

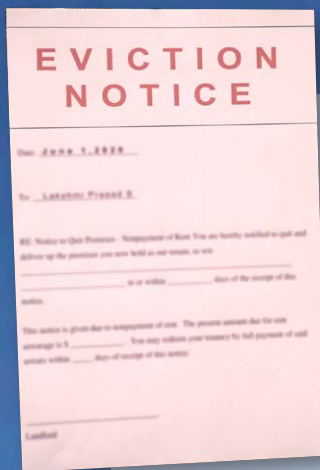
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Moratorium, Mediation, Meditation: Renting in the Time of Covid

By Casey T. Miyashiro



Over the past two years, the government has implemented various measures to protect public health and assist those impacted by the crippled economy, including eviction moratoria barring landlords from evicting residential tenants for nonpayment of rent. The purpose was two-fold: to help individuals and families who lost jobs keep a roof over their heads, and to prevent a large influx of houseless people on the streets which would expose them to a highly contagious virus. Moratoria were put in place at both the State level by Governor Ige and at the Federal level by the Centers for Disease Control and Prevention ("CDC"), and there was considerable overlap between the two.

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After considerable progress was made in combating Covid-19, Governor Ige lifted the State moratorium on August 6, 2021. The CDC moratorium expired on July 31, 2021, and was extended until October 3, 2021, but the U.S. Supreme Court issued a decision on August 26, 2021, striking down the extension. At this time, there are no moratoria in place prohibiting residential landlord-tenant evictions in the State of Hawaii.

For residential landlords who had not received rent in over a year, the end of the moratoria should have been a relief; however, in July, the Hawaii legislature passed, and Governor Ige signed into law, Act 57, which modified the section of the Hawaii Landlord-Tenant Code dealing with eviction of tenants for nonpayment of rent. In the past, a landlord only needed to give notice that rent was overdue and that the rental agreement would be terminated if not paid within five business days (colloquially, the “Five-Day Notice”). If the tenant did not pay by the deadline, the landlord could immediately bring a judicial proceeding called “summary possession” to reclaim the dwelling unit. It was simple and straightforward. Now, Act 57 requires landlords to jump through hoops by requiring them to offer mediation to tenants before calling on the courts’ assistance.

Instead of five business days’ notice, landlords must now give fifteen calendar days’ notice of their intent to terminate the rental agreement. The notice must also contain a plethora of information including: the name of the landlord and their address, the name and contact information of each tenant, whether the landlord has applied for rental assistance, and other items that never before had to be included in a notice of intent to terminate.

This additional information is needed because landlords must provide a copy of the notice to a mediation center, which will then contact both landlord and tenant to schedule a free mediation session concerning the nonpayment of rent with the goal of obviating the need for judicial intervention. The notice provides the contact information to the staff and assists the mediator in understanding the material terms of the dispute. The tenant must then schedule the mediation within the fifteen-calendar day period. Failure to do so will allow the landlord to proceed with a summary possession proceeding. Last, but certainly not least, Act 57 sets a tiered schedule for when a landlord can bring a summary possession action based on how many months rent is outstanding.

Landlords should immediately review and revise their Five-Day Notice template to comply with the change in law. Yet, they should not throw out their old versions either! The changes to Act 57 are only temporary and will expire on August 6, 2022, which will be one year after the State eviction moratorium expired. After that, the statute will revert to its previous version unless the legislature intervenes to make the changes permanent.

These new changes can be quite overwhelming and vexing, in which case, meditation may be the next best form of relief. Although the changes appear to be well-intended and meant to be a solution to prevent a mad dash of landlords to the courthouse, it remains to be seen how effective this new scheme will be. Will enough tenants meaningfully participate in mediation to keep the courts’ caseload at a manageable level? Will landlords struggle even more financially because they now have to house tenants who do not pay – and may have no intention or means of paying – even longer? Should you need assistance navigating these untested waters, the attorneys at Damon Key are ready to serve as your guide.

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**Act 57 may make evicting tenants quite frustrating
for residential landlords - meditation may help.**



2021 Legislative Update for Condominium & Community Associations

By Na Lan



With the conclusion of the Hawaii State Legislature's 2021 Regular Session, there are numerous important new laws to take note of impacting condominium and community associations.

Remote Meetings

The pandemic has prevented many associations from timely holding their annual meetings this year. Act 083 (HB 599) was signed by the Governor on June 24, 2021 and took effect upon approval to address this problem.

Under this new law, planned community associations may conduct meetings remotely consistent with the Hawaii Nonprofit Corporations Act, regardless of whether such associations have incorporated or notwithstanding any provision to the contrary provided in the association documents. This means the community association's board of directors, in its sole discretion, can authorize its members or proxies of members to participate at an annual, regular or special association meeting by means of internet, teleconference, or other electronic transmission technology in a manner that allows members the opportunity to: (1) read or hear the proceedings substantially concurrently with the occurrence of the proceedings; (2) vote on matters submitted to the members; (3) pose questions; and (4) make comments.

Act 083 also authorizes condominium associations to conduct electronic meetings and electronic, machine, or mail voting (1) during a state of emergency or local state of emergency, or (2) for any meeting noticed during such emergencies and for which the applicable emergency has since expired, or (3) whenever otherwise authorized in an association's declaration or bylaws. Condominium associations have less flexibility and much narrower authority as to remote association annual, regular or special meetings compared with community associations. Unless your project documents expressly authorize remote meetings, condominium associations can only meet or vote remotely when there is emergency proclamation or order by the Governor or Mayor in effect under Chapter 127A of the Hawaii Revised Statutes or for meetings noticed before such proclamation or order expired.

It should be noted that existing law HRS § 514B-125(d) authorizes a condominium board to meet by a means of communication through which all participants may simultaneously hear each other during the meeting, unless otherwise provided in the declaration or bylaws. If permitted by the board, any unit owner may also participate in a board meeting remotely in the same manner.

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Disposition of Unclaimed Possessions in or on the Common Elements

Act 098 (SB329) took effect upon approval on June 25, 2021. This new law removes the publication requirement and permits the Board of Directors of a condominium association to proceed directly to sell, store, donate or dispose of personalty that has been abandoned in or on the common elements of a condominium, when the identity or address of the owner is unknown.

This new law also shortens the notice period from 60 days to 30 days for a condominium board to sell, store, donate or dispose of such personalty when the identity and address of the owner is known and the board notifies such owner in writing by certified mail with return receipt requested of (1) the identity and location of the personalty; and (2) the board's intent to so sell, store, donate or dispose of the personalty.

New laws impacting common interest communities on Ag Land

Act 094 (SB186), effective June 25, 2021, disallows the enforcement of a re-recorded homeowners' association restriction if the restriction prohibits bona fide agricultural uses and activities on agricultural land.

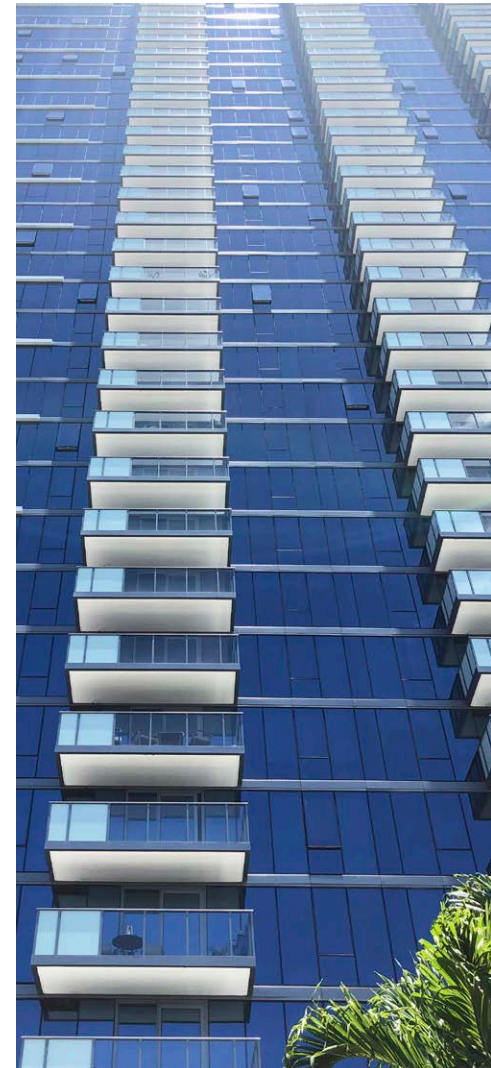
Act 077 (HB247), effective July 1, 2021, amends certain land subdivision and condominium laws related to agricultural land, to ensure certain CPR projects with more than five units, located within the agricultural district, are actually used for agricultural purposes.

Oahu - Fire Sprinkler Law Update

On February 11, 2021, City and County of Honolulu passed Ordinance 21-3, i.e., Bill 84 (2020). It clarifies that the apartment owners of a condominium or the cooperative housing corporation of an existing high-rise residential building 10 floors or higher may opt out of the automatic fire sprinkler system requirement; provided that a majority of unit owners of a condominium or a majority of shareholders of a cooperative housing corporation decide to opt out of the requirement within three years of the completion of the building fire and life safety evaluation, either by vote at a regularly scheduled or special meeting of the owners or shareholders, or by written consent in lieu of such voting; and provided further, that the building receives a passing score on the building fire and life safety evaluation through the implementation of alternative fire prevention and life safety systems. It also mandates the licensed design professional submit a copy of the authenticated building fire and life safety evaluation to the AHJ within 5 business days of its completion, or if the evaluation was completed prior to February 11, 2021, then by February 18, 2021.

On May 14, 2021, Ordinance 21-14 was adopted to extend the compliance deadlines. A building fire and life safety evaluation now shall be conducted by May 3, 2022. Buildings shall comply by passing the building fire and life safety evaluation by May 3, 2025, unless compliance is met with an automatic fire sprinkler system. A list of all existing high-rise residential buildings that need to comply with the sprinkler ordinances can be found at <https://fire.honolulu.gov/fire-and-life-safety/homeowners/sprinklers/>

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Senate Bill No. 385 The Uniform Trust Code, What Does it Mean?

By Megan L.M. Lim



Hawaii's laws underpinning the handling of a deceased person's estate, as well as conservatorships and guardianships, are set forth in the Uniform Probate Code, enacted in 1996. Now twenty-five years later, the area of trusts is also getting its own set of laws. During Hawaii's 2021 legislative session, Senate Bill No. 385 was passed, enacting the Uniform Trust Code. The new law is effective on January 1, 2022, and provides, for the first time, comprehensive statutory guidelines for the administration and enforcement of trusts across our state.

The Uniform Trust Code ("UTC"), which was drafted by the Uniform Law Commission, has already been the law in thirty-four other states and the District of Columbia. (The Uniform Law Commission is a nonprofit unincorporated association made up of commissions for uniform laws from each state. More information can be found at <https://www.uniformlaws.org>).

Before introducing the bill to the Legislature, the Probate Committee, of which Damon Key's Douglas C. Smith is a member, undertook significant efforts to make certain modifications to the UTC based on Hawaii's current laws, practices and procedures.

The Honorable R. Mark Browning, judge of the Probate Court of the First Circuit and the Chair of the Probate Committee, submitted written testimony to the legislature, expounding on the purpose of the UTC (to create statutes that reflect existing judge-made laws):

"The UTC is primarily a default statute, which means that the terms of the trust document will continue to control the administration of the trust. While there are certain duties and powers that cannot be changed by the trust document (such as the trustee's duty of good faith and the trustee's duty to account), the meaning and distribution of the trust is governed by the trust instrument. However, where the trust is silent or fails to address an issue sufficiently, the UTC can provide guidance and procedures as to how the trust is to be administered."

(The full written testimony can be viewed at: [SB385_HD2_TESTIMONY_FIN_03-31-21_.PDF](#) ([hawaii.gov](#)))

The ten main Articles in the UTC cover the following topics: definitions/notice provisions/rules governing the trust's principal place of administration; rules governing court proceedings; representation of beneficiaries, through fiduciaries or other third parties; requirements to create, amend, and terminate trusts; spendthrift trust provisions that will generally be upheld against a beneficiary's creditor, with certain exceptions; capacity requirements for a settlor to establish a revocable trust; appointment and removal of trustees; duties and powers of the trustee; Hawaii's Uniform Prudent Investor Act; and remedies for breaches of trust and determination of damages.



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A sampling of what the UTC does is listed below, and all of these issues have surfaced previously in trust litigation matters handled by our firm:

- Nonjudicial settlement agreements are valid to the extent that the agreement does not violate a material purpose of the trust and could otherwise be approved by the court (§111);
- Provides a way to establish a missing trust and its terms (§407);
- Allows irrevocable trusts to be modified or terminated upon consent of the settlor and the beneficiaries (§411);
- Establishes a statute of limitations for contesting the validity of a revocable trust—the earlier of 5 years after the settlor's death, or 90 days after the trustee sends the person a copy of the trust instrument (§604);
- Grants the court discretion to award attorney's fees and costs to any party to the trust who has acted in the best interest of the trust as a whole (§1004); and
- Sets a limitation that a beneficiary cannot commence a proceeding against a trustee for a breach of trust more than 1 year after such person received a report that adequately disclosed facts giving rise to the potential claim, or if no report was received, then the time limitation is 3 years after the first to occur of the trustee no longer acting as trustee, the termination of the beneficiary's interest, or the termination of the trust (§1005).

As an estate planning attorney, I hope that the terms of the trust agreements I prepare will be carried out smoothly without the need for court involvement. However, for various reasons—from personal conflicts, to purely administrative tasks—many individuals and families find themselves requiring court instruction or resolution regarding trust matters.

Our firm assists numerous clients in navigating this process. Many areas of trust law in Hawaii are thin or non-existent because there are no court cases in Hawaii addressing these areas specifically. This means that when advising our clients who are trustees or trust beneficiaries and assessing potential outcomes of court proceedings, we draw heavily on our experience, secondary sources, and common law from other states, to fill in areas not previously addressed by statute. We welcome the additional clarity and certainty that the new uniform law will provide.



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2021 Legislative Update

By Nicholas K. Ernst

The Hawaii State Legislature has concluded its 2021 Regular Session. Although much of the focus was on the Coronavirus, the legislature still managed to pass several noteworthy new laws.



One Bite Is All It Takes – Dog Bite Law Change

Previously, to have standing to bring an action against a dog owner in Hawaii, a dog-bite victim had to prove that the dog had bitten and injured a person on at least two separate occasions. *S.B. No. 189, A Bill for an Act Relating to Dog Bites*, changed this requirement. A person who has been bitten by a dog may bring an action against a dog owner, even if it's Fido's first offense. This is the only substantive change to the law, so trespassers who intentionally or knowingly enter a premises unlawfully should let sleeping dogs lie as the law does not protect such intruders. Likewise, a person who teases, torments, or otherwise abuses a dog without the negligence, direction, or involvement of the owner or harbinger will also find him or herself unable to file a claim.

Inverse Condemnation Claims – 2 Year Statute of Limitations

The legislature enacted *H.B. No. 357, A Bill for an Act Relating to Statute of Limitations*, to bring certainty and predictability to the time in which a plaintiff may file claims against the State for inverse condemnation. The act was prompted by the dispute that appeared before the Supreme Court of the State of Hawaii in *DW Aina Le'a Development, LLC v. State of Hawaii Land Use Commission*, and the act establishes a two-year statute of limitations for an inverse condemnation claim brought against the State, including a claim brought under article I, section 20, of the Hawaii State Constitution, pursuant to HRS § 661-5. The act amends the jurisdiction of the state circuit and district courts under HRS § 661-1 to expressly include claims against the State founded upon article I, section 20, of the Hawaii State Constitution.

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Registration Required – Covered Offender Registration

As a result of the *Doe v. Connors* decision in which the Supreme Court of the State of Hawaii held that Doe was not required to register as a covered sex offender in Hawaii despite being registered in Washington State, the legislature passed *S.B. No. 1042, A Bill for an Act Relating to Covered Offender Registration*. The act requires individuals who have been designated as a covered offender, sex offender, offender against minors, or any other sexual offender designation in another state to be subject to registration requirements in Hawaii. Covered offenders who move to Hawaii, remain here for more than 10 consecutive days, or visit for more than 30 days over a calendar year are required to register with the Attorney General. Offenders may petition the court in a civil proceeding to terminate registration requirements, provided that they have maintained a clean record for at least 10 years and they are not designated a repeat offender in any other jurisdiction. However, the attorney general may deny petitions if the offenders' registrations will assist in protecting the safety of an individual or the public.

Lexi's Law – Helmets and Flags for Rental Mopeds and Scooters

Companies that rent out mopeds or motor scooters are required to provide customers with helmets. Rented mopeds and motor scooters must also be fitted with a fluorescent, orange flag that must fly higher than five feet off the ground. The legislature enacted *S.B. 615, A Bill for an Act Relating to Rentals of Mopeds and Motor Scooters* or "Lexi's Law", after Alexis "Lexi" Jenkins, who was visiting Maui in 2017, died when her rented moped collided with a truck and she was not wearing a helmet.



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Damon Key attorneys served as Legal Line volunteers in the month of August. The Young Lawyers Division of the Hawaii State Bar Association coordinates a weekly hotline with services provided by attorney volunteers every Wednesday night from 6:00pm to 7:00pm. The volunteer attorneys provide free legal information to the general public. This one-hour weekly Legal Line program assists individuals who may not have access to an attorney and need general advice or who just want to be pointed in the right direction.



Christine A. Kubota was honored to once again participate in the 2021 Nā Hōkū Hanohano Awards in October. Christine is the Chair of the Pan-Pacific Festival Advisory Committee, and on behalf of Kintetsu International Hawaii Company, presented the award for the Instrumental Composition of the Year.

Loren A. Seehase presented for the National Business Institute on the topic of “Challenging or Appealing Administrative Zoning Decisions: What You Need to Know”. This intermediate level seminar covered topics on standing, procedural requirements, preemption, constitutional challenges, exhausting administrative remedies, judicial review, and best practices.

