

# LEGAL NOTES

## FROM THE DESK OF HAROLD CHU

We have all heard of the concept: "Buyer beware". The trend is now towards requiring disclosure by the seller and by the landlord. In this newsletter, we have several articles involving disclosure.

Hawaii state law requires sellers of residential real property to make certain disclosures. The disclosure requirement is part of the standard DROA. You should be aware of some of the potential consequences if the seller fails to make the disclosures

Landlords are required by the Hawaii Residential Landlord-Tenant Code to also make disclosures. We have explained those disclosures and the sanction that a tenant may seek from the landlord if the disclosures are not made after the disclosures are requested by the tenant.

These disclosures should not discourage you from selling or renting real property. The disclosures are not difficult. You simply have to make the disclosures.

Landlords should also be familiar with the **Servicemembers' Civil Relief Act (SCRA)**. This act was previously known as the **Soldiers and Sailors Civil Relief Act (SSCRA) of 1918**. An article by Maile McWilliams, our legal intern, provides some insights into this Act and how it may affect landlords.



The interest rate for mortgages is slowly increasing. Those with ARM mortgages may wish to consider whether now is the time to secure a loan with a fixed rate to provide certainty as to future monthly mortgage payments.

If you have been reading the legal notices in the local newspapers, you will notice many of the foreclosures involve mortgages which were obtained within the last year or so. The high number of foreclosures for recent mortgages reminds one should consider the extent one wishes to draw on the equity in their homes. Equity is the value you own in the property. It is the difference between the market value of the property and the balance of the mortgages owed on the property. Many people have seen the equity in their property increase with the recent substantial increase in market value.

There may be a temptation to borrow against the equity in your real property to secure cash for other needs. One should not forget a loan is a loan and the principal of the loan plus the interest on that loan must ultimately be repaid. There are many innovative loans available on the market now and these loans do serve a purpose. We only suggest you carefully consider whether a particular type of loan makes financial sense for your situation. While the long term trend of real property values in Hawaii is toward higher prices, we should not forget that the market values of real property do fluctuate. You should consider whether such fluctuations would be a cause of concern for you in your situation.

## SHOULD A SELLER DISCLOSE?

Hawaii Revised Statutes § 508D makes it mandatory for a Seller of residential property to disclose certain facts. This law provides that the Seller is obligated to fully and accurately disclose in writing to a Buyer any fact, defect, or condition, past or present, that would be expected to measurably affect the value of the property to a reasonable person. This state law is incorporated into paragraph C-44 of the DROA.

It has always been the philosophy of our firm to recommend that when in doubt, the Seller should disclose. When deciding whether or not to disclose, Seller often considers two factors:

- 1) Whether the fact is material and therefore should be disclosed, and
- 2) What effect such a disclosure would have on the pending sale.

If the Seller is even concerned about whether the disclosure might bother a prospective buyer, then this suggests it is probably a material fact and therefore should be disclosed.

What happens if a Seller fails to disclose? The Seller's failure to disclose could potentially draw the Seller into a lawsuit and the need to incur attorney's fees and possibly court costs. Lawsuits can

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sometimes take years to resolve. If a lawsuit is initiated due to the failure to disclose, this typically delays the closing of the transaction or even the Seller's attempt to sell the property. If the Seller is paying a mortgage, the longer the delay, the more costly it is to the Seller.

If a matter is not initially disclosed, but is disclosed later, paragraph C-44A of the DROA provides that the Buyer has additional time to decide whether to proceed with the purchase. The Buyer could decide to cancel the offer or renegotiate the purchase price or other terms of the transaction. Again, this potentially means further delay and costs to the Seller.

The intent of the Seller is typically to sell the property as quickly as possible with the least amount of problems. The choice is simple. When in doubt the Seller should disclose. Disclosure does not mean the Seller is obligated to fix the disclosed matter. The disclosure is often accompanied by a Seller's Addendum that the property is being sold in "as is" condition.



## GLOSSARY OF REAL ESTATE TERMS:

Spacious - average  
 Charming - small  
 Comfortable - very small  
 Cozy - very, very small  
 Low maintenance - no lawn  
 Walk to stores - nowhere to park your car  
 Prestigious - expensive

## Disclosure Required of Landlords

The Hawaii Residential Landlord-Tenant Code requires landlords to make certain disclosures to their tenants when they rent their properties. Landlords should be mindful of these required disclosures because they may be subject to sanctions if these disclosures are not made.

Hawaii Revised Statutes § 521-43 requires the landlord or any person acting on the landlord's behalf to disclose the following to the tenant **in writing at or before** the lease:

1. The name and address of each person authorized to manage the premises.
2. Who is authorized to receive service of process, rent, notices and demands. This information must be kept current.
3. The tenant must be given a copy of the written rental agreement.
4. The tenant must be provided with a written receipt of the rent paid at the time of payment. The tenant's cancelled check fulfills the requirement of a written receipt, but the landlord must give a receipt if the tenant requests a receipt.

5. If the owner or the landlord does not reside on the island where the rental property is located, the rental agreement must designate an agent residing on the same island where the unit is located to act on the landlord's behalf.

6. The landlord must provide their general excise tax number to all tenants.

If the owner's rental property is part of a multi-unit dwelling and there is an elevator, the landlord may post the above required disclosures in the elevator and in one other conspicuous place. If there is no elevator, the landlord can also satisfy the above disclosure requirements by posting the information in two conspicuous places. The disclosure must be printed or typed.

If there is a proper demand for the disclosure by the tenant, the landlord must provide the disclosure within ten (10) days. Hawaii Revised Statutes § 521-67 provides that if the landlord fails to do so, the landlord shall pay the tenant \$100 **plus** reasonable attorney's fees.

Bright and sunny - Venetian blinds not included

Townhouse - former tenement

Modern - 30 to 40 years old

Contemporary - at least 15 years old

Sprawling ranch - inefficient floor plan

Natural setting - forget about planning, the wildlife will eat everything

Secluded setting - far away

Executive neighborhood - high taxes

Near houses of worship - fanatical denomination next door

Park-like setting - a tree on the block

Unaffected charm - needs painting

Starter home - run down

Hurry! Won't last - about to collapse

And much, much more - nothing else comes to mind

Unique city home - used to be a warehouse

Completely updated - avocado dish washer and harvest gold carpeting

## How the Servicemembers' Civil Relief Act May Affect Landlords

By Maile McWilliams

With the high military presence in the islands, it would be wise for landlords to be familiar with the Servicemembers' Civil Relief Act.

The Servicemembers' Civil Relief Act is an update of the Soldiers and Sailors Civil Relief Act (SCCRA) of 1918. This Act was established to relieve the monetary stress on deployed servicemembers and their families to enable them to fully focus their attention on their military duties. The Servicemembers' Civil Relief Act covers those who are on active duty, reservists and members of the National Guard. Those who are involved in basic training and other mandatory schooling will also be considered on active duty.

The Act may potentially affect landlords. A servicemember can legally terminate a lease if the lease was signed **before** the member entered into active duty **and** if the servicemember can provide proof

that their ability to pay rent was materially affected by being called to active duty.

Under the Act, a serviceman can also terminate a lease by providing **written** notice that the serviceman has entered into active duty. A month-to-month contract can be terminated thirty (30) days after the next payment is due. For all other contracts, termination is effective on the last day of the month following the month **after** the notice was given. For example, if written notice was given on November 4<sup>th</sup>, the lease can be terminated effective December 31<sup>st</sup>.

The landlord can not withhold the refund of the security deposit because of early termination. The security deposit, however, can be withheld to pay for damages, repairs, and other provision listed in the lease agreement.

The Servicemembers' Civil Relief Act can also affect the eviction

process. As in all other cases, a landlord must obtain a court order to evict the tenant. The Court, however, can stay the eviction for up to three months if the court finds the servicemember's failure to pay rent is materially affected by the military service.



If you have questions regarding the Servicemembers' Civil Relief Act, you can find more information at the following links, which will also be available on the Website, <http://www.attorneyhawaii.com>.

<http://www.defenselink.mil/specials/ReliefAct>

<http://www.jagcnet.army.mil/legal>

*(Note: Maile McWilliams is a legal intern for Harold Chu and she prepared this article, in conjunction with Harold Chu, as part of her internship.)*

## A Further Note on Adding Someone to Title or Changing the Persons on Title

In our last newsletter, we discussed the legal consequences of adding people to the title. One of our clients reminded us that there are also tax consequences which should be taken into consideration.

When someone is added to the title to a property without paying for the purchase of the property, there are gift tax considerations. The presence of a mortgage will also affect the value of the gift. A person making a gift to a single person of more than \$12,000 for the entire year is required to file a

gift tax return. Although an actual gift tax may not be due or owed, the gift tax return is still required to be filed.

Similarly, when someone is taken off title, the person giving up ownership is considered to have made a gift to the person who remains on title. Taxes are always a potential factor. When adding or removing a person from the title, we strongly recommend you discuss the tax consequences with your tax advisor.



A lawyer and an engineer were fishing in the Caribbean. The lawyer said, "I'm here because my house burned down, and everything I owned was destroyed by the fire. The insurance company paid for everything."

"That's quite a coincidence," said the engineer. "I'm here because my house and all my belongings were destroyed by a flood, and my insurance company also paid for everything."

The lawyer looked somewhat confused. "How do you start a flood?" he asked.

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### THREE ENVELOPES

A manager spends a week at this new office with the manager he is replacing. On the last day the departing manager tells him, "I have left three numbered envelopes in the desk drawer. Open an envelope if you encounter a crisis you can't solve."

Three months down the track there is a major crisis, everything goes wrong and the manager feels very threatened by it all. He remembers the parting words of his predecessor and opens the first envelope. The message inside says "Blame your predecessor!" He does this and gets off the hook.

About half a year later, the company is experiencing a dip in sales, combined with serious product problems. The manager quickly opens the second envelope. The message read, "Reorganize!" This he does, and the company quickly rebounds.

Three months later, at this next crisis, he opens the third envelope. The message inside says "Prepare three envelopes".

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