

Testimony of the Real Estate Commission

**Before the
House Committee on Consumer Protection and Commerce
Tuesday, March 12, 2019
2:00 p.m.
State Capitol, Conference Room 329**

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

Chair Takumi 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.

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of this bill is to allow developers whose condominium property regimes were issued an effective date pursuant to now-repealed Hawaii Revised Statutes (HRS) sections 514A-40 and 514A-41 an additional year to update their public reports, by amending section 45 of Act 181, Session Laws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 By reviving certain salient sections of repealed HRS chapter 514A, these developers would have an opportunity to update their public reports without revising any of the governing documents and by meeting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. This bill also makes clear that those projects that met the December 31, 2018, deadline transitioned via the Act's "safe harbor."

Thank you for the opportunity to testify on this bill.

SB-552-SD-1

Submitted on: 3/9/2019 11:03:33 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

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

Comments:

This Bill reasonably allows developers additional time to come into compliance with the repeal of HRS 514B.

SB-552-SD-1

Submitted on: 3/10/2019 2:34:01 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Anne Anderson	Individual	Support	No

Comments:

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I support S.B. 552 and urge the committee to pass it.

Sincerely,

M. Anne Anderson

SB-552-SD-1

Submitted on: 3/11/2019 8:00:16 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mark R. Hagadone, Ph.D., FACFE	Individual	Support	No

Comments:

McCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

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March 11, 2019

Rep. Roy M Takumi, Chair
Rep. Linda Ichiyama, Vice Chair
Members of the House Committee on
Consumer Protection & Commerce
Thirtieth Legislature
Regular Session, 2019

Re: S.B. 552, S.D.1
Hearing on March 12, 2019, 2:00 p.m.
Conference Room 329

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 with amendments.

We have had an opportunity to confer with representatives of the Hawaii Real Estate Commission and believe that there is consensus language in the form identified as S.D. 1, with the addition of one clause. We have discussed the addition with the Commission's representative and have been advised that they have no issue with it. To make it easier for you to identify, we have copied the text of the bill from the Legislative Website, and then added the additional clause. The addition is marked in bold print Times New Roman font. This addition is simply meant to ensure that the bill is internally consistent by addressing and resolving a potential ambiguity.

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.

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Chapter 514B defines “pertinent change” to mean any change that renders any information in a public report inaccurate.¹

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.² 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.³

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:

¹ 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.

² § 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);

³ 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.

§ 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.

[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. Moreover, it may not be possible for the time share developer to amend 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.

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:

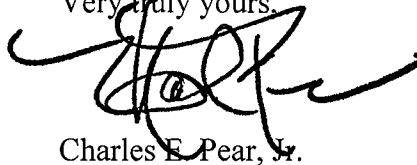
- (1) A copy of the disclosure statement required by chapter 514E is required to be delivered to the purchaser or prospective purchaser; or

- (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, or amend the condominium documents to comply with 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.

Thank you for your kind consideration of this legislation.

Very truly yours,

A handwritten signature in black ink, appearing to read 'CEP', with a stylized flourish extending to the right.

Charles E. Pear, Jr.

CEP:kn

RELATING TO CONDOMINIUMS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 514B-56, Hawaii Revised Statutes, is amended to read as follows:

" ~~[+]~~ §514B-56 ~~[+]~~ **Developer's public report; amendments.** (a) After the effective date for a developer's public report has been issued by the commission, if there are any changes, either material or pertinent changes, or both, regarding the information contained in or omitted from the developer's public report, or if the developer desires to update or change the information set forth in the developer's public report, the developer shall immediately submit to the commission an amendment to the developer's public report or an amended developer's public report clearly reflecting the change, together with such supporting information as may be required by the commission, to update the information contained in the developer's public report, accompanied by nonrefundable fees as provided in rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. Within a reasonable period of time, the commission shall issue an effective date for the amended developer's public report or take other appropriate action under this part.

(b) The submission of an amendment to the developer's public report or an amended developer's public report shall not require the developer to suspend sales, subject to the power of the commission to order sales to cease as set forth in section 514B-66; provided that the developer shall advise the appropriate real estate broker or brokers, if any, of the change and disclose to purchasers any change in the information contained in the developer's public report pending the issuance of an effective date for any amendment to the developer's public report or amended developer's public report; and provided further that if the amended developer's public report is not issued within thirty days after its submission to the commission, the commission may order a suspension of sales pending the issuance of an effective date for the amended developer's public report. Nothing in this section shall diminish the rights of purchasers under section 514B-94.

(c) The developer shall provide all purchasers with a true copy of:

(1) The amendment to the developer's public report, if the purchaser has received copies of the developer's public report and all prior amendments, if any; or

(2) A restated developer's public report, including all amendments.

(d) The filing of an amendment to the developer's public report or an amended developer's public report, in and of itself, shall not be grounds for a purchaser to

cancel or rescind a sales contract. A purchaser's right to cancel or rescind a sales contract shall be governed by sections 514B-86 and 514B-87, the terms and conditions of the purchaser's contract for sale, and applicable common law.

(e) Notwithstanding any 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."

SECTION 2. Act 181, Session Laws of Hawaii 2017, is amended by amending section 45 to read as follows:

"SECTION 45. Condominium property regimes created prior to July 1, 2006, that were issued an effective date pursuant to ~~[section]~~ sections 514A-40 and 514A-41, Hawaii Revised Statutes, may be sold on or after January 1, 2019, without revising any of the governing documents; provided that the developer's public report was active ~~[on January 1, 2019, and is]~~, non-expired, and accurate ~~[and not misleading. On]~~ between January 1, 2019, ~~[all active, non-expired chapter 514A, Hawaii Revised Statutes, developer's public reports]~~ and July 1, 2020, pursuant to sections 514A-40 and 514A-41, Hawaii

Revised Statutes, along with their most recent disclosure abstract, if any, will be treated as non-expiring developer's public reports under part IV of chapter 514B, Hawaii Revised Statutes. Chapter 514A, Hawaii Revised Statutes, developer's public reports shall be treated as non-expiring chapter 514B, Hawaii Revised Statutes, developer's reports on the first day their respective report was accurate and had an active effective date between January 1, 2019, and July 1, 2020. Should any pertinent or material changes, or both, occur to the condominium project, **then except as provided in section 514B-56(e)**, the developer shall file [~~an amended~~] a developer's public report superseding all prior reports pursuant to [~~chapter 514B,~~] section 514B-56, Hawaii Revised Statutes; provided that such projects and their subsequent reports filed under chapter 514B, Hawaii Revised Statutes, shall be exempt from the conversion requirements under section 514B-84(a)(1) and (2), Hawaii Revised Statutes. [~~Condominium~~] On July 1, 2020, condominium property regimes created prior to July 1, 2006, that were not issued an effective date pursuant to sections 514A-40 and 514A-41, Hawaii Revised Statutes, [~~and~~] did not file a notice of intent pursuant to section 514A-1.5(2)(B), Hawaii Revised Statutes, or have effective dates expired prior to January 1, 2019, shall revise their governing documents and register under chapter 514B, Hawaii Revised

Statutes, for a developer to offer for sale or to sell condominiums.

It shall not be necessary to revise the governing documents of a condominium property regime registered under chapter 514A, Hawaii Revised Statutes, to comply with chapter 514B, Hawaii Revised Statutes, for sales of time share interests to be made in such condominium property regime.

Nothing contained in this Act or in the condominium property act shall be deemed to invalidate any condominium property regime that was validly created under chapter 514A, Hawaii Revised Statutes, prior to July 1, 2006."

SECTION 3. Notwithstanding section 2 of Act 181, Session Laws of Hawaii 2017, and subject to section 2 of this Act, the following sections of chapter 514A, Hawaii Revised Statutes, shall remain operative in the form in which they read on December 31, 2018, until June 30, 2020, for the sole purpose of providing developers with sufficient time to update their developer's public reports and associated documents in order to qualify for the safe harbor provisions of section 45 of Act 181, Session Laws of Hawaii 2017, as amended by this Act:

Part I. General Provisions and Definitions

- 514A-1 Title
- 514A-1.5 Applicability of chapter
- 514A-1.6 Conformance with county land use ordinances

- 514A-2 Chapter not exclusive
- 514A-3 Definitions
- 514A-4 Status of apartments
- 514A-5 Ownership of apartments
- 514A-6 Separate taxation
- Part II. Creation, Alteration, and Termination
of Condominiums
- 514A-11 Recordation and contents of declaration
- 514A-12 Copy of the floor plans to be filed
- 514A-13 Common elements
- 514A-13.6 Mailboxes for each dwelling required
- 514A-14 Parking stalls
- 514A-14.5 Ownership of parking stalls
- 514A-15 Common profits and expenses
- 514A-15.1 Common expenses; prior late charges
- 514A-15.5 Metering of utilities
- 514A-16 Liens against apartments; removal from
lien; effect of part payment
- 514A-17 Contents of deeds or leases of apartments
- 514A-18 Blanket mortgages and other blanket liens
affecting an apartment at time of first
conveyance or lease
- 514A-19 Merger of increments
- 514A-20 Condominium property regimes
- 514A-21 Removal from provisions of this chapter
- Part III. Registration and Administration
- 514A-32 Questionnaire and filing fee

- 514A-33 Inspection
- 514A-34 Inspection expenses
- 514A-35 Waiver of inspection
- 514A-36 Public reports and registration fees
- 514A-38 Request for effective date or hearing by developer
- 514A-40 Final reports
- 514A-41 Supplementary public report
- 514A-42 True copies of public report; no misleading information
- 514A-43 Automatic expiration of public reports; exceptions
- 514A-44 Deposit of fees
- 514A-45 Supplemental regulations governing a condominium property regime
- 514A-46 Investigatory powers
- 514A-47 Cease and desist orders
- 514A-48 Power to enjoin
- 514A-49 Penalties
- 514A-50 Limitation of action

Part IV. Protection of Purchasers

- 514A-61 Disclosure requirements
- 514A-62 Copy of public report to be given to prospective purchaser
- 514A-63 Rescission rights
- 514A-64.5 Protection of purchasers' funds
- 514A-65 Escrow requirement

- 514A-67 Financing construction
- 514A-68 Misleading statements and omissions
- 514A-69 Remedies; sales voidable when and by whom
- 514A-70 Warranty against structural and appliance defects; notice of expiration required.

SECTION 4. On July 1, 2020, the authority to extend the operation of the listed sections of chapter 514A, Hawaii Revised Statutes, that is provided under section 3 to allow developers to qualify for the safe harbor provisions of section 45 of Act 181, Session Laws of Hawaii 2017, as amended by this Act, shall expire.

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2050.

SECTION 5. This Act shall take effect upon its approval.

SB-552-SD-1

Submitted on: 3/12/2019 11:38:33 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Erica Scott	Individual	Support	No

Comments: