Testimony of the Hawai'i Real Estate Commission

Before the
Senate Committee on Commerce and Consumer Protection
Wednesday, February 5, 2025
10:00 a.m.
Conference Room 229 and Videoconference

On the following measure:
S.B. 1372, RELATING TO CONDOMINIUM ASSOCIATION'S OPERATING BUDGET

Chair Keohokalole and Members of the Committee:

My name is Derrick Yamane, and I am the Chairperson of the Hawai'i Real Estate Commission (Commission). The Commission supports this bill.

The purpose of this bill is to permit condominium associations to borrow from or reallocate their reserve funds provided the loan is repaid within one year.

The Commission assisted the Joint Executive and Legislative Task Force established by Governor Josh Green, M.D., on June 28, 2024, in identifying potential solutions to support condominium associations facing significant increases to insurance premium rates. This legislation aims to provide clarity and flexibility for condominium associations seeking to utilize reserve funds to pay for emergency operating costs, such as rising insurance premiums. However, the Commission is concerned that condominium associations may engage in cycles of borrowing which consequently deplete their funds, and respectfully proposes a new paragraph (g)(4) to address this issue, below:

> (4) Every authorized borrowing or reallocation of replacement reserves funds shall be restored prior to any additional authorization for borrowing or reallocation of replacement reserves funds if the replacement reserves are less than one hundred per cent of the estimated replacement reserve.

Thank you for the opportunity to testify on this bill.

HAWAII LEGISLATIVE ACTION COMMITTEE
community ASSOCIATIONS INSTITUTE
P.O. Box 976
Honolulu, Hawaii 96808

February 1, 2025

Senator Jarrett Keohokalole, Chair
Senator Carol Fukunaga, Vice Chair
Committee on Consumer Protection
415 South Beretania Street
Honolulu, HI 96813

SB1372 OPPOSE

Dear Committee,

My name is Richard Emery, and I am submitting this authorized testimony in opposition on behalf of Community Associations Institute. On a personal note, I am a thirty-year condominium industry veteran. I am a CAI Reserve Specialist (RS), have reviewed or performed hundreds of Hawaii condominium reserve studies, participated in CAI's national task force for reserve study public policy, and currently serve as an expert in condominium disputes or litigation related to condominium budget and reserve studies.

It is noted that SB 1372 was submitted by request and that the proponent clearly does not understand the current law, Hawaii Administrative Rules, and national reserve study preparation policy.

The basis for this Bill is allow Boards to reallocate or borrow from their reserve fund to pay operating expenses subject to fifty percent owner approval, maintain a minimum reserve study funding percentage and the restoration of the reserve funds within one year.

TYPES OF RESERVE STUDIES:

It is estimated that more than 95% of all Hawaii condominiums adopt reserve studies using the cash flow funding method that excludes percentages under the Pooling Method of preparation. Cash flow

funding is the Hawaii industry funding standard. Therefore, the proposed spending limits using percentages will be difficult if not impossible to enforce.

Current Hawaii Condominium Law and Hawaii Administrative Rules Already Allow Borrowing:

HRS 514B-148 (and formerly HRS 514A)allows the Board to exceed its operating budget in an emergency and specifically says (5) "necessary for the association to obtain adequate insurance for the property.

Hawaii Administrative Rules 16-107, Subchapter 6

(c) The association board shall use replacement reserves allocated to a particular fund only for the stated purpose of that fund, except:(1) In an emergency or emergency situation the board may use the replacement reserves in any fund for any legitimate association purpose, provided the board passes a resolution containing written findings as to the necessity of using the replacement reserves for other than their designated purpose, the necessity of the expense involved, and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to all members of the association;

It is interesting to note that HAR allows three years to replenish the reserve fund. Furthermore, borrowing through an insurance premium finance contract (less than one year in length) does not require owner approval. Insurance premium financing is readily available and such short term financing has been used for years to finance insurance premiums.

It should be noted that HAR 16-107 was adopted under HRS 514A that has since been repealed. The AG states the rules are still valid until repealed. That being said, currently and actively before the Hawaii Real Estate Commission is the repeal of Chapter 16-107 and the adoption and replacement with Chapter 16-119.1 through 119.8. The new proposed rules were recommended by a task force for such purposes. A hearing was conducted with public testimony. If adopted the new proposed rules provide similar rules as HAR 16-107 but incorporate rules related to cash flow funding as such cash flow funding method was enacted after the previous adoption of HAR 16-107.

The Horse Has Left the Barn: The insurance premium crisis was in 2023 and 2024. Condominium associations have already addressed how they will pay for the new insurance premiums that were due within 14 days of the renewal date. Condos have either assessed the owners, used an insurance premium finance contract, borrowed from reserves under the existing law and rules, or a combination thereof. Future premiums cannot be an emergency as the cost of insurance is known today.

In the end SB 1372 makes no sense, it is contradictory by ignoring cash flow funding rules and is unnecessary as the law and rules to address insurance premiums are already in place.

CAI opposes SB1372.

Very truly yours,

Richard Emery
On behalf of CAI

SB-1372
Submitted on: 2/1/2025 8:55:25 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Philip Nerney	Individual	Oppose	In Person

Comments:

SB 1372 may be well intentioned but it is not well crafted or narrowly tailored. It also contains the superfluous and odd provision that:

(3) An association shall not borrow or reallocate replacement reserves funds for operating expenses that primarily benefit the board of directors, its officers, or their families. Violating this section constitutes a violation of fiduciary duty."

Apart from being cynical in outlook, fiduciary duty already prevents self-dealing. Such language has no place in statute.

SB-1372
Submitted on: 2/2/2025 12:29:43 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
lynne matusow	Individual	Oppose	Written Testimony Only

Comments:

As both a condo owner and board member I object to this bill and ask it be deferred. It adds to the slippery slope faced by condo owners, especially those who are not properly funding their reserves and cannot make major repairs, etc. Reserves money belong in reserves. The funds should not be used for operating expenses, period.

SB-1372
Submitted on: 2/2/2025 7:22:13 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Aaron Cavagnolo	Individual	Oppose	Written Testimony Only

Comments:

Please don't do this. It will only allow our board to get us in further finacial peril and mean we'd have a bigger bill later after they've sold their units.

SB-1372
Submitted on: 2/3/2025 2:36:13 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Greg Misakian	Individual	Oppose	Remotely Via Zoom

Comments:

SB1372 is problematic, as it does not clearly show an understanding of what can go wrong will go wrong with respect to transfers from reserves. Boards already have some authority to move funds from reserves, and sometimes abuse this practice. The full membership of a condominium association should be voting on any transfers of funds from reserve accounts to operating accounts when special circumstances arise.

Gregory Misakian

The Senate
The Thirty-Third Legislature
Committee on Commerce and Consumer Protection
Wednesday, February 5, 2025
10:00 a.m.

To: Senator Jarrett Keohokalole, Chair
Re: SB 1372, Relating to Condominium Association's Operating Budget

Aloha Chair Jarrett Keohokalole, Vice-Chair Carol Fukunaga, and Members of the Committee,

Mahalo for the opportunity to testify.

SB 1372 appears to solidify what some associations are already doing: borrowing from their reserves to fund their operating budgets. However, the measure adds that those borrowed funds should be repaid timely.

Unfortunately, that timely repayment will still pose financial difficulties for owners of those associations who have not diligently fulfilled their reserve requirements.

Examinations of the associations that completed their biennial registrations* reveal that few have satisfied their statutory reserve replacement requirements or, based on owners' allegations, the reported data does not correspond with their association's annual fiscal reports.

Mahalo for the opportunity to provide these comments.

Aloha,

Lila Mower

*https://web.dcca.hawaii.gov/DPR.Net/Public/ShowPublicTable.aspx

SB-1372
Submitted on: 2/3/2025 4:27:34 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Testify
Joe M Taylor	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

I OPPOSE S.B. No. 1372 for the reasons set forth below.

The new subsection (g) provides that a condominium association may authorize its board of directors to borrow or reallocate funds from the replacement reserves fund to pay for association-wide operating expenses upon meeting certain conditions.

One condition is that "written notice of the purpose and proposed use of the funds is sent to all unit owners, and owners representing a minimum of fifty per cent of the common interest, consent to the borrowing." The is not consistent with HAR Section 16-107-66(c)(1) which provides that "[i]n an emergency or emergency situation the board may use the replacement reserves in any fund for any legitimate association purpose, provided the board passes a resolution containing written findings as to the necessity of using the replacement reserves for other than their designated purpose, the necessity of the expense involved, and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to all members of the association."

The use of the word "consent" could be construed as "written consent" and not a vote at a meeting. If this bill is adopted despite the conflict with HAR Section 16-107-66(c), the Committee may wish to revise this language to read: "provided that owners representing at least fifty per cent of the common interest vote or give written consent in favor of the proposed borrowing or reallocation of funds after having been informed of the purpose and use of the funds."

A second condition is that the "reserve fund maintains a minimum fifty per cent of the required estimated replacement reserves as detailed in the reserve study conducted pursuant to HRS Section 514B-148(a)(5) and (b)." This is a bit confusing because it is not clear how it applies to reserve funds that are 100% funded when using a cash flow plan as permitted by HRS Section 514B-148(b).

The new subsection (3) provides that an association shall not borrow or reallocate replacement reserves funds for operating expenses that "primarily benefit" the board of directors, its officers,

or their families. Subsection (3) also states that a violation of its terms constitutes a "violation of fiduciary duty." This section is vague and confusing.

The reference to "primarily benefit" is vague and ambiguous and may lead to unnecessary controversy and disputes over its meaning. This language is not needed because the requirement that owners approve the borrowing or reallocation of funds ensures that the membership at large supports the purpose and use of the funds.

The reference in subsection (3) to a "violation of fiduciary duty" is confusing because it is not clear who it applies to or the legal theory under which it applies. Under this bill, it is the owners (as opposed to the board) who are required to approve the proposed borrowing or reallocation of replacement reserves funds. Owners do not owe the association a fiduciary duty, so they cannot be said to have breached or violated a fiduciary duty if they vote in favor of proposed borrowing or the reallocation of replacement reserves funds no matter who might benefit from the same. While directors do owe their associations a fiduciary duty, the duty arises from their actions as directors, not as owners. For this reason, the reference to a "violation of fiduciary duty" found in subsection (g)(3) is meaningless and should be stricken.

Respectfully submitted
Joe Taylor

LATE

SB-1372
Submitted on: 2/3/2025 5:52:24 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Anne Anderson	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

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Respectfully submitted,

Anne Anderson

SB-1372
Submitted on: 2/3/2025 6:44:24 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Testify
mary freeman	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

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Respectfully submitted,

Mary Freeman

Ewa Beach

LATE

SB-1372
Submitted on: 2/4/2025 7:26:11 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Julie Wassel	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

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LATE

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Respectfully submitted,

Pamela J. Schell

LATE

SB-1372
Submitted on: 2/4/2025 8:27:25 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Carol Walker	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committe

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Respectfully submitted,

Carol Walker

LATE

SB-1372
Submitted on: 2/4/2025 8:51:57 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Lance S. Fujisaki	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

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