

**[CHAPTER 514B]**  
**CONDOMINIUM PROPERTY ACT**

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## PART I. GENERAL PROVISIONS

**[§514B-1] Short title.** This chapter may be cited as the Condominium Property Act.

**[§514B-2] Applicability.** Applicability of this chapter is governed by part II.

**[§514B-3] Definitions.** As used in this chapter and in the declaration and bylaws, unless specifically provided otherwise or required by the context:

"Affiliate of a developer" means a person that directly or indirectly controls, is controlled by, or is under common control with, the developer.

"Association" means the unit owners' association organized under section 514B-102 or under prior condominium property regimes statutes.

"Board" or "board of directors" means the body, regardless of name, designated in the declaration or bylaws to act on behalf of the association.

"Commission" means the real estate commission of the State.

"Common elements" means:

- (1) All portions of a condominium other than the units; and
- (2) Any other interests in real estate for the benefit of unit owners that are subject to the declaration.

"Common expenses" means expenditures made by, or financial liabilities of, the association for operation of the property, and shall include any allocations to reserves.

"Common interest" means the percentage of undivided interest in the common elements appurtenant to each unit, as expressed in the declaration, and any specified percentage of the common interest means such percentage of the undivided interests in the aggregate.

"Common profits" means the balance of all income, rents, profits, and revenues from the common elements or other property owned by the association remaining after the deduction of the common expenses.

"Completion of construction" means the earliest of:

- (1) The issuance of a certificate of occupancy for the unit;
- (2) The date of completion for the project, or the phase of the project that includes the unit, as defined in section 507-43;
- (3) The recordation of the "as built" amendment to the declaration that includes the unit;
- (4) The issuance of the architect's certificate of substantial completion for the project, or the phase of the project that includes the unit; or
- (5) The date the unit is completed so as to permit normal occupancy.

"Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

"Condominium map" means, however denominated, a map or plan of the condominium property regime containing the information required by section 514B-33.

"Converted" or "conversion" means the submission of a structure to a condominium property regime more than twelve months after the completion of construction; provided that structures used as sales offices or models for a project and later submitted to a condominium property regime shall not be considered to be converted structures.

"Declaration" means any instrument, however denominated, that creates a condominium, including any amendments to the instrument.

"Developer" means a person who undertakes to develop a real estate condominium project, including a person who succeeds to the interest of the developer by acquiring a controlling interest in the developer or in the project.

"Development rights" means any right or combination of rights reserved by a developer in the declaration to:

- (1) Add real estate to a condominium;
- (2) Create units, common elements, or limited common elements within a condominium;
- (3) Subdivide units, combine units, or convert units into common elements;
- (4) Withdraw real estate from a condominium;
- (5) Merge projects or increments of a project; or
- (6) Otherwise alter the condominium.

"Limited common element" means a portion of the common elements designated by the declaration or by operation of section 514B-35 for the exclusive use of one or more but fewer than all of the units.

"Majority" or "majority of unit owners" means the owners of units to which are appurtenant more than fifty per cent of the common interests. Any specified percentage of the unit owners means the owners of units to which are appurtenant such percentage of the common interest.

"Managing agent" means any person retained, as an independent contractor, for the purpose of managing the operation of the property.

"Master deed" or "master lease" means any deed or lease showing the extent of the interest of the person submitting the property to the condominium property regime.

"Material change" as used in parts IV and V of this chapter means any change that directly, substantially, and adversely affects the use or value of:

- (1) A purchaser's unit or appurtenant limited common elements; or
- (2) Those amenities of the project available for the purchaser's use.

"Material fact" means any fact, defect, or condition, past or present, that, to a reasonable person, would be expected to measurably affect the value of the project, unit, or property being offered or proposed to be offered for sale.

"Operation of the property" means the administration, fiscal management, and physical operation of the property, and includes the maintenance, repair, and replacement of, and the making of any additions and improvements to, the common elements.

"Person" means an individual, firm, corporation, partnership, association, trust, or other legal entity, or any combination thereof.

"Pertinent change" means, as determined by the commission, a change not previously disclosed in the most recent public report that renders the information contained in the public report or in any disclosure statement inaccurate, including, but not limited to:

- (1) The size, construction materials, location, or permitted use of a unit or its appurtenant limited common element;
- (2) The size, use, location, or construction materials of the common elements of the project; or
- (3) The common interest appurtenant to the unit.

A pertinent change does not necessarily constitute a material change.

"Project" means a real estate condominium project; a plan or project whereby a condominium of two or more units located within the condominium property regime are created.

"Property" means the land, whether or not contiguous and including more than one parcel of land, but located within the same vicinity, the building or buildings, all improvements and all structures thereon, and all easements, rights, and appurtenances intended for use in connection with the condominium, which have been or are intended to be submitted to the regime established by this chapter. "Property" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

"Record", "recordation", "recorded", or "recording" means to record in the bureau of conveyances in accordance with chapter 502, or to register in the land court in accordance with chapter 501.

"Resident manager" means any person retained as an employee by the association to manage, on-site, the operation of the property.

"Structures" includes but is not limited to buildings.

"Time share unit" means the actual and promised accommodations, and related facilities, that are the subject of a time share plan as defined in chapter 514E.

"Unit" means a physical or spatial portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described in the declaration or pursuant to section 514B-35, with an exit to a public road or to a common element leading to a public road.

"Unit owner" means the person owning, or the persons owning jointly or in common, a unit and its appurtenant common interest; provided that to such extent and for such purposes as provided by recorded lease, including the exercise of voting rights, a lessee of a unit shall be deemed to be the unit owner.

**[§514B-4] Separate titles and taxation.** (a) Each unit that has been created, together with its appurtenant interest in the common elements, constitutes, for all purposes, a separate parcel of real estate.

(b) If there is any unit owner other than a developer, each unit shall be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements. The laws relating to home exemptions from state property taxes are applicable to individual units, which shall have the benefit of home exemption in those cases where the owner of a single-family dwelling would qualify. Property taxes assessed by the State or any county shall be assessed and collected on the individual units and not on the property as a whole. Without limitation of the foregoing, each unit and its appurtenant common interest shall be deemed to be a "parcel" and shall be subject to separate assessment and taxation for all types of taxes authorized by law, including, but not limited to, special assessments.

(c) If there is no unit owner other than a developer, the real estate comprising the condominium may be taxed and assessed in any manner provided by law.

**[§514B-5] Conformance with county land use laws.** Any condominium property regime established under this chapter shall conform to the existing underlying county zoning for the property and all applicable county permitting requirements adopted by the county in which the property is located, including any supplemental rules adopted by the county, pursuant to section 514B-6, to ensure the conformance of condominium property regimes to the purposes and provisions of county zoning and development ordinances and chapter 205. In the case of a property which includes one or more existing structures being converted to condominium status, the condominium property regime shall comply with section 514B-32(a)(13) or 514B-84(a).

**[§514B-6] Supplemental county rules governing a condominium property regime.** Whenever any county deems it proper, the county may adopt supplemental rules governing condominium property regimes established under this chapter in order to implement this program; provided that any of the supplemental rules adopted shall not conflict with this chapter or with any of the rules adopted by the commission to implement this chapter.

**[§514B-7] Construction against implicit repeal.** This chapter being a general act intended as a unified coverage of its subject matter, no part of it shall be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

**[§514B-8] Severability.** If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provisions or applications, and to this end the provisions of this chapter are severable.

**[§514B-9] Obligation of good faith.** Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

**[§514B-10] Remedies to be liberally administered.** (a) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. Punitive damages may not be awarded, however, except as specifically provided in this chapter or by other rule of law.

(b) Any deed, declaration, bylaw, or condominium map shall be liberally construed to facilitate the operation of the condominium property regime.

(c) Any right or obligation declared by this chapter is enforceable by judicial proceeding.

## **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.

**§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:

- (1) Shall apply only with respect to events and circumstances occurring on or after July 1, 2006; and
- (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".

**[§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 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.

### **PART III. CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS**

**[§514B-31] Creation.** (a) To create a condominium property regime, all of the owners of the fee simple interest in land shall execute and record a declaration submitting the land to the condominium property regime. Upon recordation of the master deed together with a declaration, the condominium property regime shall be deemed created.

(b) The condominium property regime shall be subject to any right, title, or interest existing when the declaration is recorded if the person who owns the right, title, or interest does not execute or join in the declaration or otherwise subordinate the right, title, or interest. A person with any other right, title, or interest in the land may subordinate that person's interest to the condominium property regime by executing the declaration, or by executing and recording a document joining in or subordinating to the declaration.

**[§514B-32] Contents of declaration.** (a) A declaration shall describe or include the following:

- (1) The land submitted to the condominium property regime;
- (2) The number of the condominium map filed concurrently with the declaration;
- (3) The number of units in the condominium property regime;
- (4) The unit number of each unit and common interest appurtenant to each unit;
- (5) The number of buildings and projects in the condominium property regime, and the number of stories and units in each building;
- (6) The permitted and prohibited uses of each unit;
- (7) To the extent not shown on the condominium map, a description of the location and dimensions of the horizontal and vertical boundaries of any unit. Unit boundaries may be defined by physical structures or, if a unit boundary is not defined by a physical structure, by spatial coordinates;
- (8) The condominium property regime's common elements;

- (9) The condominium property regime's limited common elements, if any, and the unit or units to which each limited common element is appurtenant;
- (10) The total percentage of the common interest that is required to approve rebuilding, repairing, or restoring the condominium property regime if it is damaged or destroyed;
- (11) The total percentage of the common interest, and any other approvals or consents, that are required to amend the declaration. Except as otherwise specifically provided in this chapter, and except for any amendments made pursuant to reservations set forth in paragraph (12), the approval of the owners of at least sixty-seven per cent of the common interest shall be required for all amendments to the declaration;
- (12) Any rights that the developer or others reserve regarding the condominium property regime, including, without limitation, any development rights, and any reservations to modify the declaration or condominium map. An amendment to the declaration made pursuant to the exercise of those reserved rights shall require only the consent or approval, if any, specified in the reservation; and
- (13) A declaration, subject to the penalties set forth in section 514B-69(b), that the condominium property regime is in compliance with all zoning and building ordinances and codes, and all other permitting requirements pursuant to section 514B-5, and specifying in the case of a property that includes one or more existing structures being converted to condominium property regime status:
  - (A) Any variances that have been granted to achieve the compliance; and
  - (B) Whether, as the result of the adoption or amendment of any ordinances or codes, the project presently contains any legal nonconforming conditions, uses, or structures;

except that a property that is registered pursuant to section 514B-51 shall instead provide this declaration pursuant to section 514B-54. If a developer is converting a structure to condominium property regime status and the structure is not in compliance with all zoning and building ordinances and codes, and all other permitting requirements pursuant to section 514B-5, and the developer intends to use purchaser's funds pursuant to the requirements of section 514B-92 or 514B-93 to cure the violation or violations, then the declaration required by this paragraph may be qualified to identify with specificity each violation and the requirement to cure the violation by a date certain.

(b) The declaration may contain any additional provisions that are not inconsistent with this chapter.

**§514B-33 Condominium map.** (a) A condominium map shall be recorded with the declaration. The condominium map shall contain the following:

- (1) A site plan for the condominium property regime, depicting the location, layout, and access to a public road of all buildings and projects included or anticipated to be included in the condominium property regime, and depicting access for the units to a public road or to a common element leading to a public road;
- (2) Elevations and floor plans of all buildings in the condominium property regime;
- (3) The layout, location, boundaries, unit numbers, and dimensions of the units;

- (4) To the extent that there is parking in the condominium property regime, a parking plan for the regime, showing the location, layout, and stall numbers of all parking stalls included in the condominium property regime;
  - (5) Unless specifically described in the declaration, the layout, location, and numbers or other identifying information of the limited common elements, if any; and
  - (6) A description in sufficient detail, as may be determined by the commission, to identify any land area that constitutes a limited common element.
- (b) The condominium map may contain any additional information that is not inconsistent with this chapter.

**§514B-34 Condominium map; certification of architect, engineer, or surveyor.** (a) The condominium map shall bear the statement of a licensed architect, engineer, or surveyor certifying that the condominium map is consistent with the plans of the condominium's building or buildings filed or to be filed with the government official having jurisdiction over the issuance of permits for the construction of buildings in the county in which the condominium property regime is located. If the building or buildings have been built at the time the condominium map is recorded, the certification shall state that, to the best of the architect's, engineer's, or surveyor's knowledge, the condominium map depicts the layout, location, dimensions, and numbers of the units substantially as built. If the building or buildings, or portions thereof, have not been built at the time the condominium map is recorded, within thirty days from the completion of construction, the developer shall execute and record an amendment to the declaration accompanied by a certification of a licensed architect, engineer, or surveyor certifying that the condominium map previously recorded, as amended by the revised pages filed with the amendment, if any, fully and accurately depicts the layout, location, boundaries, dimensions, and numbers of the units substantially as built.

(b) If the condominium property regime is a conversion and the government official having jurisdiction over the issuance of permits for the construction of buildings in the county in which the condominium property regime is located is unable to locate the original permitted construction plans, the certification need only state that the condominium map depicts the layout, location, boundaries, dimensions, and numbers of the units substantially as built. If there are no buildings, no certification shall be required.

**[§514B-35] Unit boundaries.** Except as provided by the declaration:

- (1) If walls, floors, or ceilings are designated as boundaries of a unit, all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit, and all other portions of the walls, floors, or ceilings, are a part of the common elements;
- (2) If any chute, flue, duct, wire, conduit, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element appurtenant solely to that unit, and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements;

- (3) Subject to paragraph (2), all spaces, interior non-loadbearing partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit; and
- (4) Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, lanais, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but are located outside the unit's boundaries, are limited common elements appurtenant exclusively to that unit.

**[§514B-36] Leasehold units.** An undivided interest in the land that is subject to a condominium property regime equal to a unit's common interest may be leased to the unit owner, and the unit and its common interest in the common elements exclusive of the land may be conveyed to the unit owner. The conveyance of the unit with an accompanying lease of an interest in the land shall not constitute a division or partition of the common elements, or a separation of the common interest from its unit. Where a deed of a unit is accompanied by a lease of an interest in the land, the deed shall not be construed as conveying title to the land included in the common elements.

**[§514B-37] Common interest.** Each unit shall have the common interest it is assigned in the declaration. Except as provided in sections 514B-32(a)(12), 514B-46, and 514B-140(d) and except as provided in the declaration, a unit's common interest shall be permanent and remain undivided, and may not be altered or partitioned without the consent of the owner of the unit and the owner's mortgagee, expressed in a duly executed and recorded declaration amendment. The common interest shall not be separated from the unit to which it appertains, and shall be deemed to be conveyed or encumbered with the unit even if the common interest is not expressly mentioned or described in the conveyance or other instrument.

**§514B-38 Common elements.** Each unit owner may use the common elements in accordance with the purposes permitted under the declaration, subject to:

- (1) The rights of other unit owners to use the common elements;
- (2) Any owner's exclusive right to use of the limited common elements as provided in the declaration;
- (3) The right of the owners to amend the declaration to change the permitted uses of the common elements; provided that subject to subsection 514B-140(c):
  - (A) Changing common element open spaces or landscaped spaces to other uses shall not require an amendment to the declaration; and
  - (B) Minor additions to or alterations of the common elements for the benefit of individual units are permitted if the additions or alterations can be accomplished without substantial impact on the interests of other owners in the common elements, as reasonably determined by the board;
- (4) Any rights reserved in the declaration to amend the declaration to change the permitted uses of the common elements;
- (5) The right of the board, on behalf of the association, to lease or otherwise use for the benefit of the association those common elements that the board determines

are not actually used by any of the unit owners for a purpose permitted in the declaration. Unless the lease is approved by the owners of at least sixty-seven per cent of the common interest, the lease shall have a term of no more than five years and may be terminated by the board or the lessee on no more than sixty days prior written notice; provided that the requirements of this paragraph shall not apply to any leases, licenses, or other agreements entered into for the purposes authorized by section 514B-140(d); and

- (6) The right of the board, on behalf of the association, to lease or otherwise use for the benefit of the association those common elements that the board determines are actually used by one or more unit owners for a purpose permitted in the declaration. The lease or use shall be approved by the owners of at least sixty-seven per cent of the common interest, including all directly affected unit owners that the board reasonably determines actually use the common elements, and the owners' mortgagees; provided that the requirements of this paragraph shall not apply to any leases, licenses, or other agreements entered into for the purposes authorized by section 514B-140(d).

**[§514B-39] Limited common elements.** If the declaration designates any portion of the common elements as limited common elements, those limited common elements shall be subject to the exclusive use of the owner or owners of the unit or units to which they are appurtenant, subject to the provisions of the declaration and bylaws. No amendment of the declaration affecting any of the limited common elements shall be effective without the consent of the owner or owners of the unit or units to which the limited common elements are appurtenant.

**[§514B-40] Transfer of limited common elements.** Except as provided in the declaration, any unit owner may transfer or exchange a limited common element that is assigned to the owner's unit to another unit. Any transfer shall be executed and recorded as an amendment to the declaration. The amendment need only be executed by the owner of the unit whose limited common element is being transferred and the owner of the unit receiving the limited common element; provided that unit mortgages and leases may also require the consent of mortgagees or lessors, respectively, of the units involved. A copy of the amendment shall be promptly delivered to the association.

**[§514B-41] Common profits and expenses.** (a) The common profits of the property shall be distributed among, and the common expenses shall be charged to, the unit owners, including the developer, in proportion to the common interest appurtenant to their respective units, except as otherwise provided in the declaration or bylaws. In a mixed-use project containing units for both residential and nonresidential use, the charges and distributions may be apportioned in a fair and equitable manner as set forth in the declaration. Except as otherwise provided in subsection (c) or the declaration or bylaws, all limited common element costs and expenses, including but not limited to maintenance, repair, replacement, additions, and improvements, shall be charged to the owner or owners of the unit or units to which the limited common element is appurtenant in an equitable manner as set forth in the declaration.

(b) A unit owner, including the developer, shall become obligated for the payment of the share of the common expenses allocated to the owner's unit at the time the certificate of occupancy relating to the owner's unit is issued by the appropriate county agency; provided that a developer may assume all the actual common expenses in a project by stating in the developer's public report required by section 514B-54 that the unit owner shall not be obligated for the payment of the owner's share of the common expenses until such time as the developer sends the owners written notice that, after a specified date, the unit owners shall be obligated to pay for the portion of common expenses that is allocated to their respective units. The developer shall mail the written notice to the owners, the association, and the managing agent, if any, at least thirty days before the specified date.

(c) Unless otherwise provided in the declaration or bylaws, if the board reasonably determines 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, the board may adopt a resolution determining that certain limited common element expenses will be assessed in accordance with the undivided common interest appurtenant to each unit. In reaching its determination, the board shall consider:

- (1) The amount at issue;
- (2) The difficulty of segregating the costs;
- (3) The number of units to which similar limited common elements are appurtenant;
- (4) The apparent difference between separate assessment and assessment based on the undivided common interest; and
- (5) Any other relevant factors, as determined by the board.

The resolution shall be final and binding in the absence of a determination that the board abused its discretion.

(d) Unless made pursuant to rights reserved in the declaration and disclosed in the developer's public report, if an association amends its declaration or bylaws to change the use of the condominium property regime from residential to nonresidential, all direct and indirect costs attributable to the newly permitted nonresidential use shall be charged only to the unit owners using or directly benefiting from the new nonresidential use, in a fair and equitable manner as set forth in the amendment to the declaration or bylaws.

**[§514B-42] Metering of utilities.** (a) Units in a project that includes units designated for both residential and nonresidential use shall have separate meters, or calculations shall be made, or both, as may be practicable, to determine the use by the nonresidential units of utilities, including electricity, water, gas, fuel, oil, sewerage, air conditioning, chiller water, and drainage, and the cost of such utilities shall be paid by the owners of the nonresidential units; provided that the apportionment of the charges among owners of nonresidential units shall be done in a fair and equitable manner as set forth in the declaration or bylaws. The requirements of this subsection shall not apply to projects for which construction commenced before January 1, 1978.

(b) Subject to any approval requirements and spending limits contained in a project's declaration or bylaws, a board may authorize the installation of meters to determine the use by the individual units of utilities, including electricity, water, gas, fuel, oil, sewerage, air conditioning, chiller water, and drainage. The cost of metered utilities shall be paid by the owners of the units based on actual consumption and, to the extent not billed directly to the unit owner by the utility provider, may be collected in the same manner as common expense

assessments. Owners' maintenance fees shall be adjusted as necessary to avoid any duplication of charges to owners for the cost of metered utilities.

**[§514B-43] Liens against units.** (a) For purposes of this section:

- (1) "Visible commencement of operations" shall have the meaning it has in section 507-41; and
  - (2) "Lien" means a lien created pursuant to chapter 507, part II.
- (b) If visible commencement of operations occurs prior to the creation of the condominium, then, upon creation of the condominium, liens arising from this work shall attach to all units in the condominium described in the declaration and their respective undivided interests in the common elements, but not to the common elements as a whole. If visible commencement of operations occurs after creation of the condominium, then liens arising from this work shall attach only to the unit or units described in the declaration on which the work was performed in the same manner as other real property, and shall not attach to the common elements.
- (c) If the developer contracts for work on the common elements, either on its behalf or on behalf of the association prior to the first meeting of the association, then liens arising from this work may attach to all units owned by the developer described in the declaration at the time of visible commencement of operations.
- (d) If the association contracts for work on the common elements after the first meeting of the association, there shall be no lien on the common elements, but the persons contracting with the association to perform the work or supply the materials incorporated in the work shall be entitled to their contractual remedies, if any.

**[§514B-44] Contents of deeds or leases of units.** Deeds or leases of units adequately describe the property conveyed or leased if they contain the following information:

- (1) The title and date of the declaration and the declaration's bureau of conveyances or land court document number or liber and page numbers;
- (2) The unit number of the unit conveyed or leased;
- (3) The common interest appurtenant to the unit conveyed or leased; provided that the common interest shall be deemed to be conveyed or encumbered with the unit even if the common interest is not expressly mentioned in the conveyance or other instrument, as provided in section 514B-37;
- (4) For a unit, title to which is registered in the land court, the land court certificate of title number for the unit, if available; and
- (5) For a unit, title to which is not registered in the land court, the bureau of conveyances document number or liber and page numbers for the instrument by which the grantor acquired title.

Deeds or leases of units may contain additional information and details deemed desirable and consistent with the declaration and this chapter, including without limitation a statement of any encumbrances on title to the unit that are not listed in the declaration. The failure of a deed or lease to include all of the information specified in this section shall not render it invalid.

**[§514B-45] Blanket mortgages and other blanket liens affecting a unit at time of first conveyance or lease.** At the time of the first conveyance or lease of each unit, every mortgage and other lien, except any improvement district or utility assessment, affecting both the unit and any other unit shall be paid and satisfied of record, or the unit being conveyed or leased and its common interest shall be released therefrom by a duly recorded partial release.

**[§514B-46] Merger of projects or increments.** (a) Two or more projects, or increments of a project, whether or not adjacent to one another, but that are part of the same incremental plan of development and in the same vicinity, may be merged together so as to permit the joint use of the common elements of the projects by all the owners of the units in the merged projects. A merger may be implemented with the vote or consent that the declaration requires for a merger, pursuant to any reserved rights set forth in the declaration, or upon vote of sixty-seven per cent of the common interest.

- (b) A merger becomes effective at the earlier of:
  - (1) A date certain set forth in the certificate of merger; or
  - (2) The date that the certificate of merger is recorded.

The certificate of merger may provide for a single association and board for the merged projects and for a sharing of the common expenses of the projects among all the owners of the units in the merged projects. The certificate of merger may also provide for a merger of the common elements of the projects so that each unit owner in the merged projects has an undivided ownership interest in the common elements of the merged projects. In the event of a merger of common elements, the common interests of each unit in the merged projects shall be adjusted in accordance with the merger provisions in the projects' declarations so that the total common interests of all units in the resulting merged project totals one hundred per cent. If the certificate of merger does not provide for a merger of the common elements, the common elements and common interests of the merged projects shall remain separate, but shall be subject to the provisions set forth in the respective declarations with respect to merger.

(c) Upon the recording of a certificate of merger that indicates that the fee simple title to the lands of the merged projects are merged, the registrar shall cancel all existing certificates of title for the units in the projects being merged and shall issue new certificates of title for the units in the merged project, covering all of the land of the merged projects. The new certificates of title for the units in the merged project shall describe, among other things, each unit's new common interest. The certificate of merger shall at least set forth all of the units of the merged projects, their new common interests, and to the extent practicable, their current certificate of title numbers in the common elements of the merged projects.

(d) In the event of a conflict between declarations and bylaws upon the merger of projects or increments, unless otherwise provided in the certificate of merger, the provisions of the first declaration and bylaws recorded shall control.

**[§514B-47] Removal from provisions of this chapter.** (a) If:

- (1) Owners of units to which are appurtenant at least eighty per cent of the common interests execute and record an instrument to the effect that they desire to remove the property from this chapter, and the holders of all liens affecting any of such units consent thereto by duly recorded instruments; or

- (2) The common elements suffer substantial damage or destruction and the damage or destruction has not been rebuilt, repaired, or restored within a reasonable time after the occurrence thereof, or the unit owners have earlier determined as provided in the declaration that the damage or destruction shall not be rebuilt, repaired, or restored;

the property shall be subject to an action for partition by any unit owner or lienor as if owned in common, in which event the sale of the property shall be ordered by the court and the net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and, except as otherwise provided in the declaration, shall be divided among all the unit owners in proportion to their respective common interests; provided that no payment shall be made to a unit owner until there has first been paid in full out of the owner's share of the net proceeds all liens on the owner's unit. Upon this sale, the property ceases to be a condominium property regime or subject to this chapter.

(b) All of the unit owners may remove a property, or a part of a property, from this chapter by an instrument to that effect, duly recorded, if the holders of all liens affecting any of the units consent thereto, by duly recorded instruments. Upon this removal from this chapter, the property, or the part of the property designated in the instrument, shall cease to be the subject of a condominium property regime or subject to this chapter, and shall be deemed to be owned in common by the unit owners in proportion to their respective common interests.

(c) Notwithstanding subsections (a) and (b), if the unit leases for a leasehold condominium property regime (including condominium conveyance documents, ground leases, or similar instruments creating a leasehold interest in the land) provide that:

- (1) The estate and interest of the unit owner shall cease and determine upon the acquisition, by an authority with power of eminent domain of title and right to possession of any part of the condominium property regime;
- (2) The unit owner shall not by reason of the acquisition or right to possession be entitled to any claim against the lessor or others for compensation or indemnity for the unit owner's leasehold interest;
- (3) All compensation and damages for or on account of any land shall be payable to and become the sole property of the lessor;
- (4) All compensation and damages for or on account of any buildings or improvements on the demised land shall be payable to and become the sole property of the unit owners of the buildings and improvements in accordance with their interests; and
- (5) The unit lease rents are reduced in proportion to the land so acquired or possessed;

the lessor and the developer, if the developer retains any interests or reserved rights in the project, shall file and record an amendment to the declaration to reflect any acquisition or right to possession. The consent or joinder of the unit owners or their respective mortgagees shall not be required, if the land acquired or possessed constitutes no more than five per cent of the total land of the condominium property regime. Upon the recordation of the amendment, the land acquired or possessed shall cease to be the subject of a condominium property regime or subject to this chapter. The lessor shall notify each unit owner in writing of the filing of the amendment and the rent abatement, if any, to which the unit owner is entitled. The lessor shall provide the association, through its board, with a copy of the recorded amendment.

- (d) For purposes of subsection (c), the acquisition or right to possession may be effected:
  - (1) By a taking or condemnation of property by the State or a county pursuant to chapter 101;
  - (2) By the conveyance of property to the State or county under threat of condemnation; or
  - (3) By the dedication of property to the State or county if the dedication is required by state law or county ordinance.
- (e) The removal provided for in this section shall in no way bar the subsequent resubmission of the property to the requirements of this chapter.

#### **PART IV. REGISTRATION AND ADMINISTRATION OF CONDOMINIUMS**

**[§514B-51] Registration required; exceptions.** (a) A developer may not offer for sale any units in a project unless the project is registered with the commission and an effective date for the developer's public report is issued by the commission.

- (b) The registration requirement of this section shall not apply to:
  - (1) The disposition of units exempted from the developer's public report requirements pursuant to section 514B-81(b);
  - (2) Projects in which all units are restricted to nonresidential uses and all units are to be sold for \$1,000,000 or more; or
  - (3) The sale of units in bulk, such as where a developer undertakes to develop and then sells all or a portion of the developer's entire inventory of units to a purchaser who is a developer. The registration requirements of this section and the developer's amended developer's public report requirements of section 514B-56 shall apply to any sale of units to the public following a sale of units in bulk.

**[§514B-52] Application for registration.** (a) An application for registration of a project shall:

- (1) Be accompanied by nonrefundable fees as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91; and
  - (2) Contain the documents and information concerning the project and the condominium property regime as required by sections 514B-54, 514B-83, and 514B-84, as applicable, and as otherwise may be specified by the commission.
- (b) The commission need not process any incomplete application and may return an incomplete application to the developer and require that the developer submit a new application, including nonrefundable fees. If an incomplete application is not completed within six months of the date of the original submission, it shall be deemed abandoned and registration of the project shall require the submission of a new application, including nonrefundable fees.
- (c) A developer shall promptly file amendments to report either any actual or expected pertinent or material change, or both, in any document or information contained in the application.

**[§514B-53] Inspection by commission.** (a) After appropriate notification has been made or additional information has been received pursuant to this part, an inspection of the project may be made by the commission.

(b) When an inspection is to be made of a project, the developer shall be required to pay an amount estimated by the commission to be necessary to cover the actual expenses of the inspection, not to exceed \$500 a day for each day consumed in the examination of the project, plus reasonable transportation expenses.

**[§514B-54] Developer's public report; requirements for issuance of effective date.** (a) Prior to the issuance of an effective date for a developer's public report, the commission shall have received the following:

- (1) Nonrefundable fees as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91;
- (2) The developer's public report prepared by the developer disclosing the information specified in section 514B-83 and, if applicable, section 514B-84;
- (3) A copy of the deed, master lease, agreement of sale, or sales contract evidencing either that the developer holds the fee or leasehold interest in the property or has a right to acquire the same;
- (4) Copies of the executed declaration, bylaws, and condominium map that meet the requirements of sections 514B-32, 514B-33, and 514B-108;
- (5) A specimen copy of the proposed contract of sale for units;
- (6) An executed copy of an escrow agreement with a third party depository for retention and disposition of purchasers' funds that meets the requirements of section 514B-91;
- (7) As applicable, the documents and information required in section 514B-92 or 514B-93;
- (8) A declaration, subject to the penalties set forth in section 514B-69(b), that the project is in compliance with all county zoning and building ordinances and codes, and all other county permitting requirements applicable to the project, pursuant to sections 514B-5 and 514B-32(a)(13); and
- (9) Other documents and information that the commission may require.

(b) The developer's public report shall not be used for the purpose of selling any units in the project until the commission issues an effective date for the developer's public report. The commission's issuance of an effective date for a developer's public report shall not be construed to constitute the commission's approval or disapproval of the project; the commission's representation that either all material facts or all pertinent changes, or both, concerning the project have been fully or adequately disclosed; or the commission's judgment of the value or merits of the project.

**[§514B-55] Developer's public report; request for hearing by developer.** If an effective date for a developer's public report is not issued within a reasonable time after compliance with registration requirements, or if the developer is materially grieved by the form or content of the developer's public report, the developer, in writing, may request and shall be given a hearing by the commission within a reasonable time after receipt of the request.

**[§514B-56] Developer's public report; amendments.** (a) After the effective date for a developer's public report has been issued by the commission, if there are any changes, either material or pertinent changes, or both, regarding the information contained in or omitted from the developer's public report, or if the developer desires to update or change the information set forth in the developer's public report, the developer shall immediately submit to the commission an amendment to the developer's public report or an amended developer's public report clearly reflecting the change, together with such supporting information as may be required by the commission, to update the information contained in the developer's public report, accompanied by nonrefundable fees as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. Within a reasonable period of time, the commission shall issue an effective date for the amended developer's public report or take other appropriate action under this part.

(b) The submission of an amendment to the developer's public report or an amended developer's public report shall not require the developer to suspend sales, subject to the power of the commission to order sales to cease as set forth in section 514B-66; provided that the developer shall advise the appropriate real estate broker or brokers, if any, of the change and disclose to purchasers any change in the information contained in the developer's public report pending the issuance of an effective date for any amendment to the developer's public report or amended developer's public report; and provided further that if the amended developer's public report is not issued within thirty days after its submission to the commission, the commission may order a suspension of sales pending the issuance of an effective date for the amended developer's public report. Nothing in this section shall diminish the rights of purchasers under section 514B-94.

(c) The developer shall provide all purchasers with a true copy of:

(1) The amendment to the developer's public report, if the purchaser has received copies of the developer's public report and all prior amendments, if any; or

(2) A restated developer's public report, including all amendments.

(d) The filing of an amendment to the developer's public report or an amended developer's public report, in and of itself, shall not be grounds for a purchaser to cancel or rescind a sales contract. A purchaser's right to cancel or rescind a sales contract shall be governed by sections 514B-86 and 514B-87, the terms and conditions of the purchaser's contract for sale, and applicable common law.

**[§514B-57] Commission oversight of developer's public report.** (a) The commission at any time may require a developer to amend or supplement the form or substance of a developer's public report to assure adequate and accurate disclosure to prospective purchasers.

(b) The developer's public report shall not be used for any promotional purpose before registration, and may be used after registration only if it is used in its entirety. No person shall advertise or represent that the commission has approved or recommended the condominium project, the developer's public report, or any of the documents contained in the application for registration.

**[§514B-58] Annual report.** (a) A developer, its successor, or assign shall file annually a report to update the material contained in the developer's public report, together with the

payment of nonrefundable fees, at least thirty days prior to the anniversary date of the effective date for a developer's public report. If there is no change to the developer's public report, the developer shall so state. This subsection shall not relieve the developer, its successor, or assign of the obligation to file amendments to the developer's public report pursuant to section 514B-56. Failure to file the annual report required by this section may subject the developer to the penalties set forth in section 514B-69(b).

(b) The developer, its successor, or assign shall be relieved from filing annual reports pursuant to this section when the initial sales of all units have been completed.

**[§514B-59] Expiration of developer's public reports.** Except as otherwise provided in this chapter, upon issuance of an effective date for a developer's public report or any amendment, the developer's public report and amendment or amendments shall not expire until such time as the developer has sold all units in the project.

**[§514B-60] No false or misleading information.** It shall be unlawful for any person or person's agent to testify falsely or make a material misstatement of fact before the commission or to file with the commission any document required by this chapter that is false, contains a material misstatement of fact, or that contains forgery. All documents shall be true, complete, and accurate in all respects, including the developer's public report, prepared by or for the developer and submitted to the commission in connection with the developer's registration of the project, and all information contained in the documents, and shall not contain any misleading information, or omit any pertinent change in the information or documents submitted to the commission.

**[§514B-61] General powers and duties of commission.** (a) The commission may:

- (1) Adopt, amend, and repeal rules pursuant to chapter 91;
- (2) Assess fees;
- (3) Conduct investigations, issue cease and desist orders, and bring an action in any court of competent jurisdiction to enjoin persons, consistent with and in furtherance of the objectives of this chapter;
- (4) Prescribe forms and procedures for submitting information to the commission; and
- (5) Prescribe the form and content of any documents required to be submitted to the commission by this chapter.

(b) If it appears that any person has engaged, is engaging, or is about to engage in any act or practice in violation of this part, part V, section 514B-103, 514B-132, 514B-134, 514B-149, sections 514B-152 to 514B-154, or any of the commission's related rules or orders, the commission, without prior administrative proceedings, may maintain an action in the appropriate court to enjoin that act or practice or for other appropriate relief. The commission shall not be required to post a bond or to prove that no adequate remedy at law exists in order to maintain the action.

(c) The commission may exercise its powers in any action involving the powers or responsibilities of a developer under this part, part V, section 514B-103, 514B-132, 514B-134, 514B-149, or sections 514B-152 to 514B-154.

(d) The commission may accept grants-in-aid from any governmental source and may contract with agencies charged with similar functions in this or other jurisdictions, in furtherance of the objectives of this chapter.

(e) The commission may cooperate with agencies performing similar functions in this and other jurisdictions to develop uniform filing procedures and forms, uniform disclosure standards, and uniform administrative practices, and may develop information that may be useful in the discharge of the commission's duties.

(f) In issuing any cease and desist order or order rejecting or revoking the registration of a condominium project, the commission shall state the basis for the adverse determination and the underlying facts.

(g) The commission, by rule, may require bonding at appropriate levels over time, escrow of portions of sales proceeds, or other safeguards to assure completion of all improvements that a developer is obligated to complete, or has represented that it will complete.

**[§514B-62] Deposit of fees.** Unless otherwise provided in this chapter, all fees collected under this chapter shall be deposited by the director of commerce and consumer affairs to the credit of the compliance resolution fund established pursuant to section 26-9(o).

**[§514B-63] Condominium specialists; appointment; duties.** The director of commerce and consumer affairs may appoint condominium specialists, not subject to chapter 76, to assist consumers with information, advice, and referral on any matter relating to this chapter or otherwise concerning condominiums. The director may also appoint secretaries, not subject to chapter 76, to provide assistance in carrying out these duties. The condominium specialists and secretaries shall be members of the employees' retirement system of the State and shall be eligible to receive the benefits of any state or federal employee benefit program generally applicable to officers and employees of the State.

**[§514B-64] Private consultants.** The director of commerce and consumer affairs may contract with private consultants for the review of documents and information submitted to the commission pursuant to this chapter. The cost of the review by private consultants shall be borne by the developer.

**[§514B-65] Investigative powers.** If the commission has reason to believe that any person is violating or has violated this part, part V, section 514B-103, 514B-132, 514B-134, 514B-149, sections 514B-152 to 514B-154, or the rules of the commission adopted pursuant thereto, the commission may conduct an investigation of the matter and examine the books, accounts, contracts, records, and files of all relevant parties. For purposes of this examination, the developer and the real estate broker shall keep and maintain records of all sales transactions and of the funds received by the developer and the real estate broker in accordance with chapter

467 and the rules of the commission, and shall make the records accessible to the commission upon reasonable notice and demand.

**[§514B-66] Cease and desist orders.** In addition to its authority under sections 514B-67 and 514B-68, whenever the commission has reason to believe that any person is violating or has violated this part, part V, section 514B-103, 514B-132, 514B-134, 514B-149, sections 514B-152 to 514B-154, or the rules of the commission adopted pursuant thereto, it may issue and serve upon the person a complaint stating its charges in that respect and containing a notice of a hearing at a stated place and upon a day at least thirty days after the service of the complaint. The person served has the right to appear at the place and time specified and show cause why an order should not be entered by the commission requiring the person to cease and desist from the violation of the law or rules charged in the complaint. If the commission finds that this chapter or the rules of the commission have been or are being violated, it shall make a report in writing stating its findings as to the facts and shall issue and cause to be served on the person an order requiring the person to cease and desist from the violations. The person, within thirty days after service upon the person of the report or order, may obtain a review thereof in the appropriate circuit court.

**[§514B-67] Termination of registration.** (a) The commission, after notice and hearing, may issue an order terminating the registration of a condominium project upon determination that a developer, or any officer, principal, or affiliate of a developer has:

- (1) Failed to comply with a cease and desist order issued by the commission affecting that condominium project;
- (2) Concealed, diverted, or disposed of any funds or assets of any person in a manner impairing rights of purchasers of units in that condominium project;
- (3) Failed to perform any stipulation or agreement made to induce the commission to issue an order relating to that condominium project;
- (4) Misrepresented or failed to disclose a material fact in the application for registration; or
- (5) Failed to meet any of the conditions described in this part necessary to qualify for registration.

(b) A developer may not convey, cause to be conveyed, or contract for the conveyance of any interest in a unit while an order revoking the registration of the condominium project is in effect, without the consent of the commission.

(c) The commission may issue a cease and desist order in lieu of an order of revocation where appropriate.

**[§514B-68] Power to enjoin.** Whenever the commission believes from satisfactory evidence that any person has violated this part, part V, section 514B-103, 514B-132, 514B-134, 514B-149, sections 514B-152 to 514B-154, or the rules of the commission adopted pursuant thereto, it may conduct an investigation of the matter and bring an action against the person in any court of competent jurisdiction on behalf of the State to enjoin the person from continuing the violation or doing any acts in furtherance thereof.

**[§514B-69] Penalties.** (a) Any person who violates or fails to comply with this part, part V, section 514B-103, 514B-132, 514B-134, 514B-149, or sections 514B-152 to 514B-154, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding \$10,000, or by imprisonment for a term not exceeding one year, or both. Any person who violates or fails to comply with any rule, order, decision, demand, or requirement of the commission under this part, part V, section 514B-103, 514B-132, 514B-134, 514B-149, or sections 514B-152 to 514B-154, shall be punished by a fine not exceeding \$10,000.

(b) In addition to any other actions authorized by law, any person who violates or fails to comply with this part, part V, section 514B-103, 514B-132, 514B-134, 514B-149, sections 514B-152 to 514B-154, or the rules of the commission adopted pursuant thereto, shall also be subject to a civil penalty not exceeding \$10,000 for any violation. Each violation shall constitute a separate offense.

**[§514B-70] Limitation of actions.** No civil or criminal actions shall be brought by the State pursuant to this chapter more than two years after the discovery of the facts upon which the actions are based or ten years after completion of the sales transaction involved, whichever has first occurred.

**[§514B-71] Condominium education trust fund.** (a) The commission shall establish a condominium education trust fund that the commission may use for educational purposes. Educational purposes shall include financing or promoting:

- (1) Education and research in the field of condominium management, condominium project registration, and real estate, for the benefit of the public and those required to be registered under this chapter;
- (2) The improvement and more efficient administration of associations; and
- (3) Expedient and inexpensive procedures for resolving association disputes.

(b) The commission may use any and all moneys in the condominium education trust fund for purposes consistent with subsection (a).

**[§514B-72] Condominium education trust fund; payments by associations and developers.** (a) Each project or association with more than five units shall pay to the department of commerce and consumer affairs a condominium education trust fund fee within one year after the recordation of the purchase of the first unit or within thirty days of the association's first meeting, and thereafter, on or before June 30 of every odd-numbered year, as prescribed by rules adopted pursuant to chapter 91.

(b) Each developer shall pay to the department of commerce and consumer affairs the condominium education trust fund fee for each unit in the project, as prescribed by rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. The project shall not be registered and no effective date for a developer's public report shall be issued until the payment has been made.

(c) Payments of any fees required under this section shall be due on or before the registration due date and shall be nonrefundable. Failure to pay the required fee by the due date shall result in a penalty assessment of ten per cent of the amount due and the association shall not

have standing to bring any action to collect or to foreclose any lien for common expenses or other assessments in any court of this State until the amount due, including any penalty, is paid. Failure of an association to pay a fee required under this section shall not impair the validity of any claim of the association for common expenses or other assessments, or prevent the association from defending any action in any court of this State.

(d) The department of commerce and consumer affairs shall allocate the fees collected under this section to the condominium education trust fund established pursuant to section 514B-71.

**[§514B-73] Condominium education trust fund; management.** (a) The sums received by the commission for deposit in the condominium education trust fund shall be held by the commission in trust for carrying out the purpose of the fund.

(b) The commission and the director of commerce and consumer affairs may use moneys in the condominium education trust fund to employ necessary personnel not subject to chapter 76 for additional staff support, to provide office space, and to purchase equipment, furniture, and supplies required by the commission to carry out its responsibilities under this part.

(c) The moneys in the condominium education trust fund may be invested and reinvested together with the real estate education fund established under section 467-19 in the same manner as are the funds of the employees' retirement system of the State. The interest and earnings from these investments shall be deposited to the credit of the condominium education trust fund.

(d) The commission shall annually submit to the legislature, no later than twenty days prior to the convening of each regular session:

- (1) A summary of the programs funded during the prior fiscal year and the amount of money in the fund; and
- (2) A copy of the budget for the current fiscal year, including summary information on programs that were funded or are to be funded.

## **PART V. PROTECTION OF CONDOMINIUM PURCHASERS**

### **A. GENERAL PROVISIONS**

**[§514B-81] Applicability; exceptions.** (a) This part applies to all units subject to this chapter, except as provided in subsection (b).

(b) No developer's public report shall be required in the case of:

- (1) A gratuitous disposition of a unit;
- (2) A disposition pursuant to court order;
- (3) A disposition by a government or governmental agency;
- (4) A disposition by foreclosure or deed in lieu of foreclosure; or
- (5) The sale of units in bulk, as defined in section 514B-51(b); provided that the requirements of this part shall apply to any sale of units to the public following the sale of units in bulk.

**[§514B-82] Sale of units.** Except as provided in section 514B-85, no sale or offer of sale of units in a project by a developer shall be made prior to the registration of the project by the developer with the commission, the issuance of an effective date for the developer's public report by the commission, and except as provided by law with respect to time share units, the delivery of the developer's public report to prospective purchasers. Notwithstanding any other provision to the contrary, where a time share project is duly registered under chapter 514E and a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser, the developer's public report need not be delivered to the purchaser or prospective purchaser.

**[§514B-83] Developer's public report.** (a) A developer's public report shall contain:

- (1) The name and address of the project, and the name, address, telephone number, and electronic mail address, if any, of the developer or the developer's agent;
  - (2) A statement of the deadline, pursuant to section 514B-89, for completion of construction or, in the case of a conversion, for the completion of any repairs required to comply with section 514B-5, and the remedies available to the purchaser, including but not limited to cancellation of the sales contract, if the completion of construction or repairs does not occur on or before the completion deadline;
  - (3) A breakdown of the annual maintenance fees and the monthly estimated cost for each unit, certified to have been based on generally accepted accounting principles, and a statement regarding when a purchaser shall become obligated to start paying the fees pursuant to section 514B-41(b);
  - (4) A description of all warranties for the individual units and the common elements, including the date of initiation and expiration of any such warranties, or a statement that no warranties exist;
  - (5) A summary of the permitted uses of the units and, if applicable, the number of units planned to be devoted to a particular use;
  - (6) A description of any development rights reserved to the developer or others;
  - (7) A declaration, subject to the penalties set forth in section 514B-69(b), that the project is in compliance with all county zoning and building ordinances and codes, and all other county permitting requirements applicable to the project, pursuant to sections 514B-5 and 514B-32(a)(13); and
  - (8) Any other facts, documents, or information that would have a material impact on the use or value of a unit or any appurtenant limited common elements or amenities of the project available for an owner's use, or that may be required by the commission.
- (b) A developer shall promptly amend the developer's public report to report any pertinent or material change or both in the information required by this section.

**[§514B-84] Developer's public report; special types of condominiums.** (a) In addition to the information required by section 514B-83, the developer's public report for a project containing any existing structures being converted to condominium status shall contain:

- (1) Regarding units that may be occupied for residential use and that have been in existence for five years or more:
    - (A) A statement by the developer, based upon a report prepared by a Hawaii-licensed architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the units;
    - (B) A statement by the developer of the expected useful life of each item reported on in subparagraph (A) or a statement that no representations are made in that regard; and
    - (C) A list of any outstanding notices of uncured violations of building code or other county regulations, together with the estimated cost of curing these violations;
  - (2) Regarding all projects containing converted structures, a verified statement signed by an appropriate county official that:
    - (A) The structures are in compliance with all zoning and building ordinances and codes applicable to the project at the time it was built, and specifying, if applicable:
      - (i) Any variances or other permits that have been granted to achieve compliance;
      - (ii) Whether the project contains any legal nonconforming uses or structures as a result of the adoption or amendment of any ordinances or codes; and
      - (iii) Any violations of current zoning or building ordinances or codes and the conditions required to bring the structure into compliance; or
    - (B) Based on the available information, the county official cannot make a determination with respect to the matters described in subparagraph (A); and
  - (3) Other disclosures and information that the commission may require.
- (b) In addition to the information required by section 514B-83, the developer's public report for a project in the agricultural district pursuant to chapter 205 shall disclose:
- (1) Whether the structures and uses anticipated by the developer's promotional plan for the project are in compliance with all applicable state and county land use laws;
  - (2) Whether the structures and uses anticipated by the developer's promotional plan for the project are in compliance with all applicable county real property tax laws, and the penalties for noncompliance; and
  - (3) Other disclosures and information that the commission may require.
- (c) In addition to the information required by section 514B-83, the developer's public report for a project containing any assisted living facility units regulated or to be regulated pursuant to rules adopted under section 321-11(10) shall disclose:
- (1) Any licensing requirements and the impact of the requirements on the costs, operations, management, and governance of the project;
  - (2) The nature and scope of services to be provided;
  - (3) Additional costs, directly attributable to the services, to be included in the association's common expenses;

- (4) The duration of the provision of the services;
- (5) Any other information the developer deems appropriate to describe the possible impacts on the project resulting from the provision of the services; and
- (6) Other disclosures and information that the commission may require.

**§514B-85 Preregistration solicitation.** (a) Prior to the registration of the project by the developer with the commission, the issuance of an effective date for the developer's public report by the commission, and the delivery of the developer's public report to prospective purchasers, and subject to the limitations set forth in subsection (b), the developer may solicit prospective purchasers and enter into nonbinding preregistration agreements with the prospective purchasers with respect to units in the project. As used in this section, "solicit" means to advertise, to induce, or to attempt in whatever manner to encourage a person to acquire a unit.

(b) The solicitation activities authorized under subsection (a) shall be subject to the following limitations:

- (1) Prior to registration of the project with the commission and the issuance of an effective date for the developer's public report, the developer shall not collect any moneys from prospective purchasers or anyone on behalf of prospective purchasers, whether or not the moneys are to be placed in an escrow account, or whether or not the moneys would be refundable at the request of the prospective purchaser; and
- (2) The developer shall not require or request that a prospective purchaser execute any document other than a nonbinding preregistration agreement. The preregistration agreement may, but need not, specify the unit number of a unit in the project to be reserved and may, but need not, include a price for the unit. The preregistration agreement shall not incorporate the terms and provisions of the sales contract for the unit and, by its terms, shall not become a sales contract. Notwithstanding anything contained in the preregistration agreement to the contrary, the preregistration agreement may be canceled at any time by either the developer or the prospective purchaser by written notice to the other. The commission may prepare a form of preregistration agreement for use pursuant to this section, and use of the commission-prepared form shall be deemed to satisfy the requirements of the preregistration agreement as provided in this section.

**§514B-86 Requirements for binding sales contracts; purchaser's right to cancel.** (a) No sales contract for the purchase of a unit from a developer shall be binding on the developer, prospective purchaser, or purchaser until:

- (1) The developer has delivered to the prospective purchaser:
  - (A) A true copy of the developer's public report including all amendments with an effective date issued by the commission. The developer's public report shall include the report itself, the condominium project's recorded declaration and bylaws, house rules if any, a letter-sized condominium project map, and all amendments. Where it is impractical to include a letter-sized condominium project map, the prospective purchaser or purchaser shall be provided a written notice of an opportunity to examine

the map. The copy of the recorded declaration and bylaws creating the project shall indicate the document number or land court document number, or both, as applicable; and

(B) A notice of the prospective purchaser's thirty-day cancellation right on a form prescribed by the commission, upon which the prospective purchaser may indicate that the prospective purchaser has had an opportunity to read the developer's public report, understands the developer's public report, and exercises the right to cancel or waives the right to cancel; and

(2) The prospective purchaser has waived the right to cancel or is deemed to have waived the right to cancel.

(b) Purchasers may cancel a sales contract at any time up to midnight of the thirtieth day after:

(1) The date that the purchaser signs the contract; and

(2) All of the items specified in subsection (a)(1) have been delivered to the purchaser.

(c) The prospective purchaser may waive the right to cancel, or shall be deemed to have waived the right to cancel, by:

(1) Checking the waiver box on the cancellation notice and delivering it to the developer;

(2) Letting the thirty-day cancellation period expire without taking any action to cancel; or

(3) Closing the purchase of the unit before the cancellation period expires.

(d) The receipts, return receipts, or cancellation notices obtained under this section shall be kept on file in possession of the developer and shall be subject to inspection at any reasonable time by the commission or its staff or agents for a period of three years from the date the receipt or return receipt was obtained.

**[§514B-87] Rescission after sales contract becomes binding.** (a) Purchasers shall have a thirty-day right to rescind a binding sales contract for the purchase of a unit from a developer if there is a material change in the project. This rescission right shall not apply, however, in the event of any additions, deletions, modifications and reservations including, without limitation, the merger or addition or phasing of a project, made pursuant to the terms of the declaration.

(b) Upon delivery to a purchaser of a description of the material change on a form prescribed by the commission, the purchaser may waive the purchaser's rescission right provided in subsection (a) by:

(1) Checking the waiver box on the option to rescind sales contract instrument, signing it, and delivering it to the seller;

(2) Letting the thirty-day rescission period expire without taking any action to rescind; or

(3) Closing the purchase of the unit before the thirty-day rescission period expires.

(c) In order to be valid, a rescission form must be signed by all purchasers of the affected unit, and postmarked no later than midnight of the thirtieth calendar day after the date that the purchasers received the rescission form from the seller. In the event of a valid exercise

of a purchaser's right of rescission pursuant to this section, the purchasers shall be entitled to a prompt and full refund of any moneys paid.

(d) The rescission form obtained by the seller under this section shall be kept on file in possession of the seller and shall be subject to inspection at a reasonable time by the commission or its staff or agents, for a period of three years from the date the receipt or return receipt was obtained.

(e) This section shall not preclude a purchaser from exercising any rescission rights pursuant to a contract for the sale of a unit or any applicable common law remedies.

**§514B-88 Delivery.** In this part, delivery shall be made by:

- (1) Personal delivery;
- (2) Registered or certified mail with adequate postage, to the recipient's address; provided that delivery shall be considered made three days after deposit in the mail or on any earlier date upon which the return receipt is signed;
- (3) Facsimile transmission, if the recipient has provided a fax number to the sender; provided that delivery shall be considered made upon the sender's receipt of automatic confirmation of transmission; or
- (4) Any other way prescribed by the commission.

**§514B-89 Sales contracts before completion of construction.** If a sales contract for a unit is signed before the completion of construction or, in the case of a conversion, the completion of any repairs required to comply with section 514B-5, the sales contract shall contain an agreement of the developer that the completion of construction shall occur on or before the completion deadline, and the completion deadline shall be referenced in the developer's public report. The completion deadline may be a specific date, or the expiration of a period of time after the sales contract becomes binding, and may include a right of the developer to extend the completion deadline for force majeure as defined in the sales contract. The sales contract shall provide that the purchaser may cancel the sales contract at any time after the specified completion deadline, if completion of construction does not occur on or before the completion deadline, as the same may have been extended. The sales contract may provide additional remedies to the purchaser if the actual completion of construction does not occur on or before the completion deadline as set forth in the contract.

**§514B-90 Refunds upon cancellation or termination.** Upon any cancellation under section 514B-86 or 514B-89, the purchaser shall be entitled to a prompt and full refund of all moneys paid, less any escrow cancellation fee and other costs associated with the purchase, up to a maximum of \$250.

**§514B-91 Escrow of deposits.** All moneys paid by purchasers shall be deposited in trust under a written escrow agreement with an escrow depository licensed pursuant to chapter 449. An escrow depository shall not disburse purchaser deposits to or on behalf of the developer prior to closing except:

- (1) As provided in sections 514B-92 and 514B-93; or
- (2) As provided in the purchaser's sales contract in the event the sales contract is canceled.

An escrow depository shall not disburse a purchaser's deposits at closing unless the escrow depository has received satisfactory assurances that all blanket mortgages and liens have been released from the purchaser's unit in accordance with section 514B-45. Satisfactory assurances shall include a commitment by a title insurer licensed under chapter 431 to issue the purchaser a title insurance policy ensuring the purchaser that the unit has been conveyed free and clear of the liens.

**[§514B-92] Use of purchaser deposits to pay project costs.** (a) Subject to the conditions set forth in subsection (b), purchaser deposits that are held in escrow pursuant to a binding sales contract may be disbursed before closing to pay for project construction costs, including, in the case of a conversion, for repairs necessary to cure violations of county zoning and building ordinances and codes, for architectural, engineering, finance, and legal fees, and for other incidental expenses of the project.

- (b) Disbursement of purchaser deposits prior to closing shall be permitted only if:
  - (1) The commission has issued an effective date for the developer's public report for the project;
  - (2) The developer has recorded the project's declaration and bylaws; and
  - (3) The developer has submitted to the commission:
    - (A) A project budget showing all costs that are required to be paid in order to complete the project, including lease payments, real property taxes, construction costs, architectural, engineering and legal fees, and financing costs;
    - (B) Evidence satisfactory to the commission of the availability of sufficient funds to pay all costs required to be paid in order to complete the project, that may include purchaser funds, equity funds, interim or permanent loan commitments, and other sources of funds; and
    - (C) If purchaser funds are to be disbursed prior to completion of construction of the project:
      - (i) A copy of the executed construction contract;
      - (ii) A copy of the building permit for the project; and
      - (iii) Satisfactory evidence of security for the completion of construction, which evidence may include the following, in forms and content approved by the commission: a completion or performance bond issued by a surety licensed in the State in an amount equal to one hundred per cent of the cost of construction; a completion or performance bond issued by a material house in an amount equal to one hundred per cent of the cost of construction; an irrevocable letter of credit issued by a federally-insured financial institution in an amount equal to one hundred per cent of the cost of construction; or other substantially similar instrument or security approved by the commission. A completion or performance bond issued by a surety or by a material house, an

irrevocable letter of credit, and any alternatives shall contain a provision that the commission shall be notified in writing before any payment is made to beneficiaries of the bond. Adequate disclosures shall be made in the developer's public report concerning the developer's use of a completion or performance bond issued by a material house instead of a surety, and the impact of any restrictions on the developer's use of purchaser's funds.

(c) A purchaser's deposits may be disbursed prior to closing only to pay costs set forth in the project budget submitted pursuant to subsection (b)(3)(A) that are approved for payment by the project lender or an otherwise qualified, financially disinterested person. In addition, purchaser deposits may be disbursed prior to closing to pay construction costs only in proportion to the valuation of the work completed by the contractor, as certified by a licensed architect or engineer.

(d) If purchaser deposits are to be disbursed prior to closing, the following notice shall be prominently displayed in the developer's public report for the project:

**"Important Notice Regarding Your Deposits:** Deposits that you make under your sales contract for the purchase of the unit may be disbursed before closing of your purchase to pay for project costs, construction costs, project architectural, engineering, finance, and legal fees, and other incidental expenses of the project. While the developer has submitted satisfactory evidence that the project should be completed, it is possible that the project may not be completed. If your deposits are disbursed to pay project costs and the project is not completed, there is a risk that your deposits will not be refunded to you. You should carefully consider this risk in deciding whether to proceed with your purchase."

**[§514B-93] Early conveyance to pay project costs.** (a) Subject to the conditions set forth in subsection (b), if units are conveyed or leased before the completion of construction of the building or buildings for the purpose of financing the construction, all moneys from the sale of the units, including any payments made on loan commitments from lending institutions, shall be deposited by the developer under an escrow arrangement into a federally-insured, interest-bearing account designated solely for that purpose, at a financial institution authorized to do business in the State. Disbursements from the escrow account may be made to pay for project construction costs, including, in the case of a conversion, for repairs necessary to cure violations of county zoning and building ordinances and codes, for architectural, engineering, finance, and legal fees, and for other incidental expenses of the project.

(b) Conveyance or leasing of units before completion of construction shall be permitted only if:

- (1) The commission has issued an effective date for the developer's public report for the project;
- (2) The developer has recorded the project's declaration and bylaws; and
- (3) The developer has submitted to the commission:
  - (A) A project budget showing all costs required to be paid in order to complete the project, including real property taxes, construction costs, architectural, engineering and legal fees, and financing costs;

- (B) Evidence satisfactory to the commission of the availability of sufficient funds to pay all costs required to be paid in order to complete the project, that may include purchaser funds, equity funds, interim or permanent loan commitments, and other sources of funds;
- (C) A copy of the executed construction contract;
- (D) A copy of the building permit for the project; and
- (E) Satisfactory evidence of security for the completion of construction, that may include the following, in forms and content approved by the commission: a completion or performance bond issued by a surety licensed in the State in an amount equal to one hundred per cent of the cost of construction; a completion or performance bond issued by a material house in an amount equal to one hundred per cent of the cost of construction; an irrevocable letter of credit issued by a federally-insured financial institution in an amount equal to one hundred per cent of the cost of construction; or other substantially similar instrument or security approved by the commission. A completion or performance bond issued by a surety or by a material house, an irrevocable letter of credit, and any alternatives shall contain a provision that the commission shall be notified in writing before any payment is made to beneficiaries of the bond. Adequate disclosures shall be made in the developer's public report concerning the developer's use of a completion or performance bond issued by a material house instead of a surety, and the impact of any restrictions on the developer's use of purchaser's funds.

(c) Moneys from the conveyance or leasing of units before completion of construction may be disbursed only to pay costs set forth in the project budget submitted pursuant to subsection (b)(3)(A) that are approved for payment by the project lender or an otherwise qualified, financially disinterested person. In addition, such moneys may be disbursed to pay construction costs only in proportion to the valuation of the work completed by the contractor, as certified by a licensed architect or engineer. The balance of any purchase price may be disbursed to the developer only upon completion of construction of the project and the satisfaction of any mechanic's and materialman's liens.

(d) If moneys from the conveyance or leasing of units before completion of construction are to be disbursed to pay for project costs, the following notice shall be prominently displayed in the developer's public report for the project:

**"Important Notice Regarding Your Funds:** Payments that you make under your sales contract for the purchase of the unit may be disbursed upon closing of your purchase to pay for project costs, including construction costs, project architectural, engineering, finance, and legal fees, and other incidental expenses of the project. While the developer has submitted satisfactory evidence that the project should be completed, it is possible that the project may not be completed. If your payments are disbursed to pay project costs and the project is not completed, there is a risk that your payments will not be refunded to you. You should carefully consider this risk in deciding whether to proceed with your purchase."

**[§514B-94] Misleading statements and omissions; remedies.** (a) No person may:

- (1) Knowingly authorize, direct, or aid in the publication, advertisement, distribution, or circulation of any false statement or representation concerning any project offered for sale or lease; or
- (2) Issue, circulate, publish, or distribute any advertisement, pamphlet, prospectus, or letter concerning a project that contains any false written statement or is misleading due to the omission of a material fact.

(b) Every sale made in violation of this section shall be voidable at the election of the purchaser; and the person making the sale and every director, officer, or agent of or for the seller, if the director, officer, or agent has personally participated or aided in any way in making the sale, shall be jointly and severally liable to the purchaser in an action in any court of competent jurisdiction upon tender of the units sold or of the contract made, for the full amount paid by the purchaser, with interest, together with all taxable court costs and reasonable attorneys' fees; provided that no action shall be brought for the recovery of the purchase price after two years from the date of the sale; and provided further that no purchaser otherwise entitled shall claim or have the benefit of this section who has refused or failed to accept within thirty days an offer in writing of the seller to take back the unit in question and to refund the full amount paid by the purchaser, together with interest at six per cent on the amount for the period from the date of payment by the purchaser down to the date of repayment.

## B. SALES TO OWNER-OCCUPANTS

**[§514B-95] Definitions.** As used in this subpart:

"Chronological system" means a system in which the residential units designated for sale to prospective owner-occupants are offered for sale to prospective owner-occupants in the chronological order in which the prospective owner-occupants deliver to the developer or the designated real estate broker completed owner-occupant affidavits, executed sales contracts or reservations, and earnest money deposits.

"Initial date of sale" means the date of the first publication of the announcement or advertisement pursuant to section 514B-95.5.

"Lottery system" means a system in which no prospective owner-occupant has an unfair advantage in the determination of the order in which residential units designated for sale to prospective owner-occupants are offered for sale because the order is determined by a lottery.

"Owner-occupant" means any individual in whose name sole or joint legal title is held in a residential unit that, simultaneous to such ownership, serves as the individual's principal residence, as defined by the department of taxation, for a period of not less than three hundred sixty-five consecutive days; provided that the individual shall retain complete possessory control of the premises of the residential unit during this period. An individual shall not be deemed to have complete possessory control of the premises if the individual rents, leases, or assigns the premises for any period of time to any other person in whose name legal title is not held; except that an individual shall be deemed to have complete possessory control even when the individual conveys or transfers the unit into a trust for estate planning purposes and continues in the use of the premises as the individual's principal residence during this period.

"Residential unit" means "unit" as defined in section 514B-3, but excludes:

- (1) Any unit intended for commercial use;

- (2) Any unit designed and constructed for hotel or resort use that is located on any parcel of real property designated and governed by a county for hotel or resort use pursuant to section 46-4; and
- (3) Any other use pursuant to authority granted by law to a county.

"Thirty-day period" or "thirty days" means thirty full consecutive calendar days, including up to midnight on the thirtieth day.

**[§514B-95.5] Announcement or advertisement; publication.** At least once in each of two successive weeks, and at any time following the issuance of an effective date of the first developer's public report for the condominium project, the developer shall cause to be published in at least one newspaper published daily in the State with a general circulation in the county in which the project is to be located, and, if the project is located other than on the island of Oahu, in at least one newspaper that is published at least weekly in the county in which the project is to be located, an announcement or advertisement containing at least the following information:

- (1) The location of the project;
- (2) The minimum price of the residential units;
- (3) A designation as to whether the residential units are to be sold in fee simple or leasehold;
- (4) A statement that for a thirty-day period following the initial date of sale of the condominium project, at least fifty per cent of the residential units being marketed shall be offered only to prospective owner-occupants;
- (5) The name, telephone number, and address of the developer or other real estate broker designated by the developer that an interested individual may contact to secure an owner-occupant affidavit, developer's public report, and any other information concerning the project; and
- (6) If applicable, a statement that the residential units will be offered to prospective purchasers through a public lottery.

**[§514B-96] Designation of residential units.** (a) The developer of any project containing residential units shall designate at least fifty per cent of the units for sale to prospective owner-occupants pursuant to section 514B-98. The designation shall be set forth either in the developer's public report or in the announcement or advertisement required by section 514B-95.5, and may be set forth in both. The units shall constitute a proportionate representation of all the residential units in the project with regard to factors of square footage, number of bedrooms and bathrooms, floor level, and whether or not the unit has a lanai.

(b) A developer shall have the right to substitute a unit designated for owner-occupants with a unit that is not so designated; provided that the units shall be similar with regard to the factors enumerated in subsection (a). The substitution shall not require the developer's submission of a supplementary developer's public report.

**[§514B-96.5] Unit selection; requirements.** (a) When the chronological system is used, the developer or the developer's real estate broker, as the case may be, shall offer the residential units that have been designated pursuant to section 514B-96 as follows:

- (1) For thirty days from the date of the first published announcement or advertisement required under section 514B-95.5, the developer or developer's real estate broker shall offer the residential units that have been designated pursuant to section 514B-96 to prospective purchasers chronologically in the order in which they submit to the developer or the developer's real estate broker, a completed owner-occupant affidavit, an executed sales contract or reservation, and an earnest money deposit in a reasonable amount designated by the developer. The developer or the developer's real estate broker shall maintain at all times a sufficient number of sales contracts and affidavits for prospective owner-occupants to execute and shall make them first available to prospective owner-occupants on the day immediately following the date of the first publication of the announcement or advertisement for the duration of the time period as specified in this paragraph. Prospective purchasers who do not have the opportunity to select a residential unit during the thirty-day period shall be placed on a back-up reservation list in the order in which they submit a completed owner-occupant affidavit and earnest money deposit in a reasonable amount designated by the developer;
  - (2) If two or more prospective owner-occupants intend to reside jointly in the same residential unit, only one residential unit designated pursuant to section 514B-96 shall be offered to them, or only one of them shall be placed on the backup reservation list;
  - (3) No developer, employee or agent of the developer, or any real estate licensee, either directly or through any other person, shall release any information or inform any prospective owner-occupant about the publication announcement or advertisement referred to in section 514B-95.5, including the date it is to appear and when the chronological system will be initiated, until after the announcement or advertisement is published; provided that a developer, as part of any preregistration solicitation permitted under section 514B-85, may disclose whether units will be offered to owner-occupants pursuant to this subpart and whether a chronological or lottery system will be used; and
  - (4) The developer shall compile and maintain a list of all prospective purchasers that submit a completed owner-occupant affidavit, an executed sales contract or reservation, and an earnest money deposit, and maintain a back-up reservation list, if any. Upon the request of the commission, the developer shall provide a copy of the list of all prospective purchasers and the back-up reservation list.
- (b) When the public lottery system is used, the developer or the developer's broker, as the case may be, shall offer the residential units that have been designated pursuant to section 514B-96 as follows:
- (1) From the date of the first published announcement or advertisement required under section 514B-95.5 until five calendar days after the last published announcement or advertisement, the developer or developer's real estate broker shall compile and maintain a list of all prospective owner-occupants who have submitted to the developer or the developer's real estate broker a duly executed owner-occupant affidavit. All prospective owner-occupants on this list shall be included in the public lottery described in paragraph (2). The developer and the developer's real estate broker shall maintain at all times sufficient copies of

affidavits for prospective owner-occupants to execute and shall make them first available to prospective owner-occupants on the day immediately following the date of the first publication of the announcement or advertisement for the duration of the time period as specified in this subsection. Upon the request of the commission, the developer shall provide a copy of the lottery list of prospective owner-occupants;

- (2) The developer or developer's real estate broker shall conduct a public lottery on the date, time, and location as set forth in the published announcement, or advertisement. The lottery shall be held no later than the thirtieth day following the date of the first published announcement or advertisement. Any person, including all prospective owner-occupants eligible for the lottery, shall be allowed to attend the lottery;
- (3) The public lottery shall be conducted so that no prospective owner-occupant shall have an unfair advantage and, as to all owner-occupants whose affidavits were submitted to the developer or the developer's real estate broker within the time period specified in paragraph (1), shall be conducted without regard to the order in which the affidavits were submitted. If two or more prospective owner-occupants intend to reside jointly in the same residential unit, only one of them shall be entitled to enter the public lottery; and
- (4) After the public lottery, each prospective owner-occupant purchaser, in the order in which they are selected in the lottery, shall be given the opportunity to select one of the residential units that have been designated pursuant to section 514B-96, execute a sales contract, and submit an earnest money deposit in a reasonable amount designated by the developer. The developer shall maintain a list, in the order of selection, of all prospective purchasers selected in the lottery, and maintain a list of all prospective purchasers who selected one of the residential units designated pursuant to section 514B-96. Prospective purchasers selected in the lottery who did not have the opportunity to select one of the residential units designated pursuant to section 514B-96, but who submitted an earnest money deposit in a reasonable amount designated by the developer, shall be placed on a back-up reservation list in the order in which they were selected in the public lottery. Upon request of the commission, copies of the lists shall be submitted.

**[§514B-97] Affidavit.** (a) The owner-occupant affidavit required by section 514B-96.5 shall expire after three hundred sixty-five consecutive days have elapsed after the recordation of the instrument conveying the unit to the affiant. The affidavit shall expire prior to this period upon acquisition of title to the property by an institutional lender or investor through mortgage foreclosure, foreclosure under power of sale, or a conveyance in lieu of foreclosure.

(b) The affidavit shall include statements by the affiant affirming that the affiant shall notify the commission immediately upon any decision to cease being an owner-occupant.

(c) The affidavit shall be personally executed by all the prospective owner-occupants of the residential unit and shall not be executed by an attorney-in-fact.

**[§514B-97.5] Prohibitions.** (a) No person who has executed an owner-occupant affidavit shall sell or offer to sell, lease or offer to lease, rent or offer to rent, assign or offer to assign, or convey the unit until at least three hundred sixty-five consecutive days have elapsed since the recordation of the purchase; provided that a person who continues in the use of the premises as the individual's principal residence during this period may convey or transfer the unit into a trust for estate planning purposes. Any contract or instrument entered into in violation of this subpart shall be subject to the remedies provided in section 514B-99(a).

(b) No developer, employee or agent of a developer, or real estate licensee shall violate or aid any other person in violating this subpart.

**[§514B-98] Sale of residential units; developer requirements.** (a) The developer may go to sale using either a chronological system or a lottery system at any time after issuance of an effective date for a developer's public report.

(b) For a thirty-day period following the initial date of sale of units in a condominium project, at least fifty per cent of the units being sold shall be offered for sale only to prospective owner-occupants; provided that notwithstanding this subpart, in the case of a project that includes one or more existing structures being converted to condominium status, each residential unit contained in the project first shall be offered for sale to any individual occupying the unit immediately prior to the conversion and who submits an owner-occupant affidavit and an earnest money deposit in a reasonable amount designated by the developer.

(c) Each contract for the purchase of a residential unit by an owner-occupant may be conditioned upon the purchaser obtaining adequate financing, or a commitment for adequate financing. If the sales contract is canceled, the developer shall re-offer the residential unit first to prospective owner-occupants on the back-up reservation list described in section 514B-96.5, in the order in which the names appear on the reservation list; provided that the prospective owner-occupant shall not have already executed a sales contract or reservation for a residential unit in the project.

(d) At any time, any prospective owner-occupant on the back-up reservation list may be offered any residential unit in the project that has not been sold or set aside for sale to prospective owner-occupants.

**[§514B-98.5] Enforcement.** (a) Whenever the commission finds based upon satisfactory evidence that any person is violating or has violated any provision of this subpart or rules of the commission adopted pursuant thereto, the commission may conduct an investigation on the matter and bring an action in the name of the commission in any court of competent jurisdiction against the person to enjoin the person from continuing the violation or doing any acts in furtherance thereof.

(b) Before the commission brings an action in any court of competent jurisdiction pursuant to subsection (a) against any person who executed an affidavit pursuant to this subpart, it may consider whether the following extenuating circumstances affected the person's ability to comply with the law:

- (1) Serious illness of any of the owner-occupants who executed the affidavit or of any other person who was to or has occupied the residential unit;
- (2) Unforeseeable job or military transfer;

- (3) Unforeseeable change in marital status, or change in parental status; or
- (4) Any other unforeseeable occurrence subsequent to execution of the affidavit.

If the commission finds that extenuating circumstances exist, the commission may cease any further action and order release of any net proceeds held in abeyance.

(c) Any individual who executes an affidavit pursuant to this subpart and who subsequently sells or offers to sell, leases or offers to lease, rents or offers to rent, assigns or offers to assign, or otherwise transfers any interest in the residential unit that the person obtained pursuant to this subpart, shall have the burden of proving the person's compliance with the requirements of this part.

(d) Upon request, the commission may require verification that a presumed owner-occupant continues to be an "owner-occupant", as defined in this subpart. If, due to a sale, lease, assignment, or transfer of the residential unit, the presumed owner-occupant is unable to verify continuing owner-occupancy status, that person may be subject to a fine in an amount equal to the profit made from the sale, lease, assignment, or transfer.

(e) The commission shall adopt rules, pursuant to chapter 91, to carry out the purposes of this subpart.

**[§514B-99] Penalties.** (a) Any person who executes an affidavit required by this subpart and who violates or fails to comply with any of the provisions of this subpart or any rule adopted by the commission pursuant thereto, shall be subject to a civil penalty of up to \$10,000; or fifty per cent of the net proceeds received or to be received by the person from the sale, lease, rental, assignment, or other transfer of the residential unit to which the violation relates, whichever is the greater amount.

(b) Any developer, employee or agent of a developer, or real estate licensee who violates or fails to comply with any of the provisions of this subpart or any rule adopted by the commission pursuant thereto, shall be subject to a civil penalty of up to \$10,000. Each violation shall constitute a separate offense.

**[§514B-99.3] False statement.** It shall be unlawful for any person to make a false statement in the affidavit required by this subpart or for any person to file with the commission any notice, statement, or other document required under this subpart or any rule adopted by the commission pursuant thereto which is false or contains a material misstatement or omission of fact. Any violation of this section shall be a misdemeanor punishable by a fine not to exceed \$2,000, or by imprisonment for a term not to exceed one year, or both.

**[§514B-99.5] Inapplicability of laws.** (a) This subpart shall not apply to:

- (1) A project developed pursuant to section 46-15 or 46-15.1, or chapter 53, 201G, or 206; provided that the developer of the project may elect to be subject to this subpart through a written notification to the commission;
- (2) Condominium projects where the developer conveys all of the residential units in the project to a spouse, or family members related by blood, descent or adoption; and
- (3) Condominium projects consisting of two or fewer units.

(b) A developer of a project specified in subsection (a)(1) who elects to be subject to this subpart, or of a project developed pursuant to an affordable housing requirement established by a state or county governmental agency, may elect to waive specific provisions of this subpart that conflict with the eligibility or preference requirements imposed by the governmental agency. The developer of a project specified in subsection (a)(1) who exercises the election shall provide detailed written notification to the commission of the specific provisions that will be waived, an explanation for each waived provision, and a statement from the affected government agency that the project is either an inapplicable project pursuant to subsection (a)(1) or a project for which a governmental agency has imposed eligibility or preference requirements. A copy of this notification shall be filed with the affected governmental agency.

(c) A filing to meet the notification requirements of subsection (a)(1) or (b) shall not be construed to be an approval or disapproval of the project by the commission.

## **PART VI. MANAGEMENT OF CONDOMINIUMS**

### **A. POWERS, DUTIES, AND OTHER GENERAL PROVISIONS**

**[§514B-101] Applicability; exceptions.** (a) This part applies to all condominiums subject to this chapter, except as provided in subsection (b).

(b) If so provided in the declaration or bylaws, this part shall not apply to:

(1) Condominiums in which all units are restricted to nonresidential uses; or

(2) Condominiums, not subject to any continuing development rights, containing no more than five units;

provided that section 514B-132 shall not be subject to these exceptions.

**[§514B-102] Association; organization and membership.** (a) The first meeting of the association shall be held not later than one hundred eighty days after recordation of the first unit conveyance; provided that forty per cent or more of the project has been sold and recorded. If forty per cent of the project is not sold and recorded at the end of one year after recordation of the first unit conveyance, an annual meeting shall be called if ten per cent of the unit owners so request.

(b) The membership of the association shall consist exclusively of all the unit owners. Following termination of the condominium, the membership of the association shall consist of all former unit owners entitled to distributions of proceeds under section 514B-47, or their heirs, successors, or assigns.

**[§514B-103] Association; registration.** (a) Each project or association having more than five units shall:

(1) Register with the commission through approval of a completed registration application, payment of fees, and submission of any other additional information set forth by the commission. The registration shall be for a biennial period with termination on June 30 of each odd-numbered year. The commission shall prescribe a deadline date prior to the termination date for the submission of a

completed reregistration application, payment of fees, and any other additional information set forth by the commission. Any project or association that has not met the submission requirements by the deadline date shall be considered a new applicant for registration and be subject to initial registration requirements. Any new project or association shall register within thirty days of the association's first meeting. If the association has not held its first meeting and it is at least one year after the recordation of the purchase of the first unit in the project, the developer or developer's affiliate or the managing agent shall register on behalf of the association and shall comply with this section, except for the fidelity bond requirement for associations required by section 514B-143(a)(3). The public information required to be submitted on any completed application form shall include but not be limited to evidence of and information on fidelity bond coverage, names and positions of the officers of the association, the name of the association's managing agent, if any, the street and the postal address of the condominium, and the name and current mailing address of a designated officer of the association where the officer can be contacted directly;

- (2) Pay a nonrefundable application fee and, upon approval, an initial registration fee, a reregistration fee upon reregistration and the condominium education trust fund fee, as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91;
- (3) Register or reregister and pay the required fees by the due date. Failure to register or reregister or pay the required fees by the due date shall result in the assessment of a penalty equal to the amount of the registration or reregistration fee; and
- (4) Report promptly in writing to the commission any changes to the information contained on the registration or reregistration application or any other documents required by the commission. Failure to do so may result in termination of registration and subject the project or the association to initial registration requirements.

(b) The commission may reject or terminate any registration submitted by a project or an association that fails to comply with this section. Any association that fails to register as required by this section or whose registration is rejected or terminated shall not have standing to maintain any action or proceeding in the courts of this State until it registers. The failure of an association to register, or rejection or termination of its registration, shall not impair the validity of any contract or act of the association nor prevent the association from defending any action or proceeding in any court in this State.

**[§514B-104] Association; powers.** (a) Except as provided in section 514B-105, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may:

- (1) Adopt and amend the declaration, bylaws, and rules and regulations;
- (2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners, subject to section 514B-148;
- (3) Hire and discharge managing agents and other independent contractors, agents, and employees;

- (4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium. For the purposes of actions under chapter 480, associations shall be deemed to be "consumers";
- (5) Make contracts and incur liabilities;
- (6) Regulate the use, maintenance, repair, replacement, and modification of common elements;
- (7) Cause additional improvements to be made as a part of the common elements;
- (8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property; provided that:
  - (A) Designation of additional areas to be common elements or subject to common expenses after the initial filing of the declaration or bylaws shall require the approval of at least sixty-seven per cent of the unit owners;
  - (B) If the developer discloses to the initial buyer in writing that additional areas will be designated as common elements whether pursuant to an incremental or phased project or otherwise, the requirements of this paragraph shall not apply as to those additional areas; and
  - (C) The requirements of this paragraph shall not apply to the purchase of a unit for a resident manager, which may be purchased with the approval of the board;
- (9) Subject to section 514B-38, grant easements, leases, licenses, and concessions through or over the common elements and permit encroachments on the common elements;
- (10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in section 514B-35(2) and (4), and for services provided to unit owners;
- (11) Impose charges and penalties, including late fees and interest, for late payment of assessments and levy reasonable fines for violations of the declaration, bylaws, rules, and regulations of the association, either in accordance with the bylaws or, if the bylaws are silent, pursuant to a resolution adopted by the board that establishes a fining procedure that states the basis for the fine and allows an appeal to the board of the fine with notice and an opportunity to be heard and providing that if the fine is paid, the unit owner shall have the right to initiate a dispute resolution process as provided by sections 514B-161, 514B-162, or by filing a request for an administrative hearing under a pilot program administered by the department of commerce and consumer affairs;
- (12) Impose reasonable charges for the preparation and recordation of amendments to the declaration, documents requested for resale of units, or statements of unpaid assessments;
- (13) Provide for cumulative voting through a provision in the bylaws;
- (14) Provide for the indemnification of its officers, board, committee members, and agents, and maintain directors' and officers' liability insurance;
- (15) Assign its right to future income, including the right to receive common expense assessments, but only to the extent section 514B-105(e) expressly so provides;
- (16) Exercise any other powers conferred by the declaration or bylaws;

- (17) Exercise all other powers that may be exercised in this State by legal entities of the same type as the association, except to the extent inconsistent with this chapter;
  - (18) Exercise any other powers necessary and proper for the governance and operation of the association; and
  - (19) By regulation, subject to sections 514B-146, 514B-161, and 514B-162, require that disputes between the board and unit owners or between two or more unit owners regarding the condominium be submitted to nonbinding alternative dispute resolution in the manner described in the regulation as a prerequisite to commencement of a judicial proceeding.
- (b) If a tenant of a unit owner violates the declaration, bylaws, or rules and regulations of the association, in addition to exercising any of its powers against the unit owner, the association may:
- (1) Exercise directly against the tenant the powers described in subsection (a)(11);
  - (2) After giving notice to the tenant and the unit owner and an opportunity to be heard, levy reasonable fines against the tenant for the violation, provided that a unit owner shall be responsible for the conduct of the owner's tenant and for any fines levied against the tenant or any legal fees incurred in enforcing the declaration, bylaws, or rules and regulations of the association against the tenant; and
  - (3) Enforce any other rights against the tenant for the violation which the unit owner as landlord could lawfully have exercised under the lease, including eviction, or which the association could lawfully have exercised directly against the unit owner, or both.
- (c) The rights granted under subsection (b)(3) may only be exercised if the tenant or unit owner fails to cure the violation within ten days after the association notifies the tenant and unit owner of that violation; provided that no notice shall be required when the breach by the tenant causes or threatens to cause damage to any person or constitutes a violation of section 521-51(1) or 521-51(6).
- (d) Unless a lease otherwise provides, this section does not:
- (1) Affect rights that the unit owner has to enforce the lease or that the association has under other law; or
  - (2) Permit the association to enforce a lease to which it is not a party in the absence of a violation of the declaration, bylaws, or rules and regulations.

**[§514B-105] Association; limitations on powers.** (a) The declaration and bylaws may not impose limitations on the power of the association to deal with the developer which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

(b) Unless otherwise permitted by the declaration, bylaws, or this chapter, an association may adopt rules and regulations that affect the use of or behavior in units that may be used for residential purposes only to:

- (1) Prevent any use of a unit which violates the declaration or bylaws;

- (2) Regulate any behavior in or occupancy of a unit which violates the declaration or bylaws or unreasonably interferes with the use and enjoyment of other units or the common elements by other unit owners; or
- (3) Restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders who regularly lend money secured by first mortgages on units in condominiums or regularly purchase those mortgages.

Otherwise, the association may not regulate any use of or behavior in units by means of the rules and regulations.

(c) No association shall deduct and apply portions of common expense payments received from a unit owner to unpaid late fees, legal fees, fines, and interest (other than amounts remitted by a unit in payment of late fees, legal fees, fines, and interest) unless the board adopts and distributes to all owners a policy stating that:

- (1) Failure to pay late fees, legal fees, fines, and interest may result in the deduction of such late fees, legal fees, fines, and interest from future common expense payments, so long as a delinquency continues to exist; and
- (2) Late fees may be imposed against any future common expense payment that is less than the full amount owed due to the deduction of unpaid late fees, legal fees, fines, and interest from the payment.

(d) No unit owner who requests legal or other information from the association, the board, the managing agent, or their employees or agents, shall be charged for the reasonable cost of providing the information unless the association notifies the unit owner that it intends to charge the unit owner for the reasonable cost. The association shall notify the unit owner in writing at least ten days prior to incurring the reasonable cost of providing the information, except that no prior notice shall be required to assess the reasonable cost of providing information on delinquent assessments or in connection with proceedings to enforce the law or the association's governing documents.

After being notified of the reasonable cost of providing the information, the unit owner may withdraw the request, in writing. A unit owner who withdraws a request for information shall not be charged for the reasonable cost of providing the information.

(e) Subject to any approval requirements and spending limits contained in the declaration or bylaws, the association may authorize the board to borrow money for the repair, replacement, maintenance, operation, or administration of the common elements and personal property of the project, or the making of any additions, alterations, and improvements thereto; provided that written notice of the purpose and use of the funds is first sent to all unit owners and owners representing fifty per cent of the common interest vote or give written consent to the borrowing. In connection with the borrowing, the board may grant to the lender the right to assess and collect monthly or special assessments from the unit owners and to enforce the payment of the assessments or other sums by statutory lien and foreclosure proceedings. The cost of the borrowing, including, without limitation, all principal, interest, commitment fees, and other expenses payable with respect to the borrowing or the enforcement of the obligations under the borrowing, shall be a common expense of the project. For purposes of this section, the financing of insurance premiums by the association within the policy period shall not be deemed a loan and no lease shall be deemed a loan if it provides that at the end of the lease the association may purchase the leased equipment for its fair market value.

**[§514B-106] Board; powers and duties.** (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the board shall owe the association a fiduciary duty and exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D.

(b) The board may not act on behalf of the association to amend the declaration or bylaws (sections 514B-32(a)(11) and 514B-108(b)(7)), to remove the condominium from the provisions of this chapter (section 514B-47), or to elect members of the board or determine the qualifications, powers and duties, or terms of office of board members (subsection (e)); provided that nothing in this subsection shall be construed to prohibit board members from voting proxies (section 514B-123) to elect members of the board; and provided further that the board may fill vacancies in its membership to serve until the next annual or special association meeting.

(c) Within thirty days after the adoption of any proposed budget for the condominium, the board shall make available a copy of the budget to all the unit owners and shall notify each unit owner that the unit owner may request a copy of the budget.

(d) The declaration may provide for a period of developer control of the association, during which a developer, or persons designated by the developer, may appoint and remove the officers and members of the board. Regardless of the period provided in the declaration, a period of developer control terminates no later than the earlier of:

- (1) Sixty days after conveyance of seventy-five per cent of the common interest appurtenant to units that may be created to unit owners other than a developer or affiliate of the developer;
- (2) Two years after the developer has ceased to offer units for sale in the ordinary course of business;
- (3) Two years after any right to add new units was last exercised; or
- (4) The day the developer, after giving written notice to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association.

A developer may voluntarily surrender the right to appoint and remove officers and members of the board before termination of that period, but in that event the developer may require, for the duration of the period of developer control, that specified actions of the association or board, as described in a recorded instrument executed by the developer, be approved by the developer before they become effective.

(e) Not later than the termination of any period of developer control, the unit owners shall elect a board of at least three members; provided that projects created after May 18, 1984, with one hundred or more individual units, shall have an elected board of at least nine members unless the membership has amended the bylaws to reduce the number of directors; and provided further that projects with more than one hundred individual units where at least seventy per cent of the unit owners do not reside at the project may amend the bylaws to reduce the board to as few as five members by the written consent of a majority of owners or the vote of a majority of a quorum at any annual meeting or special meeting called for that purpose. The association may rely on its membership records in determining whether a unit is owner-occupied. A decrease in the number of directors shall not deprive an incumbent director of any remaining term of office.

(f) At any regular or special meeting of the association, any member of the board may be removed and successors shall be elected for the remainder of the term to fill the vacancies thus created. The removal and replacement shall be by a vote of a majority of the unit

owners and, otherwise, in accordance with all applicable requirements and procedures in the bylaws for the removal and replacement of directors and, if removal and replacement is to occur at a special meeting, section 514B-121(b).

**[§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 resident manager or employee of a condominium shall serve on its board.

(c) An owner shall not act as an officer of an association and an employee of the managing agent retained by the association. Any owner who is a board member of an association and an employee of the managing agent retained by the association shall not participate in any discussion regarding a management contract at a board meeting and shall be excluded from any executive session of the board where the management contract or the property manager will be discussed.

(d) Directors shall not expend association funds for their travel, directors' fees, and per diem, unless owners are informed and a majority approve of these expenses; provided that, with the approval of the board, directors may be reimbursed for actual expenditures incurred on behalf of the association. The minutes shall reflect in detail the items and amounts of the reimbursements.

(e) Associations at their own expense shall provide all board members with a current copy of the association's declaration, bylaws, house rules, and, annually, a copy of this chapter with amendments.

(f) The directors may expend association funds, which shall not be deemed to be compensation to the directors, to educate and train themselves in subject areas directly related to their duties and responsibilities as directors; provided that the approved annual operating budget shall include these expenses as separate line items. These expenses may include registration fees, books, videos, tapes, other educational materials, and economy travel expenses. Except for economy travel expenses within the State, all other travel expenses incurred under this subsection shall be subject to the requirements of subsection (d).

**[§514B-108] Bylaws.** (a) A true copy of the bylaws shall be recorded in the same manner as the declaration. No amendment to the bylaws is valid unless the amendment is duly recorded.

(b) The bylaws shall provide for at least the following:

- (1) The number of members of the board and the titles of the officers of the association;
- (2) Election by the board of a president, treasurer, secretary, and any other officers of the association the bylaws specify;
- (3) The qualifications, powers and duties, terms of office, and manner of electing and removing directors and officers and the filling of vacancies;
- (4) Designation of the powers the board or officers may delegate to other persons or to a managing agent;

- (5) Designation of the officers who may prepare, execute, certify, and record amendments to the declaration on behalf of the association;
- (6) The compensation, if any, of the directors;
- (7) Subject to subsection (e), a method for amending the bylaws; and
- (8) The percentage, consistent with this chapter, that is required to adopt decisions binding on all unit owners; provided that votes allocated to lobby areas, swimming pools, recreation areas, saunas, storage areas, hallways, trash chutes, laundry chutes, and other similar common areas not located inside units shall not be cast at any association meeting, regardless of their designation in the declaration.

(c) The bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups. The terms of office of the several groups need not be uniform.

(d) Subject to the provisions of the declaration, the bylaws may provide for any other matters the association deems necessary and appropriate.

(e) The bylaws may be amended at any time by the vote or written consent of at least sixty-seven per cent of all unit owners. Any proposed bylaws together with the detailed rationale for the proposal may be submitted by the board or by a volunteer unit owners group. If submitted by that group, the proposal shall be accompanied by a petition signed by not less than twenty-five per cent of the unit owners as shown in the association's record of ownership. The proposed bylaws, rationale, and ballots for voting on any proposed bylaw shall be mailed by the board to the owners at the expense of the association for vote or written consent without change within thirty days of the receipt of the petition by the board. The vote or written consent, to be valid, must be obtained within three hundred sixty-five days after mailing for a proposed bylaw submitted by either the board or a volunteer unit owners group. If the bylaw is duly adopted, the board shall cause the bylaw amendment to be recorded. The volunteer unit owners group shall be precluded from submitting a petition for a proposed bylaw that is substantially similar to that which has been previously mailed to the owners within three hundred sixty-five days after the original petition was submitted to the board.

This subsection shall not preclude any unit owner or volunteer unit owners group from proposing any bylaw amendment at any annual association meeting.

**[§514B-109] Restatement of declaration and bylaws.** (a) Notwithstanding any other provision of this chapter or of any other statute or instrument, an association at any time may restate the declaration or bylaws of the association to set forth all amendments thereto by a resolution adopted by the board.

(b) Subject to section 514B-23, an association at any time may restate the declaration or bylaws of the association to amend the declaration or bylaws as may be required in order to conform with the provisions of this chapter or of any other statute, ordinance, or rule enacted by any governmental authority, or to correct the percentage of common interest for the project so it totals one hundred per cent, by a resolution adopted by the board. If the restated declaration is to correct the percentage of common interest for the project so that it totals one hundred per cent, the proportion of each unit owner's percentage of common interest shall remain the same in relation to the other unit owners. The restated declaration or bylaws shall be as fully effective for all purposes as if adopted by a vote or written consent of the unit owners.

Any declaration or bylaws restated pursuant to this subsection shall:

- (1) Identify each portion so restated;
- (2) Contain a statement that those portions have been restated solely for purposes of information and convenience;
- (3) Identify the statute, ordinance, or rule implemented by the amendment; and
- (4) Contain a statement that, in the event of any conflict, the restated declaration or bylaws shall be subordinate to the cited statute, ordinance, or rule.

(c) Upon the adoption of a resolution pursuant to subsection (a) or (b), the restated declaration or bylaws shall set forth all of the operative provisions of the declaration or bylaws, as amended, together with a statement that the restated declaration or bylaws correctly sets forth without change the corresponding provisions of the declaration or bylaws, as amended, and that the restated declaration or bylaws supersede the original declaration or bylaws and all prior amendments thereto. If the restated declaration corrects the percentage of common interest as provided in subsection (b), the restated declaration shall also amend the recorded conveyance instruments that govern the unit owner's interest in the unit.

(d) The restated declaration or bylaws must be recorded and, upon recordation, shall supersede the original declaration or bylaws and all prior amendments thereto. In the event of any conflict, the restated declaration or bylaws shall be subordinate to the original declaration or bylaws and all prior amendments thereto.

**[§514B-110] Bylaws amendment permitted; mixed use property; representation on board.** (a) The bylaws of an association may be amended to provide that the composition of the board reflect the proportionate number of units for a particular use, as set forth in the declaration. For example, an association may provide that for a nine-member board where two-thirds of the units are for residential use and one-third is for nonresidential use, sixty-six and two-thirds per cent of the nine-member board, or six members, shall be owners of residential use units and thirty-three and one-third per cent, or three members, shall be owners of nonresidential use units.

(b) Any proposed bylaw amendment to modify the composition of the board in accordance with subsection (a) may be initiated by:

- (1) A majority vote of the board; or
- (2) A submission of the proposed bylaw amendment to the board from a volunteer unit owners group accompanied by a petition from twenty-five per cent of the unit owners of record.

(c) Within thirty days of a decision by the board or receipt of a petition to initiate a bylaw amendment, the board shall mail a ballot with the proposed bylaw amendment to all of the unit owners of record. For purposes of this section only, the bylaws may initially be amended by a vote or written consent of the majority of the unit owners; and thereafter by at least sixty-seven per cent of all unit owners; provided that each of the requirements set forth in this section shall be embodied in the bylaws.

(d) The bylaws, as amended pursuant to this section, shall be recorded.

(e) Election of the new board in accordance with an amendment adopted pursuant to this section shall be held at the next regular meeting of the association or at a meeting called in accordance with section 514B-121(b) for this purpose.

(f) As permitted in the declaration or bylaws, the vote of a nonresidential unit owner shall be cast and counted only for the nonresidential seats available on the board and the vote of

a residential unit owner shall be cast and counted only for the residential seats available on the board.

(g) No petition for a bylaw amendment pursuant to subsection (b)(2) to modify the composition of the board shall be distributed to the unit owners within one year of the distribution of a prior petition to modify the composition of the board pursuant to subsection (b)(2).

(h) This section shall not preclude the removal and replacement of any one or more members of the board pursuant to section 514B-106(f). Any removal and replacement shall not affect the proportionate composition of the board as prescribed in the bylaws as amended pursuant to this section.

**[§514B-111] Judicial power to excuse compliance with requirements of declaration or bylaws.** (a) The circuit court of the judicial circuit in which a condominium is located may excuse compliance with any of the following provisions in a declaration or bylaws if it finds that the provision unreasonably interferes with the association's ability to manage the common property, administer the condominium property regime, or carry out any other function set forth in the declaration or bylaws, and that compliance is not necessary to protect the legitimate interests of the members or lenders holding security interests:

- (1) A provision limiting the amount of any assessment that can be levied against individually owned property;
  - (2) A provision requiring that an amendment to the declaration or bylaws be approved by lenders;
  - (3) A provision requiring approval of at least sixty-seven per cent of the common interest to adopt an amendment pursuant to section 514B-32(a)(11) or section 514B-108(e); provided that the amendment does not:
    - (A) Prohibit or materially restrict the use or occupancy of, or behavior within, individually owned units;
    - (B) Change the basis for allocating voting rights or assessments among unit owners; or
    - (C) Apply to less than all of the unit owners;
  - (4) A requirement that an amendment to the declaration be signed by unit owners; or
  - (5) A quorum requirement for meetings of unit owners.
- (b) The board, on behalf of the association, shall by certified mail provide all unit owners with notice of the date, time, and place of any court hearing to be held pursuant to this section.

**[§514B-112] Condominium community mutual obligations.** (a) All unit owners, tenants of owners, employees of owners and tenants, or any other persons that may in any manner use property or any part thereof submitted to this chapter are subject to this chapter and to the declaration and bylaws of the association adopted pursuant to this chapter.

(b) All agreements, decisions, and determinations lawfully made by the association in accordance with the voting percentages established in this chapter, the declaration, or the bylaws are binding on all unit owners.

(c) Each unit owner, tenants and employees of an owner, and other persons using the property shall comply strictly with the covenants, conditions, and restrictions set forth in the declaration, the bylaws, and the house rules adopted pursuant thereto. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the managing agent, resident manager, or board on behalf of the association or, in a proper case, by an aggrieved unit owner.

## B. GOVERNANCE – ELECTIONS AND MEETINGS

**[§514B-121] Association meetings.** (a) A meeting of the association shall be held at least once each year.

(b) Special meetings of the association may be called by the president, a majority of the board, or by a petition to the secretary or managing agent signed by not less than twenty-five per cent of the unit owners as shown in the association's record of ownership; provided that if the secretary or managing agent fails to send out the notices for the special meeting within fourteen days of receipt of the petition, the petitioners shall have the authority to set the time, date, and place for the special meeting and to send out the notices and proxies for the special meeting in accordance with the requirements of the bylaws and of this part.

(c) Not less than fourteen days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be:

- (1) Hand-delivered;
- (2) Sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner; or
- (3) At the option of the unit owner, expressed in writing, by electronic mail to the electronic mailing address designated in writing by the unit owner.

The notice of any meeting must state the date, time, and place of the meeting and the items on the agenda, including the general nature and rationale of any proposed amendment to the declaration or bylaws, and any proposal to remove a member of the board; provided that this subsection shall not preclude any unit owner from proposing an amendment to the declaration or bylaws or to remove a member of the board at any annual association meeting.

(d) All association meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. If so provided in the declaration or bylaws, meetings may be conducted by any means that allow participation by all unit owners in any deliberation or discussion.

(e) All association meetings shall be held at the address of the condominium or elsewhere within the State as determined by the board; provided that in the event of a natural disaster, such as a hurricane, an association meeting may be held outside the State.

**[§514B-122] Association meetings; minutes.** (a) Minutes of meetings of the association shall be approved at the next succeeding regular meeting or by the board, within sixty days after the meeting, if authorized by the owners at an annual meeting. If approved by the board, owners shall be given a copy of the approved minutes or notified of the availability of the minutes within thirty days after approval.

(b) Minutes of all meetings of the association shall be available within seven calendar days after approval, and unapproved final drafts of the minutes of a meeting shall be available within sixty days after the meeting.

(c) An owner shall be allowed to offer corrections to the minutes at an association meeting.

**[§514B-123] Association meetings; voting; proxies.** (a) If only one of several owners of a unit is present at a meeting of the association, that owner is entitled to cast all the votes allocated to that unit. If more than one of the owners is present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the owners, unless the declaration or bylaws expressly provide otherwise. There is majority agreement if any one of the owners casts the votes allocated to that unit without protest being made by any of the other owners of the unit to the person presiding over the meeting before the polls are closed.

(b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. A unit owner may vote by mail or electronic transmission through a duly executed proxy. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. In the absence of protest, any owner may cast the votes allocated to the unit by proxy. A unit owner may revoke a proxy given pursuant to this section only by actual notice of revocation to the secretary of the association or the managing agent. A proxy is void if it purports to be revocable without notice.

(c) No votes allocated to a unit owned by the association may be cast for the election or reelection of directors.

(d) A proxy, to be valid, shall:

- (1) Be delivered to the secretary of the association or the managing agent, if any, no later than 4:30 p.m. on the second business day prior to the date of the meeting to which it pertains;
- (2) Contain at least the name of the association, the date of the meeting of the association, the printed names and signatures of the persons giving the proxy, the unit numbers for which the proxy is given, the names of persons to whom the proxy is given, and the date that the proxy is given; and
- (3) If it is a standard proxy form authorized by the association, contain boxes wherein the owner has indicated that the proxy is given:
  - (A) For quorum purposes only;
  - (B) To the individual whose name is printed on a line next to this box;
  - (C) To the board as a whole and that the vote is to be made on the basis of the preference of the majority of the directors present at the meeting; or
  - (D) To those directors present at the meeting with the vote to be shared with each director receiving an equal percentage.

The proxy form shall also contain a box wherein the owner may indicate that the owner wishes to obtain a copy of the annual audit report required by section 514B-150.

(e) A proxy shall only be valid for the meeting to which the proxy pertains and its adjournments, may designate any person as proxy, and may be limited as the unit owner desires

and indicates; provided that no proxy shall be irrevocable unless coupled with a financial interest in the unit.

(f) A copy, facsimile telecommunication, or other reliable reproduction of a proxy may be used in lieu of the original proxy for any and all purposes for which the original proxy could be used; provided that any copy, facsimile telecommunication, or other reproduction shall be a complete reproduction of the entire original proxy.

(g) Nothing in this section shall affect the holder of any proxy under a first mortgage of record encumbering a unit or under an agreement of sale affecting a unit.

(h) With respect to the use of association funds to distribute proxies:

(1) Any board that intends to use association funds to distribute proxies, including the standard proxy form referred to in subsection (d)(3), shall first post notice of its intent to distribute proxies in prominent locations within the project at least twenty-one days before its distribution of proxies. If the board receives within seven days of the posted notice a request by any owner for use of association funds to solicit proxies accompanied by a statement, the board shall mail to all owners either:

(A) A proxy form containing the names of all owners who have requested the use of association funds for soliciting proxies accompanied by their statements; or

(B) A proxy form containing no names, but accompanied by a list of names of all owners who have requested the use of association funds for soliciting proxies and their statements.

The statement, which shall be limited to black text on white paper, shall not exceed one single-sided 8-1/2" x 11" page, indicating the owner's qualifications to serve on the board or reasons for wanting to receive proxies; and

(2) A board or member of the board may use association funds to solicit proxies as part of the distribution of proxies. If a member of the board, as an individual, seeks to solicit proxies using association funds, the board member shall proceed as a unit owner under paragraph (1).

(i) No managing agent or resident manager, or their employees, shall solicit, for use by the managing agent or resident manager, any proxies from any unit owner of the association that retains the managing agent or employs the resident manager, nor shall the managing agent or resident manager cast any proxy vote at any association meeting except for the purpose of establishing a quorum.

(j) No board shall adopt any rule prohibiting the solicitation of proxies or distribution of materials relating to association matters on the common elements by unit owners; provided that a board may adopt rules regulating reasonable time, place, and manner of the solicitations or distributions, or both.

**[§514B-124] Association meetings; purchaser's right to vote.** The purchaser of a unit pursuant to a recorded agreement of sale shall have all the rights of a unit owner, including the right to vote; provided that the seller may retain the right to vote on matters substantially affecting the seller's security interest in the unit, including but not limited to, the right to vote on:

(1) Any partition of all or part of the project;

- (2) The nature and amount of any insurance covering the project and the disposition of any proceeds thereof;
- (3) The manner in which any condemnation of the project shall be defended or settled and the disposition of any award or settlement in connection therewith;
- (4) The payment of any amount in excess of insurance or condemnation proceeds;
- (5) The construction of any additions or improvements, and any substantial repair or rebuilding of any portion of the project;
- (6) The special assessment of any expenses;
- (7) The acquisition of any unit in the project;
- (8) Any amendment to the declaration or bylaws;
- (9) Any removal of the project from the provisions of this chapter; and
- (10) Any other matter that would substantially affect the security interest of the seller.

**[§514B-125] Board meetings.** (a) All meetings of the board, other than executive sessions, shall be open to all members of the association, and association members who are not on the board may participate in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the board votes otherwise.

(b) The board, with the approval of a majority of a quorum of its members, may adjourn a meeting and reconvene in executive session to discuss and vote upon matters:

- (1) Concerning personnel;
- (2) Concerning litigation in which the association is or may become involved;
- (3) Necessary to protect the attorney-client privilege of the association; or
- (4) Necessary to protect the interests of the association while negotiating contracts, leases, and other commercial transactions.

The general nature of any business to be considered in executive session shall first be announced in open session.

(c) All board meetings shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. Unless otherwise provided in the declaration or bylaws, a board may permit any meeting to be conducted by any means of communication through which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting. If permitted by the board, any unit owner may participate in a meeting conducted by a means of communication through which all participants may simultaneously hear each other during the meeting, provided that the board may require that the unit owner pay for the costs associated with the participation.

(d) The board shall meet at least once a year. Notice of all board meetings shall be posted by the managing agent, resident manager, or a member of the board, in prominent locations within the project seventy-two hours prior to the meeting or simultaneously with notice to the board.

(e) A director shall not vote by proxy at board meetings.

(f) A director shall not vote at any board meeting on any issue in which the director has a conflict of interest. A director who has a conflict of interest on any issue before the board shall disclose the nature of the conflict of interest prior to a vote on that issue at the board meeting, and the minutes of the meeting shall record the fact that a disclosure was made.

"Conflict of interest", as used in this subsection, means an issue in which a director has a direct personal or pecuniary interest not common to other members of the association.

**[§514B-126] Board meetings; minutes.** (a) Minutes of meetings of the board shall include the recorded vote of each board member on all motions except motions voted on in executive session.

(b) Minutes of meetings of the board shall be approved no later than the second succeeding regular meeting.

(c) Minutes of all meetings of the board shall be available within seven calendar days after approval, and unapproved final drafts of the minutes of a meeting shall be available within sixty days after the meeting; provided that the minutes of any executive session may be withheld if their publication would defeat the lawful purpose of the executive session.

### C. OPERATIONS

**[§514B-131] Operation of the property.** The operation of the property shall be governed by this chapter and the declaration and bylaws.

**[§514B-132] Managing agents.** (a) Every managing agent shall:

(1) Be a:

(A) Licensed real estate broker in compliance with chapter 467 and the rules of the commission. With respect to any requirement for a corporate managing agent in any declaration or bylaws recorded before July 1, 2006, any managing agent organized as a limited liability company shall be deemed to be organized as a corporation for the purposes of this paragraph, unless the declaration or bylaws are expressly amended after July 1, 2006 to require that the managing agent be organized as a corporation and not as a limited liability company; or

(B) Corporation authorized to do business under article 8 of chapter 412;

(2) Register with the commission prior to conducting managing agent activity through approval of a completed registration application, payment of fees, and submission of any other additional information set forth by the commission. The registration shall be for a biennial period with termination on December 31 of an even-numbered year. The commission shall prescribe a deadline date prior to the termination date for the submission of a completed reregistration application, payment of fees, and any other additional information set forth by the commission. Any managing agent who has not met the submission requirements by the deadline date shall be considered a new applicant for registration and subject to initial registration requirements. The information required to be submitted with any application shall include the name, business address, phone number, and names of associations managed;

(3) Obtain and keep current a fidelity bond in an amount equal to \$500 multiplied by the aggregate number of units of the association managed by the managing agent;

provided that the amount of the fidelity bond shall not be less than \$20,000 nor greater than \$500,000. Upon request by the commission, the managing agent shall provide evidence of a current fidelity bond or a certification statement from an insurance company authorized by the insurance division of the department of commerce and consumer affairs certifying that the fidelity bond is in effect and meets the requirements of this section and the rules adopted by the commission. The managing agent shall permit only employees covered by the fidelity bond to handle or have custody or control of any association funds, except any principals of the managing agent that cannot be covered by the fidelity bond. The fidelity bond shall protect the managing agent against the loss of any association's moneys, securities, or other properties caused by the fraudulent or dishonest acts of employees of the managing agent. Failure to obtain or maintain a fidelity bond in compliance with this chapter and the rules adopted pursuant thereto, including failure to provide evidence of the fidelity bond coverage in a timely manner to the commission, shall result in nonregistration or the automatic termination of the registration, unless an approved exemption or a bond alternative is presently maintained. A managing agent who is unable to obtain a fidelity bond may seek an exemption from the fidelity bond requirement from the commission;

- (4) Act promptly and diligently to recover from the fidelity bond, if the fraud or dishonesty of the managing agent's employees causes a loss to an association, and apply the fidelity bond proceeds, if any, to reduce the association's loss. If more than one association suffers a loss, the managing agent shall divide the proceeds among the associations in proportion to each association's loss. An association may request a court order requiring the managing agent to act promptly and diligently to recover from the fidelity bond. If an association cannot recover its loss from the fidelity bond proceeds of the managing agent, the association may recover by court order from the real estate recovery fund established under section 467-16, provided that:
  - (A) The loss is caused by the fraud, misrepresentation, or deceit of the managing agent or its employees;
  - (B) The managing agent is a licensed real estate broker; and
  - (C) The association fulfills the requirements of sections 467-16 and 467-18 and any applicable rules of the commission;
- (5) Pay a nonrefundable application fee and, upon approval, an initial registration fee, and subsequently pay a reregistration fee, as prescribed by rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. A compliance resolution fee shall also be paid pursuant to section 26-9(o) and the rules adopted pursuant thereto; and
- (6) Report immediately in writing to the commission any changes to the information contained on the registration application or any other documents provided for registration. Failure to do so may result in termination of registration and subject the managing agent to initial registration requirements.
  - (b) The commission may deny any registration or reregistration application or terminate a registration without hearing if the fidelity bond and supporting documents fail to meet the requirements of this chapter and the rules adopted pursuant thereto.

(c) Every managing agent shall be considered a fiduciary with respect to any property managed by that managing agent.

(d) The registration requirements of this section shall not apply to active real estate brokers in compliance with and licensed under chapter 467.

(e) If a managing agent receives a request from the commission to distribute any commission-generated information, printed material, or documents to the association, its board, or unit owners, the managing agent shall make the distribution at the cost of the association within a reasonable period of time after receiving the request. The requirements of this subsection apply to all managing agents, including unregistered managing agents.

**[§514B-133] Association employees; background check; prohibition.** (a) The board, managing agent, or resident manager, upon the written authorization of an applicant for employment as a security guard or resident manager or for a position that would allow the employee access to the keys of or entry into the units in the condominium or access to association funds, may conduct a background check on the applicant or direct another responsible party to conduct the check. Before initiating or requesting a check, the board, managing agent, or resident manager shall first certify that the signature on the authorization is authentic and that the person is an applicant for such employment. The background check, at a minimum, shall require the applicant to disclose whether the applicant has been convicted in any jurisdiction of a crime which would tend to indicate that the applicant may be unsuited for employment as an association employee with access to association funds or the keys of or entry into the units in the condominium, and the judgment of conviction has not been vacated.

For purposes of this section, the criminal history disclosure made by the applicant may be verified by the board, managing agent, resident manager, or other responsible party, if so directed by the board, managing agent, or resident manager, by means of information obtained through the Hawaii criminal justice data center. The applicant shall provide the Hawaii criminal justice data center with personal identifying information, which shall include, but not be limited to, the applicant's name, social security number, date of birth, and gender. This information shall be used only for the purpose of conducting the criminal history record check authorized by this section. Failure of an association, managing agent, or resident manager to conduct or verify or cause to have conducted or verified a background check shall not alone give rise to any private cause of action against an association, managing agent, or resident manager for acts and omissions of the employee hired.

(b) An association's employees shall not engage in selling or renting units in the condominium in which they are employed, except association-owned units, unless such activity is approved by sixty-seven per cent of the unit owners.

**[§514B-134] Management and contracts; developer, managing agent, and association.** (a) Any developer or affiliate of the developer or a managing agent, who manages the operation of the property from the date of recordation of the first unit conveyance until the organization of the association, shall comply with the requirements of sections 514B-72, 514B-103, and 514B-149.

(b) The developer or affiliate of the developer, board, and managing agent shall ensure that there is a written contract for managing the operation of the property, expressing the

agreements of all parties including, but not limited to, financial and accounting obligations, services provided, and any compensation arrangements, including any subsequent amendments. Copies of the executed contract and any amendments shall be provided to all parties to the contract. Prior to the organization of the association, any unit owner may request to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.

**[§514B-135] Termination of contracts and leases of developer.** (a) If entered into before the board elected by the unit owners pursuant to section 514B-106(e) takes office:

- (1) Any management contract, employment contract, or lease of recreational or parking areas or facilities;
- (2) Any other contract or lease between the association and a developer or an affiliate of a developer; or
- (3) Any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing;

may be terminated without penalty by the association within a period of one hundred eighty days after the board elected by the unit owners pursuant to section 514B-106(e) takes office, upon not less than ninety days notice to the other party.

(b) This section does not apply to:

- (1) Any lease or other agreement the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section; or
- (2) A proprietary lease.

**[§514B-136] Transfer of developer rights.** (a) A developer right created or reserved under this chapter may be transferred only by a recorded instrument evidencing the transfer. The instrument is not effective unless executed by the transferee.

(b) Upon transfer of any developer right, the liability of a transferor developer is as follows:

- (1) A transferor is not relieved of any obligation or liability arising before the transfer, and remains liable for warranty obligations imposed upon the transferor by this chapter, if any. Lack of privity does not deprive any unit owner of standing to maintain an action to enforce any obligation of the transferor;
- (2) If a successor to any developer right is an affiliate of a developer, the transferor is jointly and severally liable with the successor for any obligations or liabilities of the successor relating to the condominium;
- (3) If a transferor retains any developer rights, but transfers other developer rights to a successor who is not an affiliate of the developer, the transferor is liable for any obligations or liabilities imposed on a developer by this chapter or by the declaration relating to the retained developer rights and arising after the transfer; and

- (4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a developer right by a successor developer who is not an affiliate of the transferor.
- (c) Unless otherwise provided in a mortgage instrument or other agreement creating a security interest, in case of foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under bankruptcy code or receivership proceedings, of any units owned by a developer or real estate in a condominium subject to development rights, a person acquiring title to all the property being foreclosed or sold, but only upon request, succeeds to all developer rights related to that property held by that developer. The judgment or instrument conveying title must provide for the transfer of only the developer rights requested.
- (d) Upon foreclosure of a security interest, sale by a trustee under an agreement creating a security interest, tax sale, judicial sale, or sale under bankruptcy code or receivership proceedings, of all interests in a condominium owned by a developer:
- (1) The developer ceases to have any developer rights; and
  - (2) The period of developer control under section 514B-106(d) terminates unless the judgment or instrument conveying title provides for transfer of all developer rights held by that developer to a successor developer.
- (e) The liabilities and obligations of a person who succeeds to developer rights are as follows:
- (1) A successor to any developer right who is an affiliate of a developer is subject to all obligations and liabilities imposed on the transferor by this chapter or by the declaration;
  - (2) A successor to any developer right, other than a successor described in paragraph (3) or (4) or a successor who is an affiliate of a developer, is subject to the obligations and liabilities imposed by this chapter or the declaration:
    - (A) On a developer which relate to the successor's exercise or nonexercise of developer rights; or
    - (B) On the transferor, other than:
      - (i) Misrepresentations by any previous developer;
      - (ii) Warranty obligations on improvements made by any previous developer, or made before the condominium was created;
      - (iii) Breach of any fiduciary obligation by any previous developer or the developer's appointees to the board; or
      - (iv) Any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer;
  - (3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs, and who may not exercise any other developer right, is not subject to any liability or obligation as a developer, except the obligation to provide a public report, any liability arising as a result thereof, and the obligations under part IV; and
  - (4) A successor to all developer rights held by a transferor who succeeded to those rights pursuant to a deed or other instrument of conveyance in lieu of foreclosure or a judgment or instrument conveying title under subsection (c), may declare in a recorded instrument the intention to hold those rights solely for transfer to another person. Thereafter, until transferring all developer rights to any person acquiring

title to any unit or real estate subject to development rights owned by the successor, or until recording an instrument permitting exercise of all those rights, that successor may not exercise any of those rights other than any right held by the transferor to control the board in accordance with section 514B-106(d) for the duration of any period of developer control, and any attempted exercise of those rights is void. So long as a successor developer may not exercise developer rights under this subsection, the successor developer is not subject to any liability or obligation as a developer other than liability for the developer's acts and omissions under section 514B-106(d).

(f) Nothing in this section subjects any successor to a developer right to any claims against or other obligations of a transferor developer, other than claims and obligations arising under this chapter or the declaration.

**[§514B-137] Upkeep of condominium.** (a) Except to the extent provided by the declaration or bylaws, the association is responsible for the operation of the property, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to employees, independent contractors, or agents of the association or other unit owners, during reasonable hours, access through the owner's unit reasonably necessary for those purposes. Unless entry is made pursuant to subsection (b), if damage is inflicted on the common elements or on any unit through which access is taken, the unit owner responsible for the damage, or the association, if it is responsible, is liable for the prompt repair thereof; provided that the association shall not be responsible to pay the costs of removing or replacing any finished surfaces or other barriers that impede its ability to maintain and repair the common elements.

(b) The association shall have the irrevocable right, to be exercised by the board, to have access to each unit at any time as may be necessary for making emergency repairs to prevent damage to the common elements or to another unit or units.

**[§514B-138] Upkeep of condominium; high-risk components.** (a) The board, after notice to all unit owners and an opportunity for owner comment, may determine that certain portions of the units, or certain objects or appliances within the units such as washing machine hoses and water heaters, pose a particular risk of damage to other units or the common elements if they are not properly inspected, maintained, repaired, or replaced by owners. Those items determined by the board to pose a particular risk are "high-risk components" for the purposes of this section.

(b) With regard to items designated as high-risk components, the board may require any or all of the following:

- (1) Inspection:
  - (A) At specified intervals; or
  - (B) Upon replacement or repair by the association or by inspectors designated by the association;
- (2) Replacement or repair at specified intervals whether or not the component is deteriorated or defective; and
- (3) Replacement or repair:

- (A) Meeting particular standards or specifications established by the board;
- (B) Including additional components or installations specified by the board; or
- (C) Using contractors with specific licensing, training, or certification approved by the board.

(c) The imposition of requirements by the board under subsection (b) shall not relieve unit owners of obligations regarding high-risk components as set forth in the declaration or bylaws including, without limitation, the obligation to maintain, repair, and replace the components.

(d) If a unit owner fails to follow requirements imposed by the board pursuant to this section, the association, after reasonable notice, may enter the unit to perform the requirements with regard to such high-risk components at the sole cost and expense of the unit owner, which costs and expenses shall be a lien on the unit as provided in section 514B-146. Nothing in this section shall be deemed to limit the remedies of the association for damages, or injunctive relief, or both.

**[§514B-139] Upkeep of condominium; disposition of unclaimed possessions.** (a) When personalty in or on the common elements of a project has been abandoned, the board may sell the personalty in a commercially reasonable manner, store the personalty at the expense of its owner, donate the personalty to a charitable organization, or otherwise dispose of the personalty in its sole discretion; provided that no sale, storage, or donation shall occur until sixty days after the board complies with the following:

- (1) The board notifies the owner in writing of:
  - (A) The identity and location of the personalty; and
  - (B) The board's intent to so sell, store, donate, or dispose of the personalty.Notification shall be by certified mail, return receipt requested, to the owner's address as shown by the records of the association or to an address designated by the owner for the purpose of notification or, if neither of these is available, to the owner's last known address, if any; or
- (2) If the identity or address of the owner is unknown, the board shall first advertise the sale, donation, or disposition at least once in a daily paper of general circulation within the circuit in which the personalty is located.

(b) The proceeds of any sale or disposition of personalty under subsection (a), after deduction of any accrued costs of mailing, advertising, storage, and sale, shall be held for the owner for thirty days. Any proceeds not claimed within this period shall become the property of the association.

**§514B-140 Additions to and alterations of condominium.** (a) No unit owner shall do any work that may jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement, as reasonably determined by the board.

(b) Subject to the provisions of the declaration, no unit owner may make or allow any material addition or alteration, or excavate an additional basement or cellar, without first obtaining the written consent of sixty-seven per cent of the unit owners, the consent of all unit owners whose units or appurtenant limited common elements are directly affected, and the approval of the board, which shall not unreasonably withhold such approval. The declaration

may limit the board's ability to approve or condition a proposed addition or alteration; provided that the board shall always have the right to disapprove a proposed addition or alteration that the board reasonably determines could jeopardize the soundness or safety of the property, impair any easement, or interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of the property.

(c) Subject to the provisions of the declaration, nonmaterial additions to or alterations of the common elements or units, including, without limitation, additions to or alterations of a unit made within the unit or within a limited common element appurtenant to and for the exclusive use of the unit, shall require approval only by the board, which shall not unreasonably withhold the approval, and such percentage, number, or group of unit owners as may be required by the declaration or bylaws; provided that the installation of solar energy devices shall be allowed on single-family residential dwellings or townhouses pursuant to the provisions in section 196-7.

As used in this subsection:

"Nonmaterial additions and alterations" means an addition to or alteration of the common elements or a unit that does not jeopardize the soundness or safety of the property, reduce the value thereof, impair any easement, detract from the appearance of the project, interfere with or deprive any nonconsenting owner of the use or enjoyment of any part of property, or directly affect any nonconsenting owner.

"Solar energy device" means any new identifiable facility, equipment, apparatus, or the like which makes use of solar energy for heating, cooling, or reducing the use of other types of energy dependent upon fossil fuel for its generation; provided that if the equipment sold cannot be used as a solar device without its incorporation with other equipment, it shall be installed in place and be ready to be made operational in order to qualify as a "solar energy device"; provided further that "solar energy device" shall not include skylights or windows.

"Townhouse" means a series of individual houses, having architectural unity and a common wall between each unit, provided that each unit extends from the ground to the roof.

(d) Notwithstanding any other provisions to the contrary in this chapter or in any declaration or bylaws:

(1) Regarding the installment of telecommunications equipment:

(A) The board shall have the authority to install or cause the installation of antennas, conduits, chases, cables, wires, and other television signal distribution and telecommunications equipment upon the common elements of the project; provided that the same shall not be installed upon any limited common element without the consent of the owner or owners of the unit or units for the use of which the limited common element is reserved; and

(B) The installation of antennas, conduits, chases, cables, wires, and other television signal distribution and telecommunications equipment upon the common elements by the board shall not be deemed to alter, impair, or diminish the common interest, common elements, and easements appurtenant to each unit, or to be a structural alteration or addition to any building constituting a material change in the plans of the project filed in accordance with sections 514B-33 and 514B-34; provided that no such installation shall directly affect any nonconsenting unit owner; and

(2) Regarding the abandonment of telecommunications equipment:

- (A) The board shall be authorized to abandon or change the use of any television signal distribution and telecommunications equipment due to technological or economic obsolescence or to provide an equivalent function by different means or methods; and
- (B) The abandonment or change of use of any television signal distribution or telecommunications equipment by the board due to technological or economic obsolescence or to provide an equivalent function by different means or methods shall not be deemed to alter, impair, or diminish the common interest, common elements, and easements appurtenant to each unit or to be a structural alteration or addition to any building constituting a material change in the plans of the project filed in accordance with sections 514B-33 and 514B-34.

As used in this subsection:

"Directly affect" means the installation of television signal distribution and telecommunications equipment in a manner which would specially, personally, and adversely affect a unit owner in a manner not common to the unit owners as a whole.

"Television signal distribution" and "telecommunications equipment" shall be construed in their broadest possible senses in order to encompass all present and future forms of communications technology.

**[§514B-141] Tort and contract liability; tolling of limitation period.** (a) A unit owner is not liable, solely by reason of being a unit owner, for any injury or damage arising out of the condition or use of the common elements. Neither the association nor any unit owner except the developer is liable for that developer's torts in connection with any part of the condominium that that developer has the responsibility to maintain.

(b) An action alleging a wrong done by the association, including an action arising out of the condition or use of the common elements, may be maintained only against the association and not against any unit owner. If the wrong occurred during any period of developer control and the association gives the developer reasonable notice of and an opportunity to defend against the action, the developer who then controlled the association is liable to the association or to any unit owner for:

- (1) All tort losses not covered by insurance suffered by the association or that unit owner; and
- (2) All costs that the association would not have incurred but for a breach of contract or other wrongful act or omission, as the same may be established through adjudication.

Whenever the developer is liable to the association under this section, the developer is also liable for all expenses of litigation, including reasonable attorneys' fees, incurred by the association.

(c) Any statute of limitation affecting the association's right of action against a developer is tolled until the period of developer control terminates. A unit owner is not precluded from maintaining an action contemplated by this section because the unit owner is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by section 514B-147.

**[§514B-142] Aging in place; limitation on liability.** (a) The association, its directors, unit owners, and their agents and tenants, acting through the board, shall not have any legal responsibility or legal liability, with respect to any actions and recommendations the board takes on any report, observation, or complaint made, or with respect to any recommendation or referral given, which relates to an elderly unit owner who, may require services and assistance to maintain independent living in the unit in which the elderly unit owner resides so that the elderly unit owner will not pose any harm to self or to others, and will not be disruptive to the condominium community because of the following problems of aging and aging in place:

- (1) The inability to clean and maintain an independent unit;
- (2) Mental confusion;
- (3) Abusing others;
- (4) Inability to care for oneself;
- (5) Inability to arrange for home care;
- (6) Loneliness and neglect; or
- (7) Inappropriate requests of others for assistance.

For purposes of this section, "elderly" means age sixty-two and older.

(b) Upon a report, observation, or complaint relating to an elderly unit owner aging or aging in place which notes a problem similar in nature to the problems enumerated in subsection (a), the board, in good faith, and without legal responsibility or liability, may request a functional assessment regarding the condition of an elderly unit owner as well as recommendations for the services which the elderly unit owner may require to maintain a level of independence that enables the owner to avoid any harm to self or to others, and to avoid disruption to the condominium community. The board, upon request or unilaterally, and without legal responsibility or liability, may recommend available services to an elderly unit owner which might enable the elderly unit owner to maintain a level of independent living with assistance, enabling in turn, the elderly unit owner to avoid any harm to self or others, and to avoid disruption to the condominium community.

(c) There is no affirmative duty on the part of the association, its board, the unit owners, or their agents or tenants to request or require an assessment and recommendations with respect to an elderly unit owner when the elderly unit owner may be experiencing the problems related to aging and aging in place enumerated in subsection (a). The association, its board, unit owners, and their agents and tenants shall not be legally responsible or liable for not requesting or declining to request a functional assessment of, and recommendations for, an elderly unit owner regarding problems relating to aging and aging in place.

(d) If an elderly unit owner ignores or rejects a request for or the results from an assessment and recommendations, the association, with no liability for cross-claims or counterclaims, may file appropriate information, pleadings, notices, or the like, with appropriate agencies or courts to seek an appropriate resolution for the condominium community and for the elderly unit owner.

(e) Costs and fees for assessments, recommendations, and actions contemplated in this section shall be as set forth in the declaration or bylaws.

(f) This section shall not be applicable to any condominium that seeks to become licensed as an assisted living facility pursuant to chapter 90, title 11, Hawaii Administrative Rules, as amended.

**§514B-143 Insurance.** (a) Unless otherwise provided in the declaration or bylaws, the association shall purchase and at all times maintain the following:

- (1) Property insurance:
  - (A) On the common elements;
  - (B) Providing coverage for special form causes of loss; and
  - (C) In a total amount of not less than the full insurable replacement cost of the insured property, less deductibles, but including coverage for the increased costs of construction due to building code requirements, at the time the insurance is purchased and at each renewal date;
- (2) Commercial general liability insurance against claims and liabilities arising in connection with the ownership, existence, use, or management of the property in a minimum amount of \$1,000,000, or a greater amount deemed sufficient in the judgment of the board;
- (3) A fidelity bond, as follows:
  - (A) An association with more than five dwelling units shall obtain and maintain a fidelity bond covering persons, including the managing agent and its employees who control or disburse funds of the association, in an amount equal to \$500 multiplied by the number of units; provided that the amount of the fidelity bond required by this paragraph shall not be less than \$20,000 nor greater than \$200,000; and
  - (B) All management companies that are responsible for the funds held or administered by the association shall be covered by a fidelity bond as provided in section 514B-132(a)(3). The association shall have standing to make a loss claim against the bond of the managing agent as a party covered under the bond;

and

- (4) The board shall obtain directors and officers liability coverage at a level deemed reasonable by the board, if not otherwise limited by the declaration or bylaws.
  - (b) If a building contains attached units, the insurance maintained under subsection (a)(1), to the extent reasonably available, shall include the units, the limited common elements, except as otherwise determined by the board, and the common elements. The insurance need not cover improvements and betterments to the units installed by unit owners, but if improvements and betterments are covered, any increased cost may be assessed by the association against the units affected.

For the purposes of this section, "improvements and betterments" means all decorating, fixtures, and furnishings installed or added to and located within the boundaries of the unit, including electrical fixtures, appliances, air conditioning and heating equipment, water heaters, or built-in cabinets installed by unit owners.

(c) If a project contains detached units, then notwithstanding the requirement in this section that the association obtain the requisite coverage, if the board determines that it is in the best interest of the association to do so, the insurance to be maintained under subsection (a)(1) may be obtained separately for each unit by the unit owners; provided that the requirements of subsection (a)(1) shall be met; and provided further that evidence of such insurance coverage shall be delivered annually to the association. In such event, the association shall be named as an additional insured.

(d) The board, in the case of a claim for damage to a unit or the common elements, may:

- (1) Pay the deductible amount as a common expense;
  - (2) After notice and an opportunity for a hearing, assess the deductible amount against the owners who caused the damage or from whose units the damage or cause of loss originated; or
  - (3) Require the unit owners of the units affected to pay the deductible amount.
- (e) The declaration, bylaws, or the board may require the association to carry any other insurance, including workers' compensation, employment practices, environmental hazards, and equipment breakdown, that the board considers appropriate to protect the association, the unit owners, or officers, directors, or agents of the association. Flood insurance shall also be maintained if the property is located in a special flood hazard area as delineated on flood maps issued by the Federal Emergency Management Agency. The flood insurance policy shall comply with the requirements of the National Flood Insurance Program and the Federal Insurance Administration.

(f) Any loss covered by the property policy under subsection (a)(1) shall be adjusted by and with the association. The insurance proceeds for that loss shall be payable to the association, or to an insurance trustee designated by the association for that purpose. The insurance trustee or the association shall hold any insurance proceeds in trust for unit owners and secured parties as their interests may appear.

(g) The board, with the vote or written consent of a majority of the owners, may require unit owners to obtain reasonable types and levels of insurance. The liability of a unit owner shall include but not be limited to the deductible of the owner whose unit was damaged, any damage not covered by insurance required by this subsection, as well as the decorating, painting, wall and floor coverings, trim, appliances, equipment, and other furnishings.

If the unit owner does not purchase or produce evidence of insurance requested by the board, the directors may, in good faith, purchase the insurance coverage and charge the reasonable premium cost back to the unit owner. In no event is the association or board liable to any person either with regard to the failure of a unit owner to purchase insurance or a decision by the board not to purchase the insurance for the owner, or with regard to the timing of its purchase of the insurance or the amounts or types of coverages obtained.

(h) The provisions of this section may be varied or waived in the case of a project in which all units are restricted to nonresidential use.

**[§514B-144] Association fiscal matters; assessments for common expenses.** (a) Assessments shall be made based on a budget adopted and distributed or made available to unit owners at least annually by the board.

(b) Except for assessments under subsections (c), (d), and (e), all common expenses shall be assessed against all the units in accordance with the allocations under section 514B-41. Any past due common expense assessment or installment thereof shall bear interest at the rate established by the association, provided that the rate shall not exceed eighteen per cent per year.

(c) Assessments to pay a judgment against the association under section 514B-147(a) may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense allocations under section 514B-41.

(d) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against such owner's unit.

(e) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

(f) In the case of a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the latter for the grantor's share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. Any such grantor or grantee is, however, entitled to a statement from the board, either directly or through its managing agent or resident manager, setting forth the amount of the unpaid assessments against the grantor, and except as to the amount of subsequently dishonored checks mentioned in such statement as having been received within the thirty-day period immediately preceding the date of such statement, the grantee is not liable for, nor is the unit conveyed subject to a lien for, any unpaid assessments against the grantor in excess of the amount therein set forth.

(g) No unit owner may exempt the unit owner from liability for the unit owner's contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of the unit owner's unit. Subject to such terms and conditions as may be specified in the declaration or bylaws, any unit owner, by conveying his or her unit and common interest to the association on behalf of all other unit owners, may exempt himself or herself from common expenses thereafter accruing.

(h) The board, either directly or through its managing agent or resident manager, shall notify the unit owners in writing of maintenance fee increases at least thirty days prior to such an increase.

**§514B-145 Association fiscal matters; collection of unpaid assessments from tenants or rental agents.** (a) If the owner of a unit rents or leases the unit and is in default for thirty days or more in the payment of the unit's share of the common expenses, the board, for as long as the default continues, may demand in writing and receive each month from any tenant occupying the unit or rental agent renting the unit, an amount sufficient to pay all sums due from the unit owner to the association, including interest, if any, but the amount shall not exceed the tenant's rent due each month. The tenant's payment under this section shall discharge that amount of payment from the tenant's rent obligation, and any contractual provision to the contrary shall be void as a matter of law.

(b) Before taking any action under this section, the board shall give to the delinquent unit owner written notice of its intent to collect the rent owed. The notice shall:

- (1) Be sent both by first-class and certified mail;
- (2) Set forth the exact amount the association claims is due and owing by the unit owner; and
- (3) Indicate the intent of the board to collect such amount from the rent, along with any other amounts that become due and remain unpaid.

(c) The unit owner shall not take any retaliatory action against the tenant for payments made under this section.

(d) The payment of any portion of the unit's share of common expenses by the tenant pursuant to a written demand by the board is a complete defense, to the extent of the amount

demanded and paid by the tenant, in an action for nonpayment of rent brought by the unit owner against a tenant.

(e) The board may not demand payment from the tenant pursuant to this section if:

(1) A commissioner or receiver has been appointed to take charge of the premises pending a mortgage foreclosure;

(2) A mortgagee is in possession pending a mortgage foreclosure; or

(3) The tenant is served with a court order directing payment to a third party.

(f) In the event of any conflict between this section and any provision of chapter 521, the conflict shall be resolved in favor of this section; provided that if the tenant is entitled to an offset of rent under chapter 521, the tenant may deduct the offset from the amount due to the association, up to the limits stated in chapter 521. Nothing herein precludes the unit owner or tenant from seeking equitable relief from a court of competent jurisdiction or seeking a judicial determination of the amount owed.

(g) Before the board may take the actions permitted under subsection (a), the board shall adopt a written policy providing for the actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a majority of the unit owners.

**[§514B-146] Association fiscal matters; lien for assessments.** *[Repeal and reenactment on December 31, 2007. L 2005, c 93, pt of §7.]* (a) All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit with priority over all other liens, except:

(1) Liens for taxes and assessments lawfully imposed by governmental authority against the unit; and

(2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association, and costs and expenses including attorneys' fees provided in such mortgages.

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association, in like manner as a mortgage of real property. In any such foreclosure, the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed. The managing agent or board, acting on behalf of the association, unless prohibited by the declaration, may bid on the unit at foreclosure sale, and acquire and hold, lease, mortgage, and convey the unit. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.

(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or assessments by the association chargeable to the unit which became due prior to the acquisition of title to the unit by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or

other purchaser of the unit shall be deemed to acquire title and shall be required to pay the unit's share of common expenses and assessments beginning:

- (1) Thirty-six days after the order confirming the sale to the purchaser has been filed with the court;
- (2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser;
- (3) Thirty days after the public sale in a nonjudicial power of sale foreclosure pursuant to section 667-5; or
- (4) Upon the recording of the instrument of conveyance;

whichever occurs first; provided that the mortgagee of record or other purchaser of the unit shall not be deemed to acquire title under paragraph (1), (2), or (3), if transfer of title is delayed past the thirty-six days specified in paragraph (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the unit shall be deemed to acquire title upon recordation of the instrument of conveyance.

(c) No unit owner shall withhold any assessment claimed by the association. A unit owner who disputes the amount of an assessment may request a written statement clearly indicating:

- (1) The amount of common expenses included in the assessment, including the due date of each amount claimed;
- (2) The amount of any penalty, late fee, lien filing fee, and any other charge included in the assessment;
- (3) The amount of attorneys' fees and costs, if any, included in the assessment;
- (4) That under Hawaii law, a unit owner has no right to withhold assessments for any reason;
- (5) That a unit owner has a right to demand mediation or arbitration to resolve disputes about the amount or validity of an association's assessment, provided the unit owner immediately pays the assessment in full and keeps assessments current; and
- (6) That payment in full of the assessment does not prevent the owner from contesting the assessment or receiving a refund of amounts not owed.

Nothing in this section shall limit the rights of an owner to the protection of all fair debt collection procedures mandated under federal and state law.

(d) A unit owner who pays an association the full amount claimed by the association may file in small claims court or require the association to mediate to resolve any disputes concerning the amount or validity of the association's claim. If the unit owner and the association are unable to resolve the dispute through mediation, either party may file for arbitration under section 514B-162; provided that a unit owner may only file for arbitration if all amounts claimed by the association are paid in full on or before the date of filing. If the unit owner fails to keep all association assessments current during the arbitration, the association may ask the arbitrator to temporarily suspend the arbitration proceedings. If the unit owner pays all association assessments within thirty days of the date of suspension, the unit owner may ask the

arbitrator to recommence the arbitration proceedings. If the owner fails to pay all association assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The unit owner shall be entitled to a refund of any amounts paid to the association which are not owed.

(e) In conjunction with or as an alternative to foreclosure proceedings under subsection (a), where a unit is owner-occupied, the association may authorize its managing agent or board to, after sixty days' written notice to the unit owner and to the unit's first mortgagee of the nonpayment of the unit's share of the common expenses, terminate the delinquent unit's access to the common elements and cease supplying a delinquent unit with any and all services normally supplied or paid for by the association. Any terminated services and privileges shall be restored upon payment of all delinquent assessments but need not be restored until payment in full is received.

(f) Before the board or managing agent may take the actions permitted under subsection (e), the board shall adopt a written policy providing for such actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a majority of the unit owners.

(g) Subject to this subsection, and subsections (h) and (i), the board may specially assess the amount of the unpaid regular monthly common assessments for common expenses against a person who, in a judicial or nonjudicial power of sale foreclosure, purchases a delinquent unit; provided that:

- (1) A purchaser who holds a mortgage on a delinquent unit that was recorded prior to the filing of a notice of lien by the association and who acquires the delinquent unit through a judicial or nonjudicial foreclosure proceeding, including purchasing the delinquent unit at a foreclosure auction, shall not be obligated to make, nor be liable for, payment of the special assessment as provided for under this subsection; and
- (2) A person who subsequently purchases the delinquent unit from the mortgagee referred to in paragraph (1) shall be obligated to make, and shall be liable for, payment of the special assessment provided for under this subsection; and provided further that the mortgagee or subsequent purchaser may require the association to provide at no charge a notice of the association's intent to claim lien against the delinquent unit for the amount of the special assessment, prior to the subsequent purchaser's acquisition of title to the delinquent unit. The notice shall state the amount of the special assessment, how that amount was calculated, and the legal description of the unit.

(h) The amount of the special assessment assessed under subsection (g) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the six months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure. In no event shall the amount of the special assessment exceed the sum of \$1,800.

(i) For purposes of subsections (g) and (h), the following definitions shall apply, unless the context requires otherwise:

"Completion" means:

- (1) In a nonjudicial power of sale foreclosure, when the affidavit required under section 667-5 is filed; and

- (2) In a judicial foreclosure, when a purchaser is deemed to acquire title pursuant to subsection (b).

"Regular monthly common assessments" does not include:

- (1) Any other special assessment, except for a special assessment imposed on all units as part of a budget adopted pursuant to section 514B-148;
  - (2) Late charges, fines, or penalties;
  - (3) Interest assessed by the association;
  - (4) Any lien arising out of the assessment; or
  - (5) Any fees or costs related to the collection or enforcement of the assessment, including attorneys' fees and court costs.
- (j) The cost of a release of any lien filed pursuant to this section shall be paid by the party requesting the release.

**[§514B-147] Association fiscal matters; other liens affecting the condominium.** (a) Except as provided in subsection (b), a judgment for money against the association, if recorded, is not a lien on the common elements, but is a lien in favor of the judgment lienholder against the common expense funds of the association. No other property of a unit owner is subject to the claims of creditors of the association.

(b) Whether perfected before or after the creation of the condominium, if a lien, other than a mortgage (including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium), becomes effective against two or more units, the unit owner of an affected unit may pay to the lienholder the amount of the lien attributable to the owner's unit, and the lienholder, upon receipt of payment, shall promptly deliver a release of the lien covering that unit. The amount of the payment shall be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(c) A judgment against the association shall be indexed in the name of the condominium and the association and, when so indexed, is notice of the lien against the units.

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

- (1) The estimated revenues and operating expenses of the association;
- (2) Information as to whether the budget has been prepared on a cash or accrual basis;
- (3) The total replacement reserves of the association as of the date of the budget;
- (4) The estimated replacement reserves the association will require to maintain the property based on a reserve study performed by the association;
- (5) A general explanation of how the estimated replacement reserves are computed;
- (6) The amount the association must collect for the fiscal year to fund the estimated replacement reserves; and
- (7) Information as to whether the amount the association must collect for the fiscal year to fund the estimated replacement reserves was calculated using a per cent funded or cash flow plan. The method or plan shall not circumvent the estimated

replacement reserves amount determined by the reserve study pursuant to paragraph (4).

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

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

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

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

(e) Except in emergency situations or with the approval of a majority of the unit owners, a board may not exceed its total adopted annual operating budget by more than twenty per cent during the fiscal year to which the budget relates. Before imposing or collecting an assessment under this subsection that has not been approved by a majority of the unit owners, the board shall adopt a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment.

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

- (1) Any requirements in an association's declaration, bylaws, or any other association documents which require the association to collect more than fifty per cent of reserve requirements; or
- (2) Any provisions relating to upgrading the common elements, such as additions, improvements, and alterations to the common elements.

(g) Subject to the procedures of section 514B-157 and any rules adopted by the commission, any unit owner whose association board fails to comply with this section may enforce compliance by the board. In any proceeding to enforce compliance, a board that has not prepared an annual operating budget and reserve study shall have the burden of proving it has complied with this section.

(h) As used in this section:

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

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

"Emergency situation" means any extraordinary expenses:

- (1) Required by an order of a court;
- (2) Necessary to repair or maintain any part of the property for which the association is responsible where a threat to personal safety on the property is discovered;
- (3) Necessary to repair any part of the property for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget;
- (4) Necessary to respond to any legal or administrative proceeding brought against the association that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget; or
- (5) Necessary for the association to obtain adequate insurance for the property which the association must insure.

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

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

**[§514B-149] Association fiscal matters; handling and disbursement of funds.** (a) The funds in the general operating account of the association shall not be commingled with funds of other activities such as lease rent collections, rental, time share, and assisted living facility operations, nor shall a managing agent commingle any association funds with the managing agent's own funds.

(b) For purposes of subsection (a), lease rent collections and rental operations shall not include the rental or leasing of common elements that is conducted on behalf of the association or the collection of ground lease rents from individual unit owners of a project and the payment of such ground lease rents to the ground lessor if:

- (1) The collection is allowed by the provisions of the declaration, bylaws, master deed, master lease, or individual unit leases of the project;
- (2) A management contract requires the managing agent to collect ground lease rents from the individual unit owners and pay the ground lease rents to the ground lessor;
- (3) The system of lease rent collection has been approved by a majority vote of all unit owners at a meeting of the association; and
- (4) The managing agent or association does not pay ground lease rent to the ground lessor in excess of actual ground lease rent collected from individual unit owners.

- (c) (1) All funds collected by an association, or by a managing agent for any association, shall be:
  - (A) Deposited in a financial institution, including a federal or community credit union, located in the State, pursuant to a resolution adopted by the board, and whose deposits are insured by an agency of the United States government;
  - (B) Held by a corporation authorized to do business under article 8 of chapter 412;
  - (C) Held by the United States Treasury; or
  - (D) Purchased in the name of and held for the benefit of the association through a securities broker that is registered with the Securities and Exchange Commission, that has an office in the State, and the accounts of which are held by member firms of the New York Stock Exchange or National Association of Securities Dealers and insured by the Securities Insurance Protection Corporation.
- (2) All funds collected by an association, or by a managing agent for any association, shall be invested only in:
  - (A) Deposits, investment certificates, savings accounts, and certificates of deposit;
  - (B) Obligations of the United States government, the State of Hawaii, or their respective agencies; provided that those obligations shall have stated maturity dates no more than ten years after the purchase date unless approved otherwise by a majority vote of the unit owners at an annual or special meeting of the association or by written consent of a majority of the unit owners; or
  - (C) Mutual funds comprised solely of investments in the obligations of the United States government, the State of Hawaii, or their respective agencies; provided that those obligations shall have stated maturity dates no more than ten years after the purchase date unless approved otherwise by a majority vote of the unit owners at an annual or special meeting of the association or by written consent of a majority of the unit owners;

provided that before any investment longer than one year is made by an association, the board must approve the action; and provided further that the board must clearly disclose to owners all investments longer than one year at each year's association annual meeting.

Records of the deposits and disbursements shall be disclosed to the commission upon request. All funds collected by an association shall only be disbursed by employees of the association under the supervision of the association's board. All funds collected by a managing agent from an association shall be held in a client trust fund account and shall be disbursed only by the managing agent or the managing agent's employees under the supervision of the association's board.

(d) A managing agent or board shall not, by oral instructions over the telephone, transfer association funds between accounts, including but not limited to the general operating account and reserve fund account.

(e) A managing agent shall keep and disburse funds collected on behalf of the condominium owners in strict compliance with any agreement made with the condominium owners, chapter 467, the rules of the commission, and all other applicable laws.

(f) Any person who embezzles or knowingly misapplies association funds received by a managing agent or association shall be guilty of a class C felony.

**[§514B-150] Association fiscal matters; audits, audited financial statement.** (a) The association shall require an annual audit of the association financial accounts and no less than one annual unannounced verification of the association's cash balance by a public accountant; provided that if the association is comprised of less than twenty units, the annual audit and the annual unannounced cash balance verification may be waived by a majority vote of all unit owners taken at an association meeting.

(b) The board shall make available a copy of the annual audit to each unit owner at least thirty days prior to the annual meeting which follows the end of the fiscal year. The board shall not be required to submit a copy of the annual audit report to an owner if the proxy form issued pursuant to section 514B-123(d) is not marked to indicate that the owner wishes to obtain a copy of the report. If the annual audit has not been completed by that date, the board shall make available:

- (1) An unaudited year end financial statement for the fiscal year to each unit owner at least thirty days prior to the annual meeting; and
- (2) The annual audit to all owners at the annual meeting, or as soon as the audit is completed, but not later than six months after the annual meeting.

(c) If the association's fiscal year ends less than two months prior to the convening of the annual meeting, the year-to-date unaudited financial statement may cover the period from the beginning of the association's fiscal year to the end of the month preceding the date on which notice of the annual meeting is mailed.

**§514B-151 Association fiscal matters; lease rent renegotiation.** (a) Notwithstanding any provision in the declaration or bylaws, any lease or sublease of the real estate or of a unit, or of an undivided interest in the real estate to a unit owner, whenever any lease or sublease of the real estate, a unit, or an undivided interest in the real estate to a unit owner provides for the periodic renegotiation of lease rent thereunder, the association shall represent the unit owners in all negotiations and proceedings, including but not limited to appraisal or arbitration, for the determination of lease rent; provided that the association's representation in the renegotiation of lease rent shall be on behalf of at least two lessees. All costs and expenses incurred in such representation shall be a common expense of the association.

(b) Notwithstanding subsection (a), if some, but not all of the unit owners have already purchased the leased fee interest appurtenant to their units as of the earlier of any date specified in the lease or sublease for the commencement of lease rent renegotiation or nine months prior to the commencement of the term for which lease rent is to be renegotiated, all costs and expenses of the renegotiation shall be assessed to the remaining lessees whose lease rent is to be renegotiated in the same proportion that the common interest appurtenant to each lessee's unit bears to the common interest appurtenant to all remaining lessees' units whose lease rent is to be renegotiated. The unpaid amount of this assessment shall constitute a lien upon the lessee's unit, which may be collected in accordance with section 514B-146 in the same manner as an unpaid common expense.

(c) In any project where the association is a lessor or sublessor, the association shall fulfill its obligations under this section by appointing independent counsel to represent the lessees in the negotiations and proceedings related to the rent renegotiation. The lessees' counsel shall act on behalf of the lessees in accordance with the vote or written consent of a majority of the lessees casting ballots or submitting written consents as determined by the ratio that the common interest appurtenant to each lessee's unit bears to the total common interest appurtenant to the units of participating lessees. Nothing in this subsection shall be interpreted to preclude the lessees from making a decision (by the vote or written consent of a majority of the lessees as described above) to retain other counsel or additional professional advisors as may be reasonably necessary or appropriate to complete the negotiations and proceedings. In the event of a deadlock among the lessees or other inability to proceed with the rent renegotiation on behalf of the lessees, the lessees' counsel may apply to the circuit court of the judicial circuit in which the condominium is located for instructions. The association shall not instruct or direct the lessees' counsel or other professional advisors. All costs and expenses incurred under this subsection shall be assessed by the association to the lessees as provided in subsection (a) or (b), as may be applicable.

(d) As used in this section, "lessees" or "remaining lessees" means all unit owners who have not purchased the leased fee interest appurtenant to their units as of the earlier of any date specified in the lease or sublease for the commencement of lease rent negotiation or nine months prior to the commencement of the term for which the lease rent is to be renegotiated. The board's allocation of expenses under this section shall be final and binding in the absence of a determination that the board abused its discretion.

**[§514B-152] Association records; generally.** The association shall keep financial and other records sufficiently detailed to enable the association to comply with requests for information and disclosures related to resale of units. Except as otherwise provided by law, all financial and other records shall be made reasonably available for examination by any unit owner and the owner's authorized agents. Association records shall be stored on the island on which the association's project is located; provided that if original records, including but not limited to invoices, are required to be sent off-island, copies of the records shall be maintained on the island on which the association's project is located.

**[§514B-153] Association records; records to be maintained.** (a) An accurate copy of the declaration, bylaws, house rules, if any, master lease, if any, a sample original conveyance document, all public reports and any amendments thereto, shall be kept at the managing agent's office.

(b) The managing agent or board shall keep detailed, accurate records in chronological order, of the receipts and expenditures affecting the common elements, specifying and itemizing the maintenance and repair expenses of the common elements and any other expenses incurred. The managing agent or board shall also keep monthly statements indicating the total current delinquent dollar amount of any unpaid assessments for common expenses.

(c) Subject to section 514B-152, all records and the vouchers authorizing the payments and statements shall be kept and maintained at the address of the project, or elsewhere within the State as determined by the board.

(d) The developer or affiliate of the developer, board, and managing agent shall ensure that there is a written contract for managing the operation of the property, expressing the agreements of all parties including but not limited to financial and accounting obligations, services provided, and any compensation arrangements, including any subsequent amendments. Copies of the executed contract and any amendments shall be provided to all parties to the contract.

(e) The managing agent or resident manager or board shall keep an accurate and current list of members of the association and their current addresses, and the names and addresses of the vendees under an agreement of sale, if any. The list shall be maintained at a place designated by the board, and a copy shall be available, at cost, to any member of the association as provided in the declaration or bylaws or rules and regulations or, in any case, to any member who furnishes to the managing agent or resident manager or the board a duly executed and acknowledged affidavit stating that the list:

- (1) Will be used by such owner personally and only for the purpose of soliciting votes or proxies, or for providing information to other owners with respect to association matters; and
  - (2) Shall not be used by the owner or furnished to anyone else for any other purpose.
- A board may prohibit commercial solicitations.

**[§514B-154] Association records; availability; disposal; prohibitions.** (a) The association's most current financial statement shall be provided to any interested unit owner at no cost or on twenty-four-hour loan, at a convenient location designated by the board. The meeting minutes of the board of directors, once approved, for the current and prior year shall either:

- (1) Be available for examination by apartment owners at no cost or on twenty-four-hour loan at a convenient location at the project, to be determined by the board of directors; or
- (2) Be transmitted to any apartment owner making a request for the minutes, by the board of directors, the managing agent, or the association's representative, within fifteen days of receipt of the request; provided that the minutes shall be transmitted by mail, electronic mail transmission, or facsimile, by the means indicated by the owner, if the owner indicated a preference at the time of the request; and provided further that the owner shall pay a reasonable fee for administrative costs associated with handling the request.

Costs incurred by apartment owners pursuant to this subsection shall be subject to section 514B-105(d).

(b) Financial statements, general ledgers, the accounts receivable ledger, accounts payable ledgers, check ledgers, insurance policies, contracts, and invoices of the association for the duration those records are kept by the association and delinquencies of ninety days or more shall be available for examination by unit owners at convenient hours at a place designated by the board; provided that:

- (1) The board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interests of the association or its members or both; and
- (2) Owners shall pay for administrative costs in excess of eight hours per year.

Copies of these items shall be provided to any owner upon the owner's request; provided that the owner pays a reasonable fee for duplication, postage, stationery, and other administrative costs associated with handling the request.

(c) After any association meeting, and not earlier, unit owners shall be permitted to examine proxies, tally sheets, ballots, owners' check-in lists, and the certificate of election; provided that:

- (1) Owners shall make a request to examine the documents within thirty days after the association meeting;
- (2) The board may require owners to furnish to the association a duly executed and acknowledged affidavit stating that the information is requested in good faith for the protection of the interest of the association or its members or both; and
- (3) Owners shall pay for administrative costs in excess of eight hours per year.

If there are no requests to examine proxies and ballots, the documents may be destroyed thirty days after the association meeting. If there are requests to examine proxies and ballots, the documents shall be kept for an additional sixty days, after which they may be destroyed. Copies of tally sheets, owners' check-in lists, and the certificates of election from the most recent association meeting shall be provided to any owner upon the owner's request, provided that the owner pays a reasonable fee for duplicating, postage, stationery, and other administrative costs associated with handling the request.

(d) The managing agent shall provide copies of association records maintained pursuant to this section and sections 514B-152 and 514B-153 to owners, prospective purchasers and their prospective agents during normal business hours, upon payment to the managing agent of a reasonable charge to defray any administrative or duplicating costs. If the project is not managed by a managing agent, the foregoing requirements shall be undertaken by a person or entity, if any, employed by the association, to whom this function is delegated.

(e) Prior to the organization of the association, any unit owner shall be entitled to inspect as well as receive a copy of the management contract from the entity that manages the operation of the property.

(f) Owners may file a written request with the board to examine other documents. The board shall give written authorization or written refusal with an explanation of the refusal within thirty calendar days of receipt of the request.

(g) An association may comply with this part by making information available to unit owners, at the option of each unit owner and at no cost to the unit owner for downloading the information, through an Internet site.

(h) A managing agent retained by one or more associations may dispose of the records of any association which are more than five years old, except for tax records, which shall be kept for seven years, without liability if the managing agent first provides the board of the association affected with written notice of the managing agent's intent to dispose of the records if not retrieved by the board within sixty days, which notice shall include an itemized list of the records proposed to be disposed.

(i) No person shall knowingly make any false certificate, entry, or memorandum upon any of the books or records of any managing agent or association. No person shall knowingly alter, destroy, mutilate, or conceal any books or records of a managing agent or association.

**[§514B-155] Association as trustee.** With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person shall not be bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, shall be fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person shall not be bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

**[§514B-156] Pets.** (a) Any unit owner who keeps a pet in the owner's unit pursuant to a provision in the bylaws which allows owners to keep pets or in the absence of any provision in the bylaws to the contrary, upon the death of the animal, may replace the animal with another and continue to do so for as long as the owner continues to reside in the owner's unit or another unit subject to the same bylaws.

(b) Any unit owner who is keeping a pet pursuant to subsection (a), as of the effective date of an amendment to the bylaws which prohibits owners from keeping pets in their units, shall not be subject to the prohibition but shall be entitled to keep the pet and acquire new pets as provided in subsection (a).

(c) The bylaws may include reasonable restrictions or prohibitions against excessive noise or other problems caused by pets on the property and the running of pets at large in the common areas of the property. No animals described as pests under section 150A-2, or animals prohibited from importation under section 141-2, 150A-5, or 150A-6 shall be permitted.

(d) Whenever the bylaws do not prohibit unit owners from keeping animals as pets in their units, the bylaws shall not prohibit the tenants of the unit owners from keeping pets in the units rented or leased from the owners; provided that:

- (1) A unit owner consents in writing to allow the unit owner's tenant to keep a pet in the unit;
- (2) A tenant keeps only those types of pets that may be kept by unit owners.

The bylaws may allow each owner or tenant to keep only one pet in the unit.

(e) Any amendments to the bylaws that provide for exceptions to pet restrictions or prohibitions for preexisting circumstances shall apply equally to unit owners and tenants.

(f) Nothing in this section shall prevent an association from immediately acting to remove vicious animals to protect persons or property.

**[§514B-157] Attorneys' fees, delinquent assessments, and expenses of enforcement.**

(a) All costs and expenses, including reasonable attorneys' fees, incurred by or on behalf of the association for:

- (1) Collecting any delinquent assessments against any owner's unit;
- (2) Foreclosing any lien thereon; or
- (3) Enforcing any provision of the declaration, bylaws, house rules, and this chapter, or the rules of the real estate commission;

against an owner, occupant, tenant, employee of an owner, or any other person who may in any manner use the property, shall be promptly paid on demand to the association by such person or

persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association.

(b) If any claim by an owner is substantiated in any action against an association, any of its officers or directors, or its board to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an owner shall be awarded to such owner; provided that no such award shall be made in any derivative action unless:

- (1) The owner first shall have demanded and allowed reasonable time for the board to pursue such enforcement; or
- (2) The owner demonstrates to the satisfaction of the court that a demand for enforcement made to the board would have been fruitless.

If any claim by an owner is not substantiated in any court action against an association, any of its officers or directors, or its board to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an association shall be awarded to the association, unless before filing the action in court the owner has first submitted the claim to mediation, or to arbitration under subpart D, and made a good faith effort to resolve the dispute under any of those procedures.

#### D. ALTERNATIVE DISPUTE RESOLUTION

**[§514B-161] Mediation.** (a) At the request of any party to a dispute concerning or involving one or more unit owners and an association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of this chapter or the association's declaration, bylaws, or house rules, the parties to the dispute shall be required to participate in mediation. Each party shall be wholly responsible for its own costs of participating in mediation, unless both parties agree that one party shall pay all or a specified portion of the mediation costs. If a party refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorneys' fees.

(b) Nothing in subsection (a) shall be interpreted to mandate the mediation of any dispute involving:

- (1) Actions seeking equitable relief involving threatened property damage or the health or safety of association members or any other person;
- (2) Actions to collect assessments;
- (3) Personal injury claims; or
- (4) Actions against an association, a board, or one or more directors, officers, agents, employees, or other persons for amounts in excess of \$2,500 if insurance coverage under a policy of insurance procured by the association or its board would be unavailable for defense or judgment because mediation was pursued.

(c) If any mediation under this section is not completed within two months from commencement, no further mediation shall be required unless agreed to by the parties.

**§514B- Hearings.** *[Effective June 29, 2006, and shall be repealed on June 30, 2009. L 2006, c 277, §4]* (a) If a dispute is not resolved by mediation as provided in section 514B-161, in addition to any other legal remedies that may be available, any party that participated in the mediation may file a request for a hearing with the office of administrative hearings as follows:

- (1) The party requesting the hearing must be a board of directors of a registered association pursuant to section 514B-103 or a unit owner who is a member of a registered association pursuant to section 514B-103;
- (2) The request for hearing shall be filed within thirty days from the final day of mediation;
- (3) The request for hearing shall name one or more parties that participated in the mediation as an adverse party and identify the statutory provisions in dispute; and
- (4) The subject matter of the hearing before the hearings officer may include any matter that was the subject of the mediation pursuant to section 514B-161.

(b) The office of administrative hearings shall accept no more than thirty requests for hearing per fiscal year under this section.

(c) The party requesting the hearing shall pay a filing fee of \$25 to the department of commerce and consumer affairs, and the failure to do so shall result in the request for hearing being rejected for filing. All other parties shall file a response, accompanied by a filing fee of \$25, to the department of commerce and consumer affairs, within twenty days of being served with the request for hearing.

(d) The hearings officer appointed by the director of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review any request for hearing filed under subsection (a). The hearings officer shall have the power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue written decisions that shall be final and conclusive, unless a party adversely affected by the decision files an appeal in the circuit court under section 91-14.

(e) Rules of practice and procedure of the department of commerce and consumer affairs shall govern all proceedings brought under this section. The burden of proof, including the burden of producing the evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence.

(f) Hearings to review and make determinations upon any requests for hearings filed under subsection (a) shall commence within sixty days following the receipt of the request for hearing. The hearings officer shall issue written findings of fact, conclusions of law, and an order as expeditiously as practicable after the hearing has been concluded.

(g) Each party to the hearing shall bear the party's own costs, including attorney's fees, unless otherwise ordered by the hearings officer.

(h) Any party to a proceeding under this section who is aggrieved by a final decision of a hearings officer may apply for judicial review of that decision pursuant to section 91-14; provided that any party seeking judicial review pursuant to section 91-14 shall be responsible for the costs of preparing the record on appeal, including the cost of preparing the transcript of the hearing.

(i) The department of commerce and consumer affairs may adopt rules and forms, pursuant to chapter 91, to effectuate the purpose of this section and to implement its provisions.

**[§514B-162] Arbitration.** (a) At the request of any party, any dispute concerning or involving one or more unit owners and an association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of this chapter or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and of chapter 658A; provided that the rules of the arbitration service conducting the arbitration shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658A, chapter 658A shall prevail; and provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect.

(b) Nothing in subsection (a) shall be interpreted to mandate the arbitration of any dispute involving:

- (1) The real estate commission;
- (2) The mortgagee of a mortgage of record;
- (3) The developer, general contractor, subcontractors, or design professionals for the project; provided that when any person exempted by this paragraph is also a unit owner, a director, or managing agent, such person in those capacities, shall be subject to the provisions of subsection (a);
- (4) Actions seeking equitable relief involving threatened property damage or the health or safety of unit owners or any other person;
- (5) Actions to collect assessments which are liens or subject to foreclosure; provided that a unit owner who pays the full amount of an assessment and fulfills the requirements of section 514B-146 shall have the right to demand arbitration of the owner's dispute, including a dispute about the amount and validity of the assessment;
- (6) Personal injury claims;
- (7) Actions for amounts in excess of \$2,500 against an association, a board, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association or its board would be unavailable because action by arbitration was pursued; or
- (8) Any other cases which are determined, as provided in subsection (c), to be unsuitable for disposition by arbitration.

(c) At any time within twenty days of being served with a written demand for arbitration, any party so served may apply to the circuit court in the judicial circuit in which the condominium is located for a determination that the subject matter of the dispute is unsuitable for disposition by arbitration.

In determining whether the subject matter of a dispute is unsuitable for disposition by arbitration, a court may consider:

- (1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute;
- (2) Problems referred to the court where court regulated discovery is necessary;
- (3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter;
- (4) The fact that the matter to be arbitrated is only part of a dispute involving other parties or issues which are not subject to arbitration under this section; and
- (5) Any matters of dispute where disposition by arbitration, in the absence of complete judicial review, would not afford substantial justice to one or more of the parties.

Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed \$200.

(d) In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under subsection (b)(7), any party to an arbitration may file a complaint for declaratory relief against the involved insurer or insurers for a determination of whether insurance coverage is unavailable due to the pursuit of action by arbitration. The complaint shall be filed with the circuit court in the judicial circuit in which the condominium is located. The insurer or insurers shall file an answer to the complaint within twenty days of the date of service of the complaint and the issue shall be disposed of by the circuit court at a hearing to be held at the earliest available date; provided that the hearing shall not be held within twenty days from the date of service of the complaint upon the insurer or insurers.

(e) Notwithstanding any provision in this chapter to the contrary, the declaration, or the bylaws, the award of any costs, expenses, and legal fees by the arbitrator shall be in the sole discretion of the arbitrator and the determination of costs, expenses, and legal fees shall be binding upon all parties.

(f) The award of the arbitrator shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and shall be served by the arbitrator on each of the parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court of the judicial circuit in which the condominium is located for an order confirming the award. The court shall grant the order confirming the award pursuant to section 658A-22, unless the award is vacated, modified, or corrected, as provided in sections 658A-20, 658A-23, and 658A-24, or a trial de novo is demanded under subsection (h), or the award is successfully appealed under subsection (h). The record shall be filed with the motion to confirm award, and notice of the motion shall be served upon each other party or their respective attorneys in the manner required for service of notice of a motion.

(g) Findings of fact and conclusions of law, as requested by any party prior to the arbitration hearing, shall be promptly provided to the requesting party upon payment of the reasonable cost thereof.

(h) Any party to an arbitration under this section may apply to vacate, modify, or correct the arbitration award for the grounds set out in chapter 658A. All reasonable costs, expenses, and attorneys' fees on appeal shall be charged to the nonprevailing party.

**[§514B-163] Trial de novo and appeal.** (a) The submission of any dispute to an arbitration under section 514B-162 shall in no way limit or abridge the right of any party to a trial de novo.

(b) Written demand for a trial de novo by any party desiring a trial de novo shall be made upon the other parties within ten days after service of the arbitration award upon all parties and the trial de novo shall be filed in circuit court within thirty days of the written demand. Failure to meet these deadlines shall preclude a party from demanding a trial de novo.

(c) The award of arbitration shall not be made known to the trier of fact at a trial de novo.

(d) In any trial de novo demanded under this section, if the party demanding a trial de novo does not prevail at trial, the party demanding the trial de novo shall be charged with all reasonable costs, expenses, and attorneys' fees of the trial. When there is more than one party on one or both sides of an action, or more than one issue in dispute, the court shall allocate its award of costs, expenses, and attorneys' fees among the prevailing parties and tax such fees against those nonprevailing parties who demanded a trial de novo in accordance with the principles of equity.