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Testimony of Matthew J. Cholewa,
CBA Real Property Section Legislative Committee Chairman
**Senate Bill 549, An Act Concerning the Common Interest Form of Ownership,
Mortgages and Real Estate Financing**
Judiciary Committee
March 10, 2006

Senator McDonald, Representative Lawlor and members of the Judiciary Committee, thank you for the opportunity to testify before the committee on Senate Bill 549, An Act Concerning the Common Interest Form of Ownership, Mortgages and Real Estate Financing.

My name is Matthew Cholewa. I am in-house counsel for LandAmerica Commonwealth and LandAmerica Lawyers Title, national title insurance underwriters, in Rocky Hill. I am chairman of the legislative committee of the CBA Real Property Section and a member of the section's executive committee. The section consists primarily of attorneys in private practice who represent consumers, businesses, lenders and others in real estate transactions.

The CBA Real Property Section supports Senate Bill 549 and, on behalf of the section, I wish to thank the committee for raising the concept in the bill. We believe the bill is important to real estate financing in Connecticut and I respectfully ask that the committee approve the bill.

The bill would make changes to the law relating to common interest communities, mortgages, and commercial loans. It would improve financing for non profit entities; help clear problems in the chain of title on properties; and facilitate the clearance of unreleased, ancient mortgages.

With regard to the Common Interest Ownership Act, the bill specifies that local zoning ordinances, building codes and the like may not prohibit or discriminate against the common interest form of ownership. This would eliminate a degree of uncertainty that has existed in Connecticut since the passage of the original unit ownership act in 1962 permitting condominiums. For example, some fire code enforcement officials claim that a multifamily building must have higher fire separation construction between units if the building is intended to be sold as a common interest community, rather than rented. The physical characteristics of the building, whether rented or sold, are identical. It will have the same insurance and unified management.

Conn. Gen. Stat. §49-2 contains "safe harbor" provisions for certain types of mortgages securing future advances, including commercial revolving loans and home equity lines of credit. These safe harbors provide the future advances with priority over other liens that arise between the time of the initial mortgage and the future advance. Without these safe harbor provisions, borrowers would be required to pay for title searches and title insurance endorsements at the time of each future advance to ensure that no intervening liens were recorded. This reduces the cost to the borrower by enabling the priority of those mortgages, including the future advances, to be determined and insured at the time of financing.

The bill removes the requirement that business entities be organized “for profit” in order to benefit from the safe harbor provisions in the statute. The CBA Real Property Section believes it makes sense for the state, as a public policy matter, to allow not-for-profit organizations such as Americares or the United Way to secure such loans and benefit from the safe harbor provisions in the statute.

The bill adds limited liability companies to the list of specifically enumerated entities in section 49-2 that fall within the safe harbor for commercial revolving loans. As the statute currently includes the generic phrase "entity," which would include LLCs, we feel that expressly enumerating limited liability companies is not a change in existing law. That is, the change is simply to clarify existing law. Because there are more LLCs registered in Connecticut than all other forms of organizations combined, and they are formed each year at a greater rate by far, we thought it would be helpful to specifically call out LLCs as one of the kinds of entities included. There should be no implication that other kinds of entities need to be specifically mentioned.

The bill also addresses the ongoing problem of unreleased and improperly released mortgages, which has posed significant challenges for real estate practitioners. Section 3 provides that a release of mortgage operates to release after-acquired title to the mortgage, which would help facilitate the clearing of real estate titles in the state. For example, a common situation in the land records occurs when someone is trying to sell or refinance a property: a Mortgage to “Bank A” followed by a release by “Bank B” (but no assignment of record from Bank A to Bank B). The parties scramble to fix the gap in the chain of title and are sent an assignment from Bank A to Bank B. Because the assignment is dated and recorded after the release signed by Bank B, under current law the release from Bank B may be considered ineffective to release the mortgage, when in actuality, the lenders simply neglected to previously record the assignment. There is little doubt that the mortgage was paid and Bank B intended to release it. This change would fix that problem.

Section 4 is a companion provision to Section 3, this time for assignments of mortgage. It provides that an assignment of mortgage operates to assign after-acquired title to the mortgage to help facilitate the clearing of real estate titles in the state. For example, if there is a mortgage to Bank A, followed by an assignment from Bank B to Bank C, and a release by Bank C, there is a gap in the chain between Bank A and Bank B. If this is corrected by later obtaining an assignment from Bank A to Bank B, it would provide that Bank B’s previous assignment to Bank C is effective to assign Bank B’s “after-acquired title” to the mortgage.

The bill, in section 5, makes several amendments to Conn. Gen. Stat. §49-13a, which governs when undischarged mortgages become invalid. It would reduce the time period for invalidating undischarged mortgages, where the mortgagor or those who owned the land had been in undisturbed possession, from 40 years to 30 years after the mortgage should have been paid off; allow undischarged mortgages that have no stated maturity date to be released automatically 30 years after the recording of the mortgage (the statute does not currently address mortgages with no stated maturity date); and eliminate the requirement that an affidavit be recorded on the land records in the case of an undischarged mortgage, which would conform the law to practice.

On behalf of the CBA Real Property Section, thank you again for the opportunity to comment on the bill before the committee. I would be pleased to answer any questions you may have.