SB 507

Measure Title:	RELATING TO PLANNED COMMUNITY ASSOCIATIONS.
Report Title:	Planned Community Associations; Notice of Meeting Required
Description:	Creates notice requirements for meetings of a planned community association or its board of directors.
Companion:	
Package:	None
Current Referral:	CPN
Introducer(s):	BAKER, CHUN OAKLAND, GABBARD, KEITH-AGARAN, NISHIHARA, Solomon

Sort by Date		**Status Text**
1/18/2013	S	Introduced.
1/22/2013	S	Passed First Reading.
1/22/2013	S	Referred to CPN.
1/25/2013	S	The committee(s) on CPN has scheduled a public hearing on 02-01-13 8:30AM in conference room 229.

Testimony to the Senate Committee on Commerce and Consumer Protection

January 29, 2013

Testimony in Opposition to

SB No. 507 relating to Planned Community Associations

(Creates notice requirements for meetings of a planned community association or its board of directors)

Dear Chair Baker, Vice Chair Galuteria and Committee members:

My name is Na Lan, and I am authorized to testify on behalf of the CAI Legislative Action Committee. CAI opposes SB No. 507 as to its notice requirements set for Board meetings or committee meetings of a planned community association.

SB No. 507 imposes the fourteen-day notice requirement to "any meeting of an association or of the board of directors" for a planned community association governed by HRS 421J. The meetings that are subject to such notice requirements would include not only the Association meetings but also Board meetings and committee meetings. The overbroad language "any meeting" would also cover both regular and special meetings.

SB No. 507 imposes a higher burden on planned community associations than condominium associations on such meeting notice requirements, especially those associations without a website or electronic member mailing list. HRS 514B-121(c) sets the same fourteen-day notice requirement for association meetings of a condominium association, but HRS 514B-125(d) simply requires that the meeting notice be posted in prominent locations within the project

seventy-two hours prior to the meeting or simultaneously with notice to the board for all board meetings of a condominium association.

The stricter fourteen-day notice requirement for Board meetings and committee meetings set by SB No. 507 may cause delay in the Board's or committee's decision making process for a planned community association. The Board of Directors and committees of a planned community association often need to make decisions on emergency operation matters or litigation related issues that need immediate action. CAI believes the advance notice of seventy-two hours set forth in HRS 514B-125(d) is more reasonable compared with the fourteen days requirement proposed by SB No. 507.

The stricter notice mailing requirements for Board meetings and committee meetings would cause further financial problems for planned community associations with tighter budget and high delinquency on owners' assessment payments, especially for those associations without a website or an electronic member mailing list.

CAI opposes SB No. 507 and respectfully requests that the Committee decline to pass it or at least limit the notice requirements to Association meetings of a planned community association.

Thank you for the opportunity to provide our testimony.

Sincerely,

Na Lan

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January 31, 2013

The Honorable Rosalyn H. Baker, Chair
Committee on Commerce and Consumer Protection

RE: BILL: SB507
DATE: February 1, 2013
TIME: 8:30 a.m.
PLACE: Conference Room 229

Dear Senator Baker and Members of the Committee:

This testimony is submitted on my own behalf as a lawyer who has spent over 30 years practicing law in Hawaii primarily representing community associations, including planned community associations, which are the subject of the referenced Bill. I am testifying on my behalf as a member of the Hawai`i State Bar Association, the Arizona Bar Association (inactive) and the California Bar Association and as the lawyer for planned community associations. I believe I am very qualified to testify on this issue. I have twice written the article for the Hawai`i State Bar Association entitled "Community Associations" in its periodic 3 volume publication: Hawaii Real Estate Law Manual (Vol. II). I have also written and taught the GRI course for Realtors® in Hawai`i for the Hawai`i Association of Realtors® and for its various statewide boards. During that time, I have served and testified on behalf of the HSBA Subcommittee on Community Associations (part of the Real Property Section) and on the Legislative Action Committee for CAI. (I am not testifying on behalf of CAI or HSBA.) I have been selected by my peers over the last few years as one of the "Best Lawyers in America."

I. THIS PROPOSED BILL IMPOSES IMPOSSIBLE BURDENS ON SOME PLANNED COMMUNITY ASSOCIATIONS IN HAWAII.

Some planned community associations (which are sometimes referred to as "master associations" or as "umbrella associations") do not deal directly with condominium associations that exist under its "umbrella", for example, or that are sub-associations of the master

association. In some cases, the Association Documents dictate that the master association would limit its contact with the various sub-associations to members who are elected by the sub-association to represent the sub-association in the master association meetings (both member and board meetings). Thus, the master association limits its communications, including notice of meetings, to those members who are elected to vote on behalf of their sub-association (*e.g.*, they act as representative of the sub-association in master association meetings) and would not have any legal or practical means to identify or to directly contact those persons who have purchased a condominium unit in a sub-association/condominium project that is part of the planned community association. The members of the condominium associations are not required to provide the master association with their names or addresses (they are required to provide the condominium association by provisions in most governing documents) and neither are the condominium associations required to make their membership lists available to any third party (*e.g.,* non-owner), making compliance with the Bill for these master associations completely impossible.

II. THE VAST MAJORITY OF PLANNED COMMUNITY ASSOCIATIONS ALREADY PROVIDE "REASONABLE NOTICE" AND THERE IS NO REASON FOR THE LEGISLATURE TO RE-WRITE EXISTING APPLICABLE NOTICE PROVISIONS.

Either all or nearly all of the planned community associations in Hawaii are non-profit corporation and are required to provide reasonable notice as prescribed by the Nonprofit Corporate Act. A declaration that requires the planned community association to provide notice to a specified, elected representative of the sub-association is a "reasonable means" of notice (see existing statutory definition discussed below) as the sub association-representative will make the date, time and agenda of the annual meeting available to the members of the sub-association that he/she represents. There are other provisions that may require direct notice, depending on the size of the master association. Or, provisions governing master associations may provide for notice to the condominium members through the board of the condominium when received by the master association.. All of these are reasonable and practical approaches to notice of membership meetings of planned community associations. There is no requirement of the type of notice contemplated by this Bill for condominium association board meetings nor should there be that type of requirement for planned community associations. (See discussion below of Nonprofit Corporation Act).

III. THE AFFECTED ASSOCIATIONS MAY BE UNABLE TO COMPLY.

Absent a voluntary willingness on the part of the individual members of a sub-association of the "master" planned community associations covered by this Bill to provide both the sub-association and the master association with their current and accurate addresses (which is very unlikely in my experience), the only valid means available to the master association to obtain the correct and current names and addresses of the owners of the individual units in sub-associations within the master association would be to pay for title reports on each of those

individual units in the various sub-associations, which, of course, except in a very small association is not practical. There is no obligation in the law for the sub-associations to provide any "master" planned community association with the names of its members. (The condominium law only contemplates that condominium projects [most sub-associations governed by a master association are, in my experience, condominium projects subject to the Condominium Property Act] provide notice of member meetings to its own members and not to third parties like the master association.] Thus, in a significant number of cases, the "master" or "umbrella" planned community associations will not have any access or any practical access to the information necessary to provide the type notice contemplated by the Bill. Many planned community associations do not have web sites that are available for this purpose.

The sub-association condominium projects typically have hundreds of members (who, of course, are also members of the master association) and under those circumstances, the master association could easily have thousands of members. In fact, it is my experience that the newly developed master associations (resort or residential) as well as a significant number of older "master" planned community associations in Hawaii have thousands or even tens of thousands of members. For example, when fully developed, it is my understanding that Mililani Town Association would include over 15,000 members. Other well-known planned community associations likely to now or eventually include thousands of members are Kaanapali, Kapalua, Princeville, Wailaea, Newtown Estates, Waikoloa Village Association, and many others on all Islands in this State. Obtaining any form of a title report by those master associations on their members who are part of a sub-association would be a practical impossibility.

IV. <u>THE COSTS OF COMPLIANCE WITH THIS BILL WOULD BE OUTRAGEOUS IN MANY INSTANCES AND CAUSE AN UNNECESSARY SIGNIFICANT INCREASE IN ASSESSMENTS</u>.

Because of the number of members in these master planned communities, the mailing costs of a master planned community association to provide notice to all of its individual members of all membership and all board meetings each year could easily reach outrageous levels that would require a big increase in the budget and thus the individual assessments when, in fact, legislation already exists to cover this issue. In lieu of making unsupported conclusory statements, I would like the Committee to examine the potential impact of this Bill on a hypothetical planned community association (where the numbers are drawn from a real association. For example, for a master planned community association with 5,000 members composed of 10 condominium sub-associations (each with 500 members) the cost of providing the notice contemplated by this Bill could be outrageous whether or not title reports were required. If title reports are required on each condo unit, because of the lack of access to current or correct names and addresses from either the condominium sub-associations or their members, which is currently the case in some of these projects in my experience, the costs would exceed $13 Million Dollars [$200 (a rough estimate of the cost of a title report plus administrative, photocopying and other mailing costs) x 5,000 members x 13 meetings (of members and the board of the planned community association].

Even if title reports are not required because all of the sub-associations or their members voluntarily agree to provide this information to the master planned community association, the cost to the master association would still be outrageous ($10 x 5,000 for mailing, postage, copying and other related administrative costs x 13 meetings of the membership or the Board would equal $650,000) On the other hand, the costs of mailing to the elected representatives of these sub-associations (in lieu of mailing to each member of each sub-association) would only be $10 (estimated average administrative, postage, photocopying and other costs) x 10 sub-associations x 13 meeting notices or $1,300. However, under this Bill, these hypothetical sub-associations would actually incur many times this level of costs as this Bill, as currently written, requires direct notice to all members of the planned community association of not only the annual membership meeting but unlike condominium associations in the Condominium Property Act, of all Board meetings. Thus, if the Board meets once a month, the mailing costs for the direct mailed notice would be $50,000 (using $10 as the estimated cost of each mailing) multiplied by 13 (12 Board meetings plus 1 annual membership meeting) or $650,000.

Moreover, there could easily be many more members in the sub-association than are discussed above. If the master association is also a resort association (which is often the case in Hawaii), there will very likely be several time share associations that comprise or are part of the various sub-associations. Every member of the time share association is typically technically a member of the master or umbrella planned community association (as well as of the condominium association and the time share association) and under this proposed legislation would have to receive notice regardless of what is stated in the Association Documents. Thus, in the example above (using $10 as the administrative and other out of pocket costs for each mailing of the notice), if, say, 3 of the 10 condominium sub-associations are also time share associations, the costs to provide notice of one annual meeting and 12 Board meetings of the master planned community association to each timeshare owner would be (3 x 50 co-owners for each apartment [*e.g.,* assuming only 50 owners in each time share program apartment or unit -- which is actually very conservative] x 500 whole units in each of the timeshare projects x $10 (for each time share owner mailing) x 13 (contemplating the typical single membership meeting and 12 board meetings) or $9,750,000; plus the 7 non-timeshare sub-associations x 500 apartments in each sub-association (*e.g.,* 500 whole apartments) x $10 (estimated administrative and mailing costs) x 13 mail outs (1 annual membership meeting and 12 board meetings) or $455,000 for a total combined annual mailing cost of $10,205,000. The new mailing costs associated with this bill for master associations (even excluding any costs to obtain the current and correct names and addresses of the members of the sub-associations) could severely and adversely impact on the operating budget for these master or planned community associations. Even if the master associations could do a mail out for half of my estimated costs (*e.g.,* $5 instead of $10), the cost to the planned community association would still be more than five million dollars, a number that would inevitably increase assessments to individual members of the planned community association by a significant amount.

V. <u>PLANNED COMMUNITY ASSOCIATIONS, UNLIKE CONDOMINIUM ASSOCIATIONS, ARE NOT CREATURES OF STATUTE – THESE TYPES OF ASSOCIATIONS HAVE BEEN AROUND FOR MANY DECADES BEFORE IT WAS EVEN POSSIBLE TO DEVELOP A CONDOMINIUM ASSOCIATION IN HAWAII</u>.

Because of the statutory derivation, all condominium associations generally share the statutory requirement for notice. In other words, all condominium associations will be the same in this regard. The exact opposite is true for planned community associations which were developed since World War I with no statutory guidance. Thus, the legislature should not enact legislation that will financially adversely impact upon hundreds or thousands of associations that differ widely in their approach to notice and, at least, tens of thousands of homeowners in Hawaii. This kind of legislation should not be considered absent competent evidence of some widespread failure on the part of these long existent and varied planned community associations to simply follow the directions for notice as provided in its own recorded Declaration or other Association Document as defined in Chapter 421J. In my experience, planned community associations are required to and do provide notice by some reasonable method to its members.

VI. <u>HARSHER, IMPRACTICAL REQUIREMENTS FOR NOTICE OF BOARD MEETINGS</u>.

This provision differs from the provision in the condominium statute in that the Condominium Property Act recognizes that it is oftentimes impracticable to give notice of a Board meeting for any pre-determined period of time. For example, in an emergency the Board may have to call a meeting within a few hours to address the emergencies: Certainly, the statutory requirement for planned community association's notice of board meetings should not be made significantly more difficult and expensive than is true for condominium associations in this State which is exactly what this Bill would do.

VII. <u>THE NON-PROFIT CORPORATION STATUTE ALREADY ADDRESSES THESE ISSUES OF NOTICE COMPREHENSIVELY</u>.

There is no need for this Bill. This issue has already been addressed by the legislature in the non-profit corporation statute which already applies to all or nearly all of the planned community associations in Hawaii. Developers in Hawaii typically incorporate any planned community association created to govern the planned community as a non-profit corporation. This was historically done because unincorporated associations could not hold title to real property in Hawaii (*e.g.*, the parks, roadways, easements, recreational facilities maintained by planned community associations). That statute was changed fairly recently, however, the change only permits ownership if the association follows a cumbersome set of requirements. Thus, all or practically all of the planned community associations in Hawaii are incorporated as non-profit corporations. Non-profit corporations are governed by Chapter 414D, Hawaii Revised Statutes which describes how notice must be given to members for a membership meeting in Section

414D-15 which relates to notice of member meetings to members and notice of directors' meetings to directors":

> a) Notice may be oral, in the form of an electronic transmission as described in subsections (i) and (j), or written.
>
> (b) Notice may be communicated in person; by telephone, telegraph, teletype, or other form of wire or wireless communication; by mail or private carrier; or by electronic transmission as described in subsections (i) and (j). If these forms of personal notice are impracticable, notice may be communicated by a newspaper of general circulation in the area where it is published; or by radio, television, or other form of public broadcast communication.

And, the drafters of the non-profit corporate statute recognized that the notice provisions in the governing documents should be given priority over any statutory mandate:

> (k) If section 414D-105(b) or any other provision of this chapter prescribes notice requirements for particular circumstances, those requirements shall govern. If articles or bylaws prescribe notice requirements, not inconsistent with this section or other provisions of this chapter, those requirements shall govern.

The drafters of the Non-Profit Corporation Statute (applicable to all or nearly all planned community associations) already defines what is "reasonable notice" <u>of a members meeting</u>:

> (a) A corporation shall give notice consistent with its bylaws of <u>meetings of members</u> in a fair and reasonable manner.
>
> (b) Any notice that conforms to the requirements of subsection (c) is fair and reasonable, but other means of giving notice may also be fair and reasonable when all the circumstances are considered; provided that notice of matters referred to in subsection (c)(2) shall be given as provided in subsection (c).
>
> (c) Notice shall be fair and reasonable if:
>
>> (1) The corporation notifies its members of the place, date, and time of each annual, regular, and special meeting of members no fewer than ten or more than sixty days before the meeting date;
>>
>> (2) Notice of an annual or regular meeting includes a description of any matter or matters that must be approved by the members under sections 414D-150, 414D-164, 414D-182, 414D-202, 414D-222, 414D-241, and 414D-242; and

> (3) Notice of a special meeting includes a description of the matter or matters for which the meeting is called.

Please note that this non-profit corporate statute like the condominium statute <u>does not</u> require that members be given notice of directors meetings – only members meetings. Notice to directors is required for directors meetings. That approach would keep the process and the cost thereof within manageable confines.

Also typically, the agenda of an annual meeting of owners of a planned community association is not limited by the notice as provided in the proposed legislation. The Annual Meeting is intended to be an opportunity for members to address a broad range of issues that are within the purview of the membership and not the board. As the non-profit corporate statute recognizes, however, special meetings of members are typically limited to the items described on the notice. As drafted, this provision makes no distinction between annual meetings or special meetings thus creating confusion.

As noted above, the drafters of Chapter 514B, Hawaii Revised Statutes (the Condominium Property Statute) have recognized THAT THE SAME NOTICE REQUIREMENTS CANNOT BE IMPOSED FOR BOARD MEETINGS AS FOR ASSOCIATION MEETINGS. Section 125 of that Chapter states:

> d) The board shall meet at least once a year. Notice of all board meetings shall be posted by the managing agent, resident manager, or a member of the board, in prominent locations within the project seventy-two hours prior to the meeting or simultaneously with notice to the board.

This Bill would require notice "not less than [14] days." How will that work if there is a natural disaster, for example, and the Board must meet immediately and within hours to release funds to protect person or property (which has actually occurred in several instances in Hawaii)? The notice to owners for a Board meeting should be left to the governing documents of the planned community association and/or should not be any stricter than the Condominium Property Act or it will create serious and unnecessary costs and technical problems for the Board in the event of an emergency.

The nonprofit corporate act provides that directors should be notified of directors meetings but not members. Section 414D-145 reads:

> §414D-145 Call and notice of meetings. (a) Unless the articles, bylaws, or subsection (c) provides otherwise, regular meetings of the board may be held without notice.
>
> (b) Unless the articles, bylaws, or subsection (c) provides otherwise, special meetings of the board shall be preceded by at least two days' notice to each director of the date, time, and place, but not the purpose, of the meeting. . . .

> (d) Unless the articles or bylaws provide otherwise, the presiding officer of the board, the president, or twenty per cent of the directors then in office may call and give notice of a meeting of the board. [L 2001, c 105, pt of §1; am L 2011, c 37, §11]

If the Committee is concerned that there may be planned community associations that are not incorporated as a non-profit corporation (which I doubt), then it should simply provide a reference to the Non-profit Corporation Act as is provided in the Condominium Property Act. Thank you for the opportunity to submit this testimony. If you have any questions, I can be reached at 697-6006 or by email at jneeley@alf-hawaii.com.

Very truly yours,

ANDERSON LAHNE & FUJISAKI LLP
A Limited Liability Law Partnership

/s/ Joyce Y. Neeley

Joyce Y. Neeley

JYN:mas

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January 28, 2013

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
REGARDING SENATE BILL 507

Hearing Date:	FRIDAY, February 1, 2013
Time :	8:30 a.m.
Place :	Conference Room 229

Chair Baker, Vice Chair Galuteria, and Members of the Committees,

My name is John Morris and I am testifying against SB 507. SB 507 proposes to require NON-condominium associations to provide notice of association and board meetings to their members. In the past, the legislature has considered but held similar bills because of the potential cost and difficulty of providing such notice.

The requirement of SB 507 to send notice to owners of association meetings seems to be superfluous because that is a requirement of virtually every set of governing documents of a non-condominium, 421J association. Moreover, association meetings usually happen only once a year and, unlike board meetings, require owner participation, so the expense has more justification.

The requirement to affirmatively provide notice of board meetings to members of non-condominiums presents significantly different issues: (1) the considerable expense of providing notice, especially for monthly board meetings; and (2) unlike the average condominium project, non-condominium projects frequently lack a central entrance or location for posting notice. Therefore, under SB 507, any non-condominium association that does not maintain a website could pay a lot of money and encounter significant logistical problems to comply with the changes to chapter 421J proposed by SB 507. (Even condominiums, which do not face those same problems, only have to post notice of board meetings at the project, not mail or hand deliver it to their members, see HRS 514B-125(d).)

For example, some non-condominium associations have hundreds or even thousands of members and often cover many acres of land. Mailing or hand delivering notice to those hundreds or thousands of members could cost a considerable amount for monthly board meetings if the non-condominium association has no website and lacks email addresses for every one of its members. Posting notice also presents problems

because of the size of many non-condominium projects.

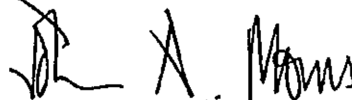
Moreover, experience has shown that a large number of owners do not respond to mailings even for annual meetings. Requiring notice for monthly board meetings could be wasted for a large percentage of owners who have no interest in attending. For those reasons, it seems that SB 507 could be greatly simplified by only requiring the association to provide notice of board meetings to those who request it:

> *In addition to any notice requirements in the association documents, every association shall provide the date and time of association and board meetings to any member who requests that information by: (a) providing the association's mailing or email address and contact telephone number to any member requesting information on association or board meetings; (b) e-mailing notices of meetings to any owner who requests notice by e-mail; or (c) if the association has a website, posting notice of association and board meetings on the website.*

Then, those owners who are interested in finding out about the meetings can do so and the association will not be forced to incur considerable and unnecessary expense to communicate that information to the many owners who have no interest whatsoever and can barely be persuaded to even participate in their annual association meetings.

Please contact me at 523-0702 if you have any questions. Thank you for this opportunity to testify.

Very truly yours,



John A. Morris

JAM:alt
G:\C\2013 Testimony SB 507 (01.28.13)

SB507
Submitted on: 1/29/2013
Testimony for CPN on Feb 1, 2013 08:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
John Rogers	Individual	Oppose	No

Comments: I am opposed to SB 507 as it is presently written. As a member of a board of directors for a homeowner association I think it is appropriate to provide notice of a Board meeting to our members. In fact, our association posts a sign at our entrance 72 - 96 hours prior to every monthly board meeting indicating the time and place of the meeting. The problem with SB 507 would be the expense and administrative burden to Associations to notify its membership using the methods listed in SB 507. There is also no provision for an exception in the event that the Board required holding an emergency meeting to deal with major infrastructure or legal issues which require immediate attention. SB 507 does distinguish between a meeting of the Association and a meeting of the Board of Directors. I believe each meeting should require a notice requirement; however the method and time frame of the notice should be specific to the type of meeting. A meeting of the Association is normally an annual meeting and is planned several months in advance. Board of Directors meetings are held much more frequently and require that their scheduling be much more spontaneous to allow the Association to conduct its day to day business.