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Representative David Nelson
State Capitol Room 13
Juneau AK, 99801

Senator Josh Revak
State Capitol Room 125
Juneau AK, 99801

RE: **Support of House Bill No. 243 and Senate Bill No. 143;**
Amendments to Alaska's Horizontal Property Regimes Act and Uniform Common Interest Ownership Act

Dear Representative Nelson and Senator Revak,

My name is Sarah A. Badten and I have been practicing law in Alaska in the area of community associations for approximately 15 years. I have represented hundreds of associations, including condominiums and owners' associations all over Alaska, but mostly in the Anchorage and Mat-Su areas. I am writing this letter in support of House Bill No. 243 and Senate Bill 143. These bills address non-partisan issues which affect thousands of Alaskan homeowners. I urge the Legislature to pass these bills, as they will greatly help our community associations, as well as Alaskan citizens who reside in or own property in these communities.

Do you, or someone you know, own a condominium or other type of property in a community which is governed by a homeowners association? Was the property built or created prior to 1986? If so, that association effectively cannot update its governing documents. It is essentially "stuck" with the original documents and lacks the ability to update them for changing times and circumstances, or to take advantage of current or future legislation. It also does not clearly have the benefit of the super-priority lien.

Unless a statutory change is made, these older associations may be forced to operate under outdated and archaic standards forever. This problem affects mostly older and often lower-income properties; the very properties that most need the protections provided by the Common Interest Ownership Act. These older associations

deserve the same protections, flexibility, and guidance provided to newer associations.

I. Amending Governing Documents

The problem: It is virtually impossible for preexisting associations to amend their governing documents.

In Alaska, almost all condominium associations and other common interest ownership communities created prior to enactment of Alaska's Common Interest Ownership Act, AS 34.08 et. seq. on January 1, 1986 (adopted from the Uniform Common Interest Ownership Act and commonly referred to herein as "UCIOA" or the "Act") (referred to as "preexisting associations") and some associations created after the Act, are unable to amend their declaration of covenants and restrictions (governing documents) due to an onerous requirement stated in their declaration that the association must first receive prior approval in writing from mortgagees or other lienholders of the properties within the association. Obtaining that approval or consent is incredibly difficult, if not impossible. As a result, these older associations are forced to operate under archaic and outdated rules. These associations have also been unable to take advantage of certain benefits, powers, protections and flexibilities granted by UCIOA because they are unable to amend their governing documents to adopt those provisions of UCIOA, which do not all automatically apply to preexisting associations.

Most lenders have no incentive to take the time and effort to evaluate any proposed amendments because the proposals have no real impact on them. Because of this, associations often do not receive any response from lenders when requesting written consent. Since a significant number of mortgage lenders are national banks with hundreds, if not thousands, of locations all over the country with department heads and decision makers located out of state, obtaining consent or approval is virtually impossible because of the lack of responsiveness from the lenders.

Not only does an association have to research and attempt to identify a contact person at each lender with apparent authority to review the request, that person may still not have the authority to bind the lender for approval or consent. Moreover, even if the proper person with authority was identified, as stated previously there is often no incentive for the lender to sign the consent (nothing in it for them).

The result of this cumbersome requirement is that many associations are forced to operate under old and outdated governing documents which do not provide current provisions and protections in today's environment. The fact that very few associations created prior to January 1, 1986 have ever made any material amendments to their

governing documents is evidence of the unreasonable hold these amendment provisions have on those communities. Faced with the daunting (and almost always unsuccessful) task of this process, most associations simply refrain from spending time and energy that will ultimately be wasted.

The solution: HB 243 and SB 143 will serve to benefit condominium associations and other common interest ownership communities, as well as the homeowners within those communities, by providing an alternative to the cumbersome and expensive written lienholder approval requirement and by providing a process to give notice and an opportunity to be heard to said mortgagees or other lienholders, without unduly restricting the ability of the association to amend its governing documents. This process will allow associations to update their governing documents to more accurately reflect current needs and operations, as well as allowing them to adopt and take advantage of the benefits and protections of UCIOA.

II. Super-priority Lien

The problem: Preexisting associations do not clearly have the benefit of the super-priority lien.

AS 34.08.040 specifically provides that the association lien statute (AS 34.08.470), including the super-priority lien, applies to pre-existing associations created prior to January 1, 1986.

UCIOA, and the super-priority lien language in particular, was drafted with the purpose of protecting the association form of living. Prior to UCIOA, many associations were failing, leading to a housing and lending crisis. UCIOA and the super-priority lien were created to keep associations from going bankrupt and to allow associations to continue to provide essential services, such as snow removal, roof maintenance, and common element repairs. The remedial nature of the legislation is why UCIOA is liberally construed. AS 34.08.810 provides that the "remedies provided by this chapter **shall** be liberally administered[.]" (emphasis added).

Unfortunately, AS 34.08.040 provides that the lien statute, AS 34.08.470, applies "to all common interest communities created in the state before January 1, 1986, **except that** the sections apply only with respect to events and circumstances occurring after January 1, 1986, and **do not invalidate existing provisions of the declaration**, bylaws, or plats or plans of the common interest communities." (emphasis added). Many

banks have interpreted this "invalidation" language to mean that they do not have to pay the super-priority lien where the Declaration has a provision that subordinates the Association's lien to the mortgage lender, which virtually all of these older association declarations obtain.

Since lenders are making loans *decades* after enactment of AS 34.08 in 1986, they are on notice of the provisions of those statutes. Moreover, it is the pre-existing associations that particularly need the protections of AS 34.08, as they are the ones most likely experiencing common element wear-and-tear, deterioration and are in the most need of common element repair and maintenance. Having enough resources for these older associations to repair and replace aging common elements is critical. The Act's remedial impact of prioritizing 6 months of assessments and fees is a very narrowly tailored method of addressing "a broad, generalized economic or social problem." *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470, 503 (1987); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978)).

The solution: HB 243 and SB 143 will resolve this dispute by clearly stating that AS 34.08.470 does not "invalidate" a declaration provision, even if it conflicts with it, so that pre-existing associations are entitled to the super-priority lien.

As a policy matter, this makes sense given that the value of the mortgage lender's security interest depends strongly on the financial strength of the association. In fact, the lender is greatly damaged when unpaid assessments are not collected and the value of the lender's secured unit is decreased, as well as the value of any other units the lender may hold as security in the association (not to mention the increased assessments to innocent unit owners in the association who are paying). Therefore, UCIOA's super-priority lien calls upon the lender to protect its own security interest and to help create and support financially solvent associations, which may be relied upon by lenders and the community to perform the maintenance, services and obligations the associations are tasked with providing.

III. Conclusion

There is a compelling state interest in enabling the members of common interest ownership communities to approve amendments to their governing documents through a legal process and for all associations to be subject to the super-priority lien. HB 243 and SB 143 provide a streamlined method for these associations to obtain lienholder

approval so that they may amend their governing documents and take advantage of the protections, flexibility and guidance of UCIOA, as well as the super-priority lien.

Thank you for your time and service. If you have any questions, please feel free to contact me and I would be happy to discuss.

Very truly yours,

BIRCH HORTON BITTNER & CHEROT

Sarah A. Badten