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From: Bruce Erfer [khillside@hotmail.com]
Sent: Tuesday, February 05, 2008 11:34 AM
To: CPCtestimony
Subject: Testimony--HB 2894

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE

REGARDING HOUSE BILL 2894

Testifier: BRUCE ERFER, Secretary, Kaanapali Hillside Homeowners' Association, and member of the Hawaii Legislative Action Committee of the Community Associations Institute ("CAI").

Hearing Date: February 6, 2008
Time: 2:00 PM
Place: Conference Room 325, State Capitol
Regarding: Testimony, House Bill 2894

Chair Herkes, Vice Chair McKelvey, and Members of the Committee:

My name is Bruce Erfer, and I am testifying on behalf of the Kaanapali Hillside Homeowners' Association (KHHA) here on Maui, in support of HB 2894. I have been President of the Association for the past 4 years. I had hoped to make this presentation in person, however I am attending yet another Circuit Court hearing that would not be necessary if our Association were provided the protections of HRS 421J.

The State's Intermediate Court of Appeals and the Supreme Court have ruled that KHHA does not fall under HRS 421J, basically because our Declaration of Covenants and Restrictions is silent with regard to the ability to assess, even though our By Laws and Charter of Incorporation both acknowledge this assessment power. It is the Declaration that is recorded upon the deeds of our 159 homeowners. Unfortunately, the inadequate Declaration also was silent as to how it could be amended--the ultimate catch 22. Currently, our Association and its homeowners are deprived of the sensible rights and protections provided by Chapter 421J. For instance, 421J is specific as to ways of amending documents when those documents do not specify a procedure for amendment.

The issue of the ability to assess (currently \$110 per month), has been litigated for almost 15 years. Following a 3-week trial in Circuit Court in 2002, Judge Cardoza ruled that our Association did come under HRS 421J; we could assess and amend based on this Statute. However, both appellate courts while ruling that owners have an implied obligation to pay assessments, also ruled that KHHA was not a "planned community association" under 421J--putting our Association back into a status of "association limbo." The passage of HB 2894 would, in effect, place our Association and other Associations with similar circumstances under the protective umbrella of Statute 421J. It would put an end to legal haggling that has cost our members over \$750,000, and cost the Courts significant time and money--exactly what 421J was meant to alleviate.

Perhaps the most supportive testimony I can offer is from our 2007 Supreme Court ruling (# 25585). In a footnote (P. 17, footnote 10), the Court recognized that KHHA did not fail, but rather was overlooked by the Statute 421J:

"KHHA's argument that public policy favors supporting the legal framework of community associations is duly noted. Indeed, this is not a situation wherein an organization failed to attain status as a "planned community association" because it overlooked the statute's requirements. Rather, it appears that HRS chapter 421J was enacted approximately fifteen years after the incorporation of KHHA. Thus, it is possible, that the legislature, in enacting HRS chapter 421J, intended that existing organizations such as KHHA--i.e., organizations that would be "associations" pursuant to chapter 421J but for the failure to include the assessment power in a recorded instrument--would fall under chapter 421J. However, even if we believe that the legislature intended to include organizations such as KHHA under HRS subchapter 421J-2's definition of "association," we

cannot depart from the plain and unambiguous language requiring that the instrument granting the required [assessment] authority must be recorded."

HRS 421J was enacted as public policy supporting the legal framework of homeowner associations. The homeowners' of the Kaanapali Hillside Association and other associations like it have been penalized with numerous legal challenges due to the developer's drafting of faulty documents--that may not meet the inclusionary specifics of HRS 421J. Please support HB 2894, enabling HRS 421J to include the homeowner associations that truly need it the most.

Thank you for this opportunity to testify.

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Steve Glanstein
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February 4, 2008

Representative Robert N. Herkes, Chair
Consumer Protection and Commerce Committee
Hawai'i State Capitol, Room 325
415 South Beretania Street
Honolulu, HI 96813

**RE: Testimony regarding HB 2894; Hearing Date: February 6, 2008; sent via fac-
simile to 586-6161; 586-8404**

Dear Chair Herkes and Members of the Committee:

Thank you for the opportunity to address the committee regarding HB 2894.

I am writing this testimony strictly as a homeowner who has first-hand personal experience with two particular community associations that attempted to assert their authority over homeowners even though there was no recorded declaration on the land of these homeowners.

I support SECTION 2 of the bill relating to document restatement which I believe is long overdue.

I am have serious concerns about SECTION 3 which proposes to redefine the requirements for a Planned Community Association.

Several homes in the Foster Village area in Honolulu did not have recorded covenants requiring membership. I purchased property in that area many years ago, with the specific intent to own without the encumbrance of a community association. A title search was done and we moved into the neighborhood.

We paid dues to the Foster Village Community Association for several years even though there was no requirement for us to do so. At that time, we supported the organization. This ended when the association changed their documents and removed our right to vote. They said we could only vote if we put restrictive covenants on our land. Obviously we were not going to encumber my land and probably couldn't without my mortgagee's consent.

The situation deteriorated in 1998 when the association considered legal action against all of the homeowners who did not have restrictive covenants. Fortunately, the legal action never came to pass.

The requirement of a recorded declaration puts the public on notice that there is a community association. **The bill proposes to redefine "declaration" as any association document instead of a recorded instrument that places the public on notice.**

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Any removal of this recordation requirement could impose restrictions or financial assessments on unsuspecting homeowners.

I especially see this becoming an issue in places such as Moanalua in Honolulu where there is a community association but no recorded membership requirement. I believe there are several areas on Maui (Upcountry) and the Kona coast (Holualua) that also might have similar issues.

In the case of the Foster Village Community Association, the covenants were ultimately removed by court order.

If this bill becomes law as written, the association could subsequently use their association documents as a means to inform us that we must pay assessments, notwithstanding the previous removal of covenants.

The bill appears to be a response to a Hawaii Supreme Court ruling related to the definition of a planned community association. The reference information is: "Kaanapali Hillside Homeowners' Association v. Doran. ICA Order Denying Plaintiff-Appellee's Motion for Reconsideration, filed 10/31/2006, 112 Haw. 470. S.Ct. Order Accepting Application for Writ of Certiorari, filed 03/08/2007, 113 Haw. 471. S.Ct. Opinion, filed 06/21/2007, 114 Haw. 361. S.Ct. Order Denying Motion for Reconsideration, filed 07/20/2007."

I respectfully request that the Committee consider the unanticipated consequences that can occur with the imposition of planned community associations without the simple requirement of advance notification to the public through the recordation process.

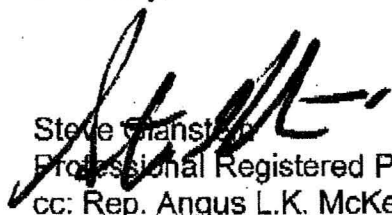
Summary

HB 2894 has a good SECTION 1 and 2.

SECTION 3 has a FUNDAMENTAL FLAW that will adversely affect homeowner rights. I urge the committee to amend the bill by protecting homeowners from "surprise community associations!"

Thank you for the opportunity to present testimony on this subject. Should you require more information, your call is most welcome. My number is 423-6766.

Sincerely,


Steve Stanston
Professional Registered Parliamentarian
cc: Rep. Angus L.K. McKelvey; Fax: 808-586-6161

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