

SB 2373

JAN 22 2010

S.B. NO. 2373

A BILL FOR AN ACT

RELATING TO PRIVATE TRANSFER FEES.

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

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

5 "§501- Prohibition of transfer fees. (a) A deed
6 restriction or other covenant running with the land applicable
7 to the transfer of real property that requires a transferee of
8 real property or the transferee's heirs, successors, or assigns,
9 to pay a fee in connection with a future transfer of the
10 property to a declarant or other person imposing the deed
11 restriction or covenant on the property or a third party
12 designated by a transferor of the property is prohibited. A
13 deed restriction or other covenant running with the land that
14 violates this section or a lien purporting to encumber the land
15 to secure a right under a deed restriction or other covenant
16 running with the land that violates this section is void and
17 unenforceable.



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

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

13 (2) Any fee, charge, assessment or fine payable to a real
14 property homeowners', condominium, cooperative, or
15 property owners' association pursuant to a
16 declaration, covenant, or law applicable to an
17 association, including a fee or charge to change the
18 association's records as to the owner of the real
19 property or to provide an estoppel letter or
20 certificate;

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



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

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

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

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

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



1 development of real property for resale to
2 others; or
3 (6) Any fee or charge payable to a government entity."

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

8 "§502- Prohibition of transfer fees. (a) A deed
9 restriction or other covenant running with the land applicable
10 to the transfer of real property that requires a transferee of
11 real property or the transferee's heirs, successors, or assigns,
12 to pay a fee in connection with a future transfer of the
13 property to a declarant or other person imposing the deed
14 restriction or covenant on the property or a third party
15 designated by a transferor of the property is prohibited. A
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19 property or to provide an estoppel letter or
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1 development of real property for resale to
2 others; or

3 (6) Any fee or charge payable to a government entity."

4 SECTION 3. New statutory material is underscored.

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

6

INTRODUCED BY: *Rosalyn H. Bah*

David Y. Lee
James H. Lee

Will Egan
Carol Fulmer
John H.



Report Title:

Real Property; Transfer Fees

Description:

Prohibits the imposition of fees for a future transfer of real property. Specifies exceptions.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



February 2, 2010

The Honorable Rosalyn H. Baker, Chair
Senate Committee on Commerce and Consumer Protection
State Capitol, Room 229
Honolulu, Hawaii 96813

RE: S.B. 2373 Relating to Private Transfer Fees

HEARING: Wednesday, February 3, 2010 at 8:30 a.m.

Aloha Chair Baker, Vice Chair Ige and Members of the Committee:

I am Gary Slovin, an attorney for Goodsill 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 strongly supports S.B. 2373, with amendments.**

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 be 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, and financial services) to make sure that all legitimate fees are exempted from this measure. In the attached proposed SDI, HAR has included additional language to make the measure prospective, and to address additional exemption concerns raised by other parties.

We respectfully request that the Committee pass this bill, with the attached proposed amendments. Mahalo for the opportunity to testify.

TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

S.B. NO.
2373

S.D. 1

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 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 such 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

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

(c) A deed restriction or other covenant running with the
land, or any lien to the extent that it purports to secure the
payment of a transfer fee prohibited by this section, is not
binding on or enforceable against the affected real property or
any subsequent owner, purchaser, or mortgagee of any interest in
the property. This subsection (c) does not imply any deed
restriction, other covenant running with the land or any such
lien recorded prior to the effective date of this section is
valid."

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
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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.

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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

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SECTION 3. New statutory material is underscored.

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

TWENTY-FIFTH LEGISLATURE, 2010
STATE OF HAWAII

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profit participation, or other consideration, payable
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(c) A deed restriction or other covenant running with the
land, or any lien to the extent that it purports to secure the
payment of a transfer fee prohibited by this section, is not
binding on or enforceable against the affected real property or
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SECTION 3. New statutory material is underscored.

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



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

January 29, 2010

The Honorable Rosalyn Baker, Chair and
Members of the Senate Committee on
Commerce and Consumer Protection
State Capitol, Room 229
Honolulu, Hawaii 96813

Re: Senate Bill 2373 Relating to Private Transfer Fees

Dear Chair Baker and members of the Senate Committee on Commerce and Consumer Protection:

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 Senate Bill 2373 Relating to Private Transfer Fees. Senate Bill 2373 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.



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ADDRESS:
1000 Bishop Street, Suite 3018
Honolulu, HI 96813-4203

Presentation of the Committee on Commerce and Consumer Protection

Wednesday, February 3, 2010 at 8:30 a.m.

Testimony on Bill S.B. 2373 Relating to Private Transfer Fee

TO: The Honorable Chair Rosalyn H. Baker
The Honorable Vice Chari David Y. Ige
Members of the Committee

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying on behalf of HBA in **support of the intent** of S.B. 2373. HBA is the trade organization that represents all FDIC insured depository institutions doing business in Hawaii.

It is our understanding that SB 2373 is intended to prevent charging a private transfer fee. A private transfer fee would add to the cost of a home in Hawaii, which is already one of the highest in the nation.

It is 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

Fax No.: (808) 521-8522

February 3, 2010

Senator Rosalyn H. Baker
and members of the Senate Committee on Commerce & Consumer Protection
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Senate Bill 2373 (Private Transfer Fees)**
Hearing Date/Time: Wednesday, February 3, 2010, 8:30 A.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 and other loans.

HFSA **supports** this Bill with amendments proposed by the Hawaii Association of Realtors in its 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. With limited exceptions, this restriction is an inappropriate restraint on the transfer of real property.

As a trade association comprised of mortgage lenders, the Hawaii Financial Services Association is concerned about this restriction because of the negative impact that it can have on the value of and 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 met on January 25, 2010 with the Hawaii Financial Services Association and other trade associations to discuss this Bill. Subsequent to the meeting, we all agreed to the wording in the proposed Senate Draft 1 which the HAR is attaching to its testimony to your Committee. The proposed Senate Draft 1 has appropriate exceptions and ensures that future restrictions are unenforceable.

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

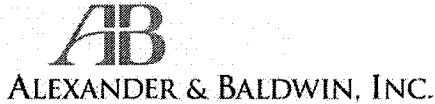
Thank you for considering our testimony.



MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association

(MSCD/hfsa)



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Honolulu, HI 96801-3440
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**SB 2373
RELATING TO PRIVATE TRANSFER FEES**

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

FEBRUARY 3, 2010

Chair Baker and Members of the Senate Committee on Commerce & Consumer Protection:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin, Inc. (A&B) on SB 2373 "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.

Thank you for the opportunity to testify.



February 2, 2010

Via Email: CPNTestimony@Capitol.hawaii.gov

The Honorable Rosalyn H. Baker, Chair
The Honorable David Y. Ige, Vice Chair
Members of the Senate Committee on Commerce
And Consumer Protection
Conference Room 229
415 South Beretania Street
Honolulu, Hawaii 96813

Re: Senate Bill 2373 Relating To Private Transfer Fees
Hearing Date: Wednesday, February 3, 2010 at 8:30 a.m.

Dear Senator Baker, Senator Ige, and Members of the Committee:

The Hawaii Land Title Association respectfully submits this written testimony in support of the intent of Senate Bill 2373 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 well-disclosed, the buyer may find itself subject to 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.

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The HLTA has suggested some amendments to the present draft of this Bill which representatives of the HLTA have been working on with the Hawaii Association of Realtors. HLTA anticipates that it will further support the revisions being submitted to your Committee. We accordingly respectfully request that your Committee advance Senate Bill 2373.

Very truly yours,



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