# HB243 HD2

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|---|---|
| Measure Title: | RELATING TO CONDOMINIUMS. |
| Report Title: | Condominiums; Board Membership |
| Description: | Clarifies that unit renters are prohibited from serving as a board member of a condominium association. (HB243 HD2) |
| Companion: | |
| Package: | None |
| Current Referral: | CPH |
| Introducer(s): | MCKELVEY, BROWER |

**PRESENTATION OF THE**
**REAL ESTATE COMMISSION**

TO THE SENATE COMMITTEE ON
COMMERCE, CONSUMER PROTECTION, AND HEALTH

TWENTY-NINTH LEGISLATURE
Regular Session of 2017

Tuesday, March 21, 2017
9:00 a.m.

**TESTIMONY ON HOUSE BILL NO. 243, H.D. 2, PROPOSED S.D. 1, RELATING TO CONDOMINIUMS.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Nikki Senter, Chairperson of the Hawaii Real Estate Commission ("Commission"). The Commission submits the following comments on House Bill No. 243, H.D. 2, Proposed S.D. 1.

The purpose of this bill is to have only one condominium chapter in the Hawaii Revised Statutes ("HRS") by repealing chapter 514A, HRS, and amending numerous other chapters to remove associated references to the repealed chapter 514A, HRS. This bill would apply chapter 514B, HRS, to all condominiums provided that such application did not invalidate existing provisions of a condominium's governing documents if necessary to preserve a developer's reserved rights.

While the Commission supports the concepts of clarity and uniformity, a wholesale repeal of chapter 514A, HRS, may well have unintended and unforeseen consequences. Chapter 514A, HRS, encompasses more than just governance of condominiums and remains relevant to condominiums and projects created prior to July 1, 2006. In addition to management of condominiums, this chapter governs the

creation, alteration, and termination of condominiums, as well as the registration and administration of same in addition to provisions to protect purchasers and govern owner-occupants. Chapters 514A and 514B, HRS, have different criteria and reporting requirements. For example, chapter 514A, HRS, allows for a series of reports, including contingent, contingent final, final, and supplementary reports whereas chapter 514B, HRS, has a single report that can be supplemented.

In order to sell, a project has to be issued an effective date by the Commission. Approximately 5,745 projects representing 171,717 units were issued effective dates under chapter 514A, HRS. Other projects that began the public report process can still file a final public report if a notice of intention was filed prior to the enactment of chapter 514B, HRS. Projects still have developer inventory, and thus are subject to the requirement for an active report. Further, not all condominiums created were for the purpose of contemporaneous sale or sale, yet these condominiums nonetheless were created under chapter 514A, HRS, and exist today. The proposed measure may be interpreted to force the sale of these condominiums many of which may be two unit projects with “non-expiring” status to allow later family generations the opportunity to sell.

Chapter 514A, HRS, projects are active and continue to submit various types of public reports to the Commission. For example, between January 1, 2010, and December 31, 2016, the Commission received contingent final reports for ten projects representing 293 units, final reports for 32 projects representing 666 units, and

supplementary reports for 185 projects representing 6,505 units. These projects range from small family unit projects to large hotels created and registered as condominiums.

Should the Committee decide to pass this measure, the Commission requests that the bill address the legal and practical issues in transitioning the many existing chapter 514A projects and unit owners to chapter 514B, HRS. The transition and reregistration of thousands of just the known chapter 514A projects would be a massive financial and time consuming undertaking for the State and fraught with potential legal and malpractice liability.

In the alternative, the Commission requests that only the governance sections of chapter 514A, HRS (for example, parts V and VII) be repealed. While the recodification clearly states that in most cases, the governance sections of chapter 514B, HRS apply, the Commission receives many inquiries over the applicability of the governance sections of chapter 514A, HRS.

Thank you for the opportunity to provide comments on House Bill No. 243, H.D. 2, Proposed S.D. 1.

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

March 19, 2017

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

Re: Testimony in Support of
HB243, HD2 Proposed SD1 RELATING TO CONDOMIMUMS
Hearing: Tues., March 21, 2017, 9 a.m., Conf. Rm. #229

Chair Baker, Vice-Chair Nishihara and Members of the 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 of the intent and purpose of proposed SD1 to HB243, HD2 and respectfully asks that it be passed out unamended.

If you have any questions, please feel free to contact me. Thank you for the opportunity to testify on this matter.

Jane Sugimura
President

**From:** mailinglist@capitol.hawaii.gov
**Sent:** Monday, March 20, 2017 8:38 AM
**To:** CPH Testimony
**Cc:** jsugimura@bendetfidell.com
**Subject:** Submitted testimony for HB243 on Mar 21, 2017 09:00AM

**HB243**
Submitted on: 3/20/2017
Testimony for CPH on Mar 21, 2017 09:00AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---|---|---|---|
| Jane Sugimura | HI Council of Assoc. of Apt. Owners a | Comments Only | Yes |

Comments: The original language of HB243 dealt with an amendment to HRS 514B-107 and was deleted by the proposed SD1. We ask that the amendment be reinstated and HRS 514B-107 (b) be amended to read: §514B-107 Board; limitations. (a) Members of the board shall be unit owners or co-owners, vendees under an agreement of sale, a trustee of a trust which owns a unit, or an officer, partner, member, or other person authorized to act on behalf of any other legal entity which owns a unit. There shall not be more than one representative on the board from any one unit. (b) No tenant, resident manager or employee of a condominium shall serve on its board.

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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**Hawai'i State Association of Parliamentarians**
**Legislative Committee**
**P. O. Box 29213**
**Honolulu, Hawai'i 96820-1613**
**E-mail: hsap.lc@gmail.com**

March 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 HB243 SD1 (Proposed) with Amendments; Hearing Date: March 21, 2017 at 9:00 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 HB243 SD1 (Proposed) with AMENDMENTS.

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 has provided a window for condominium associations to amend their governing instruments and opt-in completely to Chapter 514B with a reduced requirement of only a majority of unit owner approval. **The time for "opting in" is long overdue.**

The effective date in the proposed bill is January 1, 2019. **If possible, we suggest a stricter date of January 1, 2018.** This would impose on associations the seriousness of the need to operate under one chapter.

We noticed that the original bill description stated, "Clarifies that unit renters are prohibited from serving as a board member of a condominium association. (HB243 HD2)." The House bill contained several amendments made by the House CPC and IAC committees. They don't appear in the current proposed version of the bill. **We respectfully suggest that the Committee review those changes and consider adding them in as part of this package. The description should probably be changed to match the current status of the bill.**

**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

Digitally signed by Steve Glanstein
DN: cn=Steve Glanstein, o, ou, email=Steveghi@Gmail.com, c=US
Location: Honolulu, HI
Date: 2017.03.19 17:22:06 -10'00'

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

**From:** mailinglist@capitol.hawaii.gov
**Sent:** Sunday, March 19, 2017 3:44 PM
**To:** CPH Testimony
**Cc:** richard.emery@associa.us
**Subject:** Submitted testimony for HB243 on Mar 21, 2017 09:00AM

**HB243**
Submitted on: 3/19/2017
Testimony for CPH on Mar 21, 2017 09:00AM in Conference Room 229

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

Comments: Support the repeal of HRS 514A. It is not needed and confusing to have two laws.

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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March 18, 2017

Hearing Date: Tuesday, March 21, 2017
Time: 9:00 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 H.B. No. 243, Proposed S.D. 1 – 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 HB 243, Proposed SD1, which would repeal Hawaii Revised Statutes ("HRS") Chapter 514A – Hawaii's old and virtually irrelevant condominium law. This bill appears to be identical to SB 292, SD1, which was passed unanimously by the Senate.

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 HB 243, Proposed SD1, 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 HB 243, Proposed SD1, 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.

[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).

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, 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 than 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.

HB 243, Proposed SD1, Section 45, 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.

Finally, I note that attorneys for condominium developers have expressed concern that many condominium projects have active registrations and public reports (i.e., developer's disclosure documents) under HRS Chapter 514A. Perhaps, for consideration by the 2018 Legislature, they can devise a safe harbor provision similar to that crafted in Section 9 of Act 93 (Session Laws of Hawaii, 2005), since HB 243, Proposed SD1 does not take effect until 2019.

Regardless, the Legislature should consider that for all condominium projects sold under HRS Chapter 514A registrations (which have governing documents that are consistent with HRS Chapter 514A), it is the ***purchasers*** who will have to pay to update and clarify their condominium's declaration and bylaws to be consistent with HRS Chapter 514B. I am not sure that it is good public policy to continue to shift that burden and cost from the condominium developer to the condominium purchaser/condominium association of unit owners, particularly when the developer has had well over a decade to bring the condominium project to market under the old condominium law.

## III. Conclusion

For all of the reasons discussed above, I respectfully request that this committee pass HB 243, Proposed SD1.

Sincerely,

Gordon M. Arakaki

## HRS Chapter 514B, Part II. Applicability

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**Part II. APPLICABILITY**



## 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."

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-striped. 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.

Ekimoto & Morris
A Limited Liability Law Company

Richard S. Ekimoto
John A. Morris
Gordon M. Arakaki
Of Counsel:
Arlette S. Harada

# Applicability of Recodification to Existing Condominiums

## I. Sections Of Recodification That Are Automatically Applicable to Existing Condos

There is a fair amount of confusion about how the Recodification applies to existing condominiums. Hawaii Revised Statutes §514B-22 (attached) states that the following sections automatically apply to existing condominiums unless one of three exceptions comes into play:

1. HRS §514B-3: Definitions (to the extent that they are involved in any of the other sections, below)
2. HRS §514B-4: Separate Title & Taxation of Condominium Units
3. HRS §514B-5: Conformance with county land use laws
4. HRS §514B-35: Unit boundary provisions that treat windows, doors and other parts of the project that affect fewer than all of the owners as limited common elements
5. HRS §514B-41(c): An exception to rule apportioning limited common expenses to each unit when it would be more expensive to do so
6. HRS §514B-46: Merger of increments
7. HRS §514B-72: Payments into condominium education trust fund
8. HRS Chapter 514B, Part VI: Most of the provisions of the new law that are applicable to the management of condominiums

## II. Three Exceptions To The Automatic Applicability Provisions

Each of the statutory sections listed above automatically applies to existing condominiums unless one of the following three exceptions applies:

1. You are dealing with an event or circumstance occurring before July 1, 2006
2. The section conflicts with an existing provision of one of the condominium documents in a way that invalidates a reserved right of a developer; or
3. The section conflicts with an existing provision of one of the condominium documents in a way that would be an *"unreasonable impairment of contract."*

Exception 1 means that if something occurred before the effective date of the Recodification, it would be governed by the old condominium law. For instance, an amendment to the By-Laws required 65% approval under the old condominium law but requires 67% approval under the new law. All the amendments that were passed before July 1, 2006 with more than 65% but less than 67% approval still remain valid.

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The next two exceptions (2 and 3) only apply when the new law conflicts with your Association's governing documents. In contrast, if the governing documents are silent or consistent with the list of statutory sections in §514B-22 (see above), exceptions 2 and 3 do not apply.

Otherwise, exception 2 is intended to protect a developer's reserved rights. For instance, the developer might have reserved the right to merge phases into a single condominium. Hawaii Revised Statutes §514B-22 means that the Recodification will not prevent the developer from merging the phases into a single condominium.

Exception 3 involves the "contract clause" of the U. S. Constitution. The contract clause prohibits the government from passing laws that impair existing contracts. That does not mean that all laws which contradict the provisions of a contract are invalid. The Hawaii Attorney General has issued opinions that the legislature may adopt statutes having retroactive application on procedural issues. Nevertheless, it is possible that a provision of 514B might be substantive and could legitimately be held to impair the existing governing documents of an association.

**III. Sections Of Recodification That Are Not Automatically Applicable To Existing Condos**

While, as outlined above, most of the condominium governance provisions of the Recodification automatically apply to existing condominiums, there are a few provisions that do not automatically apply to existing condominium associations. Some of the most significant provisions that do not automatically apply to existing condominiums are:

1. HRS §514B-9 (this provision establishes an obligation of good faith for associations, directors and owners on obligations and duties imposed by HRS Chapter 514B)
2. HRS §514B-10 (this provision requires that the condominium documents and 514B to be liberally construed by the courts and eliminates punitive damages for any claims under 514B)
3. HRS §514B-32(11) (this provision reduces the approval requirement for Declaration amendments to 67%)
4. HRS §514B-38 (this provision: (a) reduces the approval requirement for leases of the common elements to 67%; (b) permits the Association to allow owners to have minimal exclusive use of the common elements without 100% owner approval; and (c) permits the Association to convert open spaces to other uses without 100% owner approval)
5. HRS §514B-47 (this provision includes specific instructions for what happens when a leasehold condominium is condemned)

## IV. Opting-In To the Recodification

As you can see, some of the provisions that do not automatically apply to existing condominiums can have a substantial benefit to those associations. For example, if you would like to eliminate punitive damages for your condominium association or reduce the approval requirement for declaration amendments and leases of the common elements to 67%, you need to opt-in to the Recodification. Hawaii Revised Statutes §514B-23 (often referred to as the "opt-in" provision of the Recodification) will allow you to amend your governing documents to conform to the provisions of Hawaii Revised Statutes Chapter 514B with the approval of only a majority of the owners.

While an amendment will not be needed for those sections that automatically apply to existing condominiums (provided that one of the three exceptions listed above does not come into play), existing condominiums must adopt an amendment for the other provisions of the Recodification to apply. Thus, with the approval of only a majority of the apartment owners, you can adopt amendments to the governing documents that will allow you to take advantage of the Recodification sections that do not automatically apply to existing condominiums.

We recommend, in particular, that any existing condominium association that is considering an amendment to its Declaration should seek a vote to opt-in. Even if you are not amending your Declaration, there are significant provisions that could benefit the Association. Opting-in also has the benefit of eliminating the concern that the automatic provisions will not apply because of a contract clause issue. For that reason, it is likely that most condominium associations will eventually choose to opt-in.

## Addendum

**§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; provided that those sections (i) apply only with respect to events and circumstances occurring on or after July 1, 2006; and (ii) 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.”

**From:** mailinglist@capitol.hawaii.gov
**Sent:** Monday, March 20, 2017 9:55 AM
**To:** CPH Testimony
**Cc:** sbradley@wcchc.com
**Subject:** Submitted testimony for HB243 on Mar 21, 2017 09:00AM

**HB243**
Submitted on: 3/20/2017
Testimony for CPH on Mar 21, 2017 09:00AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---|---|---|---|
| Stephen Bradley MD | Individual | Comments Only | No |

Comments: My condominium apartment is the most significant investment in my life. It is the place I will live out the rest of my life & will pass on to my children. I have sacrificed to purchase & maintain this investment which confronts ever more costly maintenance & preventive care & budgeting. I have true "skin in the game" & direct my board to act in all our best interests. Renters have, by their nature, a short-term view of condominium issues and, thus, should not be allowed to sit on the condominium BOD & make decisions that I and other owners will have to live with when they are long gone. The absurdity of my legislators not being able to understand such a simple concept worries me.

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

**From:** mailinglist@capitol.hawaii.gov
**Sent:** Monday, March 20, 2017 9:18 AM
**To:** CPH Testimony
**Cc:** plahne@alf-hawaii.com
**Subject:** Submitted testimony for HB243 on Mar 21, 2017 09:00AM

**HB243**
Submitted on: 3/20/2017
Testimony for CPH on Mar 21, 2017 09:00AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---|---|---|---|
| Philip L. Lahne | Individual | Support | No |

Comments: I join in the testimony submitted by Gordan Arakaki and support the bill for the same reasons

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

# Sandra-Ann Y.H. Wong

*Attorney at Law, a Law Corporation*

*1050 Bishop Street, #514*
*Honolulu, Hawaii 96813*
*sawonglaw@hawaii.rr.com 808-537-2598*


**TESTIMONY IN OPPOSITION TO HB 243, proposed SD1**
Before the Committee on Commerce, Consumer Protection, and Health
on Tuesday, February 21, 2017 at 9a.m.
in Conference Room 415

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

I am writing in **opposition to HB243, proposed SD1**.

I respectfully cannot support the proposed SD1 because it has deleted the original intent and language of the bill that addresses a very real problem – renters/tenants on condominium boards.

Renters/Tenants have no vested interest in AOAO's. For example, they do not invest a significant amount of money to purchase their unit, nor are they subject to a monthly maintenance fee. In my AOAO, I was told by one of the renters/tenants on the Board that he pays less than $100/month for rent. Putting this in perspective, this renter/tenant pays a rent that is 10% of my maintenance fee. This does not take into account a mortgage payment and for some owners, whose units are leasehold, a monthly lease rent payment. Moreover, these renters/tenants are also not affected by increases to maintenance fees or any assessments. Rather in the case of this one renter/tenant on the Board, he just continues to pay less than $100/month no matter what expenses and fees owners may be assessed. Further if the building were to just fall apart, instead of incurring a substantial financial loss, he could simply walk away and find somewhere else to rent.

It is simply wrong for renters/tenants to be setting policy and rules for owners, and making decisions as to how the AOAO money is spent, when they are not members of the AOAO and are not contributing to the upkeep of the property. Renters/Tenants and owners simply have different interests.

Currently, these renters/tenants on the Board are also eligible for officer positions. Thus, you could even have a renter/tenant as your Board President.

Therefore, I urge the Committee to re-insert the proposed amendment to HRS 514B-107. The House drafts went through 2 rounds of hearings in the House and there was a lot of support. There was no opposition.

However, in lieu of making the change in subsection (a), I think it would be more appropriate to make the change in subsection (b) as follows:

**§514B-107 Board; limitations.** (a) Members of the board shall be unit owners or co-owners, vendees under an agreement of sale, a trustee of a trust which owns a unit, or an officer, partner, member, or other person authorized to act on behalf of any other legal entity which owns a unit. There shall not be more than one representative on the board from any one unit.

(b) No <u>tenant,</u> resident manager or employee of a condominium shall serve on its board.

Thank you for the opportunity to provide testimony in Opposition to HB243, proposed SD1 and to recommend the re-insertion of the original language and intent of the bill. If the proposed amendments are accepted by the Committee, I could then support the bill.

66 Queen Street #3501
Honolulu, Hawaii 96813

March 19, 2017

Hawaii State Legislature
Senate Committee on Commerce, Consumer Protection, and Health

Re: HB243, HD2, Proposed SD1 and HB 1498, HD1, Proposed SD1
Both Relating to Condominiums

Dear Chair Baker, Vice Chair Nishihara and
Members Chang, Espero, Ihara, Kidani ,and Ruderman

I am writing in opposition to both HB243, HD2, Proposed SD1 and HB 1498, HD1, Proposed SD1, in their current forms.

As for HB 243, HD2, Proposed SD1, I urge this Honorable Committee to re-insert the language from HB 243, HD2 pertaining to HRS § 514B-107 – specifically, "(a) Members of the board shall be unit owners or co-owners, vendees under an agreement of sale, a trustee of a trust which owns a unit, or an officer, partner, member, or other person authorized to act on behalf of any other legal entity which owns a unit[~~.~~]; provided that no member of the board shall be a renter of a unit. There shall not be more than one representative on the board from any one unit."

The original language of HB 243, HD2 should not have been removed from HB 243, HD2, Proposed SD1 and needs to be re-introduced into HB 243, HD2, Proposed SD1.

I have lived in Hawaii for nearly 20 years. During most of my time in Hawaii, I have lived in condominiums – first as a renter and now as an owner. I believe condominium board membership should be reserved for owners. HB 243, HD2 would have made clear that only those individuals who have ownership interests in the condominium project will be allowed to serve on the board of directors.

When I was a renter, even though I paid rent, I did not have the same interest in keeping the condominium property values high. My main focus was keeping my rent from increasing. Now that I am an owner, I am focused on keeping my property values high, which will cause rents to increase. Thus, renter's perspectives are different from owner's needs.

Consequently, I do **not** support HB243, HD2, Proposed SD1 as it is currently written. I humbly request that the Senate Committee on Commerce, Consumer Protection, and Health revise HB243, HD2, Proposed SD1 by re-inserting the language from HB 243, HD2 to prevent renters from serving on the board of

directors. It is illogical and counterintuitive to allow renters to serve on condominium boards of directors.

Further, I do not support HB 1498, HD1, Proposed SD1, which proposes to revise HRS §§ 514B-32 and 514B-108 pertaining to amending the declaration and bylaws. Amendments to the declaration and bylaws of a condominium project affect mortgage underwriting through FannieMae and FreddieMac. As the terms "material adverse nature to owners or do not imperil the viability or stability of the association of apartment owners" are not defined in HB 1498, HD1, Proposed SD1 and are vague and overbroad and may permit amendments which could possibly impact underwriting requirements. These provisions bear further, closer scrutiny for possible negative impacts.

Thank you for the opportunity to provide written testimony in opposition to sboth HB243, HD2, Proposed SD1 and HB 1498, HD1, Proposed SD1, in their current forms.

Very truly yours,

*Sandy Ma*

Sandy S. Ma

## CPH Testimony

**From:** liis@hawaii.rr.com
**Sent:** Sunday, March 19, 2017 9:54 AM
**To:** CPH Testimony
**Subject:** HB243, Proposed SD1 and HB1498, Proposed SD1: Strong OPPOSITION to both bills, being heard on Tuesday, March 21 at 9a.m. in Rm. 229

To: The Committee on Commerce, Consumer Protection, and Health:

I am writing in STRONG OPPOSITION to the proposed SD1s for HD243 and HB1498.

In regards to HD243, proposed SD1 I am opposed because it gutted the original intent of the bill. The provision to HRS Section 514B-107 needs to be put back in. There is a serious problem of AOAO Boards having renters as Board members. This needs to be prohibited because the interest of owners and renters are not the same. Moreover, renters can come and go and, thus, do not have a vested interest in the AOAO.

In regards to HB1498, proposed SD1, I am opposed to Part III. First of all what does "are not of a material adverse nature to condominium owners or do not imperil the viability or stability of the condominium association" mean. This language is too subjective and will lead to havoc at AOAOs. Any change will be a material adverse effect to at least one owner. Also, the very nature of a change will cause instability. Declarations, bylaws, and other governing instruments are the "Constitution" for AOAO's, thus changes should not be made without input from all owners. When owners do not vote, it is a "NO" vote. Part III needs to be removed from the proposed SD1.

Thank you,
L. Fujimoto and Ohana, condo owners

## CPH Testimony

**From:** beeps@hawaii.rr.com
**Sent:** Sunday, March 19, 2017 1:37 PM
**To:** CPH Testimony
**Subject:** Testimonies in STRONG OPPOSITION TO HB243, Proposed SD 1 and HB1498, Proposed SD1 being heard on Tuesday, March 21 at 9am in Rm. 229

To: The Committee on Commerce, Consumer Protection, and Health:

We are writing in STRONG OPPOSITION to the proposed SD1s for HB243 and HB1498.

HB243, proposed SD1 gutted the original language of the bill. The original language and intent of the bill needs to be included. Renters should not be allowed to be members of an AOAO Board in which they have no ownership interest. Clearly renters and owners have different objectives.

Part III in HB1498, proposed SD1 needs to be deleted. We don't even know what "are not of a material adverse nature to condominium owners or do not imperil the viability of stability of the condominium association" means. This language is too subjective and will cause AOAO's and its owners to spend tens of thousands of dollars on attorneys' fees trying to figure it out. The current threshold to amend condo docs is fine as is. Why is this Committee pushing for this? This language is clearly for special interest and a favor to one of your fellow Senators!

Mahalo,
Dayton and Yaori Hinu

## CPH Testimony

**From:** Mike Wong <mwong010@gmail.com>
**Sent:** Monday, March 20, 2017 8:07 AM
**To:** CPH Testimony
**Subject:** HB243, Proposed SD1, STRONG OPPOSITION, being heard on Tuesday, 3/21/17 @ 9am in Rm. 229

Hello,

I am writing in opposition to the proposed SD1s for HD243.

In regards to HD243, proposed SD1 I am opposed because it removes the language preventing renters from being on AOAO boards. This needs to be prohibited because renters do not have the same stake in the game as owners do. Renters are not affected by market value, maintenance fees, and other important aspects of condo living that owners are greatly affected by. I have seen first hand how this affects their decisions on the board.

Thank you.

Mike Wong, Condo owner and board member

## CPH Testimony

**From:** Cliff Miyake <outlook_51515CCC9F36222C@outlook.com> on behalf of Cliff Miyake <cliffmiyake@gmail.com>
**Sent:** Monday, March 20, 2017 8:50 AM
**To:** CPH Testimony
**Subject:** Strong opposition to HB 243 SD1

**TESTIMONY IN OPPOSITION TO HB 243, proposed SD1**
Before the Committee on Commerce, Consumer Protection, and Health
on Tuesday,March 21, 2017 at 9a.m.
in Conference Room 229

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

I am writing in strong **opposition to HB243, proposed SD1**.

I respectfully cannot support the proposed SD1 because it has deleted the original intent and language of the bill that addresses a very real problem – renters/tenants on condominium boards.

Renters/Tenants have no vested interest in AOAO's. They own no equity and such will not suffer the consequences of decreased property values resulting from poor decisions made while serving on AOAO boards.

Renters/tenants do not speak for owners and they should not be setting policy and rules for owners, and making decisions as to how the AOAO money is spent. Renters/Tenants and owners simply have different interests. Renters also do not pay maintenance fees like owners so they do not support the continuing operations and upkeep of the property which adds to the argument that they have no vested interest in properties.

Thank you for the opportunity to provide testimony in Opposition to HB243, proposed SD1.

Sincerely,
Cliff Miyake
Craigside unit owner
2101 Nuuanu Avenue #1405
Honolulu, HI 96817

Sent from Mail for Windows 10

## CPH Testimony

**From:** auyongr001@hawaii.rr.com
**Sent:** Sunday, March 19, 2017 11:27 PM
**To:** CPH Testimony
**Subject:** HB243, Proposed SD1 and HB1498, Proposed SD1: Strong OPPOSITION to both bills, being heard on Tuesday, March 21 at 9a.m. in Rm. 229

To: The Committee on Commerce, Consumer Protection, and Health:

I am writing in STRONG OPPOSITION to the proposed SD1s for HD243 and HB1498.

In regards to HD243, proposed SD1 I am opposed because it gutted the original intent of the bill. The provision to HRS Section 514B-107 needs to be put back in. There is a serious problem of AOAO Boards having renters as Board members. This needs to be prohibited because the interest of owners and renters are not the same. Renters do not have a vested interest in the AOAO. Their residence at any one condo is temporary, normally on a year by year basis.

In regards to HB1498, proposed SD1, I am opposed to Part III. First of all what does "are not of a material adverse nature to condominium owners or do not imperil the viability or stability of the condominium association" mean. This language is too subjective and will lead to havoc at AOAOs. Any change will be a material adverse effect to at least one owner. Also, the very nature of a change will cause instability. Declarations, bylaws, and other governing instruments are the "Constitution" for AOAO's, thus changes should not be made without input from all owners. When owners do not vote, it is a "NO" vote. Part III needs to be removed from the proposed SD1.

Thank you,

Robin Auyong, condo owners