IACtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 13, 2017 12:19 PM
To: IACtestimony
Cc: richard.emery@associa.us
Subject: Submitted testimony for HB236 on Feb 15, 2017 09:00AM

HB236
Submitted on: 2/13/2017
Testimony for IAC on Feb 15, 2017 09:00AM in Conference Room 429

Submitted By	Organization	Testifier Position	Present at Hearing
Richard Emery	Associa	Oppose	Yes

Comments: First, it is im,possible to get 80% of any association to agree to so something or even respond. If this is an issue the percentage needs to be reduced to 67%. More importantly, the board has a legal and fiducairy obligation to maintain the property. Lenders will not give mortgages if the board cannot make decisions. Board members are owners too and must pay the same increase. This provision will have destructive consequences and result in litigation. The companion Bill SB400 was deferred by the Senate co0nsumer protection committee.

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From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 13, 2017 12:43 PM
To: IACtestimony
Cc: steveghi@gmail.com
Subject: Submitted testimony for HB236 on Feb 15, 2017 09:00AM

HB236
Submitted on: 2/13/2017
Testimony for IAC on Feb 15, 2017 09:00AM in Conference Room 429

Submitted By	Organization	Testifier Position	Present at Hearing
Steve Glanstein	Hawaii State Association of Parliamentarians	Oppose	No

Comments: The sale of property proposal in the bill, if adopted, will cause irreparable damage to larger community associations which dedicate small portions of land for a community park, swimming pool, etc. An 80% approval requirement of an association such as Waikoloa Village, Mililani Town Association, Ewa by Gentry just won't happen. The assessment proposal in the bill ignores substantial size differences in Planned Community Associations. We recommend that the legislature let these Planned Community Associations conduct their business in accordance with their governing documents with minimal governmental interference. When necessary, owners who have disagreed with the board's management have worked together to remove board members from office.

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Mililani Town Association
95-303 Kaloapau Street
Mililani Town, Hi 96789
Phone (808) 623-7300

February 13, 2017

Committee on Intrastate Commerce
State Capitol, Conference Room 429
415 S. Beretania Street
Honolulu, HI 96813

RE: Testimony in Opposition of HB236

Dear Chair Ohno, Vice Chair Choy and Members Cachola, Ito, Onishi, Tokioka, Ward and Woodson:

On behalf of the Mililani Town Association (MTA), I would like to urge your opposition to HB236, Relating to Planned Community Associations.

MTA's Declaration of Covenants, Conditions and Restrictions (DCCR's) state in section 5.05(f) that:

> "The Association shall have the authority to exchange or to sell and convey, or otherwise dispose of, for cash or on such terms as it shall approve, any portion or portions of the common area, with improvements thereon, or other property of the Association, the retention of which is no longer necessary, advantageous or beneficial for the Association or for the Owners,...provided, however, that no such exchange , sale or other disposition of any real property in fee....shall be made unless the same shall have been approved by an affirmative vote of not less than two-thirds (2/3) of each class of members who may vote in person or by proxy at a meeting of the Association duly called..."

As you can see, our governing documents already specify the ability to convey property, and with less than 80% approval required. Why add a bill to duplicate what is already allowed? Have Planned Community Association (PCA) governing documents been researched to see what is already allowed? My guess is the provision is already specified in PCA's documents.

The section that allows dedication to the appropriate county or to the State is unrealistic in that it assumes the county or the State will accept ownership, which is doubtful. Why would the government accept a liability that probably comes with maintenance requirements? MTA has a prime example, we own a pedestrian bridge that spans Kamehameha Highway in Mililani, and we notified the State as per our agreement that we would be turning it over to the State. The State declined to accept

Mililani Town Association
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the bridge and instead notified MTA to tear it down. Are you going to amend this bill to require the county or the State to accept the common area? Is the State prepared to take on the maintenance of these common area parcels that will be dedicated to them?

The second half of the bill, limiting annual regular assessment increases to 20% without a majority of members approving punishes an association like MTA. A 20% increase to MTA assessments equals $6.80 per month, hardly what you would consider excessive, right? In addition, with nearly 16,000 homes in our Association, getting a majority (8,001) homes to reply alone would be impossible, and for sure if it was to increase dues, it would never happen. This would force MTA to have to do more frequent assessment increases rather than risk not being able to cover expenses in any certain year. We just went 7 years between assessment increases, so you are telling Mililani residents you wish for them to get them more frequently.

Please remember that legislation in response to a few bad boards or bad property managers, has an affect on those who do things right too. Again, I urge you to kill this bill and not pass it out of your Committee.

Thank you for your time. If you have any questions, please contact me at 440-2614, I will be happy to provide any additional information you may need.

Sincerely,

David O'Neal, CMCA, AMS
General Manager

Rep. Takashi Ohno, Chair
Rep. Isaac W. Choy, Vice Chair
COMMITTEE ON INTRASTATE COMMERCE

Michael Gronemeyer, Homeowner Plantation Estates Lot Owner Association 10 Ho'ohui Road, Suite 201 Lahaina, Hawaii 96761	Hearing Date: February 15, 2017

SUBJECT: HB236 RELATING TO PLANNED COMMUNITY ASSOCIATIONS

I am a resident in the Lahaina community of Plantation Estates. I have been involved in various West Maui HOA board activity for over 15 years. I am opposed to HB236 as currently written, because it is likely to harm homeowners.

House Bill 236 has SIGNIFICANT issues related to the proposed changes to Section 421J-9 (b).

Except in emergency situations, the board of directors shall not impose a regular assessment that is more than twenty per cent greater than the immediately preceding fiscal year's assessment without the approval of a majority of the members. For a regular assessment that exceeds twenty per cent of the immediately preceding fiscal year's assessment, the board shall obtain the approval of a majority of the members at a duly convened regular annual meeting or special meeting of the association or by the written consent of the majority of members without a meeting.

This bill is likely to greatly complicate and harm unit owners in certain situations.

As you know, generally a Homeowner Association (HOA) can file federal taxes as a corporation (form 1120) or as an HOA (form 1120H). In many situations, it is advantageous to file 1120H and the HOA can elect to do so. In some situations, the HOA has a significant tax advantage filing form 1120. In other situations, the HOA does not meet the criteria needed to file 1120H and must file 1120. When form 1120 is used for filing, the IRS requires the HOA to carefully track "excess member" income from year to year. If the association does not spend this "excess member" income in the next year it will be taxed as "corporate" income.

Traditionally, if the HOA has "excess member income" (say in year 1) the way this has been handled is for the association to reduce the operating assessment

in year 2 to fully offset this excess and thereby not pay federal tax on the year 1 excess member income. However, in year 3 the assessment rates need to be raised again in line with year 1 as adjusted for inflation.

This adjustment can be very large. For example, our HOA was recently faced with an unexpected "excess member income" (in 2015) which would have required reducing monthly assessments by 25% (in 2016) to avoid paying federal tax on member income. Then in the following year (2017) we would need to go back to the assessment level in year 1 plus inflation/cost of living increases. This would not be allowed under your HB236. As a result, the HOA would likely be forced to pay taxes that it otherwise would not have to pay and would have a strong incentive to not reduce the assessments in year 2.

Second, HB 236 does not consider the fact that inflation may not always be as low as it is now. For example, in 1980 annual inflation averaged 13.5% and was over 10% in the year before and the year after. (see http://www.usinflationcalculator.com/inflation/historical-inflation-rates/)

A solution to the first and second problems above, would be to tie the assessment increase limit to 20 percent above the inflation adjusted assessments averaged over the prior five year period plus the prior years inflation rate.

Third, this HB236 limit should exempt all assessment increases required by federal, state or local laws. For example, state laws may mandate an increase in the formula by which reserves are calculated, or state laws may not permit the HOA to collect legal fees until the matter is fully resolved (courts, mediation, see SB164 and HB649, etc.). Requiring the owners to approve these non-discretionary mandated expenditures creates a problem if the owners do not approve assessments to pay for what the law requires. State laws already make it extremely difficult to collect delinquent assessments when the net foreclosed value of the property is negative.

In summary, I oppose this bill unless it is modified as described above. As the bill stands it will likely cause harm to owners.

Thank you for the opportunity to testify. Please forward this to the appropriate committee members and others in the legislature.

IACtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, February 14, 2017 1:23 PM
To: IACtestimony
Cc: albertd@hawaiianprop.com
Subject: *Submitted testimony for HB236 on Feb 15, 2017 09:00AM*

HB236
Submitted on: 2/14/2017
Testimony for IAC on Feb 15, 2017 09:00AM in Conference Room 429

Submitted By	Organization	Testifier Position	Present at Hearing
Al Denys	Hawaii CAI LAC & Hawaiian Properties	Oppose	No

Comments:

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February 14, 2017

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Rep. Takashi Ohno, Chair
Rep. Isaac W. Choy, Vice Chair
Members of the House Committee on
Intrastate Commerce
Twenty-Ninth Legislature
Regular Session, 2017

Re: H.B. 236
Hearing on February 15, 2017, 9:00 a.m.
Conference Room 429

Dear Chair, Vice Chair and Members of the Committee:

My name is Charles Pear. I am appearing as legislative counsel for ARDA Hawaii. Thank you for the opportunity to testify on HB236. On behalf of ARDA Hawaii, we respectfully **oppose** this bill in its current form

The bill authorizes a planned community association to convey or mortgage portions of the common area of the planned community. Authorization to do so requires the written approval of eighty percent (80%) of the members of the association. Any other purported conveyance, encumbrance or transfer of a common area is void.

Real estate developers frequently reserve the right to deal with the common property of a condominium, time share plan and/or planned community. For example, it is common for state or county authorities to require the developer to convey small slivers of the land of a project for roadway widening purposes. This requirement is established as a condition to granting the permits necessary to develop the project.

Real estate developers also commonly reserve to grant easements over the property of a project, and to arrange for easements in favor of the project.

Finally, developers of phased communities sometimes reserve the right to subdivide the land of the project and to withdraw any undeveloped phases from the project. This can become important when, for example, changes in consumer taste require a change in the real estate

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product being developed. It also provides an exit strategy for lenders who have to foreclose on a project that does not sell as well as expected, perhaps due to a downturn in the real estate market.

In its current form, the bill prohibits any conveyance, encumbrance or transfer of the common areas without the written approval of 80% of the owners. Any attempt to do otherwise would be void.

ARDA Hawaii believes that the bill should be revised to recognize that rights reserved to the developer will not be affected by the proposed new section shown in Section 2 of the bill.

Section 3 of the bill prohibits the adoption of certain assessments without the approval of a majority of the owners. We recommend that the committee look to the Condominium Act for guidance on what is or is not practical in the circumstances. Please also note that if a planned community is used principally for a time share plan, then it may not be practical to obtain the approval of a majority of the owners. This could be problematic if, for example, a hurricane damages a project and the uninsured portion of the cost of the repairs exceeds the 5% threshold proposed in this bill.

We also note that there appear to be technical problems with the bill. For example, it refers to "common areas" in some places, and "common elements" in others. Chapter 421J defines the term "common area" but does not use the term "common element."

In addition, the bill authorizes the association to mortgage or convey property not owned by the association.[1] The condominium act authorizes a condominium association to borrow funds,[2] but we are not certain that a condominium association has the authority to convey or

[1] §421J-3 defines "common area" to include property owned by the planned community association as well as property that is not owned by it, but that is available for use by it, as follows:

> "Common area" means real property within a planned community which is owned or leased by the association or is otherwise available for the use of its members or designated as common area in or pursuant to the declaration.

[2] See §514B-105(e), HRS, which provides as follows:

> (e) Subject to any approval requirements and spending limits contained in the declaration or bylaws, the association may authorize the board to borrow money for the repair, replacement, maintenance, operation, or administration of the common elements and personal property of the project, or the making of any additions, alterations, and improvements thereto; provided that written notice of the purpose and use of the funds is first sent to all unit owners and owners representing fifty per cent of the common interest vote or give written consent to the borrowing. In connection with the borrowing, the board may grant to the lender the right to assess and collect monthly or special assessments from the unit owners and to enforce the payment of the assessments or other sums by statutory lien and foreclosure proceedings. The cost of the borrowing, including, without limitation, all principal, interest, commitment fees, and other expenses payable with respect to the borrowing or the enforcement of the obligations under the borrowing, shall be a common expense of the project. For purposes of this section, the financing of insurance premiums by the association within the policy period shall not be deemed a loan and no lease shall be deemed a loan if it

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mortgage the common elements (common elements are owned by the unit owners, not the association) in the ordinary course of operations.

Thank you for your kind consideration of the foregoing.

Very truly yours,

McCORRISTON MILLER MUKAI MacKINNON LLP

Charles E. Pear, Jr.

CEP:kn

provides that at the end of the lease the association may purchase the leased equipment for its fair market value.