

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

Measure: SB 369 SD 1 Relating to Condominiums
Date and Time of Hearing: 2:00 p.m. Friday, March 17, 2017
Committee: Committee on Consumer Protection and
Commerce

Aloha Representative Takumi and Members of your Committee,

I am testifying in strong support of SB 369, which would prohibit retaliation against condominium owners, Board Members or employees of an Association of Apartment Owners.

Condominium Boards have extensive powers within their Condominium, which include what are normally considered executive, legislative, and judicial powers. They have significant opportunities to retaliate against Owners, minority Board members and even employees.

SB 369 SD 1 provides an opportunity for those who are being retaliated against to have some recourse to offset significant forms of retaliation that may occur.

Thank you for this opportunity to testify in support of SB 369 SD 1.

Richard Port

ANDERSON LAHNE & FUJISAKI LLP
A Limited Liability Law Partnership

733 Bishop Street, Suite 2301
Honolulu, Hawai'i 96813
Telephone: (808) 536-8177
Facsimile: (808) 536-4977

Of Counsel:
Joyce Y. Neeley

M. Anne Anderson
Philip L. Lahne
Lance S. Fujisaki

Pamela J. Schell
Paul A. Ireland Koftinow
Glenn S. Horio

March 15, 2017

Representative Roy M. Takumi, Chair
Representative Linda Ichiyama, Vice Chair
House Committee on Consumer Protection and Commerce
415 South Beretania Street
Honolulu, Hawai'i 96813

RE: Comments on S.B. 369 S.D. 1
Hearing Date: March 17, 2017, at 2:00 p.m., Conference Room 329
The Twenty-Ninth Legislature; Regular Session of 2017

Dear Chair Takumi, Vice Chair Ichiyama, and Committee Members:

My name is Paul A. Ireland Koftinow, and I am an attorney who primarily represents condominium associations and planned community associations in Hawai'i. I am also a graduate of William S. Richardson School of Law, University of Hawai'i at Mānoa. I am respectfully providing the following comments regarding S.B. 369 S.D. 1.

Generally, prevention of retaliation or discrimination is not a bad idea. However, for the reasons stated below, this measure will not effectively strengthen any protections already afforded to parties who complain of or report violations of an association's governing documents or Chapters 514A and 514B. Instead, this measure will create confusion and unnecessary hardship for owners and associations who seek to enforce governing documents.

The definition of "retaliation" in the current draft of this measure is overly broad, and it is therefore not clear what specific conduct this measure is intended to prohibit. Under the current definition of "retaliation," there are a multitude of otherwise lawful and reasonable actions an individual or association may take which will be prohibited if such actions are not "supported" by an association's declaration, bylaws, house rules, or "applicable state statute." There are also several interpretations of what might constitute an "abuse of power" in various contexts. Ideally, a well-crafted bill which prohibits retaliation or discrimination should clearly describe the retaliatory or discriminatory conduct which it is intended to prohibit, and it would thereby be more effective in preventing such conduct. In other statutes, the Legislature has identified specific conduct that is retaliatory or discriminatory. *See, e.g.*, HRS §§ 378-2 (prohibiting discriminatory practices in the workplace) and 521-74 (prohibiting retaliatory eviction). Also, as noted in previous

Representative Roy M. Takumi, Chair
Rep. Linda Ichiyama, Vice Chair
Members of the Committee
March 15, 2017
Page 2

testimony, the preamble of this measure does not describe any “findings of widespread retaliation.” (John A. Morris, Esq., written testimony re S.B. 369 dated January 31, 2017.) As such, this Committee should find that further fact finding is necessary to address what specific conduct needs to be prohibited. Otherwise, the definition of retaliation should be replaced (and, in such event, we will be available to offer a proposed replacement for the Committee’s consideration).

This Committee should also recognize that actions seeking injunctions to enforce governing documents, whether brought by an owner or an association, generally invoke a well-established body of case law whereby a party seeks to convince a judge that it is entitled to injunctive relief. Most significantly, defendants in such actions may raise various defenses to show why injunctive relief should not be imposed. Additionally, this Committee should recognize that there are already effective legal protections which 1) prevent harassment, 2) provide courts with authority to impose sanctions against parties who allege frivolous claims or defenses, 3) provide that board members owe the association a fiduciary duty, and 4) provide for recovery of attorneys’ fees and costs in actions to enforce an association’s governing documents. See, e.g., HRS § 711-1106, Hawai‘i Rules of Civil Procedure Rule 11, Hawai‘i District Court Rules of Civil Procedure Rule 11, and HRS §§ 514B-106 and 514B-157. Based on my experience, the available protections are well-suited to address concerns related to retaliation. As such, this Committee should find that this measure is unnecessary. Alternatively, if this Committee believes the measure is needed to be adopted, then at the very least, the definition of retaliation needs to be modified. Again, we are willing to work with the Committee to draft proposed language.

Lastly and significantly, district courts do not have general jurisdiction to award injunctions except in certain instances provided for by statute. See Fuller v. Pac. Med. Collections, Inc., 78 Hawai‘i 213, 220, 891 P.2d 300, 307 (Ct. App. 1995) (Generally, district court not having equity jurisdiction does not have jurisdiction to order injunctive relief in civil cases); see also HRS §§ 603–21.7(a)(3), 604-5, and 604-10.5. As such, this measure conflicts with the existing jurisdictional limits regarding district courts, to the extent that it allows parties to bring actions for injunctive relief in district courts without granting district courts the power to award injunctive relief. Therefore, the jurisdictional limits of district courts should be considered and addressed before this measure is passed.

Thank you for this opportunity to provide written testimony.

Sincerely,



Paul A. Ireland Koftinow