March 28, 2007

The Honorable Sylvia Luke  
Representative, 26th District  
Twenty-Fourth Legislature  
State Capitol, Room 332  
Honolulu, Hawaii 96813

Dear Representative Luke:

This is in response to your letter dated March 8, 2007, requesting a written opinion as to whether state or federal law prohibits a privately-owned apartment complex or condominium from: 1) renting to only non-smokers; and 2) adopting a smoke-free policy for the property, including individual units and lanais.

1. Renting to only non-smokers.

We believe that state law allows a privately-owned complex or condominium to rent to only non-smokers. In general, Chapter 515, Hawaii Revised Statutes ("HRS"), addresses discrimination in real property transactions. HRS § 515-2 states that a "real estate transaction" includes the "sale, exchange, rental, or lease of real property." HRS § 515-3 further states that it is a discriminatory practice in a real estate transaction to engage in certain conduct based on "race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection." Because smoking preference is not one of the protected classes listed in HRS § 515-3, it appears that renting to only non-smokers is allowed.

With respect to federal law, the Fair Housing Act prohibits the refusal to sell or rent a dwelling because of race, color, religion, sex, familial status, national origin, or handicap. 42 U.S.C.A. § 3604(a). Similarly, because smoking preference in not one of the protected classes listed in 42 U.S.C.A. § 3604(a), it is our view that federal law allows a privately-owned complex or condominium to rent to only non-smokers.

2. Adopting a smoke-free policy for a complex or condominium, including individual units and lanais.
In answering this question, we are construing a privately-owned apartment complex or a privately-owned condominium as a property that is treated as a single entity governed by controlling documents such as a declaration and bylaws, as opposed to separate apartments in an apartment building with owners who are not subject to such controlling documents and may act independently. (In the latter instance, there would be no centralized authority to adopt such a policy for all apartments.) Controlling documents set forth the permitted uses of and conduct on the property, and are reviewed by potential buyers before actually purchasing an apartment or condominium unit. By purchasing a unit, the buyer agrees to the rules of living on the property and, in essence, accepts the terms of the contract.

In general, legal concerns arise regarding state impairment of contract.\(^1\) However, the adoption of a smoke-free policy for the property would be a voluntary and active choice by the owners living in a condominium. HRS § 514-108(e) allows bylaws to be amended at any time by the vote or written consent of at least sixty-seven per cent of all unit owners. Because state law requires an affirmative vote of a certain percentage of owners to change the permitted uses of or conduct on the property, it is difficult to characterize the adoption of a new policy as a state impairment of contract. State law is not mandating a smoking ban;\(^2\) rather, owners have the choice to change their “contract” and the terms of their living conditions, whether it be to allow pets or prohibit smoking. Courts have recognized that “anyone who buys a unit in a common interest development with knowledge of its owners association’s discretionary power accepts the risk that the power may be used in a way that benefits the commonality but harms the individual.” *Lamden v. LaJolla Shores Condominium Homeowners Association*, 980 P.2d 940, 953 (Cal. 1999). Clearly, HRS § 514-108(e) provides an avenue to change living conditions on the property if a sufficient percentage of owners agree.

Recently, a court in Colorado upheld a condominium’s complete ban on smoking in the four-unit condominium project. In her ruling, the district court judge found that three of the four unit owners voted to amend the project’s declaration, thus satisfying the declaration’s 75% requisite percentage to amend the declaration. The court then considered whether seepage of second-hand smoke or its smell constitutes a nuisance, which was prohibited by the

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\(^2\) HRS Chapter 328J is the state law on smoking. HRS § 328J-3 prohibits smoking in enclosed or partially enclosed places open to the public. HRS § 328J-1 defines “open to the public” to mean “enclosed or partially enclosed areas to which the public is invited or permitted … but does not include a private residence unless it is used as a child care, adult day care, or health care facility.” While arguably these state laws could apply to a condominium’s lobby and hallways, they do not impair the “contract” terms of non-common interest areas, i.e. an individual unit and lanai, unless the private residence is used as one of the three types of care homes.
condominium’s declaration. The declaration prohibited nuisances on the property, as well as any practice which is a source of annoyance to residents or which interferes with the peaceful possession and proper use of the property by its residents. After finding that a nuisance was created, the court determined that the remedy of banning all smoking on the property was done reasonably and in good faith, and was not otherwise violative of any legal rights. A copy of this decision, Christiansen and Sauve v. Heritage Hills 1 Condominium Owners Association (“Heritage Hills”), is attached for your convenience. It is also available online at www.hoalegislate.com/archives/05258030.

Similarly, HRS § 514B-105(b) states:

Unless otherwise permitted by the declaration, bylaws, or this chapter, an association may adopt rules and regulations that affect the use of or behavior in units that may be used for residential purposes only to:
(1) Prevent any use of a unit which violates the declaration or bylaws;
(2) Regulate any behavior in or occupancy of a unit which violates the declaration or bylaws or unreasonably interferes with the use and enjoyment of other units or the common elements by other unit owners; or
(3) Restrict the leasing of residential units to the extent those rules are reasonably designed to meet underwriting requirements of institutional lenders who regularly lend money secured by first mortgages on units in condominiums or regularly purchase those mortgages.

Otherwise, the association may not regulate any use of or behavior in units by means of the rules and regulations.

Emphasis added.

Thus, a condominium association may regulate smoking in an individual unit or lanai if the association amended its declaration or bylaws to include a smoke-free policy, or if the association found that smoking in an individual unit or lanai unreasonably interfered with the use and enjoyment of other units or the common elements by other unit owners. The court in Heritage Hills considered the testimony of several unit owners that smoke or the smell of smoke migrating into adjoining units was a longstanding problem and, therefore, constituted a nuisance interfering with the other unit owners’ peaceful enjoyment of the property. Likewise, a Hawaii condominium association, if it did not amend its declaration or bylaws to include a smoke-free policy, would presumably need to demonstrate that smoking unreasonably interfered with other unit owners’ use and enjoyment of the condominium before adopting such a policy.

With respect to federal law, as the court in Heritage Hills noted, courts have not specifically extended the protections of the Fourteenth Amendment to a fundamental right to
smoke. In Grusendorf v. City of Oklahoma, 816 F.2d 539, 541 (10th Cir. 1987), the court discussed various rights of liberty and privacy described as “penumbras” emanating from the Bill of Rights and concluded that a nonsmoking rule for city firefighter trainees in their first year of employment had a rational relationship to a legitimate state purpose and, therefore, did not violate the due process clause.

Accordingly, it is our opinion that state and federal law allows a privately-owned apartment complex or a privately-owned condominium to adopt a smoke-free policy for the property, including individual units and lanais, so long as such a policy is properly included in the property’s controlling documents or the condominium association has demonstrated that smoking has unreasonably interfered with other unit owners’ use and enjoyment of the property.

Very truly yours,

[Signature]

Shari Wong
Deputy Attorney General

APPROVED:

[Signature]

Mark J. Bennett
Attorney General