

## Testimony of the Real Estate Commission

Before the  
House Committee on Judiciary  
Friday, March 29, 2019  
2:05 p.m.  
State Capitol, Conference Room 325

On the following measure:  
**S.B. 552, S.D. 1, H.D. 1, RELATING TO CONDOMINIUMS**

Chair Lee and Members of the Committee:

My name is Michael Pang, and I am the Chairperson of the Real Estate Commission (Commission). The Commission supports this bill and suggests two amendments.

The purpose of this bill is to allow developers whose condominium property regimes were issued an effective date pursuant to now-repealed Hawaii Revised Statutes (HRS) sections 514A-40 and 514A-41 an additional year to update their public reports, by amending section 45 of Act 181, Session Laws of Hawaii 2017, to extend the "safe harbor" of the Act.

Since the passage of Act 181, the Commission has been made aware of some, usually smaller, condominium projects that were unable to meet the Act's deadline of December 31, 2018, for an automatic transfer of active and accurate projects to HRS chapter 514B, due to a lack of time, resources, necessary professionals, and/or natural disasters. By reviving certain salient sections of repealed HRS chapter 514A, these developers would have an opportunity to update their public reports without revising any of the governing documents and by meeting certain criteria. The Commission does not anticipate any adverse effect from allowing these developers additional time to comply.

In addition, the Commission recommends two amendments to H.D. 1:

- Page 4, line 16 to page 5, line 2: Amend subsection (b) to clarify that projects meeting the December 31, 2018, deadline transitioned via the Act's "safe harbor":

(b) A chapter 514A, Hawaii Revised Statutes, developer's public report, along with [their] its most recent disclosure

abstract, if any, [~~will~~] shall be treated as a non-expiring developer's public [~~reports~~] report under part IV of chapter 514B, Hawaii Revised Statutes~~[-]~~, on the first day the chapter 514A report is accurate and has an active effective date between January 1, 2019, and July 1, 2020.

- Page 6, lines 4-9: Amend subsection (e) to make clear that the time share exception applies only to sales:

(e) A condominium property regime registered under chapter 514A, Hawaii Revised Statutes, shall not be required to revise its governing documents to comply with chapter 514B, Hawaii Revised Statutes, for sales of time share interests if sales of time share interests are made in the condominium property regime.

Finally, the Commission notes that subsection (g) on page 6, line 14 to page 7, line 5 may result in the unintended consequence of reviving HRS chapter 514A's preliminary and contingent final public reports, which the Commission respectfully submits were not intended to benefit from the safe harbor provision.

Thank you for the opportunity to testify on this bill.

**SB-552-HD-1**

Submitted on: 3/27/2019 3:56:03 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Richard Emery       | Associa             | Support                   | Yes                       |

Comments:

This Bill allows Developers additional needed time to adapt to the repeal of HRS 514A. We support.

**SB-552-HD-1**

Submitted on: 3/27/2019 6:22:23 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

| <b>Submitted By</b> | <b>Organization</b>           | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|-------------------------------|---------------------------|---------------------------|
| Mike Golojuch       | Palehua Townhouse Association | Support                   | No                        |

Comments:

We support SB552. Please pass.

Mike Golojuch, Sr.

President, Palehua Townhouse Association

**SB-552-HD-1**

Submitted on: 3/27/2019 9:14:02 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

| <b>Submitted By</b> | <b>Organization</b>                 | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|-------------------------------------|---------------------------|---------------------------|
| Jane Sugimura       | HI Council of Assoc. of Apt. Owners | Support                   | No                        |

Comments:

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March 28, 2019

Rep. Chris Lee, Chair  
Rep. Joy San Buenaventura, Vice Chair  
Members of the House Committee on Judiciary  
Thirtieth Legislature  
Regular Session, 2019

Re: S.B. 552 S.D.1, H.D.1  
Hearing on March 29, 2019, 2:05 p.m.  
Conference Room 325

Dear Chair, Vice Chair and Members of the Committee:

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

ARDA Hawaii supports S.B. 811 S.D.1, S.D. 1, with amendments.

Our reasons for supporting this bill are as follows:

Act 181, SLH 2017, repealed Chapter 514A. The Act authorizes developers to continue sales using their Chapter 514A public reports, without having to register under Chapter 514B, so long as the Chapter 514A public reports were active, accurate and not misleading. However, in the event of a pertinent or material change to the condominium, the developer is required to revise the condominium documents to comply with Chapter 514B and register the condominium under Chapter 514B.

Chapter 514B defines "pertinent change" to mean any change that renders any information in a public report inaccurate.<sup>1</sup>

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<sup>1</sup> 514B-3. Definitions. \* \* \* "Pertinent change" means, as determined by the commission, a change not previously disclosed in the most recent public report that renders the information contained in the public report or in any disclosure statement inaccurate, including, but not limited to:

- (1) The size, construction materials, location, or permitted use of a unit or its appurtenant limited common element;
- (2) The size, use, location, or construction materials of the common elements of the project; or
- (3) The common interest appurtenant to the unit.

A pertinent change does not necessarily constitute a material change.

This broad scope of this definition may lead to unanticipated consequences. For example, a public report must include a breakdown of the annual maintenance fees and the monthly estimated cost for each unit.<sup>2</sup> However, the budget typically changes each year. As a result, the amount of the monthly estimated cost for each unit, as stated in the 2018 public report, would no longer be accurate when the budget is updated in 2019, 2020, and succeeding years. In such event, Act 181 might be construed to require that the developer re-register the project under Chapter 514B and amend the condominium documents to comply with Chapter 514B.<sup>3</sup>

This may be particularly troublesome for time share plans. In particular, it is common for the developer of a time share plan to continue sales for many years – potentially decades after the initial registration of the project. This may happen because the developer re-purchases time share interests from owners who want to sell, or perhaps because the buyer defaults under a mortgage in favor of the developer, or even because some buyers simply decide to deed their time share interest back to the developer because they are tired of it or no longer want it.

In addition, a time share project is not a static entity. During the life of a time share project, the association may choose to make improvements by, for example, adding new amenities, discontinuing amenities that are no longer being used, remodeling the units, lobbies or other common areas, and so on. The developer may well still be in sales while all of this is taking place.

Each time that a time share developer sells a time share interest, it must furnish to the purchaser a copy of the developer's current time share disclosure statement. However, the developer is not required to provide a copy of the condominium public report to time share purchasers. This is set forth in Section 514B-82, which provides:

§ 514B-82. Sale of units. Except as provided in section 514B-85, no sale or offer of sale of units in a project by a developer shall be made prior to the registration of the project by the developer with the commission, the issuance of an effective date for the developer's public report by the commission, and except as provided by law with respect to time share units, the delivery of the developer's public report to prospective purchasers. Notwithstanding any other provision to the contrary, where a time share project is duly registered under chapter 514E and a disclosure statement is effective and required to be delivered to the purchaser or prospective purchaser, the developer's public report need not be delivered to the purchaser or prospective purchaser.

<sup>2</sup> § 514B-83. Developer's public report. (a) A developer's public report shall contain: \* \* \* (3) A breakdown of the annual maintenance fees and the monthly estimated cost for each unit, certified to have been based on generally accepted accounting principles, and a statement regarding when a purchaser shall become obligated to start paying the fees pursuant to section 514B-41(b);

<sup>3</sup> Technically speaking, a strong argument may be made that the public report accurately states the amount of the budget in effect in 2018 even though it would not reflect the current assessment amounts for subsequent years.

[Emphasis added.]

Since time share buyers do not receive the condominium public report, we think it pointless to require that time share developers register and obtain a new public report under Chapter 514B on an existing Chapter 514A condominium just because the condominium budget changes or there is some other change to the project.

Chapter 514A explicitly recognized that there was no need for time share developers to update their condominium public reports. Specifically, Chapter 514A required that condominium developers obtain a “supplementary public report” if there was a change in the condominium. However, it expressly exempted time share developers from this requirement, stating as follows:

§514A-41 Supplementary public report. \* \* \* (d) Notwithstanding any other provision to the contrary, this section shall not apply to a time share project duly registered under chapter 514E if, with regard to that time share project:

- (1) A copy of the disclosure statement required by chapter 514E is required to be delivered to the purchaser or prospective purchaser; or
- (2) Pursuant to section 514E-30, a copy of the disclosure statement required by chapter 514E is not required to be delivered to the purchaser or prospective purchaser because the offer and sale of the time share interest is made outside of Hawaii.

This bill extends this same statutory exemption to condominiums established pursuant to Chapter 514B. The net result is that a change to a time share project created and registered pursuant to Chapter 514A would not trigger any requirement that the developer register or obtain a public report pursuant to Chapter 514B. This makes sense in light of the fact that consumers do not receive the condominium public report anyhow, and that the time share disclosure statement would provide any necessary consumer disclosures.

S.B.552, S.D.1, also eliminated the requirement that the condominium documents be amended to comply with Chapter 514B as a condition to continuing time share sales. Specifically, S.B. 552 S.D.1 proposed to add a new subsection (e) to Section 45 of Act 181, SLH 2017, to read as follows (starting at page 3, line 20):

(e) A condominium property regime registered under chapter 514A, Hawaii Revised Statutes, shall not be required to revise its governing documents to



comply with chapter 514B, Hawaii Revised Statutes, for sales of time share interests to be made in the condominium property regime.

S.B. 552, S.D. 1, H.D.1 changed this to read as follows (starting at the page 6, line 4):

(e) A condominium property regime registered under chapter 514A, Hawaii Revised Statutes, shall not be required to revise its governing documents to comply with chapter 514B, Hawaii Revised Statutes, with respect to its time share interests if sales of time share interests are made in the condominium property regime. [Emphasis added.]

This may be construed to mean that sales of time share interests may continue without having to revise the provisions of the condominium documents dealing with time share interests. But sales of time share interests cannot continue without revising the rest of the condominium documents to comply with Chapter 514B.

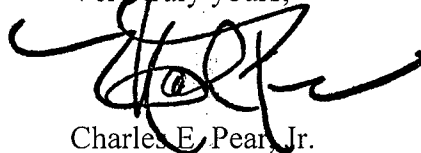
We don't think that this is practical. First, it may not be possible for the time share developer to amend any portion of the existing condominium documents to comply with Chapter 514B. And even if it is possible, it may not be wise to require that the developer attempt to do so where, for example, there are 20,000 time share owners who have already made their purchase on the basis of the existing documents created pursuant to Chapter 514A.

Moreover, the revised version of subsection (e) raises difficult issues of interpretation in determining exactly what provisions of the condominium documents deal with time share interests, and which do not. For example, do the lien and foreclosure provisions "deal with time share interests." Typically, the lien and foreclosure provisions affect an entire condominium unit. They do not address each time share interest in a unit separately. But foreclosure of an entire unit will extinguish the rights of the owners of all time share interests in that unit.

Accordingly, we support this bill, but respectfully request that this Committee revise it to use the first version of subsection (e), quoted above, from S.B.552, S.D.1, instead of the revised version contained in S.B. 552, S.D. 1, H.D. 1.

Thank you for your kind consideration of this legislation.

Very truly yours,



Charles E. Pear, Jr.

CEP:kn

**SB-552-HD-1**

Submitted on: 3/27/2019 4:01:02 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Anne Anderson       | Individual          | Support                   | Yes                       |

Comments:

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I support S.B. 552.

Respectfully submitted,

M. Anne Anderson