

**PRESENTATION OF THE
REAL ESTATE COMMISSION**

TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION AND COMMERCE

TWENTY-NINTH LEGISLATURE
Regular Session of 2017

Thursday, February 9, 2017
2:00 p.m.

**TESTIMONY ON HOUSE BILL NO. 1499, RELATING TO CONDOMINIUM
ASSOCIATIONS.**

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Nikki Senter, Chairperson of the Hawaii Real Estate Commission ("Commission"). The Commission takes no position on this bill, and submits the following comments.

The purpose of this bill is to permit annual condominium trust fund fees designated for educational purposes to be used to pay arbitrator's fees by amending sections 514B-71 and 514B-162, Hawaii Revised Statutes ("HRS"). The bill also purports to authorize use of said trust fund to fund disputes among board members or those involving a managing agent and the option of binding arbitration if a mediation fails to resolve a dispute.

The Commission supports the concept of alternative dispute resolution as an avenue for handling condominium disputes. Arbitration, however, can be more costly than mediation. Thus, should this bill pass, the Commission requests that it retain discretion regarding allocation of funds to each program.

Should the Committee decide to pass this measure, the Commission requests that the language of the bill be amended in SECTION 3 by deleting the language in section 514B-71(a)(5), HRS, and amending it to read:

"Support for arbitration of condominium related disputes ...".

The Commission also notes that the proposed amendment to section 514B-71(a)(4) in SECTION 3 of the bill is duplicative as the current section does not exclude disputes among members of a board and those that involve an association managing agent.

In addition, the proposed addition of subsection (d) to section 514B-161, HRS, in SECTION 4 is not necessary as nothing prohibits a party to a failed mediation from electing to pursue binding arbitration.

Finally, the Commission notes that while SECTION 1 of the bill proposes to amend section 514A-121, HRS, and SECTION 2 of the bill proposes to amend section 514A-121.5, HRS, those sections were superseded by section 514B-22, HRS.

Thank you for the opportunity to provide comments on House Bill No. 1499.

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 2, 2017 12:20 PM
To: CPCtestimony
Cc: richard.emery@associa.us
Subject: Submitted testimony for HB1499 on Feb 9, 2017 14:00PM

HB1499

Submitted on: 2/2/2017

Testimony for CPC on Feb 9, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Richard Emery	Associa	Support	Yes

Comments: Allowing participants to voluntarily elect binding arbitration with a reasonable cost may result in faster resolutions and reduce court filings.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 7, 2017 1:36 PM
To: CPCtestimony
Cc: albertd@hawaiianprop.com
Subject: Submitted testimony for HB1499 on Feb 9, 2017 14:00PM

HB1499

Submitted on: 2/7/2017

Testimony for CPC on Feb 9, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
AI Denys	Hawaii CAI LAC & Hawaiian Properties	Oppose	No

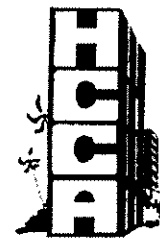
Comments: Aloha, Oppose HB 1499. Mahalo. warmest aloha AI Denys

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov



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



February 7, 2017

Rep. Angus McKelvey, Chair
Rep. Linda Ichiyama, Vice-Chair
House Committee on Consumer Protection & Commerce

Re: Testimony in Support (with comments) of
HB1499 RELATING TO CONDOMINIUM ASSOCIATIONS
Hearing: Thurs., February 9, 2017, 2 p.m., Conf. Rm. #329

Chair McKelvey, Vice-Chair Ichiyama and Members of the Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCAAO dba HCCA). This organization represents the interests of condominium and community association members.

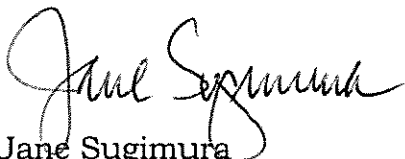
HCAAO has always supported mediation and arbitration to resolve disputes between condo owners and their boards, and accordingly it supports the intent and purpose of this bill; however, we would like to ask for amendments as follows:

- Amend Sections 1 and 3 to clarify that the amendments contemplated by this bill will allow parties to engage in binding arbitration with no right of trial *de novo*.
- Amend HRS 514A-127 and HRS 514B-163 to expressly provide that voluntary binding arbitrations [that will be added by this bill] shall not be subject to trials *de novo*.
- In Sections 2 and 4, expand the people who can seek mediation to include (i) minority board members and the rest of the Board, and (ii) owners and/or the Board and their managing agent.
- In Sections 2 and 4, clarify that if evaluative mediation is requested in writing that the other side cannot choose to do facilitative mediation instead and that doing so would be treated as a rejection to mediate.
- The statutes relating to arbitration and mediation of disputes use the mandatory word "shall"; however, there is no provision in the statutes that would allow a party who is seeking to mediate or arbitrate a dispute from

compelling the recalcitrant “other” party to participate in the process. Accordingly, we suggest that language be included in both the arbitration and mediation sections that if the arbitration or mediation does not begin within 45 days following delivery of the requester’s written demand that the requester can file a special proceeding with the circuit court to compel mediation or arbitration and that if such relief is granted by the Court, that the requester would be entitled to recover his or her fees and costs in an amount not to exceed \$1,500. This is a reasonable amount based on the following: The filing fee for a special proceeding in circuit court to compel mediation is currently \$355.00 and the service fee is \$50. We estimate no more than 2 hours to prepare the motion and 1 hour to review an opposition memo and prepare a reply memo and 1 hour of time for the court hearing and to prepare an appropriate court order reflecting the court’s decision. With the average hourly rate in Hawaii for civil attorneys at \$250, the legal fees should not exceed \$1,000 and the costs should not exceed \$405. Accordingly, we suggest capping the fees and costs at \$1,500. This sanction is very important because currently there are no consequences when the other party fails or refuses to mediate notwithstanding the mandatory language of the statute.

- Finally, we urge this Committee to include language in its committee report on this bill emphasizing that the amendments being made to the arbitration and mediation provisions of the condominium statutes are intended to reflect in the strongest way the legislative intent and policy that condo disputes should be resolved without having to expend time and expense in litigation and that the dispute resolution process should be expeditious and economical. This “legislative history” in the committee report will be very persuasive to a court and will be useful to petitioners who have to file their motion to compel in a special proceeding.

HCCA respectfully requests that you include its suggested revisions to this bill. If you have any questions, please feel free to contact me. Thank you for the opportunity to testify on this matter.



Jane Sugimura
President

LAW OFFICES OF PHILIP S. NERNEY, LLLC

A LIMITED LIABILITY LAW COMPANY
737 BISHOP STREET, SUITE 2780, HONOLULU, HAWAII 96813
PHONE: 808 537-1777
FACSIMILE: 808 537-1776

February 6, 2017

Honorable Angus L.K. McKelvey
Honorable Linda Ichiyama
Committee on Consumer Protection & Commerce
415 South Beretania Street
Honolulu, Hawaii 96813

Re: HB 1499 OPPOSE IN ITS CURRENT FORM

Dear Chair McKelvey, Vice-Chair Ichiyama and Committee Members:

HB 1499 would enable any party to a condominium dispute to impose binding arbitration upon another party who is unwilling to yield valuable legal rights and remedies, including the constitutional right to trial by jury. That is problematic.

SB 200, in contrast, enables the use of condominium education trust fund money to subsidize the expense of binding arbitration when parties agree to use it. That is a useful incentive.

In all events, well-settled precedent concerning arbitration includes the fundamental point that: "Without an agreement to arbitrate, a court may not force parties to engage in arbitration." Douglass v. Pflueger Hawaii, Inc., 110 Hawaii 520, 135 P.3d 129, 140 (2006). HB 1499 appears to be inconsistent with settled law.

The questions that a court would ask in the event of a challenge to HB 1499 are prescribed, see, Narayan v. Ritz-Carlton Development Co., 135 Hawaii 327, 333-334, 350 P.3d 995, 1001-1002 (2015), as are the elements necessary to prove the existence of an enforceable agreement to arbitrate. See, id. There is a fair likelihood that a legal challenge to HB 1499 could succeed based on the questions and the elements that would be considered.

HB 1499's proposed amendment of Hawaii Revised Statutes ("H.R.S.") §§514B-161 and -162 would be subject to the provision in §514B-22(2) that proscribes "unreasonable impairment of contract." That would be problematic because HB 1499 would certainly impair contracts. Impairment of contract is also prohibited by U.S. Const., art. I, §10.

Honorable Angus L.K. McKelvey
Honorable Linda Ichiyama
February 6, 2017
Page 2 of 2

Other problems can also be anticipated.

The approach reflected in SB 200 is preferable to the approach reflected in HB 1499. The committee is, therefore, respectfully requested to amend HB 1499 by adopting the content of SB 200.

Very truly yours,

Philip Nerney

Philip S. Nerney

From: mailinglist@capitol.hawaii.gov
Sent: Sunday, February 5, 2017 5:25 PM
To: CPCtestimony
Cc: john-a-morris@outlook.com
Subject: Submitted testimony for HB1499 on Feb 9, 2017 14:00PM

HB1499

Submitted on: 2/5/2017

Testimony for CPC on Feb 9, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
John Morris	Individual	Support	No

Comments: My name is John Morris and I am testifying in support of HB 1499, which allows the condominium education trust fund to fund not only evaluative mediation but also arbitration. Reportedly, the fund established to promote evaluative mediation has a significant positive balance. In addition, not all disputes can be resolved by mediation and it is possible that arbitration might be necessary in some cases and might prevent condominium disputes from clogging the courts. Therefore, HB 1499 seems to serve a worthwhile purpose. Nevertheless, arbitration can be significantly more expensive than evaluative mediation. The Hawaii Real Estate Commission, which administers the evaluative mediation program, has currently capped the subsidy at a maximum of \$3000, unless special circumstances exist. Therefore, perhaps the committee report for this bill could clearly state that the commission has the authority to establish criteria for arbitration under the terms of HB 1499. The bill already states that prior to filing arbitration with support from the condominium education trust fund, the parties must first attempt mediation, which is a good limitation that may reduce unnecessary arbitration. The committee report for this bill could also confirm that the commission can establish criteria for the maximum funding for any arbitration that proceeds in accordance with this proposed change in the law. Thank you for this opportunity to testify.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, February 4, 2017 2:26 PM
To: CPCtestimony
Cc: cporter@hawaiiilegal.com
Subject: *Submitted testimony for HB1499 on Feb 9, 2017 14:00PM*

HB1499

Submitted on: 2/4/2017

Testimony for CPC on Feb 9, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
Christian Porter	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

Richard J. Port
1600 Ala Moana Blvd. #3100
Honolulu, Hawaii 96815
Tel 808-941-9624
e-mail: portr001@hawaii.rr.com

Measure: HB 1499 Relating to Condominium Associations

Date and Time of Hearing: 2:00 p.m. Thursday, February 9, 2017

Committee: The Committee on Consumer Protection & Commerce

Aloha Rep, McKelvey and Members of your Committee,

Thank you for this opportunity to testify in strong support of HB 1499.

I agree with the recommended amendments suggested by Jane Sugimura which she has made on behalf of the Hawaii Council of Association of Apartment Owners. The result will be that if HB 1499 is approved, most conflicts between condo boards and their owners will be able to be resolved without these owners coming to the legislature with ever more bills requesting your assistance.

Please approve HB 1499.

Richard Port

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 7, 2017 9:42 PM
To: CPCtestimony
Cc: Schoenecker@email.Phoenix.edu
Subject: Submitted testimony for HB1499 on Feb 9, 2017 14:00PM

HB1499

Submitted on: 2/7/2017

Testimony for CPC on Feb 9, 2017 14:00PM in Conference Room 329

Submitted By	Organization	Testifier Position	Present at Hearing
JOY SCHOENECKER	Mauna Luan	Support	No

Comments: We support mediation and arbitration to resolve disputes between condo owners and their boards, and accordingly it supports the intent and purpose of this bill

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov