

SB292

Measure Title: RELATING TO CONDOMINIUMS.

Report Title: Condominiums; Condominium Property Regimes; Repeal

Description: Repeals chapter 514A, Hawaii Revised Statutes, relating to condominium property regimes, and ensures that all condominiums in the State are governed under chapter 514B, Hawaii Revised Statutes, relating to condominiums. Effective January 1, 2019.

Companion: [HB384](#)

Package: None

Current Referral: CPH

Introducer(s): BAKER, IHARA, INOUYE, KEITH-AGARAN, KIDANI, NISHIHARA, S. Chang, K. Rhoads, L. Thielen



**HAWAII STATE ASSOCIATION OF PARLIAMENTARIANS
LEGISLATIVE COMMITTEE
P. O. Box 29213
HONOLULU, HAWAII 96820-1613
E-MAIL: HSAP.LC@GMAIL.COM**

February 19, 2017

Honorable Sen. Rosalyn H. Baker, Chair
Honorable Sen. Clarence K. Nishihara, Vice-Chair
Senate Committee on Commerce, Consumer Protection, and Health (CPH)
Hawaii State Capitol, Room 230
415 South Beretania Street
Honolulu, HI 96813

RE: Testimony in SUPPORT of SB292; Hearing Date: February 23, 2017 at 9:30 a.m. in Senate conference room 229; sent via Internet

Aloha Chair Baker, Vice-Chair Nishihara, and Committee members,

Thank you for the opportunity to provide testimony on this bill.

The Hawaii State Association of Parliamentarians (“HSAP”) has been providing professional parliamentary expertise to Hawaii since 1964.

I am the chair of the HSAP Legislative Committee. I’m also an experienced Professional Registered Parliamentarian who has worked with condominium and community associations every year since I began my practice in 1983 (over 1,500 meetings in 33 years). I was also a member of the Blue Ribbon Recodification Advisory Committee that presented the recodification of Chapter 514B to the legislature in 2004.

This testimony is provided as part of HSAP’s effort to assist the community based upon our collective experiences with the bylaws and meetings of numerous condominiums, cooperatives, and Planned Community Associations.

This testimony is presented in SUPPORT of SB292.

This is long overdue. Chapter 514B was enacted in 2004 by Act 164. Chapter 514A was kept in existence at the time due to developer concerns that it would affect existing projects.

Associations and their board members simply need ONE chapter to go to. With very few exceptions, all condominium associations existing in Hawaii are subject to the requirements in Chapter 514B. Most of their operations are governed by HRS §514B-22 which provides for applicability to preexisting condominiums with some limited exceptions.

HRS §514B-23 provides for condominium associations to amend their governing instruments and opt-in completely to Chapter 514B with a majority of unit owner approval. **The majority of unit owner approval is less than the 67% requirement to amend the bylaws.**

It is time to repeal Chapter 514A. We respectfully ask that you pass this bill forward.

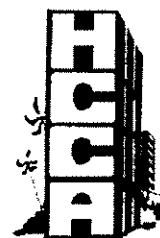
If you require any additional information, your call is most welcome. I may be contacted via phone: 423-6766 or by e-mail: hsap.lc@gmail.com. Thank you for the opportunity to present this testimony.

Sincerely,

Steve Glanstein, Professional Registered Parliamentarian
Chair, HSAP Legislative Committee
SG:tbs/Attachment



**Hawaii Council of Associations
of Apartment Owners**
DBA: Hawaii Council of Community Associations
1050 Bishop Street, #366, Honolulu, Hawaii 96813



February 22, 2017

Sen. Rosalyn Baker, Chair
Sen. Clarence Nishihara, Vice-Chair
Senate Committee on Commerce, Consumer Protection & Health

Re: Testimony in Support of
SB292 RELATING TO CONDOMIMUMS
Hearing: Thursday, February 23, 2017, 9:30 a.m., Conf. Rm. #229

Chair Baker, Vice-Chair Nishihara, Chair Keith-Agaran and Vice-Chair Rhoads and
Members of the Joint-Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment
Owners (HCAAO dba HCCA). This organization represents the interests of
condominium and community association members.

HCAAO supports this bill and agrees with the purposes stated. We incorporate by
reference the testimony of Gordon Arakaki in support of this bill.

Thanks for allowing me to testify on this matter.


Jane Sugimura
President

February 21, 2017

Richard J. Kiefer
444 Hana Highway, Suite 204
Kahului, Hawai'i 96732
Direct Line: (808) 871-9700
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Via Email

Senator Rosalyn H. Baker, Chair
Senator Clarence K. Nishihara, Vice Chair
Committee on Commerce, Consumer Protection, and Health
State Capitol
Honolulu, Hawaii

Re: **Sunset of Chapter 514A - SB 292; Relating to Condominiums**
Hearing: February 23, 2017 at 9:30 a.m.

Aloha Chair Baker, Vice Chair Nishihara and Members of the Committee:

Many condominium projects in the State still have active registrations and Public Reports under Chapter 514A. SB 292 as currently drafted does not adequately address legal and practical issues involved in transitioning those projects to Chapter 514B. Accordingly I ask that you either (1) defer SB 292 until the 2018 Session to allow affected stakeholders time to address the issues involved in such a transition, or (2) amend SB 292 to exclude from the repeal Parts III and IV of Chapter 514A, which deal with project registration and sales.

Section 47 of SB 292 provides that “condominiums formerly subject to chapter 514A ... shall be transitioned to and governed by chapter 514B... without paying any additional costs or filing any additional paperwork with the real estate commission.” This is too simplistic for a number of reasons. For example, Chapter 514B recognizes only a “Developer’s Public Report” whereas under 514A there are Preliminary, Contingent Final, Final, and “evergreen” Final Public Reports, each of which has significantly different legal effects and attributes, none of which are recognized under 514B. So, if you are either a buyer or a developer in a Project registered under Chapter 514A you will have no idea what your rights are if you are, by statute, transferred to 514B.

For this reason, any repeal of Chapter 514A Parts III and IV needs to prescribe specifically how a “Developer’s Public Report” will be issued for projects still registered under Chapter 514A. For example, 2005 Act 93, which enacted part of Chapter 514B, contains in Section 9 one method by which Chapter 514A projects can convert to Chapter 514B, by filing a replacement registration. However, while this method may be feasible for some projects it is probably impractical or impossible for others, particularly smaller projects. Any repeal needs to include a practical way of dealing with those situations.

I am an attorney who has been practicing condominium law for over 20 years, and I was a member of the Blue Ribbon Recodification Advisory Committee that assisted the Real Estate

Senator Rosalyn H. Baker, Chair
Senator Clarence K. Nishihara, Vice Chair
February 21, 2017
Page 2

Commission in the drafting of Chapter 514B. I am submitting this testimony as someone deeply involved in condominium issues, and not on behalf of anyone else.

Thank you for the opportunity to provide this testimony.

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a long horizontal line extending to the right.

Richard J. Kiefer

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 20, 2017 9:03 AM
To: CPH Testimony
Cc: richard.emery@associa.us
Subject: Submitted testimony for SB292 on Feb 23, 2017 09:30AM

SB292

Submitted on: 2/20/2017

Testimony for CPH on Feb 23, 2017 09:30AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Richard Emery | Associa | Support | Yes |

Comments: Having only one condominium association law will eliminate confusion among associations.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 20, 2017 4:43 PM
To: CPH Testimony
Cc: lynnehi@aol.com
Subject: *Submitted testimony for SB292 on Feb 23, 2017 09:30AM*

SB292

Submitted on: 2/20/2017

Testimony for CPH on Feb 23, 2017 09:30AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| lynne matusow | Individual | Support | No |

Comments:

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From: mailinglist@capitol.hawaii.gov
Sent: Saturday, February 18, 2017 11:13 AM
To: CPH Testimony
Cc: john-a-morris@outlook.com
Subject: Submitted testimony for SB292 on Feb 23, 2017 09:30AM

SB292

Submitted on: 2/18/2017

Testimony for CPH on Feb 23, 2017 09:30AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| John Morris | Individual | Support | No |

Comments: This bill is a good idea. Chapter 514A has been around for far too long. Chapter 514B was originally drafted to replace chapter 514A because chapter 514A had become so complex and difficult to use for the average condominium owner. In addition, the provisions that had to be included in chapter 514B on its applicability and its relationship to chapter 514A are so complex that they are even difficult for attorneys to understand. I strongly support this bill.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 21, 2017 12:06 PM
To: CPH Testimony
Cc: cporter@hawaiiilegal.com
Subject: Submitted testimony for SB292 on Feb 23, 2017 09:30AM

SB292

Submitted on: 2/21/2017

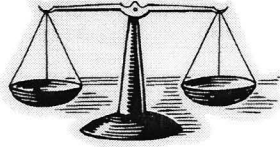
Testimony for CPH on Feb 23, 2017 09:30AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Christian Porter | Individual | Support | No |

Comments: As an attorney practicing in this area, I support the repealing of Chapter 514A in order to end the confusion that sometimes exists with having both Chapters 514A and 514B. This confusion exists with not only realtors and attorneys, but also with the courts, at times. Thank you for your consideration.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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GORDON M. ARAKAKI

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February 22, 2017

Hearing Date: Thursday, February 23, 2017
Time: 9:30 a.m.
Place: Conference Room 229

The Honorable Rosalyn H. Baker, Chair
The Honorable Clarence K. Nishihara, Vice Chair
Senate Committee on Commerce, Consumer Protection, and Health

Re: Testimony in Support of S.B. No. 292 – Relating to Condominiums

Aloha, Chair Baker, Vice Chair Nishihara, and Members of the Senate Committee on Commerce, Consumer Protection, and Health:

I am Gordon M. Arakaki, testifying as an individual in support of SB 292, which would repeal Hawaii Revised Statutes (“HRS”) Chapter 514A – Hawaii’s old and virtually irrelevant condominium law.

By way of background, from December 2000 through June 2004, I served as the Hawaii Real Estate Commission’s Condominium Law Recodification Project Attorney. During my time as the Recodification Project Attorney, I worked with lawmakers, the Commission, a blue ribbon advisory committee, and stakeholders throughout the State to “update, clarify, organize, deregulate, and provide for consistency and ease of use” of Hawaii’s then 44+ year old condominium law. I am the author of the Commission’s final report to the Legislature on the recodification of Hawaii’s condominium property regimes law, which the Legislature stated should be used as an aid in understanding and interpreting the new law (HRS Chapter 514B).¹ For my work with the condominium community in “helping craft and advance the next generation of the Hawaii Condominium Property Act,” I received the Community Associations Institute—Hawaii Chapter’s 2004 “Public Advocate Award.” Since that time (with a two-year break spent serving as Chief of Staff/Committee Clerk of the Senate Ways and Means Committee), I have worked as a private attorney specializing in, among a few other things, condominium law.

I. Maintaining two sets of condominium laws causes unnecessary confusion.

¹ Pursuant to Act 164 [Session Laws of Hawaii (“SLH”) 2004], the Hawaii Real Estate Commission’s 2003 Final Report should be used as an aid in understanding and interpreting the new condominium law (HRS Chapter 514B).

Simply put, for all of the reasons set forth in Section 1 of SB 292, maintaining HRS Chapter 514A has unnecessarily confused too many people in the condominium community and industry for far too long. Indeed, in an abundance of caution, even the Legislature has often amended both HRS Chapters 514A and 514B when there was no need to amend Chapter 514A.

For example, any law adopted after July 1, 2006 that amended a portion of Part VI (Management of Condominiums) of HRS Chapter 514B did *not* have to amend corresponding provisions of HRS Chapter 514A, which was irrelevant to condominium management matters at that point. Nevertheless, both chapters were often amended between 2007 and now, which only added to the confusion of some people regarding the fact that HRS Chapter 514B applies to all condominium management “events and circumstances occurring on or after July 1, 2006.” (*See*, HRS §514B-22.)

As noted in Section 1 of SB 292, the applicability provisions of HRS Chapter 514B seek to balance the benefits of having the improved condominium law apply to all condominiums against reasonable contractual expectations of condominiums in existence before July 1, 2006.²

It is important to note that the “reasonable contractual expectations” of condominiums in existence before July 1, 2006 are in regards to the condominium’s recorded governing documents (i.e., its master deed, declaration, bylaws, and condominium map).³ When such condominiums “opted-in” to HRS Chapter 514B, they were “opting-in” to the few relevant provisions of Chapter 514B that did not already automatically apply over the existing governing documents of the condominiums, which usually contained language required by Chapter 514A.

In other words, the “opt-in” had nothing to do with “opting-in” to HRS Chapter 514B over Chapter 514A. It had to do with “opting-in” to Chapter 514B over the language of a condominium’s governing documents that were drafted under Chapter 514A. Nevertheless, the fact that Chapter 514A was still being maintained caused some to mistakenly believe that because they had not “opted-in” to Chapter 514B, Chapter 514A somehow still applied to their condominiums, even for things that happened after July 1, 2006.

Continuing to unnecessarily cause confusion by continuing to maintain two condominium statutes (HRS Chapters 514A and 514B) makes no sense. It’s time to repeal HRS Chapter 514A.

II. Condominiums created (mostly on paper) before July 1, 2006 (under HRS Chapter 514A), but not yet brought to market for sale.

Some people have concerns about the effect of repealing HRS Chapter 514A on condominium property regimes that were created (i.e., the condominium’s master deed,

² For your reference, I have attached a copy of my annotated Part II (Applicability) of HRS Chapter 514B, which contains Ramseyered statutory language as well as the official comments of the Real Estate Commission along with my additional explanatory comments.

³ The governing documents of a condominium project are covenants running with the land, and are thus binding on all owners (and all parties who act on behalf of such owners). *Taniguchi v. King Manor*, 114 Haw. 37, 155 P.3d 1138 (2007).

declaration, bylaws, and condominium map are recorded in the Bureau of Conveyances or Land Court) before July 1, 2006 under Chapter 514A, but not yet brought to market for sale.

Preliminarily, it is useful to understand a few things about the condominium law:

- Purpose of Condominium Law. A condominium property regimes law is a *land ownership* law, a *consumer protection* law, and a *community governance* law. As a consumer protection law, the primary purpose of Hawaii’s condominium law is to make sure that buyers can know what they are buying. For example, theoretically, if a sophisticated buyer wants to take a chance on being able to get government approval to build a structure that is not allowed under State or county land use laws at the time of purchase, that should be the buyer’s choice. The key is to give the buyer a chance to make an informed decision (i.e., proper disclosure of material facts).
- Purpose of the Real Estate Commission. The Real Estate Commission is a consumer protection body established under HRS Chapter 467 (Real Estate Brokers and Salespersons) to regulate real estate licensees. The purpose of HRS Chapter 467 (and the Commission) is to protect the general public in its real estate transactions. Pursuant to HRS §467-3, the Real Estate Commission consists of nine members, at least four of whom must be licensed real estate brokers.
- Timing. As noted above, under Hawaii’s condominium property regimes law, condominiums are created upon proper filing with Bureau of Conveyances or Land Court. The Real Estate Commission’s involvement begins when condominium units are offered for sale. In other words, the ownership interest in condominium property may be created without any approval or involvement of the Real Estate Commission.

Because of the timing issue between when a condominium’s ownership interest is created and when it is sold to an actual condominium owner, there are still some condominium projects that were created before July 1, 2006, but have never been built and sold to anyone in the general public. It is important to understand that such projects exist only on paper. There are no condominium unit owners, no condominium association, and no managing agents involved, and the Real Estate Commission would not have dealt with the project and will not deal with the project unless and until the developer wants to sell the individual condominium units that were created (on paper) before July 1, 2006.

The only time that actual condominium unit owners might be involved is where someone created a condominium by recording the appropriate documents before July 1, 2006, and gave (rather sold, unless someone was paying cash—any lender would require the applicable documentation from the Real Estate Commission) the condominium units to, say, family members. In such a scenario, the condominium project would never have registered with the Real Estate Commission because units were never up for sale.

SB 292, Section 46, generously gives the developers of condominium projects created before July 1, 2006, but not yet brought to market for sale, another two years (until January 1, 2019) to register their projects with the Real Estate Commission and bring their projects to market.

After January 1, 2019, it makes sense to require that such projects have all of their documents conform to HRS Chapter 514B, as Chapter 514B has superior consumer protection provisions. This will require the developers of condominium projects created before July 1, 2006, but not brought to market for sale by January 1, 2019, to incur additional costs to bring their documents into conformity with Chapter 514B.

Therefore, I suggest that Section 47 of SB 292 be amended to simply read: “This Act shall take effect on January 1, 2019.”

III. Conclusion

For all of the reasons discussed above, I respectfully request that this committee pass SB 292 with appropriate amendments to Section 47.

Sincerely,

Gordon M. Arakaki

HRS Chapter 514B, Part II. Applicability

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Part II. APPLICABILITY

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PART II. APPLICABILITY

[§514B-21] Applicability to new condominiums. This chapter applies to all condominiums created within this State after July 1, 2006. The provisions of chapter 514A do not apply to condominiums created after July 1, 2006. Amendments to this chapter apply to all condominiums created after July 1, 2006 or subjected to this chapter, regardless of when the amendment is adopted. [L 2004, c 164, pt of §2]

Real Estate Commission's Comment (2003 Final Report)¹

1. UCIOA §1-201 is the source of this section.

Arakaki's Comment

1. This section makes amendments to HRS Chapter 514B applicable to all condominiums subject to HRS Chapter 514B, regardless of when the amendment is adopted. In other words, condominiums subject to HRS Chapter 514B should pay attention to proposals to amend the law. (Proposed amendments to the condominium law are introduced every legislative session.)

[§514B-22] Applicability to preexisting condominiums. Sections 514B-4, 514B-5, ~~514B-35, 514B-41(c),~~ 514B-46, 514B-72, and part VI, and section 514B-3 to the extent definitions are necessary in construing any of those provisions, and all amendments thereto, apply to all condominiums created in this State before July 1, 2006; ~~but~~ provided that those sections ~~apply~~:

- (1) Shall apply only with respect to events and circumstances occurring on or after July 1, 2006; and ~~do~~
- (2) Shall not invalidate existing provisions of the declaration, bylaws, condominium map, or other constituent documents of those condominiums if to do so would invalidate the reserved rights of a developer or be an unreasonable impairment of contract.

For purposes of interpreting this chapter, the terms "condominium property regime" and "horizontal property regime" shall be deemed to correspond to the term "condominium"; the term "apartment" shall be deemed to correspond to the term "unit"; the term "apartment owner" shall be deemed to correspond to the term "unit owner"; and the term "association of apartment owners" shall be deemed to correspond to the term "association". [L 2004, c 164, pt of §2; am L 2006, c 273, §5]

Real Estate Commission's Comment (2003 Final Report)

1. UCIOA §1-204, modified by the addition of the second paragraph (similar to §55-79.40 of the Virginia Condominium Act), is the source of this section.

Arakaki's Comment

1. This section is presented above in Ramseyer format to reflect amendments adopted by the 2006 Legislature.

Throughout the recodification process, many existing condominiums expressed interest in taking advantage of the new law. During the 2006 legislative session, stakeholders considered various ways to make it easier for existing condominiums to do

¹ The Real Estate Commission's "2003 Final Report" refers to the "Final Report to the Legislature, Recodification of Chapter 514A, Hawaii Revised Statutes (Condominium Property Regimes) In Response to Act 213, Section 4 (SLH 2000)," dated December 31, 2003. Pursuant to Act 164 (SLH 2004), the Commission's 2003 Final Report should be used as an aid in understanding and interpreting the new condominium law (HRS Chapter 514B). The Commission's 2003 Final Report comments are reproduced verbatim, except to fill in references to HRS Chapter 514B (since the actual chapter and section numbers were not inserted until after Acts 164 (SLH 2004) and 93 (SLH 2005) were enacted). Additional comments are inserted under "Arakaki's Comment."

HRS Chapter 514B, Part II. Applicability

so, while still protecting developers' reserved rights and protecting against the unreasonable impairment of contract rights [i.e., the standard for invoking protection under Article I, Section 10 (the Contracts Clause) of the U.S. Constitution]. The amendments reflected above appear to accomplish that.

Please note that the second proviso of HRS §514B-22 does not have anything to do with a condominium association continuing to be governed by HRS Chapter 514A. It simply recognizes that certain contractual rights may exist under a condominium project's constituent documents, and *if* invalidating a provision in the project's constituent documents would: (i) invalidate the developer's reserved rights (i.e., rights specifically reserved in the project's declaration or other constituent document), or (ii) be an *unreasonable impairment* of contract (i.e., the U.S. Constitution's Contracts Clause standard), *then* the provision(s) of the condominium project's constituent documents would not be invalidated by the new condominium law.

Note further that HRS §§514B-35 and 514B-41(c) were added to the list of provisions that apply automatically to existing condominiums (unless doing so would invalidate the developer's reserved rights or be an unreasonable impairment of contract).

HRS §514B-35 provides a statutory basis for differentiating between units, common elements, and limited common elements. This is often a matter of dispute and misunderstanding because the old law (HRS Chapter 514A) and many condominium documents do not adequately define what is included in and excluded from each category. All condominium associations and unit owners should be able to benefit from the more precise and comprehensive definitions provided by HRS §514B-35.

HRS §514B-41(c) addresses another problem that frequently confronts condominiums: accounting and charging for the costs of maintenance, repair, or replacement of limited common elements when the project documents require such costs to be charged to the individual unit owners. For example, the project documents of many condominium projects provide that parking stalls are limited common elements appurtenant to specific units and require that all costs of maintenance, repair and replacement of those stalls be charged to the unit owners on a per capita basis rather than as a common expense. Although this makes sense in certain situations, such as when a stall is damaged by oil leaking from the owner's car, it is very difficult to administer when an entire parking lot is being repaved and re-stripped. Consequently, it is not uncommon for associations to simply ignore such provisions in their project documents and treat such costs as a common expense. Making HRS §514B-41(c) applicable to existing condominiums allows the boards of such condominiums to determine that the extra cost incurred to separately account for and charge for the costs of maintenance, repair, or replacement of limited common elements is not justified, and pay for those costs as a common expense, just as new condominiums will be able to do.

~~[[§514B-23]]~~ **Amendments to governing instruments.** (a) The declaration, bylaws, condominium map, or other constituent documents of any condominium created before July 1, 2006 may be amended to achieve any result permitted by this chapter, regardless of what applicable law provided before July 1, 2006.

(b) An amendment to the declaration, bylaws, condominium map or other constituent documents authorized by this section ~~[shall be adopted in conformity with any procedures and requirements for amending the instruments specified by those instruments or, if there are none, in conformity with the amendment procedures of this chapter]~~ may be adopted by the vote or written consent of a majority of the owners; provided that any amendment adopted pursuant to this section shall not invalidate the reserved rights of a developer. If an amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person. [L 2004, c 164, pt of §2; am L 2006, c 273, §6]

Real Estate Commission's Comment (2003 Final Report)

1. UCIOA §1-206 is the source of this section.

Arakaki's Comment

1. Subsection (b) is presented above in Ramseyer format to reflect an amendment adopted by the 2006 Legislature. As noted above, many existing condominiums would like to take advantage of the new law. This amendment would make it *easier* for such condominiums to *amend* their governing documents to achieve any *result permitted by the new law*, while still protecting developers' reserved rights.