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February 1, 2011

Honorable Rida Cabanilla
Honorable Pono Chong
Committee on Housing
415 South Beretania Street
Honolulu, Hawaii 96813

LATE TESTIMONY

Re: HB 1662

Dear Chair Cabanilla, Vice-Chair Chong and Committee Members:

I write as an individual, to respond to the testimony of the Real Estate Commission. By way of reference, I have represented condominium associations full-time for over twenty years. A substantial focus of my practice includes managing conflict in the condominium setting.

The Commission testimony relates that 156,444 condominium units exist in Hawaii. A twenty-five cent increase in the condominium education trust fund, per unit per year, would therefore produce a $39,111.00 increase to the fund. Such an amount, or less, could go a long way to solving difficult condominium disputes.

The defensive nature of the Commission's testimony seems odd. Efforts to create a more robust trust fund, promoted by the relevant industry group, should be supported by the Commission.

The Commission suggests that subsection (b) of HB 1662 may be unnecessary. That is a strange assertion. Subsection (b) reads as follows:

> (b) The following types of disputes shall not be submitted to mediation without the written agreement of all parties to the dispute:
> (1) Matters relating to the collection of assessments;
> (2) Actions seeking equitable relief involving threatened property damage or the health or safety of association members or any other person;
> (3) Claims for personal injury; or
> (4) Actions involving more than $2,500 where insurance coverage for defense or indemnification under a policy of insurance procured by or for the association would be prejudiced by participation in mediation.

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That language essentially reframes existing law, but does *not* work a substantive change. Hawaii Revised Statutes Section 514B-161(b) presently reads as follows:

(b) Nothing in subsection (a) shall be interpreted to mandate the mediation of any dispute involving:

(1) Actions seeking equitable relief involving threatened property damage or the health or safety of association members or any other person;
(2) Actions to collect assessments;
(3) Personal injury claims; or
(4) Actions against an association, a board, or one or more directors, officers, agents, employees, or other persons for amounts in excess of $2,500 if insurance coverage under a policy of insurance procured by the association or its board would be unavailable for defense or judgment because mediation was pursued.

Thus, the Commission is either unfamiliar with existing law or some other reason exists for placing a negative slant on HB 1662. The Commission is, of course, familiar with the re-codified condominium law that was reworked under its auspices.

The Commission also expresses distress about references to mediation in "good faith" but H.R.S. Section 514B-157 **presently** requires "good faith" mediation. HB 1662 is consistent with that provision.

It is certainly true that good faith can be hard to gauge. It is easy to remove the "good faith" language from HB 1662, particularly when HB 1662 provides ***objective*** indications for a court to consider.

The Commission's testimony manufactures an alleged conflict between proposed section (b)(1) and H.R.S. Section 514B-146(d). Since the proposed section (b)(1) is consistent with current law, the Commission is testifying that **existing** law is in conflict with itself.

In all events, existing H.R.S. Section 514B-161(b) and proposed section (b)(1) are **not** in conflict with H.R.S. Section 514B-146(d). The former provisions concern **pre-payment** matters, whereas H.R.S. Section provides a remedy for an owner who has already paid a disputed amount.

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The Commission also dislikes proposed section (h), which reads:

> (h) Any mediation under this section shall be conducted in the county where the condominium is located, under the authority of a non-profit entity that has contracted with the commission to provide low-cost alternative dispute resolution services, unless the parties agree otherwise in writing.

The bill **expressly** states that parties can choose a mediator of their own. Still, if the Commission prefers to omit the reference to "non-profit" then the proponents of the bill have no objection to removing the words "non-profit."

The heart of the Commission's objection, really, is that HB 1662 touches a trust fund under its control. The Commission suggests that it does enough in the area of promoting mediation, but that is a debatable point.

The Commission defers comment on the "pilot" program scheduled to sunset this year. Thus, it does not defend that program or attempt to refute substantial evidence that the program has done little good for consumers.

HB 1662 reflects the perspective that mediation is a really good thing. HB 1662 adds value by expanding access to commercial quality mediation, at subsidized rates. Consumers will benefit from access to commercial quality mediation.

The Commission "has concerns" that proposed section five "creates an **uneven** playing field" by holding owners accountable for litigating non-meritorious claims. That is a bizarre assertion.

It is **existing** law that creates an "uneven playing field[.]" An *even* playing field would mean that all parties to litigation assume the usual risks and consequences of litigating.

Existing law can be construed to shield an owner from the consequences of filing even the most completely frivolous litigation if the owner simply goes through the motions of sitting through one single mediation session. **That** does not reflect an even playing field, especially when participation in mediation does not shield an association from the obligation to pay attorney's fees to an owner who prevails in litigation.

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HB 1662 specifically provides "that, when determining the reasonableness and the necessity of expenses, costs, and attorneys' fees incurred by the association, the court may consider factors including, without limitation, the importance of the issue raised by the owner against the association, the effect of the litigation on the common fund and association operations, or any effort made by the owner to resolve the dispute, including any written settlement offer or the mediation of any matter within the scope of section 514B- ."

That is, HB 1662 proposes to **continue** shielding owners *from* a "level playing field" by emphasizing safe harbor language that a court can rely upon to deny an award of attorney's fees to an association that prevails in litigation.

If the Commission prefers a level playing field, then the bill should be amended to provide that the prevailing party in litigation receives an award of its reasonable attorney's fees. Safe harbor language for the benefit of owners should be omitted.

The Commission asserts that accountability in litigation is a disincentive to mediation. That assertion utterly lacks merit.

Owners *presently* lack an incentive to mediate meaningfully and in good faith, because pursuing even frivolous litigation may lack any adverse consequence. Other owners, who pay an association's bills, may suffer a consequence; but the owner who files non-meritorious litigation risks nothing.

Properly understood, therefore, the Commission objects to HB 1662 because the Commission wants the legislature to stay away from the condominium education trust fund. The balance of the Commission's testimony concerns matters that are easily addressed and/or about which the Commission is flat wrong.

Very truly yours,

Philip S. Nerney