

**VOLUME 13, NO. 2 Funded through the Condominium Education Fund** 

#### JANUARY 2006

# What Are the Plans for Recodification Education?

The Recodification of the condominium law will come into effect beginning in July 2006.

The Real Estate Commission (Commission) with the assistance of a Hawaii Licensed Attorney with expertise in condominium development and governance will be providing directors of condominium boards, managing agents, and real estate licensees a summary of the recodification law as it applies to each respective group.

The summary will be disseminated to the respective groups by means of:

• Posting on the Commission's website

• Reference articles to be included in its Condominium Bulletin (several copies are mailed to the approximately 1,500 registered associations impacting approximately 138,000 apartments owners)

• Commission's condominium specialists along with the retained attorney will be at select sites presenting educational sessions in the community; some public access media coverage is being investigated

• Condominium Education Funds will be used to directly subsidize educational sessions in the community

The Commission with the same attorney, will be meeting with focus groups in developing the new developer's public report (basically a disclosure document) to be used in the sale of new and converted condominium projects.

Instructional sessions about the new developer's public report will be conducted with developers and their attorneys as well as real estate licensees.

The educational plan should be completed by June 1, 2006, since the new recodification law becomes effective July 1, 2006.

# Fidelity Bonds Remain a Requirement for Association Registration

The new recodified condominium law takes effect July 1, 2006 and applies to all condominiums created at that time and thereafter. Certain provisions of the new law apply to existing condominiums only if those provisions do not invalidate existing provisions of the declaration, bylaws, condominium map, and other constituent documents. This article is a discussion of the differences between the registration and fidelity bond requirements presently in existence and those created after July 1, 2006.

Currently, AOAO registration and fidelity bond requirements are addressed in §514A-95.1, HRS. In the recodified law (Act 164 (SLH 2005)), the registration and fidelity bond requirements are addressed in Section 103 (Association; registration) and Section 143 (Insurance). Additional fidelity bond requirements, relating specifically to managing agent requirements, appear in Section 132 of the recodified law.

The registration requirements found in Section 103

## See Fidelity Bonds on pg. 7

## **ALSO IN THIS ISSUE**

Letter from the Chair	2
Ask the Condominium Specialist	2
Explaining Fiduciary Duty	3
Real Estate Commission Meeting Schedule	7
Condominium Education Calendar	8

This material can be made available for individuals with special needs. Please call the Senior Condominium Specialist at (808) 586-2643 to submit your request.

The Hawaii Condominium Bulletin is funded by the Condominium Education Fund, Real Estate Commission, Professional and Vocational Licensing Division, Department of Commerce and Consumer Affairs, State of Hawaii.



## Letter from the Chair . . .

Dear Condominium Owners and Managing Agents,

The year 2005 proved to be a year of many changes in the Condominium Section. In July 2005, Michele Sunahara Loudermilk was named as the new Vice Chair for the Condominium Review Committee, replacing Kathleen H. Kagawa, Ph.D, Broker, who is now Vice Chair of the Laws and Rules Review Committee.

Foremost on the list of accomplishments, is the pas-



sage of the recodification of the new condominium property regimes law, thanks in large part to the efforts of the Blue Ribbon Recodification Advisory Committee, commissioners, and staff. Commissioners and staff also participated in the task force to facilitate the establishment of viable Naturally Occurring Retirement Communities, and worked with the

Legislative Auditor in the analysis of the regulation of condominium association managers. A remarkable 400% increase in condominium developer's public reports kept the condominium section busy.

Headway was made in the dissemination of public information with the availability of the Association of Apartment Owners registration form and the Condominium Bulletin on the Real Estate Commission's (Commission) website. The Commission has provided several educational seminars with Community Associations Institute, Hawaii Chapter.

This Bulletin includes a short summary about the use of reserves; how the use of common elements may be changed; and general information about the "Recodification Education Plan." The reference file reviews the importance of educating new board members about their fiduciary duties.

Please review the Education Calendar for upcoming educational seminars available to you. The meeting calendar includes an open invitation to attend the Commission's monthly meetings.

Finally, we would like to wish all of you a Happy New Year with many good things to come.

Sincerely,

Stanley M. Kuriyama

Stanley M. Kuriyama Chair, Condominium Review Committee

## Ask the Condominium Specialist

I know that all Associations of Apartment Owners are required to have reserves. How can the reserves be used?

As of January 1, 2000, all associations were required to fund a minimum of 50% of the estimated replacement reserves. A reserve study indicates the amount needed to establish a full replacement by the end of that project. Reserves are set up to pay for large future expenses (e.g. roof, elevator) resulting from the deterioration of the condominium project over time. Section 107-61, Hawaii Administrative Rules (HAR), states that the rules "try to ensure that each owner in a condominium project pays a fair share of the short-term and longterm costs of operating the project, based on the owner's period of ownership." This would minimize large special assessments for repairs and replacement.

As part of the reserve study, an examination of the association's declaration, bylaws, and house rules is conducted to determine which of the association's property must be included in the reserves and a schedule of anticipated replacements.

Section 16-107-66(c), HAR, requires that "The association board shall use replacement reserves allocated to a particular fund only for the stated purpose of that fund ...."

Nevertheless, subject to the association first satisfying the required statutory replacement reserve, the board may use the association's replacement reserves for other than the stated purpose:

• if it passes a resolution that complies with the requirements of Section 16-107-66(c)(1), HAR, and

• if an emergency situation exists as defined by Section 514A-83.6(j), HRS.

"Emergency situation" as defined under Section 514A-83.6(j), HRS, are any extraordinary expenses: (1) Required by an order of a court; (2) Necessary to repair or maintain any part of the property for which the association is responsible where a threat to personal safety on the property is discovered; (3) Necessary to repair any part of the property for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget; (4) Necessary to respond to any legal or administrative proceeding brought against the association that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget; or (5) Necessary for the association to obtain adequate insurance for the property which the association must insure. Replacement reserves that have been substantially depleted by an emergency are to be funded in increments over three (3) years.

For more information about reserves, you may refer to *www.caionline*.

See *Q* & *A* on pg. 6

# Send New Board Members Letter Explaining Fiduciary Duty

Community association board members often assume office ill prepared for the requirements of their new job. In particular, many of them are unfamiliar with the concept of fiduciary duty—that is, their duty of loyalty to the association. New board members are often surprised to learn that they've done something wrong when they, for example, use their position to do favors for friends and supporters, says New York attorney Steven J. Shore.

The actions of new board members who are unfamiliar with the concept of fiduciary duty can lead to many problems. For instance, board members of a New York community association recently faced a lawsuit when, after agreeing to negotiate the sale of some association property on behalf of all the members, they negotiated for themselves sales prices that were \$50,000 and \$52,500 higher than those paid to other association members [Michaelson v. Albora].

To avoid such problems, soon after new board members are elected to the board, as part of your board member training, send them a letter explaining what fiduciary duty is and what it requires of them. We've given you a Model Letter that you can adapt for use at your community (see p. 5).

#### What is 'fiduciary duty'?

Generally speaking, a fiduciary is someone who transacts business, or handles money or property, on behalf of others. Because of the nature of the relationship, being a fiduciary entails a duty of loyalty, care, and good faith.

In the community association context, this means that board members must always make decisions based on what's best for the association as a whole, explains New York attorney David L. Berkey. They may not place their own interests, or those of their friends and supporters, above those of the other members, he adds. They must act in good faith and use the same degree of care that a reasonably prudent person would use, he says. This includes getting expert advice when appropriate, Shore says.

Also, board members should avoid accepting gifts or discounted rates from association vendors, says Shore. Neither should they expect their fellow board members or the association manager to bend rules for them or give them other special treatment, he adds. "Our advice to board members is to set an example for other members of how to behave," he says.

#### What letter should say

To help new board members understand their fiduciary duty, send them a letter explaining what they can and can't do as a board member. Your letter, like our Model Letter, should start by explaining the general concept of fiduciary duty. Then, it should make clear that board members must do the following:

(1) Act in the best interests of the association. Community members trust their boards to make decisions on behalf of the entire community, based on what's best for the association *as a whole*. That means board members can't favor certain members over others, either because of personal relationships, or because someone might have voted for the board member while another person voted against him, says Shore. Nor can board members put their own interests above those of the association or its members, he adds [Ltr., par. 1].

*Insider* Says: Board members of mixed-use properties often mistakenly believe that their job is to protect the association's residential members over the commercial members. But that's not true. These board members have a fiduciary duty to do what's best for the association as a whole, including the owners of the commercial units, notes Berkey.

(2) Act with care, including seeking advice from experts when appropriate. Board members must exercise the same degree of care that a reasonably prudent person would under the circumstances, says Berkey. Sometimes this requires getting experts' advice before making a decision. For example, if board members must decide whether to repair or replace a swimming pool, and none of them are swimming pool construction experts, they should consult one, says Berkey. That's because a reasonably prudent person would seek expert advice before making such a decision. "Generally, I recommend that boards consult with experts, such as attorneys, accountants, and engineers, on issues that require specialized knowledge not possessed by anyone on the board," he says [Ltr., par. 2].

(3) Act within the scope of their authority. Community association boards usually get their authority from two places: the association's governing documents (for example, the bylaws) and state and/or local laws. When board members take actions that aren't authorized by the governing documents, for example, they're breaching their fiduciary duty to the association, says Shore. So if a board fails to grant a member a hearing before enforcing a rule against him, and the bylaws require a hearing as part of the association's enforcement procedures, the board would have breached its fiduciary duty.

Even if a board takes an action that's authorized by the governing documents, it could be breaching its fiduciary duty if that action is forbidden by state or local law. For example, if a board passes a rule allowing members to store barbecues in their units, it would be breaching its fiduciary duty if local fire codes prohibit this [Ltr., par. 3].

(4) Act in good faith. Board members' motives must be to further the legitimate best interests of the association. Decisions based on favoritism, discrimination, or malice—or decisions made arbitrarily—constitute a breach of fiduciary duty. This doesn't mean that board members can't create and enforce rules that affect some members differently from the way they affect other members, stresses Shore. No-pet rules, for example, almost always affect only certain association members, he points out. The obligation to act in good faith simply means that the decision to create a rule must be made based on the board members' honest and best judgment of what's best for the community as a whole he explains [Ltr., par. 4].

(5) Avoid four common mistakes. There are four common mistakes board members make when it comes to fiduciary duty. To help new board members avoid making these mistakes, tell them that the obligations of fiduciary duty means that they can't:

➤ Take personal advantage of business opportunities that should benefit the entire community. A perfect example of this is the situation mentioned in the lawsuit described above. The amount of money the developer paid to buy a portion of the association's property should have been split fairly among the association's members. It either should have been split equally, or according to each member's percentage interest in the association. But the board members who were sued shouldn't have used their positions on the board to negotiate a better deal for themselves than they negotiated for the rest of the members. By doing this, they placed their own interests above those of their fellow association members.

➤ Do business with the association unless a deal is disclosed and approved. It's a clear breach of fiduciary

duty for a board member to engage in "self-dealing." The most common example of this is when a board member does business with the association without disclosing that fact and getting the appropriate approval to do so. And if a board vote is required to approve the deal, the interested board member shouldn't participate in the vote, says Berkey.

It's a breach of fiduciary duty for board members to do business with the association without disclosing that fact and getting the deal approved, because it prevents the association from getting competitive bids on the contract. And that prevents the association from getting the best possible price, notes Berkey.

➤ Grant special privileges or otherwise show favoritism, or expect it from others. Board members must treat all association members fairly. They shouldn't give friends and supporters preferential treatment. Nor should they expect their fellow board members or the association manager to bend the rules for them or give them special treatment. For example, they shouldn't expect to be moved up on waiting lists for desirable parking spots.

➤ Accept gifts from vendors or others doing business with the association. Board members should never accept gifts—even small innocent items—from vendors or others doing business, or seeking to do business, with the association. So, for example, if a landscaping company that's trying to get a contract to be the landscaper for all of the association's common areas sends board members a bottle of wine, they shouldn't accept it [Ltr., par. 5].

#### Insider Sources

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## **MODEL LETTER**

### **Explain Fiduciary Duty to New Board Members**

Here's a letter, drafted with the help of New York attorney Steven J. Shore, that you can adapt and use to educate new board members about their fiduciary duty. The letter tells new board members that to fulfill their fiduciary duty, they must always act in the best interests of the association (par. 1); act with care, including seeking advice from experts when appropriate (par. 2); act within the scope of their authority (par. 3); and act in good faith (par. 4). It also tells them that they can't take personal advantage of business opportunities that should benefit the entire community; do business with the association unless the deal is disclosed and approved; grant special privileges or otherwise show favoritism to friends or supporters, or expect special treatment for themselves; or accept gifts from vendors or others who do business with the association (par 5). Show this letter to your attorney before adapting it for use at your community.

#### [Insert date]

Dear [insert name]:

Congratulations on your election to the Board of Shady Acres Community Association. The purpose of this letter is to acquaint you with the standard of conduct that is expected of community association board members in [insert state]. The law imposes certain legal obligations on all board members. Failure to fulfill these obligations could lead to a lawsuit against the association, the board, and even you personally. Chief among these obligations is what's called a "fiduciary duty" to the association. This means that you must perform your duties as a board member in good faith and with the degree of care that an ordinarily prudent person would use under similar circumstances, being at all times loyal to the association and its best interests.

But, in practice, it gets a little more complicated than that. While it's impossible to review every possible situation you might face, here are some basic guidelines to follow. As a board member, you must:

1. Act in the association's best interests at all times. Your decisions must be based on what's best for the association *as a whole*. Making decisions or taking actions that put the interests of yourself, your friends, or your supporters above those of the association or its members is a breach of your fiduciary duty to the association.

2. Act with care, including seeking advice from experts when appropriate. When making decisions or taking actions, you must exercise the degree of care that an ordinarily prudent person would under the circumstances. Among other things, this means that if for example, the board must make a decision involving an issue that no one on the board is an expert on, the board should consult an expert.

3. Act within the scope of your authority. Your authority is defined in the association's governing documents and by applicable state and local law. It's important that you understand the scope of your authority and not exceed it. If a board action violates the duly adopted bylaws, declaration, or other governing documents, or state or local laws, the board may have breached its fiduciary duty and the action may have to be invalidated. An example of this would be failing to comply with procedural requirements for community elections.

4. Act in good faith. Board members' motives must at all times be to further the legitimate best interests of the association. If board members make decisions based on favoritism, discrimination, or malice—or make arbitrary decisions—they're breaching their fiduciary duty. This doesn't mean that the board can't create a rule that affects some members differently from the way it affects others, such as a no-pets rule. It just means that the decision to create the rule must be based on board members' honest and best judgment of what is best for the association as a whole.

5. Avoid the following four common mistakes. You'll have to use your best judgment in determining what your fiduciary duty requires of you in any specific situation. But there are four common mistakes that you should avoid:

- Don't take personal advantage of business opportunities that should benefit the entire community.
- Don't do business with the association unless you disclose that fact and get the appropriate approval to do so.
- Don't give preferential treatment to friends and supporters, or expect it for yourself from others.
- Don't accept gifts from vendors or others doing business—or seeking to do business—with the association.

If, after reading this, you have any questions about fiduciary duty or what it requires of you, contact Shady Acres' attorney, [*insert name*] at [*insert phone #*]. You have undertaken an important job in the Shady Acres community, and we appreciate your service.

Thank you.

JANUARY 2006 Page 5

## Ask the Condominium Specialist

## **Q** & A from pg. 2

Can the board change the use of the common element without the consent of the owners?

The definition of your project's common elements is in your project's declaration. Section 514A-11(11), HRS, mandates that amendments to the declarations of all condominium projects existing as of May 22, 1991, and all condominium projects created thereafter, require a vote or written consent of 75% of all the owners, except as provided that condominium projects having five (5) or fewer units may allow amendments to the declaration by a vote or written consent of more than 75% of all owners.

Change in use of the common elements may occur:

• If the Board of Directors receives approval of the owners of 75% of the common interests, except as provided in §514A-13.4, HRS.

• If the common element is not being used for its original intended purpose, it may be leased or used by the board on a short term basis not to exceed five (5) years with provisions for termination with 60 days notice; or a long term with the approval of 75% of owners (\$514A-13(d)(2), HRS).

• If the common element is being used for its original intended purpose, except as provided by §514A-13.4, HRS,

# Michele Sunahara Loudermilk Appointed CRC Vice Chair

In July 2005, Michele Sunahara Loudermilk, Esq. was appointed as the Condominium Review Committee Vice Chair. She joined the Real Estate Commission in July 2004, and replaces Kathleen Kagawa, Ph.D. who is now the Laws and Rules Review Committee Vice Chair.

Ms. Loudermilk will assist Stanley M. Kuriyama, Esq. Chair of the Condominium Review Committee. She is from Honolulu and graduated from the University of Oregon with Bachelor of Arts degrees in Journalism and the Romance Languages.

Ms. Loudermilk earned a Juris Doctor degree from the William S. Richardson School of Law and is an associate general counsel in the legal department of Alexander and Baldwin. She is a member of the American Bar Association, the Hawaii State Bar Association, and Hawaii Women Lawyers. She is also a mentor in the William S. Richardson School of Law student-attorney mentorship program. the common element may be leased or used by the board for the benefit of the association with the approval of 75% of owners, including all owners directly affected, and sometimes the owners' mortgagees (§514A-13(d)(3), HRS).

• When the required approval of 90% of apartment owners (§514A-92.1, HRS) is obtained to designate additional areas as common elements.

• To material changes, additions, or alterations by an apartment owner to a project, if it adversely affects the safety, structure, appearance or value, etc., when the required prior approval of at least 75% of owners, including the owners directly affected is obtained (§514A-89, HRS).

• To non-material structural additions to the common elements, including solar energy devices, when the required board approval and the approval of those owners specified in the declaration or bylaws (§514A-89, HRS) is obtained.

(Information was obtained from §514A, HRS, and Director's Guide to Hawaii Community Association Law, by John A. Morris, Esq., Ekimoto & Morris.)

# Do Community Associations Fall Under Condominium Property Regimes Law?

Community associations fall under Chapter 421J, HRS, which defines a *planned community* as "a common interest community, other than a condominium or a cooperative housing corporation or a time share plan . . . ."

This chapter may be viewed at: http:// www.capitol.hawaii.gov/hrscurrent/Vol08Ch0401-0429/ HRS0421J.

Planned community associations do not fall under the jurisdiction of the Hawaii Real Estate Commission.

Disputes involving planned community associations are to be first submitted to mediation as indicated under §421J-13(a), HRS.

Mediation services may be found at the following mediation centers: Oahu, Mediation Center of the Pacific, Inc.—(808) 521-6767; Mediation Services of Maui, Inc.— (808)244-5744; West Hawaii Mediation Center — (808) 885-5525, Kona— (808) 326-2666; Ku'ikahi Mediation Center —(808) 935-7844; Kauai Economic Opportunity, Inc.—(808) 245-4077.

Complaints against a licensed property manager may be addressed to the Regulated Industries Complaints Office (RICO). The office is located at 235 South Beretania Street,  $9^{th}$  floor, Honolulu, Hawaii 96813, telephone (808) 587-3222.

#### Fidelity Bonds from pg. 1

(Act 164 (SLH 2005)) differ very little from those currently found in §514A-95.1(a)(2 through 5) and b; the difference being changes in the language used to describe the requirements. For example, while §514A-95.1, HRS, states "Each condominium project or association of apartment owners having six or more apartments shall...", the recodified law states "Each project or association have more than five units shall..."

While basically meaning the same thing, these two sentences represent minor changes in the language used throughout the recodified law.

For example, the term "condominium project" currently used in §514A, HRS, now refers to the "project" in the recodified law, and "association of apartment owners" now refers to the "association."

While briefly mentioned in Section 103 (Act 164 (SLH 2005)), the majority of the association fidelity bond requirements previously addressed with the registration requirements in §514A-95.1, HRS, have been included in the insurance section of the recodified law (Section 143, Act 164 (SLH 2005)).

The most dramatic change to the fidelity bond requirement is the maximum amount of the bond. In §514A-95.1(a)(1), the maximum amount of the fidelity bond is no greater than \$100,000, in the recodified law, the amount has increased to \$200,000.

In Section 143(a)(3)(A), Act 164 (SLH 2005), association fidelity bond requirements are limited to associations with more than five (5) dwelling units, covering persons, including the managing agent and its employees. §514A-95.1(a)(1) required AOAOs having six (6) or more apartments maintain a fidelity bond covering officers, directors, employees and managing agents.

# **Committee Meeting and Specialist** Office for the Day Held on Maui

On January 11, 2006, the Commission held its standing committee meetings on Maui at the Realtors Association of Maui office in Kahului. In conjunction with this meeting, the Condominium and Real Estate Specialist Office for the Day was also provided.

On October 14, 2005, a Condominium and Real Estate Specialist Office for the Day was held at the same location.

These visits to the neighbor islands provide members of the condominium and real estate communities an opportunity to meet with the Specialists about their specific condominium concerns and/or real estate licensing questions and concerns.

Some of the condominium issues included: common elements change of use; Board of Directors not running the annual meetings properly, and not following the declaration and bylaws.

Stay tuned for the next announcement of Specialist Office for the Day to be held on another neighbor island.



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

JANUARY 2006 Page 7

# **Condominium Education Calendar 2006**

This calendar lists upcoming educational events of interest to the condominium community. The publishers express **no opinion** about the quality or content of any event they do not sponsor. This listing should not be construed as an endorsement or sponsorship of any event, unless expressly indicated. Events may be subject to change; please check directly with the provider to confirm each event.

Date	Time	Event Title	Location	Provider
1/31/06	9:00-4:30	New Condominium Law	Ala Moana Hotel Honolulu, Hawaii	LOR
2/10/06	8:30-4:30	Landlord and Tenant Law	Ala Moana Hotel Honolulu, Hawaii	LOR
5/3/06	9:30-1:00	Insurance: "What You Don't Know Will Hurt You		CCM
05/03-06		CAI's 55 <sup>th</sup> Nat'l Conf. & Expo	Westin Mission Hills Palm Springs, CA	CAI

\*The seminar is partly funded by funds from the Condominium Education Fund, Real Estate Commission, Professional and Vocational Licensing Division, Department of Commerce and Consumer Affairs, State of Hawaii for condominium apartment owners whose AOAO is currently registered with the Real Estate Commission.

Information is subject to change. For full information on the above-listed courses, please call the provider.

	Provider	Phone	Address
CAI	Community Associations Institute (National)	(703) 548-8600	225 Reinekers Ln #300
	www.caionline.org		Alexandria, VA 22314
CAI-H	Community Associations Institute - Hawaii Chapter	488-1133	P.O. Box 976
	www.caihawaii.org		Honolulu, HI 96808
CCM	Condominium Council of Maui	573-4231	PO Box 1362
	www.mauicondocouncil.com		Kihei, HI 96753
HAR	Hawaii Association of Realtors	733-7060	1136 12 <sup>th</sup> Ave., Ste. 220
	www.hawaiirealtors.com		Honolulu, HI 96816
HCAAO	Hawaii Council of Associations of	733-2021	3454 Waialae Ave Ste. 6
	Apartment Owners		Honolulu, HI 96816
HSAP	Hawaii State Association of Parliamentarians		98-238 Paleo Way
	www.hsap.org		Aiea, HI 96701
HSBA-CLE	Hawaii State Bar Association - Continuing Legal Educ.	537-1868	1132 Bishop Street, Ste 906
	www.hsba.org		Honolulu, HI 96813
IREM	Institute of Real Estate Management	847-0141	PO Box 17040
	Hawaii Chapter No. 34 <u>www.iremhawaii.org</u>		Honolulu, HI 96817
LOR	Lorman Education Services		2510 Alpine Road
	www.lorman.com		Eau Claire, WI 54703
UH-OC	Noncredit Programs, Outreach College,	956-8244	2530 Dole Street
	University of Hawaii		Honolulu, HI 96822

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

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