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February 11, 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 opposing SB 2743 Section 3; sent via facsimile only

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

Thank you for the opportunity to address the committee regarding SB 2743.

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 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.**

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

SB 2743 has a good SECTION 1 and 2.

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

I was recently contacted by a key individual involved with the companion House Bill 2894, Mr. Bruce Erfer. We have been able to agree on an alternative solution for Section 3. It is attached for your review.

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 Gansstein
Professional Registered Parliamentarian
SG:tbs/Attachment

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~~

Att's Exhibit

~~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."~~

R. Hecht