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2010 LEGISLATIVE UPDATE

I. ACT 53 - SOLAR ENERGY

House Bill 2197, HD1, SD1, Effective on April 23, 2010

In 2005, the Legislature amended the law to make it easier for individual owners to install solar energy devices on single family residences and the common elements of townhouses. In 2009, several bills that proposed to give boards of directors similar rights, for the benefit of all residents of the condominium project, stalled in committee. This year, act 53 provides boards with the necessary authority, and does not limit that authority to boards of townhouses and single-family projects. Instead, act 53 covers ALL types of condominiums.

As the preamble to the act states:

> *The purpose of this Act is to amend sections 514A-13.4 and 514B-140, Hawaii Revised Statutes, to specifically provide boards of directors with the authority to install or allow the installation of solar energy or wind energy devices on the common elements under appropriate circumstances to further reduce Hawaii's dependence on energy generated from fossil fuels.*

In fact, leasing or licensing the common elements to others for installation of solar or wind energy devices seems to be the preferred course of action. Through the use of tax credits (and, possibly, the sale of surplus power to the utility company), the lessees or licensees usually compensate associations for the use of the project common areas or provide them with electricity at lower rates. (Since a condominium association often pays little if any taxes, it usually cannot take advantage of the tax credits that are available to for-profit companies that install the solar energy devices.)

Prior to act 53, the condominium law required high levels of approval ─ 67% to 75% ─ to lease even unused areas of the project, such as roofs, for the long term. Therefore, while theoretically condominium boards could take advantage of proposals to install solar by obtaining owner approval, such high levels of approval combined with owner apathy often defeated the best efforts of the boards to install solar energy devices.

With the passage of act 53, owner approval is no longer required. The law now allows the board, alone, to install solar energy or wind energy devices or lease/license roofs and other unused areas of the project for their installation. Every board's fiduciary duty to act in their fellow owners' best interests imposes significant controls on board action. Therefore, boards should exercise their new authority cautiously.

Moreover, despite act 53, owner approval may still be required in some cases. For example, the difficulty of obtaining financing for solar energy device installations seems to have resulted in some installers requesting that the association guarantee loans or other financing for the work. If an association agrees to that request, the association will probably need majority owner approval under section 514B-105(e), since, in essence, the association will be taking out a loan.

Similarly, act 53 does not cover additional construction by associations that lack the space to install sufficient solar energy devices to make the installation worthwhile. Those associations may wish to build additional space – such as roofing over parking areas – to allow the cost-effective installation of the devices. In most cases, that type of construction will require the approval of at least a majority and probably 67% to 75% of the members.

II. ACT 186 – ELECTRIC VEHICLES

SB 2231 SD 1, HD2, CD1, Effective July 1, 2010

This act prohibits associations from preventing a unit owner from placing an electric vehicle charging station on or near the owner's parking stall in any "multi-family residential dwelling or townhouse." The purpose is to help meet the Hawaii Clean Energy Initiative goal of 70 percent clean, renewable energy by 2030, thereby greatly reducing Hawaii's dependence on fossil fuels. While that goal is worthwhile, act 186 could present problems for associations

The act is very similar to recent legislation allowing homeowners to install solar energy devices and clotheslines on the common and limited common elements. As a result, it has similar provisions, including but not limited to:

- Any provision in any lease, instrument, or contract contrary to the intent of the act is "void and unenforceable."

- The association may adopt rules that reasonably restrict the placement and use of electric vehicle charging systems but cannot prohibit the installation or use of electric vehicle charging systems altogether. (Note: The act takes effect on July 1, 2010 and includes no delayed implementation date for the rules, so they seem to be required immediately.)

- The association cannot assess or charge any homeowner any fees for the installation of any electric vehicle charging system but can require reimbursement for the cost of electricity used by the electric vehicle charging system.

The act also places burdens similar to the solar and clothesline laws on any unit owner (tenants are not covered) wishing to install an electric vehicle charging system on the common or limited common elements:

- The owner may install an electric vehicle charging system on or near the parking stall of the owner's multi-family residential dwelling or townhouse, provided that: (i) the system is in compliance with any association rules and specifications; and (ii) the owner registers the system with the association within 30 days of installation.

- If the system is to be placed on a common element or limited common element, the homeowner must first obtain the consent of the association, which must give its consent if the homeowner agrees in writing to: (i) comply with the association's installation specifications; (ii) hire a licensed contractor to install the system; and (iii) within 14 days of receiving the association's approval of the system, provide a certificate of insurance naming the association as an additional insured on the owner's insurance policy.

Finally, act 186 includes provisions similar to the solar energy device and clothesline laws concerning: the liability and responsibility of the owner and the owner's successors; removal of the electric vehicle charging system to allow repair and maintenance of the common elements, etc.

Despite the worthwhile intent of act 186, it may present problems for some associations. Unlike the solar energy device and clothesline laws, act 186 does not restrict installation of electric vehicle charging stations to just single-family homes and townhouses. Instead, the act includes "multi-family residential dwellings", which, although not defined in act 186, arguably, includes all types of condominiums and even cooperatives.

Act 186 may also present a number of practical problems, depending on the age and layout of a particular multi-family residential dwelling:

- If an owner's parking space is far removed from the building and any source of electricity, some form of electricity source will have to be installed, which might require trenching or unsightly galvanized conduit.

- In older buildings, the electrical system may not be able to handle high voltages -- e.g., 220 volts or more -- which may be necessary for certain types of electric vehicles. This may require expensive rewiring or a limit on the number of charging stations that can be installed.

- Act 186 does not specifically refer to the installation of a sub meter to measure the electricity used by an electric vehicle charging station. Nevertheless, since the act does specifically require the owner to reimburse the association for electricity use, a requirement for some type of meter is certainly implicit in the act.

Other problems may surface as the practical effect of the act becomes clear. In the meantime, associations should consider adopting rules on the installation of electric vehicle charging stations. In that way, associations can deal with potential problems before they arise.

III. ACT 201 – SOLAR ENERGY DEVICES

SB 2817, SD1, HD1, CD1, Not Signed By Governor but Effective July 6, 2010

This act amends the existing law relating to solar energy devices (section 196-7, HRS) to require every homeowner association to adopt new rules relating to those devices. The new rules must not impose conditions or restrictions that: (i) increase the cost of not only installation (which is already dealt with by the present law) but also maintenance and removal of a solar energy device by more than 15 percent; or (ii) require an encumbrance on title because of the installation of a solar energy device.

The Legislature decided the existing solar energy device law needed clarification because, reportedly, some homeowner associations have created obstacles for people who wish to install solar water heaters and photovoltaic systems on their single-family dwellings or townhouses.

Act 201 clarifies the old law by stating that:

(1) The rules for installing solar devices (originally required by December 31, 2006) that deal with the new requirements of this act must be revised by July 1, 2011, to reflect those new requirements.

(2) The rules must still facilitate the installation of solar energy devices but also must not increase the cost of "installation, maintenance, and removal" of the device by more than 15 percent. (Again, the old law simply stated only that the rules could not "unduly or unreasonably restrict" the cost of the "placement" of solar energy devices by more than 15 percent.)

(3) A homeowner association can no longer require an encumbrance on title as a condition for the placement of any solar energy device (although that limitation is to be automatically repealed ("sunsetted") on June 30, 2015).

Act 201 presents a number of problems. For example, act 201 is not clear whether the cost of "maintenance or repair" refers to: (i) the owner's cost of maintenance and repair for the device, itself; or (ii) the costs incurred by the owner as a result of the association's need to maintain or repair the common or limited common elements on which the owner has installed the solar energy device.

Nevertheless, the existing law, section 196-7(d), is very clear that an owner is fully and completely responsible for removing the solar energy device if that becomes necessary for the repair, maintenance, or replacement of the common or limited common elements on which the solar energy device is located. On that basis, act 201 seems to be focusing on increased costs for the owner to maintain or repair the solar energy device, itself, for its expected useful life.

Assuming that is the case, the act lacks a specific method of calculating the cost of future "maintenance or repair" for purposes of the 15% limit stated in the act. Moreover, if the installation remains on the common elements for many years, the cost of maintenance or repair

may increase significantly from the time of the original installation to the time when maintenance or repair is eventually required, thereby increasing the uncertainty of the calculation.

Presumably, if the original installation cost of the solar energy device is $2,000, an association cannot restrict or limit the installation in such a way that future maintenance or repair of the solar energy device will cost more than $300 (i.e., 15% of $2,000). That calculation may be difficult to make at the time of installation. A more likely analysis is, for example, if five years from now the cost of maintenance or repair will be $500, the association's rules cannot increase that cost by more than $75 at that time.

IV. ACT 155 - GENERAL EXCISE TAX

HB 2595 HD 1, SD2, CD1, Effective June 1, 2010

Homeowner associations that fail to register to do business and file a general excise tax reconciliation return may be adversely affected by this act.

This act results from two main concerns:

A. The Legislature's determination that the general excise tax's efficiency has been diminished by the addition of tax exemptions for particular businesses or industries and by the fact that some businesses pay no tax because they often do not register to do business in Hawaii or file tax returns.

B. Hawaii businesses charging general excise tax costs to customers, as the law permits, but, reportedly, failing to pay their general excise tax, even while passing the tax on to Hawaii consumers and representing that it will be paid to the government.

To deal with those two problems, this act:

A. States that no one shall be entitled to any general excise tax benefit (e.g., an exemption) unless the person claiming the general excise tax benefit:

   (i) Obtains a license to engage in/conduct business, as required by law; and

   (ii) Files the annual general excise tax reconciliation tax return required by law not later than twelve months from the due date prescribed for the return.

The tax director may require a taxpayer to furnish information to determine the validity of any general excise tax benefit (which is defined as: any tax exemption, exclusion of a taxable amount, a reduction from the measure of a tax imposed, a tax deduction, a tax credit, a lower rate of tax, a segregation or division of taxable amounts between multiple taxpayers involved in the same transaction, or any income splitting allowed under this chapter). On the other hand, the director may waive the denial of the general excise tax benefit if the failure to comply is due to reasonable cause and "not to the willful neglect of the taxpayer."

B. Imposes personal liability on tax payers for the general excise tax with respect to:

(i) Any amount a taxpayer collects from a customer for general excise tax that is separately stated or accounted for in a receipt, contract, invoice, billing, or other evidence of business activity; or

(ii) Any amount equal to the general excise tax liability under the law (i.e., the amount of tax that should be paid on the transaction), when a taxpayer does not separately state or account for that tax amount as part of the transaction.

The amounts under paragraphs (i) and (ii) must be held in trust for the benefit of the State and for payment to the State in the manner and at the time required by law.

The second requirement of the act is unlikely to affect homeowner associations because they do not engage in taxable activity of the type contemplated by the act. Nevertheless, under the first requirement, homeowner associations could find that they lose or are denied their general excise tax exemption under the law if they fail to register and file a tax return.

Moreover, while there is a good-faith exception for failing to register or file, homeowner associations should avoid relying on that exception, since it is discretionary and could be denied.

V. ACT 91 – GENERAL EXCISE TAX

SB 2643 SD1, HD1, CD1, Effective July 1, 2010

This act corrected a problem with act 239, Session Laws of Hawaii 2007. Fortunately, that problem is unlikely to affect the average condominium association. Nevertheless, some associations with hotel and timeshare operations should be aware of the potential for future problems with act 91.

As originally passed in 2007, act 239 exempted the following from the general excise tax:

(1) Amounts received by a submanager of an association of apartment owners or of certain nonprofit homeowners or community associations in reimbursement of sums paid for common expenses;

(2) Amounts received by an operator of a hotel from the owner of the hotel or from a timeshare association, for employee wage and benefit costs disbursed by the operator; and

(3) Amounts received by a suboperator of a hotel from the owner of the hotel, timeshare association, or operator of the hotel, for employee wage and benefit costs disbursed by the suboperator.

That general excise tax exemption was supposed to put those payments on the same footing as similar payments to condominium managing agents, i.e., to exempt them from the general excise tax.

The act 239 tax exemption, however, was set to expire on December 31, 2009. In 2009, by passing act 196, Session Laws of Hawaii 2009, the Legislature extended the tax exemption through December 31, 2010. Act 196 also included an aggregate cap of $400,000 for the tax exemption, without stating specifically how the $400,000 cap would be calculated.

This year, in act 91, the Legislature extended the act 239 exemption to December 31, 2014, and corrected a mistake that occurred in passing act 196, Session Laws of Hawaii 2009. (Specifically, in 2009, the Legislature apparently intended to impose a $400,000 cap on the tax liability exemption, not on the gross receipts amount, but, again, that was not clear in Act 196. As a result, act 91 clarifies the law to reflect that the aggregate cap of $400,000 should apply to the aggregate tax liability, not gross receipts.)

VI. ACT 153 - PRIVATE ROADS

HB2020 HD2, SD2, CD1, Effective June 1, 2010

The purpose of this act is to expand county enforcement of traffic regulations: (i) on public streets, roads, or highways whose ownership is in dispute between the State and the county; and (ii) on certain other private streets or highways. The enforcement authority includes laws relating to county vehicular taxes, motor vehicle safety responsibility, traffic violations, use of intoxicants while operating a vehicle, motor vehicle insurance, motorcycle and motor scooter insurance, and odometers. The bill was pushed by the Big Island but affects all parts of the State.

The Legislature recognized that there are hundreds of miles of private roadways throughout the state that are open to the public. Nevertheless, questions have been raised regarding the legality of police officers enforcing traffic laws on these private roadways, such as those relating to seatbelt and child restraint violations, driving under the influence, and no-fault insurance. This act clarifies those issues.

The act applies to: (i) Any private street, highway, or thoroughfare which has been used continuously by the general public for a period of not less than six months; and (ii) Any private street, highway, or thoroughfare which is intended for dedication to the public and is open for public travel but has not yet been accepted by the county.

The county, however, does not become responsible for the maintenance and repair of the private street, highway, etc., when it enforces traffic regulations and highway safety laws or places or permits appropriate traffic control devices to be placed on that street, highway, or thoroughfare. Nor does county enforcement create adverse or prescriptive rights for the general public over the street, highway, or thoroughfare. Similarly, county consent to the placement of traffic control signs or markings on a private street is not deemed to constitute control over that street.

VII. ACT 99 - GRAFFITI

HB 2129 HD1, SD1, Effective May 12, 2010

Finding that graffiti is a community-wide problem, this act tries to impose appropriate penalties that will serve as a deterrent.

Specifically, this act requires a person sentenced for an offense in which the damage is caused by graffiti, in addition to any other penalty, to: (i) remove the graffiti from the damaged property; and (ii) for a period of time not to exceed two years from the date of sentencing, perform community service to remove any graffiti applied to other property within one hundred yards of the site of the offense for which the person was sentenced, even if the property was damaged by another person.

In either case, the consent of the property owner or owners must first be obtained before removal begins. Graffiti is defined as any unauthorized drawing, inscription, figure, or mark of any type intentionally created by paint, ink, chalk, dye, or similar substances.

VIII. ACT 169 - PRIVATE TRANSFER FEES

HB2288 HD1, SD2, CD1, Effective June 22, 2010

The purpose of this act is to prohibit real property deed restrictions or other covenants running with the land from requiring transferees to pay fees for the future transfer of the property. (While not common in Hawaii, in some states, developers of property have begun to impose such a transfer fee. In other words, every time a property is sold in a particular development, even if the developer has long ceased to own an interest in the property, a transfer fee would have to be charged and paid to the developer.)

Act 169, however, recognizes that there are numerous "legitimate" transfer fees that arise when a property is transferred. Therefore, the act exempts those "usual and customary" fees, assessments, or charges that are typical for various real property transactions, including:

(1) Payments to a lender on a mortgage loan secured by the property;

(2) **Payments to a condominium association, cooperative housing corporation, limited-equity cooperative, or planned community association pursuant to a declaration, covenant, or law applicable to the association or corporation**;

(3) Lease payments and charges to landlords;

(4) Payments to the holder of an option to purchase an interest in real property, or holder of a right of first refusal or first offer to purchase such interest, for waiving the option or right upon transfer of the property to another person;

(5) Payments by a developer of real property for resale to others;

(6) Payments to a government entity;

(7) Payments made pursuant to a deed restriction or other covenant running with the land required by a litigation settlement approved by a court before the effective date of this bill; and

(8) Payments to a qualified organization for its management of conservation land or for educating the new owners of the property on the conservation restrictions imposed upon the property.

Again, the act is only intended to eliminate the problem of private transfer fees created through a deed restriction or covenant on real property that require every buyer of the property to pay the fee to the party that created that restriction. Since that type of transfer fee is paid every time the property is transferred, the party imposing the restriction retains a perpetual interest in the transferred property. Those fees may create prohibitive costs for homeownership, negatively impact the marketability of real property, discourage buyers, and depress property values. Therefore, the act makes them void if created, filed, or recorded on or after the effective date of this bill.

Finally, the act has a sunset (automatic repeal) date of June 30, 2015.

IX. ACT 208 - PRIVATE GUARDS

SB 2165 SD1, HD2, CD1, Became Law Without the Governor's Signature 7/6/2010, Effective immediately, except for provisions effective July 2013

This act raises standards for the guard industry by specifying educational, criminal history, and training requirements for all guards and employees of guard companies who act in a guard capacity. The act results from a legislative finding that the education and training requirements in the existing law for guards are inadequate to protect the public and to provide for high-quality guard services. For example, under the prior law, it was possible for an individual to act as an armed security guard with an eighth grade education and no formal training at all.

According to the legislative findings, the proliferation of the use of guards and private security forces has resulted in an environment where individuals empowered by and answerable only to their employers are permitted to act to secure life and property in potentially dangerous and threatening situations, without adequate training or oversight that improved regulation would afford. This act is intended to subject guards to meaningful oversight and regulation that is in the best interest of the guard industry as well as the public's safety.

Effective July 1, 2013 the new requirements of the act apply to all guards, and all agents, operatives, and assistants of a guard agency, private business entity, or government agency who act in a guard capacity. Specifically, those individuals must apply to register with the board, and meet certain registration, instruction, and training requirements prior to acting as a guard.

Those individuals must (again, effective July 1, 2013):

(1) Be not less than eighteen years of age;

(2) Possess a high school education or its equivalent;

(3) Not be presently suffering from any psychiatric or psychological disorder which is directly related and detrimental to a person's performance in the profession; and

(4) Not have been convicted in any jurisdiction of a crime which reflects unfavorably on the fitness of the individual to act as a guard (unless the conviction has been annulled or expunged by court order); provided that the individual must submit to a national criminal history record check as authorized by federal law, including but not limited to the Private Security Officer Employment Authorization Act of 2004, and specified in the rules of the board (of private detectives and guards).

Also, effective July 1, 2013, guards and individuals acting in a guard capacity who meet these requirements must also successfully complete the classroom instruction specified by law (*outlined below*), pass a written test, and undergo four hours of on-the-job training supervised by an individual who has successfully completed all of the requirements of the law or who has otherwise been approved by the board for on-the-job training.

With respect to the requirement for educational/classroom instruction, prior to July 1, 2013, the guards must also complete:

(1) Eight hours of classroom instruction before the first day of service; and

(2) Four hours of classroom instruction annually thereafter.

The classroom instruction must include, but not be limited to:

(1) State and federal law regarding the legal limitations on the actions of guards, including instruction in the law concerning arrest, search and seizure, and the use of force as these issues relate to guard work;

(2) Access control, safety, fire detection and reporting, and emergency response;

(3) Homeland security issues and procedures;

(4) When and how to notify public authorities;

(5) Techniques of observation and reporting of incidents, including how to prepare an incident report;

(6) The fundamentals of patrolling;

(7) Professional ethics; and

(8) Professional image and aloha training.

(Additional requirements are imposed for those guards and individuals acting in a guard capacity who carry a firearm or other weapon, including but not limited to an electric gun as defined in law.)

Act 208 presents a number of problems for those condominiums and other homeowner associations that have their own security personnel. In particular, act 208 deletes an exemption that used to apply to associations that employed their own guards and allow them to avoid meeting any requirements of chapter 463. Specifically, under section 463-13 of the old law, a person was exempt from regulation if: the person was "employed exclusively and regularly by one employer in connection with the affairs of that employer only, in an employer-employee relationship." Act 208 deletes that exemption, as follows:

*"§463-13 **Exemptions**. This chapter does not apply to any person, firm, company, partnership, or corporation or any bureau or agency whose business is exclusively the furnishing of information as to the business and financial standing and credit responsibility of persons, firms, or corporations, or as to personal habits and financial responsibility, of applicants for insurance, indemnity bonds, or commercial credit, [~~or a person employed exclusively and regularly by one employer in connection with the affairs of such employer only and where there exists an employer-employee relationship,~~] or an attorney at law in performing the attorney's duties as such attorney at law."*

In addition, deletion of that exemption takes effect immediately. Therefore, even though most of the new requirements of act 208 do not take effect until July 1, 2013, the change to section 463-13 suggests that associations that employ their own guards exclusively for their property are now subject to all the existing requirements of chapter 463.

This means, for example, that condominium associations that employ their own security personnel may have to meet the existing requirements for guard agencies and guards, and have a principal guard for their security force, as chapter 463 requires. At a minimum, the deletion of this exemption presents uncertainty for associations that employ their own security personnel.

Changing the job description or title of security personnel will probably not exempt them from the requirements of chapter 463. Instead, the definition of "guard" in the law covers most security personnel, regardless of their title:

"Guard" means a registered uniformed or nonuniformed person responsible for the safekeeping of a client's properties and persons within contractually prescribed boundaries, and for observation and reporting relative to such safekeeping. "Guard" shall not include any active duty federal, state, or county law enforcement officers or personnel.

Finally, this act has a sunset (automatic repeal) date of July 1, 2016, but until then, associations will have to deal with the requirements of act 208. Act 208 also states that the State Board of Private Detectives and Guards must adopt rules to effectuate the provisions of the act, so, perhaps, those rules will clarify some of the issues outlined above.

X. ACT 162 – MORTGAGE FORECLOSURE TASK FORCE

SB 2472, SD2, HD1, CD1, Effective June 30, 2010

This act results from a legislative finding that a comprehensive evaluation of Hawaii's mortgage foreclosure laws is necessary before the enactment of meaningful legislation on the issue. The act creates a mortgage foreclosure task force to conduct an extensive analysis of all factors affecting mortgage foreclosures in the state and to recommend appropriate legislation.

The mortgage foreclosure task force is established within the Department of Commerce and Consumer Affairs (DCCA) for administrative purposes. The Director of the DCCA has to select the initial members of the task force, including some representatives from the specific groups or entities individually named in the act, including but not limited to: the Office of Consumer Protection, Legal Aid, mortgage counselors, the Hawaii Bar Association, the Hawaii Council of Associations of Apartment Owners, and even the judiciary.

The mortgage foreclosure task force must submit a report of its findings and recommendations, including any proposed legislation, to the Legislature no later than 20 days prior to the convening of the 2011 and 2012 regular sessions, and must participate in a joint informational session upon request by the Legislature.

The mortgage foreclosure task force will cease to exist on June 30, 2012.

XI. ACT 139 – HAWAII CIVIL RIGHTS COMMISSION

SB 2565 SD1, HD1, CD1, Effective May 25, 2010

The act is intended to:

(1) Extend the timeframe in which the Hawai‘i Civil Rights Commission (the "Commission") must complete the rulemaking process to conform state law protections against disability discrimination to the federal Americans with Disabilities Act Amendments Act of 2008 (Act), from December 31, 2010, to 12 months after the United States Equal Employment Opportunities Commission publishes final rules interpreting the Act; and

(2) Authorize the Commission to make a determination regarding whether a witness's identity or statement may be kept confidential and establish the process by which and the factors that the Commission must consider when the Commission makes this determination, including: (i) the relevance and materiality of the statement; (ii) whether the statement could be obtained some other way; or (iii) a witness's legitimate fears of retaliation, etc.

For associations, the end result may be that it will be more difficult to obtain copies of Commission investigations than is presently the case.

XII. ACT 9 – REAL ESTATE LICENSEE CONTINUING EDUCATION

SB 2602, HD1, Effective January 1, 2011

This act recognizes, in the words of the Legislature, "that the continual evolution of the real estate industry requires that real estate brokers and salespersons regularly update their knowledge of changes to the real estate industry." The Legislature further finds that an increase in continuing education hours will advance the level of professionalism in the real estate industry.

The act increases the minimum required continuing education hours for real estate brokers and salespersons from 10 hours to at least 20 hours in each two-year licensing period.

In light of the requirement in act 208 above, that security guards have a high school education, the House Committee report includes some interesting language. After noting that the original version of the bill proposed to require real estate licensees to have a high school diploma or its equivalent, as determined by the Real Estate Commission, the House noted that it had amended this bill by "*eliminating the provision requiring every real estate licensee to have a high school diploma or its equivalent*."