

## **VI Planned Community Associations, Chapter 421J, Hawaii Revised Statutes**

### NOTES:

1. The following is the full text of the new Planned Community Associations Act, Act 132 (SLH 1997), which has been assigned the designation of Chapter 421J, Hawaii Revised Statutes. In many cases, it must be read in conjunction with the Hawaii Nonprofit Corporation Act, Chapter 414D, Hawaii Revised Statutes, because that chapter will continue to apply to some aspects of the management and operation of an incorporated planned community association (“PCA”).
2. Deciding whether the PCA chapter or Chapter 414D should apply to a PCA may not always be clear and may require careful analysis. Section 11 of the PCA chapter states three rules as to how the PCA chapter should be interpreted and applied: (1) it should not be construed to subject any PCA to other applicable laws; (2) it should not be construed to exempt any PCA from other applicable laws; and (3) in the case of direct conflict between another applicable laws and the new PCA chapter, the PCA chapter will prevail.

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## VI Chapter 421J, Planned Community Associations

**§421J-1 Scope.** This chapter shall apply to all planned community associations existing as of the effective date of this chapter and all planned community associations created thereafter.

**§421J-2 Definitions.** As used in this chapter, unless otherwise indicated by the context:

“Association” means a nonprofit, incorporated, or unincorporated organization upon which responsibilities are imposed and to which authority is granted in a declaration which governs a planned community.

“Association documents” means the articles of incorporation or other document creating the association, if any, the bylaws of the association, the declaration or similar organizational documents and any exhibits thereto, any rules related to use of common areas, to architectural control, to maintenance of units, or to restrictions on use of units as well as any amendments made to the foregoing documents.

“Board of directors” or “board” means the executive board or other body, regardless of name, designated in the association documents to act on behalf of the association.

“Common area” means real property within a planned community which is owned or leased by the association or is otherwise available for the use of its members or designated as common area in or pursuant to the declaration.

“Declaration” means any recorded instrument, however denominated, that imposes on an association maintenance or operational responsibilities for the common area and creates the authority in the association to impose on units, or on the owners or occupants of the units, any mandatory payment of money as a regular annual assessment or otherwise in connection with the provisions, maintenance, or services for the benefit of some or all of the units, the owners, or occupants of the units or the common areas. A declaration includes any amendment or supplement to the instruments described in this definition.

“Member” means the person or persons owning a unit or having the right of occupancy of a unit under a recorded lease having a term of twenty or more years from its commencement date; or anyone included in the definition of a member under the association documents, including the developer, whether or not the developer owns a unit.

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

“Planned community” means a common interest community, other than a condominium or a cooperative housing corporation or a time share plan, which includes all of the following characteristics:

- (1) Real property subject to a recorded declaration placing restrictions and obligations on the owners of the real property and providing for rights and responsibilities of a separate entity, the association:
  - (A) Which owns and maintains certain property within the planned community for the common use or benefit, or both, of the owners of units within the planned community;
  - (B) Which is obligated to maintain certain property it does not own within the planned community for the common use or benefit, or both, of the owners of units within the planned community; or
  - (C) Which is obligated to provide services to any such owners or units;
- (2) Individual owners own separate units which are part of planned community at least some of which are improved by or are to be improved by residential dwellings;
- (3) Owners have automatic and non-severable membership in an association by virtue of ownership of units within the planned community; and
- (4) Owners, other than a master developer or declarant, are obligated to pay mandatory assessments by virtue of ownership of a unit within the planned community.

“Recorded” means recorded or filed in the bureau of conveyances of the state or in the office of the assistant registrar of the land court of the state, as appropriate.

“Unit” means a physical portion of the planned community designated for separate ownership or occupancy Board of directors.

**§421J-3 Board of directors.** (a) Every member of the board of directors shall be a member of the association. However, a developer may appoint or elect directors pursuant to any special voting rights or power of appointment reserved to the master developer.

(b) The board of directors shall be composed of the number and group of persons specified in the association documents. There shall not be more than one representative on the board of directors from any one unit that is owned by any person other than the master developer or declarant.

**§421J-4 Proxies.** (a) A proxy shall be in writing and shall be valid for only a specified meeting of the association and any adjournments of that meeting.

(b) A member of the association may give a proxy to any person or the board of directors as an entity, and the proxy may be limited as indicated by the member. No proxy shall be irrevocable unless:

- (1) The proxy is coupled with a financial interest in the unit; or
  - (2) The proxy is held pursuant to a first mortgage of record encumbering a unit or an agreement of sale affecting a unit.
- (c) To be valid, a proxy 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 name and signature of the person or persons giving the proxy, the unit or units for which the proxy is given, and the date that the proxy is given; and
  - (3) 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 of directors as a whole and that the vote be made on the basis of the preference of the majority of the board; or
    - (D) To those directors present at the meeting and the vote to be shared with each board member receiving an equal percentage.

(d) Any board of directors that uses association funds to distribute proxies that include the election of directors shall first post notice of its intent to distribute proxies in prominent locations within the project at

least thirty days prior to its distribution of proxies; provided that if the board receives within seven days of the posted notice a request by any owner for nomination to the board accompanied by a statement, the board shall mail to the owners either:

(1) A proxy form containing the names of all owners who have requested nomination to the board accompanied by their statements; or

(2) A proxy form containing no names, but accompanied by a list of names of all owners who have requested nomination to the board and their statements.

The statement shall not exceed one hundred words, indicating the owner's qualifications to serve on the board and reasons for wanting to receive proxies.

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

(f) Nothing in this section shall prohibit the use of proxies for filling vacancies that occur after the notice of the annual meeting has been distributed.

**§421J-5 Meetings of the board of directors .** (a) Whenever practicable, all meetings of the board of directors, other than executive sessions, shall be open to all members. Members who are not on the board of directors may participate in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the board of directors votes otherwise.

(b) The board of directors shall meet at least once each year.

(c) Minutes of the meetings of the board of directors shall include the recorded vote of each board member on all motions except motions voted upon in executive session.

(d) The board of directors, with the approval of a majority of a quorum of its members, may adjourn any meeting and reconvene in executive session to discuss and vote upon matters concerning personnel, litigation in which the association is or may become involved, or as may be necessary to protect the attorney-client privilege of the association. The general nature of any business to be considered in executive session shall be first announced in the regular session.

(e) No board member shall vote by proxy at board meetings.

(f) 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.

**§421J-6 Robert's Rules of Order.** All association and board of directors meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order, Newly Revised.

**§421J-7 Documents of the association.** (a) Upon approval by the board, the most current financial statement of the association and the minutes of the most recent meeting of the board of directors (other than minutes of executive sessions) shall be made available for examination by any member at no cost, during reasonable hours, at a location designated by the board.

(b) The approved minutes of other meetings of the board, other than executive sessions, and the approved meetings of the association for the current and prior year, shall be made available for examination by members during reasonable hours at a location designated by the board. Copies of those meeting minutes shall be provided to any member upon the member's request if the member pays a reasonable fee for duplication, postage, stationery, and other administrative costs associated with handling the request.

(c) Financial statements, general ledgers, accounts receivable ledgers, accounts payable ledgers, check ledgers, insurance policies, contracts, invoices of the association for the current and prior year, and any documents regarding delinquencies of ninety days or more, shall be made available for examination by members at reasonable hours at a location designated by the board; provided that members shall pay for all costs associated with the examination of documents. The board may require members to furnish the association with an affidavit stating that the foregoing information is requested in good faith for the protection of the interests of the association, its members, or both. Copies of these documents shall be provided to any member upon the member's request if the member pays a reasonable fee for duplication, postage, stationery, and other administrative costs associated with handling the request.

(d) Members may view proxies, tally sheets, ballots, members' check-in lists, and the certificates of election, if any, for a period of thirty days following any association meeting; provided that members shall pay for all costs associated with the examination of the documents. The board may require members to furnish to the association an affidavit stating that the foregoing information is requested in good faith for the protection of the interests of the association, its members, or both. Proxies and ballots may be destroyed following the thirty-day period. Copies of tally sheets, members' check-in lists, and the certificates of election from the most recent

association meeting shall be provided to any member upon the member's request if the member pays a reasonable fee for duplication, postage, stationery, and other administrative costs associated with handling the request.

(e) Members may file a written request with the board to examine other documents of the association. The board shall give written authorization, or written refusal with an explanation of the refusal, for the examination within sixty calendar days of receipt of the request. The board may condition its approval of any such request upon payment of reasonable fees. Without limitation, books and records kept by or on behalf of an association may be withheld from inspection and copying to the extent that they concern:

- (1) Personnel records;
- (2) An individual's medical records;
- (3) Records relating to business transactions that are currently in negotiation;
- (4) Communications which are privileged because of attorney-client privilege or any other applicable privilege of the association;
- (5) Complaints against an individual member of the association;
- (6) Any records, the release of which could be a violation of any law, ordinance, rule, or regulation; or
- (7) Similar records.

**§421J-8 Membership list.** The association shall use good faith efforts to keep an accurate and current list of the names and addresses of association members. If the list is not provided directly to members, the association shall develop a reasonable procedure by which owners may solicit votes or proxies or provide information to other owners with respect to association matters. The board may require members to furnish the association with an affidavit stating that the use of the list is requested in good faith for the protection of the association, its members, or both.

**§421J-9 Notification of assessment increases.** The board of directors shall notify members in writing of any increase in regular assessments at least thirty days prior to the increase.

**§421J-10 Attorneys' fees 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 unit or the owner of any unit;
- (2) Foreclosing any lien on any unit; or
- (3) Enforcing any provision of the association documents or this chapter;

against a member, occupant, tenant, employee of a member, or any other person who in any manner may use the property, shall be promptly paid on demand to the association by such person or persons; provided that if the association is not the prevailing party, 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 the person by the association. The reasonableness of any attorney's fees paid by a person or by an association as a result of an action pursuant to paragraph (2) shall be determined by the court.

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

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

If a member is not the prevailing party in any court action against an association, any of its officers or directors, or its board of directors, to enforce any provision of the association documents or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by the association shall be awarded to the association, unless the action was filed in small claims court, or, prior to filing the action in a higher court, the owner has first submitted the claim to mediation pursuant to section 421J-13, and made a good faith effort to resolve the dispute under any of those procedures.

(c) Nothing in this section shall be construed to prohibit the board of directors from authorizing the use of a collection agency.

*[Prior to this law being enacted, some judges had ruled that PCAs were subject to the general statute governing the awarding of attorneys' fees,*

*Section 607-14, Hawaii Revised Statutes, and were therefore limited to recovering attorneys' fees of no more than 25 percent of the PCA's claim (e.g., no more than \$250 in attorneys' fees for a \$1000 claim). Section 10 of the new PCA chapter has resolved that problem. In addition, Act 132 (SLH 1997), which enacted the PCA chapter, also amended Section 607-14 to add the following language: "Nothing in this section shall limit the recovery of reasonable attorneys, fees and costs by a planned community association and its members in actions for the collection of delinquent assessments, the foreclosure of any lien, or the enforcement of any provision of the association's governing documents, or affect any right of a prevailing party to recover attorneys' fees in excess of twenty-five per cent of the judgment pursuant to any statute that specifically provides that a prevailing party may recover all of its reasonable attorneys' fees. "Planned community association" for the purposes of this section means a nonprofit homeowners or community association existing pursuant to covenants running with the land." ]*

**§421J-11 Applicability of other laws.** Nothing in this chapter shall be construed to exempt any association or person from compliance with any applicable law, or subject any association or person to any other applicable law; provided that in the event of a conflict between any such law and this chapter, this chapter shall govern.

**§421J-12 Amendment of association documents when no procedure provided.** Whenever neither an association document nor any applicable law provide procedures for amendment of that document, the association document may be amended by the vote or written consent of association members representing three-fourths of the votes which association members are entitled to cast with respect to a declaration and two-thirds of the votes which association members are entitled to cast with respect to other association documents; provided that this section shall not apply to articles of incorporation or any association documents which by their terms or as a matter of law may be adopted or amended by the board of directors. Nothing in this section shall be deemed to supersede or override any provision of any association documents related to amendments, or any provision of any law pertaining to associations or corporations.

**§421J-13 Mediation of disputes.** (a) At the request of any party, any dispute concerning or involving one or more members and an association, its board of directors, managing agent, manager, or one or more other members relating to the interpretation, application, or enforcement of this chapter or the association documents, shall first be submitted to mediation.

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(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 of directors, 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 of directors 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 association and the member.

**§421J-14 First annual meeting of association.** The first annual meeting of the association shall take place as provided in the association documents, but not later than one year after the closing of the first conveyance of a unit to a person other than a developer.