

HB 25, HD2

Measure Title: RELATING TO SUSPENSION OF FORECLOSURE ACTIONS BY JUNIOR LIENHOLDERS.

Report Title: Foreclosure Actions; Junior Lienholders; Associations

Description: Allows a planned community association and condominium association, as junior lienholders, to initiate or continue a nonjudicial foreclosure action on a property subject to judicial foreclosure. Repeals requirement to stay power of sale foreclosure process pending a circuit court foreclosure action. Effective January 1, 2100. (HB25 HD2)

Companion:

Package: None

Current Referral: CPN, JDL

Introducer(s): EVANS



NEIL ABERCROMBIE
GOVERNOR

SHAN S. TSUTSUI
LT. GOVERNOR

STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

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KEALI'I S. LOPEZ
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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013

THURSDAY, MARCH 14, 2013
9:30 A.M.

TESTIMONY ON HOUSE BILL NO. 25, H.D. 2
RELATING TO SUSPENSION OF FORECLOSURE ACTIONS
BY JUNIOR LIENHOLDERS.

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

The Department of Commerce and Consumer Affairs ("DCCA"), Office of Consumer Protection ("OCP") appreciates the opportunity to appear today and testify on House Bill No. 25, H.D. 2, Relating to Suspension of Foreclosure Actions by Junior Lienholders. My name is Bruce B. Kim and I am the Executive Director of OCP. OCP would like to offer **comments** regarding House Bill No. 25, H.D. 2.

This legislation would effectively give associations a super lien, allowing them to foreclose regardless of any other liens on the property, or any foreclosure proceedings

already in process (up until a foreclosure commissioner is appointed). Given the difficulties and obstacles that associations have encountered when trying to foreclose, this bill seeks to mitigate the potential damage and neglect, as well as the loss of revenue, caused by lengthy delays in judicial foreclosures.

However, H.D. 2 may have the unintended consequence of accelerating foreclosures by mortgagees, as the removal of an owner-occupant may make the nonjudicial foreclosure process under Part II of HRS Chapter 667 more attractive to mortgagees who are currently foreclosing by action via Part IA of HRS Chapter 667, exclusively, at this time. Because there would be no owner-occupant resident at the time the foreclosing mortgagee initiated a foreclosure pursuant to HRS § 667-22, the foreclosure would not be subject to the dispute resolution provisions contained in Part V of HRS Chapter 667. In addition this would deprive the mortgagor of the anti-deficiency protections of HRS § 667-38 because the mortgagor is arguably no longer the “owner-occupant” of the unit as defined in HRS § 667-1.

OCP takes no position on the merits of this legislation, and is cognizant of the detrimental impact that unoccupied and/or delinquent units may have on other members of the association and the association as a whole. However, House Bill No. 25, H.D. 2 should not inadvertently be a vehicle to circumvent a mortgagor’s right to opt in to the MFDR program under Part V, nor should it be used to bar a mortgagor from the protection of the anti-deficiency judgment provisions of § 667-38. OCP worked with John Morris to craft an amendment to Senate Bill No. 508 that was included in the S.D.

Testimony on House Bill No. 25, H.D. 2
March 14, 2013
Page 3

1 to address this issue, we request that this amendment be included in House Bill No. 25, H.D. 2, as well. The text for the requested amendment is attached to this testimony.

Thank you for the opportunity to submit testimony on House Bill No. 25, H.D. 2. I would be happy to answer any questions members of the committee may have.

1 pursuant to part IA or part II by a foreclosing mortgagee, no
2 junior lienholder, except for an association, shall be permitted
3 to initiate or continue a nonjudicial foreclosure until the
4 foreclosure initiated by the foreclosing mortgagee has been
5 concluded by a judgment issued by a court pursuant to section
6 667-1.5, the recording of an affidavit after public sale
7 pursuant to section 667-33, or the filing of an agreement under
8 the mortgage foreclosure dispute resolution provisions of
9 section 667-81[-]; provided that if pursuant to part IA or part

10 VI:

11 (1) An association forecloses on residential real property
12 occupied by one or more mortgagors who are owner-
13 occupants; and

14 (2) The mortgagee subsequently forecloses its lien on the
15 same property;

16 those owner-occupants shall retain their right to require the
17 foreclosing mortgagee to participate in the procedures
18 established under part V, notwithstanding the association's
19 foreclosure.

20 (b) Upon initiation of a foreclosure action pursuant to
21 part II by a foreclosing mortgagee, no junior lienholder, except
22 for an association, shall be permitted to initiate or continue a



1 nonjudicial foreclosure during the pendency of a stay pursuant
2 to section 667-83; provided that a junior lienholder may
3 initiate or continue with a nonjudicial foreclosure if [+

4 ~~(1) The] the junior lien foreclosure was initiated before~~
5 ~~the foreclosure action by the foreclosing mortgagee [+~~
6 ~~or~~

7 ~~(2) The junior lienholder is an association and has not~~
8 ~~been provided notice of the foreclosure action,~~
9 ~~pursuant to section 667-21.5, or has not received~~
10 ~~written notification of a case opening pursuant to~~
11 ~~section 667-79.]~~

12 and if pursuant to part IA or part VI:

13 (1) An association forecloses on residential real property
14 occupied by one or more mortgagors who are owner-
15 occupants; and

16 (2) The mortgagee subsequently forecloses its lien on the
17 same property;

18 those owner-occupants shall retain their right to require the
19 foreclosing mortgagee to participate in the procedures
20 established under part V, notwithstanding the association's
21 foreclosure."





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Presentation to
Committee on Commerce and Consumer Protection
March 14, 2013 at 9:30 am
State Capitol Conference Room 229

Testimony in SUPPORT of H. B. 25, HD2

TO: The Honorable Rosalyn H. Baker, Chair
The Honorable Brickwood Galuteria, Vice Chair
Members of the Committee

My name is Neal Okabayashi and I represent the Hawaii Bankers Association (HBA). HBA is the trade association representing all FDIC insured depository institutions operating in the State of Hawaii.

The primary purpose of this Bill is to allow a condominium association, as a junior lienholder, to commence or continue a nonjudicial foreclosure action on a property subject to a judicial foreclosure. This will assist the association in generating revenues to remain fiscally viable during a pending foreclosure. We support the intent of this bill as drafted and urge its passage, unamended, except for a change in the defective date.

Thank you for this opportunity to testify and please let us know if we can provide any further information.

Neal Okabayashi
(808) 525-5785

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law

P.O. Box 4109

Honolulu, Hawaii 96812-4109

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March 14, 2013

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 25, HD 2 (Suspension of Foreclosure Actions by Junior Lienholders)**
Hearing Date/Time: Thursday, March 14, 2013, 9:30 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 supports this Bill as drafted.

The purposes of this Bill are to: (1) allows a planned community association and condominium association, as junior lienholders, to initiate or continue a nonjudicial foreclosure action on a property subject to judicial foreclosure; and to (2) repeal requirement to stay power of sale foreclosure process pending a circuit court foreclosure action.

A similar bill, Senate Bill 508 (Suspension of Foreclosure Actions by Junior Lienholders), was heard by your Committee on February 5, 2013. However, after the hearing, the SD 1 version contained a provision that if a planned community association or a condominium association forecloses on residential real property that is occupied by an owner-occupant mortgagor, and if the mortgagee (e.g. the lender) subsequently forecloses its lien on the same property, then the owner-occupant shall retain the right to require the foreclosing mortgagee to participate in the dispute resolution process under Part V, chapter 667, Hawaii Revised Statutes. This provision in the Senate Bill is not appropriate because once the association forecloses in an apartment, the mortgagor is legally no longer an "owner" of the apartment. Because the mortgagor, after the foreclosure by the association, is legally no longer an "owner", the mortgagor is not entitled to a loan modification as an "owner-occupant". For that reason, the mortgagor should not be able to use the Mortgage Foreclosure Dispute Resolution Program which was created for "owner-occupants".

HB 25, HD 2 does not contain the problematic provision that is in SB 508, SD 1.

We support this Bill as drafted and request that the only amendment should be to make the effective date "on approval".

Thank you for considering our testimony.



MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association

888 Mililani Street, 2nd Floor
Honolulu, Hawaii 96813-2918
March 12, 2013

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
REGARDING HOUSE BILL 25, HD2

Hearing Date: THURSDAY, March 14, 2013
Time : 9:30 a.m.
Place : Conference Room 229

Chair Baker, Vice Chair Galuteria, and Members of the Committee,

My name is John Morris and I am testifying in favor of HB 25, HD2. HB 25, HD2 serves an extremely worthwhile purpose, as the preamble to the bill clearly states: allowing condominium and homeowner associations to commence nonjudicial foreclosures to collect delinquencies even if the lender has filed foreclosure. In addition, as outlined in more detail below, one simple additional amendment to section 667-37 could make the bill even more effective. The bill is essentially the same as SB 508.

Under the current law, as outlined in HB 25, HD2, even if an association has begun a nonjudicial foreclosure before the lender begins its foreclosure, that nonjudicial foreclosure may have to be converted to a judicial foreclosure or put on hold. Given the long periods of time that have been typical of lender foreclosures, this is a major problem for associations. Admittedly, section 667-57 does not prevent associations from conducting a judicial foreclosure, but the right to conduct a judicial foreclosure is often of limited value to an association because of the very high cost.

Specifically, in a typical situation facing an association, there is a large mortgage that has priority over the association's lien and exceeds the value of the unit. If a unit is worth less than the mortgage - for example a \$400,000 unit has a \$500,000 mortgage - the association's foreclosure has to be made subject to the prior mortgage, which basically means the association will have no bidders at the auction (i.e., for a property worth \$100,000 less than its mortgage) and will end up buying the property for a dollar because it has a minus \$100,000 value. While that is not an ideal situation, the association at least has the opportunity of renting the unit out until the lender finally forecloses.

The association will still have to spend \$5,000 - \$6,000 foreclosing nonjudicially. If, however, an association is forced by section 667-57 to conduct a judicial foreclosure,

it will end up spending \$12,000 - \$14,000 and take 12 to 14 months to complete its judicial foreclosure with the same result - buying the unit for a dollar and trying to rent it out.

Section 667-57 can also prevent associations from exercising the other remedies in a nonjudicial foreclosure. Specifically, in Act 182 the legislature gave associations three options if they are unable to personally serve the delinquent owner with the notice of intention to begin the nonjudicial foreclosure process:

- (1) File a special proceeding in the circuit court for permission to proceed with a nonjudicial foreclosure by serving the unit owner only by publication and posting;
- (2) Proceed with a nonjudicial foreclosure of the unit without making personal service, but then the association loses the right to obtain a deficiency judgment against the unit owner; or
- (3) Take control of the unit, if the unit is unoccupied, and rent out the unit to generate rental income to pay the unit owner's delinquency.

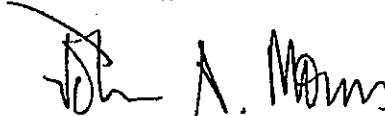
If an association is faced with an abandoned unit and wants to begin the process of nonjudicial foreclosure to take advantage of these options, it presently cannot do so under sections 667-37 and 667-57 if the lender has already started a foreclosure.

As a real-life example, a homeowner's association in west Oahu has two empty and abandoned homes that have been vacant for a year or more. About three months ago, the association wanted to start the process of nonjudicial foreclosure so they could take over those homes and rent them out to generate income. Unfortunately, when the association obtained a title report, it discovered that the lender had actually started a foreclosure in 2010, two years before, and had done nothing since. Nevertheless, since the lender foreclosure was still going on - at least theoretically - the association could do nothing because section 667-57 prohibited it from beginning a nonjudicial foreclosure (and there was no economic way to justify a judicial foreclosure of the units). Similarly, the association was unable to use any of the three remedies above because they required the association to first begin the nonjudicial foreclosure, which section 667-57 prohibited the association from doing. There is no real logic for such a situation.

TESTIMONY REGARDING HOUSE BILL 25, HD2
March 12, 2013
Page 3

Please contact me at 523-0702 if you have any questions. Thank you for this opportunity to testify.

Very truly yours,

A handwritten signature in black ink, appearing to read "John A. Morris". The signature is written in a cursive style with a horizontal line underneath it.

John A. Morris

JAM:alt
G:\C\2013 Testimony HB 25, HD2 (03.12.13)



P.O. Box 976
Honolulu, Hawaii 96808

March 12, 2013

Honorable Rosalyn H. Baker
Honorable Brickwood Galuteria
Commerce and Consumer Protection
415 South Beretania Street
Honolulu, Hawaii 96813

Re: **HB25 HD2/SUPPORT**

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

I am the vice-chair of the CAI Legislative Action Committee. CAI has the following comments in support of HB25 HD2.¹

First, CAI recognizes that the timely pursuits of judicial foreclosures by senior mortgagees, like lenders, are in everyone's best interest. However, for various reasons there have been delays of many of these judicial or court foreclosures where the property is left vacant and not sold via a court ordered auction for up to 3 or 4 years.

Second, while these judicial foreclosures are pending in the courts, and prior to the court's appointment of a foreclosure commissioner, these properties (including homes, townhomes and condominiums) fall into a state of disrepair and negatively impact the surrounding neighbors and the community as large.

One example of what can happen to a vacant unit while the judicial foreclosure is pending is depicted in the following picture:

¹ This Bill, as amended is the proper mechanism to assist associations, and not HB21 HD 2 which, in its current form, puts associations in a worst position than currently exists.

Honorable Rosalyn H. Baker
Honorable Brickwood Galuteria
March 12, 2013
Page 2 of 3



[This unit was left vacant while the judicial foreclosure took years to resolve, and the association in this case had no idea of the condition of this unit.]

Currently non-judicial foreclosures by associations come to a grinding halt once the lender initiates a judicial foreclosure. If associations could proceed with the non-judicial foreclosures until the court appoints a foreclosure commissioner, then the associations would have the opportunity to move forward; conduct a non-judicial foreclosure on the unit; and then enter the unit and attempt to mitigate the damages for everyone's benefit.

Honorable Rosalyn H. Baker
Honorable Brickwood Galuteria
March 12, 2013
Page 3 of 3

HB25 HD2 is a step in the right direction and provides associations and their surrounding communities with a mechanism to address lender judicial foreclosures that are stalled.

CAI represents the association industry, and endorses this approach. We respectfully request the Committee to pass HB25 HD2. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'CP', written in a cursive style.

Christian P. Porter

HB25

Submitted on: 3/13/2013

Testimony for CPN on Mar 14, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Jane Sugimura	Hawaii Council of Association of Apartment Owners	Support	No

Comments: HCAAO asks that the Committee pass out the bill unamended. Thank you for allowing me to testify on this matter.



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

March 13, 2013

The Honorable Rosalyn H. Baker, Chair,
The Honorable Brickwood Galuteria, Vice Chair, and
Members of the Senate Committee on Commerce and Consumer Protection
State Capitol, Room 229
Honolulu, Hawaii 96813

Re: House Bill 25, HD2 Relating to Suspension of Foreclosure Actions by
Junior Lienholders

Chair Baker, Vice Chair Galuteria, and Members of the Senate Committee on Commerce
and Consumer Protection:

I am Linda Nakamura, 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 House Bill 25 HD2 Relating to Suspension of Foreclosure Actions by Junior Lienholders as it is written.

The MBAH suggests that the bill take effect upon approval.

Thank you for the opportunity to present this testimony.

LINDA NAKAMURA
President, Mortgage Bankers Association of Hawaii

HB25

Submitted on: 3/12/2013

Testimony for CPN on Mar 14, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Dante Carpenter	BOD CCV, Phase 2, AOAO	Support	Yes

Comments: Chair Sen. Rosalyn Baker, V.C. Sen. Brickwood Galuteria & Members: As President of this 439 unit condominium in the Salt Lake Area, we are in strong support of HB21 in its original form as originally written. Contrary to certain lending institution representations, recent changes in Fannie Mae guidelines definitely support states enactment of laws similar to that contained in HB21. HB21 original language provides that the AOA or HOA's basic lien, for all unpaid assessments, shall have priority over mortgages! Finally, we believe this measure will be fair for all 159,000 condominium owners and their families! Thank you for your consideration. DKC

HB25

Submitted on: 3/12/2013

Testimony for CPN on Mar 14, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Bruce Howe	Hawaiiiana Management Co Ltd	Support	No

Comments: HB25 is a modest way to allow common interest communities to collect delinquencies and protect units in their communities during the often extended process after a lender commences foreclosure. It is necessary to correct a problem created by HB1875 last year

HB25

Submitted on: 3/12/2013

Testimony for CPN on Mar 14, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Jim Keithahn	Individual	Support	No

Comments: I am submitting this testimony on behalf of the Valley Isle Resor AOA. HB 25 will allow associations to continue nonjudicial foreclosures even if the banks judicial or court foreclosure is filed and is pending. Right now associations cannot move forward with nonjudicial foreclosures if the bank files a foreclosure action. Banks are in favor of allowing associations to keep moving on their nonjudicial foreclosures as they recognize the importance of having the asset "kept up" by the association and don't mind it being rented out.

HB25 HD2

Support

My name is Ted Walkey. I have 24 years in the management of common interest communities. I support HB25 HD2 because it aids common interest communities to remain solvent and to protect property values.

The process of a lender initiated foreclosure may take many years to finalize. During this time, the home will most likely be unoccupied and allowed to fall into disrepair. With respect to a single family home outside an association, the impact is a lowering of home values due to lack of exterior maintenance and landscaping and possibly squatters destroying the interior but no other impact on the neighbors.

In single family home in a common interest community, the neighbors feel that same impact and also an increase in maintenance fees to make up for the unit which is not paying. This is a financial burden the other homeowners should not have bear.

In a multi-family building, such as a town home, the impact is much more serious. The vacant unit can become a home for squatters but is many times used on a temporary basis by transients for making, distributing and using illicit drugs. This brings unsavory individuals into an area where working families have invested greatly into a neighborhood where they can safely raise their children. Further, these vacant units are magnets for pests: wild birds in the attic, vermin, insects, and mold. Imaging having to pay a mortgage and maintenance fees while your family must live with these threats to their health and safety.

I support almost any effort to turn vacant units into producing real estate.

HB25

Submitted on: 3/12/2013

Testimony for CPN on Mar 14, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Philip Nerney	Individual	Support	Yes

Comments: This is a modest and sensible proposal that will aid condominium associations in their collection efforts. It addresses the problem of lenders who indefinitely delay.

HB25

Submitted on: 3/11/2013

Testimony for CPN on Mar 14, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
John Schick	Individual	Support	No

Comments: If the association has the funds to maintain the property, it benefits all concerned. The paying owners do not have to assume the non-paying owners delinquencies and the mortgage holder benefits by getting best price for a well maintained property.

HB25

Submitted on: 3/11/2013

Testimony for CPN on Mar 14, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Mei Lee Wong	Individual	Support	No

Comments: AOA's are in need of support to mitigate the damage of paying owners that is caused by defaulting owners. AOA's barely break even. Please support this bill

HB25

Submitted on: 3/11/2013

Testimony for CPN on Mar 14, 2013 09:30AM in Conference Room 229

Submitted By	Organization	Testifier Position	Present at Hearing
Paul Johnson	Individual	Support	No