



# LATE TESTIMONY

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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 Rod Maile, and I am the Senior Hearings Officer for the Office of Administrative Hearings, Department and Commerce and Consumer Affairs ("DCCA"). Thank you for the opportunity to present testimony on House Bill No. 1792, Relating to Condominiums. Although DCCA supports the concept of evaluative mediation in reviewing the underlying validity of disputes between condominium owners and

condominium associations, DCCA cannot support House Bill No. 1792 for the following reasons.

First, as drafted, it is unclear what process is to be utilized for "evaluative mediation." It is our understanding that "evaluative mediation," as the concept is generally recognized by mediation professionals, does not have as its primary goal, the attainment of a mutually derived agreement between the parties to the evaluative mediation proceedings. Instead, evaluative mediation is utilized as a means to determine the relative validity and strength of the parties' respective positions so that the parties can then determine what subsequent kinds of proceedings or remedies they should pursue (i.e., mediation, arbitration, or a lawsuit). As such, an "evaluative mediation" process envisioned by House Bill No. 1792, would not necessarily result in the issuance of a definitive and binding determination. Consequently, the requirement that duly selected mediators "hear testimony, find facts, make conclusions of law, and issue written directions that shall be final and conclusive," appears to be a different kind of proceeding than the kind of evaluative mediation that is generally utilized.

Next, as to the nature of the "evaluative mediation" process, it appears that process proposed by House Bill No. 1792 is substantively identical to the contested case hearing process currently provided by HRS §514B-161.5, except that under House Bill No. 1792, a pool of qualified mediators conduct the contested case hearings, instead of DCCA hearings officers. Under The "evaluative mediation" process defined by House Bill No. 1792: 1) the rules and practices and procedure of DCCA will govern the "evaluative mediation" process; 2) the burden of proof, including the burden of

producing the evidence and the burden of persuasion, will be upon the party initiating the proceeding; 3) proof of a matter shall be by a preponderance of the evidence; and 4) an appeal may be pursued under HRS §91-14. As to the qualifications for the "evaluative mediators", because each mediator in the "pool of pre-selected qualified evaluative mediators" will need to be fully trained in the ability to conduct contested case hearings under HRS Chapter 91, as well as Hawai'i Administrative Rules Title 16, Chapter 201, we would expect that the training process for these mediators will be extensive and costly.

Lastly, because House Bill No. 1792 requires the creation of a separate "office for evaluative mediation" within DCCA, even with the number of cases being restricted to thirty requests for hearing per fiscal year, we would anticipate that the establishment of a new program will require a separate administrator, support staff, office space, equipment, and logistical support. Furthermore, House Bill No. 1792 does not indicate how or how much the "evaluative mediators" will be paid or compensated. Unless the "evaluative mediators" are to perform their services without charge, either the "office for evaluative mediation" or condominium education trust fund will be responsible for paying the "evaluative mediators" since the parties appear to be responsible for only their \$25.00 filing fee.

For these reasons, DCCA cannot support the passage of House Bill No. 1792. Thank you for the opportunity to testify on this bill.

