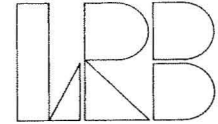


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HB2691

RELATING TO CONDOMINIUMS: MAKING VARIOUS TECHNICAL AMENDMENTS TO THE HAWAII REVISED STATUTES FOR THE PURPOSE OF CORRECTING ERRORS AND REFERENCES, AND CLARIFYING LANGUAGE

**Presented to the House Committees on Consumer Protection and Commerce
and Judiciary**

Twenty-fourth State Legislature, Regular Session of 2008

By Ken H. Takayama, Acting Director

or Myra Shozuya, Assistant Director for Revision of Statutes

Legislative Reference Bureau

Thursday, January 31, 2008

Chairs Herkes and Waters and Members of the Committees:

Thank you for the opportunity to testify in support of House Bill No. 2691. This bill makes a variety of technical housekeeping amendments relating to condominiums. House Bill No. 2691 is prepared and submitted pursuant to the Legislative Reference Bureau's statute revision functions.

Act 164, Session Laws of Hawaii 2004, repealed portions of chapter 514A, Hawaii Revised Statutes, relating to condominium property regimes, and enacted a new condominium law, codified as chapter 514B, Hawaii Revised Statutes. Acts 244, Session Laws of Hawaii 2007, reinstated the portions of chapter 514A that were repealed in the 2004 legislation, resulting in two operative chapters relating to condominiums.

The amendments proposed in this bill are of a housekeeping nature to correct and clarify language in various sections of the Hawaii Revised Statutes to reflect the existence of the two chapters on condominiums. The rationale for the amendments made by each section of this bill accompanies this testimony as Attachment 1.

Prior to its introduction, this bill was reviewed by the Real Estate Branch of the Department of Commerce and Consumer Affairs. While generally agreeing with the amendments proposed in this bill, the Real Estate Branch requested that various changes be made, two of which were inadvertently left out of the final version of the bill introduced. The Bureau requests the Committee to amend this bill to accommodate the amendments suggested by the Real Estate Branch hereto attached as Attachment 2. They are:

- (1) Making that the amendments to section 26-9(o) in section 3(2) of this bill (relating to the section 514A-131 fund) retroactive to July 1, 2006, so as not to jeopardize the administration of the fund in question;
- (2) Rephrasing the term "association of apartment owners or unit owners' association" to read "association of owners under chapter 514A or chapter 514B"; and
- (3) Other technical changes as may be necessary to accommodate the changes proposed in (1) and (2).

The Bureau stands ready to assist the Committees in preparing the committee report and any changes to the condominium housekeeping bill the Committees deem appropriate.

Thank you very much for this opportunity to testify.

Attachments

Attachment 1

SUMMARY OF AMENDMENTS CONTAINED IN HB2691

(CONDOMINIUM HOUSEKEEPING AMENDMENTS)

Act 164, Session Laws of Hawaii 2004, repealed various portions of chapter 514A, Hawaii Revised Statutes, relating to condominium property regimes, and enacted a new condominium law codified as chapter 514B, Hawaii Revised Statutes. Act 164 also amended various sections of the Hawaii Revised Statutes to repeal references to chapter 514A and its sections and replace them with references to chapter 514B and its sections. Act 244, Session Laws of Hawaii 2007, reinstated the portions of chapter 514A, Hawaii Revised Statutes, that were repealed by Act 164 (2004), resulting in two operative chapters relating to condominiums. However, Act 244 did not reinstate the references to chapter 514A that had been repealed by Act 164.

Sections 3 to 19 of this bill propose to amend the sections affected by Act 164, Session Laws of Hawaii 2004, to reinstate the chapter 514A references in light of the reinstatement of that chapter. Specifically:

Section 3. Section 26-9, HRS, sets forth the general powers and duties of the department of commerce and consumer affairs. Subsection (c) should be amended to clearly designate the department's regulatory functions in relation to condominiums created under chapter 514A, as well as those condominiums created under chapter 514B. Further, we recommend that subsection (o) be amended to clearly authorize the department to use moneys in the condominium management education fund (section 514A-131, HRS) to carry out this function.

Section 4. Section 237-16.5, HRS, levied the general excise tax on amounts received in the lease of real property, including real property or space in a condominium project. We recommend that the definition of "real property or space" in subsection (e) be amended to include condominiums and common elements under chapter 514A as well as those under chapter 514B.

Section 5. Section 237D-1, HRS, sets forth the general definitions under the transient accommodations tax law. Currently, the transient accommodations tax applies only to rentals of apartments under chapter 514B. We recommend that apartments under chapter 514A be included in this tax. Further, the terminology used in the new condominium law (chapter 514B) differs from the terminology used under chapter 514A. Specifically, an "apartment" under chapter 514A corresponds to a "unit" under chapter 514B. We therefore recommend that the definitions of "lease", "let", or "rental" and "transient accommodations" in section 237D-1 be amended to include both "apartments" and "units" to reflect the different terms used in chapters 514A and 514B.

Section 6. Section 302A-1312, HRS, requires the department of education to prepare a six-year program and financial plan for school repair and maintenance based on the principles and procedures used by condominium owners' associations in determining their estimated replacement reserves. Both chapters 514A and 514B contain procedures for determining association budgets and reserves; we

therefore recommend that a reference to section 514A-83.6, HRS, be added to the reference to section 514B-148, HRS in subsection (a)(2).

Section 7. Section 378-2.5, HRS, permits certain employers to inquire about a prospective employee's criminal history for employment purposes, including applicants for a security guard or resident manager position in a condominium, or persons with access to condominium apartments or association funds. Currently this section applies only to condominium employees under chapter 514B (section 514B-133). We recommend that the reinstated background checks under chapter 514A (codified in section 514A-82.1) also be included.

Section 8. Section 414D-311, HRS, provides that if there is a conflict of law between the provisions of chapter 514B and chapter 414D (the general law regulating nonprofit corporations), then the provisions of chapter 514B shall control. We recommend that reference to chapter 514A be added to this section so that condominiums created prior to July 1, 2006 will be on an equal footing with those created after that date.

Section 9. Section 421I-9, HRS, relates to mediation and arbitration of disputes involving cooperative housing corporations. The section specifies that when arbitration of a dispute is warranted, the procedures and principles outlined for condominium owners and associations in section 514B-163 should be followed. Chapter 514A also includes arbitration provisions in part VII reinstated by the 2007 legislation. We recommend that reference to chapter 514A, part VII, be added to the reference to section 514B-162.

Section 10. Section 467-1, HRS, contains general definitions for the regulation of real estate brokers and salespersons. Currently, the definition of "hotel" in that section excludes apartments in condominium projects under chapter 514B. We recommend that apartments under chapter 514A also be included in this exemption. Further, the terminology used in the new condominium law (chapter 514B) differs from the terminology used under chapter 514A. Specifically, an "apartment" under chapter 514A corresponds to a "unit" under chapter 514B. We therefore recommend that the definitions of "hotel" be amended to include both "apartments" and "units" to reflect the different terms used in chapters 514A and 514B.

Section 11. Section 484-3, HRS, exempts condominiums under chapter 514B from the requirements of chapter 484, the uniform land sales practices act. We recommend that projects registered under chapter 514A also be included in this exemption.

Section 12. Section 501-106(a)(2), HRS, allows the issuance of a new certificate of title under the land court system, upon the merger of two or more condominium projects under chapter 514B (section 514B-46). As chapter 514A also includes provisions for the merger of projects created under that chapter (section 514A-19), we recommend that projects under chapter 514A be included in this section. Further, the terminology used in the new condominium law (chapter 514B) differs from the terminology used under chapter 514A. Specifically, an "apartment" under chapter 514A corresponds to a "unit" under chapter 514B. We therefore recommend that subsection (a)(3) also be amended to include both "apartments" and "units" to reflect the different terms used in chapters 514A and 514B.

Section 13. Section 502C-1, HRS, contains general definitions relating to family child care homes in condominiums and planned community units. The definitions of "common elements" or

"common area", "declaration", and "townhouse" currently refer only to projects created under chapter 514B. We recommend that condominiums under chapter 514A also be included in these definitions.

Section 14. Section 514C-22, HRS, authorizes an association of apartment owners to negotiate, purchase, and sell the lessor's interest in a condominium project in a lease to fee conversion. Currently, the definition of "condominium unit" in subsection (f) restricts the application of this section to projects under chapter 514B. We recommend that projects under chapter 514A be included in these provisions. Further, the terminology used in the new condominium law (chapter 514B) differs from the terminology used under chapter 514A. Specifically, an "apartment" under chapter 514A corresponds to a "unit" under chapter 514B. We therefore recommend that this section be amended to include both "apartments" and "units" to reflect the different terms used in chapters 514A and 514B.

Section 15. Section 514E-1, HRS, contains general definitions relating to the regulation of time sharing plans. Paragraph (3) of the definition of "blanket lien" exempts from its application, a lien for common expenses of a condominium unit under chapter 514B. We recommend that liens for common expenses under chapter 514A be included in this exemption. Further, the terminology used in the new condominium law (chapter 514B) differs from the terminology used under chapter 514A. Specifically, an "apartment" under chapter 514A corresponds to a "unit" under chapter 514B. We therefore recommend that the definition of "blanket lien" be amended to include both "apartments" and "units" to reflect the different terms used in chapters 514A and 514B.

Section 16. Section 514E-29(d), HRS, provides that a lien for common expenses under chapter 514B (section 514B-146) shall have priority over a lien by a time sharing association for delinquent assessments. We recommend that liens for common expenses under chapter 514A (section 514A-90) share this priority. Further, the terminology used in the new condominium law (chapter 514B) differs from the terminology used under chapter 514A. Specifically, an "apartment" under chapter 514A corresponds to a "unit" under chapter 514B. We therefore recommend that subsection (d)(4) be amended to include both "apartments" and "units" to reflect the different terms used in chapters 514A and 514B.

Section 17. Section 516D-1, HRS, establishes lessees' rights relating to residential leasehold property in cooperative housing units and condominium projects under chapter 514B. We recommend that reference to chapter 514A be added to this section so that condominiums created prior to July 1, 2006 will be on an equal footing with those created after that date.

Sections 18 and 19. Sections 521-38 and 521-71, HRS, requires a landlord to provide notice to a tenant when contemplating conversion of the rental unit to condominium status under chapter 514B. We recommend that reference to chapter 514A be added to this section so that condominiums created prior to July 1, 2006 will be on an equal footing with those created after that date.

Sections 21 to 24 of this bill propose to amend various sections of the Hawaii Revised Statutes that were enacted or amended between 2004 (the enactment of the chapter 514B) and 2007 (the reinstatement of chapter 514A) and that refer only to chapter 514B or its provisions, to include references to chapter 514A. Specifically:

Section 21. Section 235-7(a) was amended by L 2007, c 166, §1 that added paragraph (13) exempting from the income tax the gain realized from the sale of a leased fee interest in units within a condominium project. The terminology used in the new condominium law (chapter 514B) differs from

the terminology used under chapter 514A. Specifically, an "apartment" under chapter 514A corresponds to a "unit" under chapter 514B. We therefore recommend that subsection (a)(13) be amended to include both "apartments" and "units" to reflect the different terms used in chapters 514A and 514B.

Section 22. L 2007, c 53 established a new liquor license class designated as class 15, condominium hotel license. The Act also added a definition of "condominium hotel" to section 281-1, HRS, that referenced only chapter 514B. We recommend that condominiums under chapter 514A be included in this new liquor license class based on the addition of chapter 514A to the definition of "condominium hotel" under the real estate licensing law (section 467-30) as set out in L 2007, c 244, §4. This may be accomplished by amending the definitions of "condominium hotel" and "premises" or "licensed premises" in section 281-1 to include apartments under chapter 514A.

Section 23. L 2004, c 164, provided that sales and transfers of rental management of condominiums under chapter 514B would be transactions exempt from the securities laws. L 2004, c 164, §17, amended section 485-6 (exempt transactions) by changing the reference to section 514A-3 in paragraph (14) to section 514B-3. We recommend against reinstating the chapter 514A reference in §485-6 as that chapter will be repealed in July, 2008. Instead, we recommend that section 485A-202(a)(25) (the comparable provision under the new securities law) be amended to apply to both condominium chapters. We also recommend adding references to "units" (in addition to "apartments") as "unit" is used in chapter 514B.

Section 24. Section 521-3(d) was created by L 2004, c 164, the Act that set forth the new chapter 514B. The powers of the unit owners' association for summary possession against a tenant is clearly set forth in section 514B-104(b)(2) and (3). Chapter 514A contains no similar clear mandate. Section 514A-88 does, however, allow the resident manager or board of directors to maintain an action on behalf of the association for failure to comply with the project's covenants, bylaws, and rules. We therefore recommend adding a reference to an association of apartment owners under chapter 514A to section 521-3(d).

Section 26. Section 237-24.3, HRS, was amended by Act 164, Session Laws of Hawaii 2004, to change the reference to chapter 514A in paragraph (3) to chapter 514B. Act 239, Session Laws of Hawaii 2007, further amended this paragraph and, in the process, reinstated reference to chapter 514A in paragraph (3). We recommend that this section be amended in this bill by adding the terminology used in chapter 514B to the term used in chapter 514A; specifically by adding "unit owners" to "apartment owners".

Section 27. Section 467-30, HRS, provides for the registration and bonding of condominium hotel operators and was amended by Act 164, Session Laws of Hawaii 2004, to change the reference to chapter 514A and section 514A-3 in subsection (a) to chapter 514B and section 514B-3. Act 244, Session Laws of Hawaii 2007, reinstated the reference to chapter 514A and section 514A-3. We recommend that this section be amended by adding the terminology used in chapter 514B to the term used in chapter 514A; specifically by adding "unit" to "apartment".

Section 28. Section 501-20, HRS, provides general definitions for the land court registration law. We recommend that the definition of "apartment lease" be amended by replacing the phrase "condominium property act" to reference both chapters 514A and 514B. At present, there are two "condominium property" acts (see §§514A-1 and 514B-1). Substitution of the specific chapter numbers

in place of the general term will avoid possible confusion as to which (or both) acts are intended. We also recommend that this definition be amended in this bill by adding the terminology used in chapter 514B to the term used in chapter 514A; specifically by adding "unit" to "apartment".

Sections 29 and 30. Sections 501-105 and 501-241, HRS, should be amended by adding the terminology used in chapter 514B to the term used in chapter 514A; specifically by adding "unit" to "apartment".

Section 31. Section 508D-3, HRS, provides exemptions from the mandatory seller's disclosures in real estate transactions. Paragraph (7) exempts sales of condominiums where there is an unexpired public report. As this paragraph does not specifically limit this exemption to disclosures under chapter 514B, it is assumed that the exemption applies to condominiums under either chapter 514A or 514B, as both have "public reports" (see, e.g., sections 514A-61 and 514B-83). Therefore, we recommend that "units" (as used in chapter 514B) be added to "apartments" (as used in chapter 514A).

Sections 32 to 40. Sections 514C-1, 514C-2, 514C-5, 514C-6, 514C-6.5, 516D-11, 521-52, 667-5.5, and 672E-4. These sections do not differentiate between condominiums under chapters 514A and 514B, and therefore presumably apply to both. We recommend that these sections be amended to reflect terminology differences between the two chapters, specifically by adding "unit" and "unit owners" to "apartment" and "apartment owners".

Attachment 2

PROPOSED AMENDMENTS TO HB2691

(CONDOMINIUM HOUSEKEEPING AMENDMENTS)

BY INSERTING A NEW SECTION 3(2) TO READ:

SECTION 3. Section 26-9, Hawaii Revised Statutes, is amended as follows:

2. By amending subsection (o) to read:

"(o) Every person licensed under any chapter within the jurisdiction of the department of commerce and consumer affairs and every person licensed subject to chapter 485 shall pay upon issuance of a license, permit, certificate, or registration a fee and a subsequent annual fee to be determined by the director and adjusted from time to time to ensure that the proceeds, together with all other fines, income, and penalties collected under this section, do not surpass the annual operating costs of conducting compliance resolution activities required under this section. The fees may be collected biennially or pursuant to rules adopted under chapter 91, and shall be deposited into the special fund established under this subsection. Every filing pursuant to chapter 514E or section 485-6(15) shall be assessed, upon initial filing and at each renewal period in which a renewal is required, a fee that shall be prescribed by rules adopted under chapter 91, and that shall be deposited into the special fund established under this subsection. Any unpaid fee shall be paid by the licensed person, upon application for renewal, restoration, reactivation, or reinstatement of a license, and by the person responsible for the renewal, restoration, reactivation, or reinstatement of a license, upon the application for renewal, restoration, reactivation, or reinstatement of the license. If the fees are not paid, the director may deny renewal, restoration, reactivation, or reinstatement of the license. The director may establish, increase, decrease, or repeal the fees when necessary pursuant to rules adopted under chapter 91. The director may also increase or decrease the fees pursuant to section 92-28.

There is created in the state treasury a special fund to be known as the compliance resolution fund to be expended by the director's designated representatives as provided by this subsection. Notwithstanding any law to the contrary, all revenues, fees, and fines collected by the department shall be deposited into the compliance resolution fund. Unencumbered balances existing on June 30, 1999, in the cable television fund under chapter 440G, the division of consumer advocacy fund under chapter 269, the financial institution examiners' revolving fund, section 412:2-109, the special handling fund, section 414-13, and unencumbered balances existing on June 30, 2002, in the insurance regulation fund, section 431:2-215, shall be deposited into the compliance resolution fund. This provision shall not apply to the drivers education fund underwriters fee, section 431:10C-115, insurance premium taxes and revenues, revenues of the workers' compensation special compensation fund, section 386-151, the captive insurance administrative fund, section 431:19-101.8, the insurance commissioner's education and training fund, section 431:2-214, the medical malpractice patients' compensation fund as administered under section 5 of Act 232, Session Laws of Hawaii 1984, and fees collected for deposit in the office of consumer protection restitution fund, section 487-14, the real estate appraisers fund, section 466K-1, the real estate recovery fund, section 467-16, the real estate education fund, section 467-19, the contractors recovery fund, section 444-26, the contractors education fund, section 444-29, the condominium management education fund, section 514A-131, and the condominium education trust fund, section 514B-71. Any law to the contrary notwithstanding, the director may use the moneys in the fund to employ, without regard to chapter 76, hearings officers and attorneys. All other employees may be employed in accordance with chapter 76. Any law to the contrary notwithstanding, the moneys in the fund shall be used to fund the operations of the department. The moneys in the fund may be used to train personnel as the director deems necessary and for any other activity related to compliance resolution.

As used in this subsection, unless otherwise required by the context, "compliance resolution" means a determination of whether:

- (1) Any licensee or applicant under any chapter subject to the jurisdiction of the department of commerce and consumer affairs has complied with that chapter;

- (2) Any person subject to chapter 485 has complied with that chapter;
- (3) Any person submitting any filing required by chapter 514E or section 485-6(15) has complied with chapter 514E or section 485-6(15); or
- (4) Any person has complied with the prohibitions against unfair and deceptive acts or practices in trade or commerce;

and includes work involved in or supporting the above functions, licensing, or registration of individuals or companies regulated by the department, consumer protection, and other activities of the department.

The director shall prepare and submit an annual report to the governor and the legislature on the use of the compliance resolution fund. The report shall describe expenditures made from the fund including non-payroll operating expenses."

BY AMENDING SECTION 3(2) TO READ:

[~~2~~] 3. By amending subsection (o) to read:

"(o) Every person licensed under any chapter within the jurisdiction of the department of commerce and consumer affairs and every person licensed subject to chapter 485A or registered under chapter 467B shall pay upon issuance of a license, permit, certificate, or registration a fee and a subsequent annual fee to be determined by the director and adjusted from time to time to ensure that the proceeds, together with all other fines, income, and penalties collected under this section, do not surpass the annual operating costs of conducting compliance resolution activities required under this section. The fees may be collected biennially or pursuant to rules adopted under chapter 91, and shall be deposited into the special fund established under this subsection. Every filing pursuant to chapter 514E or section [~~+~~]485A-202(a)(26)[~~+~~] shall be assessed, upon initial filing and at each renewal period in which a renewal is required, a fee that shall be prescribed by rules adopted under chapter 91, and that shall be deposited into the special fund established under this subsection. Any unpaid fee shall be paid by the licensed person, upon application for renewal, restoration, reactivation, or reinstatement of a license, and by the person responsible for the renewal, restoration, reactivation, or reinstatement of a license, upon the

application for renewal, restoration, reactivation, or reinstatement of the license. If the fees are not paid, the director may deny renewal, restoration, reactivation, or reinstatement of the license. The director may establish, increase, decrease, or repeal the fees when necessary pursuant to rules adopted under chapter 91. The director may also increase or decrease the fees pursuant to section 92-28.

There is created in the state treasury a special fund to be known as the compliance resolution fund to be expended by the director's designated representatives as provided by this subsection. Notwithstanding any law to the contrary, all revenues, fees, and fines collected by the department shall be deposited into the compliance resolution fund. Unencumbered balances existing on June 30, 1999, in the cable television fund under chapter 440G, the division of consumer advocacy fund under chapter 269, the financial institution examiners' revolving fund, section 412:2-109, the special handling fund, section 414-13, and unencumbered balances existing on June 30, 2002, in the insurance regulation fund, section 431:2-215, shall be deposited into the compliance resolution fund. This provision shall not apply to the drivers education fund underwriters fee, section 431:10C-115, insurance premium taxes and revenues, revenues of the workers' compensation special compensation fund, section 386-151, the captive insurance administrative fund, section 431:19-101.8, the insurance commissioner's education and training fund, section 431:2-214, the medical malpractice patients' compensation fund as administered under section 5 of Act 232, Session Laws of Hawaii 1984, and fees collected for deposit in the office of consumer protection restitution fund, section 487-14, the real estate appraisers fund, section 466K-1, the real estate recovery fund, section 467-16, the real estate education fund, section 467-19, the contractors recovery fund, section 444-26, the contractors education fund, section 444-29, the condominium management education fund, section 514A-131, and the condominium education trust fund, section 514B-71. Any law to the contrary notwithstanding, the director may use the moneys in the fund to employ, without regard to chapter 76, hearings officers and attorneys. All other employees may be employed in accordance with chapter 76. Any law to the contrary notwithstanding, the moneys in the fund shall be used to fund the operations of the department. The moneys in the fund may be used to train

personnel as the director deems necessary and for any other activity related to compliance resolution.

As used in this subsection, unless otherwise required by the context, "compliance resolution" means a determination of whether:

- (1) Any licensee or applicant under any chapter subject to the jurisdiction of the department of commerce and consumer affairs has complied with that chapter;
- (2) Any person subject to chapter 485A has complied with that chapter;
- (3) Any person submitting any filing required by chapter 514E or section [†]485A-202(a)(26)[†] has complied with chapter 514E or section [†]485A-202(a)(26)[†];
- (4) Any person has complied with the prohibitions against unfair and deceptive acts or practices in trade or commerce; or
- (5) Any person subject to chapter 467B has complied with that chapter;

and includes work involved in or supporting the above functions, licensing, or registration of individuals or companies regulated by the department, consumer protection, and other activities of the department.

The director shall prepare and submit an annual report to the governor and the legislature on the use of the compliance resolution fund. The report shall describe expenditures made from the fund including non-payroll operating expenses."

BY AMENDING SECTIONS 7, 14, 16, 21, 24, 26, 30, 34, 35, 36, 38, 39, AND 40:

On pages: 15, line 19; page 22, lines 1, 4, 13; page 23, line 13; page 24, lines 7, 15; page 25, line 12; page 26, lines 6, 18; page 29, line 13; page 36, line 3; page 59, line 11; page 61, line 18; page 75, line 12; page 78, line 10; page 82, line 1; page 83, lines 1, 3, 18; page 86, line 13; page 87, lines 5, 13, 20; page 89, line 22; page 90, line 12; page 91, lines 3, 17: that the addition of the phrase "unit owners' association" in the proposed amendments on these pages be changed to read:

"association of [~~apartment~~] owners [~~or unit owners' association~~] under chapter 514A or 514B"

BY AMENDING SECTION 43 TO READ:

SECTION 43. Upon its approval, this Act shall take effect retroactive to July 1, 2006; provided that:

- (1) Section [~~3(2)~~] 3(3) shall take effect on July 1, 2008;
- (2) The amendments to section 237-24.3, Hawaii Revised Statutes, by section 26 of this Act shall not be repealed on December 31, 2009, by section 4 of Act 239, Session Laws of Hawaii 2007; and
- (3) Section 25 shall take effect on July 1, 2008.