

# Hawaii Condominium Bulletin



## Law Allows Electric Vehicle Charging Station in Condominium Associations

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Senior Condominium Specialist  
at (808) 586-2643 to  
submit your request.

With the State of Hawaii promoting the use of alternative energy sources and people seeking cheaper alternatives to gasoline-powered vehicles, more electric vehicles ("EVs") will be seen on our roads. For those owners of EVs living in condominium associations, the issue arises as to where to install the electric charging system with which to charge those EVs.

Hawaii Revised Statutes ("HRS") § 196-7.5 permits a condominium owner to install an EV charging system on or near the parking stall of any multifamily residential dwelling or townhouse unit owned by that person. The law allows condominium associations to adopt rules that reasonably restrict the placement and use of charging systems, provided that those restrictions do not prohibit the placement or use of the charging systems. In addition, while an association may require reimbursement for the cost of electricity used by any electric vehicle charging system, the association cannot assess fees against a condominium owner for the placement of the charging system.

If you own a parking stall in a condominium association then, you cannot be prohibited from installing an EV charging system on or near that stall, provided that (1) the system is in compliance with any rules promulgated by the association and (2) the charging system is registered with the association within thirty days of installation. And while you can not be charged for installing it, you may be charged for the electricity used by it.

In installing an EV charging system, a unit owner must comply with any association rules in place adopted pursuant to HRS § 196-7.5. Further, if the EV charging

system is placed on a common or limited common element, the condominium owner must first obtain the consent of the association. In this regard, HRS § 196-7.5 (c) (3) states that consent must be given where the unit owner: (1) agrees in writing to comply with any design specification for installation of the charging system; (2) installs the charging system through a duly licensed contractor; and (3) within fourteen days of approval of installation of the system, provides a certificate of insurance naming the condominium association as an additional insured on the unit owner's homeowner's insurance policy.

In light of this mandate, adopting rules governing the installation of the EV charging systems will prepare an association to receive its first EV and bring clarity to the procedure. Consult with an attorney familiar with the new law to assist in the rule-making procedure.



# Letter from the Chair

It's hard to imagine that it's already December, but it has been a busy and productive year for us. First, I would like to bid a fond farewell to Karyn Takahashi and Louise Tadaki, who have left the Real Estate Branch. Many thanks to both of you for your hard work and best wishes to you in the future. I would also like to welcome Miles Ino to the Real Estate Branch staff, as our new Executive Officer. We are all looking forward to getting to know you.

In this issue, we talk about the new law that permits condominium owners to install electric vehicle charging stations. We also answer some questions about removing a property from a condominium property regime and examination of proxies. In the course of their work, the condominium specialists often take questions relating to association boards and their powers and duties. In this issue, we include an excerpt from one of our publications. Please take some time to read it. In our next issue, we will look ahead to 2012 and to what types of issues we may expect to see in the upcoming legislative session.

Finally, I would like to wish all of you a safe, peaceful, and joyful holiday season. Please enjoy this time with your families and friends, and accept my best wishes for a happy new year.

Sincerely,



Michele Sunahara Loudermilk  
Chair, Condominium Review Committee



## REB Welcomes New Staff Member

Miles Ino has joined the REB staff as its new Executive Officer, effective November 1, 2011. Miles comes to the REB from the Insurance Division where he served as an investigator for the Compliance and Enforcement Branch. We welcome you to the REB, Miles!

The REB also lost two long-time employees recently. Karyn Takahashi had a 17-year tenure at the REB where she most recently served as the secretary to the Supervising Executive Officer.

Condominium association contact persons may be more familiar with Louise Tadaki, who was the condominium association clerk handling the registration of just under 1,600 condominium associations. On a daily basis, Ms. Tadaki patiently assisted persons with the association registration process, answering questions and chasing down missing information and documents.

Mahalo to you both and good luck in your new ventures!

# Ask the Condo Specialist

**Q:** We live in a 6-unit condominium association. One of the unit owners wants to “get out” of the condominium association. The owners insist that they were not advised of the status of the property as a condominium property regime at the time of purchase. The owners have also stopped paying maintenance fees on the unit. Can the owners take themselves out of the association?

**A:** The short answer is “no”.

Removal of property from a condominium property regime (“CPR”) is governed by HRS §§ 514A-21 and 514B-47, depending on when the CPR was created (prior to July 1, 2006, under HRS Chapter 514A, or after July 1, 2006, under HRS Chapter 514B).

Both sections address removal (1) by a majority of owners to which is appurtenant at least eighty per cent of the common interest ownership and (2) where the common elements suffer substantial damage. There is no provision in either chapter of the law which allows an individual unit owner to opt out of the CPR without the assent of at least eighty per cent of the common interest ownership. It is legally impossible, therefore, for an ownership interest of less than eighty per cent to remove the property in question from a CPR.

Seek the advice of an attorney familiar with the condominium law who can advise your association of options with regard to this owner’s non-payment of maintenance fees.

This question highlights the importance of purchasers of CPR property appreciating the rights and responsibilities of living in a condominium association. Many purchasers of property in a CPR seem surprised by the concept of ownership unique to the CPR and by their role as owners in the life of the condominium association.

It is important that real estate licensees understand the legal ramifications of living in a condominium association and properly convey this to prospective purchasers of property in a CPR. While there are many benefits to condominium living, certain responsibilities take people by surprise. The payment of monthly maintenance fees or rules governing life on association property to which owners are bound are but two examples of what make living in a condominium association different from a single family home lifestyle. Situations presented by this question may be avoided by educating prospective purchasers about CPRs before a purchase.

**Q:** How long after an association meeting do I have to request to examine proxies?

**A:** HRS § 514B-154 (c) states that “[a]fter any association meeting, and not earlier” an owner shall be permitted to examine proxies provided that an owner: (1) makes a request to examine the proxies within thirty days after the association meeting; (2) a board may require an owner to execute an affidavit stating that the information is requested in good faith; and (3) an owner shall pay for administrative costs in excess of eight hours per year.

Therefore, make your request to examine proxies within thirty days after an association meeting and be prepared to sign an affidavit acknowledging a good faith request to review the proxies and pay any administrative cost attached to retrieving the proxies for your examination.

The Regulated Industries Complaints Office (“RICO”) has investigative jurisdiction over this particular provision. Any disputes regarding the examination of proxies by an owner may be submitted to RICO for an investigation and review of the matter. RICO may be reached at (808) 586-2653.

*The information provided herein is informal and for informational purposes only. Consult with an attorney familiar with the Hawaii condominium law for specific legal advice.*

# Board Members Powers and Duties

The Condominium Specialists receive many inquiries related to the board and board members and their powers, duties and obligations. The responsibilities of a board member range from fiscal management of a condominium association to enforcing rules governing people's behavior in the association. Board members are fiduciaries to the association and its owners, and must: (1) act in good faith for the good of the association; (2) follow the law and not exceed their authority; (3) put the association's interest before their personal interests; and (4) act with due diligence.

The following is an excerpt from the booklet "Condominium Property Regimes: Board Members' Powers and Duties". You may find the entire booklet, along with a second, "Condominium Property Regimes: Owner Rights and Responsibilities", online at the Real Estate Branch website, [www.hawaii.gov/hirec](http://www.hawaii.gov/hirec).

## BOARD MEMBERS' POWERS AND DUTIES

The board of directors has the ultimate responsibility for the operation of the association on behalf of the owners. Although the board can delegate authority to others, such as managing agents, it cannot delegate that responsibility. In meeting its responsibility, the board has certain significant duties or obligations to the association which also must be performed.

### A. Familiarity with Legal Documents

As previously discussed, Chapter 514B and the condominium documents form the primary basis for the definition and scope of the board's power and responsibilities. Board members need to be familiar with Chapter 514B, as well as with the association's declaration, bylaws, and house rules. If the association is incorporated as a nonprofit corporation, board members also need to be familiar with Chapter 414D and the association's articles of incorporation. A good understanding of those documents is essential to the board members' ability to carry out their duties under the law.

NOTE: Being elected to the board does NOT mean you can do anything you want. Your actions must be based on a power given to you by the law or the condominium documents. You may be liable if you act or authorize action not permitted by the law or those documents.

### B. Fiduciary Duty of Directors

Chapter 514B provides that every director owes the association a "fiduciary duty" in the performance of the director's duties, to exercise the degree of care and loyalty required of an officer or director of a nonprofit corporation (§514B-106(a)). A fiduciary relationship is a special type of relationship which arises when the confidence, trust, and reliance of one party is placed upon the judgment and advice of another. A fiduciary is bound to protect the interests of the parties relying on it. In exercising their fiduciary duties, board members must act in good faith in the best interests of the association, exercising the same degree of care and skill in making decisions or taking actions that would be expected of an ordinarily prudent person in a similar situation (§414D-149(a)). As fiduciaries, directors must place the interests of the association above their own interests at all times.

In discharging their duties, directors are entitled to rely on information, opinions, reports, or statements of officers and employees of the association, legal counsel, public accountants, or other competent professional experts (§414D-149(b)). If a director has knowledge of a matter that makes reliance on an expert or a board committee unwarranted, the director cannot in good faith act on such reliance (§414D-149(c)). The high standard of conduct to which officers and directors are held may subject each or all of them to personal liability for a breach of their fiduciary duty. The fact that officers or directors are part-time or unpaid volunteers does not excuse them from their fiduciary duty. However, the liability of unpaid directors of incorporated associations is limited to gross negligence in the performance of (or failure to perform) their duties (§414D-149(f)).

### C. Conflicts of Interest

Fiduciary duty includes a duty of undivided loyalty and honesty in voting on any matter where conflicts of interest or self-dealing could arise. A director must not permit another duty or interest to prevent the director from making an independent decision based on the best interests of the association. Directors must disclose any conflict of interest prior to a vote on the matter at the board meeting, and the disclosure must be recorded in the minutes of the meeting. If a director has a conflict of interest, he or she may not cast a vote on that matter (§514B-125(f)).



Conflict of interest can be a confusing concept. It usually arises if a director has a financial interest in the matter which is the subject of a board decision. For example, if the association is contemplating entering into a business transaction with a company in which the director has a direct personal or financial interest not common to other members of the association, the director must disclose that fact and should abstain from voting (§514B-125(f)). Although conflicts of interest are normally based on financial interests, they can also arise when the interest is personal. For instance, a conflict of interest can arise when a board considers the conduct of a unit owner or resident who is related to a director.

Another typical conflict of interest occurs when directors are members of a hotel operation which rents association property, such as a front desk area. In that situation, those directors should be particularly careful to disclose the potential conflict. The board may wish to create a committee of disinterested board members or owners to make recommendations on rent to the board, to ensure that the association receives a fair rent for the property.

#### **D. Delegation of Responsibility**

Many people, including board members, mistakenly believe that the managing agent is solely responsible for everything relating to the management and operation of the condominium project. The managing agent, except in limited circumstances, must implement the policies of the Board of Directors. Since most directors are unpaid volunteers, it is natural for boards to delegate some of their authority to the managing agent or association employees. An important aspect of the director's fiduciary duty is the supervision of those persons to whom the board has delegated authority for the day-to-day operation of the condominium project. Although the board may delegate certain authority to the officers, managing agent, resident manager, or committees, the board must still ensure that association business is conducted in accordance with the law and condominium documents. In other words, board members can delegate their authority under certain circumstances, but they cannot delegate their responsibility to operate and manage the condominium project. That means that board members can ultimately be held liable for the actions of agents and employees of the association if those agents or employees fail to carry out the board's and their own fiduciary duties.

#### **E. Business Judgment Rule**

In judging the actions of directors, courts frequently apply a test called the "business judgment rule." The courts recognize that they

should not second guess the lawful decisions of the board of directors. The board of directors is the duly elected representative of the association; its members own units in the project and have knowledge of the needs and desires of the community. The basic self-governance principle of the condominium law limits judicial inquiry into board decisions. Instead of deciding whether the buildings in a project should be painted blue or brown or green, the courts decide whether the board of directors has the authority to change the color of the buildings, acts in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the directors reasonably believe to be in the best interests of the association. This means that directors should adequately research and carefully examine the alternatives, costs, and risks of a particular decision. The process a board follows in making a decision may ultimately be more important in determining liability than the decision the board ultimately makes.

The business judgment rule recognizes that volunteer board members will not always make the right decision, but if they follow the right procedures and act in the interest of the association, they will usually not be personally liable for their actions on behalf of the association. Board members should remember the following important points about the business judgment rule:

- (1) Be informed about the association's business generally. Before making an important decision, research and consider all relevant information reasonably available to you and discuss it with your fellow board members. Consult experts if you do not have the expertise to deal with an issue. Then act reasonably and rationally.
- (2) Attend and participate in meetings, and be sure absences are recorded in the minutes.
- (3) Register dissents in the minutes when in disagreement with board actions. However, once a decision is made by the board, it is the decision of the board as a whole.
- (4) Act in the best interests of the association, not yourself. The principles of conflict of interest apply. You should not vote on matters in which you are on both sides of the transaction or from which you will derive personal or financial benefit over and above that derived by other owners. You may have problems convincing anyone that you acted in the best interests of the association if your decision primarily benefited yourself.
- (5) Do not exceed your authority. Be knowledgeable about the law and the association's condominium documents. In particular, consult a knowledgeable attorney if you are not sure that legally you can or

# Board Members Powers and Duties (cont. page 4)

should do what you plan to do. The expense of an attorney's advice before you act may be far less than the expense of litigation if your actions exceed your authority.

(6) Do something. The rule will not protect you if you fail to act. If you do nothing, it should be only because you carefully considered the issue and consciously decided to do nothing, not because you ignored the issue in the hope that it would go away. Making the wrong decision may be less damaging than making no decision at all.

## HIRING MANAGING AGENTS

The board is responsible for both the upkeep and protection of the property's physical assets, as well as keeping the association's finances in a healthy state. Since board members are typically unpaid volunteers, they often turn to the services of a managing agent or association employees to handle the day-to-day operations of the condominium.

The board's authority to hire a managing agent is usually found in the bylaws. Boards need to ensure that managing agents they hire meet the following qualifications:

(1) Be a licensed real estate broker or a trust company authorized to do business in Hawaii; and

(2) Obtain a fidelity bond for the required amounts to protect against the loss of association funds or property caused by the fraudulent or dishonest acts of the agent's employees (§514B-132(a)).

The above requirements apply only to independent contractors who assist the board in the operation of the property. An employee of the association, even if the employee performs the same functions as a managing agent, is not considered a "managing agent." Contact the Commission at (808) 586-2643 if you have questions about managing agents.

Chapter 514B provides that every managing agent is a fiduciary with respect to the property the agent manages (§514B-132(c)). As with board members, the fiduciary duty of the managing agent requires that the agent act with diligence, care, and skill, and make decisions in the best interests of the association.

The managing agent is responsible for carrying out all duties agreed to in its contract with the association. These duties may include finan-

cial management, such as collection of common assessments and other income, payment of bills and the preparation of monthly financial statements, as well as physical management. Physical management includes routine inspections of the property, supervision of maintenance, repairs and improvements, coordination of all of the various goods and services needed to operate and maintain the property, and meeting the insurance and other needs of the project.

The law does not specify in detail what services a managing agent must perform for an association. Therefore, the board should review its contract with the managing agent to determine what services the managing agent will perform. The Community Associations Institute has a publication for sale that contains information about the services commonly provided by managing agents. If the board desires services not included in the proposed management contract, it should negotiate for those services and ensure that the contract clearly indicates that the managing agent will provide those services. Otherwise, disputes and ill-feeling may arise.

As in many things, you get what you pay for. The cheapest managing agent may not always provide the best service.

# Mediation Case Summaries

## Mediation Services of Maui (“MSM”)

From August 2011 through November 2011, MSM conducted the following condominium-related mediations:

<b>PARTIES</b>	<b>ISSUE</b>	<b>DISPOSITION</b>
Owner vs. Board	Alterations to alleged common areas and possible changes to house rules.	Board declined mediation.
Owner vs. Board and CMA	Fines assessed against owner for alleged violation of house rules; complaints about condominium managing agent.	Mediation declined by CMA.

## Mediation Center of the Pacific (“MCP”)

From August 2011 through November 2011, MCP conducted the following condominium-related mediations:

Owner vs. Board	Issues regarding repairs to the common area.	Board declined to mediate.
Owner vs. Board	Allegation of unequal enforcement of house rules and fines.	No mediation scheduled; case closed.
Owner vs. Board	Issue of removal of trees from common element.	Owner w/drew complaint; case closed.
Owner vs. Board	Questioning board’s authority to require window replacements by all owners.	Owner did not follow up with mediation; case closed.

## West Hawaii Mediation Center (“West Hawaii”)

From August 2011 through November 2011, West Hawaii conducted the following condominium-related mediations.

Board vs. Owner	Dispute over bylaws relating to past due fees.	Mediated, no agreement.
Owner vs. Board	Dispute regarding bylaws and association fees.	Parties did not agree to mediate.

From the period August 2011 through November 2011, Kaua’i Economic Opportunity and Kuikahi Mediation Center did not conduct any condominium-related mediations.

# 2012 Real Estate Commission Meeting Schedule

Laws & Rules Review Committee – 9:00 a.m.

Condominium Review Committee – Upon adjournment of the  
Laws & Rules Review Committee Meeting

Education Review Committee – Upon adjournment of the  
Condominium Review Committee Meeting

Real Estate Commission – 9:00 a.m.

Wednesday, January 11, 2012\*

Wednesday, February 8, 2012

Wednesday, March 7, 2012

Wednesday, April 11, 2012

Wednesday, May 9, 2012

Wednesday, June 13, 2012

Wednesday, July 11, 2012

Wednesday, August 8, 2012

Wednesday, September 12, 2012

Wednesday, October 10, 2012

Wednesday, November 7, 2012

Wednesday, December 12, 2012

Friday, January 27, 2012

Friday, February 24, 2012

Friday, March 23, 2012

Friday, April 27, 2012

Friday, May 25, 2012

Friday, June 29, 2012

Friday, July 27, 2012

Friday, August 24, 2012

Friday, September 28, 2012

Friday, October 26, 2012

Wednesday, November 21, 2012

Friday, December 21, 2012

The January Committee meeting will be held on Maui at the Realtors Association of Maui, 441 Ala Makani Place. All other meetings will be held in the Queen Liliuokalani Conference Room of the King Kalakaua Building, 335 Merchant Street, First Floor.

Meeting dates, locations and times are subject to change without notice. Please visit the Commission's website at [www.hawaii.gov/hirec](http://www.hawaii.gov/hirec) or call the Real Estate Commission Office at (808) 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 (808) 586-2643 to submit your request.