



## *THE JUDICIARY, STATE OF HAWAII*

### **Testimony to the Twenty-Fifth Legislature, Regular Session of 2009**

House Committee on Consumer Protection & Commerce

The Honorable Robert N. Herkes, Chair

The Honorable Glenn Wakai, Vice Chair

House Committee on Judiciary

The Honorable Jon Riki Karamatsu, Chair

The Honorable Ken Ito, Vice Chair

Monday, February 9, 2009, 2:00 p.m.

State Capitol, Conference Room 325

by

Elizabeth Kent

Director

Center for Alternative Dispute Resolution

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**Bill No. and Title:** House Bill No. 1792, Relating to Condominiums

**Purpose:** Establishes the evaluative mediation program.

**Judiciary's Position:**

The Judiciary supports using mediation and believes it provides a useful method that may help preserve relationships and bring satisfying results for parties. However, the Judiciary is opposed to the current language in House Bill No. 1792 because it describes duties for mediators to perform that are not usually performed by mediators.

Mediation is an informal, private process to help parties discuss, define, and resolve their dispute. The parties control the result of their mediation, using a mediator – an impartial person – to guide the process. Mediators do not make decisions for parties and do not have the authority to compel them to perform specific tasks.

This bill would give mediators the power to, among other things, “issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law. ...” These functions are



House Bill No. 1792, Relating to Condominiums  
House Committee on Consumer Protection & Commerce and  
House Committee on Judiciary  
February 9, 2009  
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more akin to the type of powers that a hearings officer or arbitrator might perform. Mediation is a non-adjudicative process.

Thank you for the opportunity to testify on this matter.

**LAW OFFICES OF PHILIP S. NERNEY, LLLC**

A LIMITED LIABILITY LAW COMPANY  
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February 6, 2009

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

Re: HB1792-Oppose in current form  
2/9/09 @ 2:00 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.

The use of non-adjudicative methods of dispute resolution is appropriate. This proposal, however, reflects an absolute misconception about the nature of mediation. HB 1792 should not be enacted in its current form.

Mediation is a voluntary process. Mediators do not: "issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue written directions that shall be final and conclusive[.]" The very notion of such things is antithetical to the mediation process.

That said, this bill could be revised to parallel the language of SB 195, which reads as follows:

SECTION 1. Section 514B-71, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The commission may use any and all moneys in the condominium education trust fund for purposes consistent with subsection (a)[-]; provided that the sum of \$12,000 per calendar year shall be used from the fund to subsidize the cost of mediations using an evaluative method."

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

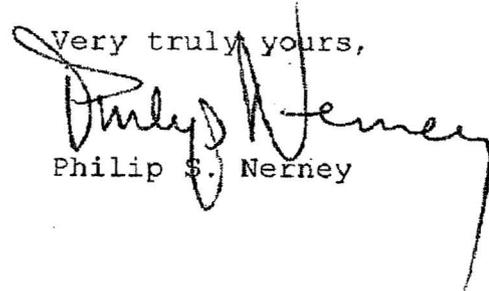
SECTION 3. This Act shall take effect on July 1, 2009.

The intent of SB 195 is to enable the use of funds, that are already routinely collected, for high quality mediation services at affordable prices.

The "condo court" experiment, which has been an abject failure, has run its course. That failed model should be abandoned. This bill, in its current form, is simply an attempt to re-title condo court.

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Please consider deleting the entire text of the current  
HB 1792, and substituting the text of SB 195 instead.  
Otherwise, please do not advance HB 1792. It has nothing to  
do with mediation in its current form.

Very truly yours,  
  
Philip S. Nerney

**PRESENTATION OF THE  
REAL ESTATE COMMISSION**

TO THE HOUSE COMMITTEE ON  
CONSUMER PROTECTION AND COMMERCE

AND

TO THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-FIFTH LEGISLATURE  
Regular Session of 2009

Monday, February 9, 2009  
2:00 p.m.

**TESTIMONY ON HOUSE BILL NO. 1792, RELATING TO CONDOMINIUMS.**

TO THE HONORABLE ROBERT N. HERKES, CHAIR, AND  
TO THE HONORABLE JON RIKI KARAMATSU, CHAIR  
AND MEMBERS OF THE COMMITTEES:

My name is William S. Chee and I serve as the Chairperson of the Real Estate Commission's ("Commission") Condominium Review Committee. Thank you for the opportunity to present testimony on House Bill No. 1792, Relating to Condominiums. The Commission opposes Section 2 of the bill, where the funding responsibility is imposed on the Condominium Education Trust Fund. For the remaining provisions of the bill, including the establishment of an "office of evaluative mediation", we offer our comments and concerns.

House Bill No. 1792, among other provisions, establishes the evaluative mediation program within the Condominium Law, Chapter 514B, Hawaii Revised Statutes ("HRS"); requires the rules, practices, and procedures of the department of commerce and consumer affairs to govern the evaluative mediation hearings; and amends the statutory definition of "educational purposes" as set forth in

section 514B-71, HRS, to include the expenses of the evaluative mediation program established under Chapter 514B, HRS, which allows the Commission, as trustees, to expend monies from the Condominium Education Trust Fund for the expenses of the evaluative mediation program.

The Commission does not support House Bill No. 1792 for the following reasons:

- As drafted, it is unclear what comprises "evaluative mediation", and how "evaluative mediation" is different from the current offering of "mediation";
- The Commission currently expends monies from the Condominium Education Trust Fund to subsidize mediation of disputes between owners and boards, and between owners of associations registered with the Commission, which makes this bill unnecessary. The Commission, pursuant to section 514B-71, HRS, after study and review, already has the authority to expend monies from the Condominium Education Trust Fund for the expeditious and inexpensive procedures for resolving association dispute which can include expenses for costs of "evaluative mediations".

The Commission would like to comment on the proposed establishment of an "office of evaluative mediation". This is not something that the Commission

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can be responsible for. The Commission would not have the necessary resources to effectively carry out the mandates of this measure.

For these reasons, the Real Estate Commission does not support passage of House Bill No. 1792. Thank you for the opportunity to testify.

THE SENATE  
THE TWENTY-FIFTH LEGISLATURE  
REGULAR SESSION OF 2009

COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

Rep. Robert N. Herkes, Chair  
Rep. Glenn Wakai, Vice Chair

COMMITTEE ON JUDICIARY

Rep. Jon Riki Karamatsu, Chair  
Rep. Ken Ito, Vice Chair

Hearing Date: Monday, February 9, 2009

Time: 2:00 p.m.

Place: Conference Room 325  
State Capitol

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

Bill No. and Title: HB 1792, Relating to Condominiums

**SUBMITTED BY E-MAIL: [testimony@capitol.hawaii.gov](mailto:testimony@capitol.hawaii.gov)**

TO THE HONORABLE ROBERT N. HERKES, CHAIR, THE HONORABLE GLEN WAKAI, VICE CHAIR, HONORABLE JON RIKI KARAMATSU, CHAIR, KEN ITO, VICE CHAIR AND MEMBERS OF THE COMMITTEES:

My name is Tracey Wiltgen, Executive Director of the Mediation Center of the Pacific (the Mediation Center) and **I am writing on behalf of the Mediation Center to oppose HB 1792.** While the Mediation Center supports the creation of an evaluative mediation program to address conflicts that arise within condominium associations, **the language of HB 1792 is confusing as it uses the terms evaluative mediation and hearing interchangeably and imposes special “powers” on mediators that extend beyond the role of a mediator, thereby compromising the integrity of the mediation process.**

The Mediation Center is a 501(c)(3) not for profit corporation whose mission is to provide high quality mediation and dispute resolution services that are affordable and accessible. The Mediation Center has provided mediation and dispute resolution services and training for Oahu's communities for the past 30 years. Additionally, since 1990, the Mediation Center has worked with the Department of Commerce and Consumer Affairs Real Estate Division, to provide mediation services for condominium matters. In fiscal year 2007 – 2008, the Mediation Center managed 42 cases involving condominium associations. 40% of the cases that participated in mediation resulted in written agreements through a facilitative mediation process.

The Mediation Center opposes HB 1792 because the language of the bill incorrectly characterizes evaluative mediation as a form of "hearing" and requires the mediator to perform functions that are not within the role of a mediator. Sections (a) through (c) of HB 1792 refer to a "hearing" while section (d) states that a "mediator" is then selected. A hearing and mediation are two distinctly different processes. Section (d) goes on to describe the "powers of the mediator" as being able to "issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue written directives that are final and conclusive." These "powers" while appropriate for a Hearings Officer or Special Master, are contrary to the role of a mediator and the mediation process.

The Guidelines for Hawai'i Mediators created by the Hawai'i Chapter of the Association for Conflict Resolution and endorsed by the Supreme Court of the State of Hawai'i on April 22, 1986 and July 11, 2002 states that "Mediation is a process in which an impartial third party intervenes in a dispute with the consent of the participants and assists them in negotiating a voluntary and informed settlement. Mediation is a separate and distinct activity from arbitration, adjudication, evaluation, counseling and therapy, although it may be used with these and other conflict resolution procedures." The Guidelines go on to state that "In mediation, whether private or public, decision-making authority rests with the participants themselves." Section VI of the Guidelines further emphasizes "Self Determination" in mediation and the primary responsibility of a mediator to let "the resolution of a dispute rest with the participants."

The Mediation Center opposes HB 1792 because the process described in the bill is that of a hearing conducted by a hearings officer or Special Master with the authority to render decisions. At no time do mediators, evaluative or otherwise, "issue subpoenas, administer oaths, hear testimony, or issue written directives that are final and conclusive." While an evaluative mediator may offer an opinion regarding the strength or weakness of a case in regard to the law, the ultimate decision whether or not to reach an agreement rests with the participants themselves.

The Mediation Center supports the creation of an evaluative mediation program. In fact, the Mediation Center is willing and able to create and administer such a program with the financial support of the Hawai'i Real Estate Commission's Condominium Education Fund. The Mediation Center has participated in discussions with various professionals working with Hawaii's condominium association community regarding the development of such a program as an option to the facilitative mediation process. The individuals serving as mediators in such a program would be trained mediators with subject matter expertise in the laws governing condominium associations. Therefore, they would have the ability to discuss the strengths and weaknesses of each participant's case and a final resolution would rest solely with the participants.

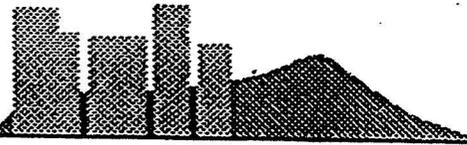
The process of mediation, evaluative or otherwise, is a distinct process that offers people the opportunity to reach their own resolutions with the assistance of an impartial mediator. Your consideration of the Mediation Center's testimony in opposition to HB 1792 to protect the integrity of the mediation process and ensure that it is clearly distinguished from other dispute resolution processes such as hearings, is appreciated.

Respectfully,

*Tracey S. Wiltgen*

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

# 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

Rep. Jon R. Karamatsu, Chair  
Committee on Judiciary

## **Testimony on HB 1792 Relating to Condominiums**

Dear Representatives Herkes and Karamatsu:

Thank you for this opportunity to testify in opposition to HB1792 on behalf of the Hawaii Independent Condominium and Co-op Owners (HICCO).

Our organization prefers HB 875 which provides for a two year continuation of the current Alternative Dispute Resolution Pilot Program.

The problem with HB 1792 is that it substitutes "evaluative mediation" for Hearings currently found in Chapter 514B-161 and thereby eliminates the current Alternative Resolution Pilot Program. This would certainly be premature inasmuch as the Evaluative Mediation Program has not been pilot tested.

There is no need for legislation pertaining to evaluative mediation since the Real Estate Commission already has the authority and funds to contract for mediation services.

We urge you to hold HB 1792 and schedule a hearing for HB 875.

Sincerely,

Richard Port, Chair  
Legislative Committee

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 RE HB 355 RE CONDOMINIUMS  
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 takes no position on this bill.

We are not aware that there is a problem with late fees for delinquent maintenance fees or that unit owners are not getting sufficient notice of collection actions.

Most if not all condominium associations charge \$25 -\$50 per month for delinquent maintenance fees. That amount is well below 20% of most if not all maintenance fees charged by associations.

Regarding notice, most if not all associations send a 30-day notice of delinquency to a unit owner before the account is referred to counsel for collection. Most of the demand letters include a statement that if payment is not received within the 30-days specified, the account will be referred to legal counsel and the unit owner will then become liable for attorneys' fees. Also, since maintenance fees for an owner-occupant would be considered a "consumer debt" under the federal Fair Debt Collection Practices Act, the federal laws requires a 30-day written notice before taking legal action.

Thank you for the opportunity to testify.

  
Jane Sugimura  
President

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