

Eric M. Matsumoto
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February 10, 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
State Capitol
Honolulu, HI 96813**

VIA Email: CPHtestimony@capitol.hawaii.gov

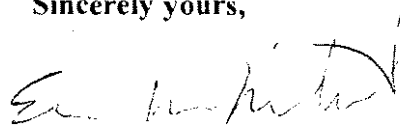
**Re: S.B. No. 2743 – Relating to Planned community Associations
Hearing: Tuesday, February 12, 2008; 9:00AM, Conf Room 229**

Dear Senators Kokubun and Ige and Committee Members:

My name is Eric Matsumoto, the immediate Past President of the Mililani Town Association. While I continue to serve on the board, I'm submitting testimony on my own behalf given the 20 plus years as its President, and as a Past President of the CAI Hawaii Chapter.

I agree with the need for the restatement of planned community associations and can support this part of the measure. However, the language of Section 3 is problematic and may have unintended consequences for some associations that have other types of improperly drafted documents. This section should be reviewed to determine if it can be reworded so as to apply only to those associations that have improperly drafted documents that are recorded in their deeds.

Sincerely yours,



Eric M. Matsumoto

**Cc: Senator Menor
Senator Bunda
Representative Lee
Representative Yamane**

testimony

From: Bruce Erfer [khillside@hotmail.com]
Sent: Monday, February 11, 2008 1:01 PM
To: testimony
Subject: SB 2743 testimony

Attachments: HB2894 revisions 3.pdf



HB2894 revisions
3.pdf (17 KB)

SENATE COMMITTEE -- CPH

TESTIMONY REGARDING SENATE BILL 2743

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 12, 2008
Time: 9:00 PM
Place: Conference Room 325, State Capitol
Regarding: Testimony, Senate Bill 229

My name is Bruce Erfer, and I am testifying on behalf of the Kaanapali Hillside Homeowners' Association (KHHA) here on Maui, in support of SB 2743. I have been President of the Association for the past 4 years. I originally got involved with the Association in hopes that I could have some positive impact on the settlement of legal issues resulting from faulty governing documents.

Let me begin by stating that I have diligently worked with a testifier (Steve Glanstein) on the House version of this bill (HB 2894), who found fault with Section 3 of the bill. Mr. Glanstein and I submit the agreed to revision of Section 3. The revision eliminates what Mr. Glanstein referred to as allowing "surprise community associations." This revision has also been submitted to the House.

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 our 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 SB 2743 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 and 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."

The Supreme Court further 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."

Furthermore, the Supreme Court ruled 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. SB 2743 would enable the definition of "planned community association" from 607-14, to also qualify a homeowner association to be covered by 421J.

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.

[PDF attached]

Perhaps the greatest irony is that even though the Supreme Court has ruled that our Association does not qualify as a "planned community association" under 421J, our Association continues to operate as if it does qualify, using the guidance and restrictions of 421J to lead the management of our Association--while not being availed of 421J's legal protections.

Thank you for this opportunity to testify.

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http://im.live.com/Messenger/IM/Home/?source=text_hotmail_join

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) [ø] 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) [(4)] 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."