



THE JUDICIARY, STATE OF HAWAII

Testimony to the House Committee on Housing

The Honorable Rida T.R. Cabanilla, Chair

The Honorable Pono Chong, Vice Chair

Wednesday, February 2, 2011, 8:30 a.m.

State Capitol, Conference Room 325

by

Rodney A. Maile

Administrative Director of the Courts

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 1662, Relating to Condominium Dispute Resolution

Purpose: Requires certain condominium-related disputes involving an owner and the association to be submitted to mediation. Requires the real estate commission of the State to submit a summary to the legislature detailing which programs were directed at the development of expeditious and inexpensive condominium-related disputes. Repeals section 514B-161, HRS. Authorizes funds from the condominium education trust fund to be used for mediation services.

Judiciary's Position:

The Judiciary recognizes the benefits of using mediation and other forms of Alternative Dispute Resolution (ADR) to resolve appropriate condominium disputes and agrees that mediation and other alternatives to court assist condominium communities.

House Bill No. 1662 would require parties to mediate "in good faith" and the Judiciary suggests deleting that provision and associated provisions. The concept of "good faith" is amorphous, and a determination of whether a party acted in "good faith" would be based on subjective rather than objective standards. We would note that having a "good faith" provision may actually lead to more litigation, when the intent of mediation is to reduce litigation.

Thank you for the opportunity to testify on this measure.



P.O. Box 976
 Honolulu, Hawaii 96808
 January 31, 2011

Honorable Rida Cabanilla
 Honorable Pono Chong
 Committee on Housing
 415 South Beretania Street
 Honolulu, Hawaii 96813

Re: HB 1662

Dear Chair Cabanilla, Vice-Chair Chong and Committee Members:

I chair the CAI Legislative Action Committee. CAI supports HB 1662.

The essential thrust of HB 1662 is that the Condominium Education Trust Fund should be used to subsidize commercial quality mediation for the resolution of condominium-related disputes. Mediation, and not adjudication, is appropriate for most such disputes.

Volunteers who serve in the various entities that the real estate commission contracts with presently do a wonderful job in many cases. Facilitated dialogue can solve a host of problems.

Some condominium-related disputes are particularly difficult, however. The services of mediators with special training and expertise can add value to the dispute resolution process in such cases. These are commercial mediators.

Consumers often require a subsidy to access commercial quality mediation services. It is important to enable consumers to have access to such services in order to enhance the prospects of success in resolving intractable condominium-related disputes.

While the number of condominium-related disputes that can best be served by commercial quality mediation may be limited, the damage such disputes may cause to particular communities can be substantial. HB 1662 should be enacted, in part, because the cost to subsidize valuable commercial quality mediation services can be distributed among the entire pool of condominium owners, through the condominium education trust fund.

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Hawaii Revised Statutes ("H.R.S.") Section 514B-71 provides (in relevant part) as follows:

[\$514B-71] Condominium education trust fund. (a)
The commission shall establish a condominium education trust fund that the commission may use for educational purposes. Educational purposes shall include financing or promoting: ***

(3) **Expeditious and inexpensive procedures for resolving association disputes.**

(b) The commission may use any and all moneys in the condominium education trust fund for purposes consistent with subsection (a). (Emphasis added)

Thus, H.R.S. Section 514B-71(a)(3) provides a source of funding for mediation services. The condominium education trust fund is funded by condominium owners. That means funding comes directly from the relevant community.

Mediation is an exceptionally consumer-friendly process. Unfortunately, the current condominium mediation statute, H.R.S. Section 514B-161, actually works against the good faith use of mediation.

This is because the current statute incentivizes consumers to devalue mediation, and to regard mediation as a *pro forma* exercise. Condominium law should, in contrast, incentivize all parties to make the most of the mediation opportunity.

A "pilot" program enabling the Department of Commerce and Consumer Affairs, Office of Administrative Hearings ("OAH"), to **adjudicate** condominium-related disputes has produced essentially no value to consumers. It is scheduled to sunset this year.

OAH has only published sixteen total decisions since July 2, 2004, which is just over two per year. Few of those decisions produced any value to a consumer. The decisions are posted on the OAH website. Other initiated cases were presumably dismissed.

Still, many consumers essentially sat idly through a single mediation session, because doing so was a jurisdictional prerequisite to entering the pilot program. Their focus was on the pilot program rather than on the mediation.

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A special authority to adjudicate condominium-related disputes is not needed. Courts adjudicate disputes.

The unmet need is for win-win opportunities. Mediation is the vehicle for creating such opportunities. CAI is asking the legislature to put its weight behind the creation of robust mediation opportunities.

Mediation can be a vehicle for clarifying misunderstandings, for mending hurt feelings, for educating and informing the parties, for testing positions out on a neutral person who is not involved in the dispute, and for many other things. The value added by using subject matter experts to serve the mediator role is to provide insight to consumers in a setting designed to bring people together. The corollary is that all parties to a condominium-related dispute should make the most of the mediation opportunity.

The outcome of litigation or arbitration is always uncertain. Mediation empowers parties to control their own outcomes and to evaluate not only the strength of their positions but to also evaluate the true path ahead if no agreement is reached.

Consumers often have meritorious positions. A respected mediator can influence recalcitrant board members to focus on their fiduciary duty to the association as a whole in cases where emotions run high and personalities clash. Consumers sometimes feel that they have meritorious positions, and may be unclear about the legal or contractual impediments to having things go their way. Consumers might also perceive that a challenging posture serves a purpose that, ultimately, might be more easily achieved if they better understood how to create change in condominium communities.

**PRESENTATION OF THE
REAL ESTATE COMMISSION**

TO THE HOUSE COMMITTEE ON
HOUSING

TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Wednesday, February 2, 2011
8:30 a.m.

**TESTIMONY ON HOUSE BILL NO. 1662, RELATING TO CONDOMINIUM DISPUTE
RESOLUTION.**

TO THE HONORABLE RIDA T.R. CABANILLA, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Michelle Loudermilk and I serve as the Chairperson of the Real Estate Commission's ("Commission") Condominium Review Committee, and I thank you for the opportunity to present testimony on House Bill No.1662, relating to condominium dispute resolution. The Commission has some concerns about House Bill No.1662.

- Section 2 of House Bill No. 1662 proposes a new section providing for mandatory mediation; creates a "duty" to mediate in good faith and defines what is included in "good faith"; includes grounds for breach of such duty; provides procedures for demanding mediation; specifies who may be mediators and limits mediators to non-profit entities contracted with the commission; provides that certain matters excluded from mandatory mediation may now be submitted to mediation; and appears to rewrite in part section 514B-161, HRS.

The Commission has some concerns with the proposed new section as follows:

- Subsection (b) may be unnecessary. The current law (section 514B-161(b), HRS) appears to allow all parties to a dispute to agree to submit any proposed excluded mediation areas to mediation.
- The proposed articulated "duty" to mediate in good faith may be unnecessary. The Commission understands that this duty is implied in the law.
- Proposed subsection (b) (1) may be inconsistent or conflicting in part with sections 514B-146(d), HRS. Subsection (b) (1) requires all parties in an assessment situation to agree to mediate an excluded matter. This is in contrast to the current law (section 514B-146(d), HRS) which allows an owner to mediate an assessment dispute where the association might not agree to mediate as long as the owner pays the association the full amount claimed by the association;
- Proposed subsection (h) limits mediators to non-profit entities that the Commission contracts to provide low-cost alternative dispute resolution services. There are many other low-cost service providers, which are not non-profit entities, and owners have in the past utilized these other services. Subsection (h) proposes to prohibit the use of such other providers.
- Section 3 of House Bill No. 1662 proposes to require the Commission to expend the Condominium Educational Trust Fund ("CETF") specifically for

mediations by the specific inclusion of mediation as an expeditious and inexpensive procedure for resolving association disputes. This proposed amendment is unnecessary. The Commission has historically and for some time, planned, budgeted and procured for such low-cost alternative dispute resolution services with funds from the CETF. See attached excerpts of the Commission's 2010 Annual Report to the legislature and the Governor reporting on the planning, budgeting and expenditure of the CETF for mediation. It should be noted that although as of December 31, 2010 there are approximately 156,444 unit owners in this state, the number of owners and board members utilizing mediation have been consistently and significantly low.

- Section 4 proposes to specifically allow the Commission and the Director of Commerce and Consumer Affairs to expend up to a proposed certain amount from the CETF for mediation. The Commission believes this proposed amendment is unnecessary because the Commission as testified earlier, annually plans for, budgets, and procures for and expends monies from the CETF specifically for mediation for resolving disputes between boards and owners. (See attached expenditure history for CETF funded mediation).
- Section 4 amends subsection (d) of 514B-73, HRS, by proposing that the Commission include in its report to the legislature a statement of which programs were directed specifically at the development of expeditious and

inexpensive procedures for resolving association disputes. The Commission believes this section is unnecessary because the Commission's Annual Report to the Governor and legislature already provides this statement. A copy of the current statement for FY 2010 is attached. (See http://hawaii.gov/dcca/real/reports/Annual%20Report_2010_final.pdf for the full text of the Commission's Condominium Review Committee Report.)

- Section 5. The Commission has concerns about the proposed deletions on page 8 lines 18-22. Where owners do not prevail against the association in disputes for collecting any delinquent assessments; foreclosing any lien; or enforcing any provision of the governing documents, the condominium law and related rules; owners are assessed the costs and expenses including reasonable attorney's fees incurred by the association for such actions. However, if an owner tries to resolve the disputes in good faith through mediation or arbitration, the law does not require the owner to pay the association for any expenses the association incurred related to any such court actions. For these situations, the proposed deletions eliminate the owners' non payment of associations' costs and expenses. As such, the Commission is concern that such a proposal impacts negatively on the use of mediation and creates an uneven playing field for owners in these situations.
- Section 6 proposes to delete the option of having a dispute not resolved by mediation heard by the Department of Commerce and Consumer Affairs'

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hearings officer. As the Office of Administrative Hearings ("OAH") administers that program, the Commission defers to the testimony OAH may provide on this matter.

Until the discussed concerns are addressed, the Real Estate Commission reserves its support of the passage of House Bill No. 1662. Thank you for the opportunity to testify.

Pro Forma Condominium Education Trust Fund (CETF) Budget and Expenditures for Fiscal Years 2006-2010 (By Fiscal Quarter) (Unofficial; Subject to Audit)

For the Fiscal Year Ending June 30, 2010

Condominium Med/Arbitration Program	20,000.00	10,300	(9,700)	20,000	10,300	(9,700)	49%
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For the Fiscal Year Ending June 30, 2009

Condominium Med/Arbitration Program	20,000.00	11,000	(9,000)	20,000	11,000	(9,000)	45%
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For the Fiscal Year Ending June 30, 2008

Condominium Med/Arb Program	18,333	10,750	(7,583)	20,000	10,750	(9,250)	46%
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For the Fiscal Year Ending June 30, 2007

Condominium Mediation and Arbitration Pro	20,000	8,800	(11,200)	44%	20,000	11,200	56%
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For the Fiscal Ending June 30, 2006

Condominium Mediation and Arbitration P	20,000	8,000	(12,000)	40%	20,000	12,000	60%
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Notes: First column is the budgeted amount. Second column is the expended amount. Third column is the budget remaining after expenditures for mediation services. Sixth column is the budgeted unexpended amount remaining at the close of the fiscal year. Review these figures with attached Chart 16 of the Commission's 2010 Annual Report (Condominium Review Committee Report) reporting the total number of requests for mediation made in each fiscal year.

CONDOMINIUM REVIEW COMMITTEE (CRC) REPORT

For fiscal year 2010, under the leadership of Chair Michele Loudermilk and Vice Chair Mark Suiso, the CRC, continued with the implementation challenges of Chapter 514B, Hawaii Revised Statutes (HRS), including the challenges of new legislation. During this same period, the CRC continued with the administration of the original condominium law, Chapter 514A, HRS, as well as other planned programs of work.

The CRC is a Commission standing committee that holds monthly public meetings in which condominium issues are presented, discussed, examined, and considered. It is a working committee that handles “nuts and bolts” issues. Developers, apartment owners, boards of directors, condominium managing agents, attorneys, educators, researchers, government officials, and others with condominium concerns participate at the meetings. The responsibilities of the CRC include: registration of condominium projects by developers; condominium association registrations; and governance, education and research programs, inclusive of the programs funded under the Condominium Education Trust Fund (CETF).

The law allows the Commission to expend monies from the CETF funds for educational purposes which include financing or promoting:

1. Education and research in the field of condominium management, condominium project registration, and real estate, for the benefit of the public and those required to be registered under this chapter;
2. The improvement and more efficient administration of associations; and
3. Expeditious and inexpensive procedures for resolving association disputes.

The Commission may use any and all moneys in the CETF for purposes consistent with the above. Additionally, the law requires the Commission to submit to the legislature annually: (1) a summary of the programs funded during the prior fiscal year with funds from the CETF; (2) the amount of money in the fund; (3) a copy of the budget for the current fiscal year, including summary information on programs which were funded or are to be funded; (4) a statement of which programs were directed specifically at the education of condominium owners; (5) summary information on programs that were funded or are to be funded and the target audience for each program; and (6) a budget for the current fiscal year that includes a line item reflecting the total amount collected from condominium associations. As noted in this report many of the funded programs for this fiscal year and many of the funded programs for the next fiscal year have been modified in part or postponed in response to the State’s current economic challenges and budgetary constraints.

FY 2010 PROGRAM OF WORK

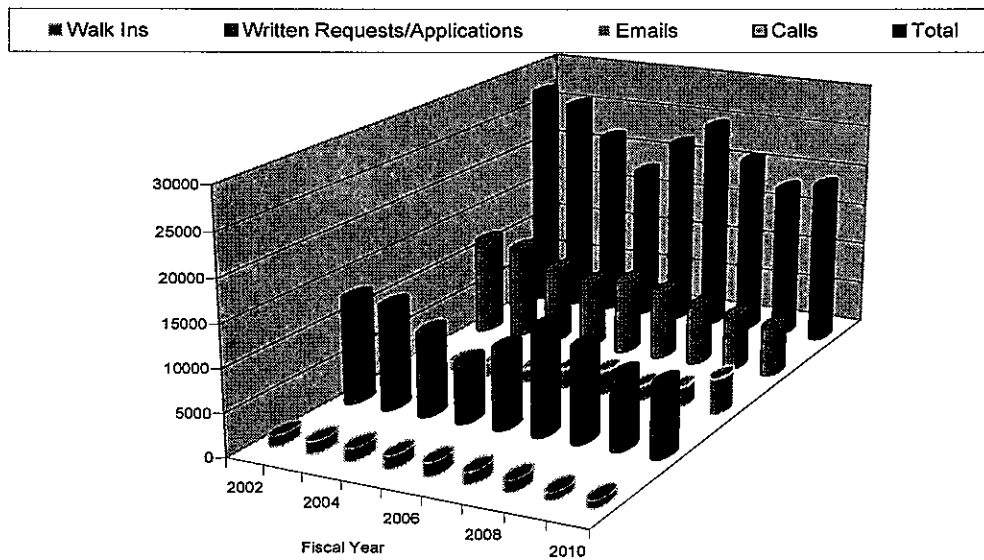
NOTE: The text that is bolded are for matters that were directed specifically at the education of condominium owners (although many others also benefitted from the education).

Condominium Laws and Education – Concurrently with the administration of Chapter 514A, HRS, the Commission participated in the legislative process to fine-tune Chapter 514B, HRS, effective July 1, 2006, and the implementation of this new law. With the help of stakeholder organizations and volunteers, the Commission continued the development and refinement of appropriate new and amended forms (including web based online fillable forms), instructions, informational sheets, procedures and evaluative processes, curriculum, materials, handouts, and power point presentations for use in statewide educational efforts. The Commission continued with statewide promotion and delivery of Commission-subsidized seminars. In May, the Commission sponsored a seminar based on its two new informational booklets, “Condominium

Property Regimes: Owner Rights and Responsibilities” and “Condominium Property Regimes: Board Members Powers and Duties”. Twenty-seven people attended this free 2 ½ hour seminar in the State Capitol Auditorium presented by a procured practitioner of condominium law. Oahu’s PEG access provider, Olelo, video taped the presentation and plans were made to rebroadcast the presentation on Olelo. Such educational efforts are targeted to inform and educate those impacted by the new condominium law, namely, the condominium unit owners, boards, managing agents, resident managers, developers, real estate licensees, their respective attorneys, prospective condominium purchasers, and the general public.

Pursuant to Subchapter 5 of Chapter 201, Title 16, Hawaii Administrative Rules, the CRC issued three informal non-binding interpretations of the provisions of Chapter 514B, HRS, and made them available to interested parties directly and online at the Commission’s web-

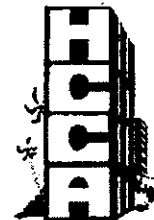
Chart 15. Condominium Advice, Education, and Referral



	2002	2003	2004	2005	2006	2007	2008	2009	2010
Walk Ins	1229	1395	1480	1473	1551	1388	1322	874	875
Written Requests/Applications	12449	12217	9819	7027	9461	12535	11035	8566	8300
Emails		1259	1819	1812	2487	2940	1890	2394	4295
Calls	11367	10971	9050	8064	8863	8157	7014	6459	5783
Total	27067	25842	22168	18376	22362	25020	21261	18293	19253



**Hawaii Council of Associations
of Apartment Owners**
DBA: Hawaii Council of Community Associations
P.O. Box 726, Aiea, HI, 96701



January 31, 2011

Rep. Rida Cabanilla, Chair
Rep. Pono Chong, Vice-Chair
House Committee on Housing

Re: HB 1662, Condo. Dispute Resolution (Mediation/DCCA Adm. Hearings)
Hearing: Wednesday, Feb. 2, 2011, 8:30 a.m., Conf. Rm. #325

Chair Cabanilla, Vice-Chair Chong and Members of the Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCAAO).

HCAAO has always supported programs that encouraged quick and inexpensive resolution of disputes between condominium unit owners and their boards. Therefore we support the mediation program described in this bill as well as the DCCA administrative hearings that will be eliminated in Section 6 of this bill. We urge this Committee to amend this bill by deleting Section 6 in its entirety.

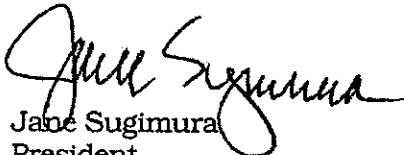
When the DCCA administrative hearings were initially adopted, it was a 2-year pilot program; however, because of problems in 2006 associated with the recodification of HRS 514A, i.e., enactment of HRS 514B in 2 separate years, through no fault of anyone, the program was inadvertently repealed when HRS514A was repealed and had to be corrected. It took two sessions to make the corrections that resulted in reinstatement of that program, which was intended to provide quick, economical resolution of disputes between unit owners and their boards when mediation failed and it has only been in operation since 2009.

While I am hopeful that the mediation program described in this bill will promote resolution of disputes, the adoption of that program should not result in the elimination of the DCCA administrative hearings, which have been and continue to be used to resolve disputes between unit owners and their boards. The difference between the two programs is that with mediation, the parties are able to reach a mutually acceptable resolution with the assistance of a professionally trained mediator. If, however, mediation does not result in a resolution (and an attempt to mediate is a pre-requisite to the DCCA administrative hearings), the DCCA hearings officer will determine who would prevail on the issues in dispute.

The cost of the DCCA administrative hearings are paid from the Condominium Education Fund, which was established for the sole purpose ¹of educating Boards and association members as to their rights and obligations and to provide alternative dispute resolution programs so that they could avoid the time and expense to litigate their dispute.

Since there would be no additional cost to retain the DCCA administrative hearings while implementing the mediation program and since the mediation program would be a pre-requisite to the DCCA administrative hearings so that there would not be any conflicts between the 2 programs, we respectfully ask that you amend this bill by deleting Section 6 and then pass out the amended version.

Thank you for the opportunity to testify.


Jane Sugimura
President

¹ The Condo Education Fund was established by the legislative so as to avoid the notorious "condo wars" that were being litigated in the circuit courts in the late 1980's, which resulted in huge expenses to the associations, their unit owners, the boards and their insurance carriers.

From: mailinglist@capitol.hawaii.gov
Sent: Sunday, January 30, 2011 11:22 PM
To: HSGtestimony
Cc: emmatsumoto@hotmail.com
Subject: Testimony for HB1662 on 2/2/2011 8:30:00 AM

Testimony for HSG 2/2/2011 8:30:00 AM HB1662

Conference room: 325
Testifier position: support
Testifier will be present: No
Submitted by: Eric M. Matsumoto
Organization: Mililani Town Association
Address: 95-303 Kaloapau St. Mililani
Phone: 282-4324
E-mail: emmatsumoto@hotmail.com
Submitted on: 1/30/2011

Comments:

We support this measure in using the Condo Ed Fund for mediation urposes.

From: Antonette Port [portr001@hawaii.rr.com]
Sent: Monday, January 31, 2011 8:09 PM
To: HSGtestimony
Subject: Testimony HB 1662

Testifier: Richard Port
Date of Hearing: Wednesday, February 2, 2011;
Time and Place of Hearing: 8:30 a.m. Conf. Rm #325
Bill Number and Title: HB 1662 Condo. Dispute Resolution (Mediation/DCCA Adm. Hearings)

Committee on Housing

Rep. Rida Cabanilla, Chair
Rep. Pono Chong, Vice Chair

Dear Representative Cabanilla,

I am testifying in opposition to the elimination of the DCCA administrative hearings in Section 6 of the bill. HB1662 would substitute a mediation program for the DCCA administrative hearings when the difference between the mediation program and the DCCA administrative hearings is substantial.

With mediation, the parties attempt to reach a mutually acceptable resolution with the assistance of a trained mediator. However, sometimes mediation does not result in a resolution of issues. DCCA hearings, on the other hand, determine who will prevail on the issues in dispute.

If your committee is inclined to move HB1662 forward, please amend this bill by deleting Section 6 in its entirety.

Thank you for this opportunity to testify,

Richard Port