



Mortgage Bankers Association of Hawaii
P.O. Box 4129, Honolulu, Hawaii 96812

February 18, 2010

The Honorable Robert N. Herkes, Chair
and Members of the House Committee on
Consumer Protection and Commerce
State Capitol, Room 325
Honolulu, Hawaii 96813

The Honorable Jon Riki Karamatsu, Chair
and Members of the House Committee on
Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

Re: House Bill 2288 Relating to Private Transfer Fees

Dear Chair Herkes and Chair Karamatsu, members of the House Committee on
Consumer Protection and Commerce, and members of the House Committee on
Judiciary:

I am Rick Tsujimura representing the Mortgage Bankers Association of Hawaii
("MBAH"). The MBAH is a voluntary organization of real estate lenders in Hawaii. Our
membership consists of employees of banks, savings institutions, mortgage bankers,
mortgage brokers, and other financial institutions. The members of the MBAH originate
the vast majority of residential and commercial real estate mortgage loans in Hawaii.
When, and if, the MBAH testifies on legislation, it is related only to mortgage lending.

MBAH supports House Bill 2288 Relating to Private Transfer Fees. House Bill
2288 prohibits the imposition of transfer fees for the transfer of real property. The
MBAH supports this measure.

The MBAH believes that deed restrictions which impose fees for the transfer of
real property will negatively impact the marketability and lendability of real property.
This will discourage buyers which in turn will depress values. In time, these types of
property will become unlendable.

For this reason we ask your favorable consideration of this measure. Thank you
for the opportunity to present this testimony.

Presentation of the Committee on Commerce and Consumer Protection,

Thursday, February 18, 2010 at 2:00 p.m.

Testimony on Bill H.B 2288 Relating to Private Transfer Fee

Support the Intent

TO: The Honorable Chairs Robert Herkes and Jon Riki Karamatsu
The Honorable Vice Chairs Glenn Wakai and Ken Ito
Members of the Committees

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying on behalf of HBA in **support of the intent** of H.B. 2288. HBA is the trade organization that represents all FDIC insured depository institutions doing business in Hawaii.

It is our understanding that H.B. 2288 is intended to prevent charging a private transfer fee. A private transfer fee would only add to the cost of buying a home in Hawaii, which is already one of the highest in the nation.

It is also unclear, if a private transfer fee is allowed, the consequences it would have on the mortgage lending market. Would it put a cloud the title on a property? Does it impact loan qualification, down payment requirements, etc.?

Thank you for the opportunity to provide our testimony.

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law

P.O. Box 4109

Honolulu, Hawaii 96812-4109

Telephone No.: (808) 521-8521

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February 18, 2010

Rep. Robert N. Herkes, Chair,
and members of the House Committee on Consumer Protection & Commerce
Rep. Jon Riki Karamatsu, Chair,
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 2288 (Private Transfer Fees)**
Hearing Date/Time: Thursday, February 18, 2010, 2:00 P.M.

I am the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is the trade association for Hawaii's financial services loan companies, which are regulated by the Hawaii Commissioner of Financial Institutions. Financial services loan companies make mortgage loans and other loans.

The HFSA supports this Bill with amendments proposed by the Hawaii Association of Realtors in their testimony.

The purpose of the Bill is to prohibit the imposition of fees for a future transfer of real property. There are specified exceptions.

A private transfer fee is created by a private party through a deed restriction or covenant ("restriction") on a real property. This restriction requires every transferee (buyer) of the real property to pay a transfer fee to the private party which created that restriction.

Because this private transfer fee is paid every time that property is transferred, the private party imposing this restriction is retaining a part of the fee simple interest in the real property that is being transferred. Except for limited exemptions, this restriction is an inappropriate restraint on the transfer of real property.

As a trade association comprised of mortgage lenders, the HFSA is concerned about this restriction because of the negative impact that it can have on the value of and on the title to real property. Value is impacted because the restriction could make the property more difficult to sell. Title issues exist when title companies consider the property to be uninsurable.

The Hawaii Association of Realtors has met with the HFSA and other trade associations to discuss this Bill. The HFSA agrees to the wording in the proposed House Draft 1 which we understand that the HAR is attaching to their testimony and which is similar to Senate Bill 2373, Senate Draft 1 which passed out of the Senate Committee on Commerce & Consumer Protection on February 12, 2010. The proposed House Draft 1 has appropriate specified exemptions and ensures that future restrictions are unenforceable.

Accordingly we ask that your Committee pass this Bill with the proposed amendments.

Thank you for considering our testimony.


MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

(MSCD/hfsa)



February 17, 2010

Via Email: CPCtestimony@Capitol.hawaii.gov

The Honorable Robert N. Herkes, Chair
The Honorable Glenn Wakai, Vice Chair
Members of the House Committee on Consumer Protection & Commerce
Conference Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

The Honorable Jon Riki Karamatsu, Chair
The Honorable Ken Ito, Vice Chair
Members of the House Committee on Judiciary
Conference Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

Re: House Bill 2288 Relating To Private Transfer Fees
Hearing Date: Thursday, February 18, 2010 at 2:00 p.m.

Dear Representatives Herkes, Wakai, Karamatsu, and Ito, and Members of the House Committee on Consumer Protection & Commerce and the House Committee on Judiciary:

The Hawaii Land Title Association respectfully submits this written testimony in support of the intent of House Bill 2288 Relating To Private Transfer Fees.

The members of the HLTA include title insurance companies and underwritten title companies that search real property titles and write policies of title insurance for real estate transactions in the State of Hawaii. In other states, certain land titles have been rendered uninsurable by the presence of a recorded covenant requiring the payment of a transfer fee or other charge to a private developer or affiliated organization each time that a property is sold. When these transfer fees are not properly disclosed, the buyer may find his or her land subject to a lien for a fee or penalty that cannot be collected from the seller. Sometimes the developer is dissolved. In that case, the property may be rendered unmarketable because there is no surviving entity to which the fees may be paid to satisfy the covenant.

Most of these covenants are designed to create a perpetual income stream for the developer or other entity which bears no fair relation to the value added to the property by the developer. The net effect of these covenants devalues the property and, as described above, may render the title unmarketable.

The HLTA has been working with the Hawaii Association of Realtors on certain amendments to the bill, and most of the suggestions have been incorporated into the companion Senate Bill 2373. HLTA therefore supports the intent of House Bill 2288 and the revisions being submitted to your Committee. We accordingly respectfully request that your respective Committees advance House Bill 2288.

Thank you very much for the opportunity to submit this testimony.

Very truly yours,



Lorrin Hirano
Board Chairperson
HAWAII LAND TITLE ASSOCIATION
c/o 1100 Alakea Street, 5th Floor
Honolulu, HI 96813

February 17, 2010

The Honorable Robert N. Herkes, Chair

House Committee on Consumer Protection and Commerce

The Honorable Jon Riki Karamatsu, Chair

House Committee on Judiciary

State Capitol, Room 325

Honolulu, Hawaii 96813

RE: H.B. 2288 Relating to Private Transfer Fees

HEARING: Thursday, February 18, 2010 at 2:00 p.m.

Aloha Chair Herkes, Chair Karamatsu and Members of the Joint Committees:

I am Gary Slovin, an attorney for Goodsell Anderson Quinn & Stifel, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,800 members in Hawai'i. **HAR supports H.B. 2288 with amendments.** H.B. 2288 prohibits the imposition of fees for a future transfer of real property, with certain limited exceptions.

PTF are fees imposed by private parties which require the payment of a certain amount (usually a percentage of sales price), potentially in perpetuity. PTFs may be imposed via deed restrictions or covenants. Sometimes, PTFs may be imposed as part of a new housing development upon the initial and subsequent purchasers of the property. These restrictions run with the land, and may not disclosed to subsequent buyers until the closing of a property sale.

Presently, there is no regulation over the imposition of PTFs, no limitation on the application of the fees, and no accountability or oversight of the recipients of the fees. HAR strongly supports prohibiting PTF because they decrease housing affordability, serve no public purpose, and provide no benefit to property purchasers or the community.

HAR believes that, left unregulated, PTFs can be misused, and may create significant financial barriers to homeownership. Because PTFs are funds due at closing, they can be a substantial burden on real property buyers, who are already financially committed to the costs of down payments, appraisals, title insurance, surveys, recording costs, mortgage points, attorney's fees, conveyance taxes, and other taxes and fees.

By supporting a prohibition on PTFs, HAR does not intend for any legitimate fees that may be part of typical real estate transactions to be inadvertently captured by the bill. HAR has met with various interested parties (including representatives from the bankers,

condominium associations, title companies, developers and financial services) to make sure that all legitimate fees are exempted from this measure.

The attached Proposed H.D. 1 reflects language that addresses the various stakeholders' concerns. The language in this draft was adopted by the Senate Committee on Commerce and Consumer Protection as S.B. 2373, S.D. 1, and differs from H.B. 2288 in the following ways:

1. Clarifies the exemption regarding fees payable to condominium associations, cooperative housing corporations, and planned community associations;
2. Includes an exemption for shared appreciation for affordable housing developments;
3. Clarifies that this measure applies prospectively and that there will be no cause of action for recovery of a fee charged prior to the effective date; and
4. Adds an exemption for fees required by court-ordered settlements, entered into prior to the effective date.

We respectfully request that this Committee pass this measure. Thank you for the opportunity to testify.

A BILL FOR AN ACT

RELATING TO PRIVATE TRANSFER FEES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 501, Hawaii Revised Statutes, is amended by adding a new section to the part entitled "Miscellaneous Provisions" to be appropriately designated and to read as follows:

"§501- Prohibition of transfer fees. (a) A deed restriction or other covenant running with the land applicable to the transfer of real property that requires a transferee of real property or the transferee's heirs, successors, or assigns, to pay a fee in connection with a future transfer of the property to a declarant or other person imposing the deed restriction or covenant on the property or a third party designated by a transferor of the property is prohibited. A deed restriction or other covenant running with the land that violates this section or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant

running with the land that violates this section is void and unenforceable.

(b) This section shall not apply to the following fees or charges required by a deed restriction or other covenant running with the land in connection with the transfer of real property:

(1) Any interest, charge, fee, or other amount payable by a borrower to a lender pursuant to a loan secured by real property, including any fee payable to the lender for consenting to an assumption of the loan or transfer of the real property, for providing an estoppel letter or certificate, or for any shared appreciation interest or profit participation or other consideration payable to the lender in connection with the loan;

(2) Any fee, charge, assessment, or fine payable to a ~~real property homeowners', condominium, cooperative, or property owners' association~~ condominium associations as defined by chapter 514A or chapter 514B, cooperative housing corporations as defined by chapter 421I or chapter 421H, and planned community associations as defined by chapter 421J, pursuant to a declaration, covenant, or law applicable to an association, including a fee or charge to change the association's records as to the owner of the real property or to provide an estoppel letter or certificate;

(3) Any fee or charge payable to a landlord under a lease of real property, including a fee or charge payable to the

landlord for consenting to an assignment of the lease, for providing an estoppel letter or certificate, or to change the landlord's records as to the owner of the lessee's interest in the lease;

(4) Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon transfer of the real property to another person;

(5) Any fee, charge, shared appreciation interest, profit participation, or other consideration, payable by:

(A) A person engaged in the business of the development of real property for resale to others and not for the person's own use or the use of the person's parent, affiliates, subsidiaries, or relatives;—or

(B) A person who acquires ~~the~~ real property for the purpose of engaging in the business of the development of real property for resale to others or for the purpose of reselling the real property to a person engaged in the business of the development of real property for resale to others; or

(C) A person who purchases real property initially transferred at a price below the then prevailing market value of

the real property pursuant to an affordable housing program established by the seller;

(6) Any fee or charge payable to a government entity; or

(7) Any fee, charge, or assessment payable pursuant to a deed restriction or other covenant running with the land that was required by a litigation settlement that was approved by the court before the effective date of this section.

(c) A deed restriction or other covenant running with the land filed after the effective date of this section, or any lien to the extent that it purports to secure the payment of a transfer fee prohibited by this section, shall not be binding on or enforceable against the subject real property or any subsequent owner, purchaser, or mortgagee of any interest in the real property. This subsection shall not be construed to imply that any particular deed restriction, covenant running with the land, or lien filed prior to the effective date of this section is valid per se.

(d) No person shall be entitled to recover from the recipient or payee any fee, charge, or assessment required by a deed restriction or other covenant running with the land in connection with the transfer of real property to the extent that the fee, charge, or assessment was paid prior to the effective date of this section."

SECTION 2. Chapter 502, Hawaii Revised Statutes, is amended by adding a new section to the part entitled "Other Provisions" to be appropriately designated and to read as follows:

"§502- Prohibition of transfer fees. (a) A deed restriction or other covenant running with the land applicable to the transfer of real property that requires a transferee of real property or the transferee's heirs, successors, or assigns to pay a fee in connection with a future transfer of the property to a declarant or other person imposing the deed restriction or covenant on the property or a third party designated by a transferor of the property is prohibited. A deed restriction or other covenant running with the land that violates this section or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable.

(b) This section shall not apply to the following fees or charges required by a deed restriction or other covenant running with the land in connection with the transfer of real property:

(1) Any interest, charge, fee, or other amount payable by a borrower to a lender pursuant to a loan secured by real property, including any fee payable to the lender for consenting to an assumption of the loan or transfer of the real property,

for providing an estoppel letter or certificate, or for any shared appreciation interest or profit participation or other consideration payable to the lender in connection with the loan;

(2) Any fee, charge, assessment, or fine payable to a real property homeowners', condominium, cooperative, or property owners' association, condominium associations as defined by chapter 514A or chapter 514B, cooperative housing corporations as defined by chapter 421I or chapter 421H, and planned community associations as defined by chapter 421J, pursuant to a declaration, covenant, or law applicable to an association, including a fee or charge to change the association's records as to the owner of the real property or to provide an estoppel letter or certificate;

(3) Any fee or charge payable to a landlord under a lease of real property, including a fee or charge payable to the landlord for consenting to an assignment of the lease, for providing an estoppel letter or certificate, or to change the landlord's records as to the owner of the lessee's interest in the lease;

(4) Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the

option or right upon transfer of the real property to another person;

(5) Any fee, charge, shared appreciation interest, profit participation, or other consideration, payable by:

(A) A person engaged in the business of the development of real property for resale to others and not for the person's own use or the use of the person's parent, affiliates, subsidiaries, or relatives; ~~or~~

(B) A person who acquires ~~the~~ real property for the purpose of engaging in the business of the development of real property for resale to others or for the purpose of reselling the real property to a person engaged in the business of the development of real property for resale to others; or

(C) A person who purchases real property initially transferred at a price below the then prevailing market value of the real property pursuant to an affordable housing program established by the seller;

(6) Any fee or charge payable to a government entity; or

(7) Any fee, charge, or assessment payable pursuant to a deed restriction or other covenant running with the land that was required by a litigation settlement that was approved by the court before the effective date of this section.

(c) A deed restriction or other covenant running with the land filed after the effective date of this section, or any lien

to the extent that it purports to secure the payment of a transfer fee prohibited by this section, shall not be binding on or enforceable against the subject real property or any subsequent owner, purchaser, or mortgagee of any interest in the real property. This subsection shall not be construed to imply that any particular deed restriction, covenant running with the land, or lien filed prior to the effective date of this section is valid per se.

(d) No person shall be entitled to recover from the recipient or payee any fee, charge, or assessment required by a deed restriction or other covenant running with the land in connection with the transfer of real property to the extent that the fee, charge, or assessment was paid prior to the effective date of this section."

SECTION 3. New statutory material is underscored.

SECTION 4. This Act shall take effect on July 1, 2010.



The Nature Conservancy
Hawai'i Program
923 Nu'uuanu Avenue
Honolulu, HI 96817

tel (808) 537-4508
fax (808) 545-2019
www.nature.org/hawaii

Testimony of The Nature Conservancy of Hawai'i
Commenting on H.B. 2288 Relating to Private Transfer Fees
House Committee on Consumer Protection & Commerce
House Committee on Judiciary
February 18, 2010, 2:00PM, Room 325

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of Hawai'i's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawai'i. Today, we actively manage more than 32,000 acres in 11 nature preserves on O'ahu, Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

The Nature Conservancy supports the intent of H.B. 2288 to protect against inappropriate or unscrupulous transfer fees that are attached as covenants and triggered upon future land sales.

However, we request an additional legitimate exemption be added to §501- (b) and §502- (b) in the bill, as follows:

"(7) Any fee, charge or assessment payable to a nonprofit land trust or land conservation organization, which has been accredited by the Land Trust Alliance or has formally adopted Land Trust Alliance standards and practices, utilizing conservation easements to permanently protect the conservation values of private lands."

Nonprofit conservation organizations often work with willing private landowners to place conservation easements on lands. These conservation easements run with the land and limit development and other uses of that land in order to protect the land's conservation, open space, agricultural, historic, and/or cultural values. Under federal law, nonprofit organizations that hold permanent conservation easements are required to annually monitor and, if necessary, enforce the easement to ensure that the landowner continues to abide by the easement terms. Oftentimes, conservation easements will include provisions for a transfer fee when portions of a property are transferred to a third party. Such transfers increase the nonprofits' monitoring and enforcement responsibilities and costs; thus, the transfer fee to cover those increased costs.

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HB 2288
RELATING TO PRIVATE TRANSFER FEES

PAUL T. OSHIRO
MANAGER – GOVERNMENT RELATIONS
ALEXANDER & BALDWIN, INC.

FEBRUARY 18, 2010

Chair Herkes, Chair Karamatsu, and Members of the House Committees on
Consumer Protection & Commerce and Judiciary:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin, Inc. (A&B) on HB
2288 "A BILL FOR AN ACT RELATING TO PRIVATE TRANSFER FEES."

The purpose of this bill is to prohibit deed restrictions or covenants that require a
transferee of real property to pay transfer fees to the person imposing the deed
restriction or covenant in connection with a transfer of real property. The bill also
provides an exemption for certain usual and customary fees, assessments, or charges
encompassed in various real property transactions.

In an effort to alleviate economic speculation for affordable/workforce housing
sold at prices below the prevailing market value, shared appreciation requirements have
been utilized for a specified period of time following the initial sale of the
affordable/workforce housing units. We understand that this bill may prohibit the use of
this option, which is primarily intended to minimize speculative investment and profit
making from affordable/workforce housing. We respectfully request your indulgence
and assistance to incorporate into the exemption section of this bill consideration
payable for shared appreciation interest, profit participation, or other consideration for
residential real property that was initially transferred at a price below the then prevailing

market value of the real property. We have attached the following amended language for Subsections (b)(5) in both Sections 1 and 2 for your consideration:

(5) Any fee, charge, shared appreciation interest, profit participation, or other consideration, payable by:

(A) A person engaged in the business of the development of real property for resale to others and not for the person's own use or the use of the person's parent, affiliates, subsidiaries, or relatives;

(B) A person who acquires the real property for the purpose of engaging in the business of the development of real property for resale to others or for the purpose of reselling the real property to a person engaged in the business of the development of real property for resale to others; or

(C) A person who purchases real property initially transferred at a price below the then prevailing market value of the real property pursuant to an affordable housing program established by the seller; or

Thank you for the opportunity to testify.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF 1250 OCEANSIDES PARTNERS REGARDING H.B. NO. 2288, RELATING TO PRIVATE TRANSFER FEES

February 18, 2010

To: Chairman Robert Herkes and Members of the House Committee on Consumer Protection and Commerce:

My name is Bob Toyofuku and I am presenting this testimony on behalf of 1250 Oceansides Partners (“Oceansides”) regarding H.B. No. 2288.

Oceansides opposes this bill because of the adverse impact on the Foundation that was created to benefit the community arising out of a settlement agreement on its residential real estate project on the Big Island. The Hawaii Board of Realtors have proposed amendments to HRS Chapters 501 and 502 embodied in this bill which are intended to prohibit private transfer fees required by a deed restriction or covenant.

All residential lots in Oceansides Hokuli’a project are subject to a transfer fee pursuant to a Settlement Agreement between Oceansides and various parties including the County of Hawaii. Pursuant to the Settlement Agreement Oceansides created a “tax exempt” foundation called the Hokuli’a Foundation which has the purpose of advancing within the Kona community the concepts of affordable housing, health care, education and Native Hawaiian culture. The Foundation receives funding from transfer fees consisting of a percentage of the gross sales price of all lots sold within Hokuli’a. These proceeds are then allocated to specific community benefit projects in the Kona area.

If this committee intends to pass this bill forward, we request that the following amendments be included in the House draft:

(1) To be inserted on page 4, after line 3: “(7) Any fee, charge, or assessment payable pursuant to a deed restriction or other covenant running with the land that was required by a litigation settlement that was approved by the court before the date of enactment.”

(2) Also, it would be clearer if the following is also included in Section 4 of the bill :

“This Act shall take effect on July 1, 2010, provided that this Act shall not apply to any deed restriction or other covenant running with the land that was first recorded before the date of enactment with respect to the project or residential community of which the subject real estate is a part.”

Oceansides also requests that it will need confirmation that an association such as the Hokuli'a Park and Cultural Sites Association falls within exemption (b) (2) on page 2 of this bill and/or that it is made clear in this bill and/or the committee report that it falls within the exemption provision.

Thank you for the opportunity to testify on this measure.