HB1875 HD2

Measure Title:	RELATING TO FORECLOSURES.
Report Title:	Mortgage Foreclosures; Homeowner Association Liens and Assessments
Description:	Implements the 2011 recommendations of the mortgage foreclosure task force to address various issues relating to the mortgage foreclosures law and related issues affecting homeowner association liens and the collection of unpaid assessments. Repeals the nonjudicial foreclosure process under part I of chapter 667, Hawaii Revised Statutes. Repeals the provision automatically making all violations of the mortgage foreclosure law an unfair or deceptive act or practice. Following the expiration of the mortgage foreclosure dispute resolution program in 2014, specifies certain foreclosure violations as unfair or deceptive acts or practices, limits the types of violations that may void a title transfer of foreclosed property, and establishes a time limit for filing actions to void title transfers of foreclosed property. (HB1875 HD2)
Companion:	
Package:	None
Current Referral:	CPN, JDL
Introducer(s):	HERKES

Sort by Date		Status Text
1/17/2012	H	Prefiled
1/18/2012	H	Introduced and Pass First Reading.
1/19/2012	H	Referred to CPC/JUD, FIN, referral sheet 2
1/20/2012	H	Bill scheduled to be heard by CPC/JUD on Wednesday, 01-25-12 2:00PM in House conference room 325.
1/25/2012	H	The committee(s) on CPC/JUD recommend(s) that the measure be deferred until 02-14-12.
2/10/2012	H	Bill scheduled for decision making on Tuesday, 02-14-12 2:00PM in conference room 325.

2/14/2012	H	The committees on CPC recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 9 Ayes: Representative(s) Herkes, Yamane, Brower, Coffman, Keith-Agaran, Luke, McKelvey, Tsuji, Thielen; Ayes with reservations: none; Noes: none; and 6 Excused: Representative(s) Cabanilla, Carroll, Ito, Souki, Ching, Marumoto.
2/14/2012	H	The committees on JUD recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 10 Ayes: Representative(s) Keith-Agaran, Rhoads, Brower, Coffman, Herkes, Luke, McKelvey, Tsuji, Fontaine, Thielen; Ayes with reservations: none; Noes: none; and 5 Excused: Representative(s) Cabanilla, Carroll, Ito, Souki, Marumoto.
2/17/2012	H	Reported from CPC/JUD (Stand. Com. Rep. No. 626-12) as amended in HD 1, recommending passage on Second Reading and referral to FIN.
2/17/2012	H	Passed Second Reading as amended in HD 1 and referred to the committee(s) on FIN with Representative(s) Riviere voting aye with reservations; none voting no (0) and Representative(s) Herkes, Kawakami, M. Lee, Mizuno, Morikawa excused (5).
2/26/2012	H	Bill scheduled to be heard by FIN on Wednesday, 02-29-12 10:00AM in House conference room 308.
2/27/2012	H	Broadcast of hearing/briefing available. See: www.capitoltv.org
3/1/2012	H	The committees on FIN recommend that the measure be PASSED, WITH AMENDMENTS. The votes were as follows: 17 Ayes: Representative(s) Oshiro, M. Lee, Choy, Giugni, Har, Hashem, Ichiyama, Jordan, Kawakami, C. Lee, Morikawa, Tokioka, Yamashita, Ward; Ayes with reservations: Representative(s) Cullen, Marumoto, Riviere; Noes: none; and Excused: none.
3/2/2012	H	Reported from FIN (Stand. Com. Rep. No. 852-12) as amended in HD 2, recommending passage on Third Reading.
3/2/2012	H	Forty-eight (48) hours notice Tuesday, 03-06-12.
3/6/2012	H	Passed Third Reading as amended in HD 2 with Representative(s) Ching, Fontaine, M. Lee, Marumoto, Riviere, Yamane voting aye with reservations; Representative(s) Cullen voting no (1) and none excused (0). Transmitted to Senate.
3/8/2012	S	Received from House (Hse. Com. No. 91).
3/8/2012	S	Passed First Reading.

3/8/2012	S	Referred to CPN, JDL.
3/9/2012	S	The committee(s) on CPN has scheduled a public hearing on 03-14-12 9:00AM in conference room 229.

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

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KEALI`I S. LOPEZ
DIRECTOR

TO THE SENATE COMMITTEE ON COMMERCE
AND CONSUMER PROTECTION

TWENTY-SIXTH LEGISLATURE
Regular Session of 2012

Wednesday, March 14, 2012
9:00 a.m.

TESTIMONY IN SUPPORT OF HB 1875 HD2: RELATING TO FORECLOSURES

TO THE HONORABLE ROSALYN H. BAKER, CHAIR, AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to testify in support of HB 1875 HD2. My name is Everett Kaneshige, I am the chairperson of the Mortgage Foreclosure Task Force ("MFTF").

The HD2 under consideration by the Committee addresses concerns from community associations regarding issues arising from enabling community association nonjudicial foreclosures using language borrowed from condominium association law. It also repeals Part I nonjudicial foreclosures (HRS §667-5). The deletion of Part I necessitated adjusting the timeline of the Mortgage Foreclosure Dispute Resolution ("MFDR") Program so that it would not greatly extend the amount of time needed to

complete a Part II nonjudicial foreclosure (HRS §667-22). This was done by inserting the same exemption within the stay that goes into effect when participation in the MFDR Program is elected by an owner-occupant (HRS §667-83), as was implemented in SB 2429 SD1 by this committee. The amending language is in HB 1875 HD2, Section 45.

In addition to the above, there are Department recommended amendments made for technical reasons in sections 25 and 35 of HB 1875 HD2. The purpose of these amendments was to make conforming amendments due to changes made by previous committees and address drafting errors.

DCCA has identified a drafting consistency issue for which it would like to propose an amendment for the Committee's consideration:

- In section 43, 667-81(d) of the HD2 the sentence "If the agreement provides for foreclosure, the parties shall memorialize the agreement in a writing signed by both parties." needs to conform to a prior amendment made to 667-81(c) of the same section of the HD2. It should be amended to read "If the agreement provides for foreclosure, the parties shall memorialize the agreement in writing, which shall be signed by both parties.".

Thank you for this opportunity to testify in support of HB 1875 HD2, DCCA recommends that it be passed, amended per the comment above. I will be happy to answer any questions that the Chairperson or members of the Committee may have.

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

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KEALI'I S. LOPEZ
DIRECTOR

PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON COMMERCE
AND CONSUMER PROTECTION

THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

Wednesday, March 14, 2012
9:00 a.m.

TESTIMONY ON HOUSE BILL NO. 1875, H.D. 2, RELATING TO FORECLOSURES.

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND TO THE HONORABLE BRIAN T. TANIGUCHI, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs appreciates the opportunity to testify on H.B. No. 1875, H.D. 2, Relating to Foreclosures. My name is Bruce Kim, Executive Director of the Office of Consumer Protection ("OCP"). OCP supports the intent of the bill and offers the following comments in support of the two-year limit on recorded association liens and the prohibition against foreclosing association liens arising solely from fines, penalties, legal fees or late fees.

In 2010, the Legislature created the Mortgage Foreclosure Task Force ("MFTF") pursuant to Act 162. This year the Task Force through its various working groups

devoted a significant amount of time and effort in attempting to strengthen Act 48. Ultimately, the Task Force's working groups came up with a number of recommendations intended to provide clarity and certainty to lenders, borrowers and associations in the foreclosure process.

I. Two-Year Limit on Recorded Association Liens.

One of the three MFTF working groups this year focused on incorporating non-judicial foreclosures for associations into Chap. 667. Among the final recommendations of the MFTF was to include a two-year limit on **recorded** association liens under Chaps. 421J, 514A and 514B. The MFTF approved this provision unanimously and rejected proposals advocating even longer expiration periods for association liens.

An element of the condominium association lobby has objected to the MFTF's two-year limitation on **recorded** association liens for various reasons. However, these objections should be considered in light of the following facts:

1. The MFTF approved adoption of identical lien and collection language for Chap. 421J associations which have been in effect for Chaps. 514A and 514B associations for many years.

> The task force recommends adding two new sections to chapter 421J, on planned community associations, to provide these associations with the same options as condominium associations with regard to association liens for assessments (modeled after sections 514A-90 and 514B-146) and the collection of unpaid assessments from tenants or rental agents (modeled after sections 514A-90.5 and 514B-145).

Comment 2, Final Report of the Mortgage Foreclosure Task Force to the Legislature for the Regular Session of 2012, at 18.

2. Under the MFTF's lien and collection provision for 421J, Chaps. 421J, 514A, and 514B associations would now have identical **automatic lien** rights which arise without any requirement that the lien be recorded. These **automatic liens** have priority over "all other liens" except for a) tax liens; and b) mortgages that were recorded prior to the recordation of a notice of a lien by the association. *See* H.R.S. § 514b-146(a). The MFTF's two-year expiration limit applies only to "**recorded**" liens, not to automatic liens which are not recorded. However, if an association chose to record its lien then the **recorded** lien would expire after two years.

3. Under Secs. 514A-90, 514B-146, and the MFTF's proposed lien and collection provision for 421J, Chaps. 421J, 514A, and 514B associations do not have to record their lien in order to foreclose on the delinquent unit owner.

> The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association, in like manner as a mortgage of real property.

H.R.S. § 514B-146(a).

There is no waiting period. Under the automatic lien provisions of 514A-90 and 514B-146, associations can foreclose on their liens from dollar one whether they are recorded or not. Under the MFTF's proposal the automatic lien would be there whether the lien is recorded or not and, if the lien is recorded, even after the two year period has run. The arguments against the two-year lien expiration for **recorded** liens are illusory.

4. According to a review of other state condominium laws, at least 33 states

plus the District of Columbia place similar time limits on association liens. These include Alaska, Arkansas, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, North Carolina, Nebraska, New Hampshire, Nevada, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, West Virginia and Wisconsin.

It is not anti-consumer to require associations to timely initiate collection efforts on delinquent association assessments in fairness to the other unit owners in the association and to the individual who is delinquent. It is also not anti-consumer to require that a **recorded** association lien expire by law after two years if the lien has been paid or is no longer under collection by the association. If the association's recorded lien automatically expires after two years, then there is no need for the parties to incur the time and expense of recording a release.

Finally, OCP has actively participated in numerous attempts to resolve this and other issues after the session began in January. There were several meetings, numerous emails and telephone calls with various opponents of the two-year limitation on recorded liens. OCP also worked closely with Sen. Hee's staff in the Judiciary Committee to come up with alternate language to extend the two-year expiration period if the association instituted proceedings to enforce its recorded lien within the two-year period.

A lien recorded by the association shall expire two years from the date of

recordation unless proceedings to enforce the lien have been instituted within that time period;

The amendment was circulated by Sen. Hee's staff to the respective parties. Unfortunately, this amendment did not make it into SB 2429 SD 2 because of time constraints.

II. No Association May Foreclose Against a Unit Owner Solely for Fines, Penalties, Legal Fees or Late Fees.

The current versions of the House and Senate bills already represent a significant compromise from the MFTF's original recommendations. In the MFTF's report to the legislature, the MFTF's version of lien and collection rights for 421J associations and 514B associations, prohibited any lien, including an "automatic lien", for "any assessments arising solely from fines, penalties, or late fees." OCP met with lawyers representing associations and agreed to a compromise amending the MFTF's language barring liens solely for fines, penalties, etc. to provide that "no association may foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees." While some may not regard the change giving associations "automatic lien" rights solely for fines, penalties, legal fees or late fees" as significant, it is. Under existing law associations have a right to initiate collection actions for such "automatic liens" from dollar one regardless of whether the associations record them or not.

There is nothing in the MFTF's original recommendations or the current versions of the House or Senate bills, which alter the existing "pay first dispute later" laws applicable to 514A or 514B associations. Under HRS § 514B-146(c), a unit owner must

first pay the association the "full amount claimed by the association" before he or she could file a small claims action or request mediation of a disputed assessment. Under the MFTF's recommendations and the current versions of the House and Senate bills, 421J associations would be afforded identical "pay first dispute later" provisions as 514 A and 514B associations. There is nothing in either the MFTF's recommendations or the existing House or Senate bills which change the fact that the unit owner must pay the "full amount claimed by the association" and remain current on all association assessments as a condition precedent to pursue an action in small claims court or submitting their claims to mediation. *See* § 421J-A(c)(5), HB 1875 HD2 at 8, lines 7-11.

There is nothing in the current version of the bill, which bars an award of an association's attorneys' fees and costs, etc. where the foreclosure action against the unit owner did not arise "solely" out of claims for fines, penalties, legal fees, or late fees.

Associations would also be free to sue the unit owner and reduce their claims for fines, penalties, legal fees or late fees to a judgment which could be recorded against the unit owner. *See* § 421J-A(a), HB 1875 HD2 at 5, lines 8-11. In addition, associations now possess automatic lien rights for such claims whether they decide to sue or not under the amendment discussed above.

Thank you for allowing me to testify on this matter. I would be happy to answer any questions the committee may have.

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March 12, 2012

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

Re: **House Bill 1875, HD 2 (Foreclosures)**
Hearing Date/Time: Wednesday, March 14, 2012, 9:00 a.m.

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA **opposes this Bill as drafted.**

The purposes of this Bill are to: (a) implement the 2011 recommendations of the Mortgage Foreclosure Task Force to address various issues relating to the mortgage foreclosures law and related issues affecting homeowner association liens and the collection of unpaid assessments; (b) repeal the non-judicial foreclosure process under Part I of Chapter 667, Hawaii Revised Statutes; (c) repeal the provision automatically making all violations of the mortgage foreclosure law an unfair or deceptive act or practice; and (d) following the expiration of the Mortgage Foreclosure Dispute Resolution program in 2014, specify certain foreclosure violations as unfair or deceptive acts or practices, limit the types of violations that may void a title transfer of foreclosed property, and establish a time limit for filing actions to void title transfers of foreclosed property.

1. Background.

I served as the Vice Chair of the Hawaii Mortgage Foreclosure Task Force ("Task Force") from 2010 to the present. I was a member of the Task Force as the designee of the HFSA. This testimony is not on behalf of the Task Force and it is not in my capacity as the Vice Chair of the Task Force.

The Task Force, which was created by Act 162 of the 2010 Session Laws of Hawaii, issued its Preliminary Report to the 2011 Legislature. As indicated in the Final Report to the 2012 Legislature, there were various issues on which the 18 Task Force members were divided. These issues are detailed in the "minority reports", which are attached to the Final Report, for the HFSA, the Hawaii Bankers Association, and the Hawaii Credit Union League.

The testimony of the HFSA on this Bill includes some of the concerns raised in those three "minority reports" about some of the Task Force's recommendations.

This HFSA testimony also incorporates by reference the testimony which we understand is being submitted by the Hawaii Bankers Association and the Hawaii Credit Union League detailing the reasons for concerns about various provisions in this Bill.

2. Proposed revisions to this Bill.

The Senate version of this House Bill is Senate Bill 2429, S.D. 2 (referred to as "the Senate Bill"). The Senate Bill is similar in many respects to this House Bill. However, there are various

substantive differences.

This House Bill should be revised as follows:

1. Undo the repeal in this House Bill of the non-judicial foreclosure process under Part I of HRS Chapter 667. The Senate Bill would similarly repeal the non-judicial foreclosure process under Part I.

The provisions for Part I non-judicial foreclosures are in HRS Secs. 667-5 through 667-15. Sections 53 through Section 59 of this Bill, which are on page 144 through page 153, would repeal those HRS sections for Part I non-judicial foreclosures.

The Task Force did not recommend the repeal. The Part I non-judicial foreclosure process was already enhanced by consumer protection provisions in Act 48 (2011).

At a minimum, Part I should be available for use by mortgage lenders for non-homeowner foreclosures, i.e. investor foreclosures.

We ask that you: (a) delete Sections 53 through 59, and (b) delete any provisions in this Bill which would repeal references to specific HRS sections for Part I non-judicial foreclosures, such as references to HRS Sec. 667-5.

2. Remove the proposed new HRS section in Section 3 of this Bill beginning on page 45, line 1, and continuing through page 47, line 6. Additionally, in Section 67 of this Bill, delete the first proviso on page 157, on lines 13 and 14. These provisions would mandate that after the Mortgage Foreclosure Dispute Resolution program expires on September 30, 2014, then beginning on October 1, 2014 there would be at least 21 foreclosure violations specified as unfair or deceptive acts or practices, there would be a laundry list of at least 18 types of violations that could void a title transfer of property which is foreclosed non-judicially, and there would be a 180 day time limit for filing actions to void the title transfers of a non-judicially foreclosed property.

These changes should be deleted because the repeal of HRS 667-60 (unfair or deceptive act or practice) in Section 62 of this Bill (page 154, lines 17 through 22) should not be dependent on whether there is a Mortgage Foreclosure Dispute Resolution program.

Additionally, this proposed new section in Section 3 of the House Bill would permit a court action to be brought to void the transfer of title after a non-judicial foreclosure sale up to 180 days after the transfer of title. This provision, which is also in the Senate Bill, will have the negative consequence of discouraging third parties from bidding at reasonable price levels at non-judicial foreclosure auctions.

Note that while this House Bill would repeal HRS Sec. 667-60 as stated above, the Senate Bill does not repeal that Section. We support the repeal in this House Bill.

3. Delete the requirement in Part II of HRS Chapter 667 for staging "open houses" or "public showings" prior to the public sale (auction) in non-judicial mortgage foreclosures. The provisions to be deleted in Part II are in HRS Secs. 677-21, 667-22, 667-26, 667-27, and 667-32.

The Senate Bill had deleted these open house provisions. We support those deletions.

It should be noted that the non-judicial foreclosure process being proposed for condominium associations and planned community associations in the latest versions of both the

Senate Bill and this House Bill do not have such an open house requirement even though that requirement was in the original version of each of these Bills. It would be consistent to delete this same open house requirement in Part II for mortgage foreclosures. The deletion is needed because of the anticipated legal problems with trying to obtain access to the property to conduct open houses and because of the potential liability connected with such open house showings.

4. Delete the attorney affirmation provision for judicial foreclosures beginning on page 47, line 7, through page 49, line 15 in this House Bill. The Senate Bill does not contain such a provision.

When this Bill was heard by the House Finance Committee on February 29, 2012, the Hawaii State Bar Association submitted testimony expressing concerns about this provision because of attorney-client privilege issues and confidentiality issues. Existing court rules, such as the Hawaii Rules of Civil Procedure and the Hawaii Supreme Court's Rules of Professional Conduct governing attorneys, already provide enforcement remedies for problems that this attorney affirmation provision purports to address.

5. Reinstate the monetary cap in HRS Sec. 514A-90(h) and HRS Sec. 514B-146(h) on pages 63 to 64 and page 68, respectively. This cap is on the total amount of unpaid common area maintenance fees that a condominium association can specifically assess against a person who purchases a foreclosed unit. The amount of the cap is temporarily a maximum of $7,200 based on 12 months of delinquent maintenance fees. (On September 30, 2014, the cap is set to return to $3,600 based on 6 months of delinquent maintenance fees.)

Unlike the Senate Bill which reduced the 12 month period to 6 months and removed the dollar cap, this House Bill keeps the 12 month period and it removes any dollar amount on the cap. The lack of a reasonable monetary cap could make it difficult for consumers to obtain mortgage financing for condominium units in certain projects.

6. Enable notices of public sales (auctions) in non-judicial foreclosures and judicial foreclosures to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the Department of Commerce and Consumer Affairs.

The Senate Bill did take steps in this direction, however, those were limited to situations where the property was owned by an owner-occupant and was the subject of a non-judicial foreclosure under Part II of HRS Chapter 667.

This Bill needs to be amended to change the current practice of publishing notices of foreclosure sales (auctions) for non-judicial and judicial foreclosures. These notices are currently required to be published once each week for three successive weeks in advance of the auction in "daily" newspapers of general circulation. Because a major "daily" newspaper is charging thousands of dollars for these advertisements, these expenses unreasonably increase the cost of non-judicial and judicial foreclosures.

To change the publication requirement for notices, we ask that you:

(a) Allow notices of non-judicial foreclosure public sales or auctions ("auctions") under Part I and II of HRS Chapter 667 to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the Department of Commerce and Consumer Affairs ("DCCA"); and

(b) Allow notices of judicial foreclosure auctions by court-appointed commissioners to be published either (i) in a newspaper that is at least "weekly" (instead of in a "daily" newspaper) or (ii) on a website maintained by a state government entity such as the DCCA. Note that while portions of Part I deal with judicial foreclosures (e.g. HRS Sec. 667-1), the requirement of where notices are published is not specified in Part I but is instead in court orders. Putting in the publication requirement for judicial foreclosures in Part I will ensure consistency.

The two alternatives, i.e. in newspapers which are at least weekly or on a government website, are identical to what is in the Senate Bill for notices in Part II non-judicial foreclosures. The changes in the Senate Bill are to HRS Sec. 667-27(d) in Section 22 on pages 102 and 103.

However, a provision in the Senate Bill on page 103, lines 15 and 16, which restricts the use of the DCCA website to owner-occupied mortgaged properties which are being foreclosed non-judicially under Part II of HRS Chapter 667, should be deleted.

Foreclosure sale notices for both non-judicial (Part I and Part II) and judicial foreclosures and for all types of properties (not just owner-occupied) should be able to be posted on the DCCA website.

7. Insert a "defective" effective date in this House Bill to ensure further discussion.

Note that the Senate Bill, but not this House Bill, would repeal the provision in HRS Sec. 667-53(c) which excludes participants of the Mortgage Foreclosure Dispute Resolution program from converting non-judicial foreclosure proceedings to judicial actions. (See the Senate Bill in Section 28 at page 120.) We do not support the repeal. The Task Force did not recommend the repeal. Such a repeal would mean that an owner-occupant could first require the lender to go through a Mortgage Foreclosure Dispute Resolution program session, and once the session is concluded, that owner-occupant could convert the foreclosure from a non-judicial process to a judicial process. The negative consequences of the repeal would be to unreasonably extend the foreclosure process and unnecessarily increase the cost of foreclosures.

Thank you for considering our testimony.

Marvin S. C. Dang

MARVIN S.C. DANG
Attorney for Hawaii Financial Services Association

(MSCD/hfsa)

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Senate Committee on Commerce and Consumer Protection

Hearing: Wednesday, March 14, 2012, 9:00 a.m.
Conference Room 229, State Capitol, 415 South Beretania Street

IN SUPPORT OF INTENT AND PURPOSE OF HB 1875, HD2

Chair Baker, Vice Chair Taniguchi, and Committee Members:

My name is George Zweibel. I am a Hawaii Island attorney and have for many years represented mortgage borrowers living on Oahu, Hawaii, Kauai and Maui. Earlier, I was a regional director and staff attorney at the Federal Trade Commission enforcing consumer credit laws as well as a legal aid consumer lawyer. I have served on the Legislature's Mortgage Foreclosure Task Force ("Task Force") since its inception in 2010, although the views I express here are my own and not necessarily those of the Task Force.

I generally support HB 1875, HD2 to the extent it implements the 2012 recommendations of the Task Force and repeals Part I of chapter 667 and requires attorneys instituting residential judicial foreclosure actions to file affirmations regarding the accuracy of submitted documents. I strongly oppose repealing § 667-60 (declaring that any violation of chapter 667 violates § 480-2) until the dispute resolution program ends and then implementing the § 667-60 compromise included in the Task Force recommendations. Further, I respectfully urge the Committee to revise HB 1875, HD2 by: (1) repealing the dispute resolution program sunset, and (2) allowing borrowers to participate in dispute resolution before they must decide whether to convert to a judicial foreclosure. Finally, to avoid undermining the intent and effectiveness of Act 48 and current law, it is important to retain: (1) specific reference to the FDIC loan modification guidelines in the dispute resolution program; (2) mortgagee liability for oral misrepresentations made on mortgagees' behalf; and (3) mortgagee liability for completing a foreclosure after a loan modification has been approved or while one is being considered.

1. **Immediately implement the Task Force's recommended § 667-60 amendments.** By expressly stating that any chapter 667 violation constitutes an unfair or deceptive act or practice ("UDAP") under § 480-2, § 667-60 is of fundamental importance because it both deters violations of the foreclosure law *and* provides meaningful remedies if they occur. This helps prevent wrongful foreclosure, *e.g.*, when servicers make mistakes or fail to honor loan modification

agreements, and ensures that important borrower rights are honored, including dispute resolution and conversion of nonjudicial to judicial foreclosures.

Lenders contend that § 667-60 may subject them to disproportionate penalties for trivial violations of chapter 667. The Task Force recommendations directly respond to this concern in two ways. First, they recommend creating several "safe harbors," *e.g.*, providing a public information notice form lenders can use to comply with § 667-41 and clarifying where foreclosure notices must be published. Second, the Task Force recommends limiting the applicability of § 667-60 to listed chapter 667 violations that are most likely to result in wrongful foreclosure and/or financial harm. Voiding a transfer of title under § 480-12 would be further limited to the most serious of those violations, and a court action seeking such relief would have to be filed within 180 days. The Task Force's recommended revision of § 667-60 was approved by 13 of the 17 voting members.

I have also submitted (and attach and incorporate) separate written testimony opposing HB 2018, HD1, which would repeal § 667-60 in its entirety and delay implementation of the Task Force compromise version of § 667-60 until after the dispute resolution program is scheduled to end (see below). This would drastically reduce existing homeowner rights and protections and encourage widespread noncompliance with Chapter 667. Instead, I respectfully request that the Committee approve immediate implementation of all of the Task Force's recommended § 667-60 revisions, without changes, which reflect substantial compromise and strike a fair balance between lenders' stated concerns regarding liability for minor violations and the need to protect borrowers from irreparable harm caused by serious chapter 667 violations. This would be consistent with SB 2429, SD2.

2. Retain judicial foreclosure attorney affirmation requirement. HB 1875, HD2 would require attorneys who file residential foreclosure actions to certify in writing that they have verified the accuracy of the documents submitted. Such due diligence by plaintiffs' attorneys would help prevent well-publicized problems involving failure to review loan documents establishing standing and other foreclosure requisites, filing notarized affidavits falsely attesting to such review and other material facts, and "robosigning" of documents. A recent foreclosure audit in San Francisco County strongly suggests that the true magnitude of this problem – in Hawaii and elsewhere – is much greater than previously realized. Casting doubt on the validity of almost every foreclosure it examined, that audit determined that *84%* contained law violations, with 2/3 having at least four violations or irregularities. New York Times, Feb. 16, 2012, at A1, A3. Transfers of many loans were made by entities that had no right to assign them and institutions took back properties in auctions even though they had not proved ownership. In *45%* of the reviewed foreclosures, properties were sold at auction to entities improperly claiming to be the beneficiary of deeds of trust (used instead of mortgages to secure residential

loans in California). In 6% of the foreclosures, the same deed of trust was assigned to two or more different entities, raising questions about who actually had the right to foreclose. Many securitized foreclosures showed gaps in the chain of title, indicating that transfers from the original loan owner to the entity currently claiming to own the deed of trust have disappeared.

Hawaii would not be the first state to require attorneys to certify that they have personally verified their clients' legal right to foreclose. The New York State Unified Court System instituted this requirement in October 2010, stating in its press release that it was adopting an attorney affirmation requirement "to protect the integrity of the foreclosure process and prevent wrongful foreclosures" and that the new filing requirement "will play a vital role in ensuring that the documents judges rely on will be thoroughly examined, accurate, and error-free before any judge is asked to take the drastic step of foreclosure." The proposed Hawaii attorney affirmation form is nearly identical to the one used in New York.

Courts in two of Ohio's largest counties, Cuyahoga County (where Cleveland is located) and Franklin County (where Columbus is located) have issued Case Management Orders requiring mortgagees' lawyers in residential foreclosure cases to ascertain and certify the accuracy of the facts and documents provided to the court. Although Ohio foreclosure attorneys objected to attorney affirmation requirements based on purported attorney-client concerns (*i.e.*, compelling them to "breach" clients' attorney-client privilege and their ethical obligations regarding confidentiality of client information), the courts there have not modified the Case Management Orders and in April 2011 the Ohio Supreme Court refused to order them to do so.

Although it was not included in SB 2429, SD2, the foreclosure attorney affirmation requirement in HB 1875, HD2, like those already in place in New York and Ohio (and possibly other states), would go far toward ending systematic foreclosure abuses and wrongful foreclosure in Hawaii.

3. **Repeal Part I nonjudicial foreclosure.** I support HB 1875, HD2's repeal of Part I of chapter 667. When the moratorium on new nonjudicial foreclosures under Part I expires on July 1, 2012, Hawaii would again have two very different but overlapping nonjudicial foreclosure laws. With the Task Force's 2012 recommended revisions, Part II would embody the best efforts of lender and borrower representatives as well as the Legislature to craft a fair, comprehensive and effective Hawaii nonjudicial foreclosure law. There is no reason for Part I to continue to provide for an inferior alternative nonjudicial foreclosure process and it should be eliminated.

4. **Repeal sunset of dispute resolution program**. Under Act 48, the dispute resolution program currently is scheduled to end on September 30, 2014. Although the program has been available since October 1, 2011, mortgagees have stopped doing nonjudicial foreclosures in Hawaii, based on their perceived

risk of undue liability under § 667-60. Consequently, mortgagees' decision to stop doing nonjudicial foreclosures will reduce to considerably less than the intended three years the period during which dispute resolution is actually available. On the other hand, by facilitating negotiations between owner-occupants and mortgagees to determine whether a loan modification or other agreement avoiding foreclosure is possible, the dispute resolution program will benefit homeowners and loan holders alike for as long as it exists. For these reasons, the sunset provision in Act 48 should be repealed, as in SB 2429, SD2.

5. **Repeal requirement that borrowers choose between dispute resolution and conversion.** Foreclosure dispute resolution and converting a nonjudicial foreclosure to a judicial foreclosure are both extremely important rights. However, they serve different purposes and borrowers should not be forced to choose between them. Conversion allows borrowers to assert legal claims and defenses in a court of law which, if established, may prevent a wrongful foreclosure and afford other relief. In contrast, dispute resolution creates a process for determining whether foreclosure can be avoided by reaching a mutually beneficial agreement, *e.g.*, by modifying loan terms, irrespective of whether legal foreclosure defenses may exist. Alternative dispute resolution should be encouraged and utilized to the greatest possible extent, but not at the expense of forfeiting the conversion right if an agreement cannot be reached. Instead, the homeowner should retain the option, in the event dispute resolution is unsuccessful, to move the foreclosure to court so that a judge can still decide whether valid foreclosure defenses exist. Eliminating this limitation is consistent with SB 2429, SD2.

6. **Retain use of FDIC loan modification guidelines in foreclosure dispute resolution program**. Section 667-80(e) mandates use of the calculations, assumptions and forms established by the Federal Deposit Insurance Corporation loan modification program (or a different program or process if the parties and neutral agree). The Task Force considered but rejected recommending removal of the specific reference to the FDIC guidelines, because that program is widely regarded as the most objective, transparent and verifiable loan modification program in widespread use. Retention of the FDIC language in § 667-80(e) will help avoid mistakes and ensure that the "net present value" calculation accurately determines whether it is more beneficial for the loan holder to modify the loan or to foreclose. Conversely, its deletion would seriously undercut the dispute resolution program's ability to achieve its intended goal.

7. **Retain mortgagee liability for oral misrepresentations**. Lenders have proposed amending § 667-59 so that foreclosing mortgagees would be bound only by written agreements and representations made on their behalf. Consumer protection law enforcement agencies and private consumer attorneys have long recognized that most misrepresentations are oral and not put into writing, making them much easier to deny later. Contrary to general rules of evidence, proof of oral misrepresentations usually is permitted to establish UDAP

or fraud claims. Lenders' proposed change would eliminate foreclosing mortgagees' legal responsibility for all oral misrepresentations made by their representatives. There can be no justification for giving anyone a "license" to commit fraud, especially when families' homes are at stake.

8. **Retain mortgagee liability for foreclosing during consideration or after approval of loan modification**. Lenders have proposed repealing § 667-56(6) and (7), which prohibit completing a foreclosure during loan modification negotiations or after acceptance into a federal loan modification program. There have been many instances in which mainland servicers have completed foreclosures while loan modifications were being considered or while trial or permanent modifications were in effect. Retaining § 667-56(6) and (7) is essential to protect Hawaii homeowners from such abuses and the obvious harm they cause.

Thank you for your consideration of my testimony.

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March 14, 2012

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

RE: H.B. 1875, H.D.2, Relating to Foreclosures

HEARING: Wednesday, March 14, 2012, at 9:00 a.m.

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

I am Myoung Oh, Government Affairs Director, testifying on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR **submits comments and requests a proposed amendment** on H.B. 1875, H.D.2, which implements the recommendations of the mortgage foreclosure task force to address various issues relating to the mortgage foreclosure law and related issues affecting homeowner associations.

HAR sincerely appreciates the efforts of the Mortgage Foreclosure Task Force to make recommendations regarding the existing foreclosure law in Hawai'i. However, the HAR has concerns that some of these recommendations may create unintended adverse consequences if it becomes law.

Moratorium on Non-Judicial Foreclosures
HAR understands that, since the enactment of Act 48, non-judicial foreclosures have essentially stopped, and lien holders have opted to pursue the more costly and lengthy judicial foreclosure route. This issue appears to be linked, in part to the stringent Unfair or Deceptive Acts and Practices (UDAP) provisions in Act 48. The mortgage industry and even Fannie Mae have cited UDAP as one of the primary reasons for noncompliance with the legislative intent of Act 48. Until certain UDAP provisions that apply to non-judicial foreclosures are clarified, HAR believes that it may be prudent to continue a moratorium on Part I and even Part II non-judicial foreclosures.

HAR believes that non-judicial foreclosures should exist as a mechanism only if it is fair and balanced for both the borrower and creditor. HAR believes that, in the meantime, court oversight via the judicial foreclosure process should continue to be utilized as the only foreclosure mechanism and be only limited to owner-occupants.

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Foreclosure Recovery for Homeowner Associations

HAR strongly supports the expansion of the condominium foreclosure law to cover planned community associations so that planned community associations are able to obtain relief due to unpaid common assessments as a form of recovery from foreclosure. Moreover, HAR supports the concept of a new section to establish an alternate power of sale process for homeowner and condominium associations for unpaid liens and assessments. We recognize that this section may need refining, and defer to the appropriate parties on specifics.

HRS Section 667-60 – Oppose 180-Day Waiting Period (Pages 46-47)

Under Pages 46-47 of H.B. 1875, H.D.2, the Task Force recommends that a 180-day waiting period be implemented after a foreclosure sale, to allow the foreclosed borrower to bring forth any claims for invalidating the public auction sale. HAR has concerns that the imposition of the 180-day requirement would severely impact the ability of a bidder to be able to purchase foreclosed real estate at auction. This will discourage potential bidding from the public at large, because, among other reasons, the waiting period will make it challenging to obtain financing. Owner occupant financing usually contains a requirement that a buyer take occupancy of the property within 30-90 days of closing the loan/purchase. If a Buyer cannot occupy a property within the lender's guidelines, the loan is categorized as an "investor loan," which requires a much larger down payment and a higher interest rate.

The California civil code sections regarding bona fide purchaser protections have worked for many years and could provide guidance for this Committee to consider. In California, the law presumes that the lender has satisfied requirements relating to notification, the auction sale, and all other aspects of the foreclosure. The lender is liable for financial damages to the mortgagor if the sale is overturned, but the third-party bidder is protected. In short, the California system encourages competitive bidding at the auction, fosters competition that will yield the highest possible sale price, and creates the opportunity for the homeowner who lost the property to recover funds in the event there is an overbid.

Based on the foregoing, if the Committee is inclined to move this bill forward for further discussion, HAR would recommend that the 180-day waiting period only apply in situations where the lender takes back the property at auction with a credit bid, but that a third-party purchaser be exempted from this requirement.

For the forgoing reasons, HAR respectfully ask this Committee to consider the attached amendments to protect third-party purchasers, while still preserving consumer protection for homeowners.

Mahalo for the opportunity to testify.

RCO
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March 13, 2012

Via Email: CPNtestimony@capitol.hawaii.gov and Hand Delivery

Senator Rosalyn H. Baker
Chair, Committee on Commerce and Consumer Protection
Hawaii State Capitol, Room 230

Re: H.B. 1875, H.D.2 –Relating to Foreclosures
Hearing: Wednesday, March 14, 2012 at 9:00 a.m.
Conference Room 229

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

I am Michael Wong, an attorney with RCO Hawaii LLLC ("RCO Hawaii"), a law firm dedicated to the representation of the mortgage banking and default servicing industry. Our firm provides a wide range of services in banking and real estate law to more than 200 large and small companies located in several Western states, including Alaska, Idaho, Arizona, Washington, Oregon, California, Nevada and Hawaii. It also serves as retained counsel for Fannie Mae in Hawaii.

RCO is pleased to **submit comments** regarding H.B. 1875, H.D.2, which implements the recommendations of the Mortgage Foreclosure Task Force, and makes numerous other changes to the Hawaii foreclosure law. RCO specifically supports the intent of the amendments made in H.B. 1875, H.D.2, which change the publication requirements for non-judicial foreclosures to a "newspaper of general circulation" and provide guidelines for qualifying as such a newspaper. This approach, which has been implemented in other states, ensures that a newspaper meets general circulation requirements, and that there is an opportunity for more than one paper to compete to publish non-judicial foreclosure notices. This helps to address the dramatic increase in costs that has occurred for publishing notices as a result of Act 48, Session Laws of Hawaii 2011. RCO believes the amendments proposed in H.B. 1875, H.D.2 are part of the solution to ensure that there is fair competition for the publication of notices.

In addition, RCO appreciates that H.B. 1875, H.D.2 goes one step further and allows for the alternative for notices of public sale to be posted electronically on the DCCA's website. RCO believes that the Internet can and should play a role in improving the foreclosure auction process, particularly by increasing visibility and participation at foreclosure auctions. Specifically, allowing notices of a foreclosure sale to be published electronically will increase bidders and third party sales. These third party sales are beneficial to everyone because the bidder absorbs

the foreclosure costs, the borrower might derive income (if the bid exceeds the offset bid), the bank does not have to add a property to its REO portfolio, and the house is back moving in the market.

RCO notes that, in other states, in lieu of a government sponsored website, notices of sale are either allowed or required to concurrently be published in newspapers and qualified online websites. In Alaska, for example, this approach has been used, and a number of newspaper websites and other qualified websites compete to publish foreclosure sale notices online for a minimal cost.

RCO remains willing to engage in further discussion and to provide input on this issue, based upon its experiences in Hawaii and other states. Thank you very much for the opportunity to testify regarding this measure.

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Executive Director

The Honorable Rosalyn H. Baker, Chair
The Honorable Brian T. Taniguchi, Vice Chair
Senate Committee on Commerce and Consumer Protection

Hearing : **Wednesday, March 14, 2012, 9:00 a.m.**
State Capitol, Conference Room 229

In Support of Intent of HB 1875, HD2 Relating to Foreclosures

Chair, Vice Chair, and Members of the Committee:

My name is Madeleine Young, representing the Legal Aid Society of Hawai'i ("Legal Aid"). I am advocating for our clients who include the working poor, seniors, citizens who speak English as a second language, the disabled, other low and moderate income families who are consumers, and families facing default and foreclosure on their homes. I provide bankruptcy services as a staff attorney in Legal Aid's Consumer Unit. Specifically, I teach a clinic to show individual consumer debtors how to prepare and file their own petition for chapter 7 bankruptcy relief, as well as provide full representation to Legal Aid clients in bankruptcy matters. I give counsel and advice to clients on protected income sources, exempt assets, and settlement options regarding their consumer debts. I also provide legal services to clients regarding mortgage default and foreclosure matters, wage garnishment avoidance, fair debt collection practices, debt collection defense, as well as student loan, tax debt, and other consumer debt problems.

We are testifying **in opposition** to HB 1875, HD2, which would repeal a key provision in § 667-60, HRS that makes any violation of chapter 667 an unfair or deceptive act or practice ("UDAP") under § 480-2, HRS. HB 1875, HD2 also delays the effective date of an essential compromise UDAP provision, which states that upon the expiration of the mortgage foreclosure dispute resolution program in 2014, certain specifically delineated foreclosure violations would constitute unfair and deceptive acts and practices under § 480-2, HRS. Removing the original UDAP protections, and delaying the effective date of the compromise UDAP provision, would seriously weaken protections for mortgage consumers in the State of Hawai'i.

Lenders have cited as the principal reason for their refusal to use the dispute resolution program established under Act 48 the risk of incurring significant UDAP penalties under § 667-60 for "minor violations" of the mortgage foreclosure law. In response to lenders' concerns, 13 of 17 voting members of the Mortgage Foreclosure Task Force ("Task Force") carefully crafted a compromise regarding the UDAP provisions. The Task Force's proposed subsections (a) and (b) of § 667-60 would expressly limit foreclosing mortgagees' UDAP liability to thirteen (13) specifically delineated Chapter 667 violations. Furthermore, proposed subsection (c) would limit to 180 days the time for filing a court action seeking to void the wrongful transfer of title in a nonjudicial foreclosure. These recommended revisions to § 667-60 address lenders' stated liability concerns but still preserve the most important homeowner protections.

In previous testimony before the CPC and JUD committees, Legal Aid supported the general intent of HB 1875, incorporating the Task Force recommendations to make Act 48 and Hawai'i's foreclosure law more efficient and effective. In making its recommendations, the Task Force worked diligently to address lenders' liability concerns, while ensuring that protections for mortgage consumers were maintained. In contrast, HB 1875, HD2 would remove important UDAP protections for consumers, and thereby make it more difficult for homeowners to establish foreclosure-related UDAP violations.

By comparison, the Senate version of this bill, SB 2429, SD2, would better implement the recommendations of the Task Force by making the compromise UDAP provision effective upon passage of the bill. Legal Aid therefore recommends adopting SB 2429, SD2, to address the issues that originally prompted this Legislature to act reform Hawaii's foreclosure process.

HB 1875, HD1 would severely diminish existing homeowners' rights and consumer protections by removing key UDAP protections under § 667-60. For this reason, Legal Aid opposes the bill as amended.

Conclusion:

We respectfully request that HB 1875, HD2 receive no further consideration and that you instead approve the Senate version of the bill, SB 2429, SD2, which reflects substantial compromise and balances the legitimate interests of homeowners and lenders alike. Thank you for the opportunity to testify.

HSBA
Hawaii State Bar Association

Testimony of the
HAWAII STATE BAR ASSOCIATION

TO: Honorable Rosalyn H. Baker, Chair
Honorable Brian T. Taniguchi, Vice Chair
Senate Committee on Commerce and Consumer Protection

FROM: Carol K. Muranaka
President, Hawaii State Bar Association

RE: **House Bill 1875, House Draft 2 (Foreclosures)**

Hearing: Wednesday, March 14, 2012, at 9:00 a.m.

Chair Baker, Vice Chair Taniguchi, and members of the Committee, I have been authorized by the Board of the Hawaii State Bar Association to OPPOSE the section of the bill relating to attorney affirmations in judicial foreclosure cases.

The HSBA takes no position on H.B. No. 1875, HD 2 (HSCR852-12), as a whole, but we oppose the proposed provision relating to attorney affirmations in judicial foreclosures, the section highlighted in the attachment hereto.

A note in the draft legislation indicates the apparent legislative intent of the proposed affirmation:

Note: During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents.

The provision is objectionable because:

1. Existing safeguards embedded in the Hawai`i Rules of Professional Conduct and the Hawai`i Rules of Civil Procedure (Rule 11), promulgated by the Hawai`i Supreme Court that govern the conduct of attorneys, are adequate to address the concerns of the proposed provision;

2. The proposed provision improperly affects the client's right of confidentiality by forcing the attorney to be a material witness who, under the Hawai`i Rules of Professional Conduct, may be forced to withdraw from representation on conflict of interest grounds and negatively affects the attorney/ client relationship, by forcing the litigating attorney for the creditor to potentially be some kind of an expert witness as to the ultimate factual issue in the case if an issue of the validity of the contract is involved; and

3. Does not accomplish the apparent legislative intent.

I. <u>Existing safeguards</u>

The standards for attorney conduct within the attorney-client relationship and before the courts have largely been the province of ethics rules promulgated by

the Judiciary, not the Legislature. Stepping into this area by the Legislature raises serious concerns as to separation of powers.

Existing rules prohibit an attorney from engaging in "frivolous action." Similarly, court rules expose an attorney to monetary sanctions and penalties for engaging in frivolous conduct. Haw. R. Civ. P. Rule 11 and F. R. Civ. P. Rule 11. Ethics rules define as a "frivolous action" (as to factual matters) where "the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." Comment [2], Haw. R. P. C. 3.1.

In representing a client before a tribunal, ethics rules dictate that,

> (a) a lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; [or]
>
> * * *
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures to the extent reasonably necessary to rectify the consequences.

Haw. R.P.C. 3.3.

The "Scope" discussion to the Hawai`i Rules of Professional Conduct also makes clear that violation of the Rules exposes an attorney to serious sanctions:

> [5] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.
>
> [6] Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.
>
> [7] Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege except insofar as those rules provide otherwise. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled

> disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The proposed requirement of an attorney affirmation appears to be based on a perception that the sanctions rules in place are insufficient to deter alleged frivolous conduct that supposedly pervades the foreclosure crisis. Yet there is no empirical or credible evidence that increasing an attorney's duty of inquiry and his/her exposure (civil, criminal and professional) will ameliorate the abuses that are the focus of the proposed new regulation. There are no other statutes or causes of action where attorneys are directly held to a standard higher than non-frivolousness – a standard not clearly or objectively defined. The danger here is that the attorney's zealous representation of the client can be dulled by the attorney's desire to protect him/herself from liability, which in turn will have a negative impact on that attorney's obligation to faithfully represent the client.

II. Violation of attorney client confidentiality and material witness/party to foreclosure litigation

More importantly, the proposed required affirmation requires the attorney to divulge the contents of communication with a representative(s) of his/her client. It

is difficult to perceive the rationale for that intrusion into the principle of confidentiality that is a cornerstone of the attorney client relationship.

A standard verification of a pleading requires the signer to swear to the accuracy of the *pleading*, but not the factual accuracy of (presumably) all "documents and records" relating to the case.

- Must the representative(s) examine the original mortgage and each check forwarded by the mortgagor and the postmark or other proof of the date of delivery (which goes to the calculation of late charges, *etc.*)? Is the representative to audit the accounts listed to attest to the accuracy of all entries, to assure that there were no typographical or other unintentional errors?
- More fundamentally, the question is how does the required affirmation cure the problem identified in the Note? If client representatives are willing to submit false documents under oath, why wouldn't they similarly lie to their attorney, when questioned about what records they reviewed and whether the contents of notarized documents are accurate?
- And if it turns out that the plaintiff's papers are somehow inaccurate, notwithstanding the client's statement of accuracy to the attorney, has the attorney been placed in a position that he/she will potentially be a witness in a perjury prosecution against his/her own client?

But, in addition to the client's statement to the lawyer that those writings were accurate and proper, the required affirmation requires more: the lawyers "own inspection and other reasonable inquiry." Apparently, when it comes to foreclosure cases, an attorney is not entitled to rely on his/her client alone; the attorney is required to inspect the client's records, and to make other inquiry reasonable under the circumstances (beyond the inquiries specifically required to be reported on in the affirmation). The required affirmation creates a level of distrust that is not healthy for the attorney-client relationship.

It would seem that micro-managing the attorney-client relationship via the required affirmation (and the underlying communications required to be reported to the court therein) injects potential adversity into the attorney-client relationship and erodes the privilege, but accomplishes little to eliminate robo-signatures, false swearing, and inadequate review on the facts by client representatives.

III. Failure to accomplish apparent legislative intent

The proposed affirmation does not accomplish the stated legislative intent. There are other steps that can be taken to curtail the abuses that led to consideration of the required affirmation.

First, without any change in law or regulation, those who misuse or corrupt the notarization process can be prosecuted or otherwise sanctioned. Next, the courts can require a more detailed submission on motions for default or summary

judgment, to clearly allege and document standing and all of the elements of a *prima facie* case. Expanding the availability of free counsel for needy foreclosure defendants and requiring notice of the right of counsel in foreclosure summonses would reduce the number of defaults. Represented defendants are more likely to raise issues such as lack of standing or other factual disputes.

Until these and other steps are taken to eliminate the reported abuses, we believe that the current draft requirement for an attorney affirmation should be deleted. Other means of attacking the problems, some of which we have suggested, should be tested before adoption of a procedure that violates the separation of powers, fundamentally impacts the attorney-client relationship, exposes the attorney to additional liabilities, and at the end of the day does not accomplish the stated legislative intent.

Thank you for considering our testimony.

following the recording of the affidavit after public sale pursuant to section 667-33. If no such action is filed within the one hundred eighty-day period, title to the property shall be deemed conclusively vested in the purchaser free and clear of any claim by the mortgagor or any person claiming by, through, or under the mortgagor."

4. By adding a new section to part IA, as designated in section 11 of this Act, to be appropriately designated and to read:

"**§667- Attorney affirmation in judicial foreclosure.** Any attorney who files on behalf of a plaintiff seeking to foreclose on a residential property under this part shall sign and submit an affirmation that the attorney has verified the accuracy of the documents submitted, under penalty of perjury and subject to applicable rules of professional conduct. The affirmation shall be in substantially the following form:

____ CIRCUIT COURT OF THE STATE OF HAWAII

_____

Plaintiff,

AFFIRMATION

v.

Defendant(s)

Mortgaged Premises:

_____

_____

Note: During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and "robosignature" of documents.

* * *

[_____], Esq., pursuant to Hawaii Revised Statutes §667-___ and under the penalties of perjury, affirms as follows:

1. I am an attorney at law duly licensed to practice in the state of Hawaii and am affiliated with the Law Firm of _____, the attorneys of record for Plaintiff in the above-captioned mortgage foreclosure action. As such, I am fully aware of the underlying action, as well as the proceedings had herein.

2. On [date], I communicated with the following representative or representatives of Plaintiff, who informed me that he/she/they (a) personally reviewed plaintiff's documents and records relating to this case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the Complaint and any supporting affidavits or affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.

Name	Title
_____	_____
_____	_____
_____	_____

3. Based upon my communication with [persons specified in item 2], as well as upon my own inspection and other reasonable inquiry under the circumstances, I affirm that, to the best of my knowledge, information, and belief, the Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law and that plaintiff has legal standing to bring this foreclosure action. I understand my continuing obligation to amend this Affirmation in light of newly discovered material facts following its filing.

4. I am aware of my obligations under Hawaii Rules of Professional Conduct.

_____

DATED:

N.B.: Counsel may augment this affirmation to provide explanatory details, and may file supplemental affirmations or affidavits for the same purpose."

PART III

SECTION 4. Section 454M-10, Hawaii Revised Statutes, is amended to read as follows:

"**§454M-10 Penalty.** Any person who violates any provision of this chapter may be subject to an administrative fine of [~~at least $1,000 and~~] not more than $7,000 for each violation; provided that $1,000 of the aggregate fine amount shall be deposited into the mortgage foreclosure dispute resolution special fund established pursuant to section 667-86."

SECTION 5. Section 501-151, Hawaii Revised Statutes, is amended to read as follows:

"**§501-151 Pending actions, judgments; recording of, notice.** No writ of entry, action for partition, or any action affecting the title to real property or the use and occupation

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March 12, 2012

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair
Committee on Commerce and Consumer Protection

RE: BILL: H.B. No. 1875, H.D.2
DATE: March 14, 2012
TIME: 9:00 a.m.
PLACE: Conference Room 229

Dear Senators Baker and Taniguchi and Members of the Committee:

Thank you for the opportunity to present testimony on H.B. No. 1875, H.D.2. Our comments are directed at the limitation on liens found in Part II, Section 2; Part III, Section 8; and Part III, Section 9.

The language that provides that a lien recorded by a planned community association or condominium association shall expire two years from the date of recordation is an unnecessary and extremely harmful provision to associations and consumers and we believe that it should be stricken. However, as we understand that the legislators believe that this provision should remain, we urge you to revise the language to at least address the most serious concerns detailed below.

1. The Automatic Lien.

Problem: Condominium associations have had automatic statutory liens for almost 50 years and a number of planned community associations have had automatic liens by virtue of their governing documents for even longer. Such automatic liens protect associations from owners selling their units or lots without paying delinquent assessments. H.B. No. 1875, H.D.2 will take away this vitally important legal right without a compelling reason. While the proponents of this bill argue that the proposed language refers only to "recorded" liens, it will have the effect of destroying the automatic lien because otherwise the provision would be meaningless if the expiration of the written lien does not also destroy the automatic lien.

Solution: At the very least, a provision should be added making it clear that the automatic lien will not be affected by the expiration of the recorded lien. There should be no basis for objection

from the task force to adding a provision of this nature because the task force proponents of the two-year lien provision affirmatively assert that the expiration of the "recorded" lien will not affect the automatic lien.

2. Planned Community Associations.

Problem: Planned community associations often record liens to perfect their liens and/or to preserve lien priority, but seldom rush to foreclosure because the amounts at stake are low and don't justify incurring the expense of foreclosure. It is not uncommon for large planned community associations to have low assessments. For example, the Palehua Community Association's annual assessment is $70. We know of at least several others whose yearly assessments are in the low $400 range. If these associations are forced to proceed with foreclosure in time to complete the process before the expiration of two years, they will need to commence foreclosure proceedings before the debt is equal to $400. This means that many associations will be forced to incur thousands of dollars in attorneys' fees and costs to foreclose on debts of a few hundred dollars or less or risk losing their liens.

Solution: Remove the two-year lien provision from Chapter 421J altogether. Whatever good it may do consumers in condominium projects (which is sketchy, to say the least), it will not do the same in planned community associations under Chapter 421J where debt accrues very slowly.

3. Exceptions to the Two Year Lien Language Are Needed.

Problem: We understand that the purpose of the two-year lien is to compel associations to act swiftly to collect assessments. However, it is not always necessary to foreclose to collect assessments. Other states have exceptions to permit the lien to continue to exist if, for example, foreclosure proceedings have started. There are, however, other circumstances where a rush to judgment is not in the association's best interest. For example, if an owner is making payments under a payment plan or the association is collecting rent from the tenant of the delinquent owner, the association ought to be permitted to collect the outstanding balance in that fashion rather than be forced to foreclose. Additionally at times foreclosure proceedings cannot be quickly completed. For example, an owner might die during the course of the proceedings, it may be difficult to obtain service, and/or the owner may deliberately cause delays. H.B. 1875 currently makes no exception if these problems arise. Furthermore, if an owner files for bankruptcy, the association will be barred by the automatic stay from recording any lien or from commencing a foreclosure proceeding. No exception is made for bankruptcies to the lien restrictions although other states have made such exceptions in their statutes.

Solution: Add a provision that states that: 1) the recorded lien won't expire if the association has taken affirmative action to enforce the lien or collect the sums due; 2) define enforcement to include entering into a payment plan with an owner, sending a notice of default and intention to foreclose or taking any other action under chapter 667, filing a legal action to foreclose the recorded lien or for a monetary judgment for amounts due, demanding payment of

rent from the tenant of the delinquent owner, and/or taking action to terminate utilities or depriving an owner of the use of the common areas; and 3) if the owner of a unit subject to a recorded lien of the association files a petition for relief under the United States Bankruptcy Code, the period of time for the association to institute proceedings to enforce the recorded lien should be tolled until thirty (30) days after the automatic stay of proceedings under Section 362 of the Bankruptcy Code is lifted as to the association's lien. Other states expressly permit this tolling.

4. Two Years is Too Short.

Problem: The two year lien is too short. Of the 33 states that have adopted a limitation on the life of an association lien, (see chart attached) only 5 states have limited the lien to two years or less. The remaining states have given the life of the lien more years (*e.g.*, 17 states have adopted a 3 year lien statute, 3 states have adopted a 5 year lien statute, 7 states have adopted a 6 year lien statute, and 1 state has adopted a 12 year lien statute). Also, keep in mind that approximately 20 states, including California, have not restricted the life a lien at all.

Solution: Increase the life of the lien to 6 years to coincide with the statute of limitations for the collection of debts. At the very least, the life of the lien should be no less than 3 years.

Thank you for your consideration of our testimony and suggested solutions to the two-year lien restriction provision currently found in H.B. No. 1875, H.D. 2. We would note that the House Committee did allow associations to renew the "recorded" lien. We are, of course, in favor of that concept.

Sincerely,

ANDERSON LAHNE & FUJISAKI LLP
A Limited Liability Law Partnership

M. Anne Anderson

Philip L. Lahne

Lance S. Fujisaki

Joyce Y. Neeley

Attached: Chart Showing Other State Legislation.

1	2	3	4	5	6	12
1. Florida (ca)* *One year & automatic extension from bankruptcy filing.	1. Idaho (ca, hoa)* 2. Mississippi (ca)* 3. Nevada (ca)* 4. Minnesota (ca)* * One year lien with right to renew for one more year.	1. Alabama (ca) 2. Alaska (cic) 3. Arizona (ca) 4. Connecticut (cic) 5. District of Colombia (ca) 6. Delaware (cic) 7. Missouri (ca) 8. North Carolina (ca, pca) 9. Nebraska (ca) 10. Nevada (cic, ch) 11. New Mexico (ca) 12. Pennsylvania (ca, pca, coop) 13. Virginia (ca) 14. Vermont (cic) 15. Washington (ca) 16. West Virginia (cic) 17. Wisconsin (ca)		1. Kentucky (ca) 2. Maine (ca) 3. Ohio (ca)	1. Colorado (cic) 2. Louisiana (hoa) 3. New Hampshire (ca) 4. New York (ca) 5. Oregon (ca, pca) 6. Rhode Island (ca) 7. Tennessee (ca)	1. Maryland (ca, hoa)

Georgia (ca): The recording of the declaration pursuant to this article shall constitute record notice of the existence of the lien, and no further recordation of any claim of lien for assessments shall be required. Ga. Code. § 44-3-109 (Article 3. Condominiums, Lien for assessments).

Minnesota (cic): Recording of the declaration constitutes record notice and perfection of any assessment lien under this section, and no further recording of any notice of or claim for the lien is required.

Abbreviations:
Condominium associations (ca)
Planned community associations (pca)
Common interest communities (cic)
Cooperative communities (coop)

P.O. Box 976
Honolulu, Hawaii 96808

March 13, 2012

Honorable Rosalyn H. Baker, Chair
Honorable Brian T. Taniguchi, Vice-Chair
Commerce and Consumer Protection
415 South Beretania Street
Honolulu, Hawaii 96813

Re: H.B. 1875, H.D.2
Hearing Date: March 14, 2012; **Time:** 9:00 a.m.

Dear Chair Baker, Vice-Chair Taniguchi and Committee Members:

I have been appointed by the Community Association Institute's Legislative Action Committee (CAI) to provide *comments and alternative language* to *three areas* of H.B. 1875, H.D.2.

CAI supports the Task Force's efforts and hard work in attempting to address concerns of various parties affected by the newly evolving nonjudicial foreclosure law. However, as we all know, condominiums (Chapter 514A and Chapter 514B, HRS entities) and community associations (Chapter 421J, HRS entities) are *made up of consumers – and CAI acts as their advocate for purposes of the suggested language contained herein.*

Our comments are in no way an attempt to ignore the work of others, like the Consumer Protector and other interest groups. We all have the same goal – *to keep maintenance fees and costs down for our owners (the consumers).* Associations can only raise maintenance fees to generate more money to meet the needs of the condominiums and communities, there are no other options.

Please keep these points and goals in mind when considering CAI's proposed revisions to certain portions of H.B. 1875, H.D.2 (*attached hereto*), and summarized as follows:

1. ***Expiration of Association Liens will cost consumers more in the end.***

    a. This is problematic, especially for Chapter 421J, HRS, Associations that only charge a fraction of the assessments that Chapter 514A & Chapter 514B, HRS Associations charge.

b. Chapter 421J, HRS, associations may only have a lien for $300 in total after 2 years. There is no reason for the lien to expire for this amount.

c. *Our suggested language (attached)* – seeks to delete this expiration altogether, OR only have it apply to condo associations – *i.e.*, Chapter 514A and Chapter 514B, HRS, projects.

2. ***Stopping any Foreclosures Related to Fines, Penalties, Legal or Late Fees Will Result in Paying Consumers Having to Carry Debtors that Only Pay Their Maintenance Fees – and Simply Dispute these Other Lawful Charges.***

a. The unintended consequence of the current language will result in paying consumers/owners having to "carry" debtors or delinquent owners that do not have to "first pay" and then dispute their debts later.

b. *Our suggested language (attached)* – seeks to delete this altogether, OR prevent associations from seeking a nonjudicial foreclosure if the owner has paid maintenance fees but has not paid any other charges. Associations could still proceed with court action and a judicial foreclosure for such non-payments.

3. ***Clarifying the "service" of the Notice of Default and Intent to Foreclose to save costs to owners, and defining the debtor's or delinquent owner's "redemption right" to avoid confusion.***

a. "Serving" the Notice of Default and Intent to Foreclose should only be required regarding the owner, and "delivery" of the Notice and Intent to Foreclose should be required for anyone else on title.

b. This simple change will result in a cost savings for consumer/owners. (*See attached language.)*

c. Our additional suggested revisions – defined "attempts at service" on the owner; and defined further what would have to be paid for a delinquent owner to "redeem" their unit or apartment. (*See attached.)*

Thank you for your time and consideration, and if you have any questions, please feel free to contact me at cporter@HawaiiLegal.com, (direct line) 539-1114, or (cell number) 542-6603).

Very truly yours,

Christian P. Porter

A. Expiration of Liens (3 Options to the Current Lanugage in H.B. No. 1875 H.D.2)

- Current Language being Proposed for Chapter 421J, HRS, Associations (*Page 4, Lines 12-14*):
    - "provided that a lien recorded by the association shall expire two years from the date of recordation unless renewed by the association prior to the expiration of the lien."
- Current Language being Proposed for Chapter 514A & 514B, HRS, Associations (*Page 60, Lines 17-20; and Page 65 Lines 18-20, respectively*):
    - "provided that a lien recorded by the association of apartment owners shall expire two years from the date of recordation unless renewed by the association of apartment owners prior to the expiration of the lien."
    - "provided that a lien recorded by the association shall expire two years from the date of recordation unless renewed by the association prior to the expiration of the lien."
- **Option #1** – *Delete* this language as to Chapter 421J, 514A & 514B, HRS, Associations.
- **Option #2** – *Delete* this language on Page 4, Lines 12-14 only as to Chapter 421J, HRS Associations.
- **Option #3** – *Alternative language* to clarify that this does not affect automatic liens arising from Association's governing documents:
    - "provided that a lien recorded by the association of apartment owners shall expire two years from the date of recordation unless renewed by the association of apartment owners prior to the expiration of the lien; however, this will in no way effect the association of apartment owners' automatic lien that arises pursuant to law or the association's governing documents."
    - "provided that a lien recorded by the association shall expire two years from the date of recordation unless renewed by the association prior to the expiration of the lien; however, this will in no way effect the association's automatic lien that arises pursuant to law or the association's governing documents."

B. **Foreclosing on lien arising from fines, penalties, legal fees, or late fees (2 Options to the Current Lanugage in H.B. No. 1875 H.D.2).**

- Current Language being Proposed for Chapter 421J, HRS, Associations (*Page 4, Lines 18-21*):
    - ". . . provided that no association may foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees."
- Current Language being Proposed for Chapter 514A & 514B, HRS, Associations (*Page 61, Lines 4-5; and Page 66, lines 3-5, respectively*):
    - ". . . provided that no association of apartment owners may foreclose a lien against any apartment that arises solely from fines, penalties, legal fees, or late fees."
    - ". . . provided that no association of apartment owners may foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees."
- **Option #1** – *Delete* this language.
- **Option #2** – *Alternative language* to clarify that this only applies to non-judicial or power of sale foreclosures, but would allow judicial foreclosures as monitored by the Courts:
    - ". . . provided that no association may ~~foreclose~~ exercise the nonjudicial or power of sale remedies provided in chapter 667 to foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees."

C. Clarifying (1) "service" of the Notice of Default, and Intent to Foreclose, and (2) definition of "redemption rights".

Suggested revisions to the pages indicated in H.B. No. 1875, H.D.2:

- **(Page 24, lines 8-19)**

(e) The association shall have the notice of default and intention to foreclose served on the owner and delivered to the following:

(1) ~~The unit owner;~~

(~~2~~) Any prior or junior creditors who have a recorded lien on the unit before the recordation of the notice of default and intention to foreclose under section 667-C;

(~~3~~2) The state director of taxation;

(43) The director of finance of the county where the unit is located; and

(~~5~~4) Any other person entitled to receive notice under section 667-5.5.

- **(Page 24, lines 20-21; Page 25,lines 1-22; and Page 26, lines 1-19)**

(f) If the association is unable to serve the notice of default and intention to foreclose on the unit owner after having an authorized process server attempt on three separate occasions (not on the same day) to serve the notice of default and intent to foreclose on the owner at unit address, ~~or any other party listed in subsection (e) (2) to (5)~~ within sixty days, the association may:

(1) File a special proceeding in the circuit court of the circuit in which the unit is located, for permission to proceed with a nonjudicial foreclosure by serving the unit owner only by publication and posting at the unit address;

(2) Proceed with a nonjudicial foreclosure of the unit; provided that if the association proceeds without the permission of the court, the association shall not be entitled to obtain a deficiency judgment against the unit owner, and the unit owner shall have ~~one year~~six months from the date

the association records the deed in the nonjudicial foreclosure to redeem he unit by paying to the association all outstanding amounts that are owed including, but not limited to, all assessments, special assessments, late fees, late charges, interest, fines, penalties, attorneys' fees and costs, and any other amounts that may be chargeable to that unit; or

(3) Take control of the unit if the unit is unoccupied, after giving notice to the unit owner at the unit owner's last known address as shown on the records of the association or as determined by the association as part of its due diligence to serve notice to the owner. The association's authority to take control of the unit pursuant to this paragraph shall be exercised solely for the purpose of renting the unit to generate rental income to pay the unit owner's delinquency, and the association shall acquire no legal title to the unit. In addition, the association shall credit the net rental proceeds generated from the rental of the unit to the owner's delinquency. For purposes of this paragraph, "net rental proceeds" means the rental proceeds remaining each month after deducting:

(A) The unit's regular monthly assessments that come due while the association controls the unit pursuant to this subsection;

(B) Any rental agent commissions; and

(C) Expenses incurred by the association in maintaining the unit in rentable condition.

If the unit owner pays the full amount of the unit owner's delinquency (including, but not limited to, all assessments, special assessments, late fees, late charges, interest, fines, penalties, attorneys' fees and costs and any other amounts that may be chargeable to that unit) to the association, the association shall return control of the unit to the unit owner; provided that the full amount of the owner's delinquency shall be calculated by deducting the net rental proceeds, if any, from the owner's delinquency.

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair
Committee on Commerce and Consumer Protection

RE: BILL: H.B. No. 1875, H.D.2
DATE: March 14, 2012
TIME: 9:00 a.m.
PLACE: Conference Room 229

Dear Senators Baker and Taniguchi and Members of the Committee:

Thank you for the opportunity to present testimony on H.B. No. 1875, H.D.2. My comments are directed at the limitation on liens found in Part II, Section 2; Part III, Section 8; and Part III, Section 9.

The language that provides that a lien recorded by a planned community association or condominium association shall expire two years from the date of recordation is an unnecessary and extremely harmful provision to associations and consumers and I believe that it should be stricken. However, since it appears that this provision will remain, I urge you to revise the language to at least address the most serious concerns detailed below.

1. Planned Community Associations.

Problem: Planned community associations often record liens to perfect their liens and/or to preserve lien priority, but seldom rush to foreclosure because the amounts at stake are low and don't justify incurring the expense of foreclosure. It is not uncommon for large planned community associations to have low assessments. For example, the association for which I have the privilege of serving as President, the Palehua Community Association, has an annual assessment of $70. If my association is forced to proceed with foreclosure in time to complete the process before the expiration of two years, it will need to commence foreclosure proceedings before the debt is equal to $400. This means that we as an association will be forced to incur thousands of dollars in attorneys' fees and costs to foreclose on debts of a few hundred dollars or less or risk losing these liens.

Solution: Remove the two-year lien provision from Chapter 421J altogether. Whatever good it may do consumers in condominium projects, it will not do the same in planned community associations under Chapter 421J where debt accrues very slowly.

2. Exceptions to the Two Year Lien Language Are Needed.

Problem: I understand that the purpose of the two-year lien is to compel associations to act swiftly to collect assessments. However, it is not always necessary to foreclose to collect assessments.. There are many circumstances where a rush to judgment is not in the association's best interest. For example, if an owner is making payments under a payment plan or the association is collecting rent from the tenant of the delinquent owner, the association ought to be permitted to collect the outstanding balance in that fashion rather than be forced to foreclose. Additionally, many times foreclosure proceedings cannot be quickly completed. For example, an owner might die during the course of the proceedings, it may be difficult to obtain service, and/or the owner may deliberately cause delays. H.B. 1875 currently makes no exception if these problems arise. Furthermore, if an owner files for bankruptcy, the association will be barred by the automatic stay from recording any lien or from commencing a foreclosure proceeding. No exception is made for bankruptcies to the lien restrictions although other states have made such exceptions in their statutes.

Solution: Add a provision that states that: 1) the recorded lien won't expire if the association has taken affirmative action to enforce the lien or collect the sums due; 2) define enforcement to include entering into a payment plan with an owner, sending a notice of default and intention to foreclose or taking any other action under chapter 667, filing a legal action to foreclose the recorded lien or for a monetary judgment for amounts due, demanding payment of rent from the tenant of the delinquent owner, and/or taking action to terminate utilities or depriving an owner of the use of the common areas; and 3) if the owner of a unit subject to a recorded lien of the association files a petition for relief under the United States Bankruptcy Code, the period of time for the association to institute proceedings to enforce the recorded lien should be tolled until thirty (30) days after the automatic stay of proceedings under Section 362 of the Bankruptcy Code is lifted as to the association's lien. Other states expressly permit this tolling.

3. Two Years is Too Short.

Problem: The two year lien is too short. In financial times such as we are now encountering, many homeowners find themselves in a negative equity position. They are, however, trying to do the right thing by continuing to pay the mortgage. If our association is forced into a quick lien and foreclosure process, inevitably, with the negative equity situation, not all debts can be fully satisfied. As the community association that brought about the crisis, we must incur the legal expenses of the process but find ourselves in the last position when it comes to collections on the debt. Given a longer window for the economic times to recover, a positive result is much more likely. Please remember that for us, 6 years still equates to only $420 dollars. To compound that by adding hundreds if not thousands of dollars of legal expenses is like pouring gasoline onto a fire. I wish I could impress you with the number of times that I have heard from homeowners that they can pay the assessments but need a "forgiveness" of the legal fees. Unfortunately, that is not realistic because the attorneys have already been paid and it is blatantly unfair to other homeowners in the association to have to absorb these costs.

Solution: Increase the life of the lien to 6 years to coincide with the statute of limitations for the collection of debts.

It is my opinion that the language as it currently appears in the subject bill does not protect the Community Associations but rather places a burden on them which is harmful to both the associations and to consumers. Please bear in mind that any proposed solution to a problem should not create a newer and more onerous problem.

Thank you for your consideration of my testimony regarding problems with and suggested solutions to provisions currently found in H.B. No. 1875, H.D. 2. I would note that the House Committee did allow associations to renew the "recorded" lien. As a minimum, this should be incorporated into the existing bill if the House insists upon continuing with this legislation.

Sincerely,

Lyndon D. Williams

President, Palehua Community Association

Villages of Kapolei Association

March 13, 2012

Honorable Rosalyn Baker
Chair: Committee Commerce and Consumer Protection

Re: HB1875 Relating to Foreclosures
March 14, 2012
9:00a.m.
Conference Room 229, State Capitol

Chair Baker, Vice Chair Taniguchi and Members:

Thank you for allowing me the opportunity to testify in opposition portions to HB 1875, HD 2. My comments are directed at the limitation on liens found in Part II, Section 2. My name is Warren Wegesend. I have been a Certified Property Manager (CPM) for over 40 years. I have managed everything from condominiums, commercial property, Public Housing to planned community associations. I am currently the General Manager of the Villages of Kapolei Association, a Planned Community Association on the Ewa plains.

The language that provides that a lien recorded by a planned community association shall expire two years from the date of recordation is an extremely harmful provision to associations and consumers and must be stricken for a number of reasons, including, without limitation:

1. The two year limitation on liens will require associations to immediately proceed with foreclosure upon recording a lien to ensure that the foreclosure process can be completed in two years. This means that the two year language will result in more foreclosures than ever. Planned community associations often record liens to perfect their liens and/or to preserve lien priority, but seldom rush to foreclosure because the amounts at stake are low and don't justify incurring the expense of foreclosure. It is not uncommon for large planned community associations to have low assessments. For example, the Villages of Kapolei Association's annual assessment is $420. I know of at least several others whose yearly assessments are in the low $400 range and in one case the annual assessment is only $70. If these associations are forced to proceed with foreclosure in time to complete the process before the expiration of two years, they will need to commence foreclosure proceedings before the debt is equal to $400. This means that many associations will be forced to incur thousands of dollars in attorneys' fees and costs to foreclose on debts of a few hundred dollars or less or risk losing their liens. I understand that the Office of Consumer Protection would have you believe that if we don't want to file liens that we could go to small claims or district court. While we sometimes obtain district court judgments, it makes no sense to take away our lien and force us to incur the expense of filing a legal action in two years. Furthermore, replacing a judgment with a lien is not in the best interest of the Association. We would lose our lien priority. (We fear that we will lose not only our recorded lien but our automatic lien. If that is not the case, at the very least the bill must be clarified to state that the expiration of the recorded lien will not affect the automatic lien). Additionally, filing a small claims or district court action would cost more in attorneys' fees. The association is a nonprofit

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E-Mail: association@villagesofkapolei.com

corporation, not a natural person, and therefore must be represented in court by attorneys. Even if the small claims court would allow a planned community association to appear via its directors or general manager, there would be a risk of personal liability to the directors or general manager if they undertake the duty to represent the association in a legal action and lose. As such, attorneys will most likely be hired regardless of the court selected. A legal action can be as expensive as a nonjudicial foreclosure action so this alternative offers no meaningful relief. The proponents of the two-year lien provision simply do not understand the practicalities of assessment collections by planned community associations.

2. As drafted, the lien will expire in two years unless renewed prior to expiration. This means additional fees will be incurred which only add to the debt owed by the unit owner. It is not always necessary to foreclose to collect assessments. For example, if an owner is making payments under a payment plan or the association is collecting rent from the tenant of the delinquent owner, the association ought to be permitted to collect the outstanding balance in that fashion rather than be forced to foreclose or to incur additional expenses to renew a lien.

3. We understand that the purpose of this bill is to force associations to take action to quickly foreclose on their members. Apparently, the proponents of the bill are under the misconception that large debt is building up in community associations and boards are not taking action to collect assessments. This concept is false. First, we don't have a huge delinquency problem, so the concept that those members who do pay on time are being force to carry a heavy financial burden created by a delinquency problem is false. Second, we are diligent about taking action to collect assessments. However, it is not necessary to immediately foreclose on every owner who falls behind in the payment of assessments. Many times we are able to work with the owners to resolve their delinquency without the need to turn the matter over to our attorneys to foreclose. It is disturbing that a law is being proposed that will force associations that wish to preserve their liens to foreclose on owners even when owners are making payments trying to catch up on their delinquencies. It is difficult to understand how anyone can view the two-year lien provision as a "consumer friendly" statute.

4. The persons who will benefit from the two-year limitation on liens are the: a) attorneys representing associations in their collection matters as the demand for their services will increase due to the urgency to record liens and proceed with foreclosure; or to have to renew a lien and b) delinquent owners who are able to stall the foreclosure process past two years, thereby preventing the association from foreclosing upon their units.

5. The persons who will be damaged by the two-year limitation on liens are the vast majority of association members who faithfully pay their maintenance fees and whose maintenance fees will increase to cover the additional collection costs that cannot be recovered from bankrupt or judgment-proof delinquent owners.

The two year limitation on liens will be extremely prejudicial to planned community associations and their members. It is an anti-consumer provision. For the reasons stated above, I strongly urge you to strike this language from HB1875 HD2 as it relates to planned community associations.

Sincerely,

Warren F. Wegesend, Jr.

Warren F. Wegesend, Jr., CPM
General Manager

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Harry Messenheimer
Organization: Bayshore Towers Association of Apartment Owners
E-mail: hmessenheimer@earthlink.net
Submitted on: 3/12/2012

Comments:
Please be careful that you do interfere with our ability to foreclose a lien. We agree with the detailed testimony of Anderson Lahne and Fujisaki, LLP.

Harry Messenheimer, President of the board of directors, Bayshore Towers, Hilo

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: Yes
Submitted by: Eric M. Matsumoto
Organization: Mililani Town Association (MTA)
E-mail: gomem67@hotmail.com
Submitted on: 3/13/2012

Comments:
While there are other provisions that need to be revised, we strongly oppose this bill as written based on the significant cost driving provisions for PCAs as follows:

1. The two year lien expiration for MTA will result in increasing the foreclosure rate from approximately 1.5% to approximately 10% based on the approximately 100 foreclosures currently in-process and aproximately 1200 delinquencies. This results in an increased cost of approximately $480,000.00, as a minimum, based on 1200 x $400 (cost per lien filing only). the total cost to implement the 2 year lien expiration would realistically be much higher moving to foreclosure. Further, for MTA, the provision would require us to place a lien on $102 (dues collected on a quarterly basis) or $204 for 6 months of delinquency. This means we spend $400 minimum just to get to the lien phase in order to collect $204 of dues. I would guess a similar scenario would be expected in other PCAs. Is this what is intended for homeowner associations to do as as a reasonable course of action by its directors? I would hope not. The question then is why push this agenda; just to have PCAs cast in the same mold as AOAOs for uniformity? As such, the lien expiration should be removed. Alternatively, increase the lien expiration to 5 years where it would make a lot more sense. And if another alternative is needed, remove PCAs from the measure to allow more time to develop reasonable, germane provisions that would be viewed as a win-win for those involved in foreclosure actions in PCAs.

And by the way, if we entered into a payment plan with a delinquent homeowner and the homeowner later defaults on the payment plan, with the 2 year lien expiration we could conceivably have much less than the 2 years to complete the foreclosure, and MTA and all their homeowneers would lose, not only the dollars accured by the non-payment, but more importantly the ability to refile the lien when the 2 yer limit is reached. This gives added credence to the options cited above.

2. The second cost driver issue is the provision that precludes PCAs from foreclosing for fines, penalties, legal fees and late fees on Page 4, Lines 18 - 20, PART II, SECTION 2 421j-A(a). We are currently experiencing cases where delinquent homeowners are paying the assessments but are not paying the late fees and legal fees. This provision permits avoidance of these kinds of costs accured as a reslut of their actions that would incur significant losses to PCAs if allowed to stand. Accordingly, we ask this provision be removed Or the language revised to accomodate the scenario as described to allow foreclosure actions to proceed.

The two cited cost driving issues result in a bill that is effectively anti-consumer for PCAs and their homeowners, and should be held or revised to preclude creating untintended financial burdens.

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Randall Weikert
Organization: Individual
E-mail: orion77@hawaiiantel.net
Submitted on: 3/13/2012

Comments:

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Susan Doles
Organization: Individual
E-mail: subodo@kahala.net
Submitted on: 3/13/2012

Comments:
I agree with testimony being submitted by Anderson, Lahne and Fujisaki LLP.

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Michael Bolton
Organization: Individual
E-mail: bolton4004@shaw.ca
Submitted on: 3/13/2012

Comments:
This bill will increase my cost of ownership and privilege a defaulting debtor at the expense of others.....unfair and unjust....

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: RAYMOND TREMBLAY
Organization: Individual
E-mail: Rayhonolulu@yahoo.com
Submitted on: 3/12/2012

Comments:
Sen. Baker, I oppose HD 1875. As an owner/ member of a large condo association I feel that the 2 yrs limit should be extended to at least 3 years if not more.
In my condo association, one owner was $50k behind in maintenance. With her knowledge of real estate laws/regulations, bankruptcy procedures, etc it took the association 5 years to collect. Failure to collect on these funds would have been totally unfair to the other owners.
I read the papers by Andersen,Lahne and Fujisaki, LLC and am in full agreement with their positions re: Part 11, Sec 2 and Part 111, Sec 8 & 9

Thank you for allowing me to comment.

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Sheila Schiel
Organization: Individual
E-mail: sheishells@yahoo.com
Submitted on: 3/12/2012

Comments:
The language that provides that a lien recorded by a planned community association or condominium association shall expire two years from the date of recordation is an unnecessary and extremely harmful provision to associations and consumers and I believe that it should be stricken. However, if the legislators believe that this provision should remain, please consider revising the language to at least address the most serious concerns:

1. At the very least, a provision should be added making it clear that the automatic lien will not be affected by the expiration of the recorded lien. There should be no basis for objection from the task force to adding a provision of this nature because the task force proponents of the two-year lien provision affirmatively assert that the expiration of the "recorded" lien will not affect the automatic lien.
2. Remove the two-year lien provision from Chapter 421J altogether. Whatever good it may do consumers in condominium projects (which is sketchy, to say the least), it will not do the same in planned community associations under Chapter 421J where debt accrues very slowly.
3. Add a provision that states that: 1) the recorded lien won't expire if the association has taken affirmative action to enforce the lien or collect the sums due; 2) define enforcement to include entering into a payment plan with an owner, sending a notice of default and intention to foreclose or taking any other action under chapter 667, filing a legal action to foreclose the recorded lien or for a monetary judgment for amounts due, demanding payment of rent from the tenant of the delinquent owner, and/or taking action to terminate utilities or depriving an owner of the use of the common areas; and 3) if the owner of a unit subject to a recorded lien of the association files a petition for relief under the United States Bankruptcy Code, the period of time for the association to institute proceedings to enforce the recorded lien should be tolled until thirty (30) days after the automatic stay of proceedings under Section 362 of the Bankruptcy Code is lifted as to the association's lien. Other states expressly permit this tolling.
4. Increase the life of the lien to 6 years to coincide with the statute of limitations for the collection of debts. At the very least, the life of the lien should be no less than 3 years.

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Penny McLeod
Organization: Individual
E-mail: Pennyraemc@gmail.com
Submitted on: 3/12/2012

Comments:

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Ann Collins
Organization: AOAO Harbor Square
E-mail: acollins@lava.net
Submitted on: 3/12/2012

Comments:

Testimony for CPN 3/14/2012 9:00:00 AM HB1875

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Joan Leonard
Organization: Individual
E-mail: leonardbio@aol.com
Submitted on: 3/12/2012

Comments: