The CAI Hawaii Legislative Action Committee Presents the

CAI Hawaii
COMMUNITY ASSOCIATIONS INSTITUTE

2023 Legislative Update

Review and Analysis of Legislative Enactments and Trends

Thursday • July 27, 2023
Noon to 1:30pm

Virtual Presentation
via GoToWebinar

Thursday, July 27, 2023
Program: Noon to 1:30 p.m.

2023 CAI LEGISLATIVE UPDATE WEBINAR

AGENDA

Opening Remarks

Speakers

- **Richard Emery**
  SB 855 and reserves generally
  SB 691 Efficiency standards
  SB 930 Landlord tenant
  Bills that didn't pass

- **Elaine Panlilio**

  SCR 48 and issues affecting availability of insurance
  HB 11 Time share
  SB 799 Time share
  SB 1057 Employers

- **John Morris**
  SB 729 REC curriculum
  HB 192 Lighting
  HB 217 Renovations
  SB 989 Drone/trespass
  HB 1091 Disclosure/shoreline
  How to sign up to testify at the legislature

- **Phil Nerney**
  SB 921 Statute of Repose/veto override
  SB 1024 Zero emission transportation
  SB 1534 Road usage fee
  HB 1509 and challenges to self-governance

Closing

CAI 2023 Legislative Update
July 27, 2023
Richard Emery

Act 62 - Reserve Study Obligations
Effective January 1, 2023

- Requires a developer's public report to contain a breakdown of annual maintenance fees, which includes annual reserve contributions based on a reserve study.
- Requires a "cash flow plan" to be a projection over a minimum term of thirty (not twenty) years.
- Requires annual budget to include estimated replacement reserves; provided that the reserve study shall be reviewed by an independent reserve study preparer; provided further that the reserve study shall be reviewed or updated at least every three years.

SB 855 - Reserve Study Obligations
Effective Upon Signature

The budget required under section 514B—144(a) shall include a summary with at least the following details:

(The easiest way to address this requirement is to include a cover page on the budget that defines all the statutory required disclosures below.)

SB 855 - Reserve Study Disclosures
Page 1

The budget required under section 514B—144(a) shall include a summary with at least the following details:

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

(2) Disclosure as to whether the budget has been prepared on a cash or accrual basis; (Existing.)

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

(Many older buildings having inadequate fire safety systems such as sprinklers. This new requirement mandates that fire safety systems be included in the reserve study, where applicable. It is the only case when the association can project a loan or special assessment to fund solely the life safety system.)

SB 855 - Reserve Study Disclosures
Page 2

(4) The balance of the total replacement reserves fund of the association as of the date of the budget; (Existing. The total amount in the reserve fund.)

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

SB 855 - Reserve Study Disclosures
Page 3

(6) A general explanation of how the estimated replacement reserves assessments are computed and detailing:

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

(B) Disclosure of any component of association property omitted from the reserve study and the basis for the omission; (A reserve study identifies all the components. If a component is believed to have a useful life longer than 30-years, it still must be disclosed. All components not included in the reserve study must be disclosed and the basis for omission.)

(C) Planned increases in the estimated replacement reserve assessments over the thirty-year plan; (Often a reserve study funding plan includes future increases in reserve study to contributions to make the funding plan work. Future increases to contributions in future years must be specifically identified in the budget summary.)

(D) Whether the actual estimated replacement reserves assessments for the prior year as defined in the study was less than the assessments provided for in the reserve study, and, if so, by how much, and explaining the impact of the lesser assessments on future estimated replacement reserves assessments; (Estimated replacement reserves are the reserve fund contributions. If for example, last year's reserve study stated the association would deposit $100,000 in the reserve fund, the association must confirm the amount it contributed to the fund, disclose a lesser amount, and disclose the effect the lower contributions have the current reserve study funding plan. Reserve contributions are specifically defined by a reserve study. Contributions are not left over cash after collecting maintenance fees and paying operating costs.)

SB 691 - Energy Efficiency Standards Effective 6/30/23

Allows the chief energy officer of the Hawaii state energy office to enforce minimum efficiency standards and adopt or amend efficiency standards. Sets minimum efficiency standards for portable electric spas, residential ventilating fans, toilets, urinals, and water coolers. Allows manufacturers to utilize the Home Ventilating Institute's certified products directory certification program to meet certain standards.

Failed Legislation
Hawaii Condo Under Attack

- Use of Proxies – Efforts to eliminate or restrict the use of proxies.
- Public Records Availability – Require condos to post on a state website all documents for up to 10-years.
- Ombudsman (Dispute Resolution) – Establish a government authority to resolve condo disputes.
- Mandatory Board Education – Mandatory curriculum to serve on the Board.

A Thought

If these proposed changes are so great, why not amend your own governing documents?

If Question, feel free to contact directly

Richard Emery, RS-8

richard.emery@associa.us

CAI 2023 LEGISLATIVE UPDATE
JULY 27, 2023
ELAINE PANLILIO

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CAI 2023 Legislative Update

July 27, 2023

John Morris

Act 149 (signed 6/29/23) SB 729 SD1 HD2 CD1

The powers and duties of the Real Estate Commission ("Commission") have been amended to require the Commission to: "*Develop a curriculum for leadership training for condominium boards of directors, including pertinent provisions of chapter 514B, association governing documents, and the fiduciary duties of board members*[.]" Section 2 of the bill also provides:

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

This bill addresses stated concerns that some board members may lack sufficient background to effectively discharge their fiduciary duties. Nevertheless, directors are legally obligated to perform to a standard set forth in law.

Section 514B-106(a), of the Hawaii Revised Statutes ("HRS") provides, in relevant part, that: "*In the performance of their duties, officers and members of the board shall owe the association a fiduciary duty and exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 414D.*"

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

> A director shall discharge the director's duties as a director, including the director's duties as a member of a committee:
> (1) In good faith;
> (2) In a manner that is consistent with the director's duty of loyalty to the corporation;
> (3) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
> (4) In a manner the director reasonably believes to be in the best interests of the corporation.

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

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

This bill as originally proposed would have established educational trust funds for not only condominium but non-condominium homeowner associations (421J) and cooperative housing corporations (421I). The bill also proposed to add requirements for directors of all types of governing bodies that:

(d) Within ninety days after being elected to the board of directors, the member shall certify in writing to the board of directors that the member has received and reviewed a copy of the corporation's articles of incorporation, bylaws, rules and regulations, and chapter 421I; provided that, for any member elected to the board of directors before the effective date of this Act, the member shall provide the written certification to the board of directors within ninety days of the effective date of this Act. The board of directors shall retain the member's written certification for the duration of the member's term.

(e) Within one year after being elected to the board of directors, the member shall obtain a board leader course completion certificate from a course approved by the real estate commission; provided that, for any member elected to the board of directors before the effective date of this Act, the member shall obtain the course completion certificate within one year of the effective date of this Act. The board of directors shall retain the member's course completion certificate for the duration of the member's term.

This would have been a significant burden for board members. At least one testifier suggested that every owner who sought to bring a complaint about how the owner's association was being managed and operated by the board should be required to provide similar confirmation that the owner had read all of the governing documents and completed a course certified by the real estate commission . . .

Act 225 (Signed 07/05/2023) HB 192 HD2 SD1 CD1

This bill may be of interest to those who use fluorescent lighting.

SECTION 1. The legislature finds that there have been many advances in the energy efficiency of lighting. Fluorescent bulbs were promoted in the 1980s because they are up to thirty-five per cent more energy efficient than the incandescent light fixtures widely in use at that time; however, further advances have been made with light-emitting diodes (LEDs) that are now up to eighty per cent more energy efficient than fluorescent bulbs and can last three to five times longer than fluorescent bulbs and thirty times longer than incandescent bulbs.

The legislature further finds that all fluorescent bulbs contain mercury, a toxic pollutant that bioaccumulates in the environment, can pollute air and water, and causes harm to wildlife and human health. The legislature notes that mercury-free alternatives exist for most of the thousands of products that contain mercury components.

The legislature believes that LEDs are a better alternative because they do not contain any mercury, are more energy efficient, and are the cheaper life-cycle cost lighting option for consumers and businesses. Phasing out the sale of mercury-containing bulbs in Hawaii will prevent additional toxic pollutants from being brought into the State's ecosystem, reduce energy use, and save consumer dollars.

Accordingly, the purpose of this Act is to prohibit the sale of certain fluorescent lamps in the State as a new manufactured product, with certain exemptions.

The act prohibits: (1) the sale of a screw or bayonet base type compact fluorescent lamp beginning January 1, 2025; and (2) the sale of a pin-base type compact fluorescent land or linear fluorescent lamp shall be prohibited beginning January 1, 2026. Exceptions are made for certain technical uses of fluorescent bulbs.

Act 177 (Signed 07/03/2023) HB 217 HD1 SD2 CD1

This bill applies to certain privately owned one- and two-story residences.

SECTION 1. The legislature finds that the costs of housing renovations in Hawaii are extremely high. These costs have further increased due to the impact of the coronavirus disease 2019 pandemic on building materials and supply chains. Hawaii's geographic location also adds to the cost of simple renovations due to shipping and high labor costs.

The legislature further finds that making a house accessible, renovating a bathroom, or modernizing a kitchen adds to home renovation costs and requires a licensed professional engineer or architect for the renovation based on certain cost amounts for work on a particular structure. The legislature also finds that the cost valuations for work on buildings, which are established by statute, are outdated and have not been updated since 1979.

The legislature recognizes that while safeguards for life, health, and property are critical, simple renovations should not require the approval of a licensed professional engineer or licensed architect. This work can be done proficiently by a professional draftsperson, engineering technician, or architectural technician. Past legislatures recognized the need to exempt certain building projects of lower values from chapter 464, Hawaii Revised Statutes (chapter 464), which regulates the practices of professional engineering, architecture, land surveying, and landscape architecture in the State. The legislature therefore finds that it is necessary to update the statute to reflect current valuation costs for work on buildings to qualify for an exemption from chapter 464.

In addition, the legislature finds that chapter 464 does not exempt building permit applicability, although the counties comply with the International Building Code and related codes as adopted by the state building code council. The codes include structural, electrical, and plumbing requirements. To help reduce the high costs of living in the State, updating the cost valuations of work on buildings should save homeowners between $2,000 and $6,000 on any given renovation project.

The purpose of this Act is to:

(1) Update the cost valuations of work on certain residences for the work to qualify for an exemption from the requirement under chapter 464 for plans and specifications to be prepared by a licensed engineer or architect; and

(2) Clarify work that is <u>not</u> exempt from the requirements of chapter 464.

Many condominium associations know that work owners perform within their units has the potential to adversely affect the common elements or other units. Fortunately, the following is not exempted from the requirements of chapter 464:

> *(3)* ***Any improvement resulting from rules established by*** *a landowner or* ***an association of owners for private property owned by the*** *landowner or* ***association of owners****."*

<u>Act 58 (Signed 06/05/23) SB 989 HD2</u>

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

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

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

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

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

(2) This section shall not apply if:

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

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

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

Act 231 (signed 07/06/2023) HB 1091 HD2 SD2 CD1

This bill addresses real property disclosures within shoreline areas. The legislature continues to identify climate change as the overriding challenge of the twenty-first century. As the findings below indicate, the legislature perceives that there should be "a sea level rise discount" in shoreline valuations.

SECTION 1. As reflected in Act 32, Session Laws of Hawaii 2017 (Act 32), the legislature recognizes that not only is climate change real, but it is also the overriding challenge of the twenty-first century and one of the priority issues of the legislature. Climate change poses immediate and long-term threats to the State's economy, sustainability, security, and residents' way of life.

The legislature recognized the existential threat of sea level rise to real property and amended section 508D-15, Hawaii Revised Statutes, to require mandatory seller disclosures in real property transactions to indicate that a parcel of residential real property lies within the sea level rise exposure area. Research published by the Intergovernmental Panel on Climate Change and the National Aeronautics and Space Administration shows that sea levels in Hawaii will continue to rise, but sea level rise has no detectable effect on valuations or sales data on real property. The lack of a sea level rise discount indicates that purchasers may be underprepared for the future challenges and implications of sea level rise and the ancillary effects of coastal erosion, future flooding, inundation, and storm surges.

This bill mandates additional seller disclosures in real estate transactions, as follows:

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

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

For condominiums and other homeowner associations. the areas for which the disclosure is required are most likely to be:

- The boundaries of a special flood hazard area as officially designated on flood maps promulgated by the National Flood Insurance Program of the Federal Emergency Management Agency for the purposes of determining eligibility for emergency flood insurance programs.

- The anticipated inundation areas designated on the department of defense's emergency management tsunami inundation maps;

- The sea level rise exposure area as designated by the Hawaii climate change mitigation and adaptation commission or its successor

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

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

PARTICIPATING IN THE LEGISLATIVE PROCESS

It Is Easy To Submit Testimony

. CAI encourages everyone to testify at the legislature. Every year, the legislature makes changes to the laws affecting condominiums and other homeowner associations. Often those changes are based on complaints by a relatively small percentage of the total number of association members. That is all the more reason to let your elected representatives know your views.

The way to find contact information for your legislators is through this link: https://www.capitol.hawaii.gov/fyl/

The way to testify on legislation is to register online through this link: https://www.capitol.hawaii.gov/account/register.aspx. The only information needed for you create an account though which you submit your testimony is your name, email address and a password.

Alternatively, simply type “Hawaii Legislature” into a search engine. The Legislature’s website is easy to navigate. Click “Submit Testimony” under the “Participate” heading. Enter a bill number on the next page.

Testimony can be as simple as clicking “Support” or “Oppose” on the testimony page. If desired, comments can be provided in a dialog box. The option to upload a pdf file of your testimony is also available.

Board members and owners should consider taking the time to testify. Legislators recognize that doing so takes time. Therefore, legislators do take the testimony of individuals into account in making decisions. As a result, minimal effort can pay significant dividends by providing legislators with a more complete view of the bills being considered. Please testify.

PHIL NERNEY'S SEGMENT

Those who regularly attend this annual webinar may recall that I sound a warning every year. The warning is that association self-governance is always under threat. This year, that threat has culminated in significant legislation.

Two task forces have been created. One will review planned community association law. The other will review condominium law. The bulk of my time will be devoted to issues that the task forces will inevitably consider. For those who are interested, the written materials provided to you include a 2017 article titled *Challenges to Condominium Self-Governance*. It is well-worth reading.

But first a story.

Governor Green's first veto was of a condominium-related bill. That bill nonetheless became law, because the legislature overrode the veto.

SB 921 was introduced at our request to address a rare but important issue. The issue is a condominium association's ability to assert a claim against a developer.

There are time limits to assert claims. One such limit is called a statute of limitations. A statute of limitations is a law that provides a defense to a claim if the claim is asserted too late. A late claim can sometimes be considered if a defendant waives, or does not raise, the issue of lateness.

Another such limit is called a statute of repose. A statute of repose bars a claim altogether. SB 921 concerns the statute of repose.

Before this legislative session, condominium law already provided that an "association's right of action against a developer is tolled until the period of developer control terminates". The question was whether that right was tolled beyond the date of the statute of repose.

> Tolling is a legal doctrine that allows for the pausing or delaying of the running of the period of time to assert a claim.

What this means is that the deadline to file a claim against a condominium developer is calculated starting from the point when the developer is no longer in control. That deadline, for construction defects, is two years after the date when a cause of action *accrues*.

In general, a cause of action accrues when someone knows, or should know, that a cause of action exists. Thus, a claim may still be viable even if the relevant facts are not discovered for some time.

Nonetheless, claims are not viable forever. In general, claims for construction defects are barred by the statute of repose after ten years. This is true whether or not the cause of action has accrued.

Now that SB 921 has become law, a condominium association can assert a claim against a developer up to two years after the period of developer control terminates, even if more than ten years have passed.

The interesting part of the story though is that the Governor's veto did not kill the bill. We received indications that the Senate might consider an override, so we encouraged that action. The Senate voted 24 to 1 to override the Governor's veto. That left the matter to the House. The House initially did not seem inclined to override the veto. We nonetheless encouraged the override and, with no time to spare, the House voted 45 to 4 (with 2 excused) to override the veto.

The moral of the story is that advocacy and engagement with the legislature is important and can produce results.

Next up are two electric vehicle-related bills.

First, **SB 1024** relates to zero emission transportation. Every part of state government is now directed to incorporate the zero emission goal into their plans. The Department of Transportation and the Hawaii State Energy Office are to develop plans "to ensure that the State's electrical charging capacity is sufficient to support the growing use of electric modes of transportation by providing for an increase of the State's electrical charging capacity".

What this likely means, in simple terms, is that associations will eventually be forced to provide electric vehicle charging capacity. The legislature has been focused on making associations enable electric vehicle charging for years.

CAI participated in a legislatively appointed working group in 2015. That group reported practical limitations inhibiting some associations from adding EV charging. It has, unfortunately, been necessary to repeatedly remind legislators of those findings in subsequent years. Passage of onerous mandates has been narrowly avoided in some years. CAI has supported EV charging requirements for new construction, but building industry advocates have opposed them.

Please, therefore, carefully consider how EV charging can be accommodated at your project. Mandates are likely to follow if industry fails to show leadership on this issue.

The second EV-related bill is **SB 1534**. That bill reinforces the fact that electric vehicles are becoming more prevalent on our roads. The State fuel tax yields less revenue as EV usage increases. A "per-mile road usage fee" is being implemented for EVs. This "is a first step in the eventual statewide transition to a per-mile usage charge for all vehicles[.]"

The transportation sector is changing, and associations, like the state government, will have to come to terms with the increasing prevalence of EVs. According to the U.S. Bureau of Labor Statistics, the Infrastructure Investment and Jobs Act, of 2021, allocated $7.5 billion to building out a nationwide charging network. It has been reported that automobile manufacturers are moving towards the production of electric vehicles. Ford reportedly intends to produce more than 2 million EVs annually by 2030. GM aims to have 20 types of EV available by 2025. Toyota promises 3.5 million EVs, per year, worldwide, by 2030. A significant percentage of the population lives in a condominium or a planned community association, so people will be bringing EVs home with them. Don't be surprised when they ask to be able to charge them.

And now, HB 1509.

HB 1509 provides for the formation of two task forces. The stated purpose of the bill is as follows:

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

What this means is that the first task force is going to determine whether planned community association law will become more like condominium law. The second task force is nominally to assess alternative dispute resolution systems applicable to condominiums.

The inspiration for the bill, though, is the effort to end association self-governance. A determined group testifies at the legislature, every year, to the effect that association living is characterized by out-of-control boards who are served by self-interested managers and attorneys.

What they want instead is minority rule, by activists, and granular government control of specific association functions. In past years, a "condominium czar" and a "Complaints and Enforcement Officer" have been proposed. The more neutral-sounding proposal for an ombudsman is often made. What it all means, though, is that a government official will tell associations what to do.

Stated differently, what they want is government-run housing.

Ask yourself: "Do you want that?"

With respect to enshrining minority rule, the prime target is the elimination of proxies. A typical story line is as follows: "The majority of people at the meeting voted for me but I lost."

The reason, of course, is that some people choose to provide a proxy to the Board or to some other person. Some people who give a proxy may be satisfied with the operation and governance of the association. Others may have a scheduling conflict. In all events, giving a proxy is a voluntary act that enables owners to express their support for the proxy holder.

People with *limited* support allege that they have *substantial* support, because they show up; and the interests of those who prefer to express support for another through a proxy are to be disenfranchised. Those favoring minority rule justify disenfranchisement by casting aspersions on proxy givers.

Arguments along the lines that proxy givers are ignorant, confused or unduly swayed by others are made to discount consideration of proxies as a decided choice made by free people. In that view, only activists matter.

The mere absence of problems, or the recognition of positive contributions by incumbents, may lead an owner to support a board the owner is happy with and does not want to change. It is certainly true that some people are glad that others may be willing to volunteer their time to their community.

As a purely theoretical matter, it might be nice if every owner was deeply engaged and participated personally and fully in every meeting of an association. Decades of experience, however, show that other priorities sometimes take precedence.

The question, then, is whether owners should be deprived of the opportunity to participate in the election of a board unless they show up to a meeting. In answering that question, it is worthwhile to note that the condominium form of ownership has grown exponentially over the past 60 years or so.

The current system has been in place for decades. The **1965** By-Laws of one of my clients provides for *proxy* voting. How has the condominium form of ownership flourished if proxy voting is so problematic?

Are people unhappy? Yes, scientifically valid surveys consistently show that approximately **10%** of owners are unhappy. Should that small *minority* rule?

The following results from CAI's 2020 Homeowner Satisfaction Survey are worth noting:

> For the eighth time in 15 years, Americans living in homeowners associations, condominiums, and housing cooperatives say they're overwhelmingly satisfied in their communities:
>
> 89% of residents rate their overall community association experience as very good or good (70%) or neutral (19%).*
>
> 89% say members of their elected governing board "absolutely" or "for the most part" serve the best interests of their communities.*
>
> 74% say their community managers provide value and support to residents and their associations.
>
> 94% say their association's rules protect and enhance property values (71%) or have a neutral effect (23%); only 4% say the rules harm property values.*
>
> Results from almost identical national surveys conducted in 2005, 2007, 2009, 2012, 2014, 2016, 2018, and 2020 are strikingly consistent, except 2020 saw an increase in three areas compared to 2018: overall experience, the role of the board, and perception of rules. Other results rarely vary a standard margin of error for national, demographically representative surveys.

If the system isn't broken, why fix it?

A separate question is whether it is constitutional to fundamentally change the system. The task forces will inevitably encounter that question if they seriously

consider the elimination of proxies and other wholesale changes to association governance.

Article I, Section 10, of the United States Constitution, prohibits the passage of any "Law impairing the Obligation of Contracts[.]" A federal court judge in Hawaii found a 2019 legislative act affecting condominium law to be: "unconstitutional because it violates Plaintiffs' rights under the Contracts Clause of the United States Constitution." Galima v. AOAO of Palm Court, Case 1:16-cv-00023-LEK-RT. That judge stated: "The Contracts Clause restricts the power of States to disrupt contractual arrangements."

This may be significant because the Supreme Court of Hawaii has also specified that: "Generally, the declaration and bylaws of a condominium serve as a contract between the condominium owners and the association, establishing the rules governing the condominium." Harrison v. Casa De Emdeko, Incorporated, 418 P.3d 559, 567 (2018). Changes the task forces might consider will be subject to Contract Clause analysis.

This may be all the more so with respect to planned community associations because the Supreme Court of Hawaii has recognized that planned community associations "are primarily creatures of common law." Lee v. Puamana Community Association, 128 P.3d 874, 888 (Haw. 2006). This means that they are primarily contractual arrangements.

The Supreme Court of Hawaii has also said this:

> [T]he right of private contract is no small part of the liberty of the citizen, and ... the usual and most important functions of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy.... [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. *Robinson v. Thurston,* 23 Haw. 777, 790–91 (Haw. Terr.1917) (Robertson, C.J., dissenting), rev'd 248 F. 420, 424 (9th Cir.1918) (adopting Chief Justice Robertson's dissent). [Kutkowski]

Thus, even though condominiums are creatures of statute, meaning they only exist because the legislature has created the condominium form of ownership through legislation, that enabling legislation has now created legal structures with a contractual basis.

There are, of course, other practical problems with restructuring association elections. For example, if an election is staged and set in advance of a meeting, then there can be no nominations from the floor. The dynamic potential of meetings will be drained.

The point, though, is that if you like what you have, be prepared to fight for it. The opponents of self-governance have achieved a great victory in the passage of HB 1509 and they will press for radical change when the task forces meet.

The motivation of some so-called activists is hard to discern. Others have a grudge.

Self-governance is inconvenient for people with a grudge. It is not usually possible to gain way by being petulant, so they want government to overcome and to overturn the decisions of democratically elected boards. In other words, they want a system in which they can threaten a government investigation if they are not given their way.

Call it the "governance by intimidation" system. You will pay me off or mollify me because I can cause trouble. Is that what you want?

So, what is the current system for resolving disputes?

The current system provides for subsidized mediation and subsidized arbitration of condominium disputes. That system exists because CAI suggested it and supported its creation.

Payments into the condominium education trust fund, made by developers and by associations during biennial registration, enable the payment of professional mediators and arbitrators to address disputes.

What this means is that access to retired judges and other qualified experts is provided to condominium owners on better terms than are available to other private claimants. Think about that. Everyone else generally has to pay the full cost for mediation and arbitration services; but condominium owners pay a nominal amount instead.

That is still not good enough, though, because it is not *free*, and because it takes *effort*. The Orwellian proposal in 2016 for an "Office of Self-Governance Oversight" that was to be run by a "condominium czar" would be more to the liking of the perennial critics.

In that system, an owner would merely have to make a complaint. Government would: 1) investigate; 2) advocate for the complainant; and 3) adjudicate the claim. Pretty neat system, right?

Who wouldn't want a free lawyer who is also the judge?

Be clear that the Real Estate Commission already has substantial statutory and rulemaking authority to vindicate the *public* interest, so the piece alleged to be missing in the dispute resolution puzzle relates solely to the exercise of *private* civil remedies regarding *privately* owned real property.

The available alternative dispute resolution mechanisms are robust. The mediation mechanism is clearly sufficient to enable parties to evaluate the merits of their claims and defenses before crossing the threshold into arbitration or litigation.

So, here is a question: Who should pay for bringing an unfounded claim against a condominium association? The alternatives are: 1) the owner who brought the unfounded claim; or 2) the innocent owners who pay the association's bills.

The simple fact is that every dollar that an association spends is a dollar paid into the association by the owners. So, an unfounded claim costs owners who have their own budgetary constraints unless the responsible owner is held to account for bringing a meritless claim.

Should engaging in pitched battle with an association be consequence-free if the battle should not have been fought? And what if the owner brought the claim out of anger or meanness rather than merit?

That question has a curious answer. The activists want associations to forego legal representation. But directors are fiduciaries, bound to protect the association, so legal challenges are handled by lawyers in the same way that plumbing issues are handled by plumbers.

Wishing away legal complexity has been tried. There was the so-called "condo court" some years ago. Disputes were referred to an administrative hearings officer rather than to a judge. Proceedings were simplified, but legal standards prevailed. The fairy kingdom in which legal complexity can be wished away does not exist.

So, the choices are between an established, democratic system, based on law and majority rule, that has flourished and grown for decades, with which the vast majority of people are satisfied, and an autocratic system in which some form of condominium czar controls.

The question to contemplate is: which do you prefer?