

SB 652



NEIL AMBERCROMBIE
GOVERNOR

BRIAN SCHATZ
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
335 MERCHANT STREET, ROOM 310
P.O. Box 541
HONOLULU, HAWAII 96809
Phone Number: 586-2850
Fax Number: 586-2856
www.hawaii.gov/dcca

KEALI S. LOPEZ
DIRECTOR

EVERETT S. KANESHIGE
DEPUTY DIRECTOR

PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON WAYS AND MEANS

TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Thursday, February 24, 2011
9:00 a.m.

**WRITTEN COMMENTS ON SENATE BILL NO. 652, S.D. 1, RELATING TO
MORTGAGE FORECLOSURES.**

TO THE HONORABLE DAVID Y. IGE, CHAIR, AND MICHELLE KIDANI, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify in support of Senate Bill No. 652, S.D.1, Relating to Mortgage Foreclosures. My name is Stephen Levins, and I am the Executive Director of the Office of Consumer Protection ("OCP"), representing the Department.

Senate Bill No. 652, S.D. 1, seeks to implement the recommendations of the mortgage foreclosure task force established by Act 162, Session Laws of Hawaii 2010. The recommendations were provided to the Hawaii Legislature on December 28, 2010 through the Preliminary Report of the Mortgage Foreclosure Task Force. They contain

significant improvements to the current non-judicial foreclosure law in Hawaii. The proposal will provide for superior notice to homeowners of an impending foreclosure, offer them the ability to convert a non-judicial foreclosure to a judicial foreclosure, and allow them to escape a deficiency judgment in a non-judicial foreclosure. The measure also will help to bring certainty to title issues by authorizing the mortgagee to record a copy of the notice of intent to foreclose with the land court or the bureau of conveyances and will harmonize state law with a recent Hawaii Bankruptcy decision.

The task force represented a broad cross section of our community and as such was able to obtain the input of virtually all interested parties. The executive director of the Office of Consumer Protection served as the chairperson. This measure is the product of hundreds of hours of hard work by its members. Because of their strong commitment to improving the mortgage foreclosure laws in Hawaii, consensus was reached on these important proposals. Since the Department believes that each of them will further the interests of consumer protection in Hawaii, it strongly supports this measure.

Thank you for providing me with the opportunity to testify on Senate Bill No. 652, S.D. 1. I will be happy to answer any questions that the committee members may have.



The Judiciary, State of Hawaii

Testimony to the Senate Committee on Ways and Means

Senator David Y. Ige, Chair

Senator Michelle Kidani, Vice Chair

Thursday, February 24, 2011, 9:00 a.m.)

State Capitol, Conference Room 211

by

Rodney A. Maile

Administrative Director of the Courts

WRITTEN TESTIMONY ONLY

Bill No. and Title: Senate Bill No. 652, S.D. 1, Relating to Mortgage Foreclosures.

Purpose: Implements recommendations of the mortgage foreclosure task force relating to service of notice, conversion from nonjudicial to judicial foreclosure, the bar against deficiency judgments, notice of pendency of action, and extinguishment of the mortgagor's interest pursuant to the old nonjudicial foreclosure law. Requires a 21 day notice of foreclosure to insurers of the subject property. Requires public sale of property after a nonjudicial power of sale foreclosure to be held at the state building in the county seat of the county where the property is located or, for the city and county of Honolulu, at the state building designated by the Department of Accountings and General Services.

Judiciary's Position:

The Judiciary expresses no opinion about the intent or purpose of this bill. In order to effectively implement this measure, however, we respectfully request sufficient funding from the Legislature and time to ensure that any assistance we provide the public is meaningful.

Since the bill outlines the steps certain mortgagors can take to easily "convert" non-judicial foreclosures to judicial foreclosures and to stay the non-judicial foreclosure proceedings, we anticipate a rise in the number of court filings. It is our understanding that approximately 75% to 90% of foreclosures are currently proceeding non-judicially. *See, for example, attached*



Senate Bill No. 652, S.D. 1, Relating to Mortgage Foreclosures
Senate Committee on Ways and Means
Thursday, February 24, 2011
Page 2

Honolulu Star Bulletin article dated March 22, 2009 which was attached to the Preliminary Report of the Mortgage Foreclosure Task Force to the Legislature for the Regular Session of 2011 (indicating that non-judicial foreclosures account for at least 75% of foreclosure proceedings.)

Another recent report indicates that the total number of foreclosure cases for January through December 2010 in Hawai'i was 12,425.¹ See attached *Star Advertiser* article dated January 13, 2011 (citing statistics from Realty Trac). During this same period, there were approximately 1,331 judicial foreclosure filings state-wide. If the Realty Trac report includes both judicial and non-judicial foreclosures, approximately 11,094 cases or almost 90% of foreclosure cases proceeded non-judicially last year. The current measure allows certain owner-occupants of *residential* property to file a conversion complaint. The attached January 13, 2011 *Star Advertiser* article indicates that most of the foreclosures in 2010 were of residential property.

Even if we conservatively estimated that only half of the 11,094 non-judicial foreclosure cases would be converted to judicial foreclosure actions pursuant to this bill, adding approximately 6,000 new cases (500 new cases per month) would constitute a very significant increase the Judiciary's caseload. Because the current circuit court judges are already carrying maximum caseloads, the Judiciary would not be able to process 6,000 new cases per year at the circuit court level, without additional resources and staffing. Our conservative estimate to fund the cost of the additional judges and support staff to handle 6,000 new circuit court cases per year, is approximately \$4,300,000.

In addition, even if these funds were allocated this Legislative session, it will still take time for the Judiciary to hire staff for the new positions. Even with immediate attention, we estimate that the Judiciary will still require between nine (9) and twelve (12) months before the new judges and staff would be fully integrated into the judicial foreclosure process.²

¹ Since the January 13, 2011 *Star Advertiser* article indicates that the yearly figure of 14,224 may include some overlap, we are using the 12,425 estimate instead. Please note that these are preliminary estimates based on recently-gathered information.

² Another example of an operational change that the Judiciary may need to make is the possible creation of a case tracking system. The measure provides that the action must be dismissed if all interested parties fail to file a statement submitting themselves to the court process within 90 days of the filing of the conversion complaint. It is unclear whether the mortgagee would move for the dismissal or whether the court clerks would need to monitor these cases. Any delay in dismissal would further prolong the foreclosure process since the "filing of the complaint shall automatically stay the non-judicial foreclosure action unless and until the judicial proceeding has been dismissed." See *S.B. No. 652, S.D. 1, p. 6, lines 21 - p.7, line 2.*



Senate Bill No. 652, S.D. 1, Relating to Mortgage Foreclosures
Senate Committee on Ways and Means
Thursday, February 24, 2011
Page 3

Furthermore, this draft now requires the Judiciary to create a conversion “complaint” form and indicates that the bill will “take effect upon approval.” It may take some time to work on this form and to implement the necessary procedures so that the process will be effective.³

Finally, the proposed conversion complaint requires the mortgagor to become the “Plaintiff” and the mortgagee to become the “Defendant.” This can result in confusion, especially for those who are not represented by attorneys. Since traditionally, the “Plaintiff” bears the burden of proof, this measure may confuse a mortgagor in believing that he or she bears the burden of proof.

Thus, to avoid confusion, the Judiciary respectfully requests that (a) the “complaint” form be changed to a “Notice of Conversion”; and (b) a provision be added to require the notified lender to file a complaint, in accordance with the rules of court, no later than 30 days after having received the Notice of Conversion. The process can then follow the usual course for judicial foreclosures.

Thank you for the opportunity to testify on Senate Bill No. 652, S.D. 1.

³ We understand that some of the Mortgage Foreclosure Task Force members are currently working on such a form, which the Judiciary may need to assist in editing.

Island Homes

RENTALS

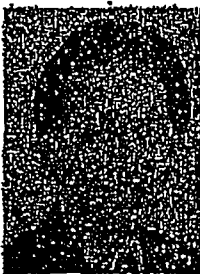
RENTALS

Open Homes

* starbulletin.com/classifieds

Facing The Challenges Of Today's Real Estate Marketplace

Facing Foreclosure



Marvin S. C. Dang
Attorney and
Managing Member
Law Offices of
Marvin S. C. Dang, LLC

Foreclosure is a financial disaster home owners hope they will never have to face. Not only does foreclosure mean the loss of their real property - probably their biggest personal investment - but their credit is severely damaged and chances of obtaining another mortgage loan substantially diminished.

Attorney Marvin Dang has handled foreclosures as an attorney for lenders for 30 years and as a commissioner for 28 years. He believes many foreclosures could be avoided if the home owner acknowledged potential problems before they reached crisis proportions, and contacted their lender to try to work out a solution.

He noted that there are many reasons why a borrower might be unable to continue making mortgage payments: loss of job, reduction in working hours and salary, huge medical bills, break-up of a marriage, an increase in the monthly mortgage payment, etc.

"Although there is no guarantee that a lender will make accommodations, chances are better that the lender will not start a foreclosure if the borrower contacts him with an explanation instead of simply halting payments," Dang said.

"Generally, lenders prefer to work out a 'win-win' solution rather than resort to foreclosure. The foreclosure process is costly and time consuming. It is a 'lose-lose' scenario. The only one who potentially benefits from a foreclosure is a buyer who manages to



pick up a foreclosed property at a bargain price at a foreclosure auction."

Dang explained that after one or two payments are missed, a lender will contact the borrower and mail out reminders to pay. If no mutual arrangement is made, a lender may refer the account to an attorney after three or four missed payments. But it could be sooner if the property is abandoned.

"Usually the first notification from the lender's attorney to the property owner is a letter confirming the default. This is sent out before the attorney begins the foreclosure proceeding. Once the borrower gets the attorney's letter, it still may be possible to work with the lender, so the property owner

should not ignore the letter," Dang said.

"If the borrower consults with a third party for assistance, it's also important to check the credentials of that person, as there are local and Mainland scam artists who have taken advantage of inexperienced Hawaii home owners with devastating results. It's best to talk with a Hawaii-based credit counseling service or a Hawaii real estate professional, rather than getting advice from the Internet. People can also meet with a bankruptcy attorney to decide what their best course may be."

Dang noted that in Hawaii there are two types of foreclosure actions, judicial and non-judicial. The judicial process is run through the court system. The lender files a complaint with the court regarding the delinquent loan and requests that the court allow the lender to foreclose on the mortgage on the real property. After the borrower is served with the complaint by a process server, the borrower needs to file a written answer with the court. If the borrower fails to respond, they will be in default as to the complaint.

The lender will ask the court to schedule a hearing to appoint a foreclosure commissioner to auction the property. At the hearing, the party being foreclosed on has an opportunity to tell the judge why a commissioner should not be appointed; for example, the property is in the process of being voluntarily sold and should close in a few months or the borrower is getting money to bring the loan current. If the judge is convinced that such a sale will close, or believes the loan can be reinstated he or she may be willing to delay the foreclosure proceeding for a short period.

If the property owner is able to pay off the loan or bring it current, the foreclosure can be dismissed.

"In a judicial foreclosure, the commissioner

Continued on Page 2

Facing Foreclosure

Continued from page 1

who is usually either an attorney or a real estate professional, is accountable to and acts on behalf of the court...not on behalf of the lender," Dang said. "It will be the responsibility of the commissioner to get access to the property to inspect it. Generally, during the foreclosure, the commissioner will not evict the home owner or the tenant of the property. But any tenant will now need to pay rent to the commissioner and not to the landlord."

"The commissioner will hold two open houses at the property, usually on Saturdays and Sundays, and place ads in newspapers, such as the Honolulu Star-Bulletin. The ads must run once each week for three consecutive weeks announcing the date and time of the open houses and the date, time, and place of the auction. The last ad needs to appear at least two weeks before the auction is to be held. In Honolulu, the foreclosure auctions are held Monday through Friday beginning at 12 noon at the Ewa Lanai at First Circuit Court at 777 Punchbowl Street, where notices of upcoming auctions are posted. There could be more

than one property being auctioned at the same time by more than one commissioner."

According to Dang, anyone planning to bid at the auction will be required to show the commissioner before the auction proof of having a deposit in the form of a cashier's check or money order or cash, since the highest bidder needs to give the commissioner ten percent of the bid price at the end of the auction. The rules of the auction are announced by the commissioner and there is usually no upset price.

"Often the lender jumps in and bids at the auction," Dang said. "These lenders could be local and Mainland banks, credit unions, and other parties who may have bought the loan being foreclosed. Before they bid, lenders would have researched the condition and value of the property being foreclosed. Other bidders should do the same. The lender is not always the highest bidder. Investors and potential home buyers sometimes outbid the lenders."

"The highest bidder needs to understand that the judicial foreclosure sale is sub-

ject to court approval. After the auction, the commissioner will file a report with the court. The lender's attorney will schedule a court hearing to approve the sale, at which time the judge will ask if anyone wants to reopen the bidding for five percent higher than the auction price. Whoever is the highest bidder either from the first public auction or at the reopening at the hearing, is generally approved by the court. The winning bidder has about 35 days to come up with the rest of the money to close the sale. Upon closing, the foreclosure commissioner will sign a deed to convey the property in 'as is' condition to the buyer. When the deed is recorded at Bureau of Conveyances, the title to the property is transferred."

Dang said that the second type of foreclosure in Hawaii, the non-judicial foreclosure, was rarely held until the late 1990s but now accounts for about 75 percent or more of foreclosure proceedings here.

"There are several basic differences between a non-judicial foreclosure and a judicial procedure," Dang pointed out. "A judicial foreclosure can take six to nine

months, whereas a non-judicial foreclosure takes two to three months since there are no court filings, no open houses, and no hearings. However, one similarity is that a newspaper ad announcing an auction will be required to run in a local newspaper once each week for three consecutive weeks, the last ad to appear at least two weeks prior to the auction. The notice of the non-judicial foreclosure sale needs to be mailed to the borrower and should be served by a process server. The notice must be posted on the property. No open houses are required to be held at the property, and there is no opportunity to inspect it in advance of the auction."

"For non-judicial foreclosures the auction and bidding procedures are similar to those of a judicial foreclosure. However, a non-judicial foreclosure auction is conducted by the lender's attorney or representative rather than a court appointed commissioner. At the conclusion of the non-judicial auction, the buyer pays the ten percent deposit. The rest of the sales price must be paid within thirty days

after the auction. Once the sales price is paid, the buyer will get a deed and becomes the owner of the property after the deed is recorded at the Bureau of Conveyances.

"For both judicial and non-judicial foreclosures, the new owner, that is, the successful bidder, is responsible for obtaining possession of the property. The new owner can keep the occupants there or can ask them to move out. In cases where occupants refuse to move, the new owner may need to go to

court to ask the judge to issue an order to evict them."

"The entire foreclosure process could possibly be avoided if the borrower simply phoned the lender before missing that first payment," Dang said. "And people who find themselves facing possible foreclosure should keep in mind that, even if the foreclosure is started, it can be delayed and the auction can be postponed if the borrower is able to work out an arrangement with the lender."

Star Advertiser

Foreclosure filings hit new high

Figures show 38 percent more Hawaii properties were affected last year compared with 2009

By Andrew Gomes
 POSTED: 01:30 a.m. HST, Jan 13, 2011

Lenders pursued or completed foreclosure against a record number of Hawaii properties last year.

There were 12,425 properties statewide affected by foreclosure last year, which was 38 percent more than the 9,002 properties in 2009 and more than triple the 3,525 properties in 2008, according to the latest report from RealtyTrac, a real estate data company.

NO PLACE LIKE HOME
 Hawaii's monthly foreclosure rates over the past year, including the year-over-year percentage gain:

2010 MONTH	TOTAL	CHANGE
December	1,000	-34.8%
November	877	+0.6%
October	1,271	+37.4%
September	1,617	+66.9%
August	1,629	+87.5%
July	930	-8.1%
June	1,000	+41.6%
May	1,055	+29.3%
April	1,474	+115.5%
March	1,097	+51.5%
February	972	+81.0%
January	1,302	+286.4%
Total	14,224	+42.9%

BY THE NUMBERS
 Five Hawaii communities with the most properties in foreclosure last year:

ZIP CODE	AREA	FORECLOSURES
96740	Kailua-Kona	1,244
96753	Kihei	905
96706	Ewa Beach	867
96761	Lahaina	646
96707	Kapolei	609

Source: RealtyTrac

Most of the properties were homes, though RealtyTrac doesn't exclude commercial real estate from its foreclosure data. If all the properties affected by foreclosure were homes, the total last year would represent 2.42 percent of all homes in the state, up from 1.8 percent the year before.

The growing number reflects the state's continuing struggle with economic recovery, and has strained families.

But so far foreclosures haven't reached epidemic proportions seen in states such as Nevada, Arizona and Florida.

"We've been relatively fortunate," said Jon Mann, a Honolulu real estate agent. "We haven't really been impacted as significantly as some mainland markets."

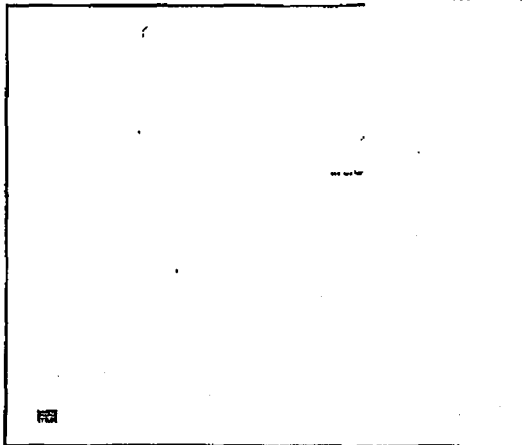
Hawaii's foreclosure level was close to the national average — 2.23 percent of housing affected by foreclosure last year — though Hawaii's rate was 11th highest.

The worst problem is in Nevada, where 9.42 percent of homes were affected by foreclosure last year. The lowest rate was 0.13 percent in Vermont.

In Hawaii, more than half the properties affected by foreclosure were on the neighbor islands, where many out-of-state investors bought vacation homes during the real estate boom in the mid-2000s.

On the Big Island, there were foreclosure filings against 3,370 properties last year, representing 4.23 percent of homes.

ADVERTISEMENT



Print Powered By FormatDynamics

Star Advertiser

MauI had 2,875 properties with foreclosure filings, or 4.05 percent of homes.

be counted on the same property in different months.

Kauai had 819 properties with foreclosure filings, or 2.75 percent of homes.

Oahu had the most properties affected by foreclosure but the lowest rate — 5,561 properties representing 1.65 percent of the housing market.

Real estate industry watchers caution that foreclosures could put downward pressure on housing prices if an overbearing number of foreclosed homes wind up on the market.

On Oahu, there were close to 3,200 single-family homes and condominiums on the market at the end of last year.

Mann said about 15 percent to 20 percent of the inventory was owned by lenders or homeowners trying to avoid foreclosure through short sales.

Whether the percentage will rise is hard to tell because not all homes that enter foreclosure are sold. Some owners work out their mortgage difficulties. In other cases, foreclosure can drag on for more than a year.

Mann notes that some additional inventory won't necessarily hurt the market because present inventory is relatively tight.

Hawaii's foreclosure problem is expected to worsen this year, according to local foreclosure attorneys.

There was a lull in the past two months, but the industry attributes that to lenders holding up cases to address improper processing issues raised a few months ago.

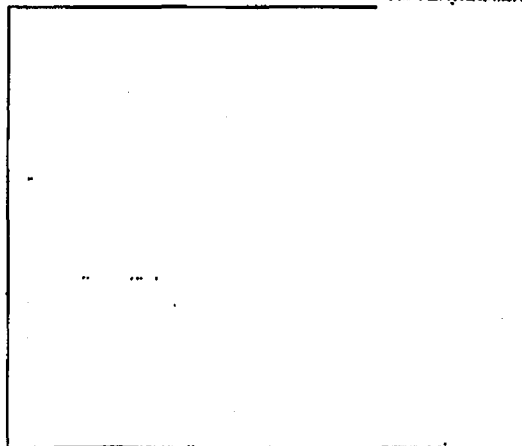
The number of foreclosure filings in December was 1,000. That was down 35 percent from 1,302 in the same month last year but was up from 877 in November.

Lenders filed a flurry of new foreclosure cases last month — 163 default notices, which according to RealtyTrac was the highest number in more than a year.

The bulk of filings last month were auction notices and lender repossessions.

RealtyTrac numbers for the full year are different in that they count properties going through foreclosure. The monthly counts are foreclosure filings, which can

ADVERTISEMENT



Print Powered By  FormatDynamics



Mortgage Bankers Association of Hawaii
P.O. Box 4129, Honolulu, Hawaii 96812

February 24, 2011

The Honorable David Ige, Chair and
Members of the Senate Committee on
Ways and Means
State Capitol, Room 211
Honolulu, Hawaii 96813

Re: Senate Bill 652, SD 1 Relating to Mortgage Foreclosures

Chair Ige and Members of the Senate Committee on Ways and Means:

I am Rick Tsujimura representing the Mortgage Bankers Association of Hawaii ("MBAH"). The MBAH is a voluntary organization of real estate lenders in Hawaii. Our membership consists of employees of banks, savings institutions, mortgage bankers, mortgage brokers, and other financial institutions. The members of the MBAH originate the vast majority of residential and commercial real estate mortgage loans in Hawaii. When, and if, the MBAH testifies on legislation, it is related only to mortgage lending.

The MBAH supports Senate Bill 652, SD 1 Relating to Mortgage Foreclosures. We feel that the mortgage foreclosure task force's recommendations were made in the best interest of the consumer as well as the lender, as both groups were represented in the task force.

Thank you for the opportunity to present this testimony.