

Honolulu, Hawaii

Feb 17, 2012

RE: H.B. No. 1875
H.D. 1

Honorable Calvin K.Y. Say
Speaker, House of Representatives
Twenty-Sixth State Legislature
Regular Session of 2012
State of Hawaii

Sir:

Your Committees on Consumer Protection & Commerce and
Judiciary, to which was referred H.B. No. 1875 entitled:

"A BILL FOR AN ACT RELATING TO FORECLOSURES,"

beg leave to report as follows:

The purpose of this measure is to implement the
recommendations of the Mortgage Foreclosure Task Force submitted
to the Legislature for the Regular Session of 2012. Specifically,
this measure, among other things:

- (1) Amends section 667-60, Hawaii Revised Statutes, which
makes any violation of the mortgage foreclosure law
under Chapter 667, Hawaii Revised Statutes, an unfair or
deceptive act or practice subject to enhanced penalties
under Chapter 480, Hawaii Revised Statutes, to:
 - (A) Specify the types of violations under Chapter 667
that constitute unfair or deceptive acts or
practices;
 - (B) Limit the types of violations that may void a title
transfer of foreclosed property; and
 - (C) Establish a time limit for filing actions to void
title transfers of foreclosed property;



- (2) Makes permanent the process under Act 48, Session Laws of Hawaii 2011, for converting nonjudicial foreclosures of residential property into judicial foreclosures;
- (3) Addresses practical challenges in the operation of the temporary mortgage foreclosure dispute resolution program under Part V of Chapter 667, Hawaii Revised Statutes, including:
 - (A) Authorizing the Department of Commerce and Consumer Affairs to contract with approved housing counselors and approved budget and credit counselors;
 - (B) Providing owner-occupants with the option of completing the dispute resolution program election form on a website maintained by the Department of Commerce and Consumer Affairs;
 - (C) Increasing the amount of time to schedule a dispute resolution session;
 - (D) Removing the neutral foreclosure dispute resolution specialist's participation in the documentation of agreements between parties to a mortgage foreclosure dispute resolution case, to streamline the dispute resolution process; and
 - (E) Providing that failure by the mortgagee and the owner-occupant to reach an agreement does not constitute failure to comply with the requirements of the dispute resolution program;
- (4) With regard to condominium and planned community associations:
 - (A) Establishes an alternate power of sale process for the collection of unpaid assessments, modeled after the process set forth in Part II of Chapter 667, Hawaii Revised Statutes, as amended by the task force's recommendations;
 - (B) Places a two-year time limit on recorded liens for assessments, and prohibits such liens arising solely from fines, penalties, or late fees;



- (C) Provides the associations with notice of an owner-occupant's decision to participate in the mortgage foreclosure dispute resolution program; and
 - (D) Allows associations to proceed with a nonjudicial foreclosure notwithstanding a stay of foreclosure proceedings arising from a dispute resolution case opening, if the association has not been notified of the foreclosure action by the foreclosing mortgagee or of the dispute resolution case opening;
- (5) With regard to planned community associations organized under Chapter 421J, Hawaii Revised Statutes:
- (A) Provides these associations with the same options and protections as condominium associations with regard to association liens for assessments and the collection of unpaid assessments from tenants or rental agents; and
 - (B) Exempts these associations from the requirements of the mortgage foreclosure dispute resolution program in Part V of Chapter 667, Hawaii Revised Statutes, and the process under section 667-53, Hawaii Revised Statutes, allowing owner-occupants to convert nonjudicial foreclosures to judicial foreclosures, to parallel the existing exemptions for condominium associations;
- (6) Provides specific language explaining the foreclosure process for the public information notice that must be distributed by persons intending to use the power of sale foreclosure process under Part II of Chapter 667, Hawaii Revised Statutes;
- (7) Clarifies, improves, and corrects provisions of Act 48, Session Laws of Hawaii 2011, a mortgage foreclosure reform measure; and
- (8) Implements additional conforming amendments for consistency and clarity.

The Department of Commerce and Consumer Affairs, Legal Aid Society, Makakilo Cliffs AOA, and a concerned individual testified in support of this measure. The Hawaii Bankers



Association, Hawaii Financial Services Association, Hawaii Chapter of the Community Associations Institute, AOA Mauna Luan, Inc., AOA The Coconut Plantation, Mililani Town Association, Hawaiiiana Management Co., McKeon Imlay Mehling LLLC, Certified Hawaii, Inc., Hawaii First, Inc., and numerous concerned individuals opposed this measure. The Hawaii Association of Realtors, RCO Hawaii LLLC, and four concerned individuals provided comments.

Your Committees find that Act 162, Session Laws of Hawaii 2010, established the Mortgage Foreclosure Task Force to develop policies and procedures to improve the way mortgage foreclosures are conducted in the State. Act 162 required the task force to submit its findings and recommendations, including any proposed legislation, to the Legislature for the regular sessions of 2011 and 2012.

Some of the task force's initial recommendations in its report to the Legislature for the Regular Session of 2011 were included in Act 48, Session Laws of Hawaii 2011, a far-reaching mortgage foreclosure reform measure that, among other things:

- (1) Temporarily authorized mortgagors who are occupying, as a primary residence, real property that is subject to nonjudicial foreclosure to either:
 - (A) Participate in the mortgage foreclosure dispute resolution program established under Act 48; or
 - (B) Convert the nonjudicial foreclosure to a judicial foreclosure;
- (2) Imposed a temporary moratorium on all new nonjudicial foreclosures conducted under Part I of Chapter 667, Hawaii Revised Statutes; and
- (3) Specified prohibited conduct and consequences of violations for foreclosing mortgagees, including making any violation of the mortgage foreclosure law under Chapter 667, Hawaii Revised Statutes, an unfair or deceptive act or practice subject to the enhanced penalties under Chapter 480, Hawaii Revised Statutes.

The task force met again over several public meetings during the legislative interim of 2011 to continue its work under Act 162. The focus of these meetings was divided among these major issues:



- (1) The new mortgage foreclosure provisions of Act 48, Session Laws of Hawaii 2011;
- (2) Matters involving condominium and other homeowner associations, including association liens and the collection of unpaid assessments; and
- (3) Mortgage foreclosure counseling and dispute resolution issues.

Based upon its deliberations on these issues, the task force adopted further recommendations in its report to the Legislature for the Regular Session of 2012.

Your Committees notes the particular importance of the provisions in this measure dealing with section 667-60, Hawaii Revised Statutes, which deems any foreclosing mortgagee who violates the mortgage foreclosure law under Chapter 667, Hawaii Revised Statutes, to have committed an unfair or deceptive act or practice under section 480-2, Hawaii Revised Statutes. Following the enactment of these provisions, lenders have bypassed the Act 48 dispute resolution program (which applies only to nonjudicial foreclosures) by instead pursuing foreclosures in court. As a result, the rate of judicial foreclosures has risen dramatically while the dispute resolution program remains dormant.

The principal reason lenders have cited for their refusal to use the dispute resolution program is the risk of incurring significant penalties under section 667-60, Hawaii Revised Statutes, for any violation of the mortgage foreclosure law. Unfair or deceptive acts or practices under section 480-2, Hawaii Revised Statutes, are subject to the imposition of fines for every day that a violation is found pursuant to section 480-3.1; voiding of the contract or agreement pursuant to section 480-12; and awarding of treble damages and reasonable attorneys' fees and costs for the claimant in a civil suit brought under section 480-13. Lenders have expressed concern about potentially incurring such penalties for minor violations of the mortgage foreclosure law, such as missed deadlines or using the wrong font sizes on printed materials.



During the interim following the 2011 legislative session, the task force reached a consensus on amendments to section 667-60, Hawaii Revised Statutes, to specify certain types of mortgage foreclosure violations as unfair or deceptive acts or practices. However, your Committees find that a complete suspension of this provision to address lender concerns appears warranted if it would clear the way for dispute resolution to be used. The hope is that by removing what lenders claim to be the chief obstacle to using the dispute resolution program, more homeowners facing foreclosure can be helped under the nonjudicial foreclosure process, as modified by Act 48 and this measure. Moreover, this action may relieve strain on the courts resulting from the recent increase in judicial foreclosure filings following the enactment of Act 48.

Your Committees also note that with the July 1, 2012, expiration of the moratorium (pursuant to Act 48) on new, nonjudicial foreclosures under Part I of Chapter 667, Hawaii Revised Statutes, Hawaii will again have two discrete but overlapping nonjudicial foreclosure laws. Numerous amendments have been made to the nonjudicial foreclosure process under Part II of Chapter 667 by Act 48 and this measure to craft a fair, comprehensive, and effective nonjudicial foreclosure law. Therefore, repeal of the Part I nonjudicial foreclosure law is warranted.

Your Committees also find that further amendments to this measure are necessary to ensure that association foreclosures and other remedies for the collection of unpaid assessments operate efficiently while preserving consumer protections. In particular, the application of these remedies to planned community associations organized under Chapter 421J, Hawaii Revised Statutes, need to be carefully tailored to fit the processes and operations of these types of associations. Your Committees have adopted several provisions along these lines upon which the various stakeholders have reached a consensus. These stakeholders are urged to continue working toward common ground on other provisions for possible inclusion in later drafts of this measure or the Senate companion measure.

Finally, your Committees note the testimony on this measure indicating that, since the passage of provisions in Act 48 requiring nonjudicial foreclosure notices to be published in a daily newspaper with the largest general circulation, the Judiciary's application of these requirements to judicial foreclosures have resulted in average advertising costs of \$2,000 per judicial foreclosure, compared with \$800 in 2008. This



equates to a one hundred fifty per cent increase in judicial foreclosure publication costs between 2008 and 2011. The projected impact on publication costs for nonjudicial foreclosures, which remains to be seen given the halting of nonjudicial foreclosure proceedings since the passage of Act 48, is estimated at up to \$4,300 per foreclosure. These rising publication costs raise consumer protection issues because they are passed on to the borrower in mortgage foreclosure proceedings.

Accordingly, your Committees have amended this measure by:

- (1) Repealing section 667-60, Hawaii Revised Statutes, the statute that automatically makes all violations of the mortgage foreclosure law an unfair or deceptive act or practice, until the expiration of the mortgage foreclosure dispute resolution program on September 30, 2014;
- (2) Following the expiration of the mortgage foreclosure dispute resolution program in 2014, re-enacting section 667-60, Hawaii Revised Statutes, as amended by the recommendations of the Mortgage Foreclosure Task Force and reflected in this measure as received by your Committees;
- (3) Repealing the nonjudicial foreclosure process under Part I of Chapter 667, Hawaii Revised Statutes, to provide a single nonjudicial foreclosure process under Part II of that chapter;
- (4) With regard to condominium and planned community association liens for unpaid assessments:
 - (A) Specifying that associations are prohibited from foreclosing upon any lien against a unit arising solely from fines, penalties, legal fees, or late fees;
 - (B) Providing that the two-year time limit for recorded association liens is subject to the association's renewal of the lien prior to expiration; and
 - (C) Eliminating the monetary cap (currently \$7,200) on the total amount of unpaid common area maintenance fees that an association may specially assess against a person who purchases a foreclosed unit,



but retaining the limit on recoverable amounts to the last twelve months (amended to six months on September 30, 2014) immediately preceding the completion of foreclosure proceedings;

- (5) With regard to the nonjudicial foreclosure process established by this measure for condominium associations under chapters 514A and 514B, Hawaii Revised Statutes, and planned community associations under Chapter 421J, Hawaii Revised Statutes:
- (A) Eliminating the requirement for staging open houses prior to the public sale of units subject to association foreclosures. On this point, your Committee was informed that in many association nonjudicial foreclosures, the unit's mortgage debt is higher than the unit's market value. This lowers the likelihood that anyone will bid on the unit in the foreclosure sale and, consequently, requiring public showings of the unit only increases the time and expense of foreclosures;
 - (B) Allowing associations to pursue the following remedies when the association is unable to serve the notice of default and intention to foreclose:
 - (i) Obtain court permission to proceed with nonjudicial foreclosure by serving notice only by publication and posting;
 - (ii) Proceed with nonjudicial foreclosure without court permission, after surrendering the right to a deficiency judgment and giving the unit owner a one-year right to redeem the unit; or
 - (iii) Rent out the unit, if the unit is unoccupied and the association sends notice to the unit owner's last known address;
 - (C) Providing that only the association, to the exclusion of other lienholders, may use the amount of the lien held against the unit to satisfy the downpayment required of successful bidders at the public sale of the unit;



- (D) Amending the distribution of sale proceeds to include government liens against the unit for taxes and assessments;
 - (E) Clarifying what constitutes a "reasonable payment plan" that a delinquent unit owner may submit to the association following receipt of a notice of default and intention to foreclose;
 - (F) Allowing, rather than requiring, associations to record the notice of default and intention to foreclose in a manner similar to the recordation of notices of pendency of action; and
 - (G) Adding a new definition of "assessment" to cover foreclosures of liens for assessments imposed by planned community associations under Chapter 421J, Hawaii Revised Statutes;
- (6) Amending the provisions affecting planned community associations organized under Chapter 421J, Hawaii Revised Statutes, to:
- (A) Provide that the priority of association liens shall be as set forth in the association's governing documents, where applicable; and
 - (B) Eliminate the arbitration option for the resolution of disputes over amounts claimed by the association and paid in full by the unit owner against whom the claim was made;
- (7) Eliminating the requirement that notices of public sale for the nonjudicial foreclosure process under Part II of Chapter 667, Hawaii Revised Statutes, and for the association nonjudicial foreclosure process established by this measure, be published in a daily newspaper with the largest general circulation within the area where the property lies, and instead establishing alternative criteria to facilitate publication in other newspapers of sufficient circulation; and
- (8) Requiring attorneys filing a judicial foreclosure action for residential property to sign and submit an affirmation that the attorney has verified the accuracy of the documents submitted in the filing, under penalty



of perjury and subject to applicable rules of professional conduct.

Technical, nonsubstantive amendments were also made for clarity, consistency, and style.

As affirmed by the records of votes of the members of your Committees on Consumer Protection & Commerce and Judiciary that are attached to this report, your Committees are in accord with the intent and purpose of H.B. No. 1875, as amended herein, and recommend that it pass Second Reading in the form attached hereto as H.B. No. 1875, H.D. 1, and be referred to the Committee on Finance.

Respectfully submitted on behalf of the members of the Committees on Consumer Protection & Commerce and Judiciary,



GILBERT KEITH-AGARAN, Chair



ROBERT N. HERKES, Chair



