

**PRESENTATION OF THE
REAL ESTATE COMMISSION**

TO THE HOUSE COMMITTEE ON
CONSUMER PROTECTION AND COMMERCE

TWENTY-NINTH LEGISLATURE
Regular Session of 2018

Wednesday, March 14, 2018
2:00 p.m.

TESTIMONY ON SENATE BILL NO. 2060, S.D. 2, RELATING TO CONDOMINIUMS.

TO THE HONORABLE ROY M. TAKUMI, CHAIR, AND MEMBERS OF THE
COMMITTEE:

My name is Nikki Senter, and I am the Chairperson of the Hawaii Real Estate Commission ("Commission"). Thank you for the opportunity to testify on S.B. 2060, S.D. 2, Relating to Condominiums. The Commission offers the following comments to this bill, which is a companion to H.B. 1874.

The purposes of this bill are to: (1) add a new section to permit annual condominium education trust funds fees designated for educational purposes to be used for voluntary binding arbitration of condominium disputes by amending Hawaii Revised Statutes ("HRS") sections 514B-71 and 514B-72 and Act 187, Session Laws of Hawaii 2013; and (2) expand the conditions mandating mediation by amending HRS section 514B-161.

The Commission supports arbitration as an additional avenue for resolving condominium disputes, but would like to confirm the intent of the bill and comment on certain parts of S.B. 2060, S.D. 2.

The Commission reads proposed section 514B-161 starting on page 7 as mandating the mediation of issues noted in subsection (a), while proposed subsection (b) on page 7 simply allows the mediation of all issues specified in that subsection if the parties agree. This amendment appears to allow every possible scenario to be mediated, either mandatorily or permissively, and may create unintended consequences. The Commission respectfully asks whether all potential scenarios that may result from S.B. 2060, S.D. 2 have been considered and whether this bill would expand allowable parties and issues beyond the historical limitations of mediation.

As examples, S.B. 2060, S.D. 2 appears to allow owners to:

- demand mediation with a developer over alleged construction defects;
- challenge a condominium managing agent on the agent's contract with a condominium board; or
- demand mediation of any personal issues between unit owners pursuant to subsection (a) (2) on page 7.

The current Commission mediation subsidy prohibits these types of situations from undergoing mediation and historically mediation was never intended to stray beyond governance issues.

Additionally, the Commission respectfully recommends that a sunset period of a certain amount of years be added to S.B. 2060, S.D. 2 to allow for a period of evaluation. The Commission expects the use of mediation and arbitration to expand with the passage of this bill. With approximately \$400,000 in the CETF over a one-year period dedicated for dispute resolution, the Commission would like the opportunity to re-evaluate the frequency of use of the expanded mediation after a certain period and to make any necessary changes in the program.

Thank you for the opportunity to provide testimony on S.B. 2060, S.D. 2.

SB-2060-SD-2

Submitted on: 3/12/2018 11:05:31 AM

Testimony for CPC on 3/14/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Richard Emery	CAI & Associa	Support	No

Comments:

The Bill will allow condo disputes to be resolved through mediation or voluntary arbitration by expansion of eligible parties. The condo industry already pays into the condo education fund that subsidizes the program. It is an affordable program for owners and associations.

SB-2060-SD-2

Submitted on: 3/12/2018 7:49:59 AM

Testimony for CPC on 3/14/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower	Hui `Oia`i`o	Comments	No

Comments:

The measure discriminates towards evaluative mediation which is biased in favor of whomever has documentation, i.e., the board and/or management. The inability of an owner to receive copies of such documentation is often the crux of a dispute.

Thus, we suggest the following amendments:

§514B- Voluntary binding arbitration. (a) Any parties permitted to mediate condominium related disputes pursuant to section 514B-161 may agree to enter into voluntary binding arbitration, which may be supported with funds from the condominium education trust fund pursuant to section 514B-71; provided that voluntary binding arbitration under this section may be supported with funds from the condominium education trust fund only after the parties have first attempted evaluative mediation.

And delete section (c) of §514B-161 Mediation:

~~(c) If evaluative mediation is requested in writing by one of the parties pursuant to subsection (a), the other party shall not have the option of requesting facilitative mediation as an alternative, and any attempt to do so shall be treated as a rejection to mediate.~~

And amend section (g) of §514B-161 Mediation as follows:

(g) Any individual mediation supported with funds from the condominium education trust fund pursuant to section 514B-71:

(1) Shall include a fee of \$375 to be paid by each party to the mediator;

(2) Shall receive no more from the fund than is appropriate under the circumstances, and in no event more than \$3,000 total;

(3) May include issues and parties in addition to those identified in subsection (a); provided that a unit owner or a developer and board are parties to the mediation at all times and the unit owner or developer and the board mutually consent in writing to the addition of the issues and parties; ~~and.~~

~~(4) May include an evaluation by the mediator of any claims presented during the mediation.~~

SB-2060-SD-2

Submitted on: 3/11/2018 2:33:41 PM

Testimony for CPC on 3/14/2018 2:00:00 PM

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 SB 2060 SD, which is essentially the same as HB1874 HD1. I spent three years as state condominium specialists from 1988-91 and since then have been in private practice representing condominium associations, so I have experience of disputes from the owner and board perspective. The bill, like HB 1874, has been drafted to try to anticipate and address the issues that arise as part of the process of dealing with disputes in condominium associations.

While some disputes may never be resolved through mediation, the legislature's willingness to promote evaluative mediation by a retired judge or experienced mediator seems to have worthwhile benefits. At a minimum, the evaluative mediation process provides both sides with an evaluation of the strengths and weaknesses of their case, which often leads to a resolution of the dispute. Even if that does not occur, the parties are at least aware of their options.

Arbitration, with a binding decision from an arbitrator, is certainly one possible option if the parties cannot resolve their disputes through mediation. Unfortunately, some people are so fixed in their opinions that they require a decision, rather than a negotiated solution. Subsidising arbitration may help resolve at least some of disputes that cannot be resolved through evaluative mediation.

While the \$6000 on voluntary binding is not a lot of money, and may even require the parties to spend additional money to complete the arbitration, the additional draw on the dispute resolution fund could reduce it significantly. Therefore, it is possible that there should be some sunset date or re-evaluation of the impact of the subsidised arbitration program in the future.

While the processes proposed by this bill may not resolve every dispute, the processes may resolve many disputes. Moreover, helping people resolve their own disputes is more consistent with the self-governance theory of the condominium law than having a state official – such as an ombudsman – tell condominium owners and boards how they should manage and operate their association.

Thank you for this opportunity to testify.

SB-2060-SD-2

Submitted on: 3/10/2018 10:56:55 AM

Testimony for CPC on 3/14/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Marcia Kimura	Individual	Oppose	No

Comments: