

Part IV. Protection of Condominium Purchasers

Real Estate Commission's Prefatory Comment to Part IV

Guiding Principles:

1. Adequate disclosure to prospective condominium purchasers is the foundation of Part IV.

As noted in the Uniform Condominium Act (1980) and Uniform Common Interest Ownership Act (1994), “[t]he best ‘consumer protection’ that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing.” (*See*, Comment to UCA/UCIOA §4-103.)

2. “Adequate disclosure” to prospective condominium purchasers involves more than disclosures involving the sale of real property in non-common interest ownership community projects.

Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. As noted in the Uniform Condominium Act (1980) and Uniform Common Interest Ownership Act (1994), “[f]or this reason, the Act, adopting the approach of many so-called ‘second generation’ condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law.” (*See*, Comment to UCA/UCIOA §4-103.)

3. Risk to purchasers’ funds should be correlated with the rights and obligations of developers.
4. The recodified condominium law should not result in an increase in the cost of government.

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§ ___: 4-1. Applicability; Exceptions. (a) This part applies to all units subject to this chapter, except as provided in subsection (b).

(b) No public report is required in the case of:

- (1) A gratuitous disposition of a unit;
- (2) A disposition pursuant to court order;
- (3) A disposition by a government or governmental agency;
- (4) A disposition by foreclosure or deed in lieu of foreclosure; or

(5) The sale of units in bulk, as defined in subsection ___: 3-1(b); provided that the requirements of this part shall apply to any sale of units to the public following the sale of units in bulk.

Real Estate Commission's Comment

1. UCA/UCIOA §4-101, modified, is the source of this section. The Commission decided not to incorporate UCA/UCIOA's “resale certificate” provisions as two standard Hawaii Association of Realtor disclosure forms generally used in connection with the resale of condominium units (i.e., the RR105C, which associations complete, and the seller disclosure form)

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already adequately serve that purpose.

2. Paragraph (b)(4) addresses the problem, raised by various stakeholders, of lenders being considered “successor developers” in foreclosure/deed in lieu of foreclosure situations.

§ ___: 4-2. Sale of Units. Except as provided in section ___: 4-5, no sale or offer of sale of units in a project by a developer shall be made prior to the registration of the project by the developer with the commission, the issuance of an effective date for the project’s public report by the commission, and except as provided by law with respect to timeshare units, the delivery of the public report to prospective purchasers. Notwithstanding any other provision to the contrary, where a time share project is duly registered under chapter 514E and a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser, the public report need not be delivered to the purchaser or prospective purchaser.

Real Estate Commission’s Comment

1. This is a new section based on some of the concepts contained in HRS §§514A-31 and 514A-62.

§ ___: 4-3. Public Report. (a) A public report must contain:

(1) The name and address of the project, and the name, address, telephone number and electronic mail address (if any) of the developer or the developer’s agent;

(2) A statement of the deadline, pursuant to section ___: 4-9, for completion of construction or, in the case of a conversion, for the completion of any repairs required to comply with section ___: 1-5, and the remedies available to the purchaser (including, but not limited to, cancellation of the sales contract) if the completion of construction or repairs does not occur on or before the completion deadline;

(3) A breakdown of the annual maintenance fees and the monthly estimated cost for each unit, certified to have been based on generally accepted accounting principles, and a statement regarding when a purchaser shall become obligated to start paying such fees pursuant to section ___: 2-11(b);

(4) A description of all warranties for the individual units and the common elements, including the date of initiation and expiration of any such warranties, or a statement that no warranties exist;

(5) A summary of the permitted uses of the units and, if applicable, the number of units planned to be devoted to a particular use;

(6) A description of any development rights reserved to the developer or others;

(7) A declaration, subject to the penalties set forth in section ___: 3-19(b), that the project is in compliance with all county zoning and building ordinances and codes, and all other county permitting requirements applicable to the project, pursuant to sections ___: 1-5 and ___: 2-2(a)(13); and

(8) Any other facts, documents, or information that would have a material impact on the use or value of a unit or any appurtenant limited common elements or amenities of the project available for an owner’s use, or that may be required by the commission.

(b) A developer shall promptly amend the public report to report any pertinent change in the information required by this section.

Real Estate Commission’s Comment

1. HRS § 514A-61, substantially modified, with elements of HRS §§514A-36 and 514A-40 are the sources of this section.

2. Under the recodified condominium law, developers can “test the market” without a public report as there is minimal risk of consumer harm when no money changes hands and no binding contracts are made. *See*, § ___: 4-5.

3. Consistent with the UCA, UCIOA, and the laws of many other jurisdictions, a single public report (“public offering statement” in the UCA/UCIOA) is required in the recodified condominium law.

4. HRS §§514A-40(b) and 514A-61(b) use the undefined term “declarant.” “Developer” is used in the recodification instead of “declarant.”

5. HRS §§514A-40(b)(2) and 514A-61(b)(1) incorrectly use the term “registered” architect or engineer. The correct term is “licensed.” *See*, HRS Chapter 464 (Professional Engineers, Architects, Surveyors and Landscape Architects).

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§ ____: 4-4. Public Report; Special Types of Condominiums. (a) *Projects containing converted structures.* In addition to the information required by section ____: 4-3, the public report for a project containing any existing structures being converted to condominium status must contain:

(1) Regarding units that may be occupied for residential use and have been in existence for five years or more:

(A) A statement by the developer, based upon a report prepared by a Hawaii licensed architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the units;

(B) A statement by the developer of the expected useful life of each item reported on in subparagraph (1)(A) or a statement that no representations are made in that regard; and

(C) A list of any outstanding notices of uncured violations of building code or other county regulations, together with the estimated cost of curing these violations.

(2) Regarding all projects containing converted structures, a verified statement signed by an appropriate county official that:

(A) The structures are in compliance with all zoning and building ordinances and codes applicable to the project at the time it was built, and specifying, if applicable, (i) any variances or other permits that have been granted to achieve compliance, (ii) whether the project contains any legal nonconforming uses or structures as a result of the adoption or amendment of any ordinances or codes, and (iii) any violations of current zoning or building ordinances or codes and the conditions required to bring the structure into compliance; or

(B) Based on the available information, the county official cannot make a determination with respect to the matters described in subparagraph (2)(A).

(3) Such other disclosures and information that the commission may require.

(b) *Projects on agricultural land.* In addition to the information required by section ____: 4-3, the public report for a project on agricultural land must disclose:

(1) Whether the structures and uses anticipated by the developer's promotional plan for the project are in compliance with all applicable state and county land use laws;

(2) Whether the structures and uses anticipated by the developer's promotional plan for the project are in compliance with all applicable county real property tax laws, and the penalties for noncompliance; and

(3) Such other disclosures and information that the commission may require.

(c) *Projects containing assisted living facility units.* In addition to the information required by section ____: 4-3, the public report for a project containing any assisted living facility units regulated or to be regulated pursuant to rules adopted under chapter 321-11(10) must disclose:

(1) Any licensing requirements and the impact of such requirements on the costs, operations, management, and governance of the project;

(2) The nature and scope of services to be provided;

(3) Additional costs, directly attributable to such services, to be included in the association's common expenses;

(4) The duration of the provision of such services;

(5) Any other information the developer deems appropriate to describe the possible impacts on the project resulting from the provision of such services; and

(6) Such other disclosures and information that the commission may require.

Real Estate Commission's Comment

1. HRS §514A-61(b), modified, and elements of HRS §514A-40 are the basic sources of subsection (a), regarding condominium conversion projects. Since condominium conversions involve existing structures and a county might not otherwise have the opportunity to address land *use* matters in these situations, it is appropriate to require county certification of compliance with its land *use* laws when converting existing structures to the condominium form of *ownership*.

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2. Subsections (b), regarding projects on agricultural land, and (c), regarding projects containing assisted living facility units, are new.

3. Consistent with the condominium law’s consumer protection purpose, subsection (c) requires additional disclosures for projects containing assisted living facility units.

One of the new century’s major challenges for condominium associations nationwide is the aging of populations within condominium units and the problems that accompany diminishing health and capacity. Recent controversies in a condominium with assisted living facility services helped to direct the Commission’s attention to this issue.¹ More broadly, however, in addition to assisted living facilities in condominiums, a growing number of senior citizens are choosing to remain in their homes and familiar surroundings rather than moving to traditional retirement destinations. This trend is creating what has become known as “Naturally Occurring Retirement Communities” (NORCs).² Regardless of whether a condominium is an assisted living facility or NORC, “self-governance” may not truly work for aged and infirm condominium owners. Some such matters may be addressed in Hawaii’s condominium law, while others may be better handled in the governing documents of condominiums. More questions in this area are sure to arise in the near future.

[See also, Act 185 (SLH, 2003), which directs the State Department of Health and the Real Estate Commission to conduct a study and report to the Legislature on the impact and feasibility of allowing condominium and cooperative housing corporation projects to become licensed as assisted living facilities to provide such services for its residents. § ___: 5-30 (Aging In Place, Limitation on Liability) was added to the recodification at the request of the Act 185 (SLH, 2003) working group.]

§ ___: 4-5. Pre-registration Solicitation. (a) Prior to the registration of the project by the developer with the commission, the issuance of an effective date for the project’s public report by the commission, and the delivery of the public report to prospective purchasers, and subject to the limitations set forth in subsection (b), the developer may solicit prospective purchasers and enter into non-binding pre-registration agreements with such prospective purchasers with respect to units in the project. As used in this section, “solicit” means to advertise, to induce or to attempt in whatever manner to encourage a person to acquire a unit.

(b) Limitations:

(1) Prior to registration of the project with the commission and the issuance of an effective date for the project’s public report, the developer shall not collect any moneys from prospective purchasers or anyone on behalf of prospective purchasers, whether or not such moneys are to be placed in an escrow account, or whether or not such moneys would be refundable at the request of the prospective purchaser.

(2) The developer shall not require nor request that a prospective purchaser execute any document other than a non-binding pre-registration agreement. The pre-registration agreement may, but need not, specify the unit number of a unit in the project to be reserved and may, but need not, include a price for the unit. The pre-registration agreement shall not incorporate the terms and provisions of the sales contract for the unit and shall not, by its terms, become a sales contract. Notwithstanding anything contained in the pre-registration agreement to the contrary, the pre-registration agreement may be cancelled at any time by either the developer or the prospective purchaser by written notice to the other. The commission may prepare a form of pre-registration agreement for use pursuant to this section, and use of the commission-prepared form shall be deemed to satisfy the requirements of the pre-registration agreement as provided in this section.

Real Estate Commission’s Comment

1. This is a new section.

§ ___: 4-6. Requirements for Binding Sales Contracts; Purchaser’s Right to Cancel. (a) No sales contract for the purchase of a unit from a developer shall be binding on developer or prospective purchaser until:

(1) The developer has delivered to the prospective purchaser:

(A) A true copy of the public report, including all amendments, with an effective date issued by the commission;

¹ See, “Raising Cane – Complaints fly at condo for seniors,” Honolulu Star-Bulletin, Sunday, July 14, 2002. The article, by Rob Perez, details the problems of One Kalakaua, the condominium at the center of a number of disputes. (<http://starbulletin.com/2002/07/14/news/perez.html>)

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

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(B) A copy of the recorded declaration and bylaws creating the project, showing the document number or land court document number, or both, as applicable; and

(C) A notice of the prospective purchaser's thirty-day cancellation right on a form prescribed by the commission, which the prospective purchaser can use to exercise the right to cancel or waive the right to cancel; and

(2) The prospective purchaser has waived the right to cancel or is deemed to have waived the right to cancel.

(b) Purchasers have the right to cancel a sales contract at any time up to midnight of the thirtieth day after (i) the date that the purchaser signs the contract, and (ii) all of the items specified in paragraph (a)(1) have been delivered to the purchaser.

(c) The prospective purchaser may waive the right to cancel, or will be deemed to have waived the right to cancel, by:

(1) Checking the waiver box on the cancellation notice and delivering it to the developer;

(2) Doing nothing and letting the thirty-day cancellation period expire; or

(3) Closing the purchase of the unit before the cancellation period expires.

(d) The receipts, return receipts, or cancellation notices obtained under this section shall be kept on file in possession of the developer and shall be subject to inspection at any reasonable time by the commission or its staff or agents for a period of three years from the date the receipt or return receipt was obtained.

Real Estate Commission's Comment

1. This is a new section based on concepts contained in HRS §514A-62.

2. The purchaser's right to cancel is a one time right that is strictly tied to the statutory "cooling off" period.

3. Rather than set the purchaser's right to cancel document in statute, the recodification allows the Real Estate Commission to prescribe the form and content of the document (which must still, of course, be consistent with statutory requirements). This will allow the Commission to react more quickly in clarifying any ambiguities in the form.

4. Many small developers have objected to HRS §514A-62's 30-day right to cancel period as a "free 30-day option to purchase" ripe for abuse by speculators. In response to this concern (and consistent with the UCA, UCIOA, and the laws of many other jurisdictions) the right to cancel ("cooling off") period was reduced from 30 to 15 days in earlier drafts of the recodification. As a practical matter under HRS Chapter 514A, large developers have encouraged prospective purchasers to close early or to waive their right to cancel. Reducing the prospective purchaser's one-time "cooling off" right to cancel period to 15 days appeared to provide for adequate consumer protection without unduly burdening small developers. The Commission's advisory committee and Real Estate Branch staff, however, recommended keeping the right to cancel period at 30 days. Real Estate Branch staff stated that, "besides the public report, there are a number of exhibits attached that are voluminous to review." The "right to cancel" period of 30 days was kept in the final draft of the recodification.

§ __: 4-7. Rescission After Sales Contract Becomes Binding. (a) Purchasers shall have a thirty-day right to rescind a binding sales contract for the purchase of a unit from a developer if there is a material change in the project. This rescission right shall not apply, however, in the event of any additions, deletions, modifications and reservations including, without limitation, the merger or addition or phasing of a project, made pursuant to the terms of the declaration.

(b) Upon delivery to a purchaser of a description of the material change on a form prescribed by the commission, such purchaser may waive the purchaser's rescission right provided in subsection (a) by (i) checking the waiver box on the option to rescind sales contract instrument, signing it and delivering it to the seller; (ii) doing nothing and letting the thirty-day rescission period expire; or (iii) closing the purchase of the unit before the thirty-day rescission period expires.

(c) In order to be valid, a rescission form must be signed by all purchasers of the affected unit, and be postmarked no later than midnight of the day that is thirty calendar days after the date that purchaser(s) received the rescission form from the seller. In the event of a valid exercise of a purchaser's right of rescission pursuant to this section, the purchaser(s) shall be entitled to a prompt and full refund of any moneys paid.

(d) The rescission form obtained by the seller under this section shall be kept on file in possession of the seller and shall be subject to inspection at a reasonable time by the commission or its staff or agents, for a period of three years from the date of the receipt or return receipt was obtained.

(e) This section shall not preclude a purchaser from exercising any rescission rights pursuant to a contract for the sale

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of a unit or any applicable common law remedies.

Real Estate Commission's Comment

1. HRS §514A-63, modified, is the source of this section.
2. "Cancellation" under the "cooling off" period of §___: 4-6 differs from "rescission" under §___: 4-7 in that cancellation under §___: 4-6 can be for any reason, while rescission under §___: 4-7 must be based on a material change in circumstances that "directly, substantially, and adversely" affects the purchaser's use or value of the purchaser's unit or appurtenant limited common elements or the project amenities available to the purchaser.
3. As made clear by subsection (e), purchasers may still exercise all applicable common law remedies (including common law rescission rights).

§ ___: 4-8. Delivery. In this part, delivery shall be made by:

- (1) Personal delivery;
- (2) Delivery by registered or certified mail with adequate postage, to the recipient's address; delivery will be considered made three days after deposit in the mail or on any earlier date upon which the return receipt is signed;
- (3) Facsimile transmission, if the recipient has provided a fax number to the sender; delivery will be considered made upon sender's receipt of automatic confirmation of transmission; or
- (4) In any other way prescribed by the commission.

Real Estate Commission's Comment

1. This is a new section.

§ ___: 4-9. Sales Contracts Before Completion of Construction. If a sales contract for a unit is signed before the completion of construction or, in the case of a conversion, the completion of any repairs required to comply with section ___: 1-5, the sales contract shall contain an agreement of the developer that the completion of construction shall occur on or before a completion deadline, and the completion deadline shall be referenced in the public report. The completion deadline may be a specific date, or the expiration of a period of time after the sales contract becomes binding, and may include a right of the developer to extend the completion deadline for *force majeure* as defined in the sales contract. The sales contract shall provide that the purchaser may cancel the sales contract at any time after the specified completion deadline, if completion of construction does not occur on or before the completion deadline, as the same may have been extended. The sales contract may provide additional remedies to the purchaser if the actual completion of construction does not occur on or before the completion deadline as set forth in the contract.

Real Estate Commission's Comment

1. This is a new section.

§ ___: 4-10. Refunds Upon Cancellation or Termination. Upon any cancellation under section ___: 4-6 or ___: 4-9, the purchaser shall be entitled to a prompt and full refund of all moneys paid, less any escrow cancellation fee and other costs associated with the purchase, up to a maximum of \$250.

Real Estate Commission's Comment

1. This is a new section based on HRS §514A-62(c).

§ ___: 4-11. Escrow of Deposits. All moneys paid by purchasers shall be deposited in trust under a written escrow agreement with an escrow depository licensed pursuant to chapter 449. An escrow depository shall not disburse purchaser deposits to or on behalf of the developer prior to closing except:

- (1) As provided in sections ___: 4-12 and ___: 4-13;
- (2) As provided in the purchaser's sales contract in the event the sales contract is cancelled.

An escrow depository shall not disburse a purchaser's deposits at closing unless the escrow depository has received satisfactory assurances that all blanket mortgages and liens have been released from the purchaser's unit in accordance with section ___: 2-15. Satisfactory assurances include a commitment by a title insurer licensed under chapter 431 to issue the purchaser a title insurance policy insuring the purchaser that the unit has been conveyed free and clear of such liens.

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Real Estate Commission's Comment

1. This is a new section based on HRS §§514A-40(a)(6) and 514A-65.

§ ___: 4-12. Use of Purchaser Deposits to Pay Project Costs. (a) Subject to the conditions set forth in subsection (b), purchaser deposits that are held in escrow pursuant to a binding sales contract may be disbursed before closing to pay for costs of acquiring the project land and buildings, project construction costs (including, in the case of a conversion, repairs necessary to cure violations of county zoning and building ordinances and codes), and architectural, engineering, finance and legal fees, and other incidental expenses of the project.

(b) Disbursement of purchaser deposits prior to closing shall be permitted only if:

- (1) The commission has issued an effective date for the project's public report;
- (2) The developer has recorded the project's declaration and bylaws;
- (3) The developer has submitted to the commission:

(A) A project budget showing all costs that must be paid in order to complete the project, including land acquisition or lease payments, real property taxes, construction costs, architect, engineering and legal fees, and financing costs;

(B) Evidence satisfactory to the commission of the availability of sufficient funds to pay all costs that must be paid in order to complete the project, which may include purchaser funds, equity funds, interim or permanent loan commitments, and other sources of funds;

(C) If purchaser funds are to be used to pay the cost of acquiring the project land or buildings, evidence satisfactory to the commission that the developer will, concurrently with the disbursement of purchaser funds, acquire title to the project land or buildings; and

(D) If purchaser funds are to be disbursed prior to completion of construction of the project:

- (i) A copy of the executed construction contract;
- (ii) A copy of the building permit for the project; and

(iii) Satisfactory evidence of security for the completion of construction. Such evidence may include the following, in forms and content approved by the commission: a completion or performance bond issued by a surety licensed in the State in an amount equal to one hundred percent of the cost of construction; a completion or performance bond issued by a material house in an amount equal to one hundred percent of the cost of construction; an irrevocable letter of credit issued by a federally insured financial institution in an amount equal to one hundred percent of the cost of construction; or such other substantially similar instrument or security approved by the commission. A completion or performance bond issued by a surety or by a material house, an irrevocable letter of credit, and any alternatives shall contain a provision that the commission shall be notified in writing before any payment is made to beneficiaries of the bond. Adequate disclosures shall be made in the public report concerning the developer's use of a completion or performance bond issued by a material house instead of a surety, and the impact of any restrictions on the developer's use of purchaser's funds.

(c) A purchaser's deposits may be disbursed prior to closing only to pay costs set forth in the project budget submitted pursuant to subparagraph (b)(3)(A) that are approved for payment by the project lender or an otherwise qualified, financially disinterested person. In addition, purchaser deposits may be disbursed prior to closing to pay construction costs only in proportion to the valuation of the work completed by the contractor, as certified by a licensed architect or engineer.

(d) If purchaser deposits are to be disbursed prior to closing, the following notice shall be prominently displayed in the public report for the project:

"Important Notice Regarding Your Deposits: Deposits that you make under your sales contract for the purchase of the unit may be disbursed before closing of your purchase to pay for project costs, including costs of acquiring the land and buildings (if any), construction costs, project architectural, engineering, finance, and legal fees, and other incidental expenses of the project. While the developer has submitted satisfactory evidence that the project should be completed, it is possible that the project may not be completed. If your deposits are disbursed to pay project costs and the project is not completed, there is a risk that your deposits will not be refunded to you. You should carefully consider this risk in deciding whether to proceed with your purchase."

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Real Estate Commission's Comment

1. This is a new section based on HRS §§514A-40(a)(6), 514A-64.5, and 514A-67, and 7/1/99 draft REC rules.

2. Regarding paragraph (b)(3)(D)(iii):

- The requirement was originally changed from “performance bond” (which is typically issued in conjunction with a payment bond and insures the performance of the contractor) to “completion bond” (which insures the performance of the developer and is the format required to obtain a final subdivision approval prior to completion of construction). However, after further debate, “performance bond” was added back to this paragraph.

- Since financial institutions on the mainland can issue letters of credit that are enforceable anywhere, and since anyone can issue letters of credit, the language has been changed to simply require that it be issued by a federally insured financial institution.

- Rather than going into detail as to the requirements of the bond forms and letter of credit forms, the revisions simply provides for the forms to be as approved by the Commission.

§ ___: 4-13. Early Conveyance to Pay Project Costs. (a) Subject to the conditions set forth in subsection (b), if units are conveyed or leased before the completion of construction of the building or buildings for the purpose of financing such construction, all moneys from the sale of such units, including any payments made on loan commitments from lending institutions, shall be deposited by the developer under an escrow arrangement into a federally-insured, interest-bearing account designated solely for that purpose, at a financial institution authorized to do business in the State. Disbursements from the escrow account may be made to pay for project construction costs (including, in the case of a conversion, repairs necessary to cure violations of county zoning and building ordinances and codes), and architectural, engineering, finance and legal fees, and other incidental expenses of the project.

(b) Conveyance or leasing of units before completion of construction shall be permitted only if:

(1) The commission has issued an effective date for the project's public report;

(2) The developer has recorded the project's declaration and bylaws;

(3) The developer has submitted to the commission:

(A) A project budget showing all costs that must be paid in order to complete the project, including real property taxes, construction costs, architect, engineering and legal fees, and financing costs;

(B) Evidence satisfactory to the commission of the availability of sufficient funds to pay all costs that must be paid in order to complete the project, which may include purchaser funds, equity funds, interim or permanent loan commitments, and other sources of funds;

(C) A copy of the executed construction contract;

(D) A copy of the building permit for the project; and

(E) Satisfactory evidence of security for the completion of construction. Such evidence may include the following, in forms and content approved by the commission: a completion or performance bond issued by a surety licensed in the State in an amount equal to one hundred percent of the cost of construction; a completion or performance bond issued by a material house in an amount equal to one hundred percent of the cost of construction; an irrevocable letter of credit issued by a federally insured financial institution in an amount equal to one hundred percent of the cost of construction; or such other substantially similar instrument or security approved by the commission. A completion or performance bond issued by a surety or by a material house, an irrevocable letter of credit, and any alternatives shall contain a provision that the commission shall be notified in writing before any payment is made to beneficiaries of the bond. Adequate disclosures shall be made in the public report concerning the developer's use of a completion or performance bond issued by a material house instead of a surety, and the impact of any restrictions on the developer's use of purchaser's funds.

(c) Moneys from the conveyance or leasing of units before completion of construction may be disbursed only to pay costs set forth in the project budget submitted pursuant to subparagraph (b)(3)(A) that are approved for payment by the project lender or an otherwise qualified, financially disinterested person. In addition, such moneys may be disbursed to pay construction costs only in proportion to the valuation of the work completed by the contractor, as certified by a licensed architect or engineer. The balance of any purchase price may be disbursed to the developer only upon completion of construction of the project and the satisfaction of any mechanics' and materialmen's liens.

(d) If moneys from the conveyance or leasing of units before completion of construction are to be disbursed to pay for

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project costs, the following notice shall be prominently displayed in the public report for the project:

“Important Notice Regarding Your Funds: Payments that you make under your sales contract for the purchase of the unit may be disbursed upon closing of your purchase to pay for project costs, including construction costs, project architectural, engineering, finance, and legal fees, and other incidental expenses of the project. While the developer has submitted satisfactory evidence that the project should be completed, it is possible that the project may not be completed. If your payments are disbursed to pay project costs and the project is not completed, there is a risk that your payments will not be refunded to you. You should carefully consider this risk in deciding whether to proceed with your purchase.”

Real Estate Commission’s Comment

- 1. This is a new section based on HRS §514A-67, UCA/UCIOA §4-110, and § ___: 4-11, Recodification Draft #2.

§ ___: 4-14. Misleading Statements and Omissions; Remedies. (a) No officer, agent, or employee of any company, and no other person may knowingly authorize, direct, or aid in the publication, advertisement, distribution, or circulation of any false statement or representation concerning any project offered for sale or lease, and no person may issue, circulate, publish, or distribute any advertisement, pamphlet, prospectus, or letter concerning any project which contains any written statement that is false or which contains an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements therein made in the light of the circumstances under which they are made not misleading.

(b) Every sale made in violation of this section is voidable at the election of the purchaser; and the person making such sale and every director, officer, or agent of or for such seller, if the director, officer, or agent has personally participated or aided in any way in making the sale, is jointly and severally liable to the purchaser in an action in any court of competent jurisdiction upon tender of the units sold or of the contract made, for the full amount paid by the purchaser, with interest, together with all taxable court costs and reasonable attorney's fees; provided that no action shall be brought for the recovery of the purchase price after two years from the date of the sale and provided further that no purchaser otherwise entitled shall claim or have the benefit of this section who has refused or failed to accept within thirty days an offer in writing of the seller to take back the unit in question and to refund the full amount paid by the purchaser, together with interest at six percent on such amount for the period from the date of payment by the purchaser down to the date of repayment.

Real Estate Commission’s Comment

- 1. HRS §§514A-68 and 514A-69, combined, but essentially identical, are the sources of this section.
- 2. Under Hawaii caselaw, proof of scienter is not required and proof of reliance is not an element of the cause of action under HRS §§514A-68 and 69.³

Real Estate Commission’s Comment

- 1. HRS §514A-70 (Warranty against structural and appliance defects; notice of expiration required) has been deleted. It is overly paternalistic, adds unnecessary costs (“notice by certified mail to all members” of the AOA, etc.), provides unclear parameters (“normal one-year period”), and results in little additional consumer protection, if any. Appropriate disclosure of warranties is the key.

³ See, DiSandro v. Makahuena Corp., 588 F.Supp. 889 (D.Hawaii 1984).