elements must be assessed against the the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.</p> <p>Section 3-116. [Lien for Assessment.] Unless the declaration provides otherwise, fines, late charges, and other fees are treated as assessments for lien purposes. [Added to UCIOA (1994) Comment.]</p> <p>Section 4-101. [Applicability; Waiver.] All of Article 4 is modifiable or waivable by agreement in a condominium restricted to non-residential use.</p> <p>Section 4-115. [Warranties.] Implied warranties of quality may be excluded or modified by agreement.</p> <p>Section 4-116. [Statute of Limitations on Warranties.] The 6-year limitation may be modified by agreement of the parties.</p> <p style="padding-left: 2em;">4. [Renumbered "3" in UCIOA (1994).] The second sentence of the section is an important limitation upon the rights of a declarant. It is the practice in many jurisdiction today, particularly jurisdictions which do not permit expansion of a condominium by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes.</p>	

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<p>With such powers of attorney, many declarants have purported to comply with the typical provision of “first generation” condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters.</p> <p>[Section 2-117 requires unanimous consent to make certain amendments to the declaration and bylaws. If a declarant were permitted to use powers of attorney to accomplish such changes, the substantial protection which Section 2-117(d) provides to unit owners would be illusory. Section 1-104 prohibits the declarant from using powers of attorney for such purposes.] [Deleted in UCIOA (1994).]</p> <p>5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, <i>see</i> Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. <i>See</i> Section 1-112. This section derives from Section 1-102(3) of the Uniform Commercial Code.</p>	
<p>§ 1-105. Separate Titles and Taxation.</p>	<p>§514A-4 Status of apartments. Each apartment, together with the common interest appertaining thereto, shall for all purposes constitute real property and may be individually conveyed, leased, or encumbered and be the subject of ownership, possession, or sale and for all other purposes be treated as if it were sole and entirely independent of the other apartment or apartments in the property of which it forms a part, and the corresponding individual titles and interests shall be recordable.</p>
<p>(a) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.</p>	<p>§514A-5 Ownership of apartments. The apartment owner is entitled to the exclusive ownership and possession of the apartment. Any apartment may be jointly or commonly owned by more than one person.</p>
<p>(b) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no development rights.</p>	<p>§514A-6 Separate taxation. The laws relating to home exemptions from state property taxes are applicable to the individual apartments, which shall have the benefit of home exemption in those cases where the owner of single-family dwelling would qualify. Property taxes assessed by the State shall be assessed on and collected on the individual apartments and not on the property as a whole. Without limitation of the foregoing, each apartment and the common interest appertaining thereto shall be deemed to be a parcel and shall be subject to separate assessment and taxation for all types of taxes authorized by law, including, but not limited to, special assessments.</p>
<p>(c) Any portion of the common elements for which the declarant has reserved any development right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.</p>	
<p>(d) If there is no unit owner other than a declarant, the real estate comprising the condominium may be taxed and assessed in any manner provided by law.</p>	
<p style="text-align: center;">UCA (1980) Comment</p> <p>1. A condominium may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently with existing rental apartment projects</p>	

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<p>which are converted into condominiums. Subsection (d) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the condominium is created may be permitted under other law. <i>See</i> subsection (d). When separate tax assessments become mandatory under this section, the assessment for each unit must include the value of that unit's common element interest, and no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively. Any common elements subject to development rights, however, are separately taxed to the declarant.</p> <p>2. Even if real estate subject to development rights is a part of the condominium and lawfully "owned" by the unit owners in common, it is in fact an asset of the declarant, and must not be taxed and assessed against unit owners. Under subsection (c), the declarant is exclusively liable for those taxes.</p> <p>3. If there is any question in a particular state that a unit occupied as a residential dwelling is not entitled to treatment as any other residential single-family detached dwelling under the homestead statutes, this section should be modified to insure that units are similarly treated.</p> <p>4. Unlike the law of New York and perhaps other states, this section imposes no limitation on the power of a jurisdiction to tax the condominium unit based on its fair market value. In most jurisdictions, experience has shown that the conversion of an apartment building to the condominium form of ownership greatly increases the fair market value of that building. Accordingly, a jurisdiction under this Act may impose real estate taxes on condominium units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.</p> <p style="text-align: center;">UCIOA (1994) Comment (relevant portions)</p> <p>5. . . . When separate tax assessments become mandatory under this section, the assessment for each unit must be based on the value of that individual unit, under whatever uniform assessment mechanism prevails in the State or locality. Importantly, no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively, even though, in the context of planned communities, the common elements owned by the association might be subject to taxation as a separately owned parcel of real estate, in the absence of this provision.</p> <p>8. Questions have arisen regarding the consequences of foreclosure of a tax lien on units or development rights in a common interest community.</p> <p>Under one theory, because real estate taxes are liens on real estate which have priority over all subordinate interests, foreclosure of the real estate tax lien on a unit could result in partial termination of the common interest community, and thus remove the unit from the common interest community. This result would follow if the tax lien were treated under Section 2-118(1) as a "lien . . . against a portion of the real estate comprising the common interest community [which] has priority over the declaration"</p> <p>Such a result, however, is inconsistent with the expectations of other unit owners in the complex. The appropriate result is that because, under this section, each parcel of real estate is a separate parcel for tax purposes, foreclosure of a tax lien on that parcel simply</p>	

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<p>results in a sale or transfer of an interest in that parcel, as part of the common interest community, unless the parcel being foreclosed is withdrawable real estate.</p> <p>9. It is also possible that a taxing authority may seek to foreclose on a declarant's development rights. Foreclosure of real estate taxes levied against withdrawable real estate, just as in the case of a foreclosure by a voluntary lienholder, may result in removal of that real estate from the common interest community; <i>see</i> Section 2-118(k). However, foreclosure of real estate owned by the declarant which has not yet been added to the common interest community will have no effect on the common interest community unless the taxing authority also acquires the development right to add that real estate to the common interest community.</p> <p>10. Under Section 3-104(c), of course, foreclosure of a tax lien for unpaid taxes levied against development rights would permit the taxing authority to take title to those development rights and exercise or transfer them as they could any other interest in real estate. However, development rights lapse pursuant to Section 2-110 if they are not exercised within the time limit established by the declaration. This result, implicit under the Act, is expressly the law in some States. <i>See, e.g., Conn. Gen. Stat. Section 47-229(e)</i>. If development rights lapse when a tax lien against those rights exists under Section 1-105(c), then whether or not those development rights apply to common elements which have previously been added to the common interest community makes no difference; the municipal lien holder is in no different position than a lender who holds a security interest in those development rights. Accordingly, while the tax lien itself would not be enforceable against the land it would continue to be the obligation of the declarant, as provided in the last clause of this subsection.</p>	
§ 1-106. Applicability of <u>State Land Use Law and</u> Local Ordinances, Regulations, and Building Codes.	[§514A-1.6] Conformance with county land use ordinances.
(a) A zoning, subdivision, building code, or other {real estate} <u>State or county land use law, ordinance, or regulation</u> may not prohibit the condominium form of ownership or impose any requirement upon a condominium {which} <u>that</u> it would not impose upon a physically identical development under a different form of ownership.	
(b) Except as provided in subsection (a), the provisions of this chapter do not invalidate or modify any provision of any building code, zoning, subdivision, or other {real estate} <u>State or county land use law, ordinance, rule, or regulation</u> governing the use of real estate.	
(c) {Any} <u>To ensure the conformance of condominium developments to the purposes and provisions of State and county land use laws, all condominium</u> {property regime established under this chapter shall} <u>developments must conform to chapter 205, the existing underlying county</u> {zoning} <u>land use laws for the</u> {property} <u>condominium real estate, and all applicable county permitting requirements adopted by the county in which the</u> {property} <u>condominium real estate is located</u> , {including any supplemental rules adopted by the county, pursuant to section 514A-45, to ensure the conformance of condominium property	Any condominium property regime established under this chapter shall conform to the existing underlying county zoning for the property and all applicable county permitting requirements adopted by the county in which the property is located, including any supplemental rules adopted by the county, pursuant to section 514A-45, to ensure the conformance of condominium property regimes to the purposes and provisions of county zoning and development ordinances and chapter 205. In the case of a property which includes one or more existing structures being converted to condominium status, the condominium property regime shall comply

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regimes to the purposes and provisions of county zoning and development ordinances and chapter 205]. In the case of [a property which] real estate that includes one or more existing structures being converted to condominium status, the [condominium property regime shall] declarant must comply with [section 514A-11(13) or section 514A-40(b)] sections 4-106(a)(3) and (4) and 5-103.1(1).	with section 514A-11(13) or section 514A-40(b).
	<p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>1. <i>See also</i>, §514A-45 (Supplemental regulations governing a condominium property regime) below, which reads: "Whenever they deem it proper, the commission, the county councils of the various counties or the city council of the city and county of Honolulu may adopt supplemental rules and regulations governing a condominium property regime established under this chapter in order to implement this program; provided that any of the supplemental rules and regulations adopted shall not conflict with this chapter or with any of the rules and regulations adopted by the commission to implement this chapter."</p> <p>2. §514A-45 tends to heighten confusion over land <i>use</i> and land <i>ownership</i> issues, so I do not recommend incorporating it in our recodification.</p>
<p style="text-align: center;">UCA (1980) Comment</p> <p>1. The first sentence of this section prohibits discrimination against condominiums by local law-making authorities. Thus, if a local law, ordinance, or regulation imposes a requirement which cannot be met if property is subdivided as a condominium but which would not be violated if all of the property constituting the condominium were owned by a single owner, this section makes it unlawful to apply that requirement or restriction to the condominium. For example, in the case of a high-rise apartment building, if a local requirement imposing a minimum number of parking spaces per apartment would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher number of spaces per apartment merely by virtue of the same building being owned as a condominium.</p> <p>2. The second sentence makes clear that, except for the prohibition on discrimination against condominiums, the Act has no effect on real estate use laws. For example, a particular piece of real estate submitted to the condominium form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the condominium but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.</p> <p style="text-align: center;">UCIOA (1994) Comment (relevant portion)</p> <p>1. The purpose of this section is to resolve the relative roles of the state and local communities in regulating the creation of common interest communities. The underlying concept is to make clear that the municipality has a legitimate interest in regulating the use of real estate, in accordance with long established zoning, building code, and similar</p>	<p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>There appears to be quite a bit of confusion over the fact that condominium property is a land <i>ownership</i>, as opposed to a land <i>use</i>, concept. In response to our request for comments from the community, various parties have asked that Hawaii's condominium property regime law be used to ensure compliance with land <i>use</i> laws (e.g., HRS Chapter 205 and county zoning, subdivision, and building ordinances). [See 9/20/01 letter from State Department of Business, Economic Development & Tourism – Office of Planning (DBEDT-OP); 5/29/01 letter from County of Hawaii – Planning Department; 5/29-5/30/01 e-mail from David Frankel, and 7/13/01 letter from Hawaii Association of Realtors containing comments of Abe Lee.]</p> <p>Hawaii's counties (particularly the Neighbor Island counties) have long complained that developers were using HRS Chapter 514A to circumvent underlying county land use laws. However, the counties have always had the power to regulate the <i>uses</i> of land pursuant to their police powers (i.e., their powers to protect the public health and safety – the legal basis for zoning laws) under HRS Chapter 46. [See, HRS §§46-1.5(13) and 46-4.] HRS §514A-1.6, passed by the Legislature in 2000, simply made this explicit in the condominium property regime law.</p> <p>We have incorporated HRS §514A-1.6 in our recodified condominium law as §1-106(c). While it is somewhat duplicative of Recodification Draft #1, §1-106(b), HRS §514A-1.6 contains specific references to requirements for condominium conversion projects which should probably be included in our recodification. We have also added language requiring that condominium property regime projects conform to HRS Chapter 205 (State Land Use Law).</p> <p>Dept. of Business, Economic Development & Tourism's (DBEDT) Suggestions</p> <p>DBEDT has suggested that: 1) the statutory language of HRS §514A-1.6 be retained; 2) HRS §514A-1.6 be amended to add language requiring conformance of condominium</p>

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<p>practices, and that such practices continue to have equal applicability to common interest communities as they do to purely rental projects. With respect to forms of ownership, however, this Act, as a state enactment, preempts the field and accordingly, except as provided in the Act, the municipality may not regulate the form of ownership, as opposed to the use of that real estate.</p>	<p>property regimes with HRS Chapter 205; 3) the statutory language of HRS §514A-45 be retained; 4) counties be afforded the opportunity to review condominium property regime site or parcel plans/maps prior to recordation so that any questions as to conformance with county codes can be examined prior to recordation and the establishment of ownership interests in the units created under a condominium property regime; and 5) we carefully examine how to effectively manage condominium property regimes on agricultural lands, and how State or county laws or codes should be amended to best address the issue. (See, September 20, 2001 letter from DBEDT – Office of Planning to Gordon M. Arakaki.)</p> <p>County of Hawaii's Suggestions</p> <p>The County of Hawaii has suggested that Hawaii's condominium law be amended to:</p> <ol style="list-style-type: none"> 1) require county certification of compliance with applicable codes for all condominium projects before final public reports may be issued (not just condominium conversions, as is currently the case under HRS §514A-40); 2) require minimum value for condominium apartments (to prevent "toolshed" apartments); 3) explicitly require that condominium property regimes follow county subdivision codes; and 4) ensure that county planning departments are allowed to comment on notice of intention for all condominium projects, at an early stage. (See, May 29, 2001 letter from County of Hawaii Planning Department to Mitchell A. Imanaka and Gordon M. Arakaki.) <p>Condominium Recodification Attorney's Analysis</p> <p>DBEDT-OP, the County of Hawaii, and others have raised legitimate concerns over the current interplay between HRS Chapter 514A and state and county land use laws. The question remains how to properly address the problem. In crafting a provision to prevent abuse of the condominium property regimes law as it relates to underlying land use laws, we should take the following factors into consideration:</p> <ul style="list-style-type: none"> • Purpose of Condominium Property Regime Law. As previously noted, a condominium property regimes law is a land <i>ownership</i> law, a <i>consumer protection</i> law, and a <i>community governance</i> law. It is not a land <i>use</i> law (i.e., it does not govern what structures may be built on real property; separate state and county land use laws control – or should control – land use matters). (See, "Basic Concepts" discussion above.) As a consumer protection law, the primary purpose of Hawaii's current condominium property regimes law is to make sure that buyers know what they are buying. Theoretically, if a sophisticated buyer wants to take a chance on being able to get government approval to build a structure that is not allowed under State or county land use laws at the time of purchase, that should be the buyer's choice. The key is to give the buyer a chance to make an informed decision. • Purpose of the Real Estate Commission. The Real Estate Commission is a consumer protection body established under HRS Chapter 467 (Real Estate Brokers and Salespersons) to regulate real estate licensees. The purpose of HRS Chapter 467 (and the Commission) is to protect the general public in its real estate transactions. Pursuant to HRS §467-3, the Real Estate Commission consists of nine members, at least four of whom must be licensed real estate brokers. • Need for Appropriate and Consistent Lines of Authority. We need to make sure that

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	<p>the appropriate governmental entities enforce the appropriate laws. County land use agencies – i.e., planning and permitting departments – have the responsibility for ensuring that all proposed development projects comply with county land use laws. County councils have the authority to pass laws giving county land use agencies the tools to ensure that any proposed condominium development complies with county land use laws.</p> <ul style="list-style-type: none"> • <u>Timing.</u> Under Hawaii's current law, condominiums are created upon proper filing with Bureau of Conveyances or Land Court. The Real Estate Commission's involvement begins when condominium units are offered for sale. <p>Recodification Draft #1, §1-106, is an attempt to keep Hawaii's condominium law (and the Real Estate Commission) true to its purpose while making it clear that HRS Chapter 205 and county land use laws control land use matters.</p> <p>The overall approach taken by UCA/UCIOA (upon which Recodification Draft #1 is based) appears to solve the problem. The Acts appear to contemplate that all condominium projects go through appropriate land use processes before recordation and sale unless, based on specific criteria, the Commission determines that a declaration may be recorded and units registered. UCA/UCIOA §2-101(b) prohibits the recordation (hence, creation) of a condominium declaration unless:</p> <ol style="list-style-type: none"> 1) "[A]ll structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an independent (registered) engineer, surveyor, or architect;" or 2) "[T]he agency has approved the declaration or amendment in the manner prescribed in Section 5-103(b)." <p>UCA/UCIOA §5-103 allows a developer to record a condominium declaration for the purpose of creating a condominium in which the units are not substantially completed <i>if</i> the agency (i.e., the Real Estate Commission) determines, "on the basis of the material submitted by the declarant and any other information available to the agency, that there is a reasonable basis to expect that the units to be conveyed will be completed by the declarant following conveyance." To help the Commission determine whether there is a "reasonable basis to expect that the units to be conveyed will be completed . . . following conveyance," UCA/UCIOA §5-103(b) requires the developer to submit the following:</p> <ol style="list-style-type: none"> (1) a verified statement showing all costs involved in completing the buildings containing those units; (2) a verified estimate of the time of completion of construction of the buildings containing those units; (3) satisfactory evidence of sufficient funds to cover all costs to complete the buildings containing those units; (4) a copy of the executed construction contract and any other contracts for the completion of the buildings containing those units; (5) a 100 percent payment and performance bond covering the entire cost of

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	<p>construction of the buildings containing those units;</p> <p style="padding-left: 40px;">(6) plans for the units conforming to the requirements of Section 2-109(c);</p> <p style="padding-left: 40px;">(7) if purchasers' funds are to be utilized for the construction of the condominium, an executed copy of the escrow agreement with an escrow company or financial institution authorized to do business within the state which provides that:</p> <p style="padding-left: 80px;">(i) disbursements of purchasers' funds may be made from time to time to pay for construction of the condominium, architectural, engineering finance, and legal fees, and other costs for the completion of the condominium in proportion to the value of the work completed by the contractor as certified by an independent (registered) architect or engineer, or bills submitted and approved by the lender of construction funds or the escrow agent;</p> <p style="padding-left: 80px;">(ii) disbursement of the balance of purchasers' funds remaining after completion of the condominium shall be made only when the escrow agent or lender receives satisfactory evidence that the period for filing mechanic's and materialman's liens has expired, or that the right to claim those liens has expired, or that the right to claim those liens has been waived, or that adequate provision has been made for satisfaction of any claimed mechanic's or materialman's lien; and</p> <p style="padding-left: 80px;">(iii) any other restriction relative to the retention and disbursement of purchasers' funds required by the agency; and</p> <p style="padding-left: 40px;">(8) any other materials or information the agency may require by its rules.</p> <p>[Note: These requirements are similar to those of HRS §514A-40 (Final Reports).]</p> <p>Therefore, it does not appear to be necessary or appropriate in the recodified Hawaii condominium law to have blanket requirements that: 1) make the recordation of all condominium property regime declarations (and other applicable documents) contingent upon county certification of compliance with county land use laws, or 2) make the sale of any condominium units (currently allowed upon the Commission's issuance of an effective date for a project's preliminary, contingent final, or final public report) contingent upon county certification of compliance with county land use laws.</p> <p>Finally, consistent with the principle that physically identical developments should be treated equally, the counties can simply draft land use ordinances governing the development of condominiums. The ordinances should hold condominium developments to the same standards as physically identical developments under different forms of ownership. In other words, the ordinances should require that condominium developments follow the same physical requirements (density, bulk, height, setbacks, water, sewerage, etc.) as physically identical developments under existing land use requirements (e.g., zoning, subdivision, building code, and cluster development laws). If a particular development proposal is inconsistent with state and county land use laws under forms of real estate ownership other than condominium ownership, the condominium property regimes law does not and will not somehow allow the project to be built.</p>

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	Land <i>use</i> laws should control land <i>use</i> matters. The condominium property regimes law should continue to encompass and control land <i>ownership</i> , <i>consumer protection</i> , and condominium <i>community governance</i> matters. And just as it would be inappropriate for the Real Estate Commission to control land <i>use</i> matters, it would be inappropriate for land use agencies to control condominium property regime matters.
§ 1-107. Eminent Domain.	
(a) If a unit is acquired by eminent domain or part of a unit is acquired by eminent domain leaving the unit owner with a remnant that may not practically or lawfully be used for any purpose permitted by the declaration, the award must include compensation to the unit owner for that unit and its allocated interests, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking, and the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.	
(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, <p style="margin-left: 40px;">(1) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration; and</p> <p style="margin-left: 40px;">(2) the portion of the allocated interests divested from the partially acquired unit are automatically reallocated to that unit and to the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially-acquired unit participating in the reallocation on the basis of its reduced allocated interests.</p>	
(c) If part of the common elements is acquired by eminent domain, the portion of the award attributable to the common elements taken must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be equally divided among the owners of the units to which that limited common element was allocated at the time of acquisition.	
[(d) The court decree must be recorded in every [county] in which any portion of the common interest community is located.]	Condominium Recodification Attorney's Comment All recordation in Hawaii is done in the State Bureau of Conveyances or State Land Court.
	[See, §514A-21(c) below, regarding effects of eminent domain proceedings on leasehold condominium projects]
UCA (1980) Comment [UCIOA (1994) changes noted] 1. The provisions of this statute are not intended to supplant the usual rules of eminent	Condominium Recodification Attorney's Comment [(7/31/01) For discussion: Should we simply delete recodification §1-107 as unnecessary?

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<p>domain but merely to supplement the rules to address the unique problems which eminent domain raises in the context of a condominium. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this section are properly integrated.</p> <p>[UCIOA (1994) added:</p> <p style="padding-left: 40px;">For example, subsection (a) uses the words “the award must include compensation to the unit owner.” This language, a change first made in MRECA, suggests that, under other state law, compensation for other interests may be required in an appropriate case and the section does not limit that result.]</p> <p>2. When a unit is taken or partially taken by eminent domain, this section provides for a recalculation of the allocated interests of all units.</p> <p style="text-align: center;">EXAMPLE 1:</p> <p>Suppose that all allocated interests in a 9-unit condominium were originally allocated to the units on the basis of size. If eight of the units are equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.</p> <p>Suppose that one of the smaller units is taken out of the condominium by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have 22 2/9% while each of the small units would have 11 1/9%.</p> <p style="text-align: center;">EXAMPLE 2:</p> <p>Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) provides that the allocated interests would automatically shift to 5 5/19% for the partially taken unit, 21 1/19% for the largest unit, and 10 10/19% for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does not mean that its allocated interests are only half as large as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken unit's reallocated interests are 5 5/19% rather than 5%.</p> <p>3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a condominium unit as a part of the condominium or must take the unit and have the unit excluded from the condominium.</p> <p>Subsection (a) merely requires that the taking body compensate the unit owner for all of his unit and its interest in the common element, whether or not the common element interest is acquired. The Act also requires that the allocated interests are automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular</p>	<p>I am not aware of any problems that need fixing with regard to eminent domain proceedings for condominium property. Alternatively, we could just include this section and see if anyone raises any concerns.]</p>

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<p>taking (for example, by allocating the common element interest, votes, and common expense liability to the government) is an unanswered question.</p> <p>4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interest to be reallocated. Subsection (b) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. This right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.</p> <p style="text-align: center;">EXAMPLE 1:</p> <p>Suppose, in a commercial condominium consisting of four units, each unit consists of a factory and parking lot, and that the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit #1 are equal, and that 1/2 the parking lot is taken by eminent domain, leaving the factory and 1/2 the lot intact. Under the formula set out in the statute, unit #1's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.</p> <p style="text-align: center;">EXAMPLE 2:</p> <p>Suppose that a condominium contains ten units, each of which is allocated at 1/10 undivided interest in the common elements. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the common element interest of all the units will be reallocated so that the partially-taken unit has a 1/19 undivided interest in the common elements and the remaining 9 units each a 2/19 undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to 1/2 of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining 9 units each having a 10% undivided interest.</p> <p>5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and reallocation of interests, votes, and liabilities.</p> <p>6. Subsection (c) provides that, if part of the common elements is acquired, the award is paid to the association. This would not normally be the rule in the absence of such a provision. [Comment 6 is left out of UCIOA (1994).]</p>	
<p>§ 1-108. Supplemental General Principles of Law Applicable. The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.</p>	
UCA (1980) Comment [UCIOA (1994) Comment essentially same]	Condominium Recodification Attorney's Comment

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<p>1. This Act displaces existing law relating to condominiums and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely an illustration: no listing could be exhaustive.</p> <p>2. The bracketed language concerning unincorporated associations should be deleted in the event the enacting state requires incorporation of a unit owners' association. See the parallel language contained in Section 3-101.</p>	<p>Members of the Real Property & Financial Services Section of the Hawaii State Bar Association (HSBA) and condominium management law attorneys have expressed concerns regarding the Hawaii Nonprofit Corporations Act passed by the 2001 Legislature (HB 599, HD1, SD1, CD1; enacted as Act 105, SLH 2001, effective date 7/1/2002). While the extent of the Act's application to nonprofit corporation condominium associations is unclear, many provisions would be disastrous if applied to common interest ownership communities.</p> <p>For example, § -88 of the new law allows members of nonprofit corporations to resign at any time. This is clearly impossible for common interest ownership communities, where membership in the community association (with all of its rights and obligations) is mandatory and runs with the land. As defined in §1.8 of the <i>Restatement of the Law, Third, Property (Servitudes)</i>:</p> <p style="padding-left: 40px;">A "common-interest community" is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal</p> <p style="padding-left: 40px;">(1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or</p> <p style="padding-left: 40px;">(2) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.</p> <p>Other sections of the new nonprofit corporation law require notice that may be different from existing provisions in declarations and bylaws. Many other provisions would be inappropriate for nonprofit corporation condominium (and community) associations, but § -321 (a transition provision) can be read to mandate application of the new law to all nonprofit corporations in existence on the effective date of the Act.</p> <p>Recodification Draft #1, §1-108 makes it clear that supplemental general principles of law (such as the nonprofit corporation law) apply only to the extent they are consistent with the condominium law.</p>
<p>§ 1-109. Construction Against Implicit Repeal. This chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.</p>	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment essentially same] This section derives from Section 1-104 of the Uniform Commercial Code.</p>	
<p>§ 1-110. Uniformity of Application and Construction. This chapter shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among States enacting it.</p>	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p>	

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<p>This Act should be construed in accordance with its underlying purpose of making uniform the law with respect to condominiums, as well as the purposes stated in the Prefatory Note of simplifying, clarifying, and modernizing the law of condominiums, promoting the interstate flow of funds to condominiums, and protecting consumers, purchasers and borrowers against condominium practices which may cause unreasonable risk of loss to them. Accordingly, the text of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.</p>	
<p>§ 1-111. Severability. If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provisions or applications, and to this end the provisions of this chapter are severable.</p>	
<p>§ 1-112. Unconscionable Agreement or Term of Contract.</p>	
<p>(a) The court, upon finding as a matter of law that a contract or contract clause was unconscionable at the time the contract was made, may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause in order to avoid an unconscionable result.</p>	
<p>(b) Whenever it is claimed, or appears to the court, that a contract or any contract clause is or may be unconscionable, the parties, in order to aid the court in making the determination, must be afforded a reasonable opportunity to present evidence as to:</p>	
<p>(1) the commercial setting of the negotiations;</p>	
<p>(2) whether a party has knowingly taken advantage of the inability of the other party reasonably to protect his interests by reason of physical or mental infirmity, illiteracy, or inability to understand the language of the agreement or similar factors;</p>	
<p>(3) the effect and purpose of the contract or clause; and</p>	
<p>(4) if a sale, any gross disparity, at the time of contracting, between the amount charged for the real estate and the value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions. A disparity between the contract price and the value of the real estate measured by the price at which similar real estate was readily obtainable in similar transactions does not, of itself, render the contract unconscionable.</p>	
<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment same]</p> <p>This section is similar to Section 2-302 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act. The rationale and comments provided in those sections are equally applicable to this section.</p>	
<p>§ 1-113. Obligation of Good Faith. Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.</p>	

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<p style="text-align: center;">UCA (1980) Comment [UCIOA (1994) Comment essentially same]</p> <p>This section sets forth a basic principle running throughout this Act: in condominium transactions, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as used in this Act, means observance of two standards, “honesty in fact” and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.</p>	
§ 1-114. Remedies To Be Liberally Administered.	
(a) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special, or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law.	
(b) Any right or obligation declared by this chapter is enforceable by judicial proceeding.	
	<p>Condominium Recodification Attorney’s Comment</p> <p><i>See</i>, discussion of “Public Policy Considerations” above regarding the proposition that “Laws (and the courts) must support the fair and efficient functioning of condominium communities.”</p>
§ 1-115. Adjustment of Dollar Amounts.] (Reserved)	
	<p>Condominium Recodification Attorney’s Comment</p> <p>Section 1-115, UCIOA (1994), relates to an exemption for “Limited Expense Liability Planned Communities” (i.e., annual average common expense liability of all units not exceeding \$300) which are not subject to any development rights. I will seek advice on whether a similar exemption for Hawaii condominiums is warranted. If so, we will reincorporate this section.</p> <p>Reserving the section number will make it easier to incorporate the provisions of UCIOA in the future, should the Legislature so decide.</p>
PART 2. APPLICABILITY	
<p>§ 1-201. Applicability to New Condominiums. Except as provided in Section 1-203, this chapter applies to all condominiums created within this State after the effective date of this chapter. The provisions of chapter 514A do not apply to condominiums created after the effective date of this chapter. Amendments to this chapter apply to all condominiums created after the effective date of this chapter or subjected to this chapter, regardless of when the amendment is adopted in this State.</p>	<p>[§514A-1.5] Applicability of chapter. This chapter shall not apply to any condominium project or association of apartment owners created prior to May 29, 1963, pursuant to Act 180, Session Laws of Hawaii 1961, unless all of the owners and holders of liens affecting any of the apartments in the project have expressly declared that this chapter shall apply to the property, and shall govern the rights, interests, and remedies of all persons owning interests in or liens upon the property; provided that any condominium project or association of apartment owners created prior to May 29, 1963, pursuant to Act 180, Session Laws of Hawaii 1961, having seven or more apartments shall register with the commission and comply with the requirements pursuant to sections 514A-95.1 and 514A-132,</p>

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	<p>except for the fidelity bond requirement. The express declaration shall be made through the execution and recordation of a declaration in form and content required to establish a condominium property regime pursuant to this chapter.</p>
<p style="text-align: center;">UCA (1980) Comment (relevant portions)</p> <p>1. The question of the extent to which a state statute should apply to particular condominiums involves two problems: first, the extent to which the statute should require or permit different results for condominiums created before and after the statute becomes effective; and second, whether the statute should impose any or all of its substantive requirements on condominiums located outside the state.</p> <p>Two conflicting policies are proposed when considering the applicability of this Act to “old” and “new” condominiums located in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of condominiums created under old law, and because of the requirements placed on declarants and unit owners’ associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act.</p> <p>On the other hand, to make all provisions of this Act automatically apply to “old” condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.</p> <p>Accordingly, the philosophy of this section reflects a desire to maximize the uniform applicability of the Act to all condominiums in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to pre-existing condominiums.</p> <p>2. In carrying out this philosophy with respect to “new” condominiums, the Act applies to all condominiums “created” within the state after the Act’s effective date. This is the effect of the first sentence of subsection (a). The first sentence of subsection (b) makes clear that the provisions of old statutes expressly applicable to condominiums do not apply to condominiums created after the effective date of this Act.</p> <p>“Creation” of a condominium pursuant to this Act occurs upon recordation of a declaration pursuant to Section 2-101; however, the definition of “condominium” in Section 1-103(7) contemplates that <i>de facto</i> condominiums may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a condominium. Any real estate project which includes individually owned units and common elements owned by the unit owners as tenants in common is therefore subject to the Act if created within the state after the Act’s effective date. No intent to subject the condominium to the Act is required, and an express intention to the contrary would be invalid and ineffective.</p>	

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<p>5. In considering the permissible amendments under subsection (b), it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of the condominium created under “old” law, even if permissible under this Act, must nevertheless be adopted “in conformity with the procedures and requirements specified” by the original condominium instruments, and in compliance with the old law.</p> <p style="text-align: center;">EXAMPLE:</p> <p>Suppose an “old” condominium declaration and “old” state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners’ approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and “old” law. Once approved, however, only 67% would be required for subsequent amendments.</p> <p>6. The last sentence of subsection (b) addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act’s limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.</p> <p style="text-align: center;">EXAMPLE:</p> <p>Assume that, pursuant to the provisions of the “old” law, the declarant may exercise control over the association for only 3 years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the “old” law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to subsection (b) to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for 2 additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control period.</p> <p>Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for 2 years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the “old” law permitting such a restriction.</p> <p>7. The reference in subsection (b) to “all present statutes expressly applicable to condominiums or horizontal property regimes” is intended to distinguish between a state’s condominium enabling statutes and those statutes which apply not only to condominiums</p>	

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<p>but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the state's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.</p> <p>8. In place of the words "declaration, bylaws, and plats and plans", each state should insert the appropriate terminology for those documents under the present state law, e.g., "master deed, rules and regulations", etc.</p> <p>9. This section does not permit a pre-existing condominium to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing condominium may elect to terminate the condominium under pre-existing law and create a new condominium which would be subject to all the provisions of this Act.</p> <p>10. Subsection (c) reflects the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out-of-state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information relating to condominiums located in other states but sold in that state. However, where sales contracts are executed wholly outside the enacting state and relate to condominiums located outside the state, it seems more appropriate for the courts of the jurisdiction(s) in which the condominium is located and where the transaction occurs to have jurisdiction over the transaction.</p>	
	<p>§514A-2 Chapter not exclusive. This chapter is in addition and supplemental to all other provisions of the Revised Statutes; provided that this chapter shall not change the substantive law relating to land court property, and provided further that if this chapter conflicts with chapters 501 and 502, chapters 501 and 502 shall prevail.</p>
	<p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <ol style="list-style-type: none"> 1. Recommend deletion of HRS §514A-2. 2. See discussion under §1-108 of Recodification Draft #1, regarding the potentially disastrous effects of the 2001 Nonprofit Corporations Act (HB 599, HD1, SD1, CD1; enacted as Act 105, SLH 2001) if it were to be applied to nonprofit corporation condominium associations (or any other common interest ownership community associations). HRS §514A-2 would make Hawaii's condominium law "supplemental" to the new nonprofit corporations law.
<p>§ 1-202. Exception for Small Cooperatives.] (Reserved)</p>	
	<p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>For the first draft of our recodification, I have kept the UCIOA/UCA section numbering. This makes it easier to follow internal cross-references. We will renumber the sections appropriately in our final draft.</p> <p>Reserving the section number will make it easier to incorporate the provisions of UCIOA in the future, should the Legislature so decide.</p>
<p>§ 1-203. Exception for Small Condominiums. If a condominium contains no</p>	

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Hawaii Condominium Law Recodification Draft #1 [Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]	Hawaii's Present Condominium Law Chapter 514A, Hawaii Revised Statutes (HRS) (Compare with Proposed Recodified Condominium Law in left-hand column)
more than [42] 5 units and is not subject to any development rights, it is subject only to Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), and 1-107 (Eminent Domain) unless the declaration provides that the entire chapter is applicable.	
<p style="text-align: center;">UCIOA (1994) Comment (relevant portion; paraphrased to apply strictly to condominiums)</p> <p>1. Section 1-201 provides generally that the Act applies to all condominiums “created” within the State after the Act’s effective date. Section 1-203, however, makes only a few of the Act’s sections applicable to condominiums containing [42] 5 or fewer units with no development rights – unless the condominium’s declaration makes the entire Act applicable.</p>	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>UCIOA and UCA exempt small (no more than 12 units) cooperatives and planned communities (but not condominiums) from their provisions.</p> <p>HRS Chapter 514A applies to all new condominiums. [See, HRS §514A-1.5 (Applicability of chapter).] However, the fidelity bond requirements of HRS §514A-95.1 (Association of apartment owners registration; fidelity bond) apply only to those condominiums having six or more units.</p> <p>For discussion: In keeping with our desire to lessen the regulatory burden on Hawaii’s people, it would seem to be appropriate to exempt smaller condominium projects from most of the requirements of our recodified condominium law (unless they choose to “opt-in” to its provisions). Consistent with HRS §514A-95.1, I have chosen “5” as the maximum number of units in a “small condominium” eligible for exception. [See Recodification Draft #1, §1-203 (Exception for Small Condominiums).]</p>
<p>§ 1-204. Applicability to Pre-Existing Condominiums. Except as provided in Section 1-205 (Same; Exception for Small Pre-Existing Condominiums), Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 1-107 (Eminent Domain), 2-103 (Construction and Validity of Declaration and Bylaws), 2-104 (Description of Units), 2-121 (Merger or Consolidation of Common Interest Communities), 3-102(a)(1) through (6) and (11) through (16) (Powers of Unit Owners’ Association), 3-111 (Tort and Contract Liability), 3-116 (Lien for Assessments), 3-118 (Association Records), 4-109 (Resales of Units), and 4-117 (Effect of Violation on Rights of Action; Attorney’s Fees), and Section 1-103 (Definitions) to the extent necessary in construing any of those sections, apply to all condominiums created in this State before the effective date of this chapter; but those sections apply only with respect to events and circumstances occurring after the effective date of this chapter and do not invalidate existing provisions of the declaration, bylaws, or plats or plans of those condominiums.</p> <p><u>For the purposes of this chapter, the terms “condominium property regime” and “horizontal property regime” shall be deemed to correspond to the term “condominium”; the term “apartment” shall be deemed to correspond to the term “unit”; the term “apartment owner” shall be deemed to correspond to the term “unit owner”; the term “association of apartment owners” shall be deemed to correspond to the term “unit owners’ association”; and the term “developer” shall be deemed to correspond to the term “declarant”.</u></p>	
<p style="text-align: center;">UCIOA (1994) Comment (paraphrased to apply strictly to condominiums) [UCA (1980) Comment essentially same (§1-102 Comments 3 and 4)]</p> <p>1. This section states the general rules of applicability of the Act to condominiums</p>	<p style="text-align: center;">Condominium Recodification Attorney’s Comment</p> <p>The second paragraph of §1-204 is added to aid interpretation of documents for pre-existing condominiums. It is similar to §55-79.40 (Application and construction of chapter)</p>

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Hawaii Condominium Law Recodification Draft #1 [Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]	Hawaii's Present Condominium Law Chapter 514A, Hawaii Revised Statutes (HRS) (Compare with Proposed Recodified Condominium Law in left-hand column)
<p>which were created before the effective date of this Act.</p> <p>2. The Act adopts a novel three-step approach to condominiums created before the effective date of the Act. First, certain provisions of the Act described in Section 1-204 automatically apply to “old” condominiums, but only prospectively, and only in a manner which does not invalidate provisions of declarations and bylaws valid under “old” law. Second, “old” law remains applicable to previously created condominiums where not automatically displaced by the Act. Third, under Section 1-206, owners of “old” condominiums may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by “old” law, so long as (a) the amendment is adopted in accordance with the procedure required by “old” law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act. In addition, as in the case of “new” projects, special exceptions are provided, in Section 1-205, for “small” projects.</p> <p>3. Elaboration of the principles described in the last Comment may be helpful.</p> <p>First, Section 1-204 provides that the enumerated provisions automatically apply to condominiums created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of condominiums created under early condominium statutes, or under common law. To avoid possible constitutional challenges, these provisions, as applied to “old” condominiums, apply only to “events and circumstances occurring after the effective date of this Act;” moreover, the provisions of this Act are subject to the provisions of the instruments creating the common interest community, and this Act does not invalidate those instruments.</p> <p>Example 1: Under Section 1-204, Section 4-109 (Resale of Units) automatically applies to “old” condominiums. Accordingly, unit owners in condominiums established prior to adoption of the Act would be obligated after the Act’s effective date to provide resale certificates to future purchasers of units. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.</p> <p>Example 2: Under Section 1-204, Section 3-118 (Association Records) automatically applies to “old” condominiums. As a result, a unit owners’ association of an “old” common interest community must maintain certain financial records, and all the records of the association “shall be made reasonably available for examination by any unit owner and his authorized agents,” even if the “old” law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.</p> <p>Second, the prior laws of the State relating to condominiums are not repealed by this Act because those laws will still apply to previously-created projects, except when displaced. Some States at one point made certain provisions of their condominium statutes</p>	<p>of the Virginia Condominium Act.</p> <p>For discussion: There may be more corresponding terms that should be defined for the transition from HRS Chapter 514A and its predecessor statutes to the recodification.</p>

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<p>automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.</p> <p>Third, the Act seeks to alleviate any undesirable consequences of “old” law, by a limited “opt-in” provision, as provided in Section 1-206. More specifically, Section 1-206 permits the owners of a pre-existing common interest community to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the project instruments as specified in those instruments and in the pre-existing statute or common law.</p> <p>Example 3: Under most “first generation” condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-112 does not automatically apply to “old” condominiums, if the unit owners of a pre-existing community amend their declaration to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.</p>	
<p>§ 1-205. Same; Exception for Small Pre-Existing Condominiums. If a condominium created within this State before the effective date of this chapter contains no more than [42] 5 units and is not subject to any development rights, it is subject only to Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), and 1-107 (Eminent Domain) unless the declaration is amended in conformity with applicable law and with the procedures and requirements of the declaration to take advantage of the provisions of Section 1-206, in which case all the sections enumerated in Section 1-204 apply to that condominium.</p>	
<p>UCIOA (1994) Comment (paraphrased to apply strictly to condominiums)</p> <p>Recognizing that pre-Act condominiums of fewer than [42] 5 units ought not to be subject to more rigorous requirements than small condominiums created under the Act, this section provides that only the same sections applicable to small condominiums will apply to small pre-Act condominiums, unless the declaration of a small pre-Act condominium is amended to take advantage of the amendment provisions of Section 1-206. If such an amendment is made pursuant to Section 1-206, the small pre-Act condominium would be subject to all of the provisions applicable to large pre-Act condominiums, and further elections under Section 1-206 would then be possible.</p>	
<p>§ 1-206. Amendments to Governing Instruments.</p>	
<p>(a) The declaration, bylaws, or plats and plans of any condominium created before the effective date of this chapter may be amended to achieve any result permitted by this chapter, regardless of what applicable law provided before this chapter was adopted.</p>	
<p>(b) An amendment to the declaration, bylaws, or plats and plans authorized by this section must be adopted in conformity with any procedures and requirements for amending the instruments specified by those instruments or, if there are none, in</p>	

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<p style="text-align: center;"><u>Hawaii Condominium Law Recodification Draft #1</u> [Based on Comparison of UCIOA (1994), UCA (1980), and HRS Chapter 514A; organization follows Uniform Laws]</p>	<p style="text-align: center;"><u>Hawaii's Present Condominium Law</u> Chapter 514A, Hawaii Revised Statutes (HRS) <i>(Compare with Proposed Recodified Condominium Law in left-hand column)</i></p>
<p>conformity with the amendment procedures of this chapter. If an amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.</p>	
<p style="text-align: center;">UCIOA (1994) Comment (paraphrased to apply strictly to condominiums)</p> <p>1. This section tracks closely the provisions of the Uniform Planned Community Act and the Model Real Estate Cooperative Act and provides a straightforward mechanism by which the documents of pre-Act condominiums may be amended to take advantage of desirable provisions of the Act. <i>See</i> the Comment to Section 1-205.</p> <p>2. In considering the permissible amendments under Section 1-206, it is important to distinguish between the law, governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of a condominium created under “old” law, even if permissible under this Act, must nevertheless be adopted “in conformity with the procedures and requirements specified” by the original instruments, and in compliance with the old law.</p> <p>Example: Suppose an “old” condominium declaration and “old” state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners’ approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and “old” law. Once approved, however, only 67% would be required for subsequent amendments.</p> <p>3. This section does not address the issue of contract rights of unit purchasers which may be affected by amendments under the new Act. Whether an amendment is effective against unit owners who purchased their units prior to the effective date of the Act and prior, therefore, to the amendment in question is controlled by the contract and constitutional law of the State.</p> <p>Example: Assume “old” state law required that 5% of the purchase price of each unit sold by a declarant must be held in escrow until all the common elements in the condominium are completed. Assume further that a declarant created a condominium under “old” law, sold 10 units to purchasers prior to the effective date of the Act, and now is holding 5% of the purchase prices for those 10 units in escrow, since the common elements are not yet completed. Immediately following the effective date of the Act, the declarant amends the declaration pursuant to Section 1-206 to provide that no escrow of any portion of the purchase price is required. The amendment is approved by the requisite votes – all held by declarant – but not by any of the 10 unit owners. On its face, the amendment would appear to comply with the provisions of this Act, since it accomplishes a result – no escrow – which is permitted by this Act and was not permitted by “old” law. Whether that amendment is effective, however, to either permit the declarant to terminate the escrow with respect to the 10 unit owners, or even to terminate the escrow scheme with respect to future unit owners (since the original 10 owners may reasonably have expected that 5% of all purchase prices would be held in escrow) is not addressed by this Act. That</p>	

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<p>determination must be based on the contractual and constitutional rights of the original purchasers.</p> <p>4. The last sentence of Section 1-206 addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.</p> <p>Example: Assume that, pursuant to the provisions of "old" condominium law, a declarant may exercise control over the association for only three years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to Section 1-206 to extend the period of declarant control for five years from the date of creation. The amendment would effectively extend control for two additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control.</p> <p>Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for two years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.</p> <p>5. In place of the words "declaration, bylaws, and plats and plans," at the end of this section, each State should insert the appropriate terminology for those documents under the present state law, <i>e.g.</i>, "master deed, rules and regulations," etc.</p> <p>6. This section does not permit a pre-existing common interest community to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing common interest community may elect to terminate the community under pre-existing law and create a new community which would be subject to all the provisions of this Act.</p> <p>7. The 1994 changes are not intended to alter the substantive rules contained in the original section. However, in light of experience in several state legislatures, these changes should make clearer the intent of the original section.</p>	
§ 1-207. Applicability to Nonresidential and Mixed-Use Condominiums.	
(a) "Nonresidential condominium" means a condominium in which all units are restricted exclusively to nonresidential purposes. Except as provided in subsection (e), this section applies only to nonresidential condominiums.	
(b) A nonresidential condominium is not subject to this chapter unless the	

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declaration otherwise provides.	
(c) The declaration of a nonresidential condominium may provide that the entire chapter applies to the condominium or that only Sections 1-105 (Separate Titles and Taxation), 1-106 (Applicability of Local Ordinances, Regulations and Building Codes), and 1-107 (Eminent Domain) apply.	
(d) If the entire chapter applies to a nonresidential condominium, the declaration may also require, subject to Section 1-112 (Unconscionable Agreement or Term of Contract), that:	
(1) notwithstanding Section 3-105 (Termination of Contracts and Leases of Declarant), any management contract, employment contract, lease of recreational or parking areas or facilities, and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and	
(2) notwithstanding Section 1-104 (Variation by Agreement), purchasers of units must execute proxies, powers of attorney, or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.	
(e) A condominium that contains units restricted exclusively to nonresidential purposes and other units that may be used for residential purposes is not subject to this chapter unless the units that may be used for residential purposes would comprise a condominium in the absence of the nonresidential units or the declaration provides that this chapter applies as provided in subsection (c) or (d).	
UCIOA (1994) Comment	
<p>1. The 1994 amendments to this section permit all nonresidential common interest communities to “opt out” of the Act; the original section was limited to planned communities. <i>(Remainder of this comment paraphrased to apply strictly to condominiums.)</i></p> <p>However, except for mixed use projects, the revised section continues to be restricted to condominiums which contain only nonresidential units. The term “residential purposes” is defined and discussed in detail in Section 1-103(27) and its Comments.</p> <p>In addition, the revised section offers the declarant of a nonresidential condominium significantly more flexibility than was allowed in the original section. This change responds to those concerns which commentators have identified as important to developers of commercial condominiums.</p> <p>The default rule is that the Act does not apply at all to a nonresidential condominium. However, the declarant may want the Act to apply in at least some circumstances. Therefore, subsection (c) provides a mechanism by which the declarant may elect simply to have the Act’s rules on eminent domain, separate taxation, and applicability of local ordinances apply to the project. These three sections all establish default rules which are likely to be desirable from both the declarant’s and future owners’ perspectives.</p> <p>2. Finally, a declarant may find the full range of the Act to be a desirable outcome, particularly in light of those many sections which permit waiver or variation by agreement.</p>	

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<p>Those sections already permitting waiver are detailed in the Official Comments to Section 1-104.</p> <p>However, even in that case, the revised section provides two additional major enhancements to flexibility.</p> <p>First, the section contemplates that the declaration may provide that the entire Act applies but that the declarant may require that the association must continue certain contracts and leases in place after turnover, even though such contracts would otherwise be subject to cancellation by the Association under Section 3-105.</p> <p>Second, the section allows the declarant to use proxies, powers of attorney, or other devices to accomplish other results which would be prohibited in the case of residential condominiums. The sole limitation in both instances is the rule of unconscionability in Section 1-112.</p> <p>3. Subsection (e) addresses the Act's applicability to mixed use projects. The default rule is nonapplicability unless the definition of a condominium would be met "in the absence of the nonresidential units." Thus, if the "residential" units and their obligations under the declaration did not satisfy the definitional threshold in Section 1-103(7) (<i>UCIOA's definition of "common interest community"</i>) – basically, a payment obligation on the unit extending by covenant to "non-unit" expenses – the Act would not apply.</p>	
<p>§ 1-208. Applicability to Out-of-State Condominiums. This chapter does not apply to condominiums or units located outside this State, but the public offering statement provisions (Sections 4-102 through 4-108) apply to all contracts for the disposition thereof signed in this State by any party unless exempt under Section 4-101(b) and the commission regulation provisions under Article 5 apply to any offering thereof in this State.</p>	
<p>UCIOA (1994) Comment (paraphrased to apply strictly to condominiums)</p> <p>This section reflects the fact that there are practical as well as constitutional limits regarding the extent to which a State should or may extend its jurisdiction to out of state transactions. A State may, of course, properly exercise its authority to protect its citizens from false or misleading information regarding common interest communities located in other States but sold in that State. However, where sales contracts are executed wholly outside the enacting State and relate to condominiums located outside the State, it seems more appropriate for the courts of the jurisdiction(s) in which the condominium is located and where the transaction occurs to have jurisdiction over the transaction.</p>	
	<p style="text-align: center;">Condominium Recodification Attorney's Comment</p> <p>HRS §514A-7 (Condominium specialist; appointment; duties) has been moved from Article 1 (General Provisions) to Article 5 (Administration and Registration of Condominiums), §5-101.5.</p>