

ACT 101

An Act Relating to Horizontal Property Regimes and Amending Act 180, Session Laws of Hawaii, 1961, as Amended.

Be it Enacted by the Legislature of the State of Hawaii:

SECTION 1. The chapter added to the Revised Laws of Hawaii 1955 by section 2 of Act 180, Session Laws of Hawaii, 1961, is hereby amended by renumbering sections 16 to 34, inclusive, thereof as sections 27 to 45, inclusive, and by amending sections 1 to 15, inclusive, thereof

so that the same shall be renumbered as sections 1 to 26, inclusive, and shall read as follows:

"Section 1. This chapter shall be known as the 'Horizontal Property Act'.

Section 2. **Definitions.** Unless it is plainly evident from the context that a different meaning is intended, as used herein:

(a) 'Apartment' means a part of the property which is intended for any type of independent use, whether residence, office, the operation of any industry or business or other use, and which includes all of a building or one or more rooms or enclosed spaces located on one or more floors (or part or parts thereof) in a building, with a direct exit to a public street or highway or to a common element or elements leading to such street or highway. An apartment may also include any unenclosed space in the building which is adjacent to and accessible directly from any one or more of the rooms or enclosed spaces included in the apartment.

(b) 'Apartment owner' means the person owning, or the persons owning jointly or in common, an apartment and the common interest appertaining thereto; provided, that to such extent and for such purposes, including the exercise of voting rights, as shall be provided by lease filed with the board of directors, a lessee of an apartment shall be deemed to be the owner thereof.

(c) 'Association of apartment owners' means all of the apartment owners acting as a group in accordance with the bylaws and declaration.

(d) 'Commission' means the real estate commission of the state department of treasury and regulation.

(e) 'Common elements', unless otherwise provided in the declaration, means and includes:

(1) The land included in the horizontal property regime, whether leased or in fee simple;

(2) The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes and entrances and exits of the building or buildings;

(3) The basements, flat roofs, yards, gardens, recreational facilities, parking areas and storage spaces;

(4) The premises for the lodging or use of janitors and other persons employed for the operation of the property;

(5) Central and appurtenant installations for services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerators;

(6) The elevators, escalators, tanks, pumps, motors, fans, compressors, ducts and in general all apparatus and installations existing for common use;

(7) Such facilities as may be designated as common elements in the declaration; and

(8) All other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use.

(f) 'Common expenses' means and includes:

(1) Expenses of operation of the property; and

(2) All sums designated common expenses by or pursuant to the provisions of this Act, the declaration or the bylaws.

(g) 'Common interest' means the percentage of undivided interest in the common elements appertaining to each apartment, as expressed in the declaration, and any specified percentage of the common interests means such percentage of said undivided interests in the aggregate.

(h) 'Common profits' means the balance of all income, rents, profits and revenues from the common elements remaining after the deduction of the common expenses.

(i) 'Condominium' means the ownership of single units, with common elements, located on property within the horizontal property regime.

(j) 'Condominium project' means a real estate condominium project; a plan or project whereby a condominium of two or more apartments located within the horizontal property regime are offered or proposed to be offered for sale.

(k) 'Declaration' means the instrument by which the property is submitted to the provisions of this Act, as hereinafter provided, and such declaration as from time to time amended.

(l) 'Developer' means a person who undertakes to develop a real estate condominium project.

(m) 'Limited common elements' means and includes those common elements designated in the declaration as reserved for the use of a certain apartment or certain apartments to the exclusion of the other apartments; provided, that no amendment of the declaration affecting any of the limited common elements shall be effective without the consent of the owner or owners of the apartment or apartments for the use of which such limited common elements are reserved.

(n) 'Majority' or 'majority of apartment owners' means the owners of apartments to which are appurtenant more than fifty per cent of the common interests, and any specified percentage of the apartment owners means the owners of apartments to which are appurtenant such percentage of the common interests.

(o) 'Master deed' or 'master lease' means any deed or lease showing the extent of the interest of the person submitting the property to the horizontal property regime.

(p) 'Operation of the property' means and includes the administration and operation of the property and the maintenance, repair and replacement of, and the making of any additions and improvements to, the common elements.

(q) 'Person' means an individual, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof.

(r) 'Property' means and includes the land, whether leasehold or in fee simple, to the extent of the interest held therein by the owner or lessee submitting such interest to the horizontal property regime, the building or buildings, all improvements and all structures thereon and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been or are intended to be submitted to the regime established by this chapter.

(s) 'To record' means to record in accordance with the provisions of chapter 343, or to register in accordance with the provisions of chapter 342.

(t) All pronouns used herein include the male, female and neuter genders and include the singular or plural numbers, as the case may be.

Section 3. Horizontal property regimes. Whenever the sole owner or sole lessee or all of the owners or all of the lessees of a property expressly declare, through the execution and recordation of a master deed or lease, together with a declaration, which declaration shall set forth the particulars enumerated by section 11, his or their desire to submit the property to the regime established by this chapter, there shall thereby be established a horizontal property regime with respect to the property, and this chapter shall be applicable to the property. In the event that the master deed or lease is already recorded, the recordation of the declaration shall be deemed sufficient to achieve the same result.

Section 4. Status of apartments. Each apartment, together with the common interest appertaining thereto, shall for all purposes constitute real property and may be individually conveyed, leased or encumbered and be the subject of ownership, possession or sale and of all types of juridic acts inter vivos or mortis causa, as if it were sole and entirely independent of the other apartment or apartments in the property of which it forms a part, and the corresponding individual titles and interests shall be recordable.

Section 5. Ownership of apartments. The apartment owner shall be entitled to the exclusive ownership and possession of the apartment. Any apartment may be jointly or commonly owned by more than one person.

Section 6. Common elements.

(a) Each apartment shall have appurtenant thereto a common interest as expressed in the declaration.

(b) The common interest appurtenant to each apartment as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all of the apartment owners affected, expressed in an amended declaration duly recorded. The common interest shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned or described in the conveyance or other instrument.

(c) The common elements shall remain undivided and no right shall exist to partition or divide any part thereof, except as otherwise expressed in this Act. Any provision to the contrary shall be null and void.

(d) Each apartment owner may use the common elements in accordance with the purpose for which they were intended without hindering or encroaching upon the lawful rights of the other apartment owners, subject always to the exclusive use of the limited common elements as provided in the declaration.

(e) The operation of the property shall be carried out as provided herein and in the declaration and the bylaws.

(f) The apartment owners shall have the irrevocable right, to be exercised by the board of directors, to have access to each apartment from time to time during reasonable hours as may be necessary for the operation of the property or for making emergency repairs therein necessary to prevent damage to the common elements or to another apartment or apartments.

Section 7. Compliance with covenants, bylaws and administrative provisions. Each apartment owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration. Failure to comply with any of the same shall be ground for an action to recover sums due, for damages or injunctive relief or both maintainable by the manager or board of directors on behalf of the association of apartment owners or, in a proper case, by an aggrieved apartment owner.

Section 8. Certain work prohibited. No apartment owner shall do any work which would jeopardize the soundness or safety of the property, reduce the value thereof or impair any easement or hereditament, nor may any apartment owner add any material structure or excavate any additional basement or cellar, without in every such case the unanimous consent of all the other apartment owners being first obtained.

Section 9. Liens against apartments; removal from lien; effect of part payment.

(a) Subsequent to recording the declaration as provided in this Act, and while the property remains the subject of a horizontal property regime, no lien shall arise or be created against the common elements. During such period, liens may arise or be created only against the several apartments and their respective common interests.

(b) Labor performed on or materials furnished to an apartment shall not be the basis of a lien pursuant to part II of chapter 193 against the apartment of any apartment owner not expressly consenting to or requesting the same, except that such express consent shall be deemed to be given by the owner of any apartment in the case of emergency repairs thereto. No labor performed on or materials furnished to the common elements shall be the basis of a lien thereon, but all funds received and to be received by the manager or board of directors in payment of common expenses, and the right to receive such funds, shall constitute trust funds for the purpose of paying the cost of such labor or materials performed or furnished at the express request or with the consent of the manager or board of directors, and the same shall be expended first for such purpose before expending any part of the same for any other purpose.

Section 10. Common profits and expenses. The common profits of the property shall be distributed among, and the common expenses shall be charged to, the apartment owners in proportion to the common interests appurtenant to their respective apartments.

Section 11. Recordation and contents of declaration. The bureau of conveyances and the land court shall immediately set up the mechanics and method by which recordation of a master deed or lease and the declaration may be made. Provisions shall be made for the recordation of instruments affecting the individual apartments on subsequent resales, mortgages and other encumbrances, as is done with all other real estate recordations; provided, however, that land court certificates of title shall not be issued for apartments. The declaration to which section 3 refers shall express the following particulars:

(a) Description of the land, whether leased or in fee simple, on

which the buildings or buildings and improvements are or are to be located.

(b) Description of the building or buildings, stating the number of stories and basements, the number of apartments and the principal materials of which it or they is or are constructed or to be constructed.

(c) The apartment number of each apartment, and a statement of its location, approximate area, number of rooms and immediate common element to which it has access, and any other data necessary for its proper identification.

(d) Description of the common elements.

(e) Description of the limited common elements, if any, stating to which apartments their use is reserved.

(f) The percentage of undivided interest in the common elements appertaining to each apartment and its owner for all purposes, including voting.

(g) Statement of the purposes for which the building or buildings and each of the apartments are intended and restricted as to use.

(h) The name of a person to receive service of process in the cases hereinafter provided, together with the residence or place of business of such person which shall be within the county or city and county in which the property is located.

(i) Provision as to the percentage of votes by the apartment owners which shall be determinative of whether to rebuild, repair or restore the property in the event of damage or destruction of all or part of the property.

(j) Any further details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with this Act.

(k) The method by which the declaration may be amended, consistent with the provisions of this Act.

Section 12. Contents of deeds or leases of apartments. Deeds or leases of apartments shall include the following particulars:

(a) Description of the land as provided in section 11 of this Act, or the post office address of the property, including in either case an appropriate reference to the recording of the declaration.

(b) The apartment number of the apartment in the declaration and any other data necessary for its proper identification.

(c) Statement of the use for which the apartment is intended and restrictions on its use.

(d) The common interest appertaining to the apartment.

(e) All encumbrances on the apartment and any further details which the grantor and grantee, or lessor and lessee, may deem desirable to set forth consistent with the declaration and this Act.

Section 13. Copy of the floor plans to be filed. Simultaneously with the recording of the declaration, there shall be filed in the office of the recording officer a set of the floor plans of the building or buildings, showing the layout, location, apartment numbers and dimensions of the apartments, stating the name of the property or that it has no name, and bearing the verified statement of a registered architect or professional engineer certifying that it is an accurate copy of portions of the plans of the building or buildings as filed with and approved by the

county or city and county officer having jurisdiction over the issuance of permits for the construction of buildings. If such plans do not include a verified statement by such architect or engineer that such plans fully and accurately depict the layout, location, apartment numbers and dimensions of the apartments as built, there shall be recorded prior to the first conveyance or lease of any apartment an amendment to the declaration to which shall be attached a verified statement of a registered architect or professional engineer certifying that the plans theretofore filed, or being filed simultaneously with such amendment, fully and accurately depict the layout, location, apartment numbers and dimensions of the apartments as built. Such plans shall be kept by the recording officer in a separate file for each property, indexed in the same manner as a conveyance entitled to record, numbered serially in the order of receipt, each designated 'apartment ownership', with the name of the property, if any, and each containing an appropriate reference to the recording of the declaration. Correspondingly, the record of the declaration shall contain a reference to the file number of the floor plans of the building or buildings on the property affected thereby.

Section 14. Blanket mortgages and other blanket liens affecting an apartment at time of first conveyance or lease. At the time of the first conveyance or lease of each apartment, every mortgage and other lien affecting both such apartment and any other apartment shall be paid and satisfied of record, or the apartment being conveyed or leased and its common interest shall be released therefrom by partial release duly recorded.

Section 15. Removal from provisions of this Act.

(a) If (i) apartment owners owning not less than eighty per cent in number of apartments in the aggregate, and owning apartments to which are appurtenant not less than eighty per cent of the common interests, shall execute and record an instrument to the effect that they desire to remove the property from the provisions of this Act, and the holders of all liens affecting any of the apartments of the apartment owners executing such instrument shall consent thereto by instruments duly recorded, or (ii) the common elements shall suffer substantial damage or destruction and such damage or destruction shall not have been rebuilt, repaired or restored within a reasonable time after the occurrence thereof or the apartment owners shall have earlier determined as provided in the declaration that such damage or destruction shall not be rebuilt, repaired or restored, then, and in either such event, the property shall be subject to an action for partition by any apartment owner or lienor as if owned in common, in which event the sale of the property shall be ordered by the court and the net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and shall be divided among all the apartment owners in proportion to their respective common interests, provided, however, that no payment shall be made to an apartment owner until there has first been paid off out of his share of such net proceeds all liens on his apartment. Upon such sale, the property shall cease to be the subject of a horizontal property regime or subject to the provisions of this Act.

(b) All of the apartment owners may remove a property, or a part

of a property, from the provisions of this Act by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the apartments consent thereto, by instruments duly recorded. Upon such removal from the provisions of this Act, the property, or the part of the property designated in such instrument, shall cease to be the subject of a horizontal property regime or subject to the provisions of this Act, and shall be deemed to be owned in common by the apartment owners in proportion to their respective common interests.

Section 16. Removal no bar to subsequent resubmission. The removal provided for in the preceding section shall in no way bar the subsequent resubmission of the property to the provisions of this Act.

Section 17. Bylaws. The operation of the property shall be governed by bylaws, a true copy of which shall be annexed to the declaration and made a part thereof. No modification of or amendment to the bylaws shall be valid unless set forth in an amendment to the declaration, which amendment is duly recorded.

Section 18. Contents of bylaws. The bylaws shall provide for at least the following:

(a) The election from among the apartment owners of a board of directors, the number of persons constituting the same and that the terms of at least one-third of the directors shall expire annually; the powers and duties of the board; the compensation, if any, of the directors; the method of removal from office of directors; and whether or not the board may engage the services of a manager or managing agent, or both, and specifying which of the powers and duties granted to the board by this Act or otherwise may be delegated by the board to either or both of them.

(b) Method of calling meetings of the apartment owners; what percentage, if other than a majority of apartment owners, shall constitute a quorum; and what percentage shall, consistent with the provisions of this Act, be necessary to adopt decisions binding on all apartment owners.

(c) Election of a president from among the board of directors who shall preside over the meetings of the board of directors and of the association of apartment owners.

(d) Election of a secretary who shall keep the minute book wherein resolutions shall be recorded.

(e) Election of a treasurer who shall keep the financial records and books of account.

(f) Operation of the property, payment of the common expenses and determination and collection of the common charges.

(g) Manner of collecting from the apartment owners their share of the common expenses.

(h) Designation and removal of personnel necessary for the maintenance, repair and replacement of the common elements.

(i) Method of adopting and of amending administrative rules and regulations governing the details of the operation and use of the common elements.

(j) Such restrictions on and requirements respecting the use and maintenance of the apartments and the use of the common elements, not set forth in the declaration, as are designed to prevent unreasonable

interference with the use of their respective apartments and of the common elements by the several apartment owners.

(k) That seventy-five per cent of the apartment owners may at any time modify or amend the bylaws, but each one of the particulars set forth in this section shall always be embodied in the bylaws.

Section 19. Books of receipts and expenditures; availability for examination. The manager or board of directors, as the case may be, shall keep detailed, accurate records in chronological order, of the receipts and expenditures affecting the common elements, specifying and itemizing the maintenance and repair expenses of the common elements and any other expenses incurred. Such records and the vouchers authorizing the payments shall be available for examination by the apartment owners at convenient hours of week days.

Section 20. Waiver of use of common elements; abandonment of apartment; conveyance to board of directors. No apartment owner may exempt himself from liability for his contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of his apartment. Subject to such terms and conditions as may be specified in the bylaws, any apartment owner may, by conveying his apartment and his common interest to the board of directors on behalf of all other apartment owners, exempt himself from common expenses thereafter accruing.

Section 21. Separate taxation. The laws relating to home exemptions from state property taxes shall be applicable to the individual apartments, which shall have the benefit of home exemption in those cases where the owner of a single-family dwelling would qualify. Property taxes assessed by the State shall be assessed on and collected on the individual apartments and not on the property as a whole. Without limitation of the foregoing, each apartment and the common interest appertaining thereto shall be deemed to be a parcel and shall be subject to separate assessment and taxation for all types of taxes authorized by law, including, but not limited to, special assessments.

Section 22. Priority of lien.

(a) All sums assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment shall constitute a lien on such apartment prior to all other liens, except only (i) liens for taxes and assessments lawfully imposed by governmental authority against such apartment, and (ii) all sums unpaid on mortgages of record. Such lien may be foreclosed by suit by the manager or board of directors, acting on behalf of the apartment owners, in like manner as a mortgage of real property. In any such foreclosure the apartment owner shall be required to pay a reasonable rental for the apartment, if so provided in the bylaws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same. The manager or board of directors, acting on behalf of the apartment owners, shall have power, unless prohibited by the declaration, to bid in the apartment at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same. Suit to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the same.

(b) Where the mortgage of a mortgage of record or other purchaser of an apartment obtains title to the apartment as a result of foreclosure of the mortgage, such acquirer of title, his successors and assigns, shall not be liable for the share of the common expenses or assessments by the association of apartment owners chargeable to such apartment which became due prior to the acquisition of title to such apartment by such acquirer. Such unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the apartment owners, including such acquirer, his successors and assigns.

Section 23. Joint and several liability of grantor and grantee for unpaid common expenses. In a voluntary conveyance the grantee of an apartment shall be jointly and severally liable with the grantor for all unpaid assessments against the latter for his share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. However, any such grantor or grantee shall be entitled to a statement from the manager or board of directors, as the case may be, setting forth the amount of the unpaid assessments against the grantor, and neither such grantor nor such grantee shall be liable for, nor shall the apartment conveyed be subject to a lien for, any unpaid assessments against the grantor in excess of the amount therein set forth.

Section 24. Insurance. The manager or board of directors, if required by the declaration, bylaws or by a majority of the apartment owners, shall have the authority to, and shall, obtain insurance for the property against loss or damage by fire and such other hazards under such terms and for such amounts as shall be required or requested. Such insurance coverage shall be written on the property in the name of such manager or of the board of directors of the association of apartment owners, as trustee for each of the apartment owners in proportion to their respective common interests. Premiums shall be common expenses. Provision for such insurance shall be without prejudice to the right of each apartment owner to insure his own apartment for his benefit.

Section 25. Actions. Without limiting the rights of any apartment owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two or more of the apartment owners, as their respective interests may appear, with respect to any cause of action relating to the common elements or more than one apartment. Service of process on two or more apartment owners in any action relating to the common elements or more than one apartment may be made on the person designated in the declaration to receive service of process.

Section 26. Personal application.

(a) All apartment owners, tenants of such owners, employees of owners and tenants, or any other persons that may in any manner use property or any part thereof submitted to the provisions of this Act shall be subject to this Act and to the declaration and bylaws of the association of apartment owners adopted pursuant to the provisions of this Act.

(b) All agreements, decisions and determinations lawfully made by the association of apartment owners in accordance with the voting per-

centages established in this Act, the declaration or the bylaws shall be deemed to be binding on all apartment owners.”

SECTION 2. This Act shall take effect upon its approval; provided, however, that the provisions of Act 180, Session Laws of Hawaii, 1961, as heretofore amended, shall continue in effect with respect to, and shall govern the rights, interests and remedies of all persons owning interests in or liens upon, any property subject to a horizontal property regime created pursuant to said Act 180 prior to the effective date of this Act; and provided, further, that if all of the owners of apartments in any property subject to a horizontal property regime created pursuant to said Act 180 prior to the effective date of this Act, together with all of the holders of liens affecting any of such apartments, shall execute and record a declaration in form and content as required for the establishment of a horizontal property regime with respect to the property under the provisions of said Act 180 as amended by this Act, thereafter a horizontal property regime with respect to the property shall exist under the provisions of said Act 180 as amended by this Act and the provisions of said Act 180 as amended by this Act shall apply with respect to the property and shall govern the rights, interests and remedies of all persons owning interests in or liens upon the property.

(Approved May 29, 1963.) **S.B. 497.**
