



IMANAKA KUDO & FUJIMOTO

HAWAII CONDO FAX

A Faxletter on Condominium Development Issues in Hawaii

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SENATE BILL 111: AMENDMENT TO UNIFORM SECURITIES ACT

On January 20, 2005, Senate Bill 111, a bill before the Hawaii State Legislature that attempts to amend the Hawaii Uniform Securities Act, was introduced and passed first reading. The current version of the proposed bill would extend the exemption from registration requirements to rental management contracts for apartment rental programs in a condominium project. The exemption from the registration requirements of the Hawaii Uniform Securities Act would apply to any offer or sale by or through a real estate broker or real estate salesperson of a rental management contract relating to an apartment rental program in a condominium project, with or without the offer or sale of an apartment in the condominium project. On January 24, 2005, House Bill 161, a bill that attempts to clarify SB 111, was introduced and also passed first reading. The entire text of the proposed bills can be obtained at http://www.capitol.hawaii.gov/sessioncurrent/bills/sb111_.htm and http://www.capitol.hawaii.gov/sessioncurrent/bills/hb161_.htm. We will continue to track and advise you of the status of Senate Bill 111 in our future editions.

FEDERAL ILSFDA: IMPROVED LOT EXEMPTION

The federal Interstate Land Sales Full Disclosure Act ("Act") generally regulates the interstate sale of "lots" (which has been interpreted to include condominiums) and obligates the developer to register with HUD in order to make specific disclosures to prospective purchasers, and precludes developers from engaging in unlawful and misleading sales practices. The Act, however, also provides certain exemptions from such registration and disclosure requirements; the one most frequently used by new condominium developers being the improved lot exemption ("Exemption"). For new condominium developments, the Exemption applies to the sale or lease of land under a contract obligating the developer to construct the building on the lot within a period of two years. To correctly claim the Exemption, developers should pay particular attention to the following:

Have a tightly drafted purchase agreement. The developer's obligation to construct a unit within two years may not be limited in any way in the purchase agreement. In other words, the developer's obligation to construct the unit within two years cannot be illusory and must unconditionally obligate the developer to do so. Thus, purchase agreements that permit breach by the developer virtually at will without consequences do not qualify for the Exemption since if such agreements did, the construction obligation would not be an obligation in reality. Similarly, contracts that directly or indirectly waive the purchaser's right to specific performance are generally treated as lacking a realistic obligation on the part of the Developer to construct the lots within the requisite time frame. Although, for

instance, limiting specific performance and other remedies is generally permitted under contract law, such limiting language may prohibit a developer from qualifying for the Exemption. Force majeure clauses, however, are permissible as long as they are recognized defenses to contract in the jurisdiction in which the building is being built. Developers should be aware that the drafting of the purchase agreement is extremely vital to claiming the exemption since HUD looks primarily to the purchase agreement to determine a developer's intent to build within the two-year period. Indeed, there is case law in other jurisdictions wherein a developer claiming the Exemption did complete the unit within the requisite two-year period, but the court found that the purchase agreement did not sufficiently evidence the developer's unconditional obligation to build within the two years, and as such, the developer was found to be in violation of the Act.

Keep track of when the clock starts ticking. The two-year time clock starts ticking for each individual unit from the date the purchaser, not developer, executes the purchase agreement. Furthermore, the Hawaii condominium law's 30-day rescission period requirement does not toll the Exemption's two-year period.

Schedule the completion of each unit accordingly. In order for a unit to be considered complete, it must be physically habitable and usable for the purpose for which it was purchased and whatever common elements, including limited common elements, are needed to access the unit (i.e., stairs, elevators, hallways) must also be completed within the two-year period. Thus, developers should be aware that the improvements that need to be completed depends on whether the project consists of a single-family product (i.e., single-family homes), multiplex product (i.e., town homes) or a multi-family building (i.e., high rise). Developers should work closely with their construction team in order to ensure that the construction schedule accommodates the required two-year deadline for each unit.

Please feel free to contact us for specific statutory and case law cites to the information contained in this article. Note that this article only provides for a general discussion of limited sections of the Act and does not consider every conceivable factor of the Act and variations may occur based on the specific facts of a situation. This article is provided only as an informative piece. It does not purport to offer specific legal advice or counsel on any issue discussed.

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