

February 20, 2013

The Honorable Angus L.K. McKelvey, Chair

House Committee on Consumer Protection & Commerce
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: H.B. 138, Relating to Real Estate Seller Disclosure

HEARING: Wednesday, February 20, 2013 at 3:00 p.m.

Aloha Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

I am James M.K. Stone, Jr., Government Affairs Committee Member, and I am appearing on behalf of the Hawai'i Association of REALTORS® (“HAR”), which is the largest trade association in the State of Hawaii and with approximately 8,000 members. HAR **strongly supports** on H.B. 138, which establishes a uniform standard for document disclosure for condominium projects, cooperative housing corporations, and other community associations and clarifies which documents are required under Hawaii law to be disclosed.

HAR supports this measure because of the benefit a uniform standard brings for consumers as well as real estate licensees involved in planned community associations, condominium projects and cooperative housing corporations transactions.

Under current law, there are several definitions of a planned community association. As a result, the nature and extent of document disclosures required of the seller is uncertain. Moreover, a seller that has property that falls within the definition of planned community, is required under HRS Chapter 508D to provide prospective buyers with “planned community declaration and association documents” at the time of the disclosure statement.

This is generally not possible as a practical matter because sellers often do not know whether their property is subject to a planned community regime and do not have the requisite documents during the early stages of the transactions when initial disclosures are provided. Often, the first indication that a property is subject to planned community governance is upon receipt of the title report.

This bill addresses these concerns by providing clarity as to the documentation that is subject to disclosure by focusing upon the recorded restrictions that affect the property, and then requiring a list of documents that must be disclosed under Chapter 508D. Obviously, a list is simple and easy way to determine what must be disclosed. In addition, the documents to be provided generally follow the definition of “association documents” already found in HRS 421J.

Rather than requiring references to multiple statutes in determining what must be disclosed, this bill focuses on these specific documents and proscribes that disclosure of the documents must be given to the purchaser within 10 days after the title report is received. Since the title search is the only sure way to know a property is located within a planned community, this bill requires disclosure only after the receipt of the title report.

In addition, the bill incorporates advanced technology by allowing for the electronic receipt of disclosure documents. Many of the documents that need to be disclosed regarding planned communities can be accessed electronically via hyperlinks in the title search or through accessing the association's website. It is more efficient (and saves paper) to provide these documents electronically to the extent they are available online or are hyperlinked.

HAR believes that this bill will make it easier for sellers to understand their disclosure obligations regarding condominium projects, cooperative housing corporations, and community associations documentation.

HAR offers the following technical amendments to the bill, and respectfully requests that they be included before passing this measure:

1) Deletion of “either directly or through the seller’s agent” in Section 2, page 2, lines 10-11. Chapter §508D already refers to the seller or its agent when referencing the seller disclosure provisions, and therefore, this language is not necessary where it appears.

2) Deletion of “directly or through the seller’s agent” in Section 2, page 3, line 22. Chapter §508D already refers to the seller or its agent when referencing the seller disclosure provisions, and therefore, this language is not necessary where it appears.

3) Changing reference to 508D-10.5 in Section 5, page 9, line 14.

This amendment is technical – the reference should be left blank, as it was intended to reference the new HRS section set forth in Section 2 of this bill.

4) Changing the effective date to May 1, 2014 in Section 8, page 10, lines 1-6.

HAR requests a single effective date of May 1, 2014, to allow HAR to educate members about the changes to the new law, and allow time for necessary amendments to HAR's standard purchase contract.

Mahalo for the opportunity to testify.

A BILL FOR AN ACT

REALTING TO REAL ESTATE SELLER DISCLOSURE

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that the adequate disclosure of documents is a critical component of all real property transactions. The seller's disclosure law, codified as chapter 508D, Hawaii Revised Statutes, requires the disclosure of restrictive covenants to be provided at the same time as the seller's real property disclosure form, if the property is located within a planned community. The legislature notes that other chapters within the Hawaii Revised Statutes contain different definitions for a "planned community". These multiple definitions create confusion about whether and how the disclosure provision applies to planned community associations.

The purpose of this Act is to eliminate confusion relating to application of the seller disclosure law by:

- (1) Establishing a uniform standard for disclosure for condominium projects, cooperative housing corporations, and other community associations;
- (2) Clarifying the types of documents that are required to be disclosed;
- (3) Requiring the disclosure of documents within ten days after the title report is received; and
- (4) Allowing for the electronic receipt of documents with the buyer's consent.

SECTION 2. Chapter 508D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§508D- Disclosure of documents; required documentation. (a) If the residential real property being offered for sale is subject to a recorded declaration, the seller, either directly or through the seller's agent, shall provide the following documents and any amendments or supplements thereto, to the extent applicable:

- (1) Articles of incorporation or other document, if any, creating the corporation or association whereby the corporation or association has the power to enforce the declaration;

(2) Bylaws of the corporation or association;

(3) Declaration or similar organizational documents, and any exhibits thereto; and

(4) Any rules relating to the use of common areas, architectural control, maintenance of units, or payment of money as a regular assessment or otherwise in connection with the provisions, maintenance, or service for the benefit of the residential real property or other real property or common areas.

(b) If the residential real property is otherwise subject to restrictions or conditions on use, either because of covenants contained in the deed for the property or because of another recorded document, the disclosure shall also include all documentation relating to any restrictions or conditions, including but not limited to any unrecorded rules or guidelines that may have been issued by any entity responsible for enforcing those restrictions or guidelines.

(c) Notwithstanding any other provision in this chapter to the contrary, the seller shall not be required to provide the documentation required under subsection (a) until ten calendar days after the seller and buyer have received a current title report for the property offered for sale. Upon receipt of the required documentation, the buyer shall have fifteen calendar days to examine the documents and decide whether to rescind the real estate purchase contract. If the buyer decides to rescind the real estate purchase contract, the buyer shall deliver to the seller ~~directly or through the seller's agent~~ within the fifteen-day period written notification of the buyer's decision to rescind the real estate purchase contract. Failure to deliver the written notification to the seller within the fifteen-day period shall be deemed an acceptance of the property offered for sale with the conditions, covenants, or restrictions on use set forth in the documents.

The right of rescission set forth in this subsection shall be in addition to the rights of rescission set forth in sections 508D-5, 508D-6, and 508D-13.

The seller and the buyer may agree in writing to reduce or extend the time periods and deadlines set forth in this subsection.

(d) If the required documents under this section are available electronically on the Internet, the seller, in lieu of providing hard copies of the documents and with the buyer's consent, may provide a written statement to the buyer that directs the buyer to the internet address or addresses where the documents are located.

(e) Compliance with this section shall fulfill the seller's duty of disclosure of material facts relating to a recorded declaration or other recorded restrictions or conditions on use of the property being offered for sale."

SECTION 3. Section 508D-1, Hawaii Revised Statutes, is amended as follows:

1. By adding four new definitions to be appropriately inserted and to read:

""Common area" means real property that is designated as common area in or pursuant to a declaration, that is owned or leased by the association under the declaration, or that is otherwise available for the use of members of the association.

"Condominium project" means a real estate condominium project; or a plan or project whereby a condominium of two or more units located within the condominium property regime have been sold or leased or are offered or proposed to be offered for sale or lease.

"Cooperative housing corporation" means a corporation having only one class of stock outstanding, each of the stockholders of which is entitled by reason of the shareholder's ownership of stock in the corporation to occupy for dwelling purposes a dwelling unit in a building owned or leased by the corporation, and no stockholder of which is entitled, either conditionally or unconditionally, to receive any distribution not out of earnings and profits of the corporation except in a complete or partial liquidation of the corporation.

"Declaration" means any recorded document, however denominated, in favor of or enforceable by a cooperative housing corporation, an association of owners of a condominium project, or other nonprofit, incorporated or unincorporated association, that restricts or conditions the use of the real property being offered for sale, or imposes obligations on the owner of the residential real property being offered for sale with respect to maintenance or operational responsibility for the common areas, architectural control, maintenance of the residential real property being offered for sale, or services for the benefit of the residential real property being offered for sale or other property subject to the declaration including the common areas."

2. By amending the definition of "disclosure statement" to read:

""Disclosure statement" means a written statement prepared by the seller, or at the seller's direction, that purports to fully and accurately disclose all material facts relating to the residential real property being offered for sale that:

- (1) Are within the knowledge or control of the seller;
- (2) Can be observed from visible, accessible areas; or
- (3) Are required to be disclosed under sections 508D-4.5 and 508D-15.

~~[If the residential real property being offered for sale is in a planned community as defined in section 421J-2, "disclosure statement" includes the planned community declaration and association documents as those terms are defined in section 421J-2, and if the property is otherwise subject to restrictions or conditions on use, either because of covenants contained in the deed for the property or because of another recorded document, the disclosure statement shall also include all documentation relating to any restrictions or conditions, including but not limited to any unrecorded rules or guidelines that may have been issued by any entity responsible for enforcing those restrictions or conditions. Except for the disclosures required under section 508D-15 and this definition, no seller shall have any duty to examine any public records when preparing a disclosure statement.]"~~

SECTION 4. Section 508D-9, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) A seller or the seller's agent shall prepare the disclosure statement in good faith and with due care. A buyer shall have no cause of action against a seller or seller's agent for, arising out of, or relating to the providing of a disclosure statement when the disclosure statement is prepared in good faith and with due care. For purposes of this section, "in good faith and with due care" includes honesty in fact in the investigation, research, and preparation of the disclosure statement and may include information on the following:

- (1) Facts based on only the seller's personal knowledge;
- (2) Facts provided to the seller by governmental agencies and departments;
- (3) Existing reports prepared for the seller by third-party consultants, including without limitation a:

- (A) Licensed engineer;
- (B) Land surveyor;
- (C) Geologist;
- (D) Wood-destroying insect control expert; or
- (E) Contractor, or other home inspection expert;

dealing with matters within the scope of the professional's license or expertise for the purpose of the disclosure statement; and

- (4) Facts provided to the seller by a managing agent of a homeowner's association, including without limitation, a condominium, cooperative, or community association.

Notwithstanding this subsection, a seller or seller's agent shall be under no obligation to engage the services of any person in the investigation, research, or preparation of the disclosure statement. The failure to engage the services of any such person for this purpose shall not be deemed an absence of good faith or due care by the seller or the seller's agent in the investigation, research, or preparation of the disclosure statement. The delivery to the buyer of reports or facts within the scope of paragraph (2), (3), or (4) after the date of the initial disclosure statement shall be considered an amendment of the disclosure statement."

SECTION 5. Section 508D-15, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) Except as required under subsections (a) and (b), and [~~in the definition of "disclosure statement" in section 508D-1,~~] as required under section 508D-~~10.5~~, the seller shall have no duty to examine any public record when preparing a disclosure statement."

SECTION 6. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take ~~effect upon its approval; provided that the documents relating to condominium projects, cooperative housing corporations, and other community associations required under this Act shall be provided as part of all contracts or agreements entered into~~ on ~~or after~~ May 1, 2014.

kawakami2 - Rise

From: mailinglist@capitol.hawaii.gov
Sent: Friday, February 08, 2013 8:11 AM
To: CPCtestimony
Cc: tabraham08@gmail.com
Subject: *Submitted testimony for HB138 on Feb 11, 2013 15:30PM*

HB138

Submitted on: 2/8/2013

Testimony for CPC on Feb 11, 2013 15:30PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Troy Abraham	Individual	Support	No

Comments:

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