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PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION

TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

THE TWENTY-SEVENTH LEGISLATURE  
REGULAR SESSION OF 2014

MONDAY, FEBRUARY 3, 2014  
2:10 P.M.

TESTIMONY ON HOUSE BILL NO. 2444, RELATING TO REAL PROPERTY.

TO THE HONORABLE ANGUS L.K. MCKELVEY, CHAIR,  
AND TO THE HONORABLE DEREK S.K. KAWAKAMI, VICE CHAIR,  
AND MEMBERS OF THE COMMITTEE:

The Department of Commerce and Consumer Affairs, Office of Consumer Protection ("OCP") appreciates the opportunity to appear today and testify on House Bill ("H.B.") No. 2444, Relating to Real Property. My name is Bruce B. Kim and I am the Executive Director of OCP.

OCP opposes H.B. No. 2444 as drafted. The measure would amend Hawaii Revised Statutes Chapter 481 by adding a new part entitled, "Lease-Purchase Agreements For Real Property". The bill defines "lease-purchase agreement" as "a real property lease for a fixed period of time with an obligation for the tenant to purchase the property at the end of the lease period where a portion of the rent is applied to future

payment.”

OCP must satisfy jurisdictional requirements set forth in Chap. 480 and other statutes it enforces before it can proceed to investigate and prosecute enforcement actions. These include determining whether the complainant is “. . . a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment”. HRS § 480-1.

In 2011, the Hawaii Intermediate Court of Appeals (“ICA”) held that a lease is a “transfer of real property for a specified term, and not a ‘service’ under HRS § 480-1”. 125 Haw. 381, 262 P.3d 670 (App. 2011), *cert. den.* 2012 WL313579 (Haw. S. Ct. 2012). The ICA further held that a lease was not a “personal investment” under HRS § 480-1. The ICA defined the term “investment” as it related to § 480-1 as putting “. . . money to use, by purchase or expenditure, in something offering profitable returns, esp. interest or income.” Fernandez argued that she made personal investment under her rental agreement because there was an option to purchase referenced in her contract that may have been exercised at some future date. However, the ICA found that neither the rental agreement nor the option agreement stated that her rental payments were to be applied towards an eventual option to purchase her unit. *Id.* Therefore the ICA concluded that Fernandez was not a “consumer” for the purpose of making a claim under HRS § 480-1.

OCP has no enforcement jurisdiction over the Hawaii Landlord-Tenant Code. It

fulfills its statutory mandate under HRS § 521-77 by operating the Landlord-Tenant Hotline which handles over 10,000 inquiries a year.

OCP has no jurisdiction over Chap. 481. HRS § 481-1 defines the acts which are subject to the chapter. This section is confined to various antitrust violations, including the “intent to destroy the competition of any regular dealer in the commodity, product, or service,” or to engage in discriminating between different communities with the intent to sell the same product for different prices in different communities.

OCP has serious concerns about incorporating this novel real estate transaction into an antitrust statute or into UDAP statutes enforced by OCP by elevating what is a purely private contractual matter into state antitrust or consumer protection law. It could lead to a flood of complaints which OCP is not equipped to deal with and exceed the limits of OCP’s enforcement jurisdiction. The measure is also unclear or ambiguous in several areas virtually assuring a multiplicity of disputes over its interpretation. OCP is concerned that “legitimizing” this non-traditional form of real estate transaction may lead to numerous lawsuits and needless distress for the so-called “tenants”. Hawaii’s previous experience with agreements of sale comes to mind.

Thank you for permitting OCP to testify on this measure today. I would be happy to take any questions the committee may have on H.B. No. 2444.

February 3, 2014

**The Honorable Angus L.K. McKelvey, Chair**

House Committee on Consumer Protection and Commerce  
State Capitol, Room 325  
Honolulu, Hawaii 96813

**RE: H.B. 2444, Relating to Real Property**

**HEARING: Monday, February 3, 2014, at 2:10 p.m.**

Aloha Chair McKelvey, Vice Chair Kawakami, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,300 members. HAR **opposes** H.B. 2444 which establishes certain requirements pertaining to lease-purchase agreements for real property and establishes causes of action for violations.

The lease provisions under the Lease-Purchase Agreement (LPA) are generally subject to the Landlord-Tenant Code. Additionally, an LPA applies where the tenant leases the property for a period of time and then is obligated to purchase the property.

HAR is deeply concerned with the unintended consequences this legislation may have on lease and purchase agreements in Hawai'i. HAR believes that two parties should have the ability to freely enter and negotiate a real estate contract. Both parties should be consulting a licensed attorney and other qualified professionals in providing legal advice or drafting its contract.

Additionally, the process of a real estate transaction and contract negotiations are complex and property specific. As such, this measure does not address many of the material terms and conditions that are necessary to protect parties in a real estate transaction. For example, as a lease, such terms include: Landlord and Tenant Responsibilities and Remedies, Security Deposit, Utilities & Service, Rental Terms, and other provisions that can be found in a Rental Agreement. As an option to purchase, such terms include: Financing, Property Inclusions, Disclosure, Conditions of Closing, and other provisions that can be found in a Purchase Contract.

For the foregoing reasons, we respectfully request that this committee hold this measure.

Mahalo for the opportunity to testify.