PRESENTATION OF THE
REAL ESTATE COMMISSION

TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION AND COMMERCE

TWENTY-FIFTH LEGISLATURE
Regular Session of 2009

Monday, February 9, 2009
2:15 p.m.

TESTIMONY ON HOUSE BILL NO. 137, RELATING TO CONDOMINIUMS.

TO THE HONORABLE ROBERT N. HERKES, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is William S. Chee and I serve as the Chairperson of the Real Estate Commission's ("Commission") Condominium Review Committee. Thank you for the opportunity to present testimony on House Bill No. 137, Relating to Condominiums. The Commission has concerns with House Bill No. 137 and respectfully disagrees that the bill purportedly makes various minor amendments to assist in clarifying and implementing the recodified condominium law. From the Commission's perspective, the amendments potentially have major substantive impact.

The Commission's concerns will be restricted to proposed amendments in House Bill No. 137 that were not originally contemplated by the recodification of Chapter 514A, HRS, and they are as follows:

- Section 2 – The term "approval", is used interchangeably with "unit owner", the "board", the "Commission", "lenders", and "developers" throughout Chapter 514B, HRS. With this new proposed definition, the

impact is that it now limits the definition only to "unit owners". To address what we believe may be an unintended result, the Commission recommends that the proposed amendment on lines 13 and 14 on page 1 be amended to read as follows: "'Approval of unit owners means approval by a vote or written consent."

- Section 3 – The proposed inclusion of section 514B-32, HRS, to automatically apply to pre-existing condominiums may result in invalidating the declarations of all existing condominiums. This is not consistent with the original recodification effort. However, if the proposed amendment is intended to make the approval requirement for amending declarations standard and consistent with the bylaw approval requirements, line 10 on page 2 should be amended by replacing the underscored section number (of "514B-32") with "514B-32(11)". This would make the proposed amendment a minor housekeeping amendment and still consistent with the original intent of recodifiying the condominium law to provide a 67% owner approval requirement to amend both the condominium declaration and bylaws.
- Section 6 – This section appears to propose a new requirement that developers include, in the developer's public report, information about reserves to repair, maintain and upkeep the condominium project. This new requirement was not contemplated as part of the

recodification effort. Currently the original and recodified condominium law requires the association to conduct a reserve study and assess the owners to fund the reserves. However, the developer who is quite familiar with the components of the condominium project apparently is in a better position to conduct a reserve study. Such valuable and relevant information can then be handed to the organized association for use in repairing, maintaining, and upkeeping the condominium project. This proposed amendment would have major substantive impact.

- Section 11 – This section proposes to allow owners and vendees under an agreement of sale to withhold information that is currently being used for a membership list. The Commission believes the membership list is an essential vehicle for condominium self governance. The proposed amendment would weaken this vehicle and allow only those owners who may be privy to the withheld names and addresses, the ability to solicit support and proxy votes to amend bylaws, declarations, elections and removals. Also the recodification effort did not contemplate this scenario. This proposed amendment would have major substantive impact and should not be given favorable consideration.

Since the Commission believes House Bill No. 137 proposes new substantive amendments not originally contemplated when Chapter 514A, HRS, was recodified, the Commission recommends, as was done in the past when recodifying the condominium law, that the proponents and all interested parties work collectively in arriving at a consensus on the final version of House Bill No. 137.

Thank you for the opportunity to provide testimony on House Bill No. 137.

HAWAII INSURERS COUNCIL
A trade association of property and casualty insurance companies

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Alison Powers
Executive Director

TESTIMONY OF ALISON POWERS

HOUSE COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Representative Robert N. Herkes, Chair
Representative Glenn Wakai, Vice Chair

Monday, February 9, 2009
2:15 p.m.

HB 137

Chair Herkes, Vice Chair Wakai and members of the Consumer Protection & Commerce Committee, my name is Alison Powers, Executive Director of Hawaii Insurers Council. Hawaii Insurers Council is a non-profit trade association of property and casualty insurance companies licensed to do business in Hawaii. Member companies underwrite approximately 60% of all property and casualty insurance premiums in the state.

Hawaii Insurers Council **opposes Section 9** of H.B. 137, which adds a new subsection (page 15, lines 8 – 18) to Chapter 514B-143 that mandates insurance companies to provide a written summary in plain language to the board of directors of an association for any insurance policy provided under Chapter 514B-143 (a), which includes property, commercial general liability, and fidelity bond insurance.

Insurance companies regularly have their policy forms reviewed by legal counsel prior to use. Legal counsel will develop the policy to insure the intent of the insurance company is captured in the policy form. To require a summarization of the policy in "plain language" could cause the insurance carrier to be subject to additional liability

should the summary language be interpreted by the insured and the courts to be different than the intent of the policy language.

We ask that the committee remove this requirement from the bill.

Thank you for this opportunity to testify.

HB137, SECTION 3

The proposed change to insert §514B-32 as a part of the list in HRS §514B-22 will have unintended consequences.

§514B-32 describes the required content of the Declaration that creates a condominium property regime. This change may result in automatically invalidating the declarations of all existing condominiums. This is inconsistent with the original recodification effort.[3]

HB137, SECTION 7

1. Item 1 proposes to amend HRS §514B-106(c):

   "(c) [~~Within thirty days after the adoption~~] Prior to the effective date of any proposed budget for the condominium, the board shall [~~make available~~] send a copy of the budget to all the unit owners [~~and shall notify each unit owner that the unit owner may request a copy of the budget~~]."

   I am opposed to this change. It actually provides for a delayed disclosure of the budget.

   The existing statute requires that the budget be available within 30 days after adoption. A board could adopt a budget for the new year in September of the past year and hold up informing owners until December.

   Owners should be entitled to have the budget available after adoption by the board, regardless of the budget's effective date.

   The proposed change also ignores the added expense without any benefit to several condominium associations to send a copy of the budget to all owners, especially foreign owners.

   I believe that the current statute requiring notification to all unit owners that they may request a copy of the budget is adequate. Currently, an association can already comply by making information available on an internet site (§514B-154).

2. Item 2 proposes to amend HRS §514B-106(f):

   "(f) At any regular or special meeting of the association, any member of the board may be removed and successors shall be elected for the remainder of the term to fill the vacancies thus created. The removal [~~and replacement~~] shall be by a vote of

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[3]This information is also contained in the presentation of the Real Estate Commission to the Senate Committee on Commerce, Consumer Protection, and Affordable Housing on February 12, 2008 on SB3175.
The web reference is: http://www.capitol.hawaii.gov/session2008/Testimony/SB3175_CPH_02-12-08.pdf

a majority of the unit owners and, otherwise, in accordance with all applicable requirements and procedures in the bylaws for the removal and replacement of directors and, if removal and replacement is to occur at a special meeting, section 514B-121(b)."

I am opposed to this change. This change is, in my opinion, the worst one of all of the changes. The current statute HRS §514B-106(f) has been very successful.[4]

I have collected statistics from four large property management companies regarding removal proceedings of one or more directors. These companies (Certified Management, Hawaiiana Management, Hawaii First, and Hawaiian Properties) manage approximately 1,200 of the about 1,628 condominium associations in the state of Hawaii.

The information received indicates only 6 planned community association removal proceedings and 19 condominium association removal proceedings in 2008.

The condominium association removal proceedings were less than 2% of all condominiums registered with the Real Estate Commission.

Either I or one of my three assistants were physically present at 15 of these 19 meetings. For your information, most of these 15 removal proceedings did not result in a removal of one or more directors.

The current law provides a threshold of a, "majority of unit owners" for both removal and subsequent replacement of directors.

This principle has worked in a majority of the removal cases.[5]

I am amenable to suggesting some changes to this section. However, the totality of these proposed changes and the detrimental effect to Hawaii's condominium associations force me to oppose this entire bill.

This majority of unit owners' threshold was designed to override several abuses in condominiums that I previously described in both verbal and written testimony presented in 2005.[6]

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[4]This amendment is exactly the same amendment that was previously deferred in 2008 by the Senate Commerce and Consumer Protection Committee when it deferred SB3175.

[5]If requested, I can provide details for each of the removals that we attended last year.

[6]2005 Act 155, known as SB1798, HD1, CD1.

HB137, SECTION 8

This section proposes to amend §514B-122(a):

> "(a) Minutes of meetings of the association shall be approved at the next succeeding regular meeting or by the board, within sixty days after the meeting, if authorized by the owners at an annual meeting. If approved by the board, owners shall be given a copy of the approved minutes [~~or notified of the availability of the minutes within thirty days after approval.~~] prior to the next association meeting."

I am opposed to this amendment. It will permit a board to withhold approved minutes until just prior to the next association meeting. That can be almost a year later.

The change also requires that a copy be given to all owners. Many owners look to the association website for minutes and my experience has been that most boards make the minutes available shortly after approval.

SUMMARY

The "minor amendments" have consequences that can undo much of the progress of the recodification effort. The major change in removal requirements would once again frustrate the removal procedures for condominium associations. I urge the committee to hold this bill.

Thank you for the opportunity to present testimony on this subject.

Sincerely,

Steve Glanstein
Professional Registered Parliamentarian

SG:tbs
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H.I.C.C.O.
HAWAII INDEPENDENT CONDOMINIUM & COOPERATIVE OWNERS
1600 ALA MOANA BLVD. - APT. 3100 - HONOLULU - HAWAII 96815

February 9, 2009

Rep. Robert N. Herkes, Chair
Committee on Consumer
Protection and Commerce

Testimony on HB 137 Relating to Condominiums

Dear Representative Herkes:

Thank you for this opportunity to testify on behalf of the Hawaii Independent Condominium and Co-op Owners (HICCO).

Our organization has concerns regarding **Sections 8 and 11 of HB 137.** Regarding Section 8, it is important that draft minutes of Association meetings be available to owners within a reasonable time after an Association meeting, preferably within 60 days. The Annual Association Meetings are often controversial and sometimes result in lawsuits. Generally, owners are not allowed to tape record these Association meetings. Therefore, draft minutes must be made available to owners who request them. I have attached a draft of appropriate language for this section.

Regarding Section 11, the proposed language in Section 11(e) would allow owners, Boards, and management companies to conceal information that all condo owners are entitled to have in order to communicate with other owners about Association bussines. Therefore, we request that you eliminate the proposed language in lines 16 & 17

We urge you to approve the alternate language we have proposed for Section 8 and eliminate the proposed language in Section 11.

Sincerely,

Richard Port, Chair
Legislative Committee

ATTACHMENT

Proposed Alternate Language for Section 8-Section 514B-122

SECTION 8- Section 514B-122, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

(a) Minutes of meetings of the Association shall be approved at the next succeeding regular meeting by the members of the Association. The Board shall approve draft minutes and make them available to owners within sixty days after the Association meeting.

HOUSE OF REPRESENTATIVES
THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2009

COMMITTEE ON CONSUMER PROTECTION & COMMERCE

HB 137 Clarification of HRS 514B

Honorable Chair Representative Robert N. Herkes and members of the committee.

I am submitting testimony in favor of HB 137. It adds immeasurability to the clarity of the law and allows a Board of Directors to consolidate many administrative tasks to reduce expenses to the association. Any exception to the distribution of information to individual members has already been provided for in the law.

I especially like the changes on page 16.
Line 5 - Frequently a developer of single family or townhome condominiums with unsold units will delay standing up the community in order to avoid paying maintenance fess on those units. Consequently, the common amenities of the community maybe in use for years before the association/developer have to fund the reserves. When the association is formed, it immediately finds itself underfunded and in violation of the reserve statutes.
Line 17 – Puts the onus on the member, who is the only one who knows, to provide current addresses.

However, on page 11, line 18 – Only the word 'directors' should be struck out.

As an owner, Director, and manager of common interest communities, I thank you for the opportunity to testify.

Ted Walkey, PCAM
593-6868

HAWAII CHAPTER
community
ASSOCIATIONS INSTITUTE

February 9, 2009

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE REGARDING HOUSE BILL 137

Hearing Date	:	MONDAY, February 9, 2009
Time	:	2: 15 p.m.
Place	:	Conference Room 325

Chair Herkes 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") to support House Bill 137, *with minor changes*. CAI Hawaii is the local chapter of a national organization dedicated to improving the management and operation of community associations nationwide. CAI has over 200 members in Hawaii and over 14,000 nationwide.

As the bill indicates, most of the changes proposed by the bill are relatively minor but CAI believes they will clarify and better implement the recodified condominium law, chapter 514B, HRS.

A brief summary of the reasons for the proposed changes is as follows:

Section 2. A number of sections in chapter 514B require the approval of the apartment owners. Experience has shown that it is often easier to obtain owner approval through a mail ballot/written consent than through a vote at a meeting. Unfortunately, owners are often unable or unwilling to attend meetings because of job commitments, residence outside of Hawaii, or apathy. Approval by written consent gives every owner a chance to vote on an issue, even if the owner cannot attend an association meeting. That is especially a problem when "supermajority" approval is required, such as 67% for the amendment of a condominium bylaws or declaration. Therefore, the first proposed amendment to the definitions section of chapter 514B -- section 514B-3 -- confirms that any owner approval required under the law can be obtained either at a meeting or through written consent. To clarify that the change refers only to approval by unit owners, CAI proposes that the definition on lines 13 and 14 be amended to read: "Approval" when used in reference to approval by unit owners means approval by a vote or the written consent of the unit owners."

Owners and even boards are often confused about who runs the project, the board of directors or the managing agent. The proposed amendment to the definition of managing agent

confirms that the managing agent is only an agent and therefore only assists the board in managing and operating the project.

A number of provisions in chapter 514B limit the authority of resident managers to participate in the management and operation of a condominium project, to avoid the problem of undue influence by association employees. The fact that the law speaks only of resident managers has sometimes resulted in abuse when an association employee is referred to as an "on-site" or "general" manager, not a "resident" manager. This proposed change corrects that problem.

Section 3. When chapter 514B was enacted, it inadvertently failed to make the section relating to declarations -- section 514B-32 -- automatically applicable to existing associations. In contrast, the section relating to bylaws -- section 514B-108 -- was made automatically applicable. This means that some associations operate under the old law (chapter 514A) and some under the new (chapter 514B). The change in this section proposes to make section 514B-32 automatically applicable to all associations by including it in section 514B-22, (which lists the sections that are automatically applicable to all associations).

Section 4. Section 514B-38(3) was enacted to allow boards of directors the flexibility to make changes to open areas of the project and to allow minor encroachments by owners on the common elements. (For example, under a strict reading of the condominium law, without this section, an owner wishing to install a small air-conditioning compressor on the common elements right outside his unit might have to obtain the approval of at least 75% or even 100% of the other owners.) Unfortunately, the reference to section 514B-140(c) in Section 514B-38(3) has hampered the effectiveness of the change by imposing high owner approval requirements, even for such simple changes. Section 4 proposes to restore the flexibility that was intended with Section 514B-38(3) by eliminating the reference to section 514B-140(c).

Section 5. Section 514B-35 states that unless the declaration indicates otherwise, parts of the project which benefit only one apartment are deemed limited common elements for the exclusive use of that apartment. The intent is to give apartments the benefit of such limited common elements and also make them responsible for those limited common elements. Nevertheless, section 514B-41, which deals with payment of the expenses of limited common elements, does not make that clear. This proposed change is intended to make it clear that owners who receive the benefit of limited common elements under section 514B-35 must also pay the expenses of those limited common elements, unless it makes more sense to charge them as common expenses under subsection 514B-41(c) (for example, when repaving a parking lot it makes more sense NOT to bill owners separately for their limited common element parking stalls). CAI suggests a slight change to this amendment, as follows (**in bold**):

Notwithstanding the preceding limitations, **except as otherwise provided in subsection (c)** all costs and expenses of items designated as limited common elements pursuant to section 514B-35, including the costs and expenses of maintenance, repair, replacement, additions, and

improvements, shall be charged to the owner or owners of the unit or units to which the limited common element is appurtenant.

Section 6. While section 514B-83 requires the developer of a condominium project to disclose to prospective purchasers the estimated amount of maintenance fees the owners will have to pay, the section does *not require the same disclosure for reserve contributions*. Sometimes, the lack of disclosure leads to significantly increased assessments for new owners in the project when they purchase and then must make contributions to reserves. This section proposes amendments to require the developer to also disclose the estimated reserve contributions that will be required from owners if they purchase a unit in a new development.

Section 7. At present, the condominium law requires that within 30 days after adopting a budget, a condominium board must notify owners that the new budget is "available." Instead of going to all the trouble of simply letting owners know that the budget is available, this section proposes to require that the board send out a copy of the budget.

The proposed amendment to section 514B-106(f) is intended to protect, minority "cumulative voting" rights if they are provided by the declaration and bylaws. (Cumulative voting allows minority groups to "cumulate" their votes in favor of one candidate so minority groups can have some representation on the board. For example, if there are three vacancies and each owner has three votes -- i.e., one vote for each vacancy -- under cumulative voting, the minority can vote all three of their votes for one of the candidates, thereby allowing themselves to elect at least one director.) Right now, section 514B-106(f) makes it clear that a majority of the owners -- 50.1% -- must vote to remove a member of the board. Unfortunately, the section also states that a majority of the owners must vote to elect new members of the board after the old board members have been removed. Requiring a majority of owners to vote to elect new members eliminates the protections of cumulative voting. The changes proposed in section 7 will allow the cumulative voting provisions for election of directors to govern the election of directors after removal of directors, to protect minority rights. The section does so by making it clear that only removal must be by a majority vote - i.e., election of directors after removal can be by cumulative voting if the bylaws permit cumulative voting. CAI suggests a slight change to this amendment, as follows (**in bold**):

"(f) At any regular or special meeting of the association, any member of the board may be removed and successors shall be elected for the remainder of the term to fill the vacancies thus created. The removal **and replacement** shall be by a vote of a majority of the unit owners, and, otherwise, in accordance with all applicable requirements and procedures in the for the removal and replacement of directors and, if removal and replacement is to occur at a special meeting, section 514B-121(b); **provided that if the bylaws provide for replacement by cumulative voting, the vote to replace directors shall be by cumulative voting,.**"

Section 8. As with the change made in section 7, this section proposes that instead of simply notifying owners that association meeting minutes are available, the board should mail the minutes to the owners before the next association meeting, so the owners can review the minutes and propose corrections at the meeting.

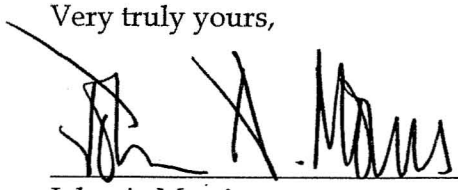
Section 9. The old condominium law, chapter 514A, required a condominium association to provide owners with a summary of the coverage provided by the association's insurance policy. Unfortunately, this requirement was inadvertently omitted from Chapter 514B. Section 9 proposes to restore this requirement.

Section 10. Chapter 514B presently requires that an association does not have to start collecting reserves until the beginning of the fiscal year following the association's first meeting. This change proposes to amend section 514B-148(b) to require associations to start collecting reserves immediately.

Section 11. At present, the law requires an association to keep a list of the names and addresses of association members and vendees who are purchasing an apartment under an agreement of sale. Unfortunately, some members and vendees fail to provide the required information to the association. This change proposes to make it clear that the association is only required to keep a list of those members and vendees *who actually provide their names and addresses to the association.*

The CAI LAC believes that all of the amendments in the bill are worthy of consideration. 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
Enclosure