THE SENATE
HOUSE OF REPRESENTATIVES
THE TWENTY-SIXTH LEGISLATURE
REGULAR SESSION OF 2012

COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair

COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Rep. Robert N. Herkes, Chair
Rep. Ryan I. Yamane, Vice Chair

NOTICE OF INFORMATIONAL BRIEFING

DATE: Thursday, January 19, 2012
TIME: 9:00am
PLACE: Conference Room 325
State Capitol
415 South Beretania Street

A G E N D A

The purpose of the information briefing is to receive the 2012 report of the Mortgage Foreclosure Task Force and to discuss the methodology, findings and recommendations from the Mortgage Foreclosure Task Force. Legislation recommended by the Mortgage Foreclosure Task Force will be discussed in noticed hearings after the 26th Legislature Convenes. The report of the Mortgage Foreclosure Task Force may be reviewed at http://lrbhawaii.info/reports/legrpts/2012/mort.pdf

Presentations

- Everett Kaneshige – Task Force Chair, Deputy Director, Department of Commerce and Consumer Affairs
- Marvin Dang – Task Force Vice Chair: Difference between the 2010 and 2011 proposed legislation
- Steven Guttman & George Zweibel – Task Force Act 48 Working Group: Recommendations to amend Act 48 including Unfair and Deceptive Acts or Practices
- John Morris & Bruce Kim- Task Force Condominium/Homeowner Association Working Group: Recommendations to address non-judicial foreclosure procedures for associations
- Jeff Gilbreath & Ryker Wada – Task Force Dispute Resolution and Counseling Working Group: Recommendations to address counseling issues, loan modification criteria and dispute resolution program

If you require auxiliary aids or services to participate in the public hearing process (i.e. ASL or foreign language interpreter, or wheelchair accessibility), please contact the committee clerk at least 24 hours prior to the hearing so that arrangements can be made.

FOR FURTHER INFORMATION, PLEASE CALL THE COMMITTEE CLERK AT 586-6070.

_____
Rep. Robert N. Herkes
Chair

_____
Senator Rosalyn H. Baker
Chair

NEIL ABERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

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DIRECTOR

EVERETT S. KANESHIGE
DEPUTY DIRECTOR

TO THE SENATE COMMITTEE ON COMMERCE
AND CONSUMER PROTECTION
AND
THE HOUSE COMMITTEE ON CONSUMER
PROTECTION AND COMMERCE

TWENTY-SIXTH LEGISLATURE
Regular Session of 2012

Thursday, January 19, 2012
9:00 a.m.

# TESTIMONY OF THE MORTGAGE FORECLOSURE TASK FORCE FINAL REPORT

TO THE HONORABLE ROSALYN BAKER AND ROBERT HERKES, CHAIRS, AND MEMBERS OF THEIR COMMITTEES:

The Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to testify on the recommendations in the Final Report of the Mortgage Foreclosure Task Force ("MFTF"). My name is Everett Kaneshige, Deputy Director of DCCA, testifying in my capacity as Chairperson of the MFTF. As MFTF Chairperson, I support the recommendations of the MFTF and recommend they be implemented, unamended.

After the Regular Session of 2011, there were significant changes in the membership and leadership of the MFTF and, in light of the major changes made by Act

48, SLH 2011, the necessity of doing a "comprehensive evaluation of Hawaii's mortgage foreclosure laws" as found by the Legislature in Act 162, SLH 2010 was all the more relevant. The methodology for review and discussion of HRS Chapter 667, associated mortgage servicer statutes in HRS Chapter 454M, and related association lien foreclosure statutes in HRS Chapters 421J and 514B was revised to provide for maximum discussion, while facilitating the Legislative Reference Bureau's ("LRB") task of compiling the proposed amendments into bill format, and allowing the MFTF members to view each proposed amendment within the context of HRS Chapter 667, generally, before having to take a position for or against the proposed amendments. This methodology was followed in order to obtain consensus and compromise between the disparate interests of the stakeholders groups represented on the MFTF.

As in 2010, the MFTF assigned members to investigative groups (in compliance with Hawaii's Sunshine Law, the total number of MFTF members in each investigative group did not exceed a quorum of the MFTF) to discuss in detail the issues relating to the following topics: Act 48, SLH 2011 (Group #1), Condominiums and Association Lien Foreclosures (Group #2), and Dispute Resolution (Group #3). Stakeholders who were not MFTF members also participated and lent their expertise to the discussions in the investigative groups. The investigative groups identified issues related to their discussion topic, developed an internal consensus as to the proper way to address the issues, then the proposed amendments were presented to the MFTF as a whole for preliminary review and inclusion in the LRB draft bill subject to a final vote for inclusion as a recommendation by the MFTF.

The findings and final recommendations of the MFTF focus on making the current provisions of Act 48 into a workable and fair procedure, addressing nonjudicial foreclosure by condominium and homeowner associations, revising the Mortgage Foreclosure Dispute Resolution Program to protect personal information and procedural issues, simplifying definitions and addressing inconsistencies in terminology. A key provision proposed by the MFTF would amend HRS §667-60 to balance protecting consumers' rights, while providing guidance for title insurers, lenders and their representatives, and avoiding penalizing them for circumstances outside of their control. This last issue was particularly important, as HRS §667-60 was widely cited by lender and title insurance stakeholders as a primary reason as to why the nonjudicial foreclosure process under Part II of HRS Chapter 667 has gone unused in the wake of Act 48, SLH 2011. This diversion of foreclosure cases to the judicial foreclosure track is evidenced in monthly statistics on judicial foreclosure filings presented by the Judiciary to the MFTF (included in the MFTF Final Report), and the emergence of a meaningful compromise on the issue is a major milestone for the MFTF and its members.

Thank you for this opportunity to testify on the Final Report of the MFTF, and the proposed legislation that emerged from that process. I will be happy to answer any questions that the Chairpersons or members of the Senate and House Committees may have.

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January 19, 2012

Sen. Rosalyn Baker, Chair,
Sen. Brian Taniguchi, Vice Chair
and members of the Senate Committee on Commerce & Consumer Protection
Rep. Robert Herkes, Chair,
Rep. Ryan Yamane, Vice Chair
and members of the House Committee on Consumer Protection & Commerce
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Informational Briefing on 2012 Report of the Mortgage Foreclosure Task Force**
**Briefing Date/Time: Thursday, January 19, 2012 at 9:00 a.m..**

I am Marvin Dang, the Vice Chair of the Hawaii Mortgage Foreclosure Task Force ("Task Force"). I represent the Hawaii Financial Services Association on the Task Force

Thank you for inviting various Task Force members to participate in today's briefing on the 2012 Report of the Task Force.

In my presentation, I will focus on the differences between the Task Force's proposed legislation to the 2011 legislature and the Task Force's proposed legislation to the 2012 legislature.

**A. Approach of the Task Force in its Report to the 2011 Legislature.**

The Task Force was created by Act 162 in 2010 to "undertake a study to develop both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in [Hawaii]." The Task Force was directed to submit reports of its findings and recommendations, including any proposed legislation, to the 2011 and 2012 legislatures.

Hawaii's foreclosure law is in Chapter 667 of the Hawaii Revised Statutes ("HRS"). That Chapter has 5 parts. Part I deals with judicial foreclosures and with the 1874 non-judicial foreclosure process. Part II is the alternate non-judicial foreclosure process created in 1998. Part III is called "Other Provisions". Part IV covers timeshare foreclosures. Part V is new. It contains the Mortgage Foreclosure Dispute Resolution program created by Act 48 of the 2011 legislative session.

In 2010, when the Task Force made its initial recommendations to the 2011 legislature, it focused on the Part I non-judicial foreclosure process, i.e. the 1874 law which has been amended over the years. The Task Force wanted to wait until its final report to the 2012 legislature before making recommendations about other parts of the foreclosure law, including the Part II alternate non-judicial foreclosure process.

**B. 2011 Legislature.**

The recommendations to the 2011 legislature were in a 20 page bill which was introduced during the 2011 session. Most of the recommendations were incorporated in Act 48 (2011 session), including:

1. Creating a limited option for an owner-occupant to convert a Part I non-judicial foreclosure to a judicial foreclosure. Act 48 expanded on this recommendation so that a Part II non-judicial foreclosure could also be converted to a judicial foreclosure. Act 48 repeals the conversion on December 31, 2012 (this wasn't a Task Force recommendation).

2. Prohibiting a deficiency judgment against an owner-occupant in a Part I non-judicial foreclosure.

3. Authorizing a foreclosing mortgagee (lender) to record with the Land Court or the Bureau of Conveyances a copy of a notice of intent to do a non-judicial foreclosure. The recorded notice will have the same effect as a notice of pendency of action (lis pendens).

Act 48 also contains provisions that weren't specifically considered by the Task Force in 2010 including:

1. Imposing a moratorium on using Part I non-judicial foreclosures (until July 1, 2012).

2. Creating a mortgage foreclosure dispute resolution process (until September 30, 2014). See HRS Secs. 667-71 through 667-86.

3. Requiring mortgage servicers to have a physical presence in Hawaii, i.e. an office and at least one agent or employee (beginning July 1, 2012). See HRS Sec. 454M-5.

4. Prohibiting in HRS Sec. 667-56 various foreclosure practices.

5. Making a violation by a foreclosing mortgagee of HRS Chapter 667 an unfair or deceptive act or practice under HRS Sec. 480-2. See HRS Sec. 667-60.

6. Increasing the maximum amount of a special assessment for unpaid common assessments that a condominium association may collect from a purchaser of a foreclosed property to $7,200 or 12 months of delinquency, up from $3,600 or 6 months of delinquency (until September 30, 2014). See HRS Secs. 514A-90 and 514B-146.

7. Establishing locations for public sales (auctions) for Part I and Part II non-judicial foreclosures, including at the Capitol for foreclosures on Oahu and at State buildings for neighbor island

foreclosures.

**C. <u>Approach of the Task Force in its Report to the 2012 Legislature.</u>**

In the process of making recommendations to the 2012 Legislature, the Task Force and its 3 investigative groups met from August through December, 2011. Public input was welcomed. The Task Force dealt with all the items it was required to address by Act 162 (which created the Task Force in 2010). The Task Force also considered the changes that were made to the foreclosure law by Act 48 (2011).

The recommendations in the Report to the 2012 legislature, including the 140 page draft bill, encompass proposals involving: Part I non-judicial foreclosures, Part II (alternate non-judicial foreclosures), Part III (other provisions, including HRS Section 667-60 dealing with unfair or deceptive acts or practices), and Part V (mortgage foreclosure dispute resolution process). There are changes to other laws including HRS Chapter 421J (planned community associations) and HRS Chapter 454M (mortgage servicers). Finally, the proposed bill creates a new section in HRS Chapter 667 for foreclosures by condominium associations and planned community associations.

The Task Force did not propose any changes to judicial foreclosures (Part I) nor to timeshare foreclosures (Part IV).

The Report to the 2012 legislature has what are styled as "minority reports". This is different from the Report to the 2011 legislature which didn't have minority reports. The six minority reports are on pages 277 through 282 of the 2012 Report. All six minority reports address the Task Force's recommendation on HRS Sec. 667-60 relating to unfair or deceptive acts or practices ("UDAP"). Three minority reports support the UDAP recommendation (Hawaiian Community Assets, Lorrin Hirano, and George Zweibel). The three minority reports opposing the UDAP recommendation were from lender organizations on the Task Force (the Hawaii Financial Services Association, the Hawaii Bankers Association, and the Hawaii Credit Union League).

Two specific issues which the Task Force discussed but did <u>not</u> make a recommendation on are described in the minority report of the Hawaii Financial Services Association on page 278 of the Task Force's Report. These are:

1. The Task Force split evenly on (and accordingly did not adopt) my motion to recommend to the legislature that "mortgagees [lenders] be allowed to continue to have the option to initiate non-judicial foreclosure actions under HRS §667-5 of Part I of HRS Chapter 667 when the moratorium in Act 48 (Section 40) ends on July 1, 2012." On the other hand, there was no recommendation by the Task Force to repeal non-judicial foreclosures under Part I.

2. Some newspapers of daily circulation in Hawaii have recently increased the cost to publish

notices of judicial and non-judicial foreclosure auctions. These notices need to be published three times before the auction. On the neighbor islands, the total cost for three notices is under a thousand dollars. On Oahu the cost for the three notices is much higher, especially for non-judicial foreclosure notices which tend to be more wordy. At a Task Force meeting in November, 2011, there was a suggestion that the Legislature should consider statutory alternatives, such as allowing these notices to be posted on a centralized internet website maintained by the state executive branch. However, that suggestion was not formally voted on by the Task Force.

Thank you again for inviting the Task Force members to participate in today's briefing.

I'll be happy to answer any questions you might have.

Marvin S. C. Dang

MARVIN S.C. DANG

(MSCD/tf)

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**Senate Committee on Commerce and Consumer Protection**
**House Committee on Consumer Protection & Commerce**

**Informational Briefing: Thursday, January 19, 2012**
**9:00 a.m.**

**Chairs Baker and Herkes, Vice Chairs Taniguchi and Yamane, and Committee Members:**

My name is George Zweibel. I am a Hawaii Island attorney and have represented mortgage borrowers living on Oahu, Hawaii, Kauai and Maui for many years. 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 since its inception in 2010, although the views I express here are my own and not necessarily those of the Task Force.

In general, I support the recommendations in the Task Force's 2012 report, which essentially fine tune existing law as amended by Act 48. However, some additional revisions would be highly beneficial, while other suggested changes would not. Accordingly, I respectfully submit for your consideration the following recommendations:

## Recommendations

(1) Adopt Task Force revisions regarding foreclosing mortgagee liability.

(2) Retain use of FDIC loan modification guidelines in foreclosure dispute resolution.

(3) Repeal sunset of foreclosure dispute resolution program.

(4) Eliminate requirement that borrower choose between dispute resolution and conversion.

(5) Retain mortgagee liability for oral misrepresentations.

(6) Retain prohibition against completing foreclosure while a loan modification is being considered or after one is approved.

(7) Eliminate former Part 1 of Chapter 667.

**1. <u>Foreclosing mortgagee liability</u>**. By declaring that a chapter 667 violation constitutes an unfair or deceptive act or practice ("UDAP") under §480-2, §667-60 deters violations and at the same time provides remedies if they do 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 state that §667-60 may result in the imposition of disproportionate penalties for "miniscule" violations of chapter 667. In response, the Task Force is recommending various "safe harbors," *e.g.*, providing a public information notice for complying with §667-41 and clarifying where foreclosure notices must be published. The Task Force also recommends limiting the applicability of §667-60 to 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 these 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, approved by 13 of the 17 voting members, reflects substantial compromise and strikes a fair and reasonable balance between lenders' stated concerns regarding liability for minor violations on the one hand, and the need to protect borrowers from real harm caused by serious chapter 667 violations on the other.

**2. <u>Use of FDIC loan modification guidelines in foreclosure dispute resolution</u>**. 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 recognized 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.

**3. <u>Sunset of dispute resolution program</u>**. 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, claiming they face undue risk of 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 nonjudicial foreclosure is possible, the dispute resolution program will benefit homeowners and loan holders alike for as long as it operates. For these reasons, the sunset provision in Act 48 should be repealed.

**4. <u>Requiring borrowers to choose dispute resolution or conversion</u>.** Foreclosure dispute resolution and converting a nonjudicial foreclosure to a judicial foreclosure are 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 and forum for determining whether foreclosure can be avoided by reaching a mutually beneficial agreement, *e.g.*, by modifying loan terms. Alternative dispute resolution should be encouraged, but not at the cost of losing the conversion right if an agreement cannot be reached.

**5. <u>Oral misrepresentations</u>**. Lenders wish to amend §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 made *orally* and not put into writing, so they can later be denied. 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 defraud homeowners.

**6. <u>Foreclosing during consideration or after approval of loan modification</u>**. Some lenders wish to repeal §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 harm they cause.

**7. <u>Elimination of former Part 1</u>.** When the moratorium on using former Part 1 of chapter 667 expires, Hawaii will again have two different nonjudicial foreclosure laws. With the changes made by Act 48 and the current Task Force revisions, former Part 2 will reflect the best efforts of all to craft a fair and effective nonjudicial foreclosure law. There is no reason for Part 1 to continue to apply to owner-occupant foreclosures and it should be repealed. Alternatively, Part 1 could be made applicable to other types of loans, but this would require a detailed review of amended Part 2 to determine which provisions should be incorporated into Part 1.

Thank you for your consideration of my testimony.

COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair

COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Rep. Robert N. Herkes, Chair
Rep. Ryan I. Yamane, Vice Chair

INFORMATIONAL BRIEFING

DATE: Thursday, January 19, 2012
TIME: 9:00 a.m.
PLACE: Conference Room 325
State Capitol
415 South Beretania Street

Dear Chairs Baker and Herkes:

My name is John Morris and, together with Bruce Kim, I am presenting background on the work performed by the Mortgage Foreclosure Task Force's Condominium/Homeowner Association Working Group. The group particularly focused on recommendations to address non-judicial foreclosure procedures for associations. The other major focus of the group was to try to put homeowner associations organized under the nonprofit corporations law (chapter 414D, HRS) and chapter 421J, HRS, on an equal footing with condominium associations with respect to collecting delinquencies.

[Note: The Condominium/Homeowner Association Working Group concluded that it was better to have a separate section for association nonjudicial foreclosures in chapter 667, instead of separate foreclosure sections in 421J, and both condominium laws, 514A and 514B.]

I first began conducting judicial foreclosures for lenders in 1985. After serving as the State's first condominium specialist with the Hawaii Real Estate Commission from 1988 to 1991, I went back to private practice and began conducting judicial foreclosures for condominium and other homeowner associations as the financial downturn of the early 1990s began.

In 1999, after the legislature passed Act 236, specifically authorizing nonjudicial foreclosures by condominium associations, I began conducting nonjudicial foreclosures on behalf of condominium associations. Thereafter, I left judicial foreclosures behind because, in most cases, they provide very little benefit to a condominium association. (The first nonjudicial foreclosure I conducted for a condominium association in September or October of 1999 resulted in the association buying the unit, renting it out for 6 to 7 months, and receiving over $12,000 in surplus sales proceeds when the lender finally foreclosed on the

unit and eliminated the association's interest. Unfortunately, I was rarely as successful with a nonjudicial foreclosure on behalf of a condominium association again.)

Nonjudicial foreclosures are important because condominium associations in a financial downturn have little chance of realizing any sales proceeds from the sale of a foreclosed condominium unit, because the unit is usually worth less than its mortgage. In almost all cases, the mortgage on the unit is ahead of the association's lien and the lender has first claim to any proceeds from the sale of the unit. As a result, there is usually no equity left in the unit to pay the association after the mortgage company has been paid.

For example, no one who understands the process will buy a condominium unit in an association's foreclosure if the unit has a mortgage of $400,000 but is worth only $300,000. In that situation, since the association's claim is usually behind the mortgage company's claim, a judicial foreclosure provides little benefit to an association. There is little point in an association spending $8,000 -$10,000 and 12 months or more to conduct a judicial foreclosure when it can spend $3,000 -$4,000 and 5 to 6 months to conduct a nonjudicial foreclosure with essentially the same result – buying a worthless unit for (typically) one dollar. Spending twice as much and taking twice as long to achieve the same result provides little benefit to an association.

In addition, since under Hawaii law the association's sale must typically be made subject to the prior mortgage, once the association purchases the unit, the best it can usually do is rent out the unit until the mortgage company decides to foreclose. A unit worth $300,000 subject to a mortgage of $400,000 is essentially impossible to sell. Therefore, while nonjudicial foreclosure is not the best possible remedy for homeowner associations, it is far better than judicial foreclosure in most cases.

Thus, Act 48 (SLH 2011) had an adverse impact on homeowner associations by severely curtailing the use of one of their most effective remedies for nonpayment of maintenance fees and association dues – nonjudicial foreclosure. In attempting to control nonjudicial foreclosures by lenders, Act 48 essentially had the same effect on nonjudicial foreclosures by associations (since condominium associations have traditionally used the same foreclosure statute as lenders, part I of chapter 667).

In addition, non-condominium homeowner associations operating under chapter 421J – who had traditionally used part I of chapter 667 to conduct nonjudicial foreclosures – were frozen out of the nonjudicial foreclosure process entirely by the wording of part II of chapter 667.

1) Nonjudicial Foreclosures By Associations

As noted above, the members of the Task Force Condominium/Homeowner Association Working Group adopted changes to try to reverse both problems. The main part of the legislation proposed by the group is a new part in chapter 667 to facilitate nonjudicial

foreclosures by condominium and other types of homeowner associations (see Section 3, pages 19 - 43 of the proposed MFTF bill). The starting point for the group's proposal was part II of chapter 667, approved by the Legislature last year, but adapted in this case for condominium and other homeowner associations.

As a result, the references to notes, mortgages, lenders, mortgagees, and mortgage from part II of chapter 667 have been mostly eliminated. Nevertheless, most of the same part II procedures continue on in the Condominium/Homeowner Association Working Group's proposed nonjudicial foreclosure law for homeowner associations.

One major change, however, is the incorporation of Section 667-T (now 667-21.6) from act 48. (That section requires homeowner associations to give an owner 60 days to propose a payment plan.) Since the notice of intention to foreclose under part II requires a homeowner association to give the owner 60 days to respond anyway, there seemed to be no reason to have two 60-day periods run consecutively. Therefore, the Condominium/Homeowner Association Working Group decided it would be more efficient to fold: (i) the 60 days for the payment plan under section 667-T, into (ii) the 60 days for the notice of intention to foreclose. As a result, section 667-T from act 48 was eliminated and incorporated into the group's nonjudicial foreclosure law for homeowner associations (as subsection (c) on page 23 of the MFTF proposed bill).

In summary, this part of the work by the Condominium/Homeowner Association Working Group begins with the process approved by the Legislature for nonjudicial foreclosures last year (part II of chapter 667) and adapts it for use by condominium and other types of homeowner associations.

2) Changes For Chapter 421J Associations

The second major focus of the Condominium/Homeowner Association Working Group was to provide associations organized under chapter 421J with many of the same protections and procedures provided to condominium associations for collecting delinquencies. Essentially, section 514B-146 from the condominium law was revised to be more appropriate to chapter 421J. (See Section 667-A in Section 2 of the MFTF bill.) As a result, this change: (i) adapts the general language relating to a lien for condominium associations to associations organized under chapter 421J, and (ii) follows the same language as chapter 514B in establishing a statutory lien for chapter 421J associations.

The last part of the section also includes the "Act 39 (SLH 2000)" six months of maintenance fees or $3,600 lien language found in section 514B-146. Since last year, as part of act 48, the Legislature extended that lien right to 12 months and $7,200, that increase was included as part of the changes made to this section by the Condominium/Homeowner association Working Group.

[Note: many chapter 421J associations are comprised of single-family homes and have relatively small monthly dues, so nonpayment by a few homeowners has less of an impact on them than on the typical condominium association. Nevertheless, some chapter 421J associations are organized as townhome-style projects, just like condominium associations. Therefore, any delinquency there can have just as severe an impact on those types of chapter 421J associations as on any condominium association.]

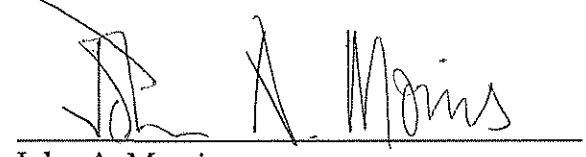
Finally, the Condominium/Homeowner Association Working Group also added language to allow a chapter 421J association to terminate utilities and common services in an appropriate case (see Section 667-A). The group also included the language found in the condominium statute that requires a purchaser at a foreclosure sale to become liable for maintenance fees after a certain date, even if the purchaser does not record the deed for the unit (see Section 667-A). This language, which has been in the condominium law since 1999, prevents a purchaser from buying the property at foreclosure and then sitting on the deed, to avoid paying maintenance fees, until a new purchaser can be found.

3) Exemptions For Chapter 421J

In what really amounts to a housekeeping measure, the Condominium/Homeowner Association Working Group made amendments that are intended to specifically exempt associations organized under chapter 421J from: (i) the requirements of the mortgage dispute resolution program (see Section 31); and (ii) the process that allows an owner occupant to convert a nonjudicial foreclosure to a judicial foreclosure (see Section 25). While act 48 did exempt condominium associations from both processes, it inadvertently seemed to suggest that associations organized under chapter 421J could be subject to both sets of requirements.

Thank you for this opportunity to testify on behalf of the Condominium/Homeowner Association Working Group of the Mortgage Foreclosure Task Force.

Very truly yours,



John A. Morris

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January 18, 2012

**Joint Senate and House Committee on Mortgage Foreclosure Task Force**
**Thursday, January 19, 2012 at 9am**
**Conference Room 325**

Good morning Chairs Baker and Herkes, Vice Chairs Taniguchi and Yamane, and Representatives and Senators,

My name is Jeff Gilbreath, Executive Director of Hawaiian Community Assets, a HUD-approved housing counseling agency that provides free foreclosure prevention counseling services through our statewide offices. I am here to speak on behalf of the Housing Counseling and Dispute Resolution Program Working Group as its Chairperson.

First, I want to commend the State Legislature for its leadership in last legislative session in taking action to address the ongoing foreclosure crisis we face. At the time of the passing of Act 48, Center for Responsible Lending reports showed that our State had seen a 687% increase in foreclosure filings between the third quarter of 2006 and the first quarter of 2010 resulting in a loss of approximately $15 billion in home equity for our families – an average loss per home of $41,668. During our counseling work, we saw the impacts of a lending industry that never had to modify loans on such a widespread basis – submitted paperwork was being reported as lost or never received, families' mortgage payments were not being recorded, repayment plans would be agreed upon and changed when the family would receive the approval paperwork, and we struggled alongside families to simply make contact with lenders from the Continent. Foreclosures were so rampant at the time that most of us in this room knew someone within our family or circle of friends who was going through the painful process of foreclosure. Today, I am proud to say that because of your actions we have seen better responses from lenders and families now have the opportunity to sit face-to-face with their lender and a third party to determine alternatives to foreclosure. As a result of implementing a culturally-appropriate process for our families, on January 11, 2012 RealtyTrac reported that the number of foreclosures in Hawaii had dropped by 52% from this time last year. Still, I caution us to be too optimistic as reports by the Center for Responsible Lending project that our nation's homeowners will experience a second round of resets on adjustable-rate mortgages at the end of 2012 into 2013 which would no doubt throw many of our families who have lost their jobs and reduced income into foreclosure.

I also want to commend Chairperson Koneshige and Vice Chair Dang for their leadership in establishing a set of recommendations that reflect the various viewpoints of the task force members and provides all parties with a clear path to continue the work of addressing the foreclosure crisis in our State.

During the Housing Counseling and Dispute Resolution Working Group meetings, I facilitated discussion on 5 primary aspects of Act 48.

**1. Promote Housing Counseling to Address Foreclosure.** The National Foreclosure Mitigation Counseling (NFMC) Program has been the primary source of funding for all Hawaii HUD-approved housing counseling agencies as well as Consumer Credit Counseling Services of Hawaii. According to an independent evaluation of by the Urban Institute, homeowners who received counseling through the Program were 60% more likely to avoid losing their home to foreclosure than homeowners who do not seek counseling. NFMC Program clients were more likely to receive a loan modification, and on average, saved $454 more on their monthly mortgage payments per month, than homeowners who received modifications but did not work with a counselor. Simply put: housing counseling works. It is a tool for both lenders and borrowers to work out alternatives to foreclosure prior to entering into judicial or the nonjudicial process. However, due to budget disputes at the Federal level, the NFMC Program has been significantly cut, endangering the capacity of housing counseling agencies to continue with this crucial service to lenders and borrowers. As a result, the Housing Counseling and Dispute Resolution Program Working Group recommended that the Department of Commerce and Consumer Affairs have the authority to contract with housing counseling agencies to provide a fee-for-service payment if the said agencies could secure a loan workout prior to the lender and borrower having to enter into the Dispute Resolution Program; a win-win-win for all parties involved.

**2. Provide a Transparent Process for Mortgage Mediation.** We have all seen Federal programs that have been established to address our foreclosure crisis fail miserably because of a lack of process, transparency, and due to the fact that loan modifications had not been implemented on such a widespread basis by lenders prior to 2008. This was the reason behind the Federal Deposit Insurance Corporation's (FDIC) creation of the "Modification-in-a-Box" Program. The program was established as a "comprehensive package of information to give servicers and financial institutions all of the tools necessary to implement a systematic and streamlined approach to modifying loans." The FDIC program provides a tested, transparent process for determining the best workout options available to homeowners and lenders on mortgage loans. Its clear set of calculations, assumptions, and forms can be reviewed for accuracy by borrowers, lenders, and third-party neutrals, but also ensures quality control for delivery of the Dispute Resolution Program and lends additional oversight of the program without squeezing the capacity of the Department of Commerce and Consumer Affairs. While the Dispute Resolution Program prefers lenders utilize the FDIC Program during mandatory mediation, there is also flexibility for lenders to utilize another program or process agreed upon by all parties.

**3. Ensure Quality of Dispute Resolution Program.** Hawaii-based lender and borrower representatives were present on the Housing Counseling and Dispute Resolution Program

Working Group. Agreement among members was made to support language must in Section 667-85 that provides immunity to mediators of the Dispute Resolution Program in order to ensure highly-qualified neutrals participate in the program and provide the opportunity for it to function in the utmost effective and efficient manner for all parties involved. Without the language, our group members feared the number of highly-qualified neutrals who have already begun training to serve in this capacity would withdraw, leaving a vacuum filled by less qualified individuals and therefore compromising the efficiency and effectiveness of the Dispute Resolution Program sessions.

**4. Establish Clarity with Regards to Unfair or Deceptive Acts and Practices.** Section 667-60 was identified throughout our convening as a highly contentious issue; however, Members Hirono and Zweibel were able to draft a compromise that creates clear "rules of the road" for both lenders and borrowers that will allow for effective implementation of nonjudicial foreclosures in Hawaii through the Dispute Resolution Program and, more broadly, improve the way mortgage foreclosures are conducted in the State. The compromise upholds common sense consumer protections by addressing some of the most egregious violations, such as "robo-signing", committed by large, Continental United States lenders, while ensuring that typographical and other non-substantial errors are not cause for finding mortgage servicers, title insurance companies, or other entities in violation of unfair or deceptive acts or practices. The compromise, which is included in our Task Force draft bill, was supported by 13 members with 4 against and 1 abstention.

**5. Create a Culture of Financial Literacy in Hawaii.** During our Working Group meeting on September 28, 2011, members discussed the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education. Though a number of ideas were presented by working group members, agreement was established to reference the January 2010 Report submitted by the Hawaii State Task Force on Financial Education and Asset Building to the State Legislature which recommended the creation of "a position or entity at the State level that would act as a 'clearinghouse' of financial education programs and services across the state of Hawaii". The agreement was made in light of the current fiscal struggles of our State. At this time it does not seem feasible to establish and fund such an entity or administrator. However, if we are serious about ensuring that future generations do not repeat the same mistakes we have made, which contributed to the national foreclosure crisis we are currently experiencing, there is absolutely a need to create a culture of financial literacy in Hawaii. We should take the opportunity to promote financial literacy and long-term savings habits through community-based and public education, collaborative outreach, and public-private partnerships. As such, I recommend the State Legislature consider targeted, cost-effective approaches that will help us create a culture of financial literacy that will prepare our children and our children's children to address this, and future, economic and foreclosure crises. Such approaches are contained in the January 2010 Report submitted by the Hawaii State Asset Building and Financial Education Task Force to the State Legislature. They include the following:

1. Financial education could be made a priority within contracts administered by the State of Hawaii to encourage financial education among various populations. For example, current recipients of public assistance are not required to receive financial education in

Hawaii even though such education could help save tax payer money for said assistance programs.

2. The State should provide State and County employees financial education as part of their trainings and workshops.

3. Increase cash savings and/or non-cash asset limits to promote long-term savings among low-income families receiving public assistance.

Thank you for your time.

Sincerely

Jeff Gilbreath
Hawaiian Community Assets