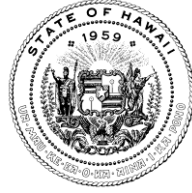


HB 271

Provides cancellation rights to persons who contract to buy a short-term product in Hawaii. Allows disbursement of purchasers' funds to a developer; provided that the developer first posts a bond or letter of credit



DAVID Y. IGE
GOVERNOR
SHAN S. TSUTSUI
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
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CATHERINE P. AWAKUNI COLÓN
DIRECTOR
JO ANN M. UCHIDA TAKEUCHI
DEPUTY DIRECTOR

**PRESENTATION OF THE
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION**

TO THE SENATE COMMITTEE ON
TOURISM AND INTERNATIONAL AFFAIRS

TWENTY-EIGHTH LEGISLATURE
Regular Session of 2015

Wednesday, March 18, 2015
2:45 p.m.

TESTIMONY ON HOUSE BILL NO. 271, H.D. 2, RELATING TO TIME SHARING.

TO THE HONORABLE GILBERT KAHELE, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Lori Beth Van Cantfort, Time Share Administrator of the Professional and Vocational Licensing Division, testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). For the reasons set forth below, the Department has strong concerns with aspects of this bill but has been working with the proponent of the bill to ensure the measure contains adequate consumer protections.

House Bill No. 271, H.D. 2, seeks to (1) provide purchasers with a 7-day rescission right when purchasing "short-term products", and (2) allow time share developers to take purchasers' funds out of escrow prior to closing and prior to

completion of the time share project, as long as the developer posts a surety bond or irrevocable letter of credit.

In practice, short-term products are sold to consumers who decide not to purchase a time share interest. These consumers are then offered to purchase a short stay at a time share property to be used sometime in the future. When they return to vacation at the property, they are solicited to purchase a time share interest again. If they decide to purchase a time share interest at that time, the price they paid for the short-term product is applied towards their time share purchase. Currently, Hawaii Revised Statutes Chapter 514E only provides a 7-day rescission right for the sale of a time share interest. The rescission right does not apply to sales of short-term products. However, many consumers assume the 7-day rescission right applies to their purchase of a short-term product because the short-term product is being sold to them to solicit a time share sale. Some developers already offer a rescission right for short-term products which further confuses consumers because they believe all developers offer a rescission right. Providing a statutory 7-day rescission right for short-term products will eliminate any confusion and provide better consumer protection.

The Department also has serious concerns about allowing developers to post a surety bond or irrevocable letter of credit instead of requiring purchasers funds remain in escrow prior to closing. The Department questions the level of consumer protection provided by a surety bond and how difficult it will be for consumers to collect on a surety bond when they are entitled to a refund. Developers will be able to take consumers'

funds without providing the Department with any proof that the project will be built (e.g. construction contract, performance/completion bond, proof of sufficient funds to complete the project). The Department is concerned that this provision would seriously disadvantage consumers by decreasing the availability/collectability of funds that would otherwise be held in escrow, now leaving consumers to try to recover from surety companies. The Department has been working with the proponent of this bill to address these concerns and is continuing its discussions.

For the Committee's information, the Senate companion measure, Senate Bill No. 754, was heard by this Committee on February 4, 2015. The Senate Committee on Commerce and Consumer Protection then passed that bill with an S.D. 2. The Department prefers the language found in House Bill No. 271, H.D. 2, but is still working with the proponent of the bill on unresolved issues. The Department would appreciate the opportunity to continue working with the Committee and proponent of this measure to develop appropriate legislation with sufficient consumer protections included.

Thank you for this opportunity to provide testimony on House Bill No. 271, H.D. 2.



DAVID Y. IGE
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SHAN S. TSUTSUI
LT. GOVERNOR

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PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
REGULATED INDUSTRIES COMPLAINTS OFFICE

TO THE SENATE COMMITTEE ON
TOURISM AND INTERNATIONAL AFFAIRS

TWENTY-EIGHTH STATE LEGISLATURE
REGULAR SESSION, 2015

WEDNESDAY, MARCH 18, 2015
2:45 P.M.

TESTIMONY ON HOUSE BILL NO.271 H.D.2
RELATING TO TIME SHARING

TO THE HONORABLE GILBERT KAHELE, CHAIR,
AND TO THE HONORABLE J. KALANI ENGLISH, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify on House Bill No. 271 H.D.2, Relating to Time Sharing. My name is Daria Loy-Goto, Complaints and Enforcement Officer for the Department's Regulated Industries Complaints Office ("RICO"). RICO offers the following comments on the bill.

House Bill No. 271 H.D.2 grants cancellation rights to persons who contract to purchase short-term products in Hawaii. The bill also allows for disbursement of

purchasers' funds to a developer under certain conditions and has a defective effective date.

RICO notes that this Committee heard the companion bill, Senate Bill No. 754, and passed out that bill with technical amendments. The House and Senate versions differ primarily in that House Bill No. 271 H.D.2 only permits disbursements for costs associated with time share development in Hawaii, while Senate Bill No. 754 S.D.2 allows a developer to use disbursements for any purpose. House Bill No. 271 H.D.2 also requires a developer to deposit either a surety bond or a letter of credit with the Director and escrow agent; Senate Bill No. 754 S.D.2 requires a developer to obtain a surety bond prior to disbursement.

RICO and the Department's Time Share Administrator have been working with the proponent of the bill on amendments that would provide sufficient consumer protections and would appreciate the opportunity to continue our efforts.

Thank you for the opportunity to testify on House Bill No. 271 H.D.2. I will be happy to answer any questions the members of the Committee may have.

CHARLES E. PEAR, JR.
ATTORNEY AT LAW

DIRECT #:
PHONE - (808) 223-1212
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March 17, 2015

Sen. Gilbert Kahele, Chair
Sen. J. Kalani English, Vice Chair
Members of the Senate Committee on
Tourism and International Affairs
Twenty-Eighth Legislature
Regular Session, 2015

Re: H.B. 271, HD 2
Hearing on March 18, 2015, 2:45 p.m.
Conference Room 225

Dear Chair, Vice Chair and Members of the Committee:

My name is Charles Pear. I am appearing as legislative counsel for ARDA Hawaii.

ARDA Hawaii supports the bill. ARDA is currently working with the DCCA on some amendments to the bill.

Last summer, representatives of the Department of Commerce and Consumer Affairs met with representatives of the American Resort Development Association to discuss regulatory issues relating to the time share industry in Hawaii. This legislation is an outgrowth of those discussions.

1. Short-Term Products.

Part of this legislation deals with short-term products, an area that is not currently regulated in the State of Hawaii.

Some people who attend a time share sales presentation would like to have the opportunity to stay in a time share project before they decide whether to make a purchase. Short-term products are intended to allow a potential time share buyer to stay in a time share resort on a trial basis. If the buyer decides to proceed with a purchase, some or all of the amount paid by the buyer for the short-term product typically is credited toward the purchase price of the time share interest.

In some states, certain disclosures must be given to prospective short-term product buyers. In addition, the buyers have a right to rescind a contract to purchase a short-term product for a certain number of days after they sign their contract.

ARDA is prepared to support the provisions of the bill regulating short-term products in recognition of the fact that streamlining the timeshare regulatory environment in Hawaii will require ongoing cooperation and give-and-take between the DCCA and the industry.

2. Escrow Bonds.

In 1982, at the request of the Chairperson of the House Consumer Protection Committee, I drafted comprehensive legislation regulating the financial structure of time share plans and establishing escrow requirements governing the sale of time share interests.

The 1982 amendment requires that the developer establish an escrow account in Hawaii¹ pursuant to a separate written escrow agreement between the developer and an escrow agent.² All funds received from the buyers must be deposited in the escrow account until closing.³

Funds may be released from escrow prior to closing if the buyer cancels his or her purchase during the 7-day rescission period or if the contract is otherwise terminated in accordance with its terms.

Buyers' funds may also be used to pay the costs of constructing and developing a time share project if certain conditions are met.⁴ Those conditions include a requirement that the developer deposit the following with the Director of the Department of Commerce and Consumer Affairs:

- a copy of the executed construction contract;
- a statement showing the costs to complete the project, including the costs to furnish the time share units;
- evidence satisfactory to the Director that there are sufficient funds to pay the costs of constructing, furnishing and completing the project (whether from buyers' funds, the developer's funds, or loan proceeds);
- a copy of executed performance and labor and material payment bonds.

If the foregoing requirements are met, then the buyer's funds may be disbursed to pay the costs of construction (to the extent completed) and the cost of purchasing furnishings and fixtures for the time share units. The Act also permits disbursement of buyers' funds to pay

¹ §514E-16(b), H.R.S.

² §514E-16(c), H.R.S.

³ §514E-16(a), H.R.S.; Rule 16-106-34(c)(1), H.A.R.

⁴ §514E-17(a)(4), H.R.S.

architectural, engineering, interior design, finance, and legal fees. And buyers' funds may be disbursed to pay "other incidental expenses of constructing the time share units or developing the time share plan", although the nature of such expenses is not defined by the Act.

The legislative history is instructive insofar as it indicates the intended purpose of this section:

* * * Subsection (4) parallels section 514A-67 of the Horizontal Property Act which permits the disbursement of buyers funds to pay the costs of construction. A developer will not be permitted to use buyers funds for construction until he files a copy of the executed construction contract and a copy of the executed performance and labor and material payment bonds insuring that all amounts due under the construction contract, including change orders up to 10%, and all other costs of construction will be paid.⁵

Under §514A-67 of the Hawaii condominium law (now Section 514B-92, H.R.S.), buyers' funds may be disbursed to pay the costs of construction (to the extent completed) and also to pay architectural, engineering, finance, and legal fees. (The condominium law does not permit disbursements for furnishings or for interior design fees.) The statute also permits disbursement of purchasers' funds to pay "other incidental expenses of the condominium".

These measures are intended to ensure that the project will be constructed. However, none of these measures protect the buyers' right to a refund in other circumstances. For example:

- If the developer defaults under its construction loan, the lender can foreclose on the project and acquire title free of the rights of the buyers – even though the buyers' funds may have been used to help pay the cost of constructing the project.
- If the developer fails to complete construction *on time*, buyers may have a right to cancel but there may be no money for escrow to refund.
- If there are material differences between the project as represented and the project as actually constructed, buyers have a right to a refund but there may be no money available to be refunded.

In the market downturn of 2007 – 2008, many condominium unit purchasers sought to cancel their sales contracts and obtain a refund of their deposits. Our firm was involved in buyer remorse lawsuits covering more than 100 units.

⁵ Conf. Com. Rep. No. 52-82 on H.B. No. 3078-82, 1982 Senate Journal, page 901.

In those cases, construction of the condominium had been completed. Buyers asserted, however, that they were entitled to rescind their purchases for various reasons. We advised the buyers and their counsel that, while they may have claims to rescind their purchases, all of the buyers' deposits had been used to pay construction costs, so there was no money in escrow to refund.

This bill proposes to authorize developers to withdraw funds from escrow upon posting an escrow bond. An escrow bond assures that buyers will receive any refund to which they become entitled. With an escrow bond, buyers can get a refund of their deposits if the lender forecloses, if the developer fails to complete construction, if the developer does not finish construction on time, or if the project is materially different than promised.

This concept is currently used in Florida. ARDA Florida's legislative counsel reports that the Florida regulators have never had to call an escrow bond.

Of course, a bond is only as good as the company that issues it. Buyers' funds held in escrow are deposited in a bank. But bonding companies sometimes have higher credit ratings than the banks used to hold funds in escrow. For example, consider these ratings of prominent bonding companies by Moody's:

Federal Insurance Company (Chubb)	Aa2/Stable
Zurich Insurance Company	Aa3/Stable
Traveler's Casualty and Surety Company	Aa2/Stable
Westchester Fire Insurance Company (ACE)	A1/Stable

as compared to the ratings by Moody's of prominent local and national banks:

J.P. Morgan Chase & Co.	A3/ Stable
Bank of America	Baa2/Stable
CitiGroup	Baa2/Stable
Wells Fargo	Aa3/Stable
Bank of Hawaii	Aa3/Stable
First Hawaiian Bank	A2

In addition, bonding programs provide a prequalification process that, in the case of an escrow bond, benefits the buyers. Issuance of a bond means that the bonding company has completed a thorough underwrite on the financial wherewithal of the developer and expects the developer to perform its obligations. By contrast, a bank merely accepts and holds the deposits.

In short, under the current system of releasing funds for construction, consumers could potentially get a half-complete project with a litigating developer and lender. The project could

never be built and consumers could even lose their funds entirely in the case of an eventual liquidation of the project. An escrow bond can help to avoid this.

3. Other Revisions and Updates.

The bill updates certain provisions of Chapter 514B to be consistent with current practice.

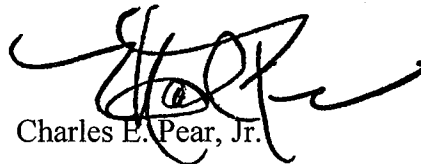
For example, the bill proposes to amend the definition of "notice of time share plan" to delete the requirement that the notice identify the initial use period for each time share interest and the name of the initial purchaser of the time share interest.

When the notice of time share plan concept was introduced in the 1982 legislation, a time share buyer typically purchased the right to use a specific unit for a particular week or "use period." Now, many time share buyers purchase an allotment of "points," which are like frequent flyer miles - you can use them to go a lot of different places, but the number of points required may differ depending on the destination that you choose. As a result, it is no longer practical to identify the use period of a time share interest.

Thank you for your kind consideration of this legislation. I would be happy to take any questions if you think that I may be of some small assistance.

Very truly yours,

MCCORRISTON MILLER MUKAI MACKINNON LLP

A handwritten signature in black ink, appearing to read 'Charles E. Pear, Jr.', written over the typed name below.

Charles E. Pear, Jr.

CEP:kn



March 18, 2015

TO: COMMITTEE ON TOURISM AND INTERNATIONAL AFFAIRS
Senator Gilbert Kahele, Chair
Senator J. Kalani English, Vice Chair

FR: Henry Perez, President ARDA Hawaii (via its Executive Director, Blake Oshiro)

RE: H.B. 271 HD2 Relating to Time Sharing.
Position: Support with Some Concerns

The American Resort Development Association (ARDA) Hawaii, the local chapter of the national timeshare trade association, supports HB271 HD2, although we do have some concerns with the specific language in the HD2. It is our understanding that this language was recommended by the Department of Commerce and Consumer Affairs (DCCA). ARDA-Hawaii defers to its attorney, Charlie Pear, on the particulars of the concerns and comments. But, we would like to respectfully request that the Committee pass this bill so that we can continue our discussion with DCCA.

The first part of the bill establishes cancellation rights for purchasers of short-term timeshare products. Based on discussions with the DCCA Timeshare Administrator, the sale of these products raised some concerns. Thus, in an effort to improve our industry, ARDA agreed to support legislation that regulates the purchase of short-term products and we support this effort to increase consumer confidence.

The remainder of the bill amends current law to allow for the use of escrow bonds. Under current law, when a buyer purchases a timeshare that is in the development stage, the purchase funds may be placed in escrow and disbursed to the developer to cover construction costs. If the developer defaults, because of the use of subordination clauses in the purchase contract, the buyer's rights are subordinated to the rights of the construction lender. The lender may foreclose and acquire title to the project free of any claims of the buyers. This leaves the buyers without recourse to recover their purchase funds.

This law was first enacted in 1985 and since that time, the law has not changed despite changes to the industry, changes to the operations and financing of times shares, and the fact that several publicly traded hospitality brands that are now associated with time shares. Thus, ARDA supports amending the law similar to 15 other states' laws that permit a timeshare developer to use buyer's deposits upon posting a bond or other financial assurance. This provides buyers with a remedy in the event a developer fails to complete construction or defaults on the construction loan. We believe similar protections in Hawaii will serve the consumers well.

ARDA is engaged in discussions with DCCA and remain hopeful that we will be able to come up with agreeable language very soon. Thank you for the opportunity to submit testimony in support of HB271 HD2.

c/o Alston Hunt Floyd & Ing * 1001 Bishop Street, 18th Floor * Honolulu, Hawai'i 96813



March 17, 2015

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Senator Gilbert Kahele, Chair
Senator J. Kalani English, Vice Chair
Members of the Senate Committee on Tourism
And International Affairs
Twenty-Eighth Legislature
Regular Session of 2015

RE: HB 271, HD2 Relating to Time Sharing
Hearing date: Wednesday, March 18, 2015
2:45 pm, Conference Room 225

Aloha Chair, Vice-Chair and Members of the Committee,

Thank you for allowing me to submit testimony on behalf of Marriott Vacations Worldwide Corporation (“MVWC”) in **SUPPORT OF HOUSE BILL 271, HD2 RELATING TO TIME SHARING**. MVWC is a global leader in the timeshare industry, with five resort properties in Hawaii. Timeshare units are a significant and stabilizing part of the tourism industry, and resort development provides thousands of construction jobs in the islands year after year.

This bill addresses an important concern in resort development. Under current Hawaii law, after a new timeshare unit is sold, the purchasers’ funds are placed in escrow and disbursed to developers to help pay for the costs of construction and development. This often occurs prior to the closing and deeding of the property. If the developer defaults and the purchaser’s lien is subordinate to the construction lender’s rights, the purchaser may be in jeopardy of losing both his property and deposit.

House Bill 271, HD2 provides a remedy to this issue by requiring the developer to post a bond or other assurance before the purchasers’ funds are released. Specifically, House Bill 271, HD2 allows the purchaser’s funds to be released to the developer if the following conditions are met:

- The developer deposits a surety bond or other financial assurance with the escrow agent and director;
- There is no lien payment trust or similar device being used by the developer;
- The sum of the bond and the purchaser’s funds remaining in escrow is at least equal to the amount of funds that would have remained in escrow without the bond;
- The bonding company is authorized to issue bonds in the state and has an acceptable financial rating.



IMANAKA ASATO

A LIMITED LIABILITY LAW COMPANY

Senator Gilbert Kahele, Chair
Senator J. Kalani English, Vice Chair
Members of the Senate Committee on Tourism
And International Affairs
March 17, 2015
Page Two

Discussions with the DCCA regarding the specific language of the bill are ongoing, but MVWC supports HB 271, HD2 as a mechanism for resort developers to access purchasers' funds needed to complete construction, while still protecting the purchaser from loss of his deposit if the project is not completed.

For these reasons, MVWC **supports** House Bill 271, HD2. Mahalo for your consideration.

Sincerely,

IMANAKA ASATO LLLC

Michael L. Iosua

MLI:tmoh

**Testimony of
Gary M. Slovin / Mihoko Ito
on behalf of
Wyndham Vacation Ownership**

DATE: March 17, 2015

TO: Senator Gilbert Kahele
Chair, Committee on Tourism and International Affairs
Submitted Via TSItestimony@capitol.hawaii.gov

RE: **H.B. 271, H.D.2 - Relating to Taxation**
Hearing Date: Wednesday, March 18, 2015 at 2:45 p.m.
Conference Room 225

Dear Chair Kahele and Members of the Committee on Tourism and International Affairs,

We submit this testimony on behalf of Wyndham Vacation Ownership. Wyndham offers individual consumers and business-to-business customers a broad suite of hospitality products and services through its portfolio of world-renowned brands. Wyndham Vacation Ownership has a substantial presence in Hawaii through its Wyndham Vacation Resorts, WorldMark by Wyndham and Shell Vacations Club brands.

Wyndham **strongly supports** H.B. 271, H.D.2, which provides a seven day right of cancellation to purchasers of short-term time share products, and allows disbursement of purchasers' funds from escrow to a developer, provided that the developer first posts a bond, letter of credit or other financial assurance to an unaffiliated third party.

Under current Hawaii law, a developer that constructs a time share project must hold a time share buyer's funds in escrow after the seven-day cancellation period has passed, the project is completed, and closing has occurred. There is only one limited circumstance when the developer may remove funds from escrow, and that process is labor and time intensive for both the developer and the DCCA. This means that a significant amount of money – potentially tens of millions of dollars – could remain in escrow for months at a time. H.B. 271, H.D.2 would protect these funds with a third party assurance, give the consumer ample protection if the project was not completed, and would grant the developer access to funds to apply to construction costs.

Gary M. Slovin
Mihoko E. Ito
C. Mike Kido
Tiffany N. Yajima

999 Bishop Street, Floor 1400
Honolulu, HI 96813
(808) 539-0840

This approach has been implemented in Florida and many other jurisdictions around the United States, and has been demonstrated to benefit both time share developers and time share purchasers. If the developer fails to complete a construction project, the consumer is entitled to a refund of funds where the developer is no longer able to provide one.

In addition, the seven day right of cancellation provided to purchasers of short-term time share products provides consumers the opportunity to explore the time share experience on a trial basis, with the benefit of cancellation after a reasonable amount of time.

Wyndham notes that the H.D.2 version of the bill includes language that raises concern, but that there are on-going discussions on this measure. As such, Wyndham respectfully requests this Committee to move the bill forward to facilitate those discussions. Thank you for the opportunity to submit testimony on this measure.



9002 San Marco Court
Orlando, Florida 32819
(407) 418-7271

March 18, 2015

To: Senator Gilbert Kahele, Chair
Senator J. Kalani English, Vice Chair
Senate Committee on Tourism and International Affairs

RE: **HB 271 HD2 – Relating to Time Sharing – In Support**
Conference Room 225; 2:45 PM

Chair Kahele, Vice Chair English and members of the committee:

Starwood Vacation Ownership (“Starwood”) appreciates the opportunity to offer testimony in support of HB 271 HD2. This measure permits the use of purchaser funds upon the posting of a letter of credit, bond or other financial assurance and provides enhanced consumer protection by regulating the sale and offer of timeshare short-term products. This measure ensures proper disclosure, and a recession period is given to the consumer purchasing a short term product and continues the modernization of Hawaii’s timeshare act.

Permitting funds to be withdrawn from escrow upon the posting of a letter of credit, bond or other financial assurance is beneficial to developers by assisting with cash flow in large resort construction projects, which often take two to three years to complete. It is beneficial to consumers because it guarantees them a refund of all purchase funds if the project is not timely completed. Currently, purchaser funds may be released to reimburse a developer for construction expenditures. This procedure could result in an incomplete project and insufficient funds remaining to complete the project.

For over two years, the industry has worked with the Department of Commerce and Consumer Affairs (DCCA) on this measure. There have been numerous meetings where industry leaders have travelled to Hawaii to meet staff members in person to discuss the merits of this valuable bill. Several modifications have been made as a result of working with DCCA. While there is currently language in the bill that needs to be updated, we are optimistic that these issues can be addressed successfully. We strongly ask for your support of HB 271 HD2 as it enhances consumer protection while encouraging the development of new accommodations in Hawaii.

Thank you for the opportunity to testify on HB 271 HD2.

Robin Suarez
Vice President/General Counsel
Starwood Vacation Ownership