

# HAWAII FINANCIAL SERVICES ASSOCIATION

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February 23, 2010

Rep. Jon Riki Karamatsu, Chair,  
and members of the House Committee on Judiciary  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Re: **House Bill 2895 (Foreclosure)**  
**Hearing Date/Time: Tuesday, February 23, 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 **opposes** this Bill. This testimony is based, in part, on my experience as an attorney who has actively done foreclosures for 32 years since 1978.

The purpose of this Bill is to allow a homeowner to force a court supervised foreclosure if a non-judicial foreclosure is successfully appealed due to an unfair sales price.

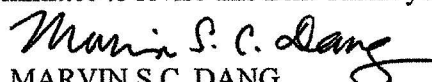
1. The non-judicial foreclosure process generally takes approximately 3 to 4 months. Under this Bill, once a non-judicial foreclosure is completed (after 3 to 4 months) the borrower would be able to appeal to a circuit court to invalidate the non-judicial foreclosure and to force a judicial foreclosure. A judicial foreclosure would add an additional 9 to 12 months to the process. The result would be a combined foreclosure process that would take 12 to 16 months to complete.

A foreclosure action is a last option for a lender because it is a "lose-lose" situation. By the time that a foreclosure is commenced the loan is already at least 3 to 4 months delinquent. If this Bill passes, the loan could be unpaid for over a year. Creating this delay in the process is not warranted.

2. If there is an appeal from the non-judicial foreclosure as contemplated by this Bill, the borrower should be required post a bond to compensate the lender for any losses resulting because the foreclosure would have to go through the judicial foreclosure process. These losses would include, among other things, any decrease in final sales price, the additional unpaid interest, and the added expenses for attorneys' and Commissioners' fees and costs.

3. This Bill would make changes to Part II of Chapter 667 of the Hawaii Revised Statutes ("HRS"). Part II is the "Alternate Power of Sale Foreclosure Process". I was involved in drafting Part II during the 1997 and 1998 legislative sessions. However, before the legislation passed in 1998, the legislature made certain changes to Part II that made it essentially unusable and unworkable. As a result, no lender today uses the Part II alternate power of sale process which are in HRS Sections 667-21 through 667-51. Instead, all non-judicial foreclosures are initiated under the provisions in HRS Sections 667-5 through 667-10, much of which was first enacted 136 years ago in 1874.

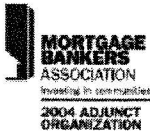
We are willing to work with your Committee to revise this Bill. Thank you.



MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association

(MSCD/hfsa)



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

February 23, 2010

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

Re: House Bill 2895 Relating to Foreclosure

Dear Chair Karamatsu 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 opposes House Bill 2895 Relating to Foreclosure as written, but does support the amendment proposed by the Hawaii Bankers Association. MBAH also supports the intent of House Bill 2895 to provide that a reasonable price be paid for the property given the context of the nature of the sale, which is a foreclosure sale for a property which may or may not have been maintained properly. However, we oppose the contents of this measure.

We request that the committee either hold the instant bill, or amend same as proposed by the Hawaii Bankers Association.

Thank you for the opportunity to present this testimony.



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Presentation to the House Committee on Judiciary

Tuesday, February 23, 2010, at 2:00 pm, Conf Rm 325

Testimony for HB 2895 Relating to Mortgage Foreclosures

TO: The Honorable Jon Riki Karamatsu, Chair  
The Honorable Ken Ito, Vice Chair  
Members of the House Committee on Judiciary

My name is Neal Okabayashi of First Hawaiian Bank for the Hawaii Bankers Association. We support the adoption of HB 2895 with a HD 1 set forth as follows.

We recommend that new subsection (b) be replaced with the following language so that a nonjudicial foreclosure price which is 70% of fair market value as established by appraisal or broker's price opinion shall be deemed to be fair and reasonable.

70% is the Durrett benchmark established by the bankruptcy case of Durrett v. Washington Natural Insurance Co., 621 F.2d 201 (5<sup>th</sup> Cir. 1980). We do note that the Durrett rule is no longer followed as prices lower than 70% have been deemed reasonable if approved by a court but since the context of this bill is a nonjudicial foreclosure context, it is appropriate to use the 70% benchmark.

Our suggested language to be used as subsection (b) is as follows:

"A public sale price of seventy per cent of the fair market value of the mortgaged property owned and occupied by a consumer as established by an appraisal or broker's price opinion shall be reasonable and fair."

I would be happy to answer any questions you may have.

**The Honorable Jon Riki Karamatsu, Chair**  
**The Honorable Ken Ito, Vice Chair**  
**House Committee on Judiciary**

**Hearing : Tuesday, February 23, 2010, 2:00 p.m.**  
**State Capitol, Conference Room 325**

**IN SUPPORT OF THE INTENT OF HB 2895**

**Chair and Members of the Committee:**

My name is Ryker Wada, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled, other low and moderate income families who are consumers and families facing default and foreclosure on their homes. We are testifying in support of the intent of HB 2895 as it may strengthen protections for consumers in the State of Hawaii.

I supervise a housing counseling program in the Consumer Unit at the Legal Aid Society of Hawaii. The Homeownership Counseling Project provides advice to individuals and families about homeownership issues. Specifically the project provides information on how to prepare yourself before purchasing a home, what to do if you are in danger of losing your home through foreclosure and issues relating to predatory mortgage lending.

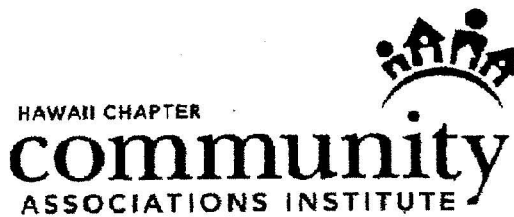
HB 2895 seeks to allow a homeowner to force a court supervised foreclosure if a non-judicial foreclosure is successfully appealed due to an unfair sales price. Essentially if a homeowner is granted an appeal by the circuit courts as a result of a determination by those courts that the sales price is unreasonable, the foreclosure shall be conducted as a judicial foreclosure.

The Legal Aid Society of Hawaii has worked in conjunction with other interested parties and supports a consolidated foreclosure bill which addresses concerns raised in HB 2895.

The Legal Aid Society of Hawaii supports the intent of the bill, and its efforts to protect the consumers in the State of Hawaii.

**Conclusion:**

We appreciate these committees' recognition of the need to protect consumers in the State of Hawaii. HB 2895 attempts to strengthen protections for consumers by allowing a homeowner to force a court supervised foreclosure if a power of sale foreclosure is successfully appealed due to an unfair sales price. We support the intent of HB 2895 and its attempts to protect homeowners in the State of Hawaii. Thank you for the opportunity to testify.



P.O. Box 976  
Honolulu, Hawaii 96808  
February 22, 2010

Honorable Jon Riki Karamatsu  
Honorable Ken Ito  
Committee on Judiciary  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: HB2895

Dear Chair Karamatsu, Vice-Chair Ito and Committee Members:

I chair the CAI Legislative Action Committee. CAI has concerns about HB 2895.

With respect to condominium associations, non-judicial foreclosures often involve units with no equity. For example, a unit with a tax assessed value of \$200,000 might have a mortgage of \$250,000.

Such a unit has essentially no value at auction because the condominium association's lien is junior to the mortgage. The unit will remain encumbered by the mortgage following the completion of the association's foreclosure.

Thus, condominium associations are often the purchaser of last resort. Associations make token bids in such circumstances and (if they are lucky) rent the unit out for a time until the mortgage lender eventually forecloses its superior lien.

Lenders operate on an unpredictable timeline according to priorities that an association is not privy to, so condominium associations are unable to simply assume that if maintenance fees go unpaid that mortgage payments are not being made. Indeed, some owners pay their mortgages but not their maintenance fees.

The point is that if the Committee chooses to move HB 2895, the bill should distinguish between a mortgagee and a condominium association. Indeed, it may be necessary to distinguish between first and second mortgagees as well.

Honorable Rida Cabanilla  
Honorable Pono Chong  
February 22, 2010  
Page 2 of 2

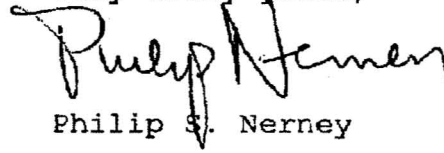
As written, HB 2895 could force condominium associations into unwarranted judicial proceedings over allegations that a nominal purchase price (of a unit encumbered by a lien exceeding the value of the unit) is unreasonable. Since a non-performing owner places a direct financial burden on other owners who do pay their bills, it is important for condominium associations to have an efficient and an effective remedy.

While CAI recognizes the limited utility of Part II of HRS Chapter 667, there is concern about HB 2895 becoming a vehicle for creating a mechanism to review non-judicial foreclosure auction prices for "reasonableness." SB 2472, for example, specifies that a sale price is reasonable if it is 70% of the tax assessed value of a unit. That bill appears to be moving in the Senate.

The concern for CAI is that any such legislation should distinguish between the situation of a first mortgagee and others. Condominium association auctions of a unit encumbered by a substantial mortgage will generally be vulnerable to a facially appealing argument that a nominal purchase price is unreasonable—even though the reality may be that there is no equity in the unit. Bidders will not pay any substantial amount for a unit that is worth less than the amount of the mortgage(s) encumbering the unit.

CAI, therefore, respectfully requests that the Committee consider deferring HB 2895.

Very truly yours,



Philip S. Nerney