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2023 LEGISLATIVE UPDATE

In 2023, the legislature made a number of changes to both the condominium law (Chapter 514B) and the requirements for planned community associations law (Chapter 421J). The text of the acts listed below can be found at: <http://www.capitol.hawaii.gov/>

Act 199 (SB855 SD1 HD2 CD1). Signed 07/03/23, effective 07/03/23, Relating To Condominium Reserve Requirements.

This act clarifies but imposes more detailed requirements for condominium reserve studies. The text of the act is attached to this legislative update to outline those requirements in full.

Last year the law was amended to state that an association must have its reserve study “reviewed” by an “independent reserve study preparer” every three years. No definition of the term was provided in the law. There was also confusion as to whether that term could include the association’s managing agent or whether the managing agent could not be considered “independent” or might be deemed to have a conflict of interest.

This year, the law was amended to require that if the budget is not prepared by an independent reserve study preparer, it must be reviewed by one every three years. In addition, the act added the following definition:

“Independent reserve study preparer” means any organization, company, or individual with a reserve study certification from an industry organization.

The law was also amended to state:

[P]rovided further that a managing agent with industry reserve study designations shall not be considered as having a conflict of interest for purposes of this paragraph.

In other words, a managing agent with the necessary qualifications can perform the review every three years.

The legislature also recognized that: (i) certain older condominiums on Oahu are required to make fire safety upgrades; and (ii) those upgrades can cost the condominium associations millions of dollars, resulting in the condominium association drastically increasing its maintenance fees. The act therefore requires a condominium association to update its annual operating budget and reserve study to include a summary of the following information:

(3) *The estimated costs of fire safety equipment or installations that meet the requirements of a life safety evaluation required by the applicable county for any building located in a county with a population greater than five hundred thousand; provided that the reserve study may forecast a loan or special assessment to fund life safety components or installation;*

The legislature based that decision on the following analysis:

[A]utomatic fire sprinkler systems provide valuable protection to persons and their homes, especially in condominium buildings. Your Committee further finds it is cost prohibitive to retrofit a condominium building for the installation of an automatic fire sprinkler system. As an alternative, condominium associations may install fire prevention and fire safety systems to reduce the risk of injury and death to residents and fire fighters. To take into account an association's efforts to install such systems, those costs should be included in the association's budget. This measure promotes transparency in an association's budget when accounting for necessary installation of fire prevention and fire safety systems and will clarify and expand reserve requirements to ensure that condominium projects will continue to remain structurally sound.

Finally, this imposes the requirement that the association's annual budget must include:

A general explanation of how the estimated replacement reserves assessments are computed[;] and detailing:

- (A) *The identity, qualifications, and potential conflicts of interest of the person or entity performing the reserve study, update, or any review thereof;*
- (B) *Disclosure of any component of association property omitted from the reserve study and the basis for the omission;*
- (C) *Planned increases in the estimated replacement reserve assessments over the thirty-year plan; and*
- (D) *Whether the actual estimated replacement reserves assessments for the prior year as defined in the study was less than the assessments provided for in the reserve study, and, if so, by how much, and explaining the impact of the lesser assessments on future estimated replacement reserves assessments.*

Note that last year, the law was changed to increase the 20-year projection required for reserve studies prepared under a cash flow analysis to 30 years. Act 199 expands the requirement for a 30-year projection to associations that use a percent funded projection. In other words, regardless of how condominium associations prepare their reserve studies, they must determine the probable reserve requirements over a 30-year, rather than a 20-year, time period.

Act 189 (HB1509 HD2 SD1 CD1). Signed 07/03/23, effective 07/03/23, Relating To Common Interest Developments.

This act proposes to:

- (1) Establish a planned community association oversight task force to examine the rights afforded to owners in a condominium property regime governed by Chapter 514B, Hawaii Revised Statutes, and determine the feasibility of extending any of those rights to members of planned community associations governed by Chapter 421J, Hawaii Revised Statutes; and
- (2) Establish a condominium property regime task force to examine and evaluate issues regarding condominium property regimes governed by Chapter 514B, Hawaii Revised Statutes, and conduct an assessment of the alternative dispute resolution systems that were established by the legislature.

Background

The legislature determined that common-interest developments are a significant form of land development in the State and include condominium property regimes, planned communities, and cooperative housing corporations. In these developments, individuals own property within the development, share ownership and use of common property with all other owners, and participate in a system of self-governance through an association or corporation of the owners within the development.

The legislature also determined that while the governance documents of the association or corporation provide ways for resolving any disputes that may arise within the development, several issues remain unresolved. In particular, while owners within condominium associations can rely on the State to facilitate the resolution of or intervene in a condominium dispute, the owners in other developments are unable to request such support from the State. Instead, the owners in those developments must privately resolve their disputes through their internal processes or the judicial process, which can be expensive and time consuming. Therefore, the legislature decided to create several task forces to examine those issues.

Each task force must: (i) submit an interim report of its findings and recommendations, including any proposed legislation, to the legislature no later than twenty days prior to the convening of the regular session of 2024; and (ii) submit a final report of its findings and recommendations, including any proposed legislation, to the legislature no later than twenty days prior to the convening of the regular session of 2025. Each task force shall cease to exist

on June 30, 2025.

Act 149 (SB729 SD1 HD2 CD1), Signed 6/29/23, effective 7/1/23, Relating To Board Members.

This act amends Section 467-4, Hawaii Revised Statutes, to expand the Real Estate Commission's powers and duties to include the obligation to:

- (8) *Develop a curriculum for leadership training for condominium boards of directors, including pertinent provisions of chapter 514B, association governing documents, and the fiduciary duties of board members;*

Section 2 of the act provides:

The real estate commission shall submit a report of its progress on the development of a curriculum for leadership training for members of boards of directors of condominium associations and submit recommendations, including any proposed legislation, to the legislature no later than twenty days prior to the convening of the regular session of 2024.

This act addresses stated concerns that some board members may lack sufficient background to effectively discharge their fiduciary duties. Section 514B-106(a), of the Hawaii Revised Statutes ("HRS") already provides, in relevant part, that: "*In the performance of their duties, officers and members of the board shall owe the association a fiduciary duty and exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D.*"

The general standards for condominium directors stated in HRS §414D-149(a) include that:

A director shall discharge the director's duties as a director, including the director's duties as a member of a committee:

- (1) *In good faith;*
- (2) *In a manner that is consistent with the director's duty of loyalty to the corporation;*
- (3) *With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and*
- (4) *In a manner the director reasonably believes to be in the best interests of the corporation.*

The curriculum to be developed by the Commission will detail the significance of these duties and other matters relevant to condominium operation and governance.

The Real Estate Commission already has considerable information and educational materials on their website, so board members who need more information on their rights and responsibilities should consider going to the Commission's website and reviewing those existing materials. It appears that the Commission will be establishing a committee to fulfill the intent of this act. Those interested in providing input should consider contacting the Commission's Condominium Education Specialist Lorie Sides.

This act, as originally proposed, would have added requirements for directors of all types of governing bodies to certify in writing to the board that the director had received and reviewed a copy of the association's governing documents. The act would have also required a director to complete a course approved by the Real Estate Commission.

At least one testifier suggested that every owner who sought to bring a complaint about how the owner's association was being managed and operated by the board should be required to provide similar confirmation that the owner had read all of the governing documents and completed a course certified by the Real Estate Commission!

Act 29 (SLH 2023, SB 921). (Note that this act was vetoed by the governor on April 21, 2023. The legislature voted to override his veto on May 4, 2023.), Relating To Limitations Of Actions.

The preamble to the act outlines its purpose as follows:

SECTION 1. The legislature finds that any statute of limitations affecting a condominium association's right of action against a developer is tolled until the period of developer control terminates. Current statutory language does not expressly state that tolling applies to the statute of repose that also limits actions based on construction to improve real property. The period of developer control can, in some situations, extend past the deadline set by the statute of repose.

The legislature further finds that a condominium association should have a reasonable opportunity to assert legal claims once the period of developer control terminates, notwithstanding the statute of repose. Accordingly, the purpose of this Act is to clarify that the tolling provision in section 514B-141 applies to the statute of repose.

As a result, this act amends Section 514B-141(c), Hawaii Revised Statutes, to read as follows [additions are underlined]:

(c) Any statute of limitation affecting the association's right of action against a developer is tolled until the period of developer control terminates~~[-]~~; provided that, notwithstanding section 657-8, no statute of repose shall affect the association's right of action against a developer sooner than two years after the period of developer control terminates. A unit owner is not precluded from maintaining an action contemplated by this section because the unit owner is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by section 514B-147.

The concern of the legislature is primarily based on the wording of Section 657-8(a), Hawaii Revised Statutes, which reads as follows:

§657-8 Limitation of action for damages based on construction to improve real property. (a) No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of any deficiency or

neglect in the planning, design, construction, supervision and administering of construction, and observation of construction relating to an improvement to real property shall be commenced more than two years after the cause of action has accrued, but in any event not more than ten years after the date of completion of the improvement.

(Emphasis added.)

Basically, that section imposes a limitation on the right to bring action relating to construction defects to: (i) the statute of limitation -- two years after the complainant knew or should have known of the defect (i.e., two years “*after the cause of action has accrued*”); (ii) or the statute of repose -- ten years after the completion of the work.

As the legislature states above, the concern was that Act 29 was needed to prevent developers from avoiding responsibility for a design or construction defect by maintaining control of an association until the statute of repose expires. Prior to Act 29, if the period of developer control extended beyond 10 years, the law did not clearly allow the association to bring claims after the period of developer control ended. Act 29 makes it clear that the association can still bring claims under those circumstances.

SCR 48 SD1. Adopted 04/18/23. Requesting That The Department Of Commerce And Consumer Affairs Compile Pertinent Data To Determine The Appropriate Scope Of A Study Analyzing Whether Implementation In This State Of Laws Similar To Captive Insurance Laws Of Massachusetts Would Address This State’s Residential Condominium Property Insurance Needs.

This resolution is intended to have the State investigate and address the lack of availability and steep increases in residential condominium property insurance since 2021. Those increases seem to be primarily due to increases in the frequency and severity of losses.

In particular, the resolution asks the DCCA to survey the associations of apartment owners for each of the 309 condominium properties that are subject to the requirements of fire sprinklers under Honolulu Ordinances Nos. 19-4 and 22-2. The DCCA is asked to compile the information received from the survey responses and submit to the legislature an interim report containing the compiled information. In particular, the report is to include the percentage by which the condominium property’s insurance premiums have increased each year since 2020.

The final report is to be submitted no later than twenty days prior to the convening of the Regular Session of 2024, with not only the DCCA’s findings and recommendations but also any proposed legislation, regarding the appropriate scope of a study analyzing whether implementation of a captive insurance system in the State that is modeled after the captive insurance system of Massachusetts would adequately and appropriately address the State’s residential condominium property insurance needs.

Finally, the legislature asks the DCCA to share the information compiled in the report with and include any recommendations from, condominium property management companies, the Hawaii Captive Insurance Council, Hawaii Council of Community Associations, Kokua Council, and the Hawaii Chapter of the Community Associations Institute.

Setting up a captive insurance system presents potential problems, since it would essentially be a form of self-insurance in which the insurer is owned by the insureds, i.e., the condominium association members. Even if part of the liability is assumed by a “reinsurance” company, large claims can still present a risk. In contrast, in a traditional insurance program, the insurance company takes on all the risks.

In summary, it will be interesting to review the DCCA’s report and recommendations on the feasibility of a captive insurance company for condominiums in Hawaii.

Act 231 [HB 1091, HD2 SD2 CD1]. Signed 07/06/2023 and effective 11/01/23. Relating To Real Property Disclosures Within Shoreline Areas.

This bill addresses real property disclosures within shoreline areas. The legislature continues to identify climate change as the overriding challenge of the twenty-first century. This bill mandates additional seller disclosures in real estate transactions, as follows:

SECTION 2. Section 508D-15, Hawaii Revised Statutes, is amended to read as follows:

(b) When residential real property lies adjacent to the shoreline, the seller shall disclose all permitted and unpermitted erosion control structures on the parcel, expiration dates of any permitted structures, any notices of alleged violation associated with the parcel, and any fines for expired permits or unpermitted structures associated with the parcel.

Note that for condominiums and other homeowner associations, the areas for which the disclosure is required are most likely to be:

- The boundaries of a special flood hazard area as officially designated on flood maps promulgated by the National Flood Insurance Program of the Federal Emergency Management Agency for the purposes of determining eligibility for emergency flood insurance programs;
- The anticipated inundation areas designated on the department of defense’s emergency management tsunami inundation maps;
- The sea level rise exposure area as designated by the Hawaii climate change mitigation and adaptation commission or its successor.

In addition, Subsection 508D-15 (c) still states:

(c) *When it is questionable whether residential real property lies within any of the designated areas referred to in subsection (a) due to the inherent ambiguity of boundary lines drawn on maps of large scale, the ambiguity shall be construed in favor of the seller; provided that a good faith effort has been made to determine the applicability of subsection (a) to the subject real property.*

Act 58 [SB 989 HD2]. Signed 06/05/23, effective 06/05/23, Relating To Unmanned Aircraft Systems.

This bill establishes the offense of trespass with an unmanned aircraft system as a misdemeanor.

SECTION 2. Chapter 711, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§711- Trespass with an unmanned aircraft system. (1) A person commits the offense of trespass with an unmanned aircraft system if the person intentionally causes an unmanned aircraft system to:

(a) Cross the property line of another and come within fifty feet of a dwelling to coerce, intimidate, or harass another person or, after having been given actual notice to desist, for any other reason; or

(b) Take off or land in violation of current Federal Aviation Administration special security instructions or unmanned aircraft systems security sensitive airspace restrictions.

(2) This section shall not apply if:

(a) Consent was given to the entry by any person with legal authority to consent or by any person who is lawfully present on the property; or

(b) The person was authorized by federal regulations to operate an unmanned aircraft system and was operating the system in an otherwise lawful manner and consistent with federal regulations.

(3) Trespass with an unmanned aircraft system is a misdemeanor.”

Act 200, [SB 930, SD1, HD2, CD1], Signed 07/03/2023, effective 5/01/24, Relating To The Residential Landlord-Tenant Code.

This act allows a landlord or landlord’s agent to charge an application screening fee for certain applicants at the time a rental application is processed for a dwelling unit, with certain restrictions.

“§521- Application screening fee. (a) When a landlord or the landlord’s agent receives a request from an applicant to rent a dwelling unit, the landlord or the landlord’s agent may charge the applicant an application

screening fee at the time the application is processed for the dwelling unit to cover the costs of obtaining information about the applicant; provided that a landlord or the landlord's agent shall only charge an application screening fee for an applicant who is eighteen years of age or older or an emancipated minor. Information sought by the landlord or the landlord's agent charging the fee may include personal reference checks, tenant reports, criminal background checks, and credit reports produced by any consumer credit reporting agency.

(b) Upon request by the applicant, a landlord or the landlord's agent shall provide to the applicant a:

(1) Receipt for payment of the application screening fee;
and

(2) Breakdown of costs covered by the application screening fee.

(c) A landlord or the landlord's agent shall return to the applicant any amount of the application screening fee that is not used for the purposes authorized by this section within thirty days after the landlord has submitted screening requests.

(d) For the purposes of this section:

"Consumer credit reporting agency" has the same meaning as in section 489P-2.

"Credit report" has the same meaning as in section 489P-2."

SECTION 2. The office of consumer protection of the department of commerce and consumer affairs shall produce and make available informational materials to provide landlords and applicants with notice regarding the specific rights and obligations established pursuant to this Act and shall widely publicize the requirements for application screening fees under this Act.

ADDENDUM -- TEXT OF ACT 199

SECTION 1. Section 514B-148, Hawaii Revised Statutes, is amended as follows [additions are underlined and deletions are ~~struck through~~]:

1. By amending its title and subsections (a) through (d) to read:

“~~§514B-148~~ **Association fiscal matters; budgets and replacement reserves**. (a) The budget required under section 514B-144(a) shall include a summary with at least the following[;] details:

(1) The estimated revenues and operating expenses of the association;

(2) [~~Information~~] Disclosure as to whether the budget has been prepared on a cash or accrual basis;

(3) The estimated costs of fire safety equipment or installations that meet the requirements of a life safety evaluation required by the applicable county for any building located in a county with a population greater than five hundred thousand; provided that the reserve study may forecast a loan or special assessment to fund life safety components or installation;

[~~(3)~~] (4) The balance of the total replacement reserves fund of the association as of the date of the budget;

[~~(4)~~] (5) The estimated replacement reserves assessments that the association will require to maintain the property based on a reserve study performed by or on behalf of the association; provided that the reserve study, if not prepared by an independent reserve study preparer, shall be reviewed by an independent reserve study preparer[; ~~provided further that the reserve study shall be reviewed or updated at least~~ not less than every three years; provided further that a managing agent with industry reserve study designations shall not be considered as having a conflict of interest for purposes of this paragraph;

[~~(5)~~] (6) A general explanation of how the estimated replacement reserves assessments are computed[;] and detailing:

(A) The identity, qualifications, and potential conflicts of interest of the person or entity performing the reserve study, update, or any review thereof;

(B) Disclosure of any component of association property omitted from the reserve study and the basis for the omission;

(C) Planned increases in the estimated replacement reserve assessments over the thirty-year plan; and

(D) Whether the actual estimated replacement reserves assessments for the prior year as defined in the study was less than the assessments provided for in the reserve study, and, if so, by how much, and explaining the impact of the lesser assessments on future estimated replacement reserves assessments;

~~[(6)]~~ (7) The amount the association must collect for the fiscal year to fund the estimated replacement reserves~~[s]~~ assessments; and

~~[(7)]~~ (8) Information as to whether the amount the association must collect for the fiscal year to fund the estimated replacement reserves assessments was calculated using a per cent funded or cash flow plan. The method or plan shall not circumvent the estimated replacement reserves assessments amount determined by the reserve study pursuant to paragraph ~~[(4)-]~~ (5).

(b) The association shall assess the unit owners to either fund a minimum of fifty per cent of the estimated replacement reserves assessments or fund one hundred per cent of the estimated replacement reserves assessments when using a cash flow plan; provided that a new association need not collect estimated replacement reserves assessments until the fiscal year ~~[which]~~ that begins after the association's first annual meeting. For each fiscal year, the association shall collect the amount assessed to fund the estimated replacement reserves assessments for that fiscal year ~~[reserves]~~, as determined by the association's plan.

(c) The association shall compute the estimated replacement reserves assessments by a formula that is based on the estimated life and the estimated capital expenditure or major maintenance required for each part of the property. The estimated replacement reserves assessments shall include:

- (1) Adjustments for revenues ~~[which]~~ that will be received and expenditures ~~[which]~~ that will be made before the beginning of the fiscal year to which the budget relates; and
- (2) Separate, designated reserves for each part of the property for which capital expenditures or major maintenance will exceed \$10,000. Parts of the property for which capital expenditures or major maintenance will not exceed \$10,000 may be aggregated in a single designated reserve.

(d) No association or unit owner, director, officer, managing agent, or employee of an association who makes a good faith effort to calculate the estimated replacement reserves assessments for an association shall be liable if the estimate subsequently proves incorrect."

2. By amending subsection (f) to read:

"(f) The requirements of this section shall override any requirements in an association's declaration, bylaws, or any other association documents relating to preparation of budgets, calculation of replacement reserve requirements, assessment and funding of replacement reserves, and expenditures from replacement reserves with the exception of:

- (1) Any requirements in an association's declaration, bylaws, or any other association documents ~~[which]~~ that require the association to collect more than fifty per cent of replacement reserve requirements; or
- (2) Any provisions relating to upgrading the common elements, such as

additions, improvements, and alterations to the common elements.”

3. By amending subsection (h) to read:

“(h) As used in this section:

“Capital expenditure” means an expense that results from the purchase or replacement of an asset whose life is greater than one year, or the addition of an asset that extends the life of an existing asset for a period greater than one year.

“Cash flow plan” means a minimum thirty-year projection of an association’s future income and expense requirements to fund fully its replacement reserves requirements each year during that thirty-year period, except in an emergency; provided that it does not include a projection of special assessments or loans during that thirty-year period, except in an emergency.

“Emergency situation” means 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 that the association must insure.

“Independent reserve study preparer” means any organization, company, or individual with a reserve study certification from an industry organization.

“Major maintenance” means an expenditure for maintenance or repair that will result in extending the life of an asset for a period greater than one year.

“Replacement reserves” means funds for the upkeep, repair, or replacement of those parts of the property, including but not limited to roofs, walls, decks, paving, and equipment, that the association is obligated to maintain.”