

HB  
638

---

---

# A BILL FOR AN ACT

RELATING TO PLANNED COMMUNITY ASSOCIATIONS.

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

1           SECTION 1. Chapter 421J, Hawaii Revised Statutes, is  
2 amended as follows:

3           1. By designating sections 421J-1 through 421J-16 as:

4                   "PART I. GENERAL PROVISIONS AND GOVERNANCE"

5           2. By adding sixteen new sections to part I to be  
6 appropriately designated and to read:

7                   "§421J-A Association; powers. (a) Except as provided in  
8 section 421J-B, and subject to the provisions of the declaration  
9 and bylaws, the association, even if unincorporated, may:

10                   (1) Adopt and amend the declaration, bylaws, and rules and  
11 regulations;

12                   (2) Adopt and amend budgets for revenues, expenditures,  
13 and reserves and collect assessments from members;

14                   (3) Hire and discharge managing agents and other  
15 independent contractors, agents, and employees;

16                   (4) Institute, defend, or intervene in litigation or  
17 administrative proceedings in its own name on behalf



1           of itself or two or more unit owners on matters  
2           affecting the planned community. For the purposes of  
3           actions under chapter 480, associations shall be  
4           deemed to be "consumers";

5           (5) Make contracts and incur liabilities;

6           (6) Regulate the use, maintenance, repair, replacement,  
7           and modification of common areas;

8           (7) Cause additional improvements to be made as a part of  
9           the common areas;

10          (8) Acquire, hold, encumber, and convey in its own name  
11          any right, title, or interest to real or personal  
12          property; provided that:

13          (A) Designation of additional areas to be common  
14          areas or subject to common expenses after the  
15          initial filing of the declaration or bylaws shall  
16          require the approval of at least sixty-seven per  
17          cent of the unit owners;

18          (B) If the developer discloses to the initial buyer  
19          in writing that additional areas will be  
20          designated as common areas whether pursuant to an  
21          incremental or phased project or otherwise, the



- 1                   requirements of this paragraph shall not apply as  
2                   to those additional areas; and
- 3           (C) The requirements of this paragraph shall not  
4                   apply to the purchase of a unit for a resident  
5                   manager, which may be purchased with the approval  
6                   of the board;
- 7           (9) Grant easements, leases, licenses, and concessions  
8                   through or over the common areas and permit  
9                   encroachments on the common areas;
- 10          (10) Impose and receive any payments, fees, or charges for  
11                   the use, rental, or operation of the common areas, and  
12                   for services provided to unit owners;
- 13          (11) Impose charges and penalties, including late fees and  
14                   interest, for late payment of assessments and levy  
15                   reasonable fines for violations of the declaration,  
16                   bylaws, rules, and regulations of the association,  
17                   either in accordance with the bylaws or, if the bylaws  
18                   are silent, pursuant to a resolution adopted by the  
19                   board that establishes a fining procedure that states  
20                   the basis for the fine and allows an appeal to the  
21                   board of the fine with notice and an opportunity to be



- 1           heard and providing that if the fine is paid, the unit
- 2           owner shall have the right to initiate a dispute
- 3           resolution process as provided by sections 421J-13,
- 4           421J-Q, or by filing a request for an administrative
- 5           hearing with the department of commerce and consumer
- 6           affairs;
- 7       (12) Impose reasonable charges for the preparation and
- 8           recordation of amendments to the declaration,
- 9           documents requested for resale of units, or statements
- 10          of unpaid assessments;
- 11       (13) Provide for cumulative voting through a provision in
- 12           the bylaws;
- 13       (14) Provide for the indemnification of its officers,
- 14           board, committee members, and agents, and maintain
- 15           directors' and officers' liability insurance;
- 16       (15) Assign its right to future income, including the right
- 17           to receive regular assessments, but only to the extent
- 18           section 421J-B expressly so provides;
- 19       (16) Exercise any other powers conferred by the declaration
- 20           or bylaws;



- 1       (17) Exercise all other powers that may be exercised in  
2       this State by legal entities of the same type as the  
3       association, except to the extent inconsistent with  
4       this chapter;
- 5       (18) Exercise any other powers necessary and proper for the  
6       governance and operation of the association; and
- 7       (19) By regulation, subject to sections 421J-10.5, 421J-13,  
8       and 421J-Q, require that disputes between the board  
9       and members or between two or more members regarding  
10       the planned community be submitted to nonbinding  
11       alternative dispute resolution in the manner described  
12       in the regulation as a prerequisite to commencement of  
13       a judicial proceeding.
- 14       (b) If a tenant of a member violates the declaration,  
15       bylaws, or rules and regulations of the association, in addition  
16       to exercising any of its powers against the member, the  
17       association may:
- 18       (1) Exercise directly against the tenant the powers  
19       described in subsection (a) (11);
- 20       (2) After giving notice to the tenant and the member and  
21       an opportunity to be heard, levy reasonable fines



1           against the tenant for the violation, provided that a  
2           member shall be responsible for the conduct of the  
3           member's tenant and for any fines levied against the  
4           tenant or any legal fees incurred in enforcing the  
5           declaration, bylaws, or rules and regulations of the  
6           association against the tenant; and

7           (3) Enforce any other rights against the tenant for the  
8           violation which the member as landlord could lawfully  
9           have exercised under the lease, including eviction, or  
10           which the association could lawfully have exercised  
11           directly against the member, or both.

12           (c) The rights granted under subsection (b) (3) may only be  
13           exercised if the tenant or member fails to cure the violation  
14           within ten days after the association notifies the tenant and  
15           member of that violation; provided that no notice shall be  
16           required when the breach by the tenant causes or threatens to  
17           cause damage to any person or constitutes a violation of section  
18           521-51(1) or 521-51(6).

19           (d) Unless a lease otherwise provides, this section does  
20           not:



1           (1) Affect rights that the member has to enforce the lease  
2           or that the association has under other law; or

3           (2) Permit the association to enforce a lease to which it  
4           is not a party in the absence of a violation of the  
5           declaration, bylaws, or rules and regulations.

6           §421J-B Association; limitations on powers. (a) The  
7           declaration and bylaws may not impose limitations on the power  
8           of the association to deal with the developer which are more  
9           restrictive than the limitations imposed on the power of the  
10          association to deal with other persons.

11          (b) Unless otherwise permitted by the declaration, bylaws,  
12          or this chapter, an association may adopt rules and regulations  
13          that affect the use of or behavior in units that may be used for  
14          residential purposes only to:

15          (1) Prevent any use of a unit which violates the  
16          declaration or bylaws; or

17          (2) Regulate any behavior in or occupancy of a unit which  
18          violates the declaration or bylaws or unreasonably  
19          interferes with the use and enjoyment of other units  
20          or the common areas by other unit owners.





1 Otherwise, the association may not regulate any use of or  
2 behavior in units by means of the rules and regulations.

3 (c) No association shall deduct and apply portions of  
4 regular assessment payments received from a member to unpaid  
5 late fees, legal fees, fines, and interest (other than amounts  
6 remitted by a unit in payment of late fees, legal fees, fines,  
7 and interest).

8 (d) No member who requests legal or other information from  
9 the association, the board, the managing agent, or their  
10 employees or agents, shall be charged for the reasonable cost of  
11 providing the information unless the association notifies the  
12 member that it intends to charge the member for the reasonable  
13 cost. The association shall notify the member in writing at  
14 least ten days prior to incurring the reasonable cost of  
15 providing the information, except that no prior notice shall be  
16 required to assess the reasonable cost of providing information  
17 on delinquent assessments or in connection with proceedings to  
18 enforce the law or the association's governing documents.

19 After being notified of the reasonable cost of providing  
20 the information, the member may withdraw the request, in  
21 writing. A member who withdraws a request for information shall



1 not be charged for the reasonable cost of providing the  
2 information.

3 (e) Subject to any approval requirements and spending  
4 limits contained in the declaration or bylaws, the association  
5 may authorize the board to borrow money for the repair,  
6 replacement, maintenance, operation, or administration of the  
7 common areas and personal property of the planned community, or  
8 the making of any additions, alterations, and improvements  
9 thereto; provided that written notice of the purpose and use of  
10 the funds is first sent to all members and owners representing  
11 fifty per cent of the common interest vote or give written  
12 consent to the borrowing. In connection with the borrowing, the  
13 board may grant to the lender the right to assess and collect  
14 monthly or special assessments from the members and to enforce  
15 the payment of the assessments or other sums by statutory lien  
16 and foreclosure proceedings. The cost of the borrowing,  
17 including, without limitation, all principal, interest,  
18 commitment fees, and other expenses payable with respect to the  
19 borrowing or the enforcement of the obligations under the  
20 borrowing, shall be a regular assessment of the project. For  
21 purposes of this section, the financing of insurance premiums by



1 the association within the policy period shall not be deemed a  
2 loan and no lease shall be deemed a loan if it provides that at  
3 the end of the lease the association may purchase the leased  
4 equipment for its fair market value.

5 §421J-C Board; powers and duties. (a) Except as provided  
6 in the declaration, the bylaws, subsection (b), or other  
7 provisions of this chapter, the board may act in all instances  
8 on behalf of the association. In the performance of their  
9 duties, officers and members of the board shall owe the  
10 association a fiduciary duty and exercise the degree of care and  
11 loyalty required of an officer or director of a corporation  
12 organized under chapter 414D. Any violation by a board or its  
13 officers or members of the mandatory provisions of section 421J-  
14 13 or 421J-Q may constitute a violation of the fiduciary duty  
15 owed pursuant to this subsection; provided that a board member  
16 may avoid liability under this subsection by indicating in  
17 writing the board member's disagreement with such board action  
18 or rescinding or withdrawing the violating conduct within forty-  
19 five days of the occurrence of the initial violation.

20 (b) The board may not act on behalf of the association to  
21 amend the declaration or bylaws, to remove the planned community



1 from the provisions of this chapter, or to elect members of the  
2 board or determine the qualifications, powers and duties, or  
3 terms of office of board members; provided that nothing in this  
4 subsection shall be construed to prohibit board members from  
5 voting proxies to elect members of the board; provided further  
6 that notwithstanding anything to the contrary in the declaration  
7 or bylaws, the board may only fill vacancies in its membership  
8 to serve until the next annual or duly noticed special  
9 association meeting. Notice of a special association meeting to  
10 fill vacancies shall include notice of the election. Any  
11 special association meeting to fill vacancies shall be held on a  
12 date that allows sufficient time for owners to declare their  
13 intention to run for election and to solicit proxies for that  
14 purpose.

15 (c) Within thirty days after the adoption of any proposed  
16 budget for the planned community, the board shall make available  
17 a copy of the budget to all the members and shall notify each  
18 member that the member may request a copy of the budget.

19 (d) The declaration may provide for a period of developer  
20 control of the association, during which a developer, or persons  
21 designated by the developer, may appoint and remove the officers



1 and members of the board. Regardless of the period provided in  
2 the declaration, a period of developer control terminates no  
3 later than the earlier of:

4 (1) Two years after the developer has ceased to offer  
5 units for sale in the ordinary course of business;

6 (2) Two years after any right to add new units was last  
7 exercised; or

8 (3) The day the developer, after giving written notice to  
9 unit owners, records an instrument voluntarily  
10 surrendering all rights to control activities of the  
11 association.

12 A developer may voluntarily surrender the right to appoint and  
13 remove officers and members of the board before termination of  
14 that period, but in that event the developer may require, for  
15 the duration of the period of developer control, that specified  
16 actions of the association or board, as described in a recorded  
17 instrument executed by the developer, be approved by the  
18 developer before they become effective.

19 (e) Not later than the termination of any period of  
20 developer control, the unit owners shall elect a board of at  
21 least three members. A decrease in the number of directors



1 shall not deprive an incumbent director of any remaining term of  
2 office.

3 (f) At any regular or special meeting of the association,  
4 any member of the board may be removed and successors shall be  
5 elected for the remainder of the term to fill the vacancies thus  
6 created. The removal and replacement shall be by a vote of a  
7 majority of the unit owners and, otherwise, in accordance with  
8 all applicable requirements and procedures in the bylaws for the  
9 removal and replacement of directors and, if removal and  
10 replacement is to occur at a special meeting.

11 §421J-D Board; limitations. (a) An owner shall not act  
12 as an officer of an association and an employee of the managing  
13 agent retained by the association. Any owner who is a board  
14 member of an association and an employee of the managing agent  
15 retained by the association shall not participate in any  
16 discussion regarding a management contract at a board meeting  
17 and shall be excluded from any executive session of the board  
18 where the management contract or the property manager will be  
19 discussed.

20 (b) Directors shall not expend association funds for their  
21 travel, directors' fees, and per diem, unless owners are



1 informed and a majority approve of these expenses; provided  
2 that, with the approval of the board, directors may be  
3 reimbursed for actual expenditures incurred on behalf of the  
4 association. The board meeting minutes shall reflect in detail  
5 the items and amounts of the reimbursements.

6 (c) Associations at their own expense shall provide all  
7 board members with a current copy of the association's  
8 declaration, bylaws, house rules, and, annually, a copy of this  
9 chapter with amendments.

10 (d) The directors may expend association funds, which  
11 shall not be deemed to be compensation to the directors, to  
12 educate and train themselves in subject areas directly related  
13 to their duties and responsibilities as directors; provided that  
14 the approved annual operating budget shall include these  
15 expenses as separate line items. These expenses may include  
16 registration fees, books, videos, tapes, other educational  
17 materials, and economy travel expenses. Except for economy  
18 travel expenses within the State, all other travel expenses  
19 incurred under this subsection shall be subject to the  
20 requirements of subsection (b).



1        §421J-E Planned community mutual obligations. (a) All  
2 members, tenants of owners, employees of owners and tenants, or  
3 any other persons that may in any manner use property or any  
4 part thereof submitted to this chapter are subject to this  
5 chapter and to the declaration and bylaws of the association  
6 adopted pursuant to this chapter.

7        (b) All agreements, decisions, and determinations lawfully  
8 made by the association in accordance with the voting  
9 percentages established in this chapter, the declaration, or the  
10 bylaws are binding on all members.

11        (c) Each member, tenants and employees of an owner, and  
12 other persons using the property shall comply strictly with the  
13 covenants, conditions, and restrictions set forth in the  
14 declaration, the bylaws, and other organizational document  
15 adopted pursuant thereto. Failure to comply with any of the  
16 same shall be grounds for an action to recover sums due, for  
17 damages or injunctive relief, or both, maintainable by the  
18 managing agent, resident manager, or board on behalf of the  
19 association or, in a proper case, by an aggrieved member.

20        §421J-F Association meetings; minutes. (a) Minutes of  
21 meetings of the association shall be approved at the next





1 succeeding regular meeting or by the board, within sixty days  
2 after the meeting, if authorized by the owners at an annual  
3 meeting. If approved by the board, owners shall be given a copy  
4 of the approved minutes or notified of the availability of the  
5 minutes within thirty days after approval.

6 (b) Minutes of all meetings of the association shall be  
7 available within seven calendar days after approval, and  
8 unapproved final drafts of the minutes of a meeting shall be  
9 available within sixty days after the meeting.

10 (c) An owner shall be allowed to offer corrections to the  
11 minutes at an association meeting.

12 §421J-G Voting for elections; cumulative voting. (a) If  
13 the bylaws provide for cumulative voting for an election at a  
14 meeting, each member present in person or represented by proxy  
15 shall have a number of votes equal to the member's voting  
16 percentage multiplied by the number of positions to be filled at  
17 the election.

18 (b) Each member shall be entitled to cumulate the votes of  
19 the member and give all of the votes to one nominee or  
20 distribute the votes among any or all of the nominees.



1        (c) The nominee or nominees receiving the highest number  
2 of votes under this section, up to the total number of positions  
3 to be filled, shall be deemed elected and shall be given the  
4 longest term.

5        (d) This section shall not prevent the filling of  
6 vacancies on the board of directors in accordance with this  
7 chapter and the association's governing documents.

8        **§421J-H Managing agents.** (a) Every managing agent shall:

9        (1) Be a:

10        (A) Licensed real estate broker in compliance with  
11 chapter 467 and the rules of the commission; or

12        (B) Corporation authorized to do business under  
13 article 8 of chapter 412;

14        (2) Register with the commission prior to conducting  
15 managing agent activity through approval of a  
16 completed registration application, payment of fees,  
17 and submission of any other additional information set  
18 forth by the commission. The registration shall be  
19 for a biennial period with termination on December 31  
20 of an even-numbered year. The commission shall  
21 prescribe a deadline date prior to the termination



1 date for the submission of a completed reregistration  
2 application, payment of fees, and any other additional  
3 information set forth by the commission. Any managing  
4 agent who has not met the submission requirements by  
5 the deadline date shall be considered a new applicant  
6 for registration and subject to initial registration  
7 requirements. The information required to be  
8 submitted with any application shall include the name,  
9 business address, phone number, and names of  
10 associations managed;

11 (3) Obtain and keep current a fidelity bond in an amount  
12 equal to \$500 multiplied by the aggregate number of  
13 units of the association managed by the managing  
14 agent; provided that the amount of the fidelity bond  
15 shall not be less than \$20,000 nor greater than  
16 \$500,000. Upon request by the commission, the  
17 managing agent shall provide evidence of a current  
18 fidelity bond or a certification statement from an  
19 insurance company authorized by the insurance division  
20 of the department of commerce and consumer affairs  
21 certifying that the fidelity bond is in effect and



1 meets the requirements of this section and the rules  
2 adopted by the commission. The managing agent shall  
3 permit only employees covered by the fidelity bond to  
4 handle or have custody or control of any association  
5 funds, except any principals of the managing agent  
6 that cannot be covered by the fidelity bond. The  
7 fidelity bond shall protect the managing agent against  
8 the loss of any association's moneys, securities, or  
9 other properties caused by the fraudulent or dishonest  
10 acts of employees of the managing agent. Failure to  
11 obtain or maintain a fidelity bond in compliance with  
12 this chapter and the rules adopted pursuant thereto,  
13 including failure to provide evidence of the fidelity  
14 bond coverage in a timely manner to the commission,  
15 shall result in nonregistration or the automatic  
16 termination of the registration, unless an approved  
17 exemption or a bond alternative is presently  
18 maintained. A managing agent who is unable to obtain  
19 a fidelity bond may seek an exemption from the  
20 fidelity bond requirement from the commission;



1        (4) Act promptly and diligently to recover from the  
2        fidelity bond, if the fraud or dishonesty of the  
3        managing agent's employees causes a loss to an  
4        association, and apply the fidelity bond proceeds, if  
5        any, to reduce the association's loss. If more than  
6        one association suffers a loss, the managing agent  
7        shall divide the proceeds among the associations in  
8        proportion to each association's loss. An association  
9        may request a court order requiring the managing agent  
10       to act promptly and diligently to recover from the  
11       fidelity bond. If an association cannot recover its  
12       loss from the fidelity bond proceeds of the managing  
13       agent, the association may recover by court order from  
14       the real estate recovery fund established under  
15       section 467-16, provided that:

16       (A) The loss is caused by the fraud,  
17       misrepresentation, or deceit of the managing  
18       agent or its employees;

19       (B) The managing agent is a licensed real estate  
20       broker; and



- 1            (C) The association fulfills the requirements of  
2            sections 467-16 and 467-18 and any applicable  
3            rules of the commission;
- 4            (5) Pay a nonrefundable application fee and, upon  
5            approval, an initial registration fee, and  
6            subsequently pay a reregistration fee, as prescribed  
7            by rules adopted by the director of commerce and  
8            consumer affairs pursuant to chapter 91. A compliance  
9            resolution fee shall also be paid pursuant to section  
10           26-9(o) and the rules adopted pursuant thereto; and
- 11           (6) Report immediately in writing to the commission any  
12           changes to the information contained on the  
13           registration application or any other documents  
14           provided for registration. Failure to do so may  
15           result in termination of registration and subject the  
16           managing agent to initial registration requirements.
- 17           (b) The commission may deny any registration or re-  
18           registration application or terminate a registration without  
19           hearing if the fidelity bond and supporting documents fail to  
20           meet the requirements of this chapter and the rules adopted  
21           pursuant thereto.



1        (c) Every managing agent shall be considered a fiduciary  
2 with respect to any property managed by that managing agent.

3        (d) The registration requirements of this section shall  
4 not apply to active real estate brokers in compliance with and  
5 licensed under chapter 467.

6        (e) If a managing agent receives a request from the  
7 commission to distribute any commission-generated information,  
8 printed material, or documents to the association, its board, or  
9 unit owners, the managing agent shall make the distribution at  
10 the cost of the association within a reasonable period of time  
11 after receiving the request. The requirements of this  
12 subsection apply to all managing agents, including unregistered  
13 managing agents.

14        **§421J-I Association employees; background check;**  
15 **prohibition.** (a) The board, managing agent, or resident  
16 manager, upon the written authorization of an applicant for  
17 employment as a security guard or resident manager or for a  
18 position that would allow the employee access to the keys of or  
19 entry into the units in the planned community or access to  
20 association funds, may conduct a background check on the  
21 applicant or direct another responsible party to conduct the



1 check. Before initiating or requesting a check, the board,  
2 managing agent, or resident manager shall first certify that the  
3 signature on the authorization is authentic and that the person  
4 is an applicant for such employment. The background check, at a  
5 minimum, shall require the applicant to disclose whether the  
6 applicant has been convicted in any jurisdiction of a crime  
7 which would tend to indicate that the applicant may be unsuited  
8 for employment as an association employee with access to  
9 association funds or the keys of or entry into the units in the  
10 planned community, and the judgment of conviction has not been  
11 vacated.

12 For purposes of this section, the criminal history  
13 disclosure made by the applicant may be verified by the board,  
14 managing agent, resident manager, or other responsible party, if  
15 so directed by the board, managing agent, or resident manager,  
16 by means of information obtained through the Hawaii criminal  
17 justice data center. The applicant shall provide the Hawaii  
18 criminal justice data center with personal identifying  
19 information, which shall include, but not be limited to, the  
20 applicant's name, social security number, date of birth, and  
21 gender. This information shall be used only for the purpose of





1 conducting the criminal history record check authorized by this  
 2 section. Failure of an association, managing agent, or resident  
 3 manager to conduct or verify or cause to have conducted or  
 4 verified a background check shall not alone give rise to any  
 5 private cause of action against an association, managing agent,  
 6 or resident manager for acts and omissions of the employee  
 7 hired.

8 (b) An association's employees shall not engage in selling  
 9 or renting units in the planned community in which they are  
 10 employed, except association-owned units, unless such activity  
 11 is approved by sixty-seven per cent of the members.

12 §421J-J Tort and contract liability; tolling of limitation  
 13 period. (a) A member is not liable, solely by reason of being  
 14 a unit owner, for any injury or damage arising out of the  
 15 condition or use of the common elements. Neither the  
 16 association nor any member except the developer is liable for  
 17 that developer's torts in connection with any part of the  
 18 planned community that the developer has the responsibility to  
 19 maintain.

20 (b) An action alleging a wrong done by the association,  
 21 including an action arising out of the condition or use of the



1 common areas, may be maintained only against the association and  
2 not against any member. If the wrong occurred during any period  
3 of developer control and the association gives the developer  
4 reasonable notice of and an opportunity to defend against the  
5 action, the developer who then controlled the association is  
6 liable to the association or to any member for:

- 7       (1) All tort losses not covered by insurance suffered by  
8       the association or that unit owner; and
- 9       (2) All costs that the association would not have incurred  
10       but for a breach of contract or other wrongful act or  
11       omission, as the same may be established through  
12       adjudication.

13 Whenever the developer is liable to the association under this  
14 section, the developer is also liable for all expenses of  
15 litigation, including reasonable attorneys' fees, incurred by  
16 the association.

17       (c) Any statute of limitation affecting the association's  
18 right of action against a developer is tolled until the period  
19 of developer control terminates. A member is not precluded from  
20 maintaining an action contemplated by this section because the



1 member is a unit owner or a member or officer of the  
2 association.

3 §421J-K Insurance. (a) Unless otherwise provided in the  
4 declaration or bylaws, the association shall purchase and at all  
5 times maintain the following:

6 (1) Property insurance:

7 (A) On the common areas;

8 (B) Providing coverage for special form causes of  
9 loss; and

10 (C) In a total amount of not less than the full  
11 insurable replacement cost of the insured  
12 property, less deductibles, but including  
13 coverage for the increased costs of construction  
14 due to building code requirements, at the time  
15 the insurance is purchased and at each renewal  
16 date;

17 (2) Commercial general liability insurance against claims  
18 and liabilities arising in connection with the  
19 ownership, existence, use, or management of the  
20 property in a minimum amount of \$1,000,000, or a



1 greater amount deemed sufficient in the judgment of  
2 the board;

3 (3) A fidelity bond, as follows:

4 (A) An association with more than five dwelling units  
5 shall obtain and maintain a fidelity bond  
6 covering persons, including the managing agent  
7 and its employees who control or disburse funds  
8 of the association, in an amount equal to \$500  
9 multiplied by the number of units; provided that  
10 the amount of the fidelity bond required by this  
11 paragraph shall not be less than \$20,000 nor  
12 greater than \$200,000; and

13 (B) All management companies that are responsible for  
14 the funds held or administered by the association  
15 shall be covered by a fidelity bond as provided  
16 in section 421J-H. The association shall have  
17 standing to make a loss claim against the bond of  
18 the managing agent as a party covered under the  
19 bond; and

20 (4) The board shall obtain directors and officers  
21 liability coverage at a level deemed reasonable by the



1           board, if not otherwise limited by the declaration or  
2           bylaws.

3           (b) If a building contains attached units, the insurance  
4 maintained under subsection (a) (1), to the extent reasonably  
5 available, shall include the units, the limited common areas,  
6 except as otherwise determined by the board, and the common  
7 areas. The insurance need not cover improvements and  
8 betterments to the units installed by unit owners, but if  
9 improvements and betterments are covered, any increased cost may  
10 be assessed by the association against the units affected.

11           For the purposes of this section, "improvements and  
12 betterments" means all decorating, fixtures, and furnishings  
13 installed or added to and located within the boundaries of the  
14 unit, including electrical fixtures, appliances, air  
15 conditioning and heating equipment, water heaters, or built-in  
16 cabinets installed by unit owners.

17           (c) If a project contains detached units, then  
18 notwithstanding the requirement in this section that the  
19 association obtain the requisite coverage, if the board  
20 determines that it is in the best interest of the association to  
21 do so, the insurance to be maintained under subsection (a) (1)



1 may be obtained separately for each unit by the unit owners;  
2 provided that the requirements of subsection (a)(1) shall be  
3 met; and provided further that evidence of such insurance  
4 coverage shall be delivered annually to the association. In  
5 such event, the association shall be named as an additional  
6 insured.

7 (d) The board, in the case of a claim for damage to a unit  
8 or the common areas, may:

- 9 (1) Pay the deductible amount as a common expense;
- 10 (2) After notice and an opportunity for a hearing, assess  
11 the deductible amount against the owners who caused  
12 the damage or from whose units the damage or cause of  
13 loss originated; or
- 14 (3) Require the unit owners of the units affected to pay  
15 the deductible amount.

16 (e) The declaration, bylaws, or the board may require the  
17 association to carry any other insurance, including workers'  
18 compensation, employment practices, environmental hazards, and  
19 equipment breakdown, that the board considers appropriate to  
20 protect the association, the unit owners, or officers,  
21 directors, or agents of the association. Flood insurance shall



1 also be maintained if the property is located in a special flood  
2 hazard area as delineated on flood maps issued by the Federal  
3 Emergency Management Agency. The flood insurance policy shall  
4 comply with the requirements of the National Flood Insurance  
5 Program and the Federal Insurance Administration.

6 (f) Any loss covered by the property policy under  
7 subsection (a)(1) shall be adjusted by and with the association.  
8 The insurance proceeds for that loss shall be payable to the  
9 association, or to an insurance trustee designated by the  
10 association for that purpose. The insurance trustee or the  
11 association shall hold any insurance proceeds in trust for unit  
12 owners and secured parties as their interests may appear.

13 (g) The board, with the vote or written consent of a  
14 majority of the unit owners, may require unit owners to obtain  
15 reasonable types and levels of insurance. The liability of a  
16 unit owner shall include but not be limited to the deductible of  
17 the owner whose unit was damaged, any damage not covered by  
18 insurance required by this subsection, as well as the  
19 decorating, painting, wall and floor coverings, trim,  
20 appliances, equipment, and other furnishings.



1        If the unit owner does not purchase or produce evidence of  
2 insurance requested by the board, the directors may, in good  
3 faith, purchase the insurance coverage and charge the reasonable  
4 premium cost back to the unit owner. In no event is the  
5 association or board liable to any person either with regard to  
6 the failure of a unit owner to purchase insurance or a decision  
7 by the board not to purchase the insurance for the owner, or  
8 with regard to the timing of its purchase of the insurance or  
9 the amounts or types of coverages obtained.

10        (h) The provisions of this section may be varied or waived  
11 in the case of a project in which all units are restricted to  
12 nonresidential use.

13        **§421J-L Association fiscal matters; audits, audited**  
14 **financial statement.** (a) The association shall require an  
15 annual audit of the association financial accounts and no less  
16 than one annual unannounced verification of the association's  
17 cash balance by a public accountant; provided that if the  
18 association is comprised of less than twenty units, the annual  
19 audit and the annual unannounced cash balance verification may  
20 be waived at an association meeting by a vote of a majority of  
21 the unit owners.





1        (b) The board shall make available a copy of the annual  
2 audit to each unit owner at least thirty days prior to the  
3 annual meeting which follows the end of the fiscal year. The  
4 board shall not be required to submit a copy of the annual audit  
5 report to an owner if the proxy form issued pursuant to section  
6 421J-4 is not marked to indicate that the owner wishes to obtain  
7 a copy of the report. If the annual audit has not been  
8 completed by that date, the board shall make available:

9        (1) An unaudited year end financial statement for the  
10 fiscal year to each unit owner at least thirty days  
11 prior to the annual meeting; and

12        (2) The annual audit to all owners at the annual meeting,  
13 or as soon as the audit is completed, but not later  
14 than six months after the annual meeting.

15        (c) If the association's fiscal year ends less than two  
16 months prior to the convening of the annual meeting, the year-  
17 to-date unaudited financial statement may cover the period from  
18 the beginning of the association's fiscal year to the end of the  
19 month preceding the date on which notice of the annual meeting  
20 is mailed.



1        §421J-M Association records; generally. The association  
2        shall keep financial and other records sufficiently detailed to  
3        enable the association to comply with requests for information  
4        and disclosures related to resale of units. Except as otherwise  
5        provided by law, all financial and other records shall be made  
6        available pursuant to section 421J-N for examination by any unit  
7        owner and the owner's authorized agents. Association records  
8        shall be stored on the island on which the association is  
9        located; provided that if original records, including but not  
10       limited to invoices, are required to be sent off-island, copies  
11       of the records shall be maintained on the island on which the  
12       association's project is located.

13       §421J-N Association records; records to be maintained.  
14       (a) An accurate copy of the declaration, bylaws, house rules,  
15       if any, master lease, if any, a sample original conveyance  
16       document, all public reports and any amendments thereto, shall  
17       be kept at the managing agent's office.

18       (b) The managing agent or board shall keep detailed,  
19       accurate records in chronological order, of the receipts and  
20       expenditures affecting the common areas, specifying and  
21       itemizing the maintenance and repair expenses of the common



1 areas and any other expenses incurred. The managing agent or  
2 board shall also keep monthly statements indicating the total  
3 current delinquent dollar amount of any unpaid regular  
4 assessments.

5 (c) Subject to section 421J-M, all records and the  
6 vouchers authorizing the payments and statements shall be kept  
7 and maintained at the address of the association, or elsewhere  
8 within the State as determined by the board.

9 (d) The developer or affiliate of the developer, board,  
10 and managing agent shall ensure that there is a written contract  
11 for managing the operation of the property, expressing the  
12 agreements of all parties, including but not limited to  
13 financial and accounting obligations, services provided, and any  
14 compensation arrangements, including any subsequent amendments.  
15 Copies of the executed contract and any amendments shall be  
16 provided to all parties to the contract.

17 §421J-0 Association documents to be provided. (a)  
18 Notwithstanding any other provision in the declaration, bylaws,  
19 or house rules, if any, the following documents, records, and  
20 information, whether maintained, kept, or required to be  
21 provided pursuant to this section or sections 421J-M, 421J-N, or



1 421J-7, shall be made available to any unit owner and the  
2 owner's authorized agents by the managing agent, resident  
3 manager, board through a board member, or the association's  
4 representative:

5 (1) All financial and other records sufficiently detailed  
6 in order to comply with requests for information and  
7 disclosures related to the resale of units;

8 (2) An accurate copy of the declaration, bylaws, house  
9 rules, if any, master lease, if any, a sample original  
10 conveyance document, and all public reports and any  
11 amendments thereto;

12 (3) Detailed, accurate records in chronological order of  
13 the receipts and expenditures affecting the common  
14 areas, specifying and itemizing the maintenance and  
15 repair expenses of the common areas and any other  
16 expenses incurred and monthly statements indicating  
17 the total current delinquent dollar amount of any  
18 unpaid assessments for common expenses;

19 (4) All records and the vouchers authorizing the payments  
20 and statements kept and maintained at the address of



1           the project, or elsewhere within the State as  
2           determined by the board, subject to section 421J-M;  
3       (5) All signed and executed agreements for managing the  
4           operation of the property, expressing the agreement of  
5           all parties, including but not limited to financial  
6           and accounting obligations, services provided, and any  
7           compensation arrangements, including any subsequent  
8           amendments;  
9       (6) An accurate and current list of members of the planned  
10           community association and the members' current  
11           addresses and the names and addresses of the vendees  
12           under an agreement of sale, if any. A copy of the  
13           list shall be available, at cost, to any unit owner or  
14           owner's authorized agent who furnishes to the managing  
15           agent, resident manager, or the board a duly executed  
16           and acknowledged affidavit stating that the list:  
17           (A) Shall be used by the unit owner or owner's  
18               authorized agent personally and only for the  
19               purpose of soliciting votes or proxies or for  
20               providing information to other unit owners with  
21               respect to association matters; and

- 1           (B) Shall not be used by the unit owner or owner's
- 2           authorized agent or furnished to anyone else for
- 3           any other purpose;
  
- 4           (7) The association's most current financial statement, at
- 5           no cost or on twenty-four-hour loan, at a convenient
- 6           location designated by the board;
  
- 7           (8) Meeting minutes of the association, pursuant to
- 8           section 421J-F;
  
- 9           (9) Meeting minutes of the board, pursuant to section
- 10          421J-5, which shall be:
  
- 11          (A) Available for examination by unit owners or
- 12          owners' authorized agents at no cost or on
- 13          twenty-four-hour loan at a convenient location at
- 14          the project, to be determined by the board; or
  
- 15          (B) Transmitted to any unit owner or owner's
- 16          authorized agent making a request for the minutes
- 17          within fifteen days of receipt of the request by
- 18          the owner or owner's authorized agent; provided
- 19          that:
  
- 20          (i) The minutes shall be transmitted by mail,
- 21          electronic mail transmission, or facsimile,



1                   by the means indicated by the owner or  
2                   owner's authorized agent, if the owner or  
3                   owner's authorized agent indicated a  
4                   preference at the time of the request; and  
5           (ii) The owner or owner's authorized agent shall  
6                   pay a reasonable fee for administrative  
7                   costs associated with handling the request;

8       (10) Financial statements, general ledgers, the accounts  
9           receivable ledger, accounts payable ledgers, check  
10           ledgers, insurance policies, contracts, and invoices  
11           of the association for the duration those records are  
12           kept by the association, and any documents regarding  
13           delinquencies of ninety days or more shall be  
14           available for examination by unit owners or owners'  
15           authorized agents at convenient hours at a place  
16           designated by the board; provided that:

17           (A) The board may require unit owners or owners'  
18                   authorized agents to furnish to the association a  
19                   duly executed and acknowledged affidavit stating  
20                   that the information is requested in good faith

- 1                   for the protection of the interests of the  
2                   association, its members, or both; and
- 3           (B) Unit owners or owners' authorized agents shall  
4                   pay for administrative costs in excess of eight  
5                   hours per year;
- 6           (11) Proxies, tally sheets, ballots, unit owners' check-in  
7                   lists, and the certificate of election subject to  
8                   section 421J-7;
- 9           (12) Copies of an association's documents, records, and  
10                   information, whether maintained, kept, or required to  
11                   be provided pursuant to this section or section 421J-  
12                   M, 421J-N, or 421J-7;
- 13           (13) A copy of the management contract from the entity that  
14                   manages the operation of the property before the  
15                   organization of an association;
- 16           (14) Other documents requested by a unit owner or owner's  
17                   authorized agent in writing; provided that the board  
18                   shall give written authorization or written refusal  
19                   with an explanation of the refusal within thirty  
20                   calendar days of receipt of a request for documents  
21                   pursuant to this paragraph; and





1       (15) A copy of any contract, written job description, and  
2       compensation between the association and any person or  
3       entity retained by the association to manage the  
4       operation of the property on-site, including but not  
5       limited to the general manager, operations manager,  
6       resident manager, or site manager; provided that  
7       personal information may be redacted from the contract  
8       copy, including but not limited to the manager's date  
9       of birth, age, signature, social security number,  
10       residence address, telephone number, non-business  
11       electronic mail address, driver's license number,  
12       Hawaii identification card number, bank account  
13       number, credit or debit card number, access code or  
14       password that would permit access to the manager's  
15       financial accounts, or any other information that may  
16       be withheld under state or federal law.

17       (b) Copies of the items in subsection (a) shall be  
18       provided to any unit owner or owner's authorized agent upon the  
19       owner's or owner's authorized agent's request; provided that the  
20       owner or owner's authorized agent pays a reasonable fee for



1 duplication, postage, stationery, and other administrative costs  
2 associated with handling the request.

3 (c) Notwithstanding any provision in the declaration,  
4 bylaws, or house rules providing for another period of time, all  
5 documents, records, and information listed under subsection (a),  
6 whether maintained, kept, or required to be provided pursuant to  
7 this section or section 421J-M, 421J-N, or 421J-7, shall be  
8 provided no later than thirty days after receipt of a unit  
9 owner's or owner's authorized agent's written request, unless a  
10 lesser time is provided pursuant to this section or section  
11 421J-M, 421J-N, or 421J-7, and except as provided in subsection  
12 (a) (14).

13 (d) Any documents, records, and information, whether  
14 maintained, kept, or required to be provided pursuant to this  
15 section or section 421J-M, 421J-N, or 421J-7, may be made  
16 available electronically to the unit owner or owner's authorized  
17 agent if the owner or owner's authorized agent requests such in  
18 writing.

19 (e) An association may comply with this section or section  
20 421J-M, 421J-N, or 421J-7 by making the required documents,  
21 records, and information available to unit owners or owners'



1 authorized agents for download through an internet site, at the  
2 option of each unit owner or owner's authorized agent and at no  
3 cost to the unit owner or owner's authorized agent.

4 (f) Any fee charged to a unit owner or owner's authorized  
5 agent to obtain copies of the association's documents, records,  
6 and information, whether maintained, kept, or required to be  
7 provided pursuant to this section or section 421J-M, 421J-N, or  
8 421J-7, shall be reasonable; provided that a reasonable fee  
9 shall include administrative and duplicating costs and shall not  
10 exceed \$1 per page, or portion thereof, except that the fee for  
11 pages exceeding eight and one-half inches by fourteen inches may  
12 exceed \$1 per page.

13 §421J-P Association as trustee. With respect to a third  
14 person dealing with the association in the association's  
15 capacity as a trustee, the existence of trust powers and their  
16 proper exercise by the association may be assumed without  
17 inquiry. A third person shall not be bound to inquire whether  
18 the association has power to act as trustee or is properly  
19 exercising trust powers. A third person, without actual  
20 knowledge that the association is exceeding or improperly  
21 exercising its powers, shall be fully protected in dealing with



1 the association as if it possessed and properly exercised the  
2 powers it purports to exercise. A third person shall not be  
3 bound to assure the proper application of trust assets paid or  
4 delivered to the association in its capacity as trustee."

5 3. By amending section 421J-2 to add a new definition to  
6 be appropriately inserted and to read:

7 "Commission" means the real estate commission established  
8 pursuant to section 467-3."

9 4. By amending section 421J-5 to read:

10 **"§421J-5 Meetings of the board of directors; committee or**  
11 **subcommittee.** (a) All meetings of the board of directors,  
12 other than executive sessions, shall be open to all members to  
13 provide input on the matters being discussed. Members who are  
14 not on the board of directors may participate in any  
15 deliberation or discussion, other than during executive  
16 sessions, unless a majority of a quorum of the board of  
17 directors votes otherwise.

18 (b) The board of directors shall meet at least once each  
19 year.

20 (c) The board of directors, with the approval of a  
21 majority of a quorum of its members, may adjourn any meeting and



1 reconvene in executive session to discuss and vote upon matters  
2 [~~concerning~~]:

3       (1) Concerning personnel [];

4       (2) Concerning litigation in which the association is or  
5       may become involved [, ~~or as may be necessary~~];

6       (3) Necessary to protect the attorney-client privilege of  
7       the association []; or

8       (4) Necessary to protect the interests of the association  
9       while negotiating contracts, leases, and other  
10       commercial transactions.

11 The general nature of any business to be considered in executive  
12 session shall be first announced in the regular session.

13       (d) No board member shall vote by proxy at board meetings.

14       (e) A director who has a conflict of interest on any issue  
15 before the board shall disclose the nature of the conflict of  
16 interest prior to a vote on that issue at the board meeting, and  
17 the minutes of the meeting shall record the fact that a  
18 disclosure was made.

19       (f) The board may appoint committees or subcommittees to  
20 review and consider any specific matters, and may alter or  
21 eliminate the committees or subcommittees; provided that the



1 board in the minutes of the meeting at which the action was  
2 taken to appoint the committee or subcommittee shall:

3 (1) Report that the committee or subcommittee was  
4 appointed;

5 (2) Identify the members of the committee or subcommittee;  
6 and

7 (3) Describe the matter that the committee or subcommittee  
8 is to review and consider.

9 (g) Minutes of the meetings of the board of directors  
10 shall include the recorded vote of each board member present on  
11 all motions except motions voted upon in executive session.

12 Minutes of all meetings of the board shall be approved no later  
13 than the second succeeding regular meeting. Minutes of all  
14 meetings of the board shall be available within seven calendar  
15 days after approval, and unapproved final drafts of the minutes  
16 of a meeting shall be available within thirty days of the  
17 meeting; provided that the minutes of any executive session may  
18 be withheld if their publication would defeat the lawful purpose  
19 of the executive session.

20 (h) Unless otherwise provided in the declaration or  
21 bylaws, a board may permit any meeting to be conducted by any



1 means of communication through which all directors participating  
2 may simultaneously hear each other during the meeting. A  
3 director participating in a meeting by this means is deemed to  
4 be present in person at the meeting. If permitted by the board,  
5 any member may participate in a meeting conducted by a means of  
6 communication through which all participants may simultaneously  
7 hear each other during the meeting; provided that the board may  
8 require that the member pay for the costs associated with the  
9 participation."

10 5. By amending section 421J-10.5 to read:

11 "**§421J-10.5 Association fiscal matters; lien for**  
12 **assessments.** (a) All sums assessed by the association, but  
13 unpaid for the share of the assessments chargeable to any unit,  
14 shall constitute a lien on the unit. The priority of the  
15 association's lien shall, except as otherwise provided by law,  
16 be as provided in the association documents or, if no priority  
17 is provided in the association documents, by the recordation  
18 date of the liens; provided that any amendment to the  
19 association documents that governs the priority of liens on the  
20 unit shall not provide that an association lien shall have  
21 priority over a mortgage lien that is recorded before the



1 amendment is recorded. A lien recorded by an association for  
2 unpaid assessments shall expire six years from the date of  
3 recordation unless proceedings to enforce the lien are  
4 instituted prior to the expiration of the lien; provided that  
5 the expiration of a recorded lien shall in no way affect the  
6 association's automatic lien that arises pursuant to this  
7 subsection or the association documents. Any proceedings to  
8 enforce an association's lien for any assessment shall be  
9 instituted within six years after the assessment became due;  
10 provided that if the owner of a unit subject to a lien of the  
11 association files a petition for relief under the United States  
12 Bankruptcy Code (11 U.S.C. section 101 et seq.), the period of  
13 time for instituting proceedings to enforce the association's  
14 lien shall be tolled until thirty days after the automatic stay  
15 of proceedings under section 362 of the United States Bankruptcy  
16 Code (11 U.S.C. section 362) is lifted.

17 The lien of the association may be foreclosed by action or  
18 by nonjudicial or power of sale foreclosure procedures set forth  
19 in chapter 667, by the managing agent or board, acting on behalf  
20 of the association and in the name of the association; provided  
21 that no association may exercise the nonjudicial or power of





1 sale remedies provided in chapter 667 to foreclose a lien  
2 against any unit that arises solely from fines, penalties, legal  
3 fees, or late fees, and the foreclosure of any such lien shall  
4 be filed in court pursuant to part IA of chapter 667. In any  
5 association foreclosure, the unit owner shall be required to pay  
6 a reasonable rental for the unit, if so provided in the  
7 association documents or the law, and the plaintiff in the  
8 foreclosure shall be entitled to the appointment of a receiver  
9 to collect the rental owed by the unit owner or any tenant of  
10 the unit. If the association is the plaintiff, it may request  
11 that its managing agent be appointed as receiver to collect the  
12 rental from the tenant. The managing agent or board, acting on  
13 behalf of the association and in the name of the association,  
14 may bid on the unit at foreclosure sale and acquire and hold,  
15 lease, mortgage, and convey the unit thereafter as the board  
16 deems reasonable. Action to recover a money judgment for unpaid  
17 assessments shall be maintainable without foreclosing or waiving  
18 the lien securing the unpaid assessments owed.

19 In the case of a voluntary conveyance, the grantee of a  
20 unit shall be jointly and severally liable with the grantor for  
21 all unpaid assessments against the latter for the grantor's



1 share of the common expenses up to the time of the grant or  
2 conveyance, without prejudice to the grantee's right to recover  
3 from the grantor the amounts paid by the grantee. Any such  
4 grantor or grantee is entitled to a statement from the board,  
5 either directly or through its managing agent or resident  
6 manager, setting forth the amount of the unpaid assessments  
7 against the grantor. The grantee is not liable and the unit  
8 conveyed is not subject to a lien for any unpaid assessments  
9 against the grantor in excess of the amount set forth in the  
10 statement, except as to the amount of subsequently dishonored  
11 checks mentioned in the statement as having been received within  
12 the thirty-day period immediately preceding the date of such  
13 statement.

14 (b) Except as provided in subsection [~~(g)~~] (j) or in the  
15 association documents, when the mortgagee of a mortgage of  
16 record or other purchaser of a unit obtains title to the unit as  
17 a result of foreclosure of the mortgage, the acquirer of title  
18 and the acquirer's successors and assigns shall not be liable  
19 for the share of the assessments by the association chargeable  
20 to the unit that became due prior to the acquisition of title to  
21 the unit by the acquirer. The unpaid share of assessments shall



1 be deemed to be assessments collectible from all of the unit  
2 owners, including the acquirer and the acquirer's successors and  
3 assigns. The mortgagee of record or other purchaser of the unit  
4 shall be deemed to acquire title and shall be required to pay  
5 the unit's share of assessments beginning:

- 6 (1) Thirty-six days after the order confirming the sale to  
7 the purchaser has been filed with the court;
  - 8 (2) Sixty days after the hearing at which the court grants  
9 the motion to confirm the sale to the purchaser;
  - 10 (3) Thirty days after the public sale in a nonjudicial  
11 power of sale foreclosure conducted pursuant to  
12 chapter 667; or
  - 13 (4) Upon the recording of the instrument of conveyance;
- 14 whichever occurs first; provided that the mortgagee of record or  
15 other purchaser of the unit shall not be deemed to acquire title  
16 under paragraph (1), (2), or (3), if transfer of title is  
17 delayed past the thirty-six days specified in paragraph (1), the  
18 sixty days specified in paragraph (2), or the thirty days  
19 specified in paragraph (3), when a person (other than the  
20 mortgagee of record or other purchaser of the unit) who appears  
21 at the hearing on the motion or a party to the foreclosure



1 action (other than the mortgagee of record or other purchaser of  
2 the unit) requests reconsideration of the motion or order to  
3 confirm sale, objects to the form of the proposed order to  
4 confirm sale, appeals the decision of the court to grant the  
5 motion to confirm sale, or the debtor or mortgagor declares  
6 bankruptcy or is involuntarily placed into bankruptcy. In any  
7 such case, the mortgagee of record or other purchaser of the  
8 unit shall be deemed to acquire title upon recordation of the  
9 instrument of conveyance.

10 (c) ~~[Except as provided in section 667-92(c), no unit~~  
11 ~~owner shall withhold any assessment claimed by the association.]~~

12 A unit owner who receives a demand for payment from an  
13 association and disputes the amount of an assessment may request  
14 a written statement clearly indicating:

- 15 (1) The amount of regular and special assessments included  
16 in the assessment, including the due date of each  
17 amount claimed;
- 18 (2) The amount of any penalty~~[,]~~ or fine, late fee, lien  
19 filing fee, and any other charge included in the  
20 assessment~~[,]~~ that is not imposed on all members as a  
21 regular assessment; and



1 (3) The amount of attorneys' fees and costs, if any,  
2 included in the assessment [✓].

3 (d) A unit owner who disputes the information in the  
4 written statement received from the association pursuant to  
5 subsection (c) may request a subsequent written statement that  
6 additionally informs the unit owner that:

7 [~~(4) That under~~] (1) Under Hawaii law, a unit owner has no  
8 right to withhold assessments for any reason;

9 [~~(5) That a~~] (2) A unit owner has a right to demand  
10 mediation to resolve disputes about the amount or  
11 validity of an association's regular assessment;  
12 provided that the unit owner immediately pays the  
13 regular assessment in full and keeps regular  
14 assessments current; [~~and~~]

15 [~~(6) That payment~~] (3) Payment in full of the regular  
16 assessment [~~does~~] shall not prevent the unit owner  
17 from contesting the regular assessment or receiving a  
18 refund of amounts not owed [✓]; and

19 (4) If the unit owner contests any attorney's fee and  
20 cost, penalty or fine, late fee, lien filing fee,  
21 special assessment not imposed on all members, or



1           other charges included in the assessment, except  
2           regular assessments, the unit owner may demand  
3           mediation as provided in subsection (g) prior to  
4           paying those charges.

5           (e) No unit owner shall withhold any regular assessment  
6           that is claimed by the association. Nothing in this section  
7 shall limit the rights of a unit owner to the protection of all  
8 fair debt collection procedures mandated under federal and state  
9 law.

10           ~~[(d)]~~ (f) A unit owner who pays an association the full  
11 amount of the regular assessment claimed by the association may  
12 file a claim against the association in court, including small  
13 claims court, or require the association to mediate under  
14 section 421J-13 to resolve any disputes concerning the amount or  
15 validity of the association's regular assessment claim. If the  
16 unit owner and the association are unable to resolve the dispute  
17 through mediation, either party may file for ~~[relief with a~~  
18 ~~court,]~~ arbitration; provided that a unit owner may only file  
19 for ~~[relief in court]~~ arbitration if all amounts claimed by the  
20 association as regular assessments are paid in full on or before  
21 the date of filing. If the unit owner fails to keep all



1 association regular assessments current during the [~~court~~  
2 hearing,] arbitration, the association may ask the [~~court~~]  
3 arbitrator to temporarily suspend the arbitration proceedings.  
4 If the unit owner pays all association regular assessments  
5 within thirty days of the date of suspension, the unit owner may  
6 ask the [~~court~~] arbitrator to recommence the proceedings. If  
7 the unit owner fails to pay all association regular assessments  
8 by the end of the thirty-day period, the association may ask the  
9 [~~court~~] arbitrator to dismiss the proceedings. The unit owner  
10 shall be entitled to a refund of any amounts paid as regular  
11 assessments to the association that are not owed.

12 (g) A unit owner who contests the amount of any attorneys'  
13 fees and costs, penalties or fines, late fees, lien filing fees,  
14 special assessments not imposed on all members, or any other  
15 charges, except regular assessments, may make a demand in  
16 writing for mediation on the validity of those charges. The  
17 unit owner has thirty days from the date of the written  
18 statement requested pursuant to subsection (d) to file demand  
19 for mediation on the disputed charges, other than regular  
20 assessments. If the unit owner fails to file for mediation  
21 within thirty days of the date of the written statement



1 requested pursuant to subsection (d), the association may  
2 proceed with the collection of the charges. If the unit owner  
3 makes a request for mediation within thirty days, the  
4 association shall be prohibited from attempting to collect any  
5 of the disputed charges until the association has participated  
6 in the mediation. The mediation shall be completed within sixty  
7 days of the unit owner's request for mediation; provided that if  
8 the mediation is not completed within sixty days or the parties  
9 are unable to resolve the dispute by mediation, the association  
10 may proceed with collection of all amounts due from the unit  
11 owner for attorneys' fees and costs, penalties or fines, late  
12 fees, lien filing fees, special assessments not imposed on all  
13 members, or any other charges.

14 [~~e~~] (h) In conjunction with or as an alternative to  
15 foreclosure proceedings under subsection (a), where a unit is  
16 owner-occupied, the association may authorize its managing agent  
17 or board, after sixty days written notice to the unit owner of  
18 the unit's share of the assessments, to terminate the delinquent  
19 unit's access to the common areas and cease supplying a  
20 delinquent unit with any and all services normally supplied or  
21 paid for by the association. Any terminated services and





1 privileges shall be restored upon payment of all delinquent  
2 assessments, but need not be restored until payment in full is  
3 received.

4 ~~[(f)]~~ (i) Before the board or managing agent may take the  
5 actions permitted under subsection ~~[(e)7]~~ (h), the board shall  
6 adopt a written policy providing for such actions and have the  
7 policy approved by a majority vote of the unit owners, as  
8 provided in the association documents, who are present in person  
9 or by proxy or as otherwise permitted by the association  
10 documents, at an annual or special meeting of the association or  
11 by the written consent of a voting interest equal to a quorum of  
12 the unit owners unless the association documents already permit  
13 the process.

14 ~~[(g)]~~ (j) Subject to this subsection and subsection ~~[(h)7]~~  
15 (k), the board may specially assess the amount of the unpaid  
16 regular ~~[periodic]~~ assessments for assessments against a person  
17 who, in a judicial or nonjudicial power of sale foreclosure,  
18 purchases a delinquent unit; provided that:

19 (1) A purchaser who holds a mortgage on a delinquent unit,  
20 which mortgage is not subordinate to the priority of  
21 lien by the association, and who acquires the



1 delinquent unit through a judicial or nonjudicial  
2 foreclosure proceeding, including purchasing the  
3 delinquent unit at a foreclosure auction, shall not be  
4 obligated to make, nor be liable for, payment of the  
5 special assessment as provided for under this  
6 subsection; and

7 (2) A person who subsequently purchases the delinquent  
8 unit from the mortgagee referred to in paragraph (1)  
9 shall be obligated to make, and shall be liable for,  
10 payment of the special assessment provided for under  
11 this subsection; and provided further that the  
12 mortgagee or subsequent purchaser may require the  
13 association to provide, at no charge, a notice of the  
14 association's intent to claim a lien against the  
15 delinquent unit for the amount of the special  
16 assessment, prior to the subsequent purchaser's  
17 acquisition of title to the delinquent unit. The  
18 notice shall state the amount of the special  
19 assessment, how that amount was calculated, and the  
20 legal description of the unit.



1           ~~[(h)]~~ (k) The amount of the special assessment assessed  
 2 under subsection ~~[(g)]~~ (j) shall not exceed the total amount of  
 3 unpaid regular ~~[periodic]~~ assessments that were assessed during  
 4 the six months immediately preceding the completion of the  
 5 judicial or nonjudicial power of sale foreclosure.

6           ~~[(i)]~~ (l) For purposes of ~~[subsections (g) and (h),]~~ this  
 7 section, the following definitions shall apply, unless the  
 8 context requires otherwise:

9           "Completion" means:

- 10           (1) In a nonjudicial power of sale foreclosure, when the
- 11                 affidavit required under section 667-33 is recorded;
- 12                 and
- 13           (2) In a judicial foreclosure, when a purchaser is deemed
- 14                 to acquire title pursuant to subsection (b).

15           "Regular ~~[periodic]~~ assessments" does not include:

- 16           (1) Any special assessment, except for a special
- 17                 assessment imposed on all units as part of a budget
- 18                 adopted pursuant to the association documents;
- 19           (2) Late charges, fines, or penalties;
- 20           (3) Interest assessed by the association;
- 21           (4) Any lien arising out of the assessment; or



1           (5) Any fees or costs related to the collection or  
2 enforcement of the assessment, including attorneys' fees and  
3 court costs."

4           6. By amending section 421J-13 to read:

5           "~~[f] §421J-13 [f] Mediation of disputes. [(a) At the~~  
6 ~~request of any party, any dispute concerning or involving one or~~  
7 ~~more members and an association, its board of directors,~~  
8 ~~managing agent, manager, or one or more other members relating~~  
9 ~~to the interpretation, application, or enforcement of this~~  
10 ~~chapter or the association documents, shall first be submitted~~  
11 ~~to mediation.~~

12           ~~(b) Nothing in subsection (a) shall be interpreted to~~  
13 ~~mandate the mediation of any dispute involving:~~

14           ~~(1) Actions seeking equitable relief involving threatened~~  
15 ~~property damage or the health or safety of association~~  
16 ~~members or any other person;~~

17           ~~(2) Actions to collect assessments;~~

18           ~~(3) Personal injury claims; or~~

19           ~~(4) Actions against an association, a board of directors,~~  
20 ~~or one or more directors, officers, agents, employees,~~  
21 ~~or other persons for amounts in excess of \$2,500 if~~



1           ~~insurance coverage under a policy of insurance~~  
 2           ~~procured by the association or its board of directors~~  
 3           ~~would be unavailable for defense or judgment because~~  
 4           ~~mediation was pursued.~~

5           ~~(c) If any mediation under this section is not completed~~  
 6           ~~within two months from commencement, no further mediation shall~~  
 7           ~~be required unless agreed to by the association and the member.]~~

8           (a) The mediation of a dispute between a member and the board,  
 9           member and the managing agent, board members and the board, or  
 10           directors and managing agents and the board shall be mandatory  
 11           upon written request to the other party when:

12           (1) The dispute involves the interpretation or enforcement  
 13           of the association's declaration, bylaws, or similar  
 14           organizational documents;

15           (2) The dispute falls outside the scope of subsection (b);

16           (3) The parties have not already mediated the same or a  
 17           substantially similar dispute; and

18           (4) An action or an arbitration concerning the dispute has  
 19           not been commenced.

20           (b) The mediation of a dispute between a member and the  
 21           board, member and the managing agent, board members and the



1 board, or directors and managing agents and the board shall not  
2 be mandatory when the dispute involves:

3 (1) Threatened property damage or the health or safety of  
4 members or any other person;

5 (2) Assessments;

6 (3) Personal injury claims; or

7 (4) Matters that would affect the availability of any  
8 coverage pursuant to an insurance policy obtained by  
9 or on behalf of an association.

10 (c) If evaluative mediation is requested in writing by one  
11 of the parties pursuant to subsection (a), the other party  
12 cannot choose to do facilitative mediation instead, and any  
13 attempt to do so shall be treated as a rejection to mediate.

14 (d) A member or an association may apply to the circuit  
15 court in the judicial circuit where the member's property is  
16 located for an order compelling mediation only when:

17 (1) Mediation of the dispute is mandatory pursuant to  
18 subsection (a);

19 (2) A written request for mediation has been delivered to  
20 and received by the other party; and



1       (3) The parties have not agreed to a mediator and a  
2       mediation date within forty-five days after a party  
3       receives a written request for mediation.

4       (e) Any application made to the circuit court pursuant to  
5       subsection (d) shall be made and heard in a summary manner and  
6       in accordance with procedures for the making and hearing of  
7       motions. The prevailing party shall be awarded its attorneys'  
8       fees and costs in an amount not to exceed \$1,500.

9       (f) Each party to a mediation shall bear the attorneys'  
10      fees, costs, and other expenses of preparing for and  
11      participating in mediation incurred by the party, unless  
12      otherwise specified in:

13      (1) A written agreement providing otherwise that is signed  
14      by the parties;

15      (2) An order of a court in connection with the final  
16      disposition of a claim that was submitted to  
17      mediation;

18      (3) An award of an arbitrator in connection with the final  
19      disposition of a claim that was submitted to  
20      mediation; or



1       (4) An order of the circuit court in connection with  
 2           compelled mediation in accordance with subsections (d)  
 3           and (e).

4       (g) A court or an arbitrator with jurisdiction may  
 5       consider a timely request to stay any action or proceeding  
 6       concerning a dispute that would be subject to mediation pursuant  
 7       to subsection (a) in the absence of the action or proceeding,  
 8       and refer the matter to mediation; provided that:

9       (1) The court or arbitrator determines that the request is  
 10       made in good faith and a stay would not be prejudicial  
 11       to any party; and

12       (2) No stay shall exceed a period of ninety days."

13       7. By adding two new parts to be appropriately designated  
 14 and to read:

15                   **"PART II. ALTERNATIVE DISPUTE RESOLUTION**

16       **§421J-Q Arbitration.** (a) At the request of any party,  
 17 any dispute concerning or involving one or more members and an  
 18 association, its board, managing agent, or one or more other  
 19 members relating to the interpretation, application, or  
 20 enforcement of this chapter or the association's declaration,  
 21 bylaws, or similar organizational documents adopted in





1 accordance with its bylaws shall be submitted to arbitration.  
2 The arbitration shall be conducted, unless otherwise agreed by  
3 the parties, in accordance with the rules adopted by the  
4 commission and of chapter 658A; provided that the rules of the  
5 arbitration service conducting the arbitration shall be used  
6 until the commission adopts its rules; provided further that  
7 where any arbitration rule conflicts with chapter 658A, chapter  
8 658A shall prevail; and provided further that notwithstanding  
9 any rule to the contrary, the arbitrator shall conduct the  
10 proceedings in a manner which affords substantial justice to all  
11 parties. The arbitrator shall be bound by rules of substantive  
12 law and shall not be bound by rules of evidence, whether or not  
13 set out by statute, except for provisions relating to privileged  
14 communications. The arbitrator shall permit discovery as  
15 provided for in the Hawaii rules of civil procedure; provided  
16 that the arbitrator may restrict the scope of such discovery for  
17 good cause to avoid excessive delay and costs to the parties or  
18 the arbitrator may refer any matter involving discovery to the  
19 circuit court for disposition in accordance with the Hawaii  
20 rules of civil procedure then in effect.



1 (b) Nothing in subsection (a) shall be interpreted to  
2 mandate the arbitration of any dispute involving:

3 (1) The real estate commission;

4 (2) The mortgagee of a mortgage of record;

5 (3) Actions seeking equitable relief involving threatened  
6 property damage or the health or safety of unit owners  
7 or any other person;

8 (4) Actions to collect assessments which are liens or  
9 subject to foreclosure; provided that a unit owner who  
10 pays the full amount of an assessment and fulfills the  
11 requirements of section 421J-10.5 shall have the right  
12 to demand arbitration of the owner's dispute,  
13 including a dispute about the amount and validity of  
14 the assessment;

15 (5) Personal injury claims;

16 (6) Actions for amounts in excess of \$2,500 against an  
17 association, a board, or one or more directors,  
18 officers, agents, employees, or other persons, if  
19 insurance coverage under a policy or policies procured  
20 by the association or its board would be unavailable  
21 because action by arbitration was pursued; or



1           (7) Any other cases which are determined, as provided in  
2           subsection (c), to be unsuitable for disposition by  
3           arbitration.

4           (c) At any time within twenty days of being served with a  
5           written demand for arbitration, any party so served may apply to  
6           the circuit court in the judicial circuit in which the member's  
7           property is located for a determination that the subject matter  
8           of the dispute is unsuitable for disposition by arbitration.

9           In determining whether the subject matter of a dispute is  
10          unsuitable for disposition by arbitration, a court may consider:

11          (1) The magnitude of the potential award, or any issue of  
12          broad public concern raised by the subject matter  
13          underlying the dispute;

14          (2) Problems referred to the court where court regulated  
15          discovery is necessary;

16          (3) The fact that the matter in dispute is a reasonable or  
17          necessary issue to be resolved in pending litigation  
18          and involves other matters not covered by or related  
19          to this chapter;



1 (4) The fact that the matter to be arbitrated is only part  
2 of a dispute involving other parties or issues which  
3 are not subject to arbitration under this section; and

4 (5) Any matters of dispute where disposition by  
5 arbitration, in the absence of complete judicial  
6 review, would not afford substantial justice to one or  
7 more of the parties.

8 Any such application to the circuit court shall be made and  
9 heard in a summary manner and in accordance with procedures for  
10 the making and hearing of motions. The prevailing party shall  
11 be awarded its attorneys' fees and costs in an amount not to  
12 exceed \$200.

13 (d) In the event of a dispute as to whether a claim shall  
14 be excluded from mandatory arbitration under subsection (b)(7),  
15 any party to an arbitration may file a complaint for declaratory  
16 relief against the involved insurer or insurers for a  
17 determination of whether insurance coverage is unavailable due  
18 to the pursuit of action by arbitration. The complaint shall be  
19 filed with the circuit court in the judicial circuit in which  
20 the member's property is located. The insurer or insurers shall  
21 file an answer to the complaint within twenty days of the date



1 of service of the complaint and the issue shall be disposed of  
2 by the circuit court at a hearing to be held at the earliest  
3 available date; provided that the hearing shall not be held  
4 within twenty days from the date of service of the complaint  
5 upon the insurer or insurers.

6 (e) Notwithstanding any provision in this chapter to the  
7 contrary, the declaration, or the bylaws, the award of any  
8 costs, expenses, and legal fees by the arbitrator shall be in  
9 the sole discretion of the arbitrator and the determination of  
10 costs, expenses, and legal fees shall be binding upon all  
11 parties.

12 (f) The award of the arbitrator shall be in writing and  
13 acknowledged or proved in like manner as a deed for the  
14 conveyance of real estate, and shall be served by the arbitrator  
15 on each of the parties to the arbitration, personally or by  
16 registered or certified mail. At any time within one year after  
17 the award is made and served, any party to the arbitration may  
18 apply to the circuit court of the judicial circuit in which the  
19 member's property is located for an order confirming the award.  
20 The court shall grant the order confirming the award pursuant to  
21 section 658A-22, unless the award is vacated, modified, or



1 corrected, as provided in sections 658A-20, 658A-23, and  
2 658A-24, or a trial de novo is demanded under subsection (h) and  
3 section 421J-R, or the award is successfully appealed under  
4 subsection (h) and section 421J-R. The record shall be filed  
5 with the motion to confirm award, and notice of the motion shall  
6 be served upon each other party or their respective attorneys in  
7 the manner required for service of notice of a motion.

8 (g) Findings of fact and conclusions of law, as requested  
9 by any party prior to the arbitration hearing, shall be promptly  
10 provided to the requesting party upon payment of the reasonable  
11 cost thereof.

12 (h) Any party to an arbitration under this section may  
13 apply to vacate, modify, or correct the arbitration award for  
14 the grounds set out in chapter 658A. All reasonable costs,  
15 expenses, and attorneys' fees on appeal shall be charged to the  
16 nonprevailing party.

17 **§421J-R Trial de novo and appeal.** (a) The submission of  
18 any dispute to an arbitration under section 421J-Q shall in no  
19 way limit or abridge the right of any party to a trial de novo.

20 (b) Written demand for a trial de novo by any party  
21 desiring a trial de novo shall be made upon the other parties



1 within ten days after service of the arbitration award upon all  
2 parties and the trial de novo shall be filed in circuit court  
3 within thirty days of the written demand. Failure to meet these  
4 deadlines shall preclude a party from demanding a trial de novo.

5 (c) The award of arbitration shall not be made known to  
6 the trier of fact at a trial de novo.

7 (d) In any trial de novo demanded under this section, if  
8 the party demanding a trial de novo does not prevail at trial,  
9 the party demanding the trial de novo shall be charged with all  
10 reasonable costs, expenses, and attorneys' fees of the trial.  
11 When there is more than one party on one or both sides of an  
12 action, or more than one issue in dispute, the court shall  
13 allocate its award of costs, expenses, and attorneys' fees among  
14 the prevailing parties and tax such fees against those  
15 nonprevailing parties who demanded a trial de novo in accordance  
16 with the principles of equity.

17 **PART III. ADMINISTRATION**

18 **§421J-S General powers and duties of real estate**

19 **commission.** (a) The commission may:

- 20 (1) Adopt, amend, and repeal rules pursuant to chapter 91;  
21 (2) Assess fees;



1           (3) Conduct investigations, issue cease and desist orders,  
2           and bring an action in any court of competent  
3           jurisdiction to enjoin persons, consistent with and in  
4           furtherance of the objectives of this chapter;

5           (4) Prescribe forms and procedures for submitting  
6           information to the commission; and

7           (5) Prescribe the form and content of any documents  
8           required to be submitted to the commission by this  
9           chapter.

10          (b) If it appears that any person has engaged, is  
11          engaging, or is about to engage in any act or practice in  
12          violation of this chapter or any of the commission's related  
13          rules or orders, the commission, without prior administrative  
14          proceedings, may maintain an action in the appropriate court to  
15          enjoin that act or practice or for other appropriate relief.

16          The commission shall not be required to post a bond or to prove  
17          that no adequate remedy at law exists in order to maintain the  
18          action.

19          (c) The commission may exercise its powers in any action  
20          involving the powers or responsibilities of a developer under  
21          this chapter.





1 (d) The commission may accept grants-in-aid from any  
2 governmental source and may contract with agencies charged with  
3 similar functions in this or other jurisdictions, in furtherance  
4 of the objectives of this chapter.

5 (e) The commission may cooperate with agencies performing  
6 similar functions in this and other jurisdictions to develop  
7 uniform filing procedures and forms, uniform disclosure  
8 standards, and uniform administrative practices, and may develop  
9 information that may be useful in the discharge of the  
10 commission's duties.

11 (f) The commission, by rule, may require bonding at  
12 appropriate levels over time, escrow of portions of sales  
13 proceeds, or other safeguards to assure completion of all  
14 improvements that a developer is obligated to complete, or has  
15 represented that it will complete.

16 **§421J-T Investigatory powers.** If the commission has  
17 reason to believe that any person is violating or has violated  
18 this chapter, or the rules of the commission adopted pursuant  
19 thereto, the commission may conduct an investigation of the  
20 matter and examine the books, accounts, contracts, records, and  
21 files of the association, the board of directors, the managing



1 agent, the real estate broker, the real estate salesperson, the  
2 purchaser, or the developer. For the purposes of this  
3 examination, the developer and the real estate broker shall keep  
4 and maintain records of all sales transactions and of the funds  
5 received by the developer and the real estate broker pursuant  
6 thereto, and shall make the records accessible to the commission  
7 upon reasonable notice and demand.

8       **§421J-U Cease and desist orders.** In addition to its  
9 authority under section 421J-V, whenever the commission has  
10 reason to believe that any person is violating or has violated  
11 this chapter, or the rules of the commission adopted pursuant  
12 thereto, it shall issue and serve upon the person a complaint  
13 stating its charges in that respect and containing a notice of a  
14 hearing at a stated place and upon a day at least thirty days  
15 after the service of the complaint. The person served has the  
16 right to appear at the place and time specified and show cause  
17 why an order should not be entered by the commission requiring  
18 the person to cease and desist from the violation of the law or  
19 the rules of the commission charged in the complaint. If, upon  
20 the hearing, the commission is of the opinion that this chapter  
21 or the rules of the commission have been or are being violated,



1 it shall make a report in writing stating its findings as to the  
2 facts and shall issue and cause to be served on the person an  
3 order requiring the person to cease and desist from the  
4 violations. The person, within thirty days after service upon  
5 the person of the report or order, may obtain a review thereof  
6 in the appropriate circuit court.

7       **§421J-V Power to enjoin.** Whenever the commission believes  
8 from satisfactory evidence that any person has violated this  
9 chapter or the rules of the commission adopted pursuant to this  
10 chapter, it may conduct an investigation on the matter and bring  
11 an action in the name of the people of the State in any court of  
12 competent jurisdiction against the person to enjoin the person  
13 from continuing the violation or engaging therein or doing any  
14 act or acts in furtherance thereof.

15       **§421J-W Penalties.** (a) Any person who violates or fails  
16 to comply with this chapter is guilty of a misdemeanor and shall  
17 be punished by a fine not exceeding \$10,000 or by imprisonment  
18 for a term not exceeding one year, or both. Any person who  
19 violates or fails, omits, or neglects to obey, observe, or  
20 comply with any rule, order, decision, demand, or requirement of



1 the commission under this chapter shall be punished by a fine  
2 not exceeding \$10,000.

3 (b) Any person who violates any provision of this chapter  
4 or the rules of the commission adopted pursuant thereto shall  
5 also be subject to a civil penalty not exceeding \$10,000 for any  
6 violation. Each violation shall constitute a separate offense.

7 **§421J-X Association; registration.** (a) Each association  
8 shall:

9 (1) Secure and maintain a fidelity bond in an amount for  
10 the coverage and terms as required by section 421J-K.  
11 An association shall act promptly and diligently to  
12 recover from the fidelity bond required by this  
13 section. An association that is unable to obtain a  
14 fidelity bond may seek approval for an exemption, a  
15 deductible, or a bond alternative from the commission.  
16 Current evidence of a fidelity bond includes a  
17 certification statement from an insurance company  
18 registered with the department of commerce and  
19 consumer affairs certifying that the bond is in effect  
20 and meets the requirement of this section and the  
21 rules adopted by the commission;



1           (2) Register with the commission through approval of a  
2           completed registration application, payment of fees,  
3           and submission of any other additional information set  
4           forth by the commission. The registration shall be  
5           for a biennial period with termination on June 30 of  
6           each odd-numbered year. The commission shall  
7           prescribe a deadline date prior to the termination  
8           date for the submission of a completed reregistration  
9           application, payment of fees, and any other additional  
10          information set forth by the commission. Any project  
11          or association that has not met the submission  
12          requirements by the deadline date shall be considered  
13          a new applicant for registration and be subject to  
14          initial registration requirements. Any new project or  
15          association shall register within thirty days of the  
16          association's first meeting. If the association has  
17          not held its first meeting and it is at least one year  
18          after the recordation of the purchase of the first  
19          unit in the project, the developer or developer's  
20          affiliate or the managing agent shall register on  
21          behalf of the association and shall comply with this



1 section, except for the fidelity bond requirement for  
2 associations required by section 421J-K. The public  
3 information required to be submitted on any completed  
4 application form shall include but not be limited to  
5 evidence of and information on fidelity bond coverage,  
6 names and positions of the officers of the  
7 association, the name of the association's managing  
8 agent, if any, the street and the postal address of  
9 the planned community association, and the name and  
10 current mailing address of a designated officer of the  
11 association where the officer can be contacted  
12 directly;

- 13 (3) Pay a nonrefundable application fee and, upon  
14 approval, an initial registration fee and a  
15 reregistration fee upon reregistration as provided in  
16 rules adopted by the director of commerce and consumer  
17 affairs pursuant to chapter 91;
- 18 (4) Register or reregister and pay the required fees by  
19 the due date. Failure to register or reregister or  
20 pay the required fees by the due date shall result in



1           the assessment of a penalty equal to the amount of the  
2           registration or reregistration fee; and

3           (5) Report promptly in writing to the commission any  
4           changes to the information contained on the  
5           registration or reregistration application or any  
6           other documents required by the commission. Failure  
7           to do so may result in termination of registration and  
8           subject the project or the association to initial  
9           registration requirements.

10          (b) The commission may reject or terminate any  
11         registration submitted by a project or an association that fails  
12         to comply with this section. Any association that fails to  
13         register as required by this section or whose registration is  
14         rejected or terminated shall not have standing to maintain any  
15         action or proceeding in the courts of this State until it  
16         registers. The failure of an association to register, or  
17         rejection or termination of its registration, shall not impair  
18         the validity of any contract or act of the association nor  
19         prevent the association from defending any action or proceeding  
20         in any court in this State."




1 SECTION 2. This Act does not affect rights and duties that  
2 have matured, penalties that were incurred, and proceedings that  
3 were begun before its effective date.

4 SECTION 3. Statutory material to be repealed is bracketed  
5 and stricken. New statutory material is underscored.

6 SECTION 4. This Act shall take effect on January 1, 2020.

7

INTRODUCED BY:  \_\_\_\_\_

JAN 18 2019





# H.B. NO. 638

**Report Title:**

Planned Community Associations

**Description:**

Specifies the powers of a planned community association and its board. Inserts similar provisions concerning governance and documents as are provided to condominium associations. Specifies alternative dispute resolution procedures. Specifies the Real Estate Commission as the regulatory entity.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*



## Testimony of the Real Estate Commission

Before the  
House Committee on Consumer Protection and Commerce  
Friday, February 1, 2019  
2:00 p.m.  
State Capitol, Conference Room 329

### On the following measure: H.B. 638, RELATING TO PLANNED COMMUNITY ASSOCIATIONS

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 opposes this bill.

The purposes of this bill are to specify: (1) the powers of a planned community association and its board and inserts similar provisions concerning governance and documents as are provided to condominium associations; (2) alternative dispute resolution procedures; and (3) the Commission as the regulatory entity. Currently, planned community associations exist as originally envisioned as self-enforced and self-governed entities.

The Commission objects to this bill for the following reasons:

- A new regulatory measure requires a sunrise review by the Auditor. This bill appears to propose a new regulatory measure, as this bill would regulate a new class of unregulated activity: planned community associations. Presently, and as originally intended in 1997, planned community associations are self-governed. The Commission believes this bill is premature, as it has not undergone the required analysis by the Auditor, pursuant to Hawaii Revised Statutes (HRS) section 26H-6, which requires that all “new regulatory measures being considered for enactment that, if enacted, would subject unregulated professions and vocations to licensing **or other regulatory controls** shall be referred to the auditor for analysis” (emphasis added).
- The proposed measure would require significant resources to implement. The implementation of an additional area of probable registration would adversely impact the Commission’s limited resources during these difficult

economic times, as well as its priorities and program of work. It is currently unknown how many associations are in existence and what types of issues arise from them. The Commission's operating funds are specifically dedicated to fund those programs it was designed to be used for. Therefore, if a new regulatory area is created, a new source of revenue must be created to fund its operations for operating and personnel costs.

For these reasons, the Commission opposes the passage of H.B. 638 and recommends a sunrise review by the Auditor. Thank you for the opportunity to testify on this bill.

**HB-638**

Submitted on: 1/30/2019 9:37:35 AM

Testimony for CPC on 2/1/2019 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Richard Emery	Associa	Comments	No

Comments:

We support the fundamental concept to improve HRS 421J. Additional work is needed within the industry to discuss the best approach.

**HB-638**

Submitted on: 1/30/2019 6:59:08 PM

Testimony for CPC on 2/1/2019 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mark McKellar	Law Offices of Mark K. McKellar, LLLC	Oppose	No

Comments:

RE: H.B. 638

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

I OPPOSE H.B. 638, which would make many changes to Chapter 421J, the Planned Community Association Act. This measure includes many provisions from Chapter 514B, the Condominium Property Act, and most of this measure is verbatim from Chapter 514B. It is not unheard of to have a uniform statutory scheme for all common interest communities as some states have adopted the Uniform Common Interest Ownership Act, or some form of it. See <https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/UniformActs/Pages/default.aspx>. However, planned community associations and condominium associations in Hawaii have unique histories and governance structures. A wide-sweeping imposition of provisions from Chapter 514B on planned community associations, without sufficient review and analysis of the effects of doing so, is likely to create serious issues and confusion.

Unlike planned community associations, condominium associations in Hawaii have long been governed pursuant to a statutory scheme. In fact, authorities have recognized Hawaii as “the first state to enact statutory provisions enabling the creation of condominiums.” *State Sav. & Loan Ass'n v. Kauaian Dev. Co.*, 50 Haw. 540, 546, 445 P.2d 109, 115 (1968). Planned community associations are not “creatures of statute,” and “are primarily creatures of common law.” *Lee v. Puamana Cmty. Ass'n*, 109 Hawai'i 561, 575, 128 P.3d 874, 888 (2006). Planned community associations are also governed by their governing documents and carry out responsibilities which are defined in their governing documents (e.g, maintenance of common areas, regulation of design and architectural schemes, enforcing covenants, and collecting unpaid assessments).

In 1997, the Legislature passed HRS Chapter 421J, which sets forth a minimal scheme of governance for planned community associations. The basic framework of Chapter 421J was and still is reasonable because there are many different types of planned community associations. Many planned community associations include layers of sub-associations, such as other planned community associations, condominium associations, resort associations, merchant associations, and associations which manage facilities that serve the community. For some planned community associations, assessments are collected directly from owners, whereas others collect assessments directly from a sub-association. In addition, planned community associations own common areas (whereas members of condominium associations usually have an undivided interest in the common elements). See Joyce Y. Neeley, *Community Associations*, Hawaii Real Estate Law Manual, 2: 10-1 (Deborah Macer Chin, ed., 2010).

A verbatim overlay of sections from Chapter 514B to Chapter 421J makes little or no sense for many planned community associations. The issues presented by this measure can be complex, and it is impossible to predict how this measure will affect planned community associations without a careful review. For example, it would make no sense to require planned community associations to obtain the types and levels of insurance set forth in Section 514B-143, HRS (which this measure would do, if passed). This makes no sense because, for many planned community associations, lots and single-family dwellings are owned by individual association members. In addition, this measure provides that planned community associations may regulate the use or behavior in units by rules and regulations if that behavior: 1) violates the declaration or bylaws, or 2) unreasonably interferes with the use and enjoyment of other units or the common areas by other unit owners. However, many planned community associations do not impose regulations concerning the behavior of members inside their units (which are often single family dwellings). This measure also assumes that planned community associations are managed by managing agents. However, many planned community associations are self-managed.

This measure will also require that planned community associations participate in arbitration of disputes regarding an association's "regular assessment claim." Mandatory arbitration of claims for collection of assessments will be costlier for all parties involved. For some planned community associations, assessments can be as low as \$25.00 each month, which means that assessment delinquencies can be relatively low when compared to condominium associations. For a dispute to be arbitrated, the parties will have to pay the arbitrator's fees as well as administrative fees – which fees are usually much higher than the cost of filing a lawsuit in the District Courts of the State of Hawaii. Unlike Court fees, arbitration fees can easily exceed the

assessment debt in most cases, and as a result, this measure could have the effect of making collection actions costlier for all parties involved.

This measure should not be passed without careful review of every provision by various stakeholders. For instance, before changes of this magnitude are made, they should be reviewed, vetted and approved by a task force, which is what happened with Chapter 514B.

Respectfully submitted,

Mark McKellar

**HB-638**

Submitted on: 1/30/2019 6:38:01 PM

Testimony for CPC on 2/1/2019 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Paul A. Ireland Koftinow	Individual	Oppose	No

Comments:

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

I OPPOSE H.B. 638, which would make many changes to Chapter 421J, the Planned Community Association Act. This measure includes many provisions from Chapter 514B, the Condominium Property Act, and most of this measure is verbatim from Chapter 514B. It is not unheard of to have a uniform statutory scheme for all common interest communities as some states have adopted the Uniform Common Interest Ownership Act, or some form of it. See <https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/UniformActs/Pages/default.aspx>. However, planned community associations and condominium associations in Hawaii have unique histories and governance structures. A wide-sweeping imposition of provisions from Chapter 514B on planned community associations, without sufficient review and analysis of the effects of doing so, is likely to create serious issues and confusion.

Unlike planned community associations, condominium associations in Hawaii have long been governed pursuant to a statutory scheme. In fact, authorities have recognized Hawaii as “the first state to enact statutory provisions enabling the creation of condominiums.” *State Sav. & Loan Ass’n v. Kauaian Dev. Co.*, 50 Haw. 540, 546, 445 P.2d 109, 115 (1968). Planned community associations are not “creatures of statute,” and “are primarily creatures of common law.” *Lee v. Puamana Cmty. Ass’n*, 109 Hawai’i 561, 575, 128 P.3d 874, 888 (2006). Planned community associations are also governed by their governing documents and carry out responsibilities which are defined in their governing documents (e.g, maintenance of common areas, regulation of design and architectural schemes, enforcing covenants, and collecting unpaid assessments).

In 1997, the Legislature passed HRS Chapter 421J, which sets forth a minimal scheme of governance for planned community associations. The basic framework of Chapter 421J was and still is reasonable because there are many different types of planned community associations. Many planned community associations include layers of sub-associations, such as other planned community associations, condominium associations, resort associations, merchant associations, and associations which manage facilities that serve the community. For some planned community associations,



assessments are collected directly from owners, whereas others collect assessments directly from a sub-association. In addition, planned community associations own common areas (whereas members of condominium associations usually have an undivided interest in the common elements). See Joyce Y. Neeley, *Community Associations*, Hawaii Real Estate Law Manual, 2: 10-1 (Deborah Macer Chin, ed., 2010).

A verbatim overlay of sections from Chapter 514B to Chapter 421J makes little or no sense for many planned community associations. The issues presented by this measure can be complex, and it is impossible to predict how this measure will affect planned community associations without a careful review. For example, it would make no sense to require planned community associations to obtain the types and levels of insurance set forth in Section 514B-143, HRS (which this measure would do, if passed). This makes no sense because, for many planned community associations, lots and single-family dwellings are owned by individual association members. In addition, this measure provides that planned community associations may regulate the use or behavior in units by rules and regulations if that behavior: 1) violates the declaration or bylaws, or 2) unreasonably interferes with the use and enjoyment of other units or the common areas by other unit owners. However, many planned community associations do not impose regulations concerning the behavior of members inside their units (which are often single family dwellings). This measure also assumes that planned community associations are managed by managing agents. However, many planned community associations are self-managed.

This measure will also require that planned community associations participate in arbitration of disputes regarding an association's "regular assessment claim." Mandatory arbitration of claims for collection of assessments will be costlier for all parties involved. For some planned community associations, assessments can be as low as \$25.00 each month, which means that assessment delinquencies can be relatively low when compared to condominium associations. For a dispute to be arbitrated, the parties will have to pay the arbitrator's fees as well as administrative fees – which fees are usually much higher than the cost of filing a lawsuit in the District Courts of the State of Hawaii. Unlike Court fees, arbitration fees can easily exceed the assessment debt in most cases, and as a result, this measure could have the effect of making collection actions costlier for all parties involved.

This measure should not be passed without careful review of every provision by various stakeholders. For instance, before changes of this magnitude are made, they should be reviewed, vetted and approved by a task force, which is what happened with Chapter 514B.

Respectfully submitted,

Paul A. Ireland Koftinow

**HB-638**

Submitted on: 1/30/2019 6:59:04 PM

Testimony for CPC on 2/1/2019 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Julie Wassel	Individual	Oppose	No

Comments:

RE: H.B. 638

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

I OPPOSE H.B. 638, which would make many changes to Chapter 421J, the Planned Community Association Act. This measure includes many provisions from Chapter 514B, the Condominium Property Act, and most of this measure is verbatim from Chapter 514B. It is not unheard of to have a uniform statutory scheme for all common interest communities as some states have adopted the Uniform Common Interest Ownership Act, or some form of it.

See <https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/UniformActs/Pages/default.aspx>. However, planned community associations and condominium associations in Hawaii have unique histories and governance structures. A wide-sweeping imposition of provisions from Chapter 514B on planned community associations, without sufficient review and analysis of the effects of doing so, is likely to create serious issues and confusion.

Unlike planned community associations, condominium associations in Hawaii have long been governed pursuant to a statutory scheme. In fact, authorities have recognized Hawaii as “the first state to enact statutory provisions enabling the creation of condominiums.” *State Sav. & Loan Ass’n v. Kauaian Dev. Co.*, 50 Haw. 540, 546, 445 P.2d 109, 115 (1968). Planned community associations are not “creatures of statute,” and “are primarily creatures of common law.” *Lee v. Puamana Cmty. Ass’n*, 109 Hawai’i 561, 575, 128 P.3d 874, 888 (2006). Planned community associations are also governed by their governing documents and carry out responsibilities which are defined in their governing documents (e.g, maintenance of common areas, regulation of design and architectural schemes, enforcing covenants, and collecting unpaid assessments).

In 1997, the Legislature passed HRS Chapter 421J, which sets forth a minimal scheme of governance for planned community associations. The basic framework of Chapter 421J was and still is reasonable because there are many different types of planned community associations. Many planned community associations include layers of sub-associations, such as other planned community associations, condominium associations, resort associations, merchant associations, and associations which manage facilities that serve the community. For some planned community associations, assessments are collected directly from owners, whereas others collect assessments directly from a sub-association. In addition, planned community associations own common areas (whereas members of condominium associations usually have an undivided interest in the common elements). See Joyce Y. Neeley, *Community Associations*, Hawaii Real Estate Law Manual, 2: 10-1 (Deborah Macer Chin, ed., 2010).

A verbatim overlay of sections from Chapter 514B to Chapter 421J makes little or no sense for many planned community associations. The issues presented by this measure can be complex, and it is impossible to predict how this measure will affect planned community associations without a careful review. For example, it would make no sense to require planned community associations to obtain the types and levels of insurance set forth in Section 514B-143, HRS (which this measure would do, if passed). This makes no sense because, for many planned community associations, lots and single-family dwellings are owned by individual association members. In addition, this measure provides that planned community associations may regulate the use or behavior in units by rules and regulations if that behavior: 1) violates the declaration or bylaws, or 2) unreasonably interferes with the use and enjoyment of other units or the common areas by other unit owners. However, many planned community associations do not impose regulations concerning the behavior of members inside their units (which are often single family dwellings). This measure also assumes that planned community associations are managed by managing agents. However, many planned community associations are self-managed.

This measure will also require that planned community associations participate in arbitration of disputes regarding an association's "regular assessment claim." Mandatory arbitration of claims for collection of assessments will be costlier for all parties involved. For some planned community associations, assessments can be as low as \$25.00 each month, which means that assessment delinquencies can be relatively low when compared to condominium associations. For a dispute to be arbitrated, the parties will have to pay the arbitrator's fees as well as administrative fees – which fees are usually much higher than the cost of filing a lawsuit in the District Courts of the State of Hawaii. Unlike Court fees, arbitration fees can easily exceed the

assessment debt in most cases, and as a result, this measure could have the effect of making collection actions costlier for all parties involved.

This measure should not be passed without careful review of every provision by various stakeholders. For instance, before changes of this magnitude are made, they should be reviewed, vetted and approved by a task force, which is what happened with Chapter 514B.

Respectfully submitted, Julie Wassel

**HB-638**

Submitted on: 1/31/2019 11:52:53 AM

Testimony for CPC on 2/1/2019 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Lance S. Fujisaki	Individual	Oppose	No

Comments:

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

I OPPOSE H.B. 638 because the proposed amendments to Chapter 421J, the Planned Community Association Act, will create significant problems in the operation of planned community association ("PCAs"). This measure is essentially a crude cut and paste of many provisions from Chapter 514B, the Condominium Property Act. Provisions have been added without carefully considering whether the provisions are appropriate for planned communities. Moreover, the provision radically expands the exposure of directors, officers and employees of PCAs as well as

Although the concept of having a uniform statutory scheme for all common interest communities, including condominium projects and PCAs, is not unprecedented, changes to the statutory scheme of PCAs must be carefully reviewed and analyzed. This is not the case with this bill.

At the outset, it should be noted that PCAs are fundamentally different from condominium projects. Condominium projects are residential projects that include, in many cases, commercial space, such as retail, offices, restaurants and other businesses. PCAs are much more varied and complex. Examples of PCAs are Mililani Town Association, Villages of Kapolei Association, Ko Olina Community Association, and Wailea Community Association. Many PCAs include layers of sub-associations, such as other planned community associations, condominium associations, resort associations, merchant associations, resort hotels, and associations which manage facilities that serve the community. For example, Ko Olina Community Association includes Aulani, a Disney Resort and Spa, the Four Seasons resort, and other resort properties. Some PCAs collect assessments directly from owners, whereas others collect assessments directly from a sub-association. In addition, PCAs own common areas, while members of condominium associations usually have an undivided interest in the common elements. See Joyce Y. Neeley, Community Associations, Hawaii Real Estate Law Manual, 2: 10-1 (Deborah Macer Chin, ed., 2010).

Based on condominium registration, the Hawaii Real Estate Commission reports that there are approximately 170,000 units in condominium projects. 2017 Annual Report Real Estate Commission, Real Estate Branch, Professional and Vocational Licensing

Division, Department of Commerce and Consumer Affairs, State of Hawaii. I believe there are vastly more units in planned community associations. Thus, major changes to the law governing PCAs will have a substantial impact on the population.

The problems that will be created by this bill are impossible to fully predict without further study, however, there are several obvious concerns:

1. Section 421J-B(b) provides that PCAs may regulate the use or behavior in units by rules and regulations if that behavior: 1) violates the declaration or bylaws, or 2) unreasonably interferes with the use and enjoyment of other units or the common areas by other unit owners. While this is appropriate for high density condominium projects, it is very rare if not unheard of for planned community governing documents to authorize a PCA to impose regulations concerning the behavior of members inside their units (which are often single family dwellings). As a result, this measure will radically increase the power of PCAs to regulate behavior in ways the legislature probably does not intend.
2. Section 421J-B(e) will make it impossible for PCAs to borrow funds as it will require the approval of owners representing “fifty per cent of the common interest vote.” First, the concept of “common interest” comes from Chapter 514B and refers to the common interest of every owner in the common elements of a condominium project. The term “common interest” has no application to a planned community as the common area is owned by the association, not members. Thus, there is no “common interest” in planned communities and it will be impossible to satisfy this provision. Second, because PCAs have large membership roles, and members have a much less direct relationship with their PCA than condominium association, it is very difficult to persuade members to vote on anything. A 50% vote in a large association may require 7,500 or more votes. This will be impossible to obtain in nearly every PCA.
3. This measure assumes that PCAs are managed by managing agents. However, many PCAs are self-managed by employees of the PCA.
4. Section 421J-I(b) precludes PCA employees from selling or renting units in the planned community in which they are employed. While this prohibition may be relevant to condominium projects, it is inappropriate for planned communities that may have thousands of units. It is not unusual for PCA employees to reside in the same planned community that they work in. I am not aware of this causing a problem with PCAs.
5. It would make no sense to require PCAs to obtain the types and levels of insurance set forth in Section 514B-143, HRS (which this measure would do, if passed). This provision would also allow PCAs to force unit owners to purchase insurance, and to force place the insurance at the owner’s expense. This makes no sense because, for many PCAs, lots and single-family dwellings are owned by individual association members. There are no concerns about PCAs having to pay insurance deductibles due to plumbing leaks or other problems within individual units.

6. Section 421J-W(a) of this measure declares that the violation of Chapter 421J is a misdemeanor that shall be punished by a fine not exceeding \$10,000 or by imprisonment for a term not exceeding one year, or both. Violations of any requirement of the Real Estate Commission shall be punished by a fine not exceeding \$10,000. Although this provision is based upon § 514B-69, the penalties described in § 514B-69 are limited to violations of specific provisions of Chapter 514B. Section 421J-W(a) radically expands the concept in § 514B-69 by imposing criminal penalties on ALL violations of Chapter 421J.

7. Directors of PCAs are required to comply with the declaration of covenants, conditions and restrictions, by-laws, other governing documents, Robert's Rules of Order Newly Revised (11th Edition) and Chapter 414D (for incorporated PCAs). Inadvertent mistakes frequently happen. By operation of § 421J-C(a), any director who violates any of these authorities, in addition to Chapter 421J, may be subject to imprisonment or a substantial fine. This measure will essentially impose strict liability for violations of the statute, governing documents and other authorities.

8. Many PCAs find it difficult to persuade qualified members to serve on their boards. Directors are typically lay persons who donate hundreds of hours of service each year to their associations without remuneration performing a difficult and thankless job. By imposing criminal penalties for violating Chapter 421J and other authorities, it is doubtful that any person of sound mind would want to serve on a PCA board knowing that each mistake may cause them to be imprisoned or pay a fine of up to \$10,000. Without qualified directors, individual members in PCAs may be harmed as their PCA will not be able to discharge its duties.

9. This measure will also require that PCAs participate in arbitration of disputes regarding an association's "regular assessment claim." Mandatory arbitration of claims for collection of assessments will be costlier for all parties involved. For some PCAs, assessments can be as low as \$25.00 each month, which means that assessment delinquencies can be relatively low when compared to condominium associations. For a dispute to be arbitrated, the parties will have to pay the arbitrator's fees as well as administrative fees - which fees are usually much higher than the cost of filing a lawsuit in the District Courts of the State of Hawaii. Unlike Court fees, arbitration fees can easily exceed the assessment debt in most cases, and as a result, this measure could have the effect of making collection actions costlier for all parties involved. In addition, the statute does not address how arbitrations will be handled if a member is not able to afford arbitration, and unlike the situation for condominium associations, there is no program by the state to subsidize arbitrations

This measure should not be passed without careful review of every provision by various stakeholders. There are probably countless other problem provisions that are not as obviously spotted as those listed above. Before changes of this magnitude are made, they should be reviewed, vetted and approved by a task force, which is what happened with Chapter 514B.



Respectfully submitted,

Lance S. Fujisaki

**HB-638**

Submitted on: 1/31/2019 12:34:37 PM

Testimony for CPC on 2/1/2019 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Philip Nerney	Individual	Comments	No

Comments:

While an interest in harmonizing the law of planned community associations with the law of condominiums is understandable, caution is appropriate. Planned community associations ("PCAs") have traditionally been creatures of the common law, while condominiums are creatures of statute. They have distinct positions in society.

Harmonizing certain *procedural* aspects of governing PCAs with condominium law makes sense. A more uniform approach to meeting notices, proxies and the like may have merit.

Legislation should protect self-governance, though, and should respect essential differences between the two types of entities. PCAs are not condominiums and should not be made to be the same.

Thus, while a working group or some other form of study may be appropriate, HB 638 may be moving too far and too fast. The issue should be studied but HB 638 should not be passed in its current form.

RE: H.B. 638

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

I OPPOSE H.B. 638, which would make many changes to Chapter 421J, the Planned Community Association Act. This measure includes many provisions from Chapter 514B, the Condominium Property Act, and most of this measure is verbatim from Chapter 514B. It is not unheard of to have a uniform statutory scheme for all common interest communities as some states have adopted the Uniform Common Interest Ownership Act, or some form of it. See <https://www.caionline.org/Advocacy/StateAdvocacy/PriorityIssues/UniformActs/Pages/default.aspx>. However, planned community associations and condominium associations in Hawaii have unique histories and governance structures. A wide-sweeping imposition of provisions from Chapter 514B on planned community associations, without sufficient review and analysis of the effects of doing so, is likely to create serious issues and confusion.

Unlike planned community associations, condominium associations in Hawaii have long been governed pursuant to a statutory scheme. In fact, authorities have recognized Hawaii as “the first state to enact statutory provisions enabling the creation of condominiums.” *State Sav. & Loan Ass'n v. Kauaian Dev. Co.*, 50 Haw. 540, 546, 445 P.2d 109, 115 (1968). Planned community associations are not “creatures of statute,” and “are primarily creatures of common law.” *Lee v. Puamana Cmty. Ass'n*, 109 Hawai'i 561, 575, 128 P.3d 874, 888 (2006). Planned community associations are also governed by their governing documents and carry out responsibilities which are defined in their governing documents (e.g. maintenance of common areas, regulation of design and architectural schemes, enforcing covenants, and collecting unpaid assessments).

In 1997, the Legislature passed HRS Chapter 421J, which sets forth a minimal scheme of governance for planned community associations. The basic framework of Chapter 421J was and still is reasonable because there are many different types of planned community associations. Many planned community associations include layers of sub-associations, such as other planned community associations, condominium associations, resort associations, merchant associations, and associations which manage facilities that serve the community. For some planned community associations, assessments are collected directly from owners, whereas others collect assessments directly from a sub-association. In addition, planned community associations own common areas (whereas members of condominium associations usually have an undivided interest in the common elements). See Joyce Y. Neeley, *Community Associations, Hawaii Real Estate Law Manual*, 2: 10-1 (Deborah Macer Chin, ed., 2010).

A verbatim overlay of sections from Chapter 514B to Chapter 421J makes little or no sense for many planned community associations. The issues presented by this measure can be complex, and it is impossible to predict how this measure will affect planned community associations without a careful review. For example, it would make no sense to require planned community associations to obtain the types and levels of insurance set forth in Section 514B-143, HRS (which this measure would do, if passed). This makes no sense because, for many planned community associations, lots and single-family dwellings are owned by individual association members. In addition, this measure provides that planned community associations may regulate

the use or behavior in units by rules and regulations if that behavior: 1) violates the declaration or bylaws, or 2) unreasonably interferes with the use and enjoyment of other units or the common areas by other unit owners. However, many planned community associations do not impose regulations concerning the behavior of members inside their units (which are often single family dwellings). This measure also assumes that planned community associations are managed by managing agents. However, many planned community associations are self-managed.

This measure will also require that planned community associations participate in arbitration of disputes regarding an association's "regular assessment claim." Mandatory arbitration of claims for collection of assessments will be costlier for all parties involved. For some planned community associations, assessments can be as low as \$25.00 each month, which means that assessment delinquencies can be relatively low when compared to condominium associations. For a dispute to be arbitrated, the parties will have to pay the arbitrator's fees as well as administrative fees – which fees are usually much higher than the cost of filing a lawsuit in the District Courts of the State of Hawaii. Unlike Court fees, arbitration fees can easily exceed the assessment debt in most cases, and as a result, this measure could have the effect of making collection actions costlier for all parties involved.

This measure should not be passed without careful review of every provision by various stakeholders. For instance, before changes of this magnitude are made, they should be reviewed, vetted and approved by a task force, which is what happened with Chapter 514B.

Respectfully submitted,

*Chandra R.N. Kanemaru*

*Country Club Village Resident & Board Member*

**HB-638**

Submitted on: 1/31/2019 1:50:45 PM

Testimony for CPC on 2/1/2019 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Anne Anderson	Individual	Oppose	No

Comments:

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

I OPPOSE H.B. 638 because the proposed amendments to Chapter 421J, the Planned Community Association Act, will create significant problems in the operation of planned community association ("PCAs"). This measure is essentially a crude cut and paste of many provisions from Chapter 514B, the Condominium Property Act. Provisions have been added without carefully considering whether the provisions are appropriate for planned communities. Moreover, the provision radically expands the exposure of directors, officers and employees of PCAs as well as

Although the concept of having a uniform statutory scheme for all common interest communities, including condominium projects and PCAs, is not unprecedented, changes to the statutory scheme of PCAs must be carefully reviewed and analyzed. This is not the case with this bill.

At the outset, it should be noted that PCAs are fundamentally different from condominium projects. Condominium projects are residential projects that include, in many cases, commercial space, such as retail, offices, restaurants and other businesses. PCAs are much more varied and complex. Examples of PCAs are Mililani Town Association, Villages of Kapolei Association, Ko Olina Community Association, and Wailea Community Association. Many PCAs include layers of sub-associations, such as other planned community associations, condominium associations, resort associations, merchant associations, resort hotels, and associations which manage facilities that serve the community. For example, Ko Olina Community Association includes Aulani, a Disney Resort and Spa, the Four Seasons resort, and other resort properties. Some PCAs collect assessments directly from owners, whereas others collect assessments directly from a sub-association. In addition, PCAs own common areas, while members of condominium associations usually have an undivided interest in the common elements. See Joyce Y. Neeley, Community Associations, Hawaii Real Estate Law Manual, 2: 10-1 (Deborah Macer Chin, ed., 2010).

Based on condominium registration, the Hawaii Real Estate Commission reports that there are approximately 170,000 units in condominium projects. 2017 Annual Report Real Estate Commission, Real Estate Branch, Professional and Vocational Licensing

Division, Department of Commerce and Consumer Affairs, State of Hawaii. I believe there are vastly more units in planned community associations. Thus, major changes to the law governing PCAs will have a substantial impact on the population.

The problems that will be created by this bill are impossible to fully predict without further study, however, there are several obvious concerns:

1. Section 421J-B(b) provides that PCAs may regulate the use or behavior in units by rules and regulations if that behavior: 1) violates the declaration or bylaws, or 2) unreasonably interferes with the use and enjoyment of other units or the common areas by other unit owners. While this is appropriate for high density condominium projects, it is very rare if not unheard of for planned community governing documents to authorize a PCA to impose regulations concerning the behavior of members inside their units (which are often single family dwellings). As a result, this measure will radically increase the power of PCAs to regulate behavior in ways the legislature probably does not intend.
2. Section 421J-B(e) will make it impossible for PCAs to borrow funds as it will require the approval of owners representing “fifty per cent of the common interest vote.” First, the concept of “common interest” comes from Chapter 514B and refers to the common interest of every owner in the common elements of a condominium project. The term “common interest” has no application to a planned community as the common area is owned by the association, not members. Thus, there is no “common interest” in planned communities and it will be impossible to satisfy this provision. Second, because PCAs have large membership roles, and members have a much less direct relationship with their PCA than condominium association, it is very difficult to persuade members to vote on anything. A 50% vote in a large association may require 7,500 or more votes. This will be impossible to obtain in nearly every PCA.
3. This measure assumes that PCAs are managed by managing agents. However, many PCAs are self-managed by employees of the PCA.
4. Section 421J-I(b) precludes PCA employees from selling or renting units in the planned community in which they are employed. While this prohibition may be relevant to condominium projects, it is inappropriate for planned communities that may have thousands of units. It is not unusual for PCA employees to reside in the same planned community that they work in. I am not aware of this causing a problem with PCAs.
5. It would make no sense to require PCAs to obtain the types and levels of insurance set forth in Section 514B-143, HRS (which this measure would do, if passed). This provision would also allow PCAs to force unit owners to purchase insurance, and to force place the insurance at the owner’s expense. This makes no sense because, for many PCAs, lots and single-family dwellings are owned by individual association members. There are no concerns about PCAs having to pay insurance deductibles due to plumbing leaks or other problems within individual units.

6. Section 421J-W(a) of this measure declares that the violation of Chapter 421J is a misdemeanor that shall be punished by a fine not exceeding \$10,000 or by imprisonment for a term not exceeding one year, or both. Violations of any requirement of the Real Estate Commission shall be punished by a fine not exceeding \$10,000. Although this provision is based upon § 514B-69, the penalties described in § 514B-69 are limited to violations of specific provisions of Chapter 514B. Section 421J-W(a) radically expands the concept in § 514B-69 by imposing criminal penalties on ALL violations of Chapter 421J.

7. Directors of PCAs are required to comply with the declaration of covenants, conditions and restrictions, by-laws, other governing documents, Robert's Rules of Order Newly Revised (11th Edition) and Chapter 414D (for incorporated PCAs). Inadvertent mistakes frequently happen. By operation of § 421J-C(a), any director who violates any of these authorities, in addition to Chapter 421J, may be subject to imprisonment or a substantial fine. This measure will essentially impose strict liability for violations of the statute, governing documents and other authorities.

8. Many PCAs find it difficult to persuade qualified members to serve on their boards. Directors are typically lay persons who donate hundreds of hours of service each year to their associations without remuneration performing a difficult and thankless job. By imposing criminal penalties for violating Chapter 421J and other authorities, it is doubtful that any person of sound mind would want to serve on a PCA board knowing that each mistake may cause them to be imprisoned or pay a fine of up to \$10,000. Without qualified directors, individual members in PCAs may be harmed as their PCA will not be able to discharge its duties.

9. This measure will also require that PCAs participate in arbitration of disputes regarding an association's "regular assessment claim." Mandatory arbitration of claims for collection of assessments will be costlier for all parties involved. For some PCAs, assessments can be as low as \$25.00 each month, which means that assessment delinquencies can be relatively low when compared to condominium associations. For a dispute to be arbitrated, the parties will have to pay the arbitrator's fees as well as administrative fees - which fees are usually much higher than the cost of filing a lawsuit in the District Courts of the State of Hawaii. Unlike Court fees, arbitration fees can easily exceed the assessment debt in most cases, and as a result, this measure could have the effect of making collection actions costlier for all parties involved. In addition, the statute does not address how arbitrations will be handled if a member is not able to afford arbitration, and unlike the situation for condominium associations, there is no program by the state to subsidize arbitrations

This measure should not be passed without careful review of every provision by various stakeholders. There are probably countless other problem provisions that are not as obviously spotted as those listed above. Before changes of this magnitude are made, they should be reviewed, vetted and approved by a task force, which is what happened with Chapter 514B.

Respectfully submitted,

M. Anne Anderson





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



January 31, 2019

Rep. Toy Takumi, Chair  
Rep. Linda Ichiyama, Vice-Chair  
House Committee on Consumer Protection & Commerce

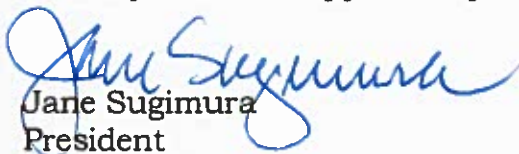
Re: Testimony in re HB638 Re Planned Community Associations  
Hearing: Friday, February 1, 2019, 2 p.m., Conf. Rm. #329

Chair Takumi, Vice-Chair Ichiyama and Members of the Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCAAO dba HCCA).

I'm here to ask that you defer action on this bill for now. I asked Rep. Johanson's office to draft this bill so that we could work with stakeholders to revise it to incorporate into HRS 421J some of the provisions that are already in HRS 514B. We just have not been able to meet with the stakeholders to discuss and determine what changes have to be made.

Thank you for the opportunity to testify on this matter.

  
Jane Sugimura  
President