PRESENTATION OF THE
REAL ESTATE COMMISSION

TO THE SENATE COMMITTEE ON
JUDICIARY AND LABOR

TWENTY-FOURTH LEGISLATURE
Regular Session of 2008

Tuesday, April 1, 2008
10:00 a.m.

TESTIMONY ON HOUSE BILL NO. 3331, H.D. 2, S.D. 1, RELATING TO CONDOMINIUMS.

TO THE HONORABLE BRIAN TANIGUCHI, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Bill Chee and I serve as the Chair of the Real Estate Commission's ("Commission") Condominium Review Committee, and I thank you for the opportunity to present testimony in opposition to Section 3 in House Bill No. 3331, H.D. 2, S.D. 1, Relating to Condominiums.

The Commission's objections to Section 3 are as follows:

1. Requiring the Commission to submit to the Legislature an additional written report, would be duplicative of the efforts to which the Commission currently adheres. Under §§514A-133(d), HRS, and 514B-73(d), HRS, the Commission is mandated to submit its annual report prior to the legislature convening providing all relevant information including data regarding condominium governance mediations.

2. The current mediation contract with the Commission requires the provider to submit quarterly written reports to the Commission regarding, among other things, the number of cases processed, status of the parties, description of

the dispute, and disposition of the matter. Requiring the provider to submit a further written notice will create an additional burden on the provider and will increase the cost of the contract.

3. The Commission is unclear as to the intent of the requirement for the Commission to submit proposed legislation. As it would counter the intent of chapters 514A, HRS, and 514B, HRS, of self-governance in condominium management, the legislature's mandate for the Commission to submit legislation prior to the 2009 legislative session is a tenuous requirement. The requirement would necessitate the Commission advocate for changes to the condominium management sections and act contrary to the intent of self-governance by the appropriate stakeholders.

For these reasons, we do not support Section 3 of House Bill No. 3331, H.D. 2, S.D. 1 and ask that it be deleted from the bill.

Thank you for the opportunity to present testimony.

HAWAII CHAPTER community ASSOCIATIONS INSTITUTE

March 31, 2008

SENATE COMMITTEE ON JUDICIARY AND LABOR
REGARDING HOUSE BILL 3331, HD 2, SD1

Hearing Date	:	Tuesday, April 1, 2008
Time	:	10:00 a.m.
Place	:	Conference Room 016

Chair Taniguchi and Members of the Committee:

The Community Associations Institute, Hawaii Chapter, Legislative Action Committee ("CAI") opposes this bill, primarily because the bill attempts to: 1) prohibit the use of arbitration following mediation; and 2) force owners and boards to use the hearings process -- commonly referred to as **"condo court"** -- established through the Department of Commerce and Consumer Affairs' office of administrative hearings. The bill does so by allowing any party to an unsuccessful mediation to file in condo court within 30 days of the end of the mediation, while prohibiting a party from filing for arbitration any sooner than 30 days after the end of the unsuccessful mediation.

The reasoning behind the bill is unclear.

* For more than 20 years, the condominium law has given owners and boards the option of using arbitration as a means of resolving their disputes. Arbitration is a proven method of resolving disputes. In contrast, condo court is an unproven method of dispute resolution that, so far, has had mixed results. Moreover, condo court is a temporary, pilot program with limited jurisdiction that was established by act 277 (SLH 2006) and which is supposed to sunset on June 30, 2009.

* While an arbitrator must usually be paid, at least the arbitrator then has an obligation and an incentive to resolve the case for the parties paying him. In contrast, experience has shown that, to date, the hearings officers of the DCCA seem intent on restricting the number of cases heard in condo court by using condo court's limited jurisdiction as a basis to dismiss claims, or even whole cases. In other words, the main goal of the hearings office seems to be to avoid hearing condo cases.

* The bill proposes to delete an existing provision from section 514B-161(b) stating that mediation of collection disputes is not required. That provision should remain in the law. Otherwise, owners will undermine an association's efforts to collect delinquent fees by prolonging the collection process through mediation. Without regular payments of

maintenance fees an association cannot operate, so an owner should not be allowed to use the mediation process to delay paying his maintenance fees. He should pay first and then mediate the dispute.

* Section 3 of the bill attempts to increase the complexity of the mediation process for no apparent reason. The problem is not with mediation but with the attempt of HB 3331 to force parties to use condo court instead of arbitration. The focus of the bill should be on evaluating the effectiveness of condo court, not the effectiveness of mediation.

* Section 5 of the bill proposes to remove the language relating to condo court from section 514A-121 but not from section 514B-161. Section 5 should state:

> *This Act shall take effect upon its approval; provided that the amendments to sections 514A-121.5(b) to (j), Hawaii Revised Statutes, in section ~~[2]~~ 1 of this Act, and to sections 515B-161(b) to (k) Hawaii Revised Statutes, in section 2 of this Act, shall be repealed on June 30, 2009.*

Unless that change is made, the legislative intent of sunsetting the condo court process on June 30, 2009 -- see Act 277 (SLH 2006) -- will be overridden. Act 277 (SLH 2006) created the condo court pilot program by adding a completely new section to chapter 514B. Act 277 (SLH 2006) also stated that that new section was supposed to be repealed on June 30, 2009. In contrast, HB 3331, HD 2, SD1 takes the language creating the condo court program from Act 277 (SLH 2006) and then adds it to section 514B-161. In other words, even if the completely new section created by Act 277 (SLH 2006) is repealed on June 30, 2009, the language of that section will live on in section 514B-161, unless the change suggested above is made to section 5 of HB 3331, HD 2, SD1.

For the reasons stated above, CAI respectfully requests that the committee hold HB 3331, HD 2, SD1. Thank you for this opportunity to testify.

Very truly yours,

John A. Morris
Hawaii Legislative Action Committee
of the Community Associations Institute

JAM:alt

HAWAII COUNCIL OF ASSOCIATIONS
OF APARTMENT OWNERS
P.O. Box 726
Aiea, Hawaii 96701
Telephone (808) 566-2122

March 29, 2008

Senator Brian Taniguchi, Chair
Senator Clayton Hee, Vice-Chair
Senate Committee on Judiciary

RE: Testimony in Favor of HB 3331, HD2, SD1 Re Condominiums
Decision Making: Tues., April 1, 2008, 10 a.m., Conf. Rm. #016

Chair Taniguchi and Vice-Chair Hee and Members of the Committee:

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

HCAAO supports this bill, as amended (except for the defective date), and urges you to pass it out of committee with the correct date and one minor change.

Section 3 mistakenly refers to "mediation" instead of "DCCA administrative hearings" ("DCCA Hearings"), which is the subject matter of this bill. The Real Estate Commission already receives annual reports on the number of mediations that occur and their disposition. Currently, because the DCCA Hearings is a pilot program, there is no reporting requirement. Accordingly, I suggest the following corrections:

(1) The number of disputes under sections 514A-121.5(c) and 514B-161(c), Hawaii Revised Statutes, in which ~~a mediation service or mediator is selected to provide mediation services~~ DCCA administrative hearings is used to resolve disputes;

(2) The outcomes and disposition of the DCCA administrative hearings ~~mediation proceedings~~ pursuant to sections 514A-121.5(c) and 514B-161(c), Hawaii Revised Statutes, including any failure to reach a disposition and the reasons for failure;

(3) A determination of the effectiveness and impact of DCCA administrative hearings ~~mediation proceedings~~ to resolve disputes pursuant to sections 514A-121.5(c) and 514B-161(c), Hawaii Revised Statutes, and any recommendations to improve the DCCA administrative hearing ~~the mediation~~ option to resolve disputes involving the interpretation or enforcement of association declarations, bylaws, or house rules: and

Thank you for the opportunity to testify.

Jane Sugimura
President

H.I.C.C.O.

HAWAII INDEPENDENT CONDOMINIUM & COOPERATIVE OWNERS
1600 ALA MOANA BLVD. - APT. 3100 - HONOLULU - HAWAII 96815

April 1, 2008

Senator Brian T. Taniguchi, Chair
Senator Clayton Hee, Vice Chair
Committee on Judiciary and Labor

Testimony on HB 3331, HD 2, SD 1 Relating to Condominiums

Dear Senators:

Thank you for this opportunity to testify in strong support of HB 3331, HD 2, SD 1 on behalf of the Hawaii Independent Condominium and Co-op Owners (HICCO). The mission of our organization is to represent the interests of individual condominium and co-op owners in the State of Hawaii.

HB3331, HD 2. SD 1 accomplishes several things. First, it states which sections of 514B and 514A for which an owner or a Board of Directors can request a hearing. This is important because a majority of condominiums have not as yet opted in to 514B and are still governed by 514A. The current State Statute has caused considerable confusion this year because these sections were omitted in error last year.

Secondly, HB 3331, HD 2, SD 1 will ensure that an owner or the Board of Directors will have an opportunity to request a hearing without the other party taking a complaint directly to the much more expensive process of arbitration where attorneys are required. This totally undermines the very purpose for which the Legislature created the hearing process.

HICCO requests that your committee support HB 3331, HD 2, SD 1 with the amendments proposed by Jane Sugimura. The amendments are needed because the alternative dispute resolution process is the process that is being piloted whereas the mediation process is already in place. I will be present to answer any questions you may have.

Sincerely,

Richard Port

Richard Port, Chair
Legislative Committee

March 31, 2008

Senate Committee on Judiciary and Labor
Chair Brian T. Taniguchi
Vice Chair Clayton Hee
Conference Room 16

Re: H.B. NO. 331
Relating to Condominiums

Dear Chairs Senator Brian Taniguchi and Senator Clayton Hee and all members of the committee:

My name is Tracey Wiltgen, Executive director of The Mediation Center of the Pacific, Inc.. I am testifying against HB No. 331 as it relates to the scheduling of mediations and disclosure requirements following mediations.

The proposed language in HB 331 SECTION 1 "The mediation service or mediator shall notify the commission in writing of '**reasons for failure to complete mediation**' and SECTION 2 "The mediator or the mediation service shall notify the commission in writing of the disposition of the mediation '**including...reasons for failure to complete mediation,**' is contrary to the basic guidelines and standards governing mediation.

Mediation is built on public confidence and understanding that the mediation process is confidential. Confidentiality and release of information as defined in the Guidelines for Hawai`i Mediators endorsed by the Supreme Court of the State of Hawai`i on July 11, 2002, states "The Mediator and any mediation administrative agency, whether during pre-mediation or mediation, should hold all information acquired in mediation in confidence. Mediators are obliged to resist disclosure of information about the contents and outcomes of the mediation process."

Additionally, Standard V of the Model Standards of Conduct for Mediators adopted by the American Bar Association August 9, 2005 states "A mediator should not communicate to any non-participant information about how the parties acted in the mediation. A mediator may report, if required, whether parties appeared at a scheduled mediation and whether or not the parties reached a resolution."

Confidentiality starts at the onset of a request for mediation. Therefore, whether or not parties actually participate in the mediation process, a mediator or mediation service is ethically prohibited from providing specific information to anyone regarding why one party chose not to participate or complete mediation.

Finally, proposed changes to HB 3331 places a burden on the mediator or mediation service to establish that a party received written notice of mediation, to show the mediation occurred even if a party chose not to participate. This proposed change not only places additional responsibility on the mediator or mediation service to ensure a party receives such a notice, but it additionally places the mediator or mediation service in the potential position to be asked to provide additional information such as the subject matter of the mediation which is required in SECTION 2 (c)(4) to request a hearing with the office of administrative hearings, which again would be prohibited under Confidentiality Guidelines.

To protect the confidential nature of mediation, I oppose the specific language of HB 3331 as noted above.

Respectfully submitted,

Tracey S. Wiltgen
Executive Director, The Mediation Center of the Pacific, Inc.

LAW OFFICES OF PHILIP S. NERNEY, LLLC

A LIMITED LIABILITY LAW COMPANY
201 MERCHANT STREET, SUITE 1500, HONOLULU, HAWAII 96813
PHONE: 808 537-1777
FACSIMILE: 808 537-1776

March 31, 2008

Senator Brian T. Taniguchi
Chair, Committee on Judiciary
and Labor
415 S. Beretania Street
Honolulu, Hawaii 96813

Re: **H.B. 3331 H.D.2 S.D.1/OPPOSED**

Dear Chairman Taniguchi:

Please do not pass this bill. Condo court remains a "solution" in search of a problem. It is a proven failure, and a venue for mischief and abuse. It has no value in the real world.

As the Department of Commerce and Consumer Affairs ("DCCA") made clear in its Report to the Twenty-Fourth State Legislature ("Report"), in December 2006, "there is still not yet a significant demand for the kind of services provided by the CDR Pilot Program." That remains true today.

If the program were simply harmless, then there would be no reason to care. Unfortunately, the whole condo court notion is misguided and counterproductive. Indeed, it is a positive instrument of abuse and harm.

The basis for my perspective is that I have represented condominium associations full time since 1990. In addition, I have a master's degree in counseling psychology and am a trained mediator. While I write as an individual, and not for any entity, please note that I chair the condominium specialty area for the Mediation Center of the Pacific and I help to train mediators there. I also mediate child protection cases for the Family Court of the First Circuit.

Thus, I am a strong advocate for mediation, I train mediators and I provide mediation services. If the Legislature wants to promote mediation, then it should abandon condo court entirely. Some reasons for abandoning this proven failure are detailed in an enclosed article published in the Community Associations Institute Newsletter before condo court was first enacted.

Please review the statistics contained in DCCA's Report. In the 29-month period reviewed therein, exactly **one** case was resolved in favor of an owner. At the same time, DCCA warned the Legislature that "the costs of the CDR proceedings may become very significant."

A case in point is that one client of mine was named by a person who was not even an owner, and despite multiple motions to dismiss, on abundantly rich grounds, the hearings officer allowed the process to languish for far too long. After thousands of dollars in fees and costs, DCCA finally gave notice of a proposed dismissal and then allowed the claimant to withdraw the claim. That was not just. It was not efficient. It was not fair.

On the contrary, it was manifestly unjust, unfair and inefficient. Innocent owners of the condominium association client paid the cost of that ridiculous farce. Please understand that condo court has no value whatever in the real world. As indicated in the enclosed article:

> The condo court proposal should be abandoned because it represents a fundamental misapprehension of the problem to be solved. The problem to be solved is how to address matters of relatively minor significance in a convenient, expeditious and economical fashion. Alternative dispute resolution mechanisms are presently available to meet that need.
>
> In contrast, personal and property rights of major significance cannot be trivialized. If ADR fails, matters of major significance should be addressed to existing courts.

Please, therefore, do not pass HB 3331 HD2 SD1. Instead, please consult with experts in mediation. Mediation in its fundamental essence is a voluntary process. The proposed legislation does violence to the essential attributes of mediation. Indeed, it mocks mediation to say that mediation has occurred even if one party was not present.

This is phenomenally misguided legislation. Please do not pass it.

Very truly yours,

Philip S. Nerney

Enclosure

CONDO COURT — NAY

The Condo Court Proposal Should Be Abandoned

By Philip Nerney, Esq.

Philip Nerney

The well-intentioned proposal to create a "condo court" should be abandoned. New bureaucracy is unnecessary and would be problematic.

Instead, greater emphasis should be placed upon the use of *evaluative* mediation, and other forms of alternative dispute resolution ("ADR"), to resolve difficult condominium related disputes. Community-based organizations and private mediators can provide these services. **If public funds are to be expended in relation to the resolution of condominium disputes, then those funds should be provided to support the delivery of high quality ADR services, in community-based centers, at subsidized rates.**

The condo court proposal should be abandoned because it represents a fundamental misapprehension of the problem to be solved. The problem to be solved is how to address matters of relatively minor significance in a convenient, expeditious and economical fashion. Alternative dispute resolution mechanisms are presently available to meet that need.

In contrast, personal and property rights of major significance cannot be trivialized. If ADR fails, matters of major significance should be addressed to existing courts.

The resolution of minor matters.

Minor matters can become major headaches. While bothersome, matters lacking significant substance are still minor and should not be adjudicated. Courts *adjudicate* disputes. Court judgments should be reserved for major matters that cannot be resolved by other means.

Minor matters often arise out of interpersonal and/or intra-psychic conflict. Judges are often untrained to address such matters. Thus, their judgments may not attend to underlying issues. Qualified mediators can evaluate the merits of a claim while also providing an essentially therapeutic service.

For example, the lonely and/or unwell busybody can sometimes identify "inequities" and demand "justice"; but no court should be burdened with episodic complaints from such persons. On the contrary, trivial complaints by malcontented persons should be specifically diverted to a *non-adjudicative* process. Attention-seeking behavior sometimes serves as a mood regulating tactic for such persons, and their behavior should be treated as what it is.

Boards of directors and/or individual directors sometimes need a reality check too. A non-adjudicative format is appropriate for things like clarifying the meaning of fiduciary duty and for reining in perceived excesses.

That is, evaluative mediation processes, administered by subject matter experts, are flexible and can be adapted to a variety of circumstances. The key is to make such processes more broadly available than is presently the case.

The role of community-based mediation programs.

Facilitative mediation is the dominant mode of community-based mediation on Oahu today. The essence of facilitative mediation is that parties themselves are expected to arrive at their own solutions, without advice, judgment or counseling by the mediators. Facilitative mediators are neutral process managers, more or less.

Some condominium attorneys and/or account executives are reluctant to use facilitative mediation, especially if mediators lack subject matter expertise. Facilitative mediation is worth consideration, however, because facilitation often enables parties to identify real issues and interests, so that mutually beneficial outcomes can be achieved.

Moreover, programs such as the Mediation Center of the Pacific's Access ADR program allow parties to select subject matter experts who are able to use evaluative mediation when that is what the parties want. Initiatives of that sort should be supported.

After all, legislative and judicial policy has been, for quite some time, to promote alternative dispute resolution. The condo court proposal is a step backwards.

A [condominium] home is not a castle.

Many disputes emanate from the frustration and anger that some people feel about the choices and/or circumstances that have led them to condominium ownership. Some owners are unable to perceive, or simply refuse to accept, that condominiums are different from single-family dwellings.

When frustrated aspirations are at the root of a dispute, a court can only attend to the symptom. That is, the presenting problem (parking, maintenance, whatever)

continued on page 9

CONDO COURT — NAY

continued from page 4

is not the real problem. It is only a symptom. Addressing the *symptom* will not resolve the real problem.

Struggles for dominance are essentially related to psychological processes rather than to real issues of condominium governance. Such struggles occur at both ends of the socio-economic spectrum. For example, some people of modest means argue for single-family dwelling independence at condominium prices. On the other end, high-powered persons in pricey places may be used to getting their own way, and make every effort to do so.

The point is that many condominium disputes utterly lack merit; and the creation of a court that invites such disputes would be inappropriate. There should instead be barriers to the presentation of frivolous claims.

Autonomous governance of condominium associations.

A fundamental principle of association governance should be autonomy. That is, courts should have a *lesser* role in the governance of condominium associations. If the legislature is keen to take an action, it should expressly articulate that courts are to employ a deferential standard of review with respect to association governance.

This means that courts should generally defer to the decisions of elected boards of directors. Courts should be specifically *disallowed* from interfering with association governance in most cases. Judicial second-guessing is unwarranted and can be harmful.

A new court is not appropriate. A new standard of judicial review would be.

A new standard of performance.

Professionals involved with condominium (and other) associations should note, of course, that the idea of a condo court means that there is room for improvement in the management and representation of associations. Associations would be wise to become more critical consumers of professional services, and professionals would be wise to develop conflict resolution skills.

Personal and property rights of major significance.

Real conflicts involving personal and property rights of major significance do occur. Counsel have the duty to manage such conflicts for the benefit of clients, rather than for self-benefit, of course. Ironically, associations sometimes fail to perceive that needless haste to litigate can serve the interests of attorneys and disserve the interests of an association. An appropriate compromise, early on, can sometimes vastly improve a client's net recovery and can save a good deal of time and heartache.

And then there are a certain number of significant, intractable disputes that persist following the best efforts of conscientious people. A condo court is no place for such matters, because the full range of rights, procedures and protections should be available to litigants in such circumstances.

New bureaucracy is unnecessary and would be problematic.

Condo court is a feel-good solution to a problem that does not really exist. That is, an adequate judicial bureaucracy is well established. A new court is unnecessary.

Law is complex. The condo court proposal is an effort to wish complexity away. Deciding cases on inadequate records after abbreviated processes, in which substantial rights are prejudiced, will not yield justice.

continued on page 10

CONDO COURT — NAY

continued from page 9

The delivery of rough justice will not do. If an issue is worthy of adjudication, then normal rules of civil procedure and evidence should apply. Condo court would be a kangaroo court (or as one wit put it, a "condoroo" court).

The idea that condo court can be a vessel to contain all condominium disputes is an illusion. In addition to the problem of rough justice, there is also the problem of jurisdiction. For example, one person's "bylaw interpretation" issue is another person's discrimination claim. The legislature cannot divest federal court jurisdiction over discrimination claims, for example, so disputes will still proceed in multiple courts. Issues related to judicial and non-judicial foreclosures, and many other issues, would create jurisdictional conflicts as well.

There is also the problem of precedent. The determination of one case can affect other cases. That is another reason why anything worthy of adjudication is worthy of adjudicating on a well-developed record. There are no shortcuts to justice.

On the other hand, non-adjudicative processes can yield consensual results at lower cost, more quickly and with greater attention to relational issues than courts can deliver. That is what is wanted. In short, evaluative mediation, by subject matter experts, should become the preferred mode of resolving condominium disputes that do not yield to facilitative processes. The proposal for a condo court should be abandoned.

Philip Nerney is an attorney and mediator. He also has a masters degree in counseling psychology. His telephone number is 537-1777 x117.

Essential Elements of Meeting Minutes

A Property Manager's Perspective

continued from page 8

Finally, there is adjournment. Whether pursuant to the "action of time," (the scheduled time for the meeting having elapsed), or in the absence of any further new business, the meeting may be concluded by a motion for adjournment, or just adjourned by the Chair when the business is completed. The minutes should indicate the time of adjournment.