

KA NU HOU

The Newsletter of the Real Property & Financial
Services Section of the Hawaii State Bar Association

March 2001

From the Chair

Several years back, I was asked to cover a Real Property and Financial Services Section Board meeting in place of a director who could not attend. Thus, almost accidentally, I was introduced to one of the very best boards I have ever been involved with, and the only board I know where most of the past chairs *just keep coming back to the monthly meetings*. Why? Because so many times, our monthly brown-bag lunch meeting is like a mini-CLE, where some of the best real estate practitioners in Hawaii share their ideas, concerns, news and information in a friendly and easy-going setting. I want to invite all of our members to feel free to come to any of our RPFSS Board meetings. It may be just the place for *you*, too, to expand your legal skills and make some new friends.

As you may know, the RPFSS is the largest Section of the HSBA. One of our Section benefits is a first-rate website: www.hsba.org/sections/rpfs. While you are there, please sign up for our Section's exclusive discussion group, too. This year, our Section will be working on greater networking with the Business Law and Natural Resources Sections, with whom we share some joint concerns, and with whom we hope to present some joint programs.

Please let us know what you think about the new look of the newsletter. (RPFSS Newsletter Editor and Chair-Elect Rick Kiefer

now vies with our webmistress, Nancy Grekin, for computer savvy!) All of us on the Board are very grateful for both of their ongoing efforts.

Trudy Burns Stone, Chair
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Board Meetings

For 2001, the monthly meetings of the RPFSS Board will be held at Carlsmith Ball LLP's Honolulu Office on the 22nd Floor of the Pacific Tower. Dates of upcoming meetings are listed on the back of each edition of the newsletter. All Section members are welcome to attend these lively and informative meetings.

Rewriting Hawaii's Condominium Property Act

The Real Estate Commission has embarked on an ambitious effort to rewrite Hawaii's Condominium Property Act, Chapter 514A, HRS. This effort was set in motion by 2000 Act 213, which directed the Commission to conduct a review of Hawaii's nearly 40-year old condominium

law to "update, clarify, organize, deregulate, and provide for consistency and ease of use" of the law. Act 213 further requires the Commission to make findings and recommendations for recodification of Chapter 514A and to develop draft legislation consistent with its review and recommendations for submission to the 2003 Legislature.

To implement Act 213's directives, the Commission has hired an attorney who will work full-time over the next two years on the recodification of Chapter 514A. He is Gordon Arakaki, a graduate of the William S. Richardson School of Law with extensive experience in the State's legislative and executive branches, as well as in the Honolulu City Council, the Land Use Research Foundation, and the Chamber of Commerce of Hawaii.

In the initial phase of the recodification process, the Commission is reviewing the history of Chapter 514A, the laws of other jurisdictions, uniform acts, and commentary to gain an understanding of relevant issues and approaches to condominium regulation. The Commission is also actively soliciting input from organizations and individuals who deal with or are affected by Chapter 514A.

When it completes its initial review, the Commission will begin drafting legislation to recodify Chapter 514A. Because Act 213 mandates that such legislation be introduced in the 2003 legislative session, the Commission's current schedule calls for the draft legislation to be complete by October 2002 so that it can be included in the Governor's 2003 legislative package. Throughout this process, the Commission plans to use its website, www.state.hi.us/hirec, as the primary means of

keeping the public informed of the recodification process.

In light of the pending recodification of Chapter 514A, the Board of the Real Property and Financial Services Section has decided to resurrect the Section's condominium subcommittee. This committee is open to all Section members who are interested in the recodification, and the Board expects that the committee will be the primary means by which the Section will interact with the Real Estate Commission in the recodification process.

Section members who are interested in participating in the Section's condominium subcommittee are invited to contact Rick Kiefer at rkiefer@carlsmith.com. The Real Estate Commission's recodification counsel, Gordon Arakaki, also encourages all interested Section members to contact him at [Gordon M Arakaki/DCCA@dcca.state.hi.us](mailto:Gordon_M_Arakaki/DCCA@dcca.state.hi.us). Gordon can also be reached by phone at 586-2644 or 586-2646.

By Rick Kiefer, Carlsmith Ball

Foreclosure Buyers Beware

On December 18, 2000, Judge Kevin Chang issued a ruling in First Hawaiian Bank v. Franklin B. Sequin, et al., Civil No. 99-0334-01 (1st Cir.) that clarified a controversial part of 2000 Act 39. Act 39 enacted Section 514A-90(g), HRS, which permits a condominium owners' Association to specially assess certain common area expenses against a person who, in a judicial or non-judicial foreclosure, purchases an apartment whose prior owner was

delinquent in payment of Association assessments. Under the statute, the special assessment may be as much as \$1,800.

Section 514A-90(g)(1) exempts from the special assessment a mortgage holder who acquires the apartment through the foreclosure. In such a case, however, Section 514(g)(2) allows the Association to specially assess a third-party who subsequently acquires the apartment from the foreclosing mortgage holder, so long as the Association has recorded a notice of special assessment prior to the acquisition of title by the subsequent purchaser.

Because of statements in the preamble to Act 39, questions have been raised as to whether Section 514A-90(g) permits an Association to specially assess a third-party who acquires an apartment directly through a foreclosure where the Association has not recorded a notice of special assessment. In the Sequin case, for example, the Association of Apartment Owners of the Alexander Gardens condominium sought to specially assess a third-party purchaser who, two days after the enactment of Act 39, had acquired an apartment by Commissioner's Deed even though the Association had not recorded a notice of the special assessment.

The purchaser sought an order from the foreclosure court that she was not liable for the special assessment. However, in his December 18 Order, Judge Chang ruled that Act 39 does not require the filing of a notice of special assessment where the foreclosure sale was from the foreclosure commissioner to a non-mortgagee purchaser. Accordingly, Judge Chang ordered that the purchaser pay the Association's special assessment.

This ruling makes it easier for condominium Associations to collect the special assessment that is permitted under Section 514-90(g), but it also means that foreclosure purchasers cannot rely on the absence of a recorded assessment notice to protect them from subsequent special assessments of up to \$1,800.

By Lorrin Hirano, Associate Legal Counsel, Title Guaranty of Hawaii, Inc.

2001 Legislation

A number of Bills have been introduced in the State Legislature this year that, if enacted, could directly affect real estate and banking practitioners and their clients. All of these Bills, together with their committee reports, subsequent drafts, hearing notices and other information, can be accessed through the RPFS Section's website at www.hsba.org/sections/rpfs/legis.html. The website also features summaries of pending legislation in other areas, such as tax and business organizations, which may also be of interest to Section members.

Pending Bills that could affect the real property or financial services area include:

Condominiums

HB 795 Establishes a fair market value standard for determining the value of the leased fee interest for condos and co-op housing corporations that must be used (1) for leases executed after the effective date of the

Act and (2) for pre-existing leases that do not specify an appraisal standard, and that may be used upon agreement of the lessor and lessee for pre-existing leases that specify an appraisal standard.

HB 1225/SB 1324 Gives condominium associations the right to access an apartment when necessary to make repairs to that or other apartments or to the common elements.

HB 1231/SB 1319 Requires mediation for certain condominium disputes.

SB 769 Requires mortgage holders to pay common expenses to the association while foreclosure proceedings are pending if the unit is being rented, and increases the membership of real estate commission by two members to represent interests of condominium owners.

Escrow Depositories

SB 1060/HB 584 Makes regulatory changes to the laws governing escrow depositories.

Financial Services Loan Companies

HB 1128 Makes general housekeeping changes to the financial services loan companies law.

Land Court

HB 998/SB 1452 Makes general housekeeping amendments to HRS Ch. 501.

HB 1375 Abolishes the Land Court.

Land Use

HB 1170/SB 1469 Repeals the State Land Use Commission law and gives the counties sole jurisdiction over land use, planning and zoning, except for management of conservation land which would remain with the State Board of Land and Natural Resources (BLNR).

HB 1311/SB 1469 Amends the current provisions of the State Land Use laws governing the rural and agricultural districts and establishes a task force to identify and designate non-important or marginal agricultural lands for inclusion in the rural district, in order to provide for rural development that supports agriculture, protects open space, and accommodates rural, non-farm uses.

HB 1455 Imposes a 4-year moratorium on the reclassification of agricultural, conservation, and rural lands to a designation other than agricultural, conservation, or rural.

HB 1462 Highlights the importance of preserving scenic resources in the State Land Use Conservation district. Establishes guidelines and amends the procedure for BLNR consideration and approval of applications to construct high-voltage electric power transmission lines of greater than forty-six kilovolts in the conservation district.

HB 1571 Establishes a land evaluation and site assessment system. Requires the Land Use Commission, the Department of Agriculture, and the counties, to establish district boundaries for the conservation of important agricultural lands, and other lands districts. Abolishes the current State urban, rural, and agricultural districts.

SB 799 Permits the counties to change the State Land Use designation of lands containing up to 75 acres, up from the current limit of 15 acres.

SB 912 Eliminates the acreage threshold over which land use boundary changes must go before the Land Use Commission.

SB 943 Allows a single family dwelling on agricultural land if the dwelling was originally intended for use in connection with a farm or if allowed under county ordinance or administrative practice.

Mandatory Seller Disclosures

SB 169/HB 79 Amends the Mandatory Seller Disclosure Act (Chapter 508D, HRS) to eliminate the requirement that sellers or their agents research public records and eliminates the exemption from disclosure obligations for absentee owners.

Real Property Leases

HB 1131/SB 688 Requires, in a leasehold rent renegotiation, that a rent based on fair market value shall apply even if the value is lower than the existing rent and the lease bars the lowering of rent upon renegotiation. (Editor's Note: A similar bill was passed last year but vetoed by the Governor when the Attorney General's office and others expressed constitutional and other concerns about the bill.)

HB 1132/SB 844 Gives certain lessees and sublessees the option of extending the remainder of their lease to full term, or acquiring the leased fee interest in the property

from the lessor for fair market value in accordance with the uniform standards of professional appraisal practice, either by agreement or through condemnation.

Special Mortgage Recording Fee

SB1072/HB 596 Gives the Hawaii Hurricane Relief Fund (HHRF) board of directors the power to suspend special mortgage recording fees that are imposed on all mortgages filed with the Bureau of Conveyances. Extends the authorization to issue reimbursable general obligation bonds.

SB 518/SB 1497 Requires that money in the HHRF that is no longer needed for commercial property coverage be returned pro rata to policyholders.

SB 707/HB 1289 Repeals the collection of the Special Mortgage Recording Fee (SMRF) retroactively to December 1, 2000.

SB 703 Requires the HHRF to implement a grant program to provide financial assistance to residential property owners who install wind damage mitigation devices.

SB 838/HB 1156 Prohibits escheat of funds in the HHRF to the State; prohibits the repeal of dissolution of the fund except by enactment of law; and clarifies the requirements for investment of HHRF funds to maximize corpus.

SB 1248 Requires that funds from the HHRF be returned to mortgagors upon the repeal of the HHRF law.

SB 1326/HB 1125 Requires the HHRF to develop and implement a program to provide grants to residential property owners.

Time Share

HB 17 Exempts time share units from some condominium disclosure requirements under Chapter 514A.

HB 18 Exempts time shares offered for sale outside of the State from the requirements of HRS Sections 514E-8 (mutual right to cancel) and 514E-9 (disclosure statement).

HB 19 Permits the director to accept for registration a disclosure statement from another jurisdiction if the jurisdiction's registration requirements are substantially similar or more restrictive than Hawaii's.

HB 21 Repeals the requirement that timeshare sales agents wear an ID badge.

HB 22 Re-defines "acquisition agent" to exclude employees or contractors of real estate brokers.

HB 23 Requires all time share purchase contracts to contain a notice that the purchaser has 7 days to rescind. Repeals the statutory requirements for the contents of disclosures on promotional materials and gives the director the discretion to prescribe disclosure by rule.

HB 1552 Excludes time share plans from definition of "planned community" and "door-to-door sale", and provides that interest and usury laws do not apply to a lien or security interest in time share interest.

Uniform Commercial Code

HB 896 Amends the recently enacted UCC Article 9 provisions regarding "pre-effective-date financing statements".

SB1008/HB 532 Addresses the filing of frivolous financing statements by requiring that initial financing statements be authenticated by the debtor.

Please note that these are summaries of the initial drafts of the Bills that were introduced in the 2001 Legislature, and the Bills may change dramatically as they work their way through the legislative process. The full text of the Bills, their latest drafts and current status can all be found at the Section's website.

Compiled by the Section's Legislation Committee: Nancy Grekin, Lorrin Hirano, Grace Kido and Ken Marcus

Maui County Code OnLine

The Maui County Code is now available online. The Code can be accessed through the Section's website or directly at www.ordlink.com/codes/maui/index.htm. The online Code is user-friendly and current as of the County's August 2000 Code update.

What Has Your Board Been Up To?

Three new directors have joined the RPFSS Board for 2001. They are:

Nancye Bethurem who practices environmental, natural resources, water and land use law at Alston Hunt Floyd & Ing in Honolulu. Nancye was the Chair of the HSBA's Natural Resources Section in 2000 and is also a Director and Past-Chair of Hawaii Women Lawyers. Nancye is a graduate of the School of Law at the University of Missouri at Kansas City.

Peter Kubota who practices business, commercial and real estate law in Hilo. Peter is a 1989 graduate of the William H. Richardson School of Law.

Livingston "Jack" Wong who is in-house counsel at Kamehameha Schools where he handles real estate and other matters. Jack is a graduate of the UCLA School of Law.

Nancye, Peter and Jack join the following continuing Board members: Gail Ayabe (Treasurer), Bill Byrns, Max Graham, Lorrin Hirano (Secretary), Grace Kido, Rick Kiefer (Chair-Elect), Charlie Loomis, Ken Marcus, Bud Quitiquit, Bob Rowland, Tom Rosenberg and Trudy Burns Stone (Chair).

Board Meeting Highlights November 2000

2000 Section Chair Jon Pang reported that the Report of the Section's Opinion Letter

Committee has been finalized and is ready for printing and distribution at the HSBA's Annual Convention. Copies of the Report were distributed to the Board, and the Board approved the Report.

Trudy Stone reported that she, Nancy Grekin and Rick Kiefer had decided to continue with a hard-printed newsletter for 2001, rather than something e-mailed or posted on the Internet, but to seek to reduce costs by looking for alternative printers.

Professor David Callies updated the Board on current takings litigation at the Federal Circuit Court of Appeals.

January 2001

The Board discussed various bills which could affect Section members' practices that have been introduced in the 2001 legislature.

To make Board meetings more accessible to Section members, the Board decided to move its monthly meetings to Carlsmith Ball's main conference room.

February 2001

The Board discussed possible topics for the Section's seminar at the HSBA's Annual Convention in September.

Mitch Imanaka, Chair of the Real Estate Commission's Condominium Review Subcommittee, and Gordon Arakaki of the Commission's in-house legal staff briefed the Board on the pending recodification of HRS Chapter 514A.

Real Property and Financial Services Section

HAWAII STATE BAR ASSOCIATION

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CALENDAR OF EVENTS

March 16, Noon to 1:30 p.m.

Board of Directors' Meeting
Pacific Tower, 22nd Floor

April 27, Noon to 1:30 p.m.

Board of Directors' Meeting
Pacific Tower, 22nd Floor

May 18, Noon to 1:30 p.m.

Board of Directors' Meeting
Pacific Tower, 22nd Floor

Comments?

Please send them to the
newsletter chair by e-mail:

rkiefer@carlsmith.com

And check our website:

<http://www.hsba.org/sections/rpfs>