

SB121

Measure Title: RELATING TO CONDOMINIUMS.

Report Title: Condominiums; Condominium Association; Dispute Resolution; Mediation; Arbitration; Condominium Education Trust Fund

Description: Broadens the scope of condominium related disputes for which an apartment owner or the board of directors can mandate mediation. Lowers the additional annual condominium education trust fund fee, used to support costs of mediation, to 75 cents times the number of condominiums units included in a registered project or association and discourages future surpluses of the fee. Specifies that any surplus funds collected for the additional annual condominium education trust fund to support mediation may be used for any education purpose provided under section 514B-71(a), HRS. Amends the conditions that mandate mediation and exceptions to mandatory mediation.

Companion: HB200

Package: None

Current Referral: CPH/JDL, WAM

Introducer(s): K. RHOADS

**PRESENTATION OF THE
REAL ESTATE COMMISSION**

TO THE SENATE COMMITTEE ON
COMMERCE, CONSUMER PROTECTION, AND HEALTH

AND

THE SENATE COMMITTEE ON JUDICIARY AND LABOR

TWENTY-NINTH LEGISLATURE
Regular Session of 2017

Friday, February 3, 2017
9:30 a.m.

TESTIMONY ON SENATE BILL NO. 121, RELATING TO CONDOMINIUMS.

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
TO THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR,
AND MEMBERS OF THE COMMITTEES:

My name is Nikki Senter and I am the Chairperson of the Hawaii Real Estate Commission ("Commission"). The Commission appreciates the opportunity to present testimony on Senate Bill No. 121, Relating to Condominiums. The Commission opposes certain sections of the measure and submits the following comments.

Senate Bill No. 121 expands the subject matter available for mediation under HRS Chapter 514B to specifically include "design and construction defect claims"; decreases by half the amount of money collected into the condominium education trust fund ("CETF"); and mandates that future surplus monies in the CETF be reduced as practicable in an amount equal to any surplus.

As a general matter, mediation is a helpful dispute resolution tool which the Commission has supported for use in condominium governance disputes since 1992. However, as it involves condominium developers and contractors, the Commission

ordinarily has no jurisdiction over these entities or individuals; thus disputes involving developers or contractors generally go to arbitration or litigation. The Commission finds that most of the disputes occurring within condominium associations are between owners and the board as a whole or individual board members, not developers or contractors of the condominium project. Where developers or their representatives are sitting on newly created condominium boards, disputes tend to focus on the authority of the board to get things done, not on design or defect claims. The Commission believes the addition of design and defect claims to mandatory mediation is unwarranted and opposes this.

The proposed reduction by half of the monies collected into the CETF from the condominium biennial registration fee would make it difficult for the Commission to continue carrying out its duties. The measure asks the Commission to first, cut the amount of registration fees by half and second, to anticipate any surplus in the CETF and to reduce by that amount money collected for registration in the next biennium. The Commission cannot anticipate or predict the use of mediation by owners for resolving disputes. If the Commission failed to set aside enough monies from any "surplus", it would be unable to adequately subsidize the mediation program for owners. The Commission opposes this section of the proposed Senate Bill No. 121.

SECTION 4 of Senate Bill No. 121 includes removal of a section of the current law that encourages mediation by providing that an owner who did not prevail in a court of law but who attempted mediation prior to the court action is not necessarily

responsible for all reasonable costs and attorneys' fees. Senate Bill No. 121's elimination of that language removes any incentive for owners to attempt mediation as a first resort.

This measure expands those subjects permissible for mediation to include "Chapter 514B". This is overbroad and unnecessarily expands the scope of permissible topics to be mediated to subject areas historically not intended to be the subject of mediated disputes, for example, disputes regarding common interest ownership, common elements, unit size, etc.

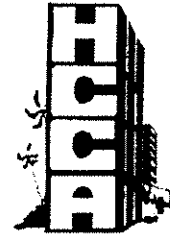
Paragraph (d) of SECTION 5 of the measure provides that a prevailing party shall be awarded attorneys' fees in an amount not to exceed \$200. Paragraph (e) immediately after appears to conflict in that it states that each party to a mediation shall bear their own costs in the absence of certain conditions.

Currently, for evaluative mediation, each party to the mediation pays \$375, more than the \$150 proposed by Senate Bill No. 121. The amount of \$375 was recommended by mediation providers consistent with the usual costs associated with evaluative mediation.

Thank you for the opportunity to provide testimony in opposition and comments with regard to certain sections of Senate Bill No. 121.



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



February 1, 2017

Sen. Rosalyn Baker, Chair
Sen. Clarence Nishihara, Vice-Chair
Senate Committee on Commerce, Consumer Protection & Health

Sen. Gilbert S.C. Keith-Agaran, Chair
Sen. Karl Rhoads, Vice-Chair
Senate Committee on Judiciary and Labor

Re: Testimony in Support (with comments) of
SB121 RELATING TO CONDOMIMUMS
Hearing: Fri., February 3, 2017, 9:30 a.m., Conf. Rm. #229

Chair Baker, Vice-Chair Nishihara, Chair Keith-Agaran and Vice-Chair Rhoads and
Members of the Joint-Committee:

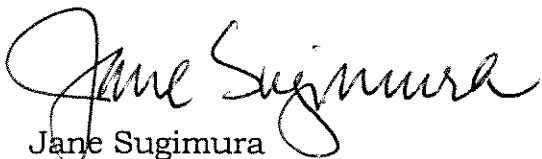
I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment
Owners (HCAAO dba HCCA). This organization represents the interests of
condominium and community association members.

HCAAO has always supported mediation to resolve disputes between 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:

- Expand the disputes to include disputes between (i) board members and the Board, (ii) disputes between owners and/or the Board and their managing agent, and (iii) disputes by the association against the developer and/or its design professionals.
- Clarify that if evaluative mediation is requested in writing that the other side cannot choose to do facilitative mediation instead and that doing so will be treated as a rejection to mediate.
- At Section 3 of the bill (pp.3-4), delete suggested revisions that would lower the amounts to be collected to \$0.75/per unit. In order for the condo-education fund to be able to subsidize the additional mediations and arbitrations contemplated by this bill, it will need all of the money that it is getting now.

- At page 9 lines 7-8. The prevailing party who has to go to court should be able to recover all of his or her legal fees and costs and it should not be limited to \$200. The filing fee for a special proceeding in circuit court to compel mediation is currently \$355.00 and the service fee is \$50. I 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 Honolulu for civil attorneys at \$250, the legal fees should not exceed \$1,000 and the costs should not exceed \$405. Accordingly, I suggest capping the fees and costs at \$1,500. This is very important because currently there are no consequences in HRS 514B-161 (i.e., the mediation statute) where the other party refuses or fails to mediate notwithstanding the mandatory language of the statute.
- At page 10, line 3, needs to specify whether this fee is for evaluative or facilitative mediation because the current policy requires each party to an evaluative mediation to pay \$175.00 to the mediator and the condo-education fund will pay up to \$3,000 and possibly \$6,000 to complete the mediation.
- Add a provision that the condo-education fund will subsidize voluntary binding arbitration between the parties under a program similar to the evaluative mediation program, i.e., the Real Estate Commission contracts with private agencies or practitioners to arbitrate disputes where the parties have agreed to binding arbitration. This arbitration would be different from the statutory arbitration under HRS 514B-162, which provides for a trial de novo. Just like the evaluative mediation program, each party would pay \$175 to the arbitrator and the condo-education fund would pay up to \$3,000 to complete the arbitration. Binding arbitration of disputes would be available to the same parties that would be allowed to mediate their disputes, i.e., owners, Boards, board members, managing agents and developers and their design professionals.

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



P.O. Box 976
Honolulu, Hawaii 96808

January 31, 2017

Honorable Rosalyn H. Baker
Honorable Clarence K. Nishihara
Committee on Commerce, Consumer Protection and Health
415 South Beretania Street
Honolulu, Hawaii 96813

And

Honorable Gilbert S.C. Keith-Agaran
Honorable Karl Rhoads
Committee on Judiciary and Labor
415 South Beretania Street
Honolulu, Hawaii 96813

Re: SB 121 - SUPPORT

Dear Chairs, Vice-Chairs and Committee Members:

I am a member of the Community Associations Institute Legislative Action Committee. CAI strongly supports SB 121.

SB 121 has many virtues. For one, it mandates the mediation of condominium-related disputes in a clear and an enforceable manner.

Mediation is only *nominally* mandatory under current law. SB 121 *actually* mandates mediation, and provides a simple mechanism to enforce the mandate.

That is important, because the failure to mediate has been cited by some owners as a source of frustration with respect to condominium ownership. CAI supports the use of mediation for addressing condominium-related disputes.

Honorable Rosalyn H. Baker
Honorable Gilbert S.C. Keith-Agaran
Honorable Clarence K. Nishihara
Honorable Karl Rhoads
January 31, 2017
Page 2 of 3

The presently available program of evaluative mediation allows for even unrepresented parties to profitably participate in mediation. Mediation is a well-established process in broad use to resolve disputes of all kinds. The mediation process has a substantial educational component that has utility even when the parties find themselves unready to settle during the mediation itself. That is, mediation enables resolution of many disputes, and often plants the seeds of an eventual settlement in other situations. Mediation is almost always beneficial.

Another virtue of SB 121 is that it will create a better fit between the amount of the assessment and the actual program cost. That is important because consumers who own condominiums pay the assessment that enables the mediation subsidy, and should not pay more than is necessary for that purpose.

The 75 cents per unit per year assessment will produce a fund of at least \$120,000 annually, based on approximately 160,000 registered condominium units (as of 2015). That amount will increase with the addition of new condominium units.

A full day mediation at approximately \$300 to \$350 per hour costs \$2,400 to \$2,800, but many mediations are scheduled on a half-day basis. Thus, the committee should be confident that ample resources will be available to meet anticipated demand.

One of the most expensive sorts of disputes encountered by condominiums involves design and construction defect claims. SB 121 allows for use of the fund to include such claims within the evaluative mediation program. That will be money exceptionally well spent, particularly with the significant numbers of new condominiums being built in Kakaako and elsewhere.

The \$6,000 cap per mediation will ensure that no single case will consume too much of the fund. While it is unlikely that many mediations would require the maximum subsidy, at least 20 mediations could be funded at the maximum subsidy. Twenty mediations per year probably matches a realistic expectation for program utilization, but it seems more likely that the fund could support 40 to 60 mediations per year given that a number will almost certainly take one day or less.

Honorable Rosalyn H. Baker
Honorable Gilbert S.C. Keith-Agaran
Honorable Clarence K. Nishihara
Honorable Karl Rhoads
January 31, 2017
Page 3 of 3

REC might note that commencement during the 2017 biennium would be administratively inconvenient. Deferring the adjustment date to commence with the 2019 biennium registration period would be unobjectionable from CAI's perspective.

CAI does maintain, however, that it is reasonable to set the amounts stated in SB 121 in the statute itself, rather than through rulemaking, because the amounts in the bill are sufficient and SB 121 does not affect the Real Estate Commission's opportunity to establish the total amount of the condominium education trust fund assessment. The component of that assessment referenced in SB 121 is an industry inspired and supported initiative for a particular purpose and the industry perspective with respect to this particular subsidy should be considered as being meaningful.

Another virtue of SB 121 is that it clarifies both Hawaii Revised Statutes §§514B-157 and -161. Both of those statutes are a muddle and a source of uncertainty. CAI takes the position that SB 121 should proceed in a form that adopts the amendments to those statutory sections even if other aspects of SB 121 draw objections.

Additionally, SB 121 puts beyond doubt that each party to a mediation is to bear its own fees and costs in the absence of: 1) agreement between the parties; or 2) the decision of a judge or an arbitrator. This is of great importance because there have been reports that some owners have been charged with attorneys' fees incurred by an association in connection with mediation, notwithstanding extant statutory language that apparently prohibits that practice. CAI supports the removal of any potential disincentive to the productive use of mediation as an industry standard.

SB 121 is an altogether beneficial bill that will contribute substantially to the increased acceptance and use of mediation as an alternative dispute resolution method. CAI strongly recommends that the committee adopt SB 121.

Community Associations Institute, by

Philip Nerney

For its Legislative Action Committee

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, January 31, 2017 1:32 PM
To: CPH Testimony
Cc: richard.emery@associa.us
Subject: Submitted testimony for SB121 on Feb 3, 2017 09:30AM

SB121

Submitted on: 1/31/2017

Testimony for CPH/JDL on Feb 3, 2017 09:30AM in Conference Room 016

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

Comments: Mediation has proven to be very successful in resolving condominium disputes. There are several Bills before the legislature to strengthen the process. I believe that the fees should not be lowered at this time as the program is young and efforts are being made to require more mediations. I also do not feel it is appropriate to include construction defect cases in the program from condominium fees.

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.

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COMMITTEE ON COMMERCE, CONSUMER PROTECTION AND HEALTH

Testimony Regarding SB 121

Friday, February 3, 2017
Time: 9:30 AM
Place: Conference Room 016

John Morris
(808) 523 0702

Chairs Baker and Keith-Agaran and Members of the Committees,

I work as an attorney representing condominiums and other homeowner associations and I am testifying with comments on SB 121. The bill seems to make worthwhile changes to the law in an effort to promote and expand mediation. Mediation was first funded from the condominium education fund back in the early 1990s on the basis that it was not just a dispute resolution process but an educational process that allowed both sides to learn the strengths, weaknesses, and even the validity of their claims. Since many condominium disputes seem to result from a misunderstanding of law and the governing documents, the mediation process is extremely worthwhile.

For example, I was recently at a town hall meeting of a large condominium association which the board had convened to outline how it was proposing to handle the replacement of the common element, main drainpipes in the building. Following the presentation, an owner stood up and told the board should have informed the owners sooner and that, regardless, the board could not proceed with the work without owner approval.

In fact, that was not the case. The declaration, bylaws, and even Hawaii's reserves law requires the board to properly maintain and repair the common elements of a condominium. Owner approval is not required for that work because it is deemed essential. (The board president also pointed out to the owner that the board had been discussing the project at every monthly board meeting for the prior year, but the owner had not bothered to attend.)

That owner might have filed a formal legal action based on his mistaken understanding. Rather than waste judicial resources on an invalid claim, mediation could have helped the owner understand the basic principles of his own governing documents and the law and save himself

and everyone else money.

Senate Bill 121, however, seems to have an inherent contradiction in that it suggests that it is expanding mediation while cutting the funding for mediation. Moreover, other bills have been introduced this session that propose to expand the education trust fund to support arbitration of disputes that are not resolved through mediation. Therefore, it might be better to first determine whether the expansion of mediation can be effective before cutting the funding for mediation. Certainly, the difference between assessing every owner \$1.50 dollar or \$.75 hardly seems worth a major dispute.

Moreover, although mediation has long been part of the system of self-governance for condominiums in Hawaii, the Real Estate Commission only established its new “evaluative” mediation program less than two years ago. The evaluative mediation program, unlike the regular mediation program, provides mediators with subject matter background to better advise the participants on the merits of their claims. Therefore, evaluative mediation deserves a chance to get up to speed and in full use before the funding for the mediation program is cut.

Given the size of the condominium industry, it is not surprising that it is taking a while to convince boards and owners of the benefits of evaluative mediation. If the legislature would like to speed the process along, it could consider other options. For example, the legislature could mandate that the Real Estate Commission conduct statewide presentations to explain the law and promote the advantages of evaluative mediation in resolving disputes without the rancor that typically accompanies litigation and, sometimes, even arbitration. That process could be effective in creating a better understanding of mediation and its benefits.

Mandating mediation is sometimes frowned upon by mediators because the process is supposed to be voluntary. If that is a concern, rather than making mediation mandatory under the circumstances outlined in the bill, the law could simply say that to say that a board (or an owner) could take no further action under those circumstances without first going to mediation. That would get the parties into mediation while not making mediation mandatory.

Finally, it is not clear that expanding the use of the education trust fund for mediation on construction disputes would necessarily help the basic purpose of owners and boards resolving the differences. Mediation on construction disputes is usually funded by the association and the various other parties, such as contractors and developers. In contrast, the mediation in the condominium law is intended to inexpensively resolve disputes between owners and the board

because owners can ill afford to spend thousands of dollars to resolve their disputes.

Thank you for this opportunity to testify.

John Morris

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 2, 2017 9:33 AM
To: CPH Testimony
Cc: cporter@hawaiiilegal.com
Subject: Submitted testimony for SB121 on Feb 3, 2017 09:30AM

SB121

Submitted on: 2/2/2017

Testimony for CPH/JDL on Feb 3, 2017 09:30AM in Conference Room 016

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

Comments: As an attorney that practices in the condo industry, I support the expansion of evaluative mediation as proposed in SB121. This program works! Thank you for your consideration and good work.

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From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, January 31, 2017 2:06 PM
To: CPH Testimony
Cc: mrckima@gmail.com
Subject: *Submitted testimony for SB121 on Feb 3, 2017 09:30AM*

SB121

Submitted on: 1/31/2017

Testimony for CPH/JDL on Feb 3, 2017 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Marcia Kimura	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.

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

Measure: SB 121 Relating to Condominiums

Date and Time of Hearing: 9:30 a.m. Friday, February 3, 2017

Committee: The Committees on Commerce, Consumer Protection and Health and Judiciary and Labor

Aloha Senators Baker & Keith-Agaran and Members of your Committees,

Thank you for this opportunity to testify in strong support of SB 121, but requesting some modifications to the bill. It is impossible to overstate the importance of this bill to condominium owners.

One of the problems with the existing law regarding mediation is that there are few incentives and no penalties for any board that refuses to engage in mediation. While the penalties in SB 121 for not participating are mild, boards will be much less likely to refuse participation. SB 121 will definitely lead to greater use of mediation and improvements in settling condominium disputes, reducing owners coming to the legislature with their concerns and complaints.

Please note that there is an important spelling error on page 8, line 18. The word "meditation" should be "mediation".

I urge your committees not to reduce the educational trust fund fee for condominium associations at this time because the number of mediations will definitely increase markedly with the changes, requiring greater use of mediation by associations. Furthermore, including design and construction defects as proposed in section 2, page 3, lines 4 & 5. will in and of itself will increase mediations of disputes.

I also request that your committees approve the changes in SB 121 proposed by Jane Sugimura on behalf of the Hawaii Council of Associations of Apartment Owners.

I urge your committees to approve SB 121 with amendments as discussed above.

Richard Port

CPH - JDL - WAM
Friday 3 February 2017
3:00pm, Capitol Building, Room 016

Commerce, Consumer Protection, Health

Senator Rosalyn H. Baker, Chair and Clarence K. Nishihara, Vice Chair

Judiciary and Labor

Senator Gilbert S.C. Keith-Agaran, Chair and Senator Karl Rhoads

RE: Testimony in support of SB 121

Aloha:

1. I testify in support of SB 121.

2. Presently, Boards of Directors can refuse to participate in mediation. This usually happens because current law requires home owners to pay any disputed debt before seeking mediation. What usually happens is that after monies are paid, there is then no incentive for Boards to participate in mediation as they already have what they want, an owners money.

3. Mandating Boards to participate in owner(s) requested mediation or arbitration is fair and just.

3. As regards the Condo Education Trust Fund, it has been my experience in going to seminars that lunch is usually included and this is what brings many people to participate. It is my opinion that these funds, where are paid by owners, are most likely co-mingled with funds by the organizers of said events. Monies paid by owners should not be used to purchase lunch for attendees. Cutting back on monetary contributions by owners to CETF is appropriate.

4. Please vote in favor of and pass Senate Bill 121.

Respectfully, Dale A. Head (808) 696-4589 sunnymakaha@yahoo.com