

Kukui Plaza Town Hall Meeting March 29, 2004

Why recodify? (What is the problem we're trying to fix?)

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, *Session Laws of Hawaii* (2000)] Consequently, the Legislature directed the Real Estate Commission to conduct a review of Hawaii’s condominium property regimes law and to submit draft legislation to the Legislature.

The purpose of the recodification/SB 2210 is “to update, clarify, organize, deregulate, and provide for consistency and ease of use of the condominium property regimes law.” [Act 213, *Session Laws of Hawaii* (2000)]

Why should people care?

1. 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. This alone makes the recodification project extremely important for the citizens of Hawaii.

2. 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.

3. 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 “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.

Bottom line?

To make Hawaii’s condominium property law better for people who build, sell, buy, manage, and *live* in condominiums.

Summary of Selected Recodification/SB 2210 Issues

Improvements to Condominium Management Provisions

Even with the best of intentions, the accretion of layers of amendments to HRS Chapter 514A over the decades has resulted in statutory provisions that are often inconsistent, outdated, or overly restrictive for most condominiums. Generally, the recodification makes many improvements to help condominium communities function fairly and efficiently (e.g., encouraging owner participation by clearly allowing owners to choose to receive notices by e-mail, to vote by snail-mail or e-mail, and by *not* requiring the unnecessary disqualification of proxies; giving associations the tools to deal with obsolete provisions in their declarations and bylaws; and giving associations the tools to make sure that the right people pay for the right things).

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
Part VI. Management		
Guiding philosophy	<p>The philosophy guiding Part V (Condominium Management) is:</p> <ul style="list-style-type: none"> • Minimal government involvement and • Self-governance by the condominium community. 	<p>The philosophy guiding Part VI (Management of Condominium) continues to be:</p> <ul style="list-style-type: none"> • Minimal government involvement and • Self-governance by the condominium community. <p>At the same time, the recodification seeks to ensure that the condominium community (both owners and management) has the tools with which to govern itself; it enhances self-governance.</p>
Organization and clarity of management provisions	Haphazard and confusing.	<p>Reorganizes into four Subparts:</p> <ol style="list-style-type: none"> 1) Powers, Duties, and Other General Provisions; 2) Governance – Elections and Meetings; 3) Operations; and 4) Alternative Dispute Resolution. <p>Enhances clarity of Condominium Property Act by, among other things, consolidating provisions on single issues (e.g., proxies). Eliminates the artificial approach regarding the contents of bylaws developed in HRS §514A-82(a) and (b). Minimizes the statutory requirements for condominium governing documents while incorporating certain provisions currently in HRS §514A-82(a) and (b) in more appropriate statutory sections.</p>

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
Exceptions	None.	If provided for in the declaration or bylaws: 1) Condominiums in which all units are restricted to non-residential purposes; or 2) Small condominiums (i.e., containing no more than five units.) These exceptions recognize the difficulty of a “one size fits all” approach to management provisions.
Elections: Mail and e-mail voting	No provision.	Expressly allows <u>mail</u> and <u>e-mail</u> voting by directed proxy.
Elections: Board candidates’ statements/requests for proxies at association expense	Allows owners to send out 100 word board candidates’ statements/ requests for proxies.	Allows owners to send out board candidates’ statements/requests for proxies on an 8 1/2” by 11” sheet of paper.
Meetings, Association: Notice	Requires that notice (date, time, and place of meeting), agenda, and standard proxy form (if any) be sent (interpreted to mean hand-delivered or mailed) to apartment owners at least 14 days before meeting.	Same requirements, but also expressly allows the use of <u>e-mail</u> notice, as an alternative, to unit owners who agree to receive such notice. This also saves paper and postage costs.
Meetings: Conference calls and video-conferencing	No provision.	Allows boards to meet by <u>telephone conference call</u> and <u>video-conferencing</u> (and allows associations to do so if provided for in the declaration or bylaws).
Meetings, Board: Executive session	Allowed for association personnel and litigation matters.	Adds provisions allowing executive session for: <ul style="list-style-type: none"> • Attorney-client privileged matters; and • When the association is negotiating contracts, leases, and other commercial transactions.
Meetings, Board: Definition of conflict of interest	No definition.	Defined as, “an issue in which a director has a direct personal or pecuniary interest not common to other members of the association” (from <i>Robert’s Rules of Order</i>).
Fiscal: Insurance	Requires property insurance and flood insurance in flood hazard areas. Allows exterior glass coverage and directors’ and officers’ liability insurance.	<ul style="list-style-type: none"> • Adds, to the extent reasonably available, provision requiring general liability insurance. • Allows individual unit owners to be responsible for insuring detached units. • Allows responsible parties to be billed for deductibles. • Allows for any other insurance the board considers appropriate

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
		to protect the association, its owners, directors, officers, or agents. <ul style="list-style-type: none"> • Allows association to require unit owners to carry insurance covering their personal liability.
Fiscal: Risk management of high risk components	No provision.	Permits associations to maintain and repair “high risk components” (e.g., washing machine hoses, water heaters, toilet “O” rings) before they fail (which should help with insurance premiums).
Fiscal: Liability for contract and tort liability of association	No provision.	Protects unit owners from individual liability for contract and tort liability of the association.
Fiscal: Liability, Aging-in-Place	No provision.	“Good Samaritan” provision. To avoid harm to an elderly resident’s self or others and to avoid disruption to the condominium community, limits liability of association in requesting functional assessment and recommendations for services.
Fiscal: Association’s borrowing authority	Lender’s security unclear.	Consistent with nationwide practice, clarifies that an association’s assessment powers may be used as security for lenders. (Borrowing helps avoid special assessments against owners.)
Fiscal: Deposits into out-of-state, federally-insured, financial institutions	Not allowed.	Allowed.
Fiscal: Assessment lien limited priority over mortgage liens.	Gives association assessment liens a limited priority over mortgage liens (for up to six months of assessments, with a cap of \$1,800; last amended by Act 80, SLH 2003).	Identical.
Quiet enjoyment: Behavior of tenants	Unclear.	Permits board to take direct action to control behavior of tenants if owner/landlord fails to do so.
Quiet enjoyment: Vicious animals	No provision.	To protect persons or property, allows associations to act immediately in removing vicious animals.
Percentages to approve amendment of governing documents and to take various association actions	90% to add area to common elements; 80% to terminate the condominium; 75% to amend the declaration; 65% to amend the bylaws; a few other provisions require approval of a majority of owners or as otherwise required by	80% to terminate the condominium; 67% to amend the declaration or bylaws and make most other major decisions (consistent with Fannie Mae guidelines); a few other provisions require approval of a majority of owners or as otherwise

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
	the declaration or bylaws or <i>Robert's Rules</i> .	required by the declaration or bylaws or <i>Robert's Rules</i> .
Dealing with obsolete and other provisions in governing documents that unreasonably interfere with association's ability to manage property	Other than amending the governing documents, no provision.	In certain situations, allows circuit court to excuse of compliance with provisions in governing documents that unreasonably interfere with association's ability to manage property.
Alternative Dispute Resolution: Who can request mediation	Owners or the board.	Any party may request mediation.
Alternative Dispute Resolution: Filing for <i>trial de novo</i> after arbitration	No deadline for filing for <i>trial de novo</i> .	Requires parties to file for <i>trial de novo</i> within thirty days of written demand or lose right to <i>trial de novo</i> .
Alternative Dispute Resolution: Further study on how to improve	Not applicable.	In SB 2210 as introduced, but deleted by Senate CPH committee.

Note: The table above lists only some of the many improvements to Hawaii's condominium law made by the recodification/SB 2210.

What the recodification/SB 2210 does *not* do:

- It does NOT eliminate the fiduciary duty of board members.
- It does NOT allow non-owners to serve on boards.
- It does NOT conflict with *Robert's Rules* in allowing boards to approve association meeting minutes.
- It does NOT shield boards from liability for gross negligence in calculating reserves.
- It does NOT eliminate the ability of unit owners to submit "for quorum purposes only" proxies.

Improvements to other parts of the Condominium Law

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
Part I. General Provisions		
Definitions clarified		
“Common elements”	Long list, including facilities designated as common elements in the declaration and anything else “necessary or convenient to its existence, maintenance, and safety, or normally in common use.”	Defines “Units” and “Limited common elements” with specificity and defines “Common elements” as everything else. Helps clarify <u>who is responsible for what</u> .
“Material change”	Not defined in Part I. Used in HRS §514A-63 (Rescission rights)	Ties definition to standard for rescission rights (direct, substantial, and adverse effect on the use or value of a purchaser’s unit or appurtenant limited common elements or available project amenities).
“Material facts”	Not defined in Part I.	For consistency, uses definition of “material facts” in HRS §508D-1.
“Pertinent change”	Not defined in Part I. Used in HRS §514A-41 (Supplementary public report)	Ties required amended public reports (disclosures) to changes in “material respect” while clarifying that not all such changes rise to the level of giving purchasers rescission rights.
“Property”	No similar provision in definition of “property.”	Adds to existing definition of “property” to specifically allow for air/water space condominiums. Helps do away with “tool shed” condominiums on agricultural lands fiction.
Conformance with land use laws	Requires conformance with county land use ordinances. <i>(This has always been the case, but some counties have not enforced their own land use and real property tax laws.)</i>	Per “home rule” objections of the counties (particularly Hawaii County), status quo. Also added more disclosures for projects on agricultural land. Earlier versions of the recodification made very clear that: 1) State and county land use laws control (and have always controlled) land use issues; 2) the condominium law is a land ownership, consumer protection, and community governance law; and 3) the counties should not discriminate against the condominium form of ownership.
Remedies to be liberally administered	No similar provision.	Explicitly <i>negates</i> any implication that the Hawaii Supreme Court holdings regarding restrictive covenants/equitable servitudes in <u>Hiner v. Hoffman</u> (1999), and <u>Fong v. Hashimoto</u> (2000), apply to

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
		condominium communities. Supports the fair and efficient functioning of our condominium communities (and other common interest ownership communities).
Part II. Applicability		
Condominiums created after effective date of recodification	No express provision.	Applies to all condominiums created after the effective date of the new law. <i>Amendments to the new law apply to all condominiums created after the effective date of the new law or subjected to the new law, regardless of when the amendment is adopted.</i>
Pre-existing condominiums	Exempts condominiums created before May 29, 1963, unless 100% of the owners expressly declare that the chapter applies.	Sections relating to separate titles and taxation, conformance with county land use laws, merger of projects or increments, the Condominium Education Trust Fund (payments), and Part VI (Management of Condominium), and the section on definitions (to the extent definitions are necessary in construing any of those provisions), apply to all condominiums created before the effective date of the new law; <i>but only with respect to things happening after the effective date of the new law and do not invalidate existing provisions of the governing documents of those condominiums.</i> Regardless of what applicable law provided before the effective of the new law, however, the governing documents can be amended to achieve any result permitted by the new law.
Part III. Creation, Alteration, and Termination		
Contents of declaration	HRS §514A-11 contains long list of requirements for contents of declaration.	Enhances clarity of condominium law by minimizing the statutory requirements for condominium governing documents while incorporating certain provisions currently in HRS §514A-11, et seq., in more appropriate statutory sections.
Transfer of limited common elements	HRS §514A-14 limited to transfer of parking stalls.	Expands applicability to other limited common elements and requires notice to association.
Part IV. Registration and Administration		

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
Exceptions to registration and administration	Condominium units not offered for sale.	<ul style="list-style-type: none"> • Condominium units not offered for sale; • Disposition of units excepted from public report requirements (i.e., gratuitous, pursuant to court order, by government, by foreclosure or deed in lieu of foreclosure, and bulk sales); and • 100% nonresidential condominiums costing \$1 million or more. <p>Rejected exception for small condominiums (i.e., no more than five units) based on objections from Real Estate Commission staff and Kauai County.</p>
Role of Real Estate Commission	Commission has consumer protection, condominium stakeholder education, and limited condominium governance responsibilities. Some parties would have the Commission take some land <i>use</i> responsibilities as well.	<p>Commission's role is fundamentally:</p> <ol style="list-style-type: none"> 1) To provide consumer protection through adequate disclosure to prospective condominium purchasers; and 2) Education of condominium community stakeholders (i.e., those who build, sell, buy, manage, live-in, etc. condominium projects). <p>Commission's limited condominium governance responsibilities were retained in the final draft.</p>
Jurisdiction of Commission	Commission has jurisdiction over provisions scattered throughout HRS Chapter 514A, including selected sections of Part V (Condominium Management).	For the sake of clarity, most provisions under the jurisdiction of the Commission placed in Parts IV (Registration and Administration) and V (Protection of Condominium Purchasers). Ended up keeping Commission's existing jurisdiction over a few sections in Part VI (Management of Condominium).
Consumer protection – Risk to purchasers' funds	Inconsistent and unclear at times.	Correlates risk to purchasers' funds with the rights and obligations of developers. Provisions in this part, in conjunction with Part V (Protection of Purchasers), are meant to help assure that a developer is not able to obtain use of a purchaser's money until the purchaser is able to get a completed unit. Note, however, that some exceptions are allowed with appropriate disclosures.
Consumer protection – Disclosure	Requires numerous different disclosure documents, which expire	Requires a single public report, which does not expire, with an

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
statements	at different times (Notifications of Intention, Disclosure Abstracts, Preliminary Public Reports, Contingent Final Public Reports, Final Public Reports, Supplementary Public Reports).	ongoing duty to amend the report whenever necessary to prevent the public report from becoming misleading in any material respect. Also requires an annual “update” report to the Commission.
Condominium Education Trust Fund	Misnames “Condominium Management Education Fund.”	Renames the fund to “Condominium Education Trust Fund” to more accurately reflect its funding sources and permissible uses. The name change also highlights the fact that it would be illegal for the Legislature to raid this fund.
Part V. Protection of Purchasers		
Exceptions to required public report.	A timeshare project duly registered under chapter 514E and for which a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser, or, pursuant to §514E-30, delivery of the §514E disclosure is not required because the offer and sale is made outside of Hawaii.	<ol style="list-style-type: none"> 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; and 5) Exceptions to registration set forth in Part IV. <p>A public report is not required to be delivered for a timeshare project duly registered under chapter 514E and for which a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser.</p> <p>Subsection (4) addresses the problem of lenders being considered “successor developers” in foreclosure/deed in lieu of foreclosure situations.</p>
Consumer protection – Disclosure statements	Requires numerous different disclosure documents (Disclosure Abstracts, Preliminary Public Reports, Contingent Final Public Reports, Final Reports, Supplementary Public Reports).	Adequate disclosure to prospective condominium purchasers is the foundation of Part V.
Consumer protection – Disclosure statements for special types of condominiums	Additional disclosures for projects containing conversion buildings.	Additional disclosures for projects containing conversion buildings, projects on agricultural land, and projects containing assisted living facility units.
Consumer protection – Right to cancel vs. rescission rights	Confusing rights to cancel/rescind contracts to buy condominiums.	Clarifies that the purchaser’s right to cancel is a one time right that is strictly tied to the statutory “cooling off” period of thirty days after the purchaser has received the public

Selected Issues	Current Law (HRS Chpt. 514A)	Recodification Final Draft
		report and other required documents. Rescission rights are related to material changes (i.e., changes that directly, substantially, and adversely affect the use or value of a purchaser's unit or appurtenant limited common elements or available project amenities) and may be statutorily enforced up to thirty days after receiving notice of the material change. Common law rescission rights may always be enforced.

For more information:

The Commission's final draft of the proposed recodification, along with background information, research reference lists, commentary on the proposed law, and findings and recommendations of the Commission, is included in the Commission's *Final Report to the Legislature – Recodification of Chapter 514A, Hawaii Revised Statutes (Condominium Property Regimes) in Response to Act 213, Section 4 (SLH 2000)*, dated December 31, 2003. This report is available for the public review on the Commission's website at: <http://www.hawaii.gov/hirec>.

The following documents are also available on the Commission's website:

- The September 2003 Public Hearing Discussion Draft of the recodification (with comments; Ramseyered; posted September 2003). (The Commission held public hearings on the recodification on Kauai, Maui, the Big Island – both in Kona and in Hilo – and Oahu from September through October 2003.)
- The Commission's December 2002 *Progress Report to the Legislature*, which contains the second draft of the recodification (with comments; Ramseyered; posted January 2003).
- The first draft of the recodification (with comments; Ramseyered; posted January 2002).

Questions? Comments? Suggestions?

Write: Mitchell Imanaka & Gordon Arakaki
 DCCA - Real Estate Branch
 335 Merchant Street, Room 333
 Honolulu, HI 96813

Call: (808) 586-2643

E-mail: Gordon.M.Arakaki@dcca.hawaii.gov