LATE

Testimony of the Hawai'i Real Estate Commission

Before the
Senate Committee on Commerce and Consumer Protection
Wednesday, February 5, 2025
10:00 a.m.
Conference Room 229 and Videoconference

On the following measure:
S.B. 146, RELATING TO CONDOMINIUMS

Chair Keohokalole and Members of the Committee:

My name is Derrick Yamane, and I am the Chairperson of the Hawai'i Real Estate Commission (Commission). The Commission offers comments on this bill.

The purpose of this bill is to amend the conditions and procedures of alternative dispute resolution methods for condominium-related disputes.

Currently, section 514B-146(f), Hawaii Revised Statutes (HRS), provides for condominium unit owners to contest common expenses through small claims court or mediation. For fines and other assessments, section 514B-146(g), HRS, provides for fees to be contested by filing a demand for mediation. Section 11 of this bill amends this language to specify that:

> *A unit owner may file an action in any court with jurisdiction, or may request mediation, to contest:*
>
> *(1) A paid assessment; or*
>
> *(2) An unpaid assessment other than a common expense assessment or fine. Fines shall be subject to [proposed] section 514B-B.*

Proposed section 514B-B(a)(3) additionally provides for fines to be taken to small claims court as well. The Commission believes the above amendments could impose additional burden to the Judiciary's Small Claims Court, and subsequently defers to the Judiciary for administrative concerns they may have.

This bill also establishes minimum qualifications of mediators, arbitrators, and evaluators who provide alternative dispute resolution supported by the Condominium Education Trust Fund (CETF). The Commission takes no position on these requirements specified under proposed section 514B-G, but for the Committee's information, notes that it does not contract with individual mediators; and instead,

contracts with mediation providers to provide alternative dispute resolution supported by the CETF.

As proposed section 514B-F provides for the CETF to support disputes submitted to "early neutral evaluation", the Commission kindly requests a delayed effective date of July 1, 2026, to provide additional time to amend its existing contracts with mediation providers, or to draft and procure new contracts, as appropriate.

Thank you for the opportunity to testify on this bill.

HAWAII LEGISLATIVE
ACTION COMMITTEE
community
ASSOCIATIONS INSTITUTE

P.O. Box 976
Honolulu, Hawaii 96808

February 1, 2025

Honorable Jarret Keohokalole
Honorable Carol Fukunaga
Committee on Commerce and Consumer Protection
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **SB 146 SUPPORT**

Dear Chair Keohokalole, Vice Chair Fukunaga and Committee Members:

CAI supports SB 146. SB 146 will protect consumers by improving alternative dispute resolution processes for condominium-related disputes.

SB 146 clarifies the law and makes law changes that are warranted based on experience. SB 146 also includes conforming amendments.

Notably, complaints about the assessment of fines are effectively addressed. SB 146 prohibits the reported practice of charging attorneys' fees to collect a disputed fine.

SB 146 requires fines to be reasonable, and notice of the assessment of a fine must conform to due process requirements. An appeal process must be provided, and remaining disputes will be finally resolved by the small claims court.

For disputes about matters other than fines, SB 146 changes existing law by making early neutral evaluation the next step for disputes that are not settled in mediation. Early neutral evaluation supplants **non-**binding arbitration.

Early neutral evaluation differs from mediation, even though mediation can have an evaluative component. Forms of early neutral evaluation are presently used by major alternative dispute resolution companies, like the American Arbitration Association[1] and Dispute Prevention & Resolution, Inc.[2] Courts[3] and the federal government use early neutral evaluation as well.[4]

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[1]https://www.adr.org/sites/default/files/document_repository/Early_Neutral_Evaluation.pdf

[2] https://dprhawaii.com/services/

[3] For example, https://cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/early-neutral-evaluation-ene/, and https://mncourts.gov/Help-Topics/ENE-ECM.aspx

[4] https://www.adr.gov/guidance/adrguide-home/11-odra-ene/

The value of introducing early neutral evaluation into the dispute resolution process is that it will enable a fair consideration of the merits of a claim or defense without the burdens of litigation. Only the most resolute disputants will carry a dispute forward after first attempting mediation, and then also obtaining a reasoned decision by an experienced evaluator.

SB 146 provides that:

> (f) The evaluation process shall be determined by the evaluator; provided that every evaluation process shall include the reasonable opportunity for each party to the dispute to:
>
> (1) Submit a written position statement, together with supporting declarations or exhibits;
>
> (2) Submit a written response to the position statement of any other party; and
>
> (3) Set forth the essential points upon which an asserted claim or defense is based at an informal hearing convened by the evaluator; provided that the rules of evidence, except those concerning privileges, shall not apply at the hearing.
>
> (g) Within ninety days following completion of the hearing, the evaluator shall provide the parties with a written evaluation of the claims and defenses presented by the parties in their written statements and oral presentations. The evaluation shall consist of:
>
> (1) A reasoned decision, determining the prevailing party and what relief, if any, should be granted; and
>
> (2) A separate document, containing an award of reasonable attorneys' fees and costs and other expenses to the prevailing party.
>
> (h) The evaluator's timely written evaluation shall:
>
> (1) Bind the parties with respect to the evaluator's award of attorneys' fees and costs and other expenses in connection with the evaluation process; and
>
> (2) Serve as the basis for an award of all reasonable attorneys' fees and costs and other expenses to the prevailing party in any action or proceeding relating to the subject matter of the dispute whenever that party is also the party determined by the evaluator to have been the prevailing party.

Early neutral evaluation goes well beyond mediation, and provides parties with an expert assessment of the probable outcome of a dispute after an evidentiary hearing. SB 146 incentivizes dispute resolution before the expense, inconvenience and uncertainty of formal adjudication.

Exposure to both mediation and early neutral evaluation before proceeding to litigation or binding arbitration will also prevent parties from proceeding unaware of the risks. The laws, contractual provisions, and standards applicable to a dispute, will inevitably be clear by that point.

SB 146 substantially lowers the fee to participate in mediation, and authorizes waiver of the fee altogether if the fee poses an unreasonable economic burden. SB 146 promotes easy access to alternative dispute resolution processes and is user friendly.

SB 146 leaves open the amount of support to provide for mediation, early neutral evaluation and binding arbitration. The Committee is requested to subsidize these processes robustly. The condominium education trust fund is funded by developers and condominium owners, so a general fund appropriation is not required.

It is important to note that condominium-related disputes loom larger in the press than in the real world. The Real Estate Commission's Annual Report for 2024 ("Report") (DC 153) details that there were **20** facilitative mediations and **41** evaluative mediations last year. Report at 31. The Report identified 1649 registered condominium associations, representing 169,574 units (Report at 32), indicating an entirely manageable volume of complaint. Interestingly, 48% of new residential condominium projects in 2024 were limited to 15 units or less. Report at 30.

SB 146 provides a true safe harbor against exposure to attorneys' fees and costs in litigation or binding arbitration.

The current "safe harbor" is illusory. It is conditioned upon proof that an owner "made a good faith effort to resolve the dispute" in mediation or non-binding arbitration.[5]

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[5] Per Hawaii Revised Statutes §514B-157(b):

> If any claim by an owner is not substantiated in any court action against an association, any of its officers or directors, or its board to enforce any provision of the declaration, bylaws, house rules, or this chapter, then all reasonable and necessary expenses, costs, and attorneys' fees incurred by an association shall be awarded to the association, unless before filing the action in court the owner has first submitted the claim to mediation, or to arbitration under subpart D, and made a good faith effort to resolve the dispute under any of those procedures.

Evidence of conduct in mediation is "not admissible."[6] Thus, "good faith" in mediation cannot be proven. The typical prevailing party standard generally applies to litigated claims. Early neutral evaluation supplants non-binding arbitration in SB 146 and the evaluator determines the prevailing party.

Moreover, current law is unjust. Taken at face value, an owner could engage an association in expensive, meritless litigation with impunity by *simply sitting through a three-hour mediation*. Owners pay the expenses of an association. Those innocent consumers should not be expected to pay for the litigation of meritless claims.

Condominium law already favors condominium owners who seek to vindicate their rights. The special processes available to condominium owners are unavailable to owners who do not live in an association. It is reasonable to expect condominium owners to make the most of those processes.

There are nonetheless critics of the remedial scheme. As noted in the article *Challenges to Condominium Self Governance*, Hawaii Bar Journal (November 2017):

> The piece that is perceived to be missing in the remedial scheme is a remedy that does not entail risk or effort.
>
> That missing piece must be understood to relate solely to the exercise of private civil remedies regarding privately owned real property, because the Commission already has substantial statutory and rulemaking authority to vindicate the public interest. Laws of general application can be passed during annual legislative sessions as well.

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[6] The Hawaii Rules of Evidence provide as follows:

> Rule 408 Compromise, offers to compromise, and mediation proceedings. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, or (3) mediation or attempts to mediate a claim which was disputed, is not admissible to prove liability for or invalidity of the claim or its amount. **Evidence of conduct or statements made in compromise negotiations or mediation proceedings is likewise not admissible.** This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation proceedings. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. (Emphasis added)

> It is the private grievances of individual condominium owners that owners must pursue on their own. The justification for government action in favor of one party to a private condominium dispute has yet to be established.

SB 146 enhances the efficiency of the remedial scheme.

Early neutral evaluation will be less formal, less expensive, quicker and likely as predictive of a trial outcome as **non-**binding arbitration. In practice, **non-**binding arbitration can be every bit as formal, burdensome and expensive as litigation. The design of SB 146 incentivizes the settlement of disputes at a lower level of intensity, burden and expense.

Support for voluntary **binding** arbitration is preserved. The value of an expensive, **non-**binding arbitration process, however, the result of which can be rejected, is limited.

SB 146 authorizes the Real Estate Commission to establish the qualifications of mediators, arbitrators and evaluators. The Committee is requested to set a substantial base level of experience to serve and then allow the Commission to consider exceptional circumstances.

SB 146 requires disclosures by mediators, evaluators and arbitrators, and sets standards for those disclosures. Remedies are provided for undisclosed matters.

A variety of essentially conforming amendments are included in SB 146. Without limitation, certain language in Hawaii Revised Statutes §514B-106 is omitted because it is superfluous and certain unwieldy language in §514B-146 is clarified, operationalized and updated in SB 146.

CAI respectfully requests the Committee to pass SB 146.

CAI Legislative Action Committee, by

Philip Nerney

Its Chair

SB-146
Submitted on: 2/2/2025 12:15:01 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Richard Emery	Testifying for Hawaii First Realty	Support	In Person

Comments:

I support SB146. It is a progressive solution to address condominium disputes in an equitable manner.

SB-146
Submitted on: 2/4/2025 8:30:52 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Testify
Mark McKellar	Testifying for Law Offices of Mark K. McKellar, LLLC	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

I OPPOSE S.B. No. 146 for the reasons set forth below.

SECTION 2

A. Section 514B-A

1. There is a typographical error in Section 514B-A(3): The word “of” between the words interpretation and enforcement should be changed to “or” so that it reads “interpretation or enforcement”.

2. This section replaces Section 514B-157, and the predecessor section, Section 514A-94. For many decades, Section 514A-94 and the comparable provision in Chapter 514B, Section 514B-157, has contained the clause, “shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys’ fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association.” For no reason, this clause has been omitted in S.B. No. 146.

The deletion of the clause beginning with "shall be promptly paid . . ." will have major consequences for associations. Without this clause, condominium associations may be precluded from recovering attorneys' fees incurred in the enforcement of the governing documents unless the association commences an action or proceeding against the owner. This will significantly increase the cost of seeking reimbursement of legal fees and costs. If associations are unable to seek reimbursement of legal fees from owners who violate the governing documents, the legal fees will be borne by owners who complied with the governing documents. There may be little incentive for owners to comply with the governing documents.

3. Section 514B-A(c) is a new section that may have draconian effects on associations' ability to seek reimbursement of attorneys' fees for the enforcement of governing documents. The effect of this section is that, depending upon the "evaluator's" evaluation, an association (or owners) may be unfairly and permanently released from any exposure to attorneys' fees and costs in connection with the dispute.

For example, if an association commences an early neutral evaluation of a condominium-related dispute with an owner, and the evaluator renders an evaluation that is unfavorable to the association, the association will be precluded from seeking reimbursement of its attorneys' fees from the unit owner, even if the evaluation is found to be erroneous. The association will have no ability to appeal the decision of the evaluator. The dispute may be critically important to the association. The association may be barred from recovering its attorneys' fees, even if a circuit court judge disagrees with the evaluator and enters judgment in favor of the association. In this regard, Section 514B-A(c) may be unconstitutional as it deprives parties of their constitutional right to due process.

Furthermore, because early neutral evaluations may have a major effect on whether an association will be able to recover its attorneys' fees in enforcing its governing documents, which can exceed $100,000 in heavily litigated disputes, Section 514B-A(c) will require associations to expend significant time preparing for and presenting its position in early neutral evaluations. The early neutral evaluations will be as important as binding arbitrations.

B. Section 514B-B

S.B. No. 146 adds a new provision on fines and appeals from fines. It establishes procedures to be followed by associations and time periods for action. While procedures and time periods serve a good purpose, this provision may conflict with the procedures and time periods for action found in the governing instruments of condominium associations. This will likely create

confusion. If this bill is to be adopted, a provision should be added addressing how those conflicts are to be resolved.

The new subsection (b) found in SECTION 2 of the bill related to fines provides that no attorneys' fees with respect to a fine shall be charged by an association against any unit owner or tenant with before the time when a fine is deemed to be collectible. This could be construed as prohibiting an association from recovering attorneys' fees incurred by it in having its lawyer send a demand letter to an owner who has violated a covenant if a fine resulting from the violation is later waived, rescinded, or set aside. The fact that a fine has been waived, rescinded, or set aside does not necessarily mean that there was no violation warranting the sending of a demand letter. It may be that the board agreed to waive or rescind the fine as a gesture of goodwill or that the fine was set aside by the small claims court for technical reasons. Furthermore, a board may be less inclined to waive fines upon appeal if doing so means that it must also waive all attorneys' fees incurred by the association in connection with the violation.

SECTION 3

SECTION 3 adds a new subpart to replace the existing Subpart D, Alternative Dispute Resolution. This section represents a major change to the law without any compelling reason for the change.

Probably the most trouble provisions in SECTION 3 are those in Section 514B-G, qualifications of mediators, arbitrator and evaluators. The qualifications of evaluators is of paramount concern because, under Section 514B-A(c), the early neutral evaluations rendered by evaluators may, depending on the outcome, preclude a party from recovering its attorneys' fees and costs.

The qualifications in SECTION 3 are not adequate to protect the parties. Condominium associations are complex entities, the governing documents and HRS Chapter 514B contain dense and sometimes conflicting provisions, and there is a body of Hawai‘i appellate court decisions that evaluators should be familiar with in order to render sound evaluations. At minimum, evaluators should be attorneys licensed in the state of Hawai`i with at least 5-years of experience.

SECTION 5

SECTION 5 adds a new definition of “condominium-related dispute” to Section 514B-3. The definition of "condominium-related dispute" should include disputes between associations and managing agents.

SECTION 8

SECTION 8 of the bill amends the fine provision found in HRS Section 104(a)(11), but omits a change to HRS Section 104(b) which also relates to fines. This omission will create inconsistencies in the law.

SECTION 11

The proposed changes to HRS Section 514B-146 found in SECTION 11 of the bill are quite substantial without any stated compelling reason for the changes. If HRS Section 514B-146 is to be amended, the proposed wording should be amended for clarification.

The new Section 514B-146(f) allows a unit owner to request mediation within thirty days of the statement described in subsection (d). The statement referred to in subsection (d) is given only if an owner requests such a statement. The deadline to request mediation should not be tied to a date that is uncertain and may never arise.

The new subsection (f) states that an owner shall be entitled to a refund of any amounts paid that are determined to have not been owed. It is not clear who makes this determination because it follows the section allowing an owner to file a court action or to request mediation. It should be revised to clarify that the determination must be made by a court of competent jurisdiction, via a binding final judgment, and that payment of any refund shall be subject to any orders of a court granting stays or other relief.

The new subsection (g) provides that the association may proceed to collect an unpaid assessment by any legal means, except where collection efforts are stayed pursuant to subsection

(f). It should be made clear that the 60-day stay provided for in subsection (f) shall not apply to the recordation of a lien by an association because it is conceivable that an association will need to record a lien during that time period to preserve the priority of its lien.

Finally, HRS Section 514B-146 requires owners to pay common expense assessments before disputing those amounts, but allows owners to dispute all other assessments prior to payment. This can place significant financial burdens on associations where the amounts at issue have been paid by an association to third parties, such as payment of submetered utilities. The right to dispute charges prior to payment should be limited to charges for which an association has not advance funds, such as fines, late fees, or interest.

SECTION 13

For the reasons discussed above with regard to SECTION 3, Section 514B-A, I strongly object to the deletion of Section 514B-157. The deletion of Section 514B-157 will substantially impair an association's ability to enforce its covenants.

For the foregoing reasons, I respectfully OPPOSE S.B. No. 146 and urge your Committee to defer this measure. Alternatively, if it is to be passed by the Committee, I urge the Committee to amend the bill to address the issues discussed above.

Respectfully submitted,

Mark McKellar

SB-146
Submitted on: 2/2/2025 5:10:09 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Dallas Walker	Individual	Support	Written Testimony Only

Comments:

I support this measure.

SB-146
Submitted on: 2/2/2025 7:01:53 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Aaron Cavagnolo	Individual	Support	Written Testimony Only

Comments:

To: Hawaii State Legislature
Subject: Testimony in Support of and Concerns Regarding SB 146

Dear Members of the Legislature,

I appreciate the opportunity to provide testimony regarding SB 146. As a condominium owner who has recently participated in evaluative mediation with my association, I recognize the importance of improving dispute resolution processes for condominium-related conflicts. While I support some of the changes proposed in SB 146, I also have significant concerns regarding the reliance on evaluative mediation as the primary step before litigation.

First of all, **the inclusion of early neutral evaluation in the dispute resolution process is a significant improvement.** Providing parties with a preliminary assessment of their claims can help set realistic expectations and potentially reduce unnecessary litigation. It also seems like a much more useful option then evaluative mediation which I will go into further detail about below.

My concerns stem from the limitations of evaluative mediation when dealing with uncooperative condominium boards. Unlike governmental entities, condominium boards often lack meaningful checks on their power when they refuse to follow governing documents. Many disputes are prohibitively expensive to litigate, meaning that if a board is unwilling to engage in good faith, mediation becomes an ineffective, costly hurdle rather than a path to resolution.

Having recently undergone mediation, I found that my association's board did not seem genuinely interested in reaching a solution. Their participation appeared to be a procedural requirement rather than a sincere attempt at resolution. They refused to provide any documentation and declined to discuss key issues within the scope of the mediation I had requested. This experience highlights a fundamental flaw: there are no real consequences for a party that attends mediation without a good-faith effort to resolve disputes - even though good faith is required in the statute.

After my mediation, I spoke with the Executive Director of The Mediation Center of the Pacific regarding my concerns about the other party’s participation and at the time my feeling that the mediator didn't force them to participate in good faith. While I had issues with the process, I was informed that the rules were followed. Most notably, I learned that mediators from Mediation

Center of the Pacific will never state that a party failed to participate in good faith, as their role is to remain neutral. Also from my understanding is that they will only say that they could not set up a mediation but will never in this case say that either party did not attempt in good faith to participate. This underscores my concern: there is no effective enforcement mechanism to ensure meaningful participation, leaving owners vulnerable to a process that may serve only as a procedural step rather than a true resolution tool.

To improve SB 146, I urge the Legislature to consider mechanisms that encourage genuine participation in mediation, such as:

- Requiring parties to provide relevant documentation in advance of mediation.
- Allowing mediators to document instances of non-cooperation without declaring bias.
- Establishing consequences for bad-faith participation, such as mandatory early neutral evaluation when requested.

Additionally, I have testified at and attended hearings such as those for the Condo Property Regime Task Force. During these sessions, the overwhelming majority of testimonies came from owners describing distressing situations of out-of-control boards. Notably, I did not hear any board members testifying that owners had too much power. In a well-functioning system, there are typically complaints from both sides. However, in these hearings, the only voices portraying owners as a problem came from lawyers on the panel and committees—individuals who financially benefit from the current system of representing associations.

Overall, I support the intent of SB 146 in improving dispute resolution within condominium governance. However, meaningful enforcement measures must be in place to ensure that mediation serves as a fair and effective step rather than a mere formality that boards can manipulate to stall accountability. Without such safeguards, mediation risks becoming an expensive procedural hurdle that primarily benefits condominium attorneys rather than the owners and AOAOs. For instance, during my own mediation, my association spent over $10,000 on legal fees, including preparation and the 6-hours of mediation itself—highlighting how the process can be financially burdensome while failing to produce meaningful outcomes.

Thank you for your time and consideration.

Sincerely,

Aaron Cavagnolo

Committee on Commerce and Consumer Protection

SB 146 Regarding Dispute Resolution

Wednesday, February 5, 2025 @ 10:00AM

My name is Jeff Sadino, I am a condo owner in Makiki, and I **SUPPORT** this Bill.

Sue Savio has said multiple times that Hawaii has the worst condo governance in the country[1]. This also significantly increases our insurance premiums. Clearly, dispute resolution is badly needed.

There are many considerations to this lengthy Bill both for and against it. While I am not qualified to comment on every one of them, I believe this Bill is well thought out and definitely a step in the right direction. As a whole, I support this Bill.

I ask for the following revisions:

Revision 1:

Page 3: 514B-B(a)(2)(D) (regarding information included with violation notices): Any evidence that the alleged violation is based on shall be provided to the owner. Hearsay shall not be used as the basis for a violation notice. (**We have a Constitutional right to see the evidence used against us**. If not, it means we are a dictatorship.) The due date of the fine shall be clearly stated.

Revision 2:

Page 3: 514B-B(a)(3)(1) (regarding small claims): Attorney fees related to attorney time spent preparing for or participating in the small claim suit shall not be charged to the losing party. (Even though this is standard procedure in small claims court, it would be helpful to be explicit that this standard procedure extends to condominium disputes. Even though 514B-B(b) has similar

[1] "Director's and Officers, one company left Hawaii. We're done. We don't like Hawaii anymore. You folks have more claims than anybody else. We're outta here. You're a small state, with just a few dollars that you give us and you have more claims than New York, and we pay out more here, and you have more claims and we pay out more than we do in Florida. We're done. And California. We beat them all. As small of a state as we are with our little 1700 condos, they are paying out more Director's and Officers claims, so this one company has left. This other company sent us a list and said we are going to have a rate increase in Hawaii. I wasn't surprised. I knew this was coming. Anywhere from 25 to 65%."

wording, that section would still allow for attorney fees to be charged to the owner after a judgement that the fine is collectable.)

Revision 3:

Page 15: 514B-H(f) (regarding failure of Mediators to disclose conflicts of interest): I believe that if a Mediator fails to disclose a conflict of interest, the other Party should be able to recover some financial damages. It seems likely that this failure to disclose will occur much more often by the Association and trade industry; then the Owner just wasted a bunch of their time and money attending a Mediation that was poisoned from the start.

Revision 4:

Page 25: 514B-106(a) (regarding boards not following ADR procedures): This may be included someplace else, but the reasoning that a violation of fiduciary duty may have occurred when a board member does not follow ADR should be preserved and not removed like it is here.

Thank you for the opportunity to provide testimony,

Jeff Sadino

JSadino@gmail.com

(808) 370-2017

SB-146
Submitted on: 2/3/2025 1:23:11 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Greg Misakian	Individual	Oppose	Remotely Via Zoom

Comments:

SB146 is not well thought out and is not the answer to help condominium owners resolve issues and concerns.

If you've already tried mediation and it didn't work, why would you want to try it again and at a higher cost and higher risk, with more attorney's fees involved. Calling a mediation another name is just a creative way for attorneys to make more money.

HB890 and its companion bill SB1265, which will establish an Ombudsman's Office for Condominium Associations at no cost to the State of Hawaii, is the only real solution to finally address the serious issues of misconduct and corruption at condominium associations throughout Hawaii, and the many predatory attorneys who earn their living on the backs of condominium owners.

Gregory Misakian

SB-146
Submitted on: 2/3/2025 8:19:48 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Mike	Individual	Support	Written Testimony Only

Comments:

I support this bill.

The Senate
The Thirty-Third Legislature
Committee on Commerce and Consumer Protection
Wednesday, February 5, 2025
10:00 a.m.

To: Senator Jarrett Keohokalole, Chair
Re: SB 146, Relating to Condominiums

Aloha Chair Jarrett Keohokalole, Vice-Chair Carol Fukunaga, and Members of the Committee,

Mahalo for the opportunity to provide comments regarding the intent of SB 146.

Today, I testify as the nexus of many grassroots coalitions of property owners who own and/or reside in common-interest homeowners' associations throughout Hawaii.

I was selected to participate in the Condominium Property Regime Task Force established by Act 189, Session Laws of Hawaii 2023. It was my hope that the Task Force's work would be meaningful because the State's focus on affordable housing to attract and retain skilled workers who are essential to the health of our community, magnifies the importance of improving condominium association governance.

However, as of this date, minutes of the DCCA Real Estate Commission reveal that the REC has yet to fund its portion of the funds needed for the Legislative Reference Bureau as stipulated by Act 43, Session Laws of Hawaii 2024, having put the release of those funds "under advisement." Those funds came from mandatory contributions by registered condominium association owners into the Condominium Education Trust Fund.

Frankly, it is surprising that an unelected body, the Real Estate Commission, can disregard the decisions made for the public good by the Legislature. The REC's decision also causes distrust in that Commission when it will not openly discuss its reasons for withholding those funds.

On November 2, 2023, Dathan Choy, Condominium Specialist with DCCA, provided the Real Estate Branch's estimate of the number of condominium units and associations in Hawaii, which, when compared to the latest US Census data, revealed that a significant portion, **more than 40%, of Hawaii's housing stock are condominium units**.

Hundreds of years ago, William Shakespeare wrote, "*a rose by any other name would smell as sweet*," and for what sometimes seems nearly as long, I have advocated for and supported alternative dispute resolution methods for condominium owners. The proposed methods were alternatively called an "ombudsman," a "condo czar," a "complaints and enforcement officer," and now, an "evaluator." I supported those earlier iterations with the hope that the proposed ADR methods would be viable alternatives to mediation, arbitration, and litigation because

"***there should be a robust and meaningful opportunity to come to terms before attorneys fees become a significant factor***."[1]

However, SB 146 would not enable an "*opportunity to come to terms before attorneys fees become a significant factor,*"[2] and fails the "as sweet" test. SB 146 creates another iteration of the existing mediation process, thus devaluating for condominium owners and residents the purpose of "early neutral evaluation."

In recent years, Legislators and the DCCA were provided updated matrices of tallied data from reports found in the Real Estate Commission (REC) publication, the *Hawaii Condominium Bulletin.*[3,4,5] Please refer to Exhibit A for the most recently produced matrix and copies of recent issues of "Mediation Case Summaries" from the *Hawaii Condominium Bulletin,* provided to represent the tally's larger data source.

This tally reveals that since September 2015, **80% of the mediation cases reported were initiated by owners against their association and/or board, and over 95% of disputes were about violations or interpretations of HRS 514B or the association's governing documents** (e.g., Declaration, By-Laws, House Rules, Resolutions).

Only 36% of these cases were mediated to an agreement, leaving **nearly two (2) out of every three (3) mediation cases unresolved or withdrawn**, a metric that disputes unsubstantiated claims that "*mediations are successful*."

While SB 146 seeks to ensure that the evaluator is knowledgeable about the subject matter--an improvement over the requirements of mediators subsidized by the Condominium Education Trust Fund--a rigorous effort to distance the evaluator from conflicts of interest is lacking. This concern, if the evaluator or evaluation would truly be "neutral," is significant because it was revealed last year that mediators were imbued with disparaging misinformation about condominium owners during a mediators' class. Please refer to Exhibit B.

An additional concern regarding neutrality is that SB 146 does not address the costs and damages incurred by the party injured by the lack of impartiality if that partiality is discovered *after* an evaluation is completed.

Considering these concerns, I request that, as soon as possible, your Committee schedules and hears SB 1265 and SB 1498, regarding an ombudsman's office for condominium associations and an ombudsman's office for homeowners' associations, respectively, which were initiated by concerned property owners of common interest communities. Both measures were referred to your Committee and WAM/JDC.

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[1] Nerney, Philip S. "Professional Mediation of Condominium-Related Disputes," *Hawaii Bar Journal*, July 2015.
[2] Ibid.
[3] https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2011-2015/
[4] https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2016-2020/
[5] https://cca.hawaii.gov/reb/hawaii-condominium-bulletin-2021-2025/

I have these additional comments regarding SB 146:

One of the most egregious complaints made by owners regarding actions by their association is that they were not provided with proper notification of alleged violations. Many of those who lost their homes due to nonjudicial foreclosures made this accusation, rendering it too common to dismiss. Thus, the following addition is suggested:

> *Before taking any action under this section, the board shall give to the unit owner and/or tenant written notice of its intent to collect the assessment owed. The notice shall be sent both by first-class and certified mail, return request requested, with adequate postage to the recipient's address as shown by the records of the association or to an address designated by the owner for the purpose of notification, or, if neither of these is available, to the owner's last known address.*

Additionally, the following excerpts from Florida's 2024 Statutes[6] are suggested for consideration:

- *An association may levy reasonable fines for violations of the declaration, association bylaws, or reasonable rules of the association. A fine may not exceed $100 per violation against any member or any member's tenant, guest, or invitee for the failure of the owner of the parcel or its occupant, licensee, or invitee to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association unless otherwise provided in the governing documents. A fine may be levied by the board for each day of a continuing violation, with a single notice and opportunity for hearing, except that the fine may not exceed $1,000 in the aggregate unless otherwise provided in the governing documents. A fine of less than $1,000 may not become a lien against a parcel. In any action to recover a fine, the prevailing party is entitled to reasonable attorney fees and costs from the nonprevailing party as determined by the court.*

- *A fine or suspension levied by the board of administration may not be imposed unless the board first provides at least 14 days' written notice of the parcel owner's right to a hearing to the parcel owner at his or her designated mailing or e-mail address in the association's official records and, if applicable, to any occupant, licensee, or invitee of the parcel owner, sought to be fined or suspended. Such hearing must be held within 90 days after issuance of the notice before a committee of at least three members appointed by the board who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee. The committee may hold the hearing by telephone or other electronic means. The notice must include a description of the alleged violation; the specific action required to cure such violation, if applicable; and the hearing date, location, and access information if held by telephone or other electronic means. A parcel owner has the right to attend a hearing by telephone or other electronic means.*

[6] http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0718/0718.html

- *If the committee, by majority vote, does not approve a proposed fine or suspension, the proposed fine or suspension may not be imposed. The role of the committee is limited to determining whether to confirm or reject the fine or suspension levied by the board.*

- *If a violation has been cured before the hearing or in the manner specified in the written notice required in paragraph (b) or paragraph (d), a fine or suspension may not be imposed.*

Mahalo for the opportunity to submit these comments regarding SB 146.

Lila Mower

EXHIBIT A

HI Condo Bulletin	AOAO/BOD V	OWNER V	OWNER V	OWNER V	TOTAL	mediated	mediated	assn did not	owner did not	elevated	other
ISSUE MONTH	OWNER	AOAO/BOD	OWNER	CAM	CASES	to agreemnt	w/o agreemnt	mediate*	mediate**	to arbitration	***
Dec-24	3	19			22	8	7	3	3	1	
Sep-24	5	11			16	9.5	6				0.5
Jun-24	0	11			11	4	5	1			1
March-24	0	12			12	2	6	2	1	1	
December-23	5	13			18	8	6		1	1	2
September-23	0	8			8	3	4			1	
June-23	4	10			14	4	5	0	2		3
March-23	3	15			18	1	14		2		1
December-22	3	8			11	1	7	0	2		1
September-22	2	4			6	3	1	0	0		2
June-22	5	14			19	5.5	10.5				3
March-22	2	15			17	8	4			1	4
December-21	1	8			9	3	4				2
September-21	3	13			16	8	5				3
June-21	5	12			17	8	5	2			2
March-21	1	9			10	4	3		2		1
December-20	5	15			20	7	12		1		
September-20	2	4			6	2	3				1
June-20	1	2			3	3	0		.		
March-20	3	13			16	5	9		1		1
December-19	2	13		1	16	5	6		2		3
September-19	3	8			11	6	4				1
June-19	0	10			10	5	3		1		1
March-19	2	13			15	7	4	1	1		2
December-18	1	2			3	0	3				
September-18	3	7			10	4	2	1	1		2
June-18	1	4.5	0.5		6	2	3	1			
March-18	5	5	1		11	3	3		2		3
December-17	3	13			16	5	6	3	2		
September-17	1	10			11	3	5	2	1		
June-17	0	6			6	3	3				
March-17	2	4			6	4	2				
December-16	2	6			8	2	4	2			
September-16	2	8			10	2	5	1	2		
June-16	1	3	1		5	3	0	0	1		1
March-16	2	10			12	3	2	1	4		2
December-15	2	7			9	3	2	3	1		
September-15	0	2	1		3	1	1	1			
total cases	85	347.5	3.5	1	437	158	174.5	24	33	5	42.5
total by percent	19.451%	79.519%	0.801%	0.229%	100.000%	36.156%	39.931%	5.492%	7.551%	1.144%	9.725%

*association declined, refused, nonresponsive, or withdrew **owner declined, refused, nonresponsive, or withdrew ***based on interpretation of comments including lack of clarity, incomplete, unable to schedule

Mediation Case Summaries

From September of 2024 through November of 2024, the following condominium mediations or arbitrations were conducted pursuant to Hawai`i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission ("Commission") for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Mediation exists not only to facilitate conflict resolution, but to also educate the parties involved as to the intricacies of the condominium law, their association's governing documents, and the strengths and weaknesses of their respective arguments. While the Commission strives for every mediation to resolve the conflicts, not every mediation will come to an agreement. That does not necessarily mean mediation has failed, as it also serves to reduce costly litigation.

The Commission subsidizes up to $3,000 for qualified evaluative mediations and up to $600 for facilitative mediations for qualified associations. Should a mediation not come to an agreement once that subsidy money is exhausted, no agreement is noted in Commission records. However, the Commission is aware that parties often come to agreements through continued unsubsidized mediation.

Dispute Prevention and Resolution, Inc.

Owner vs AOUO	Dispute over interpretation of the house rules and retaliation	Mediated to agreement
AOUO vs Owner	Dispute over interpretation of the declaration, bylaws, and house rules regarding tenants	Mediated to agreement
Owner vs AOUO	Dispute over interpretation of the declarations and bylaws over repairs	Mediated to agreement
Owner vs AOUO	Dispute over interpretation of the declarations and bylaws	No agreement
Owner vs AOUO	Dispute over interpretation of the house rules and retaliation	No agreement
Owner vs AOUO	Dispute over interpretation of the bylaws, house rules, and selective enforcement	No agreement, private mediation continues
Owner vs AOUO	Dispute over the governing documents and retaliation	No agreement
Owner vs AOUO	Dispute over the governing documents and related attorney fees	Mediated to agreement
Owner vs AOUO	Dispute over interpretation of the declaration and bylaws in use of parking ramp	Arbitration in favor of the owner
AOUO vs Owner	Dispute over interpretation of the declaration and bylaws over use of common element for EV charging	No agreement
Owner vs AOUO	Dispute over the governing documents and related attorney fees and fines	Mediated to agreement
Owner vs AOUO	Dispute over parking, harassment, and board duties	No agreement
Owner vs AOUO	Dispute over noise, recreational area usage, and fire code violations	No agreement
Owner vs AOUO	Dispute over interpretation of the declarations and bylaws in repairs	Mediated to agreement

cont. page 8

Mediation Case Summaries

Kauai Economic Opportunity

Owner vs AOUO	Dispute over damage	No mediation, AOUO failed to respond
Owner vs AOUO	Dispute over damage	No mediation, AOUO failed to respond
Owner vs AOUO	Dispute over leaks and insurance coverage	No agreement, owner withdrew

Lou Chang

AOUO vs Owner	Dispute over the governing documents regarding access to perform repairs and maintenance	Mediated to agreement

Mediation Center of the Pacific

Owner vs AOUO	Dispute over interpretation of the declarations and bylaws over fines, late fees, and attorney fees	Mediated to agreement
Owner vs AOUO	Dispute over interpretation of the declaration and bylaws over fees for documents	No mediation, requesting owner withdrew
Owner vs AOUO	Dispute over interpretation of the declaration, bylaws, house rules over fees and fines, building management	No mediation, AOUO declined mediation
Owner vs AOUO	Dispute over interpretation of the declaration, bylaws, house rules over fees and fines, meeting participation, and maintenance	No mediation, requesting owner refused contact

To consult with any of our subsidized private mediation services, contact one of the following providers:

Oahu
Mediation Center of the Pacific, Inc.
1301 Young Street, 2nd Floor
Honolulu, HI 96814
Tel: (808) 521-6767
Fax: (808) 538-1454
Email: mcp@mediatehawaii.org

Maui
Mediation Services of Maui, Inc.
95 Mahalani Street, Suite 25
Wailuku, HI 96793
Tel: (808) 244-5744
Fax: (808) 249-0905
Email: info@mauimediation.org

West Hawaii
West Hawaii Mediation Center
65-1291 Kawaihae Road, #103B
Kamuela, HI 96743
Tel: (808) 885-5525 (Kamuela)
Tel: (808) 326-2666 (Kona)
Fax: (808) 887-0525
Email: info@whmediation.org

East Hawaii
Ku'ikahi Mediation Center
101 Aupuni St. Ste. 1014 B-2
Hilo, HI 96720
Tel: (808) 935-7844
Fax: (808) 961-9727
Email: info@hawaiimediation.org

Kauai
Kauai Economic Opportunity, Inc.
2804 Wehe Road
Lihue, HI 96766
Tel: (808) 245-4077 Ext. 229 or 237
Fax: (808) 245-7476
Email: keo@keoinc.org

Lou Chang, A Law Corporation
Mediator, Arbitrator, Attorney
Member, National Academy of Arbitrators
P.O. Box 61188, Honolulu, Hawaii 96839
Tel: (808) 384-2468
Email: louchang@hula.net
Website: www.louchang.com

Charles W. Crumpton
Crumpton Collaborative Solutions LLLC
Tel: (808) 439-8600
Email: crumpton@chjustice.com
Websites: www.acctm.org; www.nadn.org; www.accord3.com; and www.mediate.com

Dispute Prevention and Resolution
1003 Bishop Street, Suite 1155
Honolulu, HI 96813
Tel: 523-1234
Website: http://www.dprhawaii.com/

September 2024

Mediation Case Summaries

From June of 2024 through August of 2024, the following condominium mediations or arbitrations were conducted pursuant to Hawai`i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

AOUO vs Owner	Dispute over the interpretation of the declaration, bylaws and house rules	Mediated to an agreement
Owner vs AOUO	Dispute over the maintenance fees and legal fees	Mediated to an agreement
Owner vs AOUO	Dispute over retaliation, interpretation of the bylaws and house rules	Mediated to an agreement
Owner vs AOUO	Dispute over the bylaws and declaration, common elements	No Agreement
Owner vs AOUO	Dispute over the bylaws and declaration, insurance	No Agreement
Owner vs AOUO	Dispute over the bylaws covering flooring	No Agreement
Owner vs AOUO	Dispute over the bylaws and declaration over fines	Mediated to an agreement
AOUO vs Owner	Dispute over the bylaws and declaration over repairs	No Agreement
Owner vs AOUO	Dispute over the bylaws and declaration over repairs	Mediated to an agreement
Owner vs AOUO	Dispute over the bylaws and declaration over repairs and budget	Mediated to an agreement
AOUO vs Owner	Dispute over the bylaws and declaration over improvements	No Agreement
AOUO vs Owner	Dispute over the bylaws and declaration over smoking	Mediated to an agreement
Owner vs AOUO	Dispute over the bylaws and declaration over insurance	No Agreement
AOUO vs Owner	Dispute over the bylaws and declaration over attorney fees	Mediated to an agreement

Lou Chang

Owner vs AOUO	Dispute over House Rules, noise, common area maintenance and harassment	Mediated to an interim agreement, future private mediation
Owner vs AOUO	Dispute over interpretation of the bylaws, declaration, owner participation and common elements	Mediated to an agreement

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Fax: (808) 538-1454
Email: mcp@mediatehawaii.org

Maui
Mediation Services of Maui, Inc.
95 Mahalani Street, Suite 25
Wailuku, HI 96793
Tel: (808) 244-5744
Fax: (808) 249-0905
Email: info@mauimediation.org

West Hawaii
West Hawaii Mediation Center
65-1291 Kawaihae Road, #103B
Kamuela, HI 96743
Tel: (808) 885-5525 (Kamuela)
Tel: (808) 326-2666 (Kona)
Fax: (808) 887-0525
Email: info@whmediation.org

East Hawaii
Ku`ikahi Mediation Center
101 Aupuni St. Ste. 1014 B-2
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Website: www.louchang.com

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Email: crumpton@chjustice.com
Websites: www.acctm.org; www.nadn.org; www.accord3.com; and www.mediate.com

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Honolulu, HI 96813
Tel: 523-1234
Website: http://www.dprhawaii.com/

June 2024

Mediation Case Summaries

From March of 2024 through May of 2024, the following condominium mediations or arbitrations were conducted pursuant to Hawai`i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

Owner vs AOUO	Dispute over the interpretation and violation of bylaws and house rules involving treatment of employees	Mediated, no agreement
Owner vs AOUO	Dispute over the interpretation and violation of declaration and bylaws regarding building repairs and maintenance	Mediated to an agreement
Owner vs AOUO	Dispute over the interpretation and violation of declaration and bylaws regarding disability access, repairs, discrimination, and notice	Mediation, no agreement
Owner vs AOUO	Dispute over the interpretation and violation of bylaws and house rules, alleged retaliation	Mediation, no agreement
Owner vs AOUO	Dispute over special assessment	Mediation in progress
Owner vs AOUO	Dispute over the interpretation and violation of bylaws regarding proxies	Mediation, no agreement
Owner vs AOUO	Dispute over the interpretation and violation of declaration and bylaws regarding common elements, retaliation	Mediation, no agreement
Owner vs AOUO	Dispute over the modification of a unit, retaliation	Mediated to an agreement

Mediation Center of the Pacific

Owner vs AOUO	Dispute over the interpretation and violation of house rules in relation to parking stalls and loading zone	AOUO declined Mediation
Owner vs AOUO	Dispute over the interpretation and violation of bylaws and declaration in relation to renovations and lack of communication	Mediated to an agreement

Big Island Mediation Center

Owner vs AOUO	Dispute over the enforcement of association rules	Mediated to an agreement

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Oahu
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Fax: (808) 538-1454
Email: mcp@mediatehawaii.org

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Mediation Services of Maui, Inc.
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Wailuku, HI 96793
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Tel: (808) 326-2666 (Kona)
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Email: info@whmediation.org

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March, 2024

Mediation Case Summaries

From December of 2023 through February of 2024, the following condominium mediations or arbitrations were conducted pursuant to Hawai'i Revised Statutes §§ 514B-161 and 514B-162.5 and subsidized by the Real Estate Commission for registered condominium associations. The Mediation Center of the Pacific conducted additional condominium mediations through the District Courts while mediation providers conducted community outreach in their respective communities.

Dispute Prevention and Resolution, Inc.

Owner vs AOUO	Dispute over the interpretation of governing documents and existing rules	Mediated, no agreement
Owner vs AOUO	Dispute over common elements	Arbitration with an agreement of all parties reached
Owner vs AOUO	Dispute over common elements and repairs	Mediated, no agreement
Owner vs AOUO	Dispute over board resolutions, declaration and bylaws regarding guest fees	Mediated, no agreement
Owner vs AOUO	Dispute over the governing documents and board obligations	Mediated, no agreement
Owner vs AOUO	Dispute over common elements and repairs	Mediated to an agreement
Owner vs AOUO	Dispute over lanai common element expense	Mediated to an agreement
Owner vs AOUO	Dispute over the interpretation of declaration and bylaws regarding water damage	Mediated, no agreement

Mediation Center of the Pacific

Owner vs AOUO	Dispute over the interpretation and violation of the declaration and bylaws	No mediation, AOUO attorney failed to schedule
Owner vs AOUO	Dispute over the interpretation and violation of bylaws and house rule	Mediated, no agreement
Owner vs AOUO	Dispute over the interpretation of house rules related to pets	No mediation, AOUO declined
Owner vs AOUO	Dispute over the interpretation of bylaws related to alternative living arrangements	No mediation, owner failed to schedule

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Fax: (808) 538-1454
Email: mcp@mediatehawaii.org

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Mediation Services of Maui, Inc.
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Wailuku, HI 96793
Tel: (808) 244-5744
Fax: (808) 249-0905
Email: info@mauimediation.org

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West Hawaii Mediation Center
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Kamuela, HI 96743
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Tel: (808) 326-2666 (Kona)
Fax: (808) 887-0525
Email: info@whmediation.org

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Website: http://www.dprhawaii.com/

EXHIBIT B

Lila Mower

August 29, 2024

State of Hawaii
Department of Commerce and Consumer Affairs, Real Estate Branch
335 Merchant Street, Room 333
Honolulu, Hawaii 96813
Attention: Neil K. Fujitani, Supervising Executive Officer

Regarding: **MEDIATION BIAS**

Aloha Mr. Fujitani,

It has been a while since we last spoke and I hope this message finds you well.

After a recent instruction session for mediators produced by a center that provides Condominium Education Trust Fund (CETF) subsidized mediations, a few of those mediators reported--independently of each other--that an instructor spoke disparagingly of condo owners.

I received the first call in June. A participant in that mediation class, an acquaintance, unexpectedly called to assure that, despite what the instructor said, the participant would be fair, having previously heard from condo owners about their concerns.

A second call, also in June, came from another acquaintance whose contact attended a class for mediators and made a similar allusion about the instructor's regard for condo owners.

I did not piece together the significance of those two calls until a third person contacted me this month.

She provided more specificity, additionally alleging that the mediators' class instructor claimed that there was a "fight" about who would be the Chair of the Condominium Property Regime (CPR) Task Force. The instructor she spoke of was elected the Chair, and I was elected as Vice-Chair. However, there was no such dispute and there are publicly available recordings of the CPR Task Force meetings that witness the Task Force's proceedings and refute the instructor's mistruth.

Perhaps the mediators' class was also recorded and may be available for review by your office. Apparently, there were many mediators in that Zoom class which suggests a wide disbursement of misinformation.

Apparently, during this instructional class for mediators, the instructor sought to inculcate a prejudice against condo-owners that should not exist for any just or fair dispute resolution process.

For many years, I have testified to the Legislature that "mediations do not work," and supported that claim with copies of the mediation cases summarized in each quarterly Hawaii Condominium Bulletin. Legislators and their aides have had years, and the CPR Task Force and the DCCA has now had nearly a year, to verify, refute, or otherwise challenge my findings.

In no event do I want alternative dispute resolution processes to fail. But condo owners have repeatedly alleged that their mediations were not as successful as lawmakers had envisioned and as we condo owners had hoped.

The mediation case summaries in the Hawaii Condominium Bulletins appear to support these condo owners' allegations. (See addenda for copies for the last reported year.)

Tallies of the hundreds of mediation cases reported in the Hawaii Condominium Bulletin reveal that the vast majority of mediation cases were initiated by condo owners against their association (or the associations' boards), and that most mediation cases were **not** successfully "settled to agreement." Since 1991, from when copies of the Hawaii Condominium Bulletins can be found online, only about one in every four reported cases were "settled to agreement." More recently, since 2015 when evaluative mediations were first subsidized by the CETF, only about one of every three reported mediation cases were "settled to agreement."

One of every three or four cases that "settled to agreement" is not assurance of a successful process.

Testimonies that "mediations do not work" have inadvertently upset many people, especially those who participate in mediations as mediators or legal counsel. Rather than denouncing these assertions or the owner-participants of mediation, **the standards of the mediation process should be improved so that greater success can be garnered.**

And that improvement starts with the instruction of mediators who are supposed to be **neutral** parties:

> *"A mediator is a neutral third party that leads a mediation between parties as a form of alternative dispute resolution. A mediator's goal is to encourage collaboration between the parties and guide them to a settlement through the mediation process."* (source, https://www.law.cornell.edu/wex/mediator)

Because the Condominium Education Trust Fund is funded by condo owners' mandatory contributions, the DCCA Real Estate Commission and Real Estate Branch (REC REB) should be aware of these biases that nullify their and lawmakers' claims that the mediation process offers a "neutral" means of dispute resolution.

Additionally, mediators should be aware of how the CETF subsidies are implemented as it may affect the fairness of the process and the success of their mediation.

Although the DCCA REC REB has invoices that detail the transactional aspect of mediation, those in the mediators' class were unsure of how the CETF subsidy works. One mediation center purportedly charges $375 per participating *person* while another mediation center charges $375 per *party*. If this is correct, then that cost differential alone could affect the mediation process and outcome, preventing some owners from pursuing, participating in, and resolving disputes through mediation.

Ideally, because of owners' contributions to CETF, the summaries provided by the mediation centers should report an important element of mediation—its costs--that condo owners have had to expend to

protect their rights, often compelled to equip themselves with legal assistance for some semblance of fairness when opposed by attorneys who represent their associations and, in some cases, their associations' insurers.

The legal fees expended by associations and their insurers, too, should be valuable data to the DCCA REC REB and condo owners, as the legal costs of dispute resolution is a major factor which influence the cost and availability of association and HO6 insurances, a catastrophe that the Governor has now determined is an emergency.

Further, the failure of mediators to disclose their prior relationships or conflicts of interest has created distrust in the mediation process. A participant in the mediator class suggested that attorneys who practiced in condo or association law should **not** serve as mediators as it was this mediator's observation that the condo or association attorneys were "always in favor of the condo [association or board]" and were not mediating based on "the issue at hand." Condo owners who participated in mediation have made similar allegations.

Contrary to what reportedly occurred in that instructional class for mediators, mediation provider centers should emphasize that biases and prejudices have no place in just and fair dispute resolution.

The DCCA REC REB must act to ensure that mediations subsidized by condo owners' mandatory contributions to the Condominium Education Trust Fund are used properly, as intended, and not to harm those very owners. Biases in the mediation process are unacceptable.

Mahalo to your attention to this very disconcerting matter.

Aloha,

/s/

Lila Mower

Cc: Mediation Center of the Pacific
Dispute Prevention and Resolution
Senate Committee on Commerce and Consumer Protection
House Committee on Consumer Protection and Commerce
DCCA, Office of Consumer Protection
DCCA, Regulated Industries Complaints Office
Hawaii State Judiciary
Various condominium owners' and consumer advocacy groups

SB-146
Submitted on: 2/3/2025 8:45:38 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Jonathan Billings	Individual	Support	Written Testimony Only

Comments:

I am in support of this bill.

SB-146
Submitted on: 2/3/2025 5:44:27 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

LATE

Submitted By	Organization	Testifier Position	Testify
Anne Anderson	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

I OPPOSE S.B. No. 146 for the reasons set forth below.

SECTION 2

A. Section 514B-A

1. There is a typographical error in Section 514B-A(3): The word "of" between the words interpretation and enforcement should be changed to "or" so that it reads "interpretation or enforcement".

2. This section replaces Section 514B-157, and the predecessor section, Section 514A-94. For many decades, Section 514A-94 and the comparable provision in Chapter 514B, Section 514B-157, has contained the clause, "shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association." For no reason, this clause has been omitted in S.B. No. 146.

The deletion of the clause beginning with "shall be promptly paid . . ." will have major consequences for associations. Without this clause, condominium associations may be precluded from recovering attorneys' fees incurred in the enforcement of the governing documents unless the association commences an action or proceeding against the owner. This will significantly increase the cost of seeking reimbursement of legal fees and costs. If associations are unable to seek reimbursement of legal fees from owners who violate the governing documents, the legal fees will be borne by owners who complied with the governing documents. There may be little incentive for owners to comply with the governing documents.

3. Section 514B-A(c) is a new section that may have draconian effects on associations' ability to seek reimbursement of attorneys' fees for the enforcement of governing documents. The effect of this section is that, depending upon the "evaluator's" evaluation, an association (or owners) may be unfairly and permanently released from any exposure to attorneys' fees and costs in connection with the dispute.

For example, if an association commences an early neutral evaluation of a condominium-related dispute with an owner, and the evaluator renders an evaluation that is unfavorable to the association, the association will be precluded from seeking reimbursement of its attorneys' fees from the unit owner, even if the evaluation is found to be erroneous. The association will have no ability to appeal the decision of the evaluator. The dispute may be critically important to the association. The association may be barred from recovering its attorneys' fees, even if a circuit court judge disagrees with the evaluator and enters judgment in favor of the association. In this regard, Section 514B-A(c) may be unconstitutional as it deprives parties of their constitutional right to due process.

Furthermore, because early neutral evaluations may have a major effect on whether an association will be able to recover its attorneys' fees in enforcing its governing documents, which can exceed $100,000 in heavily litigated disputes, Section 514B-A(c) will require associations to expend significant time preparing for and presenting its position in early neutral evaluations. The early neutral evaluations will be as important as binding arbitrations.

B. Section 514B-B

S.B. No. 146 adds a new provision on fines and appeals from fines. It establishes procedures to be followed by associations and time periods for action. While procedures and time periods serve a good purpose, this provision may conflict with the procedures and time periods for action found in the governing instruments of condominium associations. This will likely create confusion. If this bill is to be adopted, a provision should be added addressing how those conflicts are to be resolved.

The new subsection (b) found in SECTION 2 of the bill related to fines provides that no attorneys' fees with respect to a fine shall be charged by an association against any unit owner or tenant with before the time when a fine is deemed to be collectible. This could be construed as prohibiting an association from recovering attorneys' fees incurred by it in having its lawyer send a demand letter to an owner who has violated a covenant if a fine resulting from the violation is later waived, rescinded, or set aside. The fact that a fine has been waived, rescinded, or set aside does not necessarily mean that there was no violation warranting the sending of a demand letter. It may be that the board agreed to waive or rescind the fine as a gesture of goodwill or that the fine was set aside by the small claims court for technical reasons. Furthermore, a board may be less inclined to waive fines upon appeal if doing so means that it must also waive all attorneys' fees incurred by the association in connection with the violation.

SECTION 3

SECTION 3 adds a new subpart to replace the existing Subpart D, Alternative Dispute Resolution. This section represents a major change to the law without any compelling reason for the change.

Probably the most trouble provisions in SECTION 3 are those in Section 514B-G, qualifications of mediators, arbitrator and evaluators. The qualifications of evaluators is of paramount concern

because, under Section 514B-A(c), the early neutral evaluations rendered by evaluators may, depending on the outcome, preclude a party from recovering its attorneys' fees and costs.

The qualifications in SECTION 3 are not adequate to protect the parties. Condominium associations are complex entities, the governing documents and HRS Chapter 514B contain dense and sometimes conflicting provisions, and there is a body of Hawai‘i appellate court decisions that evaluators should be familiar with in order to render sound evaluations. At minimum, evaluators should be attorneys licensed in the state of Hawai`i with at least 5-years of experience.

SECTION 5

SECTION 5 adds a new definition of "condominium-related dispute" to Section 514B-3. The definition of "condominium-related dispute" should include disputes between associations and managing agents.

SECTION 8

SECTION 8 of the bill amends the fine provision found in HRS Section 104(a)(11), but omits a change to HRS Section 104(b) which also relates to fines. This omission will create inconsistencies in the law.

SECTION 11

The proposed changes to HRS Section 514B-146 found in SECTION 11 of the bill are quite substantial without any stated compelling reason for the changes. If HRS Section 514B-146 is to be amended, the proposed wording should be amended for clarification.

The new Section 514B-146(f) allows a unit owner to request mediation within thirty days of the statement described in subsection (d). The statement referred to in subsection (d) is given only if an owner requests such a statement. The deadline to request mediation should not be tied to a date that is uncertain and may never arise.

The new subsection (f) states that an owner shall be entitled to a refund of any amounts paid that are determined to have not been owed. It is not clear who makes this determination because it follows the section allowing an owner to file a court action or to request mediation. It should be revised to clarify that the determination must be made by a court of competent jurisdiction, via a binding final judgment, and that payment of any refund shall be subject to any orders of a court granting stays or other relief.

The new subsection (g) provides that the association may proceed to collect an unpaid assessment by any legal means, except where collection efforts are stayed pursuant to subsection (f). It should be made clear that the 60-day stay provided for in subsection (f) shall not apply to the recordation of a lien by an association because it is conceivable that an association will need to record a lien during that time period to preserve the priority of its lien.

Finally, HRS Section 514B-146 requires owners to pay common expense assessments before disputing those amounts, but allows owners to dispute all other assessments prior to payment. This can place significant financial burdens on associations where the amounts at issue have been paid by an association to third parties, such as payment of submetered utilities. The right to dispute charges prior to payment should be limited to charges for which an association has not advance funds, such as fines, late fees, or interest.

SECTION 13

For reasons discussed above with regard to SECTION 3, Section 514B-A, I strongly object to the deletion of Section 514B-157. The deletion of Section 514B-157 will substantially impair an association's ability to enforce its covenants.

For the foregoing reasons, I respectfully OPPOSE S.B. No. 146 and urge your Committee to defer this measure. Alternatively, if it is to be passed by the Committee, I urge the Committee to amend the bill to address the issues discussed above.

Respectfully submitted,

Anne Anderson

LATE

SB-146
Submitted on: 2/3/2025 6:50:09 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
mary freeman	Individual	Oppose	Written Testimony Only

Comments:

I OPPOSE S.B. No. 146 for the reasons set forth below.

SECTION 2

A. Section 514B-A

1. There is a typographical error in Section 514B-A(3): The word "of" between the words interpretation and enforcement should be changed to "or" so that it reads "interpretation or enforcement".

2. This section replaces Section 514B-157, and the predecessor section, Section 514A-94. For many decades, Section 514A-94 and the comparable provision in Chapter 514B, Section 514B-157, has contained the clause, "shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association." For no reason, this clause has been omitted in S.B. No. 146.

The deletion of the clause beginning with "shall be promptly paid . . ." will have major consequences for associations. Without this clause, condominium associations may be precluded from recovering attorneys' fees incurred in the enforcement of the governing documents unless the association commences an action or proceeding against the owner. This will significantly increase the cost of seeking reimbursement of legal fees and costs. If associations are unable to seek reimbursement of legal fees from owners who violate the governing documents, the legal

fees will be borne by owners who complied with the governing documents. There may be little incentive for owners to comply with the governing documents.

3. Section 514B-A(c) is a new section that may have draconian effects on associations' ability to seek reimbursement of attorneys' fees for the enforcement of governing documents. The effect of this section is that, depending upon the "evaluator's" evaluation, an association (or owners) may be unfairly and permanently released from any exposure to attorneys' fees and costs in connection with the dispute.

For example, if an association commences an early neutral evaluation of a condominium-related dispute with an owner, and the evaluator renders an evaluation that is unfavorable to the association, the association will be precluded from seeking reimbursement of its attorneys' fees from the unit owner, even if the evaluation is found to be erroneous. The association will have no ability to appeal the decision of the evaluator. The dispute may be critically important to the association. The association may be barred from recovering its attorneys' fees, even if a circuit court judge disagrees with the evaluator and enters judgment in favor of the association. In this regard, Section 514B-A(c) may be unconstitutional as it deprives parties of their constitutional right to due process.

Furthermore, because early neutral evaluations may have a major effect on whether an association will be able to recover its attorneys' fees in enforcing its governing documents, which can exceed $100,000 in heavily litigated disputes, Section 514B-A(c) will require associations to expend significant time preparing for and presenting its position in early neutral evaluations. The early neutral evaluations will be as important as binding arbitrations.

B. Section 514B-B

S.B. No. 146 adds a new provision on fines and appeals from fines. It establishes procedures to be followed by associations and time periods for action. While procedures and time periods serve a good purpose, this provision may conflict with the procedures and time periods for action found in the governing instruments of condominium associations. This will likely create confusion. If this bill is to be adopted, a provision should be added addressing how those conflicts are to be resolved.

The new subsection (b) found in SECTION 2 of the bill related to fines provides that no attorneys' fees with respect to a fine shall be charged by an association against any unit owner or

tenant with before the time when a fine is deemed to be collectible. This could be construed as prohibiting an association from recovering attorneys' fees incurred by it in having its lawyer send a demand letter to an owner who has violated a covenant if a fine resulting from the violation is later waived, rescinded, or set aside. The fact that a fine has been waived, rescinded, or set aside does not necessarily mean that there was no violation warranting the sending of a demand letter. It may be that the board agreed to waive or rescind the fine as a gesture of goodwill or that the fine was set aside by the small claims court for technical reasons. Furthermore, a board may be less inclined to waive fines upon appeal if doing so means that it must also waive all attorneys' fees incurred by the association in connection with the violation.

SECTION 3

SECTION 3 adds a new subpart to replace the existing Subpart D, Alternative Dispute Resolution. This section represents a major change to the law without any compelling reason for the change.

Probably the most trouble provisions in SECTION 3 are those in Section 514B-G, qualifications of mediators, arbitrator and evaluators. The qualifications of evaluators is of paramount concern because, under Section 514B-A(c), the early neutral evaluations rendered by evaluators may, depending on the outcome, preclude a party from recovering its attorneys' fees and costs.

The qualifications in SECTION 3 are not adequate to protect the parties. Condominium associations are complex entities, the governing documents and HRS Chapter 514B contain dense and sometimes conflicting provisions, and there is a body of Hawai‘i appellate court decisions that evaluators should be familiar with in order to render sound evaluations. At minimum, evaluators should be attorneys licensed in the state of Hawai`i with at least 5-years of experience.

SECTION 5

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SECTION 8

SECTION 8 of the bill amends the fine provision found in HRS Section 104(a)(11), but omits a change to HRS Section 104(b) which also relates to fines. This omission will create inconsistencies in the law.

SECTION 11

The proposed changes to HRS Section 514B-146 found in SECTION 11 of the bill are quite substantial without any stated compelling reason for the changes. If HRS Section 514B-146 is to be amended, the proposed wording should be amended for clarification.

The new Section 514B-146(f) allows a unit owner to request mediation within thirty days of the statement described in subsection (d). The statement referred to in subsection (d) is given only if an owner requests such a statement. The deadline to request mediation should not be tied to a date that is uncertain and may never arise.

The new subsection (f) states that an owner shall be entitled to a refund of any amounts paid that are determined to have not been owed. It is not clear who makes this determination because it follows the section allowing an owner to file a court action or to request mediation. It should be revised to clarify that the determination must be made by a court of competent jurisdiction, via a binding final judgment, and that payment of any refund shall be subject to any orders of a court granting stays or other relief.

The new subsection (g) provides that the association may proceed to collect an unpaid assessment by any legal means, except where collection efforts are stayed pursuant to subsection (f). It should be made clear that the 60-day stay provided for in subsection (f) shall not apply to the recordation of a lien by an association because it is conceivable that an association will need to record a lien during that time period to preserve the priority of its lien.

Finally, HRS Section 514B-146 requires owners to pay common expense assessments before disputing those amounts, but allows owners to dispute all other assessments prior to payment. This can place significant financial burdens on associations where the amounts at issue have been paid by an association to third parties, such as payment of submetered utilities. The right to dispute charges prior to payment should be limited to charges for which an association has not advance funds, such as fines, late fees, or interest.

SECTION 13

For reasons discussed above with regard to SECTION 3, Section 514B-A, I strongly object to the deletion of Section 514B-157. The deletion of Section 514B-157 will substantially impair an association's ability to enforce its covenants.

For the foregoing reasons, I respectfully OPPOSE S.B. No. 146 and urge your Committee to defer this measure. Alternatively, if it is to be passed by the Committee, I urge the Committee to amend the bill to address the issues discussed above.

Respectfully submitted,

Mary Freeman

Ewa Beach

LATE

SB-146
Submitted on: 2/3/2025 10:19:54 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Carol Walker	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

I OPPOSE S.B. No. 146 for the reasons set forth below.

SECTION 2

A. Section 514B-A

1. There is a typographical error in Section 514B-A(3): The word “of” between the words interpretation and enforcement should be changed to “or” so that it reads “interpretation or enforcement”.

2. This section replaces Section 514B-157, and the predecessor section, Section 514A-94. For many decades, Section 514A-94 and the comparable provision in Chapter 514B, Section 514B-157, has contained the clause, “shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys’ fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association.” For no reason, this clause has been omitted in S.B. No. 146.

The deletion of the clause beginning with “shall be promptly paid . . .” will have major consequences for associations. Without this clause, condominium associations may be precluded

from recovering attorneys' fees incurred in the enforcement of the governing documents unless the association commences an action or proceeding against the owner. This will significantly increase the cost of seeking reimbursement of legal fees and costs. If associations are unable to seek reimbursement of legal fees from owners who violate the governing documents, the legal fees will be borne by owners who complied with the governing documents. There may be little incentive for owners to comply with the governing documents.

3. Section 514B-A(c) is a new section that may have draconian effects on associations' ability to seek reimbursement of attorneys' fees for the enforcement of governing documents. The effect of this section is that, depending upon the "evaluator's" evaluation, an association (or owners) may be unfairly and permanently released from any exposure to attorneys' fees and costs in connection with the dispute.

For example, if an association commences an early neutral evaluation of a condominium-related dispute with an owner, and the evaluator renders an evaluation that is unfavorable to the association, the association will be precluded from seeking reimbursement of its attorneys' fees from the unit owner, even if the evaluation is found to be erroneous. The association will have no ability to appeal the decision of the evaluator. The dispute may be critically important to the association. The association may be barred from recovering its attorneys' fees, even if a circuit court judge disagrees with the evaluator and enters judgment in favor of the association. In this regard, Section 514B-A(c) may be unconstitutional as it deprives parties of their constitutional right to due process.

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B. Section 514B-B

S.B. No. 146 adds a new provision on fines and appeals from fines. It establishes procedures to be followed by associations and time periods for action. While procedures and time periods serve a good purpose, this provision may conflict with the procedures and time periods for action found in the governing instruments of condominium associations. This will likely create confusion. If this bill is to be adopted, a provision should be added addressing how those conflicts are to be resolved.

1. new subsection (b) found in SECTION 2 of the bill related to fines provides that no attorneys' fees with respect to a fine shall be charged by an association against any unit owner or tenant with before the time when a fine is deemed to be collectible. This could be construed as prohibiting an association from recovering attorneys' fees incurred by it in having its lawyer send a demand letter to an owner who has violated a covenant if a fine resulting from the violation is later waived, rescinded, or set aside. The fact that a fine has been waived, rescinded, or set aside does not necessarily mean that there was no violation warranting the sending of a demand letter. It may be that the board agreed to waive or rescind the fine as a gesture of goodwill or that the fine was set aside by the small claims court for technical reasons. Furthermore, a board may be less inclined to waive fines upon appeal if doing so means that it must also waive all attorneys' fees incurred by the association in connection with the violation.

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Probably the most trouble provisions in SECTION 3 are those in Section 514B-G, qualifications of mediators, arbitrator and evaluators. The qualifications of evaluators is of paramount concern because, under Section 514B-A(c), the early neutral evaluations rendered by evaluators may, depending on the outcome, preclude a party from recovering its attorneys' fees and costs.

The qualifications in SECTION 3 are not adequate to protect the parties. Condominium associations are complex entities, the governing documents and HRS Chapter 514B contain dense and sometimes conflicting provisions, and there is a body of Hawai‘i appellate court decisions that evaluators should be familiar with in order to render sound evaluations. At minimum, evaluators should be attorneys licensed in the state of Hawai`i with at least 5-years of experience.

SECTION 5

SECTION 5 adds a new definition of “condominium-related dispute” to Section 514B-3. The definition of "condominium-related dispute" should include disputes between associations and managing agents.

SECTION 8

SECTION 8 of the bill amends the fine provision found in HRS Section 104(a)(11), but omits a change to HRS Section 104(b) which also relates to fines. This omission will create inconsistencies in the law.

SECTION 11

The proposed changes to HRS Section 514B-146 found in SECTION 11 of the bill are quite substantial without any stated compelling reason for the changes. If HRS Section 514B-146 is to be amended, the proposed wording should be amended for clarification.

1. new Section 514B-146(f) allows a unit owner to request mediation within thirty days of the statement described in subsection (d). The statement referred to in subsection (d) is given only if an owner requests such a statement. The deadline to request mediation should not be tied to a date that is uncertain and may never arise.

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SECTION 13

1. reasons discussed above with regard to SECTION 3, Section 514B-A, I strongly object to the deletion of Section 514B-157. The deletion of Section 514B-157 will substantially impair an association's ability to enforce its covenants.

For the foregoing reasons, I respectfully OPPOSE S.B. No. 146 and urge your Committee to defer this measure. Alternatively, if it is to be passed by the Committee, I urge the Committee to amend the bill to address the issues discussed above.

Respectfully submitted,

Carol Walker

LATE

SB-146
Submitted on: 2/3/2025 10:54:32 PM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Primrose Leong-Nakamoto	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

I OPPOSE S.B. No. 146 for the reasons set forth below.

SECTION 2

A. Section 514B-A

1. There is a typographical error in Section 514B-A(3): The word "of" between the words interpretation and enforcement should be changed to "or" so that it reads "interpretation or enforcement".

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The proposed changes to HRS Section 514B-146 found in SECTION 11 of the bill are quite substantial without any stated compelling reason for the changes. If HRS Section 514B-146 is to be amended, the proposed wording should be amended for clarification.

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The new subsection (f) states that an owner shall be entitled to a refund of any amounts paid that are determined to have not been owed. It is not clear who makes this determination because it follows the section allowing an owner to file a court action or to request mediation. It should be revised to clarify that the determination must be made by a court of competent jurisdiction, via a binding final judgment, and that payment of any refund shall be subject to any orders of a court granting stays or other relief. The new subsection (g) provides that the association may proceed to collect an unpaid assessment by any legal means, except where collection efforts are stayed pursuant to subsection (f). It should be made clear that the 60-day stay provided for in subsection (f) shall not apply to the recordation of a lien by an association because it is conceivable that an association will need to record a lien during that time period to preserve the priority of its lien Finally, HRS Section 514B-146 requires owners to pay common expense assessments before disputing those amounts, but allows owners to dispute all other assessments prior to payment. This can place significant financial burdens on associations where the amounts at issue have been paid by an association to third parties, such as payment of submetered utilities. The right to dispute charges prior to payment should be limited to charges for which an association has not advance funds, such as fines, late fees, or interest.

SECTION 13

1. reasons discussed above with regard to SECTION 3, Section 514B-A, I strongly object to the deletion of Section 514B-157. The deletion of Section 514B-157 will substantially impair an association's ability to enforce its covenants.

For the foregoing reasons, I respectfully OPPOSE S.B. No. 146 and urge your Committee to defer this measure. Alternatively, if it is to be passed by the Committee, I urge the Committee to amend the bill to address the issues discussed above.

Respectfully Submitted,

Primrose K. Leong-Nakamoto

LATE

SB-146
Submitted on: 2/4/2025 7:31:03 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Julie Wassel	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

I OPPOSE S.B. No. 146 for the reasons set forth below.

SECTION 2

A. Section 514B-A

1. There is a typographical error in Section 514B-A(3): The word "of" between the words interpretation and enforcement should be changed to "or" so that it reads "interpretation or enforcement".

2. This section replaces Section 514B-157, and the predecessor section, Section 514A-94. For many decades, Section 514A-94 and the comparable provision in Chapter 514B, Section 514B-157, has contained the clause, "shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association." For no reason, this clause has been omitted in S.B. No. 146.

The deletion of the clause beginning with "shall be promptly paid . . ." will have major consequences for associations. Without this clause, condominium associations may be precluded

from recovering attorneys' fees incurred in the enforcement of the governing documents unless the association commences an action or proceeding against the owner. This will significantly increase the cost of seeking reimbursement of legal fees and costs. If associations are unable to seek reimbursement of legal fees from owners who violate the governing documents, the legal fees will be borne by owners who complied with the governing documents. There may be little incentive for owners to comply with the governing documents.

3. Section 514B-A(c) is a new section that may have draconian effects on associations' ability to seek reimbursement of attorneys' fees for the enforcement of governing documents. The effect of this section is that, depending upon the "evaluator's" evaluation, an association (or owners) may be unfairly and permanently released from any exposure to attorneys' fees and costs in connection with the dispute.

For example, if an association commences an early neutral evaluation of a condominium-related dispute with an owner, and the evaluator renders an evaluation that is unfavorable to the association, the association will be precluded from seeking reimbursement of its attorneys' fees from the unit owner, even if the evaluation is found to be erroneous. The association will have no ability to appeal the decision of the evaluator. The dispute may be critically important to the association. The association may be barred from recovering its attorneys' fees, even if a circuit court judge disagrees with the evaluator and enters judgment in favor of the association. In this regard, Section 514B-A(c) may be unconstitutional as it deprives parties of their constitutional right to due process.

Furthermore, because early neutral evaluations may have a major effect on whether an association will be able to recover its attorneys' fees in enforcing its governing documents, which can exceed $100,000 in heavily litigated disputes, Section 514B-A(c) will require associations to expend significant time preparing for and presenting its position in early neutral evaluations. The early neutral evaluations will be as important as binding arbitrations.

B. Section 514B-B

S.B. No. 146 adds a new provision on fines and appeals from fines. It establishes procedures to be followed by associations and time periods for action. While procedures and time periods serve a good purpose, this provision may conflict with the procedures and time periods for action found in the governing instruments of condominium associations. This will likely create confusion. If this bill is to be adopted, a provision should be added addressing how those conflicts are to be resolved.

The new subsection (b) found in SECTION 2 of the bill related to fines provides that no attorneys' fees with respect to a fine shall be charged by an association against any unit owner or tenant with before the time when a fine is deemed to be collectible. This could be construed as prohibiting an association from recovering attorneys' fees incurred by it in having its lawyer send a demand letter to an owner who has violated a covenant if a fine resulting from the violation is later waived, rescinded, or set aside. The fact that a fine has been waived, rescinded, or set aside does not necessarily mean that there was no violation warranting the sending of a demand letter. It may be that the board agreed to waive or rescind the fine as a gesture of goodwill or that the fine was set aside by the small claims court for technical reasons. Furthermore, a board may be less inclined to waive fines upon appeal if doing so means that it must also waive all attorneys' fees incurred by the association in connection with the violation.

SECTION 3

SECTION 3 adds a new subpart to replace the existing Subpart D, Alternative Dispute Resolution. This section represents a major change to the law without any compelling reason for the change.

Probably the most trouble provisions in SECTION 3 are those in Section 514B-G, qualifications of mediators, arbitrator and evaluators. The qualifications of evaluators is of paramount concern because, under Section 514B-A(c), the early neutral evaluations rendered by evaluators may, depending on the outcome, preclude a party from recovering its attorneys' fees and costs.

The qualifications in SECTION 3 are not adequate to protect the parties. Condominium associations are complex entities, the governing documents and HRS Chapter 514B contain dense and sometimes conflicting provisions, and there is a body of Hawai‘i appellate court decisions that evaluators should be familiar with in order to render sound evaluations. At minimum, evaluators should be attorneys licensed in the state of Hawai`i with at least 5-years of experience.

SECTION 5

SECTION 5 adds a new definition of "condominium-related dispute" to Section 514B-3. The definition of "condominium-related dispute" should include disputes between associations and managing agents.

SECTION 8

SECTION 8 of the bill amends the fine provision found in HRS Section 104(a)(11), but omits a change to HRS Section 104(b) which also relates to fines. This omission will create inconsistencies in the law.

SECTION 11

The proposed changes to HRS Section 514B-146 found in SECTION 11 of the bill are quite substantial without any stated compelling reason for the changes. If HRS Section 514B-146 is to be amended, the proposed wording should be amended for clarification.

The new Section 514B-146(f) allows a unit owner to request mediation within thirty days of the statement described in subsection (d). The statement referred to in subsection (d) is given only if an owner requests such a statement. The deadline to request mediation should not be tied to a date that is uncertain and may never arise.

The new subsection (f) states that an owner shall be entitled to a refund of any amounts paid that are determined to have not been owed. It is not clear who makes this determination because it follows the section allowing an owner to file a court action or to request mediation. It should be revised to clarify that the determination must be made by a court of competent jurisdiction, via a binding final judgment, and that payment of any refund shall be subject to any orders of a court granting stays or other relief.

The new subsection (g) provides that the association may proceed to collect an unpaid assessment by any legal means, except where collection efforts are stayed pursuant to subsection (f). It should be made clear that the 60-day stay provided for in subsection (f) shall not apply to

the recordation of a lien by an association because it is conceivable that an association will need to record a lien during that time period to preserve the priority of its lien.

Finally, HRS Section 514B-146 requires owners to pay common expense assessments before disputing those amounts, but allows owners to dispute all other assessments prior to payment. This can place significant financial burdens on associations where the amounts at issue have been paid by an association to third parties, such as payment of submetered utilities. The right to dispute charges prior to payment should be limited to charges for which an association has not advance funds, such as fines, late fees, or interest.

SECTION 13

For reasons discussed above with regard to SECTION 3, Section 514B-A, I strongly object to the deletion of Section 514B-157. The deletion of Section 514B-157 will substantially impair an association's ability to enforce its covenants.

For the foregoing reasons, I respectfully OPPOSE S.B. No. 146 and urge your Committee to defer this measure. Alternatively, if it is to be passed by the Committee, I urge the Committee to amend the bill to address the issues discussed above.

Respectfully submitted,

Julie Wassel

LATE

SB-146
Submitted on: 2/4/2025 8:47:18 AM
Testimony for CPN on 2/5/2025 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Lance S. Fujisaki	Individual	Oppose	Written Testimony Only

Comments:

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

I OPPOSE S.B. No. 146 for the reasons set forth below.

SECTION 2

A. Section 514B-A

1. There is a typographical error in Section 514B-A(3): The word "of" between the words interpretation and enforcement should be changed to "or" so that it reads "interpretation or enforcement".

2. This section replaces Section 514B-157, and the predecessor section, Section 514A-94. For many decades, Section 514A-94 and the comparable provision in Chapter 514B, Section 514B-157, has contained the clause, "shall be promptly paid on demand to the association by such person or persons; provided that if the claims upon which the association takes any action are not substantiated, all costs and expenses, including reasonable attorneys' fees, incurred by any such person or persons as a result of the action of the association, shall be promptly paid on demand to such person or persons by the association." For no reason, this clause has been omitted in S.B. No. 146.

The deletion of the clause beginning with "shall be promptly paid . . ." will have major consequences for associations. Without this clause, condominium associations may be precluded from recovering attorneys' fees incurred in the enforcement of the governing documents unless the association commences an action or proceeding against the owner. This will significantly increase the cost of seeking reimbursement of legal fees and costs. If associations are unable to seek reimbursement of legal fees from owners who violate the governing documents, the legal fees will be borne by owners who complied with the governing documents. There may be little incentive for owners to comply with the governing documents.

3. Section 514B-A(c) is a new section that may have draconian effects on associations' ability to seek reimbursement of attorneys' fees for the enforcement of governing documents. The effect of this section is that, depending upon the "evaluator's" evaluation, an association (or owners) may be unfairly and permanently released from any exposure to attorneys' fees and costs in connection with the dispute.

For example, if an association commences an early neutral evaluation of a condominium-related dispute with an owner, and the evaluator renders an evaluation that is unfavorable to the association, the association will be precluded from seeking reimbursement of its attorneys' fees from the unit owner, even if the evaluation is found to be erroneous. The association will have no ability to appeal the decision of the evaluator. The dispute may be critically important to the association. The association may be barred from recovering its attorneys' fees, even if a circuit court judge disagrees with the evaluator and enters judgment in favor of the association. In this regard, Section 514B-A(c) may be unconstitutional as it deprives parties of their constitutional right to due process.

Furthermore, because early neutral evaluations may have a major effect on whether an association will be able to recover its attorneys' fees in enforcing its governing documents, which can exceed $100,000 in heavily litigated disputes, Section 514B-A(c) will require associations to expend significant time preparing for and presenting its position in early neutral evaluations. The early neutral evaluations will be as important as binding arbitrations.

B. Section 514B-B

S.B. No. 146 adds a new provision on fines and appeals from fines. It establishes procedures to be followed by associations and time periods for action. While procedures and time periods serve a good purpose, this provision may conflict with the procedures and time periods for action found in the governing instruments of condominium associations. This will likely create confusion. If this bill is to be adopted, a provision should be added addressing how those conflicts are to be resolved.

The new subsection (b) found in SECTION 2 of the bill related to fines provides that no attorneys' fees with respect to a fine shall be charged by an association against any unit owner or tenant with before the time when a fine is deemed to be collectible. This could be construed as prohibiting an association from recovering attorneys' fees incurred by it in having its lawyer send a demand letter to an owner who has violated a covenant if a fine resulting from the violation is later waived, rescinded, or set aside. The fact that a fine has been waived, rescinded, or set aside does not necessarily mean that there was no violation warranting the sending of a demand letter. It may be that the board agreed to waive or rescind the fine as a gesture of goodwill or that the fine was set aside by the small claims court for technical reasons. Furthermore, a board may be less inclined to waive fines upon appeal if doing so means that it must also waive all attorneys' fees incurred by the association in connection with the violation.

SECTION 3

SECTION 3 adds a new subpart to replace the existing Subpart D, Alternative Dispute Resolution. This section represents a major change to the law without any compelling reason for the change.

Probably the most troublesome provisions in SECTION 3 are those in Section 514B-G, qualifications of mediators, arbitrator and evaluators. The qualifications of evaluators is of paramount concern because, under Section 514B-A(c), the early neutral evaluations rendered by

evaluators may, depending on the outcome, preclude a party from recovering its attorneys' fees and costs.

The qualifications in SECTION 3 are not adequate to protect the parties. Condominium associations are complex entities, the governing documents and HRS Chapter 514B contain dense and sometimes conflicting provisions, and there is a body of Hawai‘i appellate court decisions that evaluators should be familiar with in order to render sound evaluations. At minimum, evaluators should be attorneys licensed in the state of Hawai`i with at least 5-years of experience.

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SECTION 5 adds a new definition of "condominium-related dispute" to Section 514B-3. The definition of "condominium-related dispute" should include disputes between associations and managing agents.

SECTION 8

SECTION 8 of the bill amends the fine provision found in HRS Section 104(a)(11), but omits a change to HRS Section 104(b) which also relates to fines. This omission will create inconsistencies in the law.

SECTION 11

The proposed changes to HRS Section 514B-146 found in SECTION 11 of the bill are quite substantial without any stated compelling reason for the changes. If HRS Section 514B-146 is to be amended, the proposed wording should be amended for clarification.

The new Section 514B-146(f) allows a unit owner to request mediation within thirty days of the statement described in subsection (d). The statement referred to in subsection (d) is given only if an owner requests such a statement. The deadline to request mediation should not be tied to a date that is uncertain and may never arise.

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SECTION 13

For reasons discussed above with regard to SECTION 3, Section 514B-A, I strongly object to the deletion of Section 514B-157. The deletion of Section 514B-157 will substantially impair an association's ability to enforce its covenants.

For the foregoing reasons, I respectfully OPPOSE S.B. No. 146 and urge your Committee to defer this measure. Alternatively, if it is to be passed by the Committee, I urge the Committee to amend the bill to address the issues discussed above.

Respectfully submitted,

Lance Fujisaki

Dear Senator Keohokalole, Senator Fukunaga, and Member of the Committee:

I OPPOSE S.B. No. 146 for the reasons set forth below.

LATE

SECTION 2

A. Section 514B-A

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For example, if an association commences an early neutral evaluation of a condominium-related dispute with an owner, and the evaluator renders an evaluation that is unfavorable to the association, the association will be precluded from seeking reimbursement of its attorneys' fees from the unit owner, even if the evaluation is found to be erroneous. The association will have no ability to appeal the decision of the evaluator. The dispute may be critically important to the association. The association may be barred from recovering its attorneys' fees, even if a circuit court judge disagrees with the evaluator and enters judgment in favor of the association. In this regard, Section 514B-A(c) may be unconstitutional as it deprives parties of their constitutional right to due process.

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SECTION 3

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There is a typographical error in Section 514B-D(h)(1): The word "of" between the words court and arbitrator be changed to "or" so that it reads "court or arbitrator".

Probably the most troubling provisions in SECTION 3 are those in Section 514B-G, qualifications of mediators, arbitrator and evaluators. The qualifications of evaluators is of paramount concern because, under Section 514B-A(c), the early neutral evaluations rendered by evaluators may, depending on the outcome, preclude a party from recovering its attorneys' fees and costs.

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advanced funds, such as fines, late fees, or interest.

SECTION 13

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Respectfully submitted,

Pamela J. Schell