

SB 945, SD1

Measure Title: RELATING TO SMOKING.

Report Title: Smoking; Condominiums; Cooperative Housing Corporations; Prohibition by Rule

Description: Allows condominium associations and cooperative housing corporations to adopt rules to prohibit smoking in units, common elements, or limited common elements if a majority of the tenant shareholders or owners approved the smoking prohibition. (SD1)

Companion: [HB34](#)

Package: None

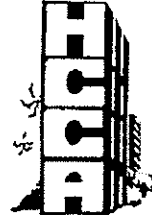
Current Referral: HTH, CPN

Introducer(s): WAKAI

<u>Sort by Date</u>		Status Text
1/24/2013	S	Introduced.
1/24/2013	S	Passed First Reading.
1/24/2013	S	Referred to HTH, CPN.
1/25/2013	S	The committee(s) on HTH has scheduled a public hearing on 01-30-13 1:15PM in conference room 229.
1/30/2013	S	The committee(s) on HTH recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in HTH were as follows: 3 Aye(s): Senator(s) Green, Baker, Nishihara; Aye(s) with reservations: none ; 0 No(es): none; and 2 Excused: Senator(s) Chun Oakland, Slom.
2/6/2013	S	Reported from HTH (Stand. Com. Rep. No. 82) with recommendation of passage on Second Reading, as amended (SD 1) and referral to CPN.
2/6/2013	S	Report adopted; Passed Second Reading, as amended (SD 1) and referred to CPN.
2/15/2013	S	The committee(s) on CPN will hold a public decision making on 02-20-13 9:30AM in conference room 229.



**Hawaii Council of Associations
of Apartment Owners**
DBA: Hawaii Council of Community Associations
1050 Bishop Street, #366, Honolulu, Hawaii 96813



February 16, 2013

Sen. Roslyn Baker, Chair
Sen. Brickwood Galuteria, Vice-Chair
Senate Committee on Commerce and Consumer Protection

Re: SB945, SD1 RELATING TO SMOKING
Hearing: Wed., Feb. 20, 2013, 9:30 a.m., Conf. Rm. #229

Chair Baker, Vice-Chair Galuteria and Members of the Committee:

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

HCAAO opposes this bill because it will affect condominium and co-op unit owners, who are smokers, who purchased their units or their shares before passage of this law. The amendment reflected by SD1 also is not helpful since it would allow a condominium to allow the prohibition on a vote of a "majority" of the owners in the association (or more than holders of 50% of the common interest) as that is defined in the condominium documents whereas under current law, it takes 67% to 75% to amend the condominium bylaws or declaration. Since this law will affect important property rights of unit owners, the legislature should not reduce the amount necessary for a condominium to amend its declaration and bylaws.

As John Morris points out in his testimony in opposition to the companion House Bill HB34, if a particular unit owner's smoking is interfering with another unit owner's use and enjoyment of his or her unit, section HRS 514B-105(b)(2)¹ already provides a means to control that specific nuisance.

¹ "(2) Regulate any behavior in or occupancy of a unit that violates the declaration or the bylaws or unreasonably interferes with the use and enjoyment of other units or the common elements by other unit owners."

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Since existing laws already provide a means by which condominium unit owners can (i) prohibit smoking in the individual units and (ii) take affirmative action if such conduct in a particular case becomes a nuisance that interferes with the use and enjoyment by a unit owner of his or her unit, HCAAO asks that you defer passage of this bill.

Jane Sugimura
President



P.O. Box 976
Honolulu, Hawaii 96808

February 18, 2013

Honorable Rosalyn H. Baker
Honorable Brickwood Galuteria
Commerce and Consumer Protection
415 South Beretania Street
Honolulu, Hawaii 96813

Re: SB 945 SD1/ Comments

Dear Chair Baker, Vice-Chair Galuteria and Committee Members:

I chair the CAI Legislative Action Committee. CAI previously commented that "it is appropriate to require owner (not board) approval of measures to prohibit smoking within units, to the extent that the impact of smoking behavior remains within units. The power to regulate behavior outside a unit already exists."

SB 945 SD1 would require owner approval to prohibit smoking within units, but it would also require owner approval to prohibit smoking outside of units. CAI urges the Committee to consider owner approval only for a prohibition of smoking within units.

Condominium boards of directors are already authorized to regulate the use of the common elements, per Hawaii Revised Statutes Sections 514B-104(a)(6) and 514B-106(a), which provide:

§514B-104 Association; powers. (a) Except as provided in section 514B-105, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may:***

(6) Regulate the use, maintenance, repair, replacement, and modification of common elements;

and

§514B-106 Board; powers and duties. (a) Except as provided in the declaration, the bylaws, subsection (b), or other provisions of this chapter, the board may act in all instances on behalf of the association.

Honorable Rosalyn H. Baker
Honorable Brickwood Galuteria
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Also, boards can already: "Regulate any behavior in or occupancy of a unit which violates the declaration or bylaws or unreasonably interferes with the use and enjoyment of other units or the common elements by other unit owners[.]" H.R.S. Section 514B-105(b)(2). This includes smoking.

CAI requests that the Committee preserve and maintain all of this existing authority.

The Committee may wish to take note of other things, including:

1. H.R.S. Section 514B-105(b) limits board rulemaking authority for behavior in units, so there is a basis for concern about referencing common elements and limited common elements in that section;

2. SB 945 SD1 may conflict with H.R.S. Section 328J-3(13) which already prohibits smoking in certain parts of condominium common elements;

3. The Attorney General's March 28, 2007 opinion, provided to Representative Sylvia Luke, to the effect that:

State and federal law allows a privately-owned apartment complex or a privately-owned condominium to adopt a smoke-free policy for the property, including individual units and lanais, so long as such a policy is properly included in the property's controlling documents or the condominium association has demonstrated that smoking has unreasonably interfered with other unit owners' use and enjoyment of the property.

4. A commercially reasonable time to sell would mitigate the impact of such legislation on owners who smoke.

Thus, if the Committee is inclined to pass a bill along the lines of SB 945 SD1, CAI suggests that the Committee consider an amendment such as:

(3) Prohibit smoking in units, provided that no such rule shall become effective sooner than 180 days after both the board and a majority of unit owners have approved the prohibition; or

Very truly yours,

Philip Nerney

Philip Nerney



To: The Honorable Rosalyn Baker, Chair, Committee on Commerce & Consumer Protection
The Honorable Brickwood Galuteria, Vice Chair, Committee on Commerce & Consumer Protection
Members, Senate Committee on Commerce and Consumer Protection

From: Jessica Yamauchi, Executive Director

Date: February 19, 2013

Hrg: Senate Committee on Commerce & Consumer Protection; Wed., February 20, 2013 at 9:30 a.m. in Rm 229

Re: **Comments for SB 945, SD1, Relating to Smoking**

Thank you for the opportunity to offer comments on SB 945, SD1 which allows condominiums and cooperative housing corporations to adopt rules to prohibit smoking in units, common elements, or limited common elements.

The Coalition for a Tobacco Free Hawaii (Coalition) is an independent organization in Hawaii working to reduce tobacco use through education, policy and advocacy. Our organization is a small nonprofit organization of over 100 member organizations and 2,000 advocates that works to create a healthy Hawaii through comprehensive tobacco prevention and control efforts. The Coalition also supports the public through its Smoke-Free Homes Initiative, designed to create smoke-free apartments and condos through voluntary policy adoption.

Secondhand smoke is dangerous; the **U.S. Surgeon General in 2010 notes that any level of exposure to secondhand smoke is dangerous and can be harmful.** The International Agency for Research on Cancer and the U.S. Environmental Protection Agency both note that environmental tobacco smoke (or secondhand smoke) is carcinogenic to humans. Secondhand smoke contains 7,000 identifiable chemicals, 69 of which are known or probable carcinogens.

The Coalition receives calls from residents who reside in multi-unit housing and who have asthma and other health issues affected by secondhand smoke exposure. The Coalition supports efforts that will encourage any multi-unit dwelling to go smoke-free. Condominiums currently have the right to create house rules or adopt by-laws that will prohibit smoking, but a law will give the condominium boards and residents stronger legal support should they be interested in pursuing a smoke-free policy. Through our efforts we have learned that all residents—regardless if they have asthma, COPD or other health issues—are impacted by the hazards of secondhand smoke.

All families deserve to live free of second-hand smoke. The only way to ensure this is to prohibit smoking in units. The American Society of Heating, Refrigerating, and Air Conditioning Engineers (ASHRAE) adopted a position that states, “[a]t present, the only means of effectively eliminating health risks associated with indoor exposure is to ban smoking activity. . . No other engineering approaching, including current and advanced dilution ventilation or air cleaning technologies, have demonstrated or should be relied upon to control health risks from ETS [environmental tobacco smoke] exposure in spaces where smoking occurs.”



In addition to protection from second-hand smoke, a smoke-free environment also reduces the fire hazards caused by cigarettes and lessens the high maintenance costs for rehabilitating units formerly occupied by a smoker.

Thank you for the opportunity to provide comments on this matter.

A handwritten signature in black ink, written in a cursive style. The name 'Jessica Yamauchi' is clearly legible.

Jessica Yamauchi, M.A.
Executive Director

To: Honorable Senator Rosalyn Baker
From: McKeen Kessel
Date: February 19, 2013

Subject: In support of passing SB945 WITH REGARD TO SMOKING

There is some societal injustice in the fact that many luxury condominiums have been able to pass House Rules reducing second hand smoke by prohibiting smoking where it impacts nonsmokers whereas moderately priced and low income condominiums, more likely to be owned by hard working Hawaiian citizens, have been reluctant to pass similar rules.

A likely explanation for this disparity is that condominium Associations consisting of members that own their unit as a second home are more likely to feel confident that they have the financial wherewithal to protect themselves from frivolous lawsuits initiated by unhappy smokers.

Unfortunately, this wealth disparity has lead to a quality of air disparity in that people of limited means are more likely to have to breathe second hand smoke coming from a neighbor's lanai or a shared ventilation system with little recourse.

It is grossly unfair that these same people will also suffer disproportionately from the well documented health consequences of breathing someone else's second hand smoke.

Passage of SB945 will help to insure that all Hawaiian condominium Associations will be able to protect the health of nonsmokers by democratically adopting House Rules limiting where people can smoke without the fear of retaliatory lawsuits.

In support of smokers, research shows that 70% of people that smoke want to quit. Limiting where people can smoke helps them to quit.


McKeen Kessel

1032 S. Kihei Rd A-514.
Kihei, Hi. 96753.

Phone: 808-874-3564

Email: mlbk13@gmail.com

I support this bill because it will save lives, protect consumers, and free condo associations from the fear of frivolous lawsuits.

Most condo associations allow the board and/or the association to pass house rules. In fact, 514B-104 Association; powers. [1. Adopt and amend the declaration, bylaws, and rules and regulations] is unambiguous in that it clearly shows that associations can pass house rules.

In addition, Deputy Attorney General Shari Wong, in a letter to Representative Luke dated March 28, 2007, wrote that a condo association could prohibit smoking in units and the common and limited common areas with a rule if " the condominium association has demonstrated that smoking has unreasonably interfered with unit owners' use and enjoyment of the property."

The problem is, many associations have limited financial resources and are afraid to ban smoking on lanais and/or in the unit with a house rule because board lawyers recommend bylaw or declaration changes to ward off frivolous lawsuits. Passage of SB945 would help to mitigate this fear.

As an example, at my last association meeting an owner loudly threatened to sue the board and every individual owner that voted in favor of prohibiting smoking on lanais with a house rule.

Unfortunately, many associations have been unable to pass bylaws to prohibit smoking. Part of the problem is that unreturned proxies count as "no" votes and approximately 18% of the population smoke.

The end result is that a small minority of owners are able to prevent passage of bylaws that would prohibit behavior that causes death, disability and disease in nonsmokers.

If SB945 passes, many condo associations in Hawaii will be able to better protect their owners and guests by prohibiting smoking in areas where innocent people are involuntarily exposed to second hand smoke.

This bill does not prevent associations from passing bylaws to prohibit smoking, it simply levels the playing field and allows a more democratic process in that associations can also vote to prohibit smoking with a house rule, which requires a simple majority, without the fear of an owner(s) filing a frivolous lawsuit.

I firmly believe that if this bill passes many of our residents and tourists will be able to breathe a little easier knowing that the state of Hawaii is doing everything it can to protect them from involuntary exposure to second hand smoke.

It is also important to pass this bill because 70% of the people that smoke want to quit and limiting where they can smoke by passing house rules helps them to stop.

McKeen Kessel
1032 S. Kihei Rd. A-514
Kihei, Hi. 96753

SB945

Submitted on: 2/18/2013

Testimony for CPN on Feb 20, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Joylin K L Domingo	Individual	Support	No

Comments: I am graciously asking for your consideration to pass Senate Bill 945, a bill that aims to ban smoking in condominium, and apartment complexes. My 'Ohana and I are proud, first time owners of a condo in Kapolei for one year now. Although we're ecstatic to have made our first purchase, we also regret purchasing a unit next to a smoker. Through the house buying process, one can only cross their fingers and hope for dream neighbors. Bum luck for us... My son and I are asthmatic, and our neighbors constant smoking for one entire year has really worsened the situation. At this time, we are expecting our second child, and there isn't anything we can do about the smoking. We have considered removing carpets, which smell like smoke, and even discussed relocating due to our frustration. We have discussed this issue with the Resident Manager, and were told there isn't anything we could do. We have also contacted Coalition for a Tobacco Free Hawaii, and asked for suggestions. The only solution at this time would be to confront our neighbor, and politely tell them our situation, with the risk of creating animosity between us. Sadly, our neighbors smoke is our 5am alarm clock. We rise, and go to bed with the smell of cigaretts. It's disgusting, it's frustrating, and most of all detrimental to our health. Please consider passing Senate Bill 945 which will give our children a healthier, safer environment to live in.

SB945

Submitted on: 2/19/2013

Testimony for CPN on Feb 20, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Ilene Montero	Individual	Support	No

TO: Senate Committee on Commerce and Consumer Protection
ATTN: Senator Rosalyn H. Baker, Chairman
Notice of Hearing on DATE: 2/20/2013
TIME: 9:30 AM

I am strongly opposed to SB945, S.D. 1 for the following reasons:

This bill is a dangerous step against established condo law that existed when an individual purchased their unit as the law currently requires approval by 67% of owners in changing either the Horizontal Property Regime or the Bylaws.

There should be reluctance to legislate behavior entirely within a person's home. Where does this stop? Will the next step be to ban alcohol or certain juices/ades because of their high-quantity of sugar, which could also be construed as a health hazard?

As a practical matter, who is going to enforce this ban? It will be left to the on-site Resident Manager (if there is one). How will the manager ensure that someone is smoking in the unit? Will a manager have the authority to break down the door to come in to the unit to enforce the rule just because an aroma of smoke is coming from the unit? Could it be a pan that got too hot, a toaster that burned the toast, or even incense burning? How will either the manager or the unit owner prove the action did or did not occur? It would be one person's word against another's. Who will adjudicate?

As another practical matter, what if the unit is rented as a short-term vacation rental, and the Resident Manager sites the renter for an infraction? Will the Resident Manager be able to fine the renter on the spot? Will the Resident Manager fine the owner who is not even on site and able to enforce the policy in the event of a violation? How will the owner collect any fine imposed on the owner if the renter denies the charge?

Yes, the question should be put to the owners in a democratic fashion, but all aspects of the problem must be considered by the Association---including violations, enforcement, etc---to be sure the Association wants to expend that amount of effort to insure compliance. Therefore, a 67% approval by all owners would inure these other areas are explored and discussed. The preamble of the rule stating "Unless otherwise prohibited by the articles of incorporation or bylaws," is a useless introduction. What current set of Bylaws (more than likely developed more than 10-20 years ago) would contain any such prohibition of smoking? When 514B was recently passed, it outlined what would be in the Bylaws, and no such provision concerning smoking was required.

As a matter of information, I am an ex-smoker (quitting on 1 Oct 1974 after 25 years of smoking) and enjoy my smoke-free environment in my own home; but I do not want the legislature to mandate a change through a simple majority of owners voting to adopt a no-smoking policy in dwelling units. Until, and if, the entire State of Hawaii votes to go smoke-free, I do not agree with this bill. Why not go after the tobacco industry instead of condominium owners? Where do you draw the line between alleged health hazards and individual rights within one's own home?

Respectfully submitted,

BERT L. BLODGETT

3823 Lwr Honoapiilani Rd, Apt 317

Lahaina, HI 96761-8911

SB945

Submitted on: 2/15/2013

Testimony for CPN on Feb 20, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Pamela Williams	Individual	Oppose	No