

Honolulu, Hawaii

FEB 17 2012

RE: S.B. No. 2429
S.D. 1

Honorable Shan S. Tsutsui
President of the Senate
Twenty-Sixth State Legislature
Regular Session of 2012
State of Hawaii

Sir:

Your Committee on Commerce and Consumer Protection, to which was referred S.B. No. 2429 entitled:

"A BILL FOR AN ACT RELATING TO FORECLOSURES,"

begs 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, and a concerned individual testified in support of this measure. The Community Associations Institute Legislative Action Committee; Hawaii State Bar Association; Hawaii Bankers Association; Hawaii Financial Services Association; Mililani Town Association; Hawaii First, Inc.; AOA 909 Kapiolani; Golf Villas at Mauna Lani AOA; Country Club Village; Villages of Kapolei Association; Certified Hawaii, Inc.; and twenty-three concerned individuals opposed this measure. The Hawaii Association of Realtors; RCO Hawaii, LLLC; and Hawaii Credit Union League provided comments.

Your Committee finds that Act 162, Session Laws of Hawaii 2010, established the Mortgage Foreclosure Task Force to recommend 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.

As an initial matter, your Committee wishes to express its sincere appreciation for the significant amount of time and effort that the task force members spent reviewing the provisions of the mortgage foreclosure law under Chapter 667, Hawaii Revised Statutes, with a particular focus on the amendments made by Act 48, Session Laws of Hawaii 2011; attempting to resolve issues raised; and considering the interests and protection of consumers.

With the expiration of the moratorium (pursuant to Act 48) on new, nonjudicial foreclosures under Part I of Chapter 667, Hawaii Revised Statutes, on July 1, 2012, Hawaii will again have two discrete but overlapping nonjudicial foreclosure laws. Your Committee notes that 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, your Committee believes that repeal of the Part I nonjudicial foreclosure process should be considered.

Under Act 48, the temporary dispute resolution program, which applies only to nonjudicial foreclosures, currently is scheduled to end on September 30, 2014. Your Committee notes that although the program has been available since October 2011, mortgagees have not pursued nonjudicial foreclosures in Hawaii, ostensibly because of the perceived risk of undue liability under the provisions of



Act 48 that make any violation of the mortgage foreclosure law an unfair or deceptive act or practice and thus subject to enhanced penalties under Chapter 480, Hawaii Revised Statutes. Your Committee finds that this measure addresses these concerns, and accordingly, your Committee believes that it is appropriate to make the dispute resolution program permanent in order to fairly assess the program's effectiveness in providing owner-occupants an opportunity to negotiate an agreement that avoids foreclosure or mitigates damages in cases where foreclosure is unavoidable.

In addition, your Committee finds 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, needs to be carefully tailored to fit the processes and operations of these types of associations.

Finally, it has come to your Committee's attention that newspaper publication costs have soared to a level that makes compliance with requirements for publishing foreclosure notices significantly expensive. Your Committee received testimony stating 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. Consequently, your Committee believes alternatives for publishing foreclosure notices, including an option for posting foreclosure notices on a website maintained by the Department of Commerce and Consumer Affairs, need to be explored. Therefore, your Committee has provided for website publication of notices of public sale for discussion purposes and pending further research by the Department of Commerce and Consumer Affairs on the feasibility of authorizing electronic publication for other foreclosure notices.



In light of these considerations, your Committee has amended this measure by:

- (1) Repealing the nonjudicial foreclosure process under Part I of Chapter 667, Hawaii Revised Statutes, to provide for a single nonjudicial foreclosure process under Part II of that chapter;
- (2) With regard to the mortgage foreclosure dispute resolution program under Part V of Chapter 667, Hawaii Revised Statutes:
 - (A) Making the program permanent by repealing its sunset date;
 - (B) Repealing the prohibition against participants of the program converting their nonjudicial foreclosure proceedings to judicial actions; and
 - (C) Providing that the written notification of a dispute resolution case opening, which operates as a stay of foreclosure proceedings, does not toll the time period for curing the mortgage loan default;
- (3) With regard to condominium and planned community association liens for unpaid assessments:
 - (A) Establishing provisions requiring the release of recorded liens upon full satisfaction of the recorded lien and discharge of any secured debt;
 - (B) Specifying that the associations are prohibited from foreclosing upon any lien against a unit arising solely from fines, penalties, legal fees, or late fees; 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, and instead limiting the recoverable amount to the last six months of fees assessed immediately prior



to the completion of foreclosure proceedings,
regardless of the dollar amount;

- (4) 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 ensure that the association's claim and foreclosure costs are paid before other claims;
 - (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;
 - (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;
- (5) 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, or by the date of recordation of the liens except as otherwise provided by law;
 - (B) Specify that in order to terminate a delinquent unit's access to common areas or services or demand rent from the tenant of delinquent unit owners, the association must act in accordance with a policy adopted by a majority vote of the association members present in person or by proxy at an association meeting, rather than a majority of all unit owners, or by the written consent of a voting interest equal to a quorum of the unit owners;
 - (C) Amend the provisions allowing the association to collect unpaid assessments from the tenant of the delinquent unit, to accommodate rent payments made other than monthly;
 - (D) Replace the arbitration option for a unit owner who pays the association the full amount claimed by the



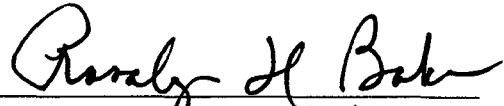
association with the option of mediation or filing a court claim to resolve disputes concerning the claim. This amendment was made because of the lack of specific provisions in Chapter 421J, Hawaii Revised Statutes, governing arbitrations;

- (6) With regard to the publication requirements for notices of public sale issued 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:
 - (A) Eliminating the requirement that the notice 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
 - (B) In lieu of publication by newspaper, allowing the notice to be posted on a website maintained by the Department of Commerce and Consumer Affairs, if the subject property is owned by an owner-occupant;
- (7) Changing the effective date of this measure to June 30, 2012, to ensure that the repeal of the nonjudicial foreclosure process under Part I of Chapter 667, Hawaii Revised Statutes, takes effect prior to the expiration of the moratorium on Part I nonjudicial foreclosures on July 1, 2012, pursuant to section 40 of Act 48, Session Laws of Hawaii 2011;
- (8) Eliminating the delayed effective date for the amendments to section 607-5(a) and (b) and section 667-53(a)(6), Hawaii Revised Statutes (amending the schedule of circuit court costs and fees to reference the fee for petitions to convert nonjudicial foreclosures of residential property into judicial proceedings and provide for the deposit of these fees into the Mortgage Foreclosure Dispute Resolution Special Fund); and
- (9) Making technical, nonsubstantive amendments for style, clarity, consistency.



As affirmed by the record of votes of the members of your Committee on Commerce and Consumer Protection that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 2429, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 2429, S.D. 1, and be referred to the Committee on Judiciary and Labor.

Respectfully submitted on
behalf of the members of the
Committee on Commerce and
Consumer Protection,



ROSALYN H. BAKER, Chair



The Senate
 Twenty-Sixth Legislature
 State of Hawai'i

Record of Votes
Committee on Commerce and Consumer Protection
CPN

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|--|---------------------|----------|-----|---------|
| Bill / Resolution No.:* | Committee Referral: | Date: | | |
| SB2429 | CPN, JDL | 2-10-12 | | |
| <input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____ | | | | |
| The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313 | | | | |
| Members | Aye | Aye (WR) | Nay | Excused |
| BAKER, Rosalyn H. (C) | ✓ | | | |
| TANIGUCHI, Brian T. (VC) | ✓ | | | |
| GALUTERIA, Brickwood | ✓ | | | |
| GREEN, M.D., Josh | ✓ | | | |
| NISHIHARA, Clarence K. | | | | ✓ |
| SOLOMON, Malama | ✓ | | | |
| SLOM, Sam | | ✓ | | |
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| TOTAL | 5 | 1 | 0 | 1 |
| Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted | | | | |
| Chair's or Designee's Signature: | | | | |
| Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy | | | | |

*Only one measure per Record of Votes