HAWAII CHAPTER
community
ASSOCIATIONS INSTITUTE

March 29, 2008

SENATE COMMITTEE ON COMMERCE,
CONSUMER PROTECTION AND AFFORDABLE HOUSING
REGARDING HOUSE BILL 2894

Hearing Date	:	TUESDAY, April 1, 2008
Time	:	9: 00 a.m.
Place	:	Conference Room 229

Chair Kokubun and Members of the Committee:

My name is John Morris and I am testifying on behalf of the Hawaii Legislative Action Committee of the Community Associations Institute ("CAI") in support of House Bill 2894. CAI Hawaii is the local chapter of a national organization dedicated to improving the management and operation of community associations nationwide. This testimony focuses primarily on sections 1, 2, and 4 of the bill.

Section 1 of House Bill 2894 – Interpretation. This section merely establishes a rule of interpretation which the Legislature has already included in the condominium law. Essentially, the rule provides guidance to associations and members of associations in interpreting how their governing documents should be construed.

Section 2 of House Bill 2894 – Restatement. This section would allow non-condominium homeowner associations to "restate" their documents by board resolution and without an owner vote, just as condominiums can restate their documents to include: (i) prior amendments approved by the owners and (ii) provisions required by law. (*"Restatement" is basically a cleanup process under which the board gathers together all prior amendments to a document, plus any requirements imposed by the law, and includes them in a single document, for ease of use and interpretation. Restatement also allows a board of directors to remove from the document any potentially discriminatory statements about children, pets, etc., that might be contrary to law and might expose the association to liability*). In other words, restatement is only possible for amendments the owners have already approved or requirements that the Legislature has imposed on the association.

Unfortunately, that right of restatement does not exist under chapter 421J, although it has existed in the condominium law for almost 20 years. The restatement provision of the condominium law was originally enacted, in part, because owners would accuse their board of violating the documents, when, in fact, the board was following legal requirements enacted by the Legislature after the documents had been drafted. This problem is now arising for non-condominium associations.

Section 4 of House Bill 2894 – Amendment by Mail Ballot/Written Consent. This section proposes changes to the law that would make it easier to amend the governing documents of non-condominium associations by permitting amendments by written consent as well as by a vote at a meeting, even if the documents, themselves, do not specifically permit a vote by written consent. The Legislature also gave this right to condominium associations more than 20 years ago.

Many owners and board members have experienced the frustration of attempting to amend the governing documents of the association at a meeting. Unfortunately, for better or worse, association members sometimes seem to be either unable/unwilling to participate in association meetings or simply too apathetic to attend. That is particularly true for associations whose members are scattered around the country (and even around the world), making it difficult for them to attend association meetings.

At present, some governing documents of non-condominium associations can only be amended by a vote at an association meeting. For example, if an amendment requires a vote of two-thirds of the owners and two-thirds of the owners do not even attend a meeting, amendments cannot be passed at that meeting, no matter how important the amendments may be.

In contrast, if the documents can be amended by mail ballot/written consent, the association can continue to target owners who fail to respond to the mail ballot until: (i) the amendment passes or (ii) it is clear that the amendment lacks the support to pass. Moreover, the written consent/mail ballot process allows every association member to participate directly in important amendments and have his (or her) vote counted, even if the member is unable to attend an association meeting.

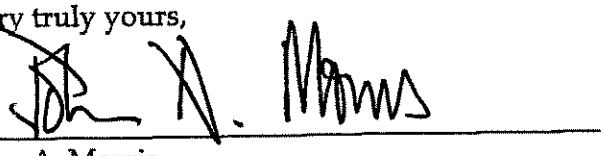
Again, the condominium law, which affects hundreds more homeowner associations in the State of Hawaii than Chapter 421J, HRS, has long allowed voting by written consent/mail ballot without any problems. Since the Legislature has recognized the benefits of allowing voting in condominiums by written consent/mail ballot, the Legislature should extend the same benefits to members of non-condominium associations.

Finally, the proposed changes in Section 4 would also make it easier for those associations whose members are ALL supposed to actually sign amendments to the governing documents, even if there are several thousand members (a ridiculous requirement that, nonetheless, exists in the governing documents of some associations).

Section 3 of House Bill 2894 - Definitions. This section deals with clarifying the definition of planned community association under chapter 421J. While there was some opposition to some of the changes made in that section, the parties have now worked out revised definitions that meet the concerns of everyone involved. Therefore, CAI hopes that this committee will seriously consider the proposed changes to section 3.

Please contact me at 523-0702 if you have any questions. Thank you for this opportunity to testify.

Very truly yours,



John A. Morris
Hawaii Legislative Action Committee
of the Community Associations Institute

JAM:alt

March 31, 2008

To: SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION AND AFFORDABLE HOUSING

TESTIMONY REGARDING HOUSE BILL 2894

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

Hearing Date: April 1, 2008
Time: 9:00 PM
Place: Conference Room 229, State Capitol

Chair Kokubun and Members of the Committee:

My name is Bruce Erfer, and I am testifying as a board member on behalf of the Kaanapali Hillside Homeowners' Association (KHHA) on Maui as well as the Hawaii Legislative Action Committee of the Community Associations Institute ("CAI") in support of House Bill 2894. My testimony focuses primarily on section 3 of the bill, although I strongly support what I consider the common sense amendments to sections 1, 2 and 4 of the bill.

Let me begin by stating that I have diligently worked with a testifier (Steve Glanstein) who found fault with Section 3 of the bill (in both HB 2894, and in the original Senate Bill 2743.) Mr. Glanstein and I previously submitted to the House Committee an agreed to revision of Section 3 (attached). The revision eliminates what Mr. Glanstein referred to as allowing "surprise community associations." While it was my understanding, and I believe that of Mr. Glanstein, that the version approved by the House Committee would include this revision to section 3, it did not. Hence, the version before you today does not include this revision language, and I respectfully ask that the version voted upon include the amendments to section 3 as attached. Mr. Glanstein's major issue is the insistence that an association document be recorded upon the members' deeds.

HRS 421J guides, protects, and offers rights to members of Planned Community Associations--the homeowners. Associations that qualify under the umbrella of 421J are given certain rights, responsibilities, and guidelines that, if adhered to, lessen the chances of legal challenges. Those few associations that do not qualify under this 421J umbrella, are left in "association limbo" and may be open to significant legal challenges--as is our Association and its members.

Following a three week trial in 2002, over the ability of our Association to assess, the District Court affirmed that there was an "implied" obligation that enabled an assessment power, and declared the Association to be 421J compliant. The Association operated under 421J for almost four years until the State's Intermediate Court of Appeals (in 2006) and the Supreme Court (in 2007) affirmed the Association's assessment power, but ruled that the Association does not fall under HRS 421J, basically because its Declaration of Covenants and Restrictions is silent with regard to the ability to assess, even though the By Laws and Charter of Incorporation both acknowledge this assessment power. It is the Declaration that is recorded upon the deeds of the 159 homeowners. Unfortunately, the inadequate Declaration also was silent as to how it could be amended--the ultimate catch 22. Currently, the 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.

While the Hawaii Supreme Court ruled that KHHA was not a "planned community association" under 421J, it did rule that KHHA qualified as a "planned community association" under HRS 607-14 – a statute that allows the Court to make an exception, for "planned community associations," to the standard legal costs and fees award of 25%. Hence, two definitions of "planned community associations" exist in two different statutes. HB 2894 would enable an association meeting the definition of "planned community association" under 607-14, to also qualify that homeowner association to be covered by 421J.

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."

The Supreme Court futher cited a quotation from a former ruling:

"We do not legislate or make laws. Even where the Court is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used."

It may be presumptious of me, but if the judges of the appellate courts of Hawaii were present today, they would strongly recommend that HB 2894 be implemented.

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--not meeting the inclusionary specifics of HRS 421J. Please support HB 2894, enabling HRS 421J to include the homeowner associations that truly need it the most.

Direct any questions you may have to me at (808)-667-6066 or at khillside@hotmail.com. Thank you very much for this opportunity to testify.

Respectfully,

Bruce Erfer

Attachment (2 pages)

HB 2894 revision: page 1

SECTION 3. Section 421J-2, Hawaii Revised Statutes, is amended as follows:

1. By amending the definition of "association" to read:

""Association" means a nonprofit, incorporated, or unincorporated organization [~~upon~~]:

(1) Upon which responsibilities are imposed and to which authority is granted in a declaration which governs a planned community[~~.~~]; or

(2) A planned community association as defined pursuant to section 607-14."

2. By amending the definition of "association documents" to read:

"Association documents" means the articles of incorporation or other document creating the association, if any, the bylaws of the association, the declaration or similar organizational documents and any exhibits thereto, any rules related to use of common areas, to architectural control, to maintenance of units, [~~or~~] to restrictions on use of units, or to payment of money as a regular annual assessment or otherwise in connection with the provisions, maintenance, or services for the benefit of some or all of the units, the owners, or occupants of the units or the common areas, as well as any amendments made to the foregoing documents.

4. By amending the definition of "declaration" to read:

"Declaration" means any recorded [~~instrument~~] association document, however denominated, that imposes obligations on [~~an association~~] the owners of the units with respect to maintenance or operational responsibilities for the common area, architectural control, maintenance of units, or restrictions on use of units[~~and creates the authority in the association to impose on units, or on the owners or occupants of the units, any mandatory payment of money as a regular annual assessment or otherwise in connection~~

~~with the provisions, maintenance, or services for the benefit of some or all of the units, the owners, or occupants of the units or the common areas~~]. A declaration includes any amendment or supplement to the instruments described in this definition.

5. By amending the definition of "planned community" to read:

""Planned community" means one of the following:

(1) real property, other than a condominium or a cooperative housing corporation or a time share plan, subject to a planned community association which is defined pursuant to section 607-14, or

(2) [~~or~~] a common interest community, other than a condominium or a cooperative housing corporation or a time share plan, which includes all of the following characteristics:

(A) [~~(1)~~] Real property subject to a recorded declaration placing restrictions and obligations on the owners of the real property [~~and providing for rights and responsibilities of~~] that are enforced or enforceable by a separate entity, the association[:], established for that purpose whether or not mentioned in the declaration, and:

(i) [~~(A)~~] Which owns and maintains certain property within the planned community for the common use or benefit, or both, of the owners of units within the planned community;

(ii) [~~(B)~~] Which is obligated to maintain certain property it does not own within the planned community for the common use or benefit, or both, of the owners of units within the planned community; or

(iii) [(C)] Which is obligated to provide services to any such owners or units;

(B) [~~(2)~~] Individual owners own separate units which are part of a planned community at least some of which are improved by or are to be improved by residential dwellings;

(C) [~~(3)~~] Owners have automatic and non-severable membership in an association by virtue of ownership of units within the planned community; and

(D) [~~(4)~~] Owners, other than a master developer or declarant, are obligated by any association document to pay mandatory assessments by virtue of ownership of a unit within the planned community."

Steve Glanstein
P. O. Box 22885
Honolulu, HI 96823-2885

March 31, 2008

Sen. Russell S. Kokubun (Fax: 808-586-6659)
Chairman, Consumer Protection and Affordable Housing Committee
2nd Senatorial District
Hawaii State Capitol, Room 407
415 South Beretania Street
Honolulu, HI 96813

RE: Testimony supporting HB 2894 with amendments to SECTION 3; sent via facsimile and e-mail

Dear Chair Kokubun, Vice-Chair Ige, and members of the committee,

Thank you for the opportunity to address the committee regarding HB 2894. This bill is similar to the companion bill SB 2743 which was previously deferred by your committee on February 12, 2008.

I am writing this testimony 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 am also very experienced with homeowners associations, having served as a professional registered parliamentarian in Hawaii for 25 years.

SECTION 2 of the bill relating to document restatement is long overdue and I support it.

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

I have first hand experience where this recordation protection provided a defense to both myself and numerous residents in the Foster Village area when a board of directors was considering legal action to force us to be members of a community association.

The current statute requires a recorded instrument. This requirement PROTECTS PROSPECTIVE BUYERS AND EXISTING HOMEOWNERS.

I recommend that this protection be retained.[1]

---

[1]These issues were previously presented by me in testimony before this committee on companion bill SB 2743 on February 11, 2008.

I subsequently worked with one homeowner proponent of this bill, Mr. Bruce Erfer of Kaanapali Hillside Owners Association.

We agreed that (1) recordation was important and (2) the requirement of HRS §607-14 should also be applied.

The HRS §607-14 requirement was added, but SECTION 3 proposes to remove the recordation requirement.

I respectfully request that the Committee amend SECTION 3 item 2 to RETAIN THE EXISTING DEFINITION of "Declaration."

I respectfully request that the Committee change SECTION 1 as needed to support the change in SECTION 3.

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

SG:tbs/Attachment
D:\$P\Legislative2008\HB2894\Testimony2.wpd

Mililani Town Association

95-303 Kaloapau Street
Mililani Town, HI 96789
Phone (808) 623-7300

April 1, 2008

Senator Russell Kokubun, Chair,
Senator David Ige, Vice-Chair
Committee on Commerce, Consumer Protection
And Affordable Housing
c/o Legislator's Public Access Room VIA Email: testimony@capitol.hawaii.gov
State Capitol
Honolulu, HI 96813

Re: H.B. No. 2894 – Relating to Planned community Associations
Hearing: Tuesday, April 1, 2008; 9:00AM, Conf Room 229

Dear Senators Kokubun and Ige and Committee Members:

My name is Eric Matsumoto, currently serving as Vice-President of Mililani Town Association, having previously served as its President for 20 plus years and as a Past President of the CAI Hawaii Chapter.

Thank you for hearing this bill. I fully support Sections 1 and 2 of the bill, especially Section 2 which provides for restatement of planned community associations.

However, the language of Section 3 is problematic and may have unintended consequences for some associations that have other types of improperly drafted documents. I would support an amendment that would revise the definition of a planned community to include a community association defined either under Section 607-14 or a common interest community subject to recordation in addition to the other aspects that make up a planned community.

Sincerely yours,

Eric M. Matsumoto
Vice-President

Cc: Senator Menor
Senator Bunda
Representative Lee
Representative Yamane