

HAWAII CHAPTER



community
ASSOCIATIONS INSTITUTE

P.O. Box 976
Honolulu, Hawaii 96808

The Honorable Robert N. Herkes, Chair
and Members of the Committee on
Consumer Protection & Commerce

RE: MEASURE: HB1639
HEARING: FEBRUARY 9, 2009, 2:15 P.M., RM 325
COPIES: 1

Dear Rep. Herkes and Members of the Committee:

My name is Philip L. Lahne and I am the Co-Chair of the Hawai'i Legislative Action Committee of the Community Associations Institute ("CAI"). CAI is a non-profit national and statewide organization whose members include condominium associations, planned community associations, residential cooperatives, homeowners, managing agents, and others involved in creating, managing, servicing, and living in common interest communities.

The Committee strongly supports the passage of HB1639 as a matter of simple fairness. Unlike ordinary business entities or even typical nonprofit corporations, condominium associations have only a limited ability to adjust expenditures to account for reductions in income due to owners' failure to pay assessments. Associations are required to purchase prescribed types and amounts of insurance, provide water and sewer and other utilities, maintain statutorily mandated replacement reserves, repair and replace common elements such as roofs, hot and cold water systems and air conditioning systems, keep landscaping in good order, paint and waterproof buildings, employ resident managers, managing agents, accountants, lawyers, gardeners and trash removal services, and otherwise preserve, protect, and hopefully enhance the value of their projects in good times and bad. When some owners fail to pay assessments, the "budget hole" must be filled by either increasing other owners' assessments or from the proceeds of a sale, voluntary or otherwise, of the delinquent owner's unit. It is only fair to the non-delinquent owners to require buyers who purchase apartments at distress prices at foreclosure sales to make the association whole.

In good times when most owners have significant equity in their units, owners who are unable to pay their mortgages and maintenance fees are typically able to sell their units at a sufficient profit to pay off their mortgage and maintenance fee debts. In a rising market during which there is spirited bidding at foreclosure auctions, this is true even if the sale is the result of a foreclosure by a lender or an association. Thus, condominium associations can avoid raising assessments to fill the hole left by a delinquent owner because they are able to anticipate getting paid upon the sale of the delinquent owner's unit.

But all that changes in a down market when many units are “under water” – encumbered by debts that exceed the market value of the unit. That is what happened in the late 1990’s and that is what is happening today. Apartments cannot be sold for enough to pay off the liens and the foreclosure of those liens results only in deficiency judgments against the owners that may never be collected. As a result, the other non-delinquent owners bear the burden of filling the budget hole, which can result in further delinquencies. In some cases on the mainland, the combination of falling values, rising delinquencies, and deterioration due to lack of maintenance and repair has caused owners to simply “walk away” from condominium projects leaving behind the empty apartments for squatters and criminals to occupy.

The Legislature wrestled with this problem as stressed condominium associations pleaded for relief in the late 1990’s. One approach that was considered was the so-called condominium “super lien” that gives condominium associations first priority for payment of six months of common expense assessments out of the proceeds of any foreclosure sale. Although at least 17 other jurisdictions had adopted such an approach, the Legislature was concerned that giving condominium associations such a “super lien” might make it more difficult and expensive for buyers to obtain home loans and chose a different approach instead. The result was Act 39 (SLH 2000). In that Act, the Legislature stated:

The legislature finds that due to the current economic situation many condominium owners have been unable to meet payments for either their mortgage or maintenance expenses. Mortgagees have lost significant amounts during this period. Homeowners associations have, likewise, lost much during this period. Both are innocent victims of these economic times. Homeowners associations and mortgage lenders have participated in many hearings and discussions with the legislature over the years. Attempts to find a solution have been hampered because both parties are innocent victims. While a solution has been elusive, this Act goes a long way toward resolving the issue in a creative and fair manner.

Act 39 created a unique special assessment that condominium associations were empowered to collect from the purchasers of apartments that had been foreclosed upon by lenders. The assessment was, and still is, limited to \$1,800 based upon information provided by condominium managing agents as to the average monthly common expense assessment charged by condominium associations to homeowners at the time.

The system established by Act 39 has worked well in the booming real estate market that prevailed until recently and which both obviated the need to impose the special assessment in the vast majority of cases and made it less difficult and onerous for non-delinquent owners to absorb any remaining amount after the \$1,800 limit was reached. But times have changed and once again condominium associations “are innocent victims of these economic times” of plummeting sales and sale prices and “under water” properties. HB1639 addresses this situation in two ways.

First, it sets the special assessment limit at six months of actual assessments rather than capping it at maximum of \$1,800. Removing the cap not only assures that condominium associations are fully reimbursed for six months of assessments, but also eliminates a no doubt unintended paradoxical effect of the \$1,800 cap -- that buyers of foreclosed units in low and middle income projects may have to pay all or nearly all of six months worth of assessments, while buyers of such units in commercial and upper income and luxury residential projects get a free ride for the difference between \$1,800 and the actual assessment amount. In other words, the wealthy buyers who the least likely to need a break get a discount while the average buyers who are the most likely to need a break pay the full amount. This inequity should not be allowed to continue.

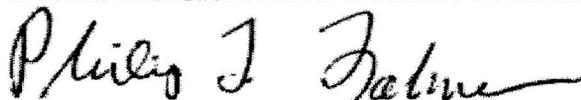
Second, the scope of the special assessment is expanded to include all amounts owed to the association by the delinquent owner as there is little logic to limiting the special assessment to only regular monthly assessments, since all amounts unpaid by a delinquent owner represent costs to the association which burden the non-delinquent owners.

Finally, it should be noted that the Act 39 special assessment only applies to foreclosure sales and, as the Hawai'i Supreme Court has recognized on numerous occasions, there is a difference between "the sacrifice price that would result from an execution or foreclosure sale, and, on the other hand, the retail price that could be realized in the slow process of trade." In Re Taxes B. P. Bishop Estate, 33 Haw. 149 (Hawai'i Terr. 1934). In other words, buyers at foreclosure sales of condominium units are likely to pay less than the fair market value of the property and will still have acquired the property at a "sacrifice price" even considering the payment of the special assessment.

As both state and national leaders have said, things are going to get worse before they get better. As of 2007, 1,565 condominium projects containing 145,124 apartments were registered with the Department of Commerce and Consumer Affairs. The U.S. Census Bureau estimated that there were a total of 500,036 housing units in Hawai'i in 2006. In other words, about 30% of Hawai'i housing units are in condominium projects that will be struggling to cope with the economic downturn. The enactment of HB1639 will help avoid making that struggle even more difficult than it already is by allocating the burden of delinquent assessments more fairly and equitably.

Thank you for the opportunity to submit this testimony. If you have any questions, I can be reached at 536-8177 or by email at plahne@alf-hawaii.com.

COMMUNITY ASSOCIATIONS INSTITUTE
HAWAI'I LEGISLATIVE ACTION COMMITTEE



PHILIP L. LAHNE, Co-Chair



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February 8, 2009

The Honorable Robert N. Herkes, Chair
House Committee on Consumer Protection & Commerce
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: H.B. 1639 Relating to Condominium Property Regimes

HEARING: Monday, February 9, 2009 at 2:15 p.m.

Aloha Chair Herkes and Members of the Committee on Consumer Protection and Commerce:

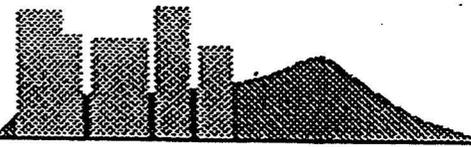
I am Myoung Oh, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR") and its 9,600 members in Hawai'i. HAR **supports** H.B. 1639, which allows condominium associations to assess to the purchaser in a foreclosure sale up to six months of unpaid common expense assessments.

Common expense assessments are the life-blood of condominium associations. These assessments, when delinquent or unpaid, ultimately burden both the association and other unit owners.

H.B. 1639 clarifies that condominium associations have the right to assess against the purchaser in a foreclosure up to six months of unpaid assessments for the unit purchased. Under the present law, the amount of the assessment is limited to \$1800, but H.B. 1639 would remove that statutory cap. H.B. 1639 also clarifies the nature and scope of the condominium assessment, and adds that the assessment may include unpaid utility charges. HAR believes that these amendments and clarifications will help condominium associations to recover delinquent assessments, and protect both the association and its unit owners.

Mahalo for the opportunity to testify.

H.I.C.C.O.



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

February 9, 2009

Rep. Robert N. Herkes, Chair
Committee on Consumer
Protection and Commerce

Testimony on HB 1639 Relating to Condominiums

Dear Representative Herkes:

Thank you for this opportunity to testify on behalf of the Hawaii Independent Condominium and Co-op Owners (HICCO).

HB 1639 will help all condominium owners in Hawaii. Currently, Condominium Associations are only able to recover a maximum of \$1,800 from the foreclosure of owner units by their banks. Since foreclosures sometimes take a year or longer to complete, and during that time associations are not able to collect maintenance fees for those units, condominium associations lose thousands of dollars in spite of the fact that these condominium associations play no role in approving the loans entered into between the banks and the individual owners.

We respectfully request that your committee approve HB 1639.

Sincerely,

Richard Port, Chair
Legislative Committee

Steve Glanstein
P. O. Box 22885
Honolulu, HI 96823-2885

February 8, 2009

Rep. Robert N. Herkes, Chair
Rep. Glenn Wakai, Vice-Chair
Consumer Protection and Commerce Committee
Hawai'i State Capitol, Room 325
415 South Beretania Street
Honolulu, HI 96813

RE: Testimony supporting HB 1639; Hearing Date: February 9, 2009; sent via facsimile to 586-6221; e-mail to: CPCtestimony@Capitol.hawaii.gov.

Dear Chair Herkes, Vice-Chair Wakai, and Members of the Committee:

I am an experienced Professional Registered Parliamentarian and have worked with over 120 condominium association meetings last year. I personally was parliamentarian or chair for 81 of these meetings and have three assistants who assist with the other meetings.

It has been my custom for many years to provide the community with the benefit of my experience with numerous condominium, cooperative, and planned community association meetings (about 1,200 in 25 years). This testimony is presented strictly as an individual in that capacity.

HB 1639 proposes to remove the \$1,800 cap on the amount that a condominium association can collect in a judicial or non-judicial foreclosure.

I support HB 1639 for the following reasons:

1. The cap is an arbitrary number that penalizes the other owners in the condominium and forces them to pay for any deficiency resulting out of foreclosure.
2. The cap fails to match the reality that many condominiums have maintenance fees that are greater than \$300 per month.
3. The cap ignores the reality that some condominium maintenance fees include water, air conditioning, and even electricity.

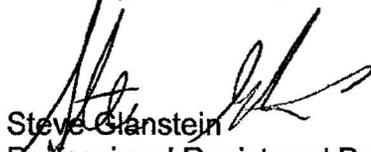
4. Finally, the banks and mortgage companies have options available to them that our Hawaii condominium associations don't have.

A bank or mortgage company can **require maintenance fees to be paid into an escrow account similar to property taxes and lease rent.**

Hawaii's condominium associations obviously can't escrow mortgage payments.

I urge the committee to approve this bill. Thank you for the opportunity to present testimony on this subject.

Sincerely,



Steve Glanstein
Professional Registered Parliamentarian

HOUSE OF REPRESENTATIVES
THE TWENTY-FIFTH LEGISLATURE
REGULAR SESSION OF 2009

COMMITTEE ON CONSUMER PROTECTION & COMMERCE

HB 1639 – Section 514B-146

Honorable Chair Representative Robert N. Herkes and members of the committee.

I am submitting testimony in support of HB 1639. As the number of foreclosures increase, common interest communities are finding it harder to pay the bills of the association. Units in foreclosure do not pay maintenance fees or other assessments. However, landscaping, refuse removal, utilizes, etc. all must be paid for if the community is to survive. The lost maintenance fees must be made up by the other owners.

HB 1639 will permit these communities to recoup at least some of the loss. While it may seem to be a burden on the purchaser of the foreclosed unit, it is in fact not. He is able to purchase at fire-sale prices in a community with common elements and amenities that have been maintained thus preserving the value of the community itself, permitting him, with little extra effort, to enjoy a quality home or benefit from his investment.

From the mortgagors' point of view, it is much easier to resell a unit with maintained landscaping and amenities than one with weed filled lawns and an algae filled swimming pool.

Thank you for the opportunity to testify.

Ted Walkey, PCAM

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

February 6, 2009

Representative Robert N. Herkes
Chair, Consumer Protection
and Commerce Committee
415 S. Beretania Street
Honolulu, Hawaii 96813

Re: HB1639/Support
2/9/09 @ 2:15 p.m. @ Room 325

Dear Representative Herkes:

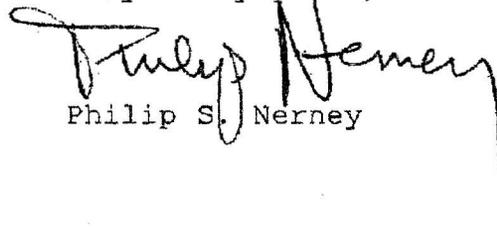
I am an attorney in private practice. I have represented condominium and community associations full time since 1990.

HB 1639 should be enacted. Condominium assessments are the lifeblood of associations. Associations have to pay to operate and to maintain their projects, in good times and bad.

The current law leaves associations vulnerable to substantial losses. Allowing associations to recover six months worth of common assessments reduces that exposure to loss.

The current cap of \$1,800 is inconsistent with current realities. That amount is more like three months worth of common assessments, or less, at many projects. This bill should be enacted so that the focus will be on six months worth of common expenses rather than on a specific dollar amount. That is appropriate because condominium projects run the gamut from modest to grand, and an arbitrary dollar figure disadvantages associations with higher cost structures.

Very truly yours,



Philip S. Nerney

HAWAII COUNCIL OF ASSOCIATIONS
OF APARTMENT OWNERS

P.O. Box 726
Aiea, Hawaii 96701
Telephone (808) 566-2122

February 7, 2009

Rep. Robert Herkes, Chair
Rep. Glenn Wakai, Vice-Chair
House Committee on Consumer Protection & Commerce

RE: TESTIMONY IN SUPPORT OF HB 1639
Hearing: Monday, February 9, 2009, 2:15 p.m., Conf. Rm. #325

Chair Herkes, Vice-Chair Wakai and Members of the Committee:

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

HCAAO supports this bill and asks that you pass it out of this Committee.

We join in the comments by Community Associations Institute in support of this bill.

The \$1,800 currently allowed as a lien priority (i.e., representing 6 months of maintenance fees) in foreclosure is no longer realistic or adequate. Most condominiums in the state have maintenance fees in the \$400 - \$800 per month range. With the worsening of the economy and the number of unemployment growing on a daily basis, we have seen maintenance fee delinquencies increase at an alarming rate and that trend has been forecasted to continue into late 2010. Therefore, we support elimination of the statutory limit of \$1,800 and ask that you pass this bill.

Thank you for the opportunity to testify.


Jane Sugimura
President

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- 1 -

Steve Glanstein
P. O. Box 22885
Honolulu, HI 96823-2885

February 8, 2009

Rep. Robert N. Herkes, Chair
Rep. Glenn Wakai, Vice-Chair
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Steve Glanstein
Professional Registered Parliamentarian

SG:tbs
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