

Honolulu, Hawaii

APR 29 2011 , 2011

RE: S.B. No. 651  
S.D. 2  
H.D. 2  
C.D. 1

Honorable Shan S. Tsutsui  
President of the Senate  
Twenty-Sixth State Legislature  
Regular Session of 2011  
State of Hawaii

Honorable Calvin K.Y. Say  
Speaker, House of Representatives  
Twenty-Sixth State Legislature  
Regular Session of 2011  
State of Hawaii

Sirs:

Your Committee on Conference on the disagreeing vote of the Senate to the amendments proposed by the House of Representatives in S.B. No. 651, S.D. 2, H.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO MORTGAGE FORECLOSURES,"

having met, and after full and free discussion, has agreed to recommend and does recommend to the respective Houses the final passage of this bill in an amended form.

The purpose of this measure is to implement a comprehensive strategy to reform the foreclosure process by implementing additional protections for homeowners in foreclosure or at-risk of foreclosure by:

- (1) Instituting a mortgage foreclosure dispute resolution program in the Department of Commerce and Consumer Affairs for nonjudicial foreclosures under Part II of chapter 667, Hawaii Revised Statutes, of residential real property occupied by a mortgagor as a primary residence;



- (2) Authorizing an owner-occupant of residential real property to convert a nonjudicial foreclosure pursuant to part II, Hawaii Revised Statutes, to a judicial foreclosure action;
- (3) Barring deficiency judgments after a nonjudicial foreclosure pursuant to part II of chapter 667, Hawaii Revised Statutes, against an owner-occupant who does not own any other real property unless the debt is secured by collateral;
- (4) Specifying prohibited conduct and consequences of violations for foreclosing mortgagees;
- (5) Strengthening regulation of the mortgage servicer industry;
- (6) Suspending foreclosure actions by a junior lienholder during the pendency of a mortgage foreclosure;
- (7) Increasing the amount of a special assessment for unpaid common assessments that a condominium association may collect from a purchaser of a foreclosed unit to \$10,000;
- (8) Requiring that public sale of real property following a nonjudicial power of sale foreclosure shall take place at certain state facilities that are not under the administration of the Judiciary;
- (9) Strengthening notice requirements and making conforming amendments to the nonjudicial power of sale foreclosure process under part II of chapter 667, Hawaii Revised Statutes;
- (10) Repealing the nonjudicial foreclosure process under part I of chapter 667, Hawaii Revised Statutes;
- (11) Appropriating an unspecified amount from the general fund to the mortgage foreclosure dispute resolution special fund established by this measure for the purpose of establishing the mortgage foreclosure dispute resolution program;
- (12) Appropriating an unspecified amount from the compliance resolution fund to the mortgage foreclosure dispute resolution special fund established by this measure for



the purpose of establishing the mortgage foreclosure dispute resolution program;

- (13) Appropriating an unspecified amount from the mortgage foreclosure dispute resolution special fund for the Department of Commerce and Consumer Affairs to establish and operate the mortgage foreclosure dispute resolution program; and
- (14) Providing for the sunset of the mortgage foreclosure dispute resolution program, authorization for conversion of nonjudicial foreclosures to judicial actions, and increase in allowable common assessments, and providing for the reimbursement, using residual monies in the mortgage foreclosure dispute resolution fund, of the general fund and the compliance resolution fund.

Your Committee on Conference finds that the number of residential mortgage foreclosures in Hawaii has increased so rapidly during this current period of economic recession that Hawaii has gained the unfortunate distinction of having one of the highest foreclosure rates in the country. A high rate of residential foreclosures disrupts not only the lives of individual homeowners, but also the fabric of the community. Lawmakers in almost every state in the country are currently taking measures to reform the foreclosure process by addressing abuses in the system and providing relief to homeowners who have fallen into distress. Hawaii's situation as a leader in foreclosure rates brings with it the opportunity to also be a leader in homeowner protections and sound reforms to the foreclosure process. This measure is intended to provide relief to distressed homeowners across the State including owners of single-family houses, condominiums, and apartments.

Although other measures relating to mortgage foreclosures have been introduced to the Legislature and considered by your Committee on Conference, this omnibus measure presents the most thorough consideration of the scope of relevant issues and includes the most important elements of measures considered by the House of Representatives and the Senate. This measure incorporates the recommendations of the Mortgage Foreclosure Task Force convened pursuant to Act 162, Session Laws of Hawaii 2010. Your Committee on Conference notes that the Task Force is directed by its authorizing statute to continue its work throughout the coming year and plans to make recommendations to the Legislature prior to the 2012 Regular Session for further reform of the foreclosure system, particularly in regards to the nonjudicial foreclosure process and its use by



condominium associations for collection of common area maintenance fee assessments. The moratorium on nonjudicial foreclosures under part I of chapter 667, Hawaii Revised Statutes, is included in this measure in anticipation of task force recommendations that may include significant changes to the current foreclosure process.

Your Committee on Conference is mindful that the ability of condominium associations to foreclose on liens for past-due assessments for common expenses is affected by this measure. Recognizing that non-payment of common expenses by any one unit in a condominium, planned community, or cooperative housing project results in an increased burden on other homeowners within the association, the Legislature has preserved the right of associations to foreclose on liens under part II of chapter 667, Hawaii Revised Statutes, and has exempted lien foreclosures by an association from dispute resolution and judicial conversion requirements. The special situation of association lien foreclosures and the interests of all association members in timely collection of assessments for common expenses merits special consideration by the Task Force in its recommendations to the Legislature.

Your Committee on Conference further finds that the effectiveness of alternative dispute resolution in resolving foreclosure matters has been demonstrated by foreclosure mediation programs in Nevada, Connecticut, and Washington, D.C., that have been enacted since the start of the current housing downturn. The key components of successful programs are their mandatory nature and inclusion of effective oversight mechanisms. Successful programs have also recognized that even if foreclosure is not avoidable, often a foreclosing mortgagee and a distressed mortgagor are able to come to a mutually beneficial agreement that provides cost savings to the foreclosing mortgagee and mitigates damage to the mortgagor. Less costly to the parties and the State in comparison to litigation, dispute resolution allows the parties to pursue a negotiated settlement that responds to the specific situation of each foreclosing mortgagee and mortgagor. The mortgage foreclosure dispute resolution program established by this measure includes components of the Nevada mediation program, which has been recognized as a model program, and original components that have been created specifically to respond to Hawaii's unique residential real estate market and existing regulatory framework.

Your Committee on Conference finds that conversion of nonjudicial foreclosures to judicial actions is an innovative recommendation of the Mortgage Foreclosure Task Force. Conversion to judicial actions will provide important oversight to the



foreclosure process during the period that the mortgage foreclosure dispute resolution program is being fully implemented and while the Task Force is considering further reforms to the foreclosure system. In consideration of issues relating to the impact of this measure on already scarce Judiciary resources, judicial conversion authorized by this measure is limited to an eighteen-month period, and remedies other than judicial conversion are incentivized by this measure through relief from deficiency judgment following nonjudicial foreclosures.

Your Committee on Conference has amended this measure by:

- (1) Specifying that the mortgage foreclosure dispute resolution program established by this measure shall be operative from no later than October 1, 2011, and shall continue until September 30, 2014;
- (2) Clarifying that the mortgage foreclosure dispute resolution program established by this measure shall be available to owner-occupants of residential real property who have resided at the property for at least two hundred consecutive days;
- (3) Making amendments to the administration of the foreclosure dispute resolution program to clarify consumer protections and to allow the Department of Commerce and Consumer Affairs to implement the program without unnecessary delays due to generally applicable rule-making or procurement requirements;
- (4) Making amendments to internal deadlines in the mortgage foreclosure dispute resolution program to avoid unnecessary delay in the process;
- (5) Specifying that penalties for noncompliance with the mortgage foreclosure dispute resolution program shall include a fine of up to \$1,500;
- (6) Specifying that the fee for filing a notice of foreclosure with the Department of Commerce and Consumer Affairs shall be \$250;
- (7) Specifying that the option to convert a nonjudicial foreclosure to a judicial action shall be available upon the effective date of this measure until December 31, 2012, and shall include an initial forty-five day phase-in



period during which a mortgagor may convert a pending nonjudicial foreclosure without regard to certain prior notice and time limit requirements;

- (8) Specifying a maximum \$300 filing fee for petitions for conversion filed before the mortgage foreclosure dispute resolution program is operative to avoid penalizing mortgagors who would have chosen to pursue dispute resolution if it had been available;
- (9) Specifying that the assignment of parties in the petition for conversion shall not affect the assignment of parties in the converted foreclosure action;
- (10) Specifying that an owner-occupant may elect to pursue either the mortgage foreclosure dispute resolution program or conversion to a judicial foreclosure, but not both;
- (11) Specifying that the maximum amount of a special assessment for unpaid common assessments that a condominium association may collect from a purchaser of a foreclosed unit shall be \$7,200; provided that the increase in the maximum amount of the special assessment shall be repealed on September 30, 2014;
- (12) Clarifying prohibited conduct for a foreclosing mortgagee and clarifying that violation of any provision of chapter 667, Hawaii Revised Statutes, by a foreclosing mortgagee shall be an unfair or deceptive act or practice;
- (13) Clarifying that a junior lienholder may only initiate or continue with a nonjudicial foreclosure under part I if no other foreclosure action is pending and under part II of chapter 667, Hawaii Revised Statutes, during the pendency of a stay during dispute resolution if the junior lienholder initiates the lien foreclosure before a foreclosing mortgagee initiates a mortgage foreclosure and that no person shall initiate a judicial foreclosure during the pendency of a stay of foreclosure as part of the mortgage foreclosure dispute resolution program or of a nonjudicial foreclosure converted to a judicial action;
- (14) Specifying that the prohibition against deficiency judgments after a nonjudicial foreclosure pursuant to part II of chapter 667, Hawaii Revised Statutes, shall apply



regardless of the mortgagor's ownership of other real property;

- (15) Strengthening notice requirements and consumer protections for nonjudicial foreclosures conducted pursuant to part I of chapter 667, Hawaii Revised Statutes;
- (16) Clarifying requirements for mortgage servicers and requiring mortgage servicers who service twenty percent or more of the total mortgage servicer market in the State to maintain a physical presence in the State;
- (17) Deleting the general fund appropriation to the mortgage foreclosure dispute resolution special fund;
- (18) Inserting an appropriation amount of \$400,000 from the compliance resolution fund to the mortgage foreclosure dispute resolution special fund established by this measure for the purpose of establishing the mortgage foreclosure dispute resolution program;
- (19) Inserting an appropriation amount of \$1,850,000 from the mortgage foreclosure dispute resolution special fund for the Department of Commerce and Consumer Affairs to establish and operate the mortgage foreclosure dispute resolution program;
- (20) Imposing a moratorium to end on July 1, 2012, on nonjudicial foreclosures under part I of chapter 667, Hawaii Revised Statutes;
- (21) Directing the Department of Commerce and Consumer Affairs to submit a report to the Legislature prior to the 2012 Regular Session on the operations and outcomes of the mortgage foreclosure dispute resolution program;
- (22) Specifying that any monies remaining in the mortgage foreclosure dispute resolution special fund upon its repeal shall be deposited to the compliance resolution fund;
- (23) Inserting a severability clause;
- (24) Making the measure effective upon its approval; and



- (25) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

Your Committee on Conference notes that this measure in its final form is the result of productive collaboration among stakeholders, advocates, mortgage professionals, state regulators, and the Judiciary.

As affirmed by the record of votes of the managers of your Committee on Conference that is attached to this report, your Committee on Conference is in accord with the intent and purpose of S.B. No. 651, S.D. 2, H.D. 2, as amended herein, and recommends that it pass Final Reading in the form attached hereto as S.B. No. 651, S.D. 2, H.D. 2, C.D. 1.

Respectfully submitted on behalf  
of the managers:

ON THE PART OF THE HOUSE

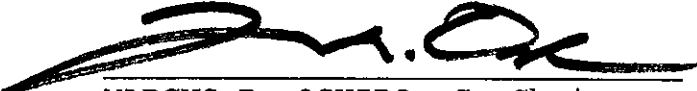
ON THE PART OF THE SENATE

  
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ROBERT N. HERKES, Co-Chair

  
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ROSALYN H. BAKER, Chair

  
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GILBERT KEITH-AGARAN, Co-Chair

  
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DAVID Y. ISE, Co-Chair

  
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MARCUS R. OSHIRO, Co-Chair





