



NEIL ABERCROMBIE  
GOVERNOR

SHAN S. TSUTSUI  
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' I S. LOPEZ  
DIRECTOR

JO ANN M. UCHIDA TAKEUCHI  
DEPUTY DIRECTOR

PRESENTATION OF THE  
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON JUDICIARY AND LABOR

THE TWENTY-SEVENTH LEGISLATURE  
REGULAR SESSION OF 2013

WEDNESDAY, MARCH 27, 2013  
10:50 A.M.

TESTIMONY ON HOUSE BILL NO. 25, H.D. 2, S.D. 1  
RELATING TO SUSPENSION OF FORECLOSURE ACTIONS  
BY JUNIOR LIENHOLDERS.

TO THE HONORABLE CLAYTON HEE, CHAIR,  
AND TO THE HONORABLE MAILE S.L. SHIMABUKURO, 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, S.D. 1, Relating to Suspension of Foreclosure Actions by Junior Lienholders. My name is Bruce B. Kim and I am the Executive Director of OCP.

**OCP supports House Bill No. 25, H.D. 2, S.D. 1 with the following comments:**

House Bill No. 25, H.D.2, S.D.1 allows a condominium association, as a junior lienholder, to commence or continue a nonjudicial foreclosure action on a property subject to judicial foreclosure even if the lender has filed for foreclosure. The Senate Draft 1 also preserves the right of owner-occupants to participate in dispute resolution as well as the anti-deficiency judgment protection of HRS § 667-38 in specific situations. 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 by mortgagees.

In comparing the House Bill No. 25, H.D. 2 with the Senate Draft 1, OCP prefers the Senate Draft 1 of the bill. While both the HD2 and the SD1 provide relief to associations, the SD1 makes clear that mortgagors' rights as owner-occupants are not adversely affected in the process. In particular, mortgagors as owner-occupants retain the ability to participate in the dispute resolution provisions contained in Part V of HRS Chapter 667. In addition, and more significantly, under the current language of the bill, the anti-deficiency judgment protections of HRS § 667-38 apply to these mortgages because the mortgagor continues to be regarded as the owner-occupant of the unit as defined in HRS § 667-1.

OCP 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. S.D. 1 now makes clear that the former owner-occupant of the foreclosed unit will be treated as the owner-occupant in any subsequent foreclosure by the mortgagee for

Testimony on House Bill No. 25, H.D. 2, S.D. 1  
March 27, 2013  
Page 3

purposes of the anti-deficiency judgment protection of § 667-38 and the Part V  
Mortgage Foreclosure Dispute Resolution Program.

Thank you for the opportunity to submit testimony on House Bill No. 25, H.D. 2,  
S.D. 1. I would be happy to answer any questions members of the committee may  
have.

# HAWAII FINANCIAL SERVICES ASSOCIATION

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

P.O. Box 4109

Honolulu, Hawaii 96812-4109

Telephone No.: (808) 521-8521

Fax No.: (808) 521-8522

March 27, 2013

Senator Clayton Hee, Chair  
and members of the Senate Committee on Judiciary and Labor  
Hawaii State Capitol  
Honolulu, Hawaii 96813

Re: **House Bill 25, HD 2 (Suspension of Foreclosure Actions by Junior Lienholders)**  
**Hearing Date/Time: Wednesday, March 27, 2013, 10:50 a.m.**

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

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

The purposes of this Bill are to: (1) allow a condominium association, as a junior lienholder, to commence or continue a nonjudicial foreclosure action on a property subject to a judicial foreclosure even if the lender has filed for foreclosure; and to (2) preserve the right of owner-occupants to require the foreclosing mortgagee to participate in the dispute resolution process in situations where an association forecloses on residential real property occupied by one or more owner-occupant mortgagors for whom the unit is and has been the person's primary residence for a continuous period of not less than two hundred days immediately preceding the date on which the notice is served and the mortgagee subsequently forecloses its lien on the same property.

We oppose the addition in the Bill beginning on page 4, line 20, and continuing to page 5, line 10. That addition provides 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 is not appropriate because once the association forecloses in an apartment, the mortgagor is legally no longer an "owner" of the unit. 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 specifically for "owner-occupants".

House Bill 25, House Draft 2 does not contain the problematic provision that is in Senate Draft 1. We prefer the HD 2 version.

**Accordingly, we ask that this bill be amended by reverting to the HD 2 version, except that this Bill should be effective "on its approval".**

Thank you for considering our testimony.



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

Presentation To  
Senate Committee on Judiciary and Labor  
March 27, 2013 at 10:50 am  
State Capitol Conference Room 016

**Testimony in OPPOSITION to Bill H. B. 25, HD2, SD1**

TO: The Honorable Clayton Hee, Chair (JDL)  
The Honorable Maile S. L. Shimabukuro, Vice Chair (JDL)  
Members of the JDL Committee

My name is Neal Okabayashi and I represent the Hawaii Bankers Association, a trade association of local FDIC insured banks.

We oppose HB 25, HD 2, SD 1, in its present form because it is flawed in its logic. The amendments contained in SD 1 would provide a non-owner occupant the power to claim he or she is an owner-occupant and delay foreclosure proceedings for six to seven months, in either a judicial or non-judicial setting. The stated purpose of mediation is not possible because the mortgagor is no longer an owner-occupant. DCCA has stated the purpose of mediation is either home retention or a graceful exit but since the mortgagor has already exited the condominium unit, neither purpose is legally possible.

The only purpose served by SD 1 is to damage the interest of the lender and possibly the condominium association. It is feasible that the condominium may have a renter occupying the unit but a condominium has a vested interest in having owner-occupants because if a condominium has an insufficient number of owner-occupants, it is not eligible for Fannie Mae financing. Thus, any delay in finding an owner-occupant may inure to the detriment of the condominium association and SD 1 does cause such delay.

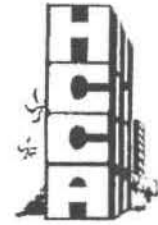
Thus, because of the flaw in logic in SD 1, we urge the committee to adopt HD 2, except for the defective effective date.

Thank you for this opportunity to testify, and I am happy to answer any questions the Chair or the committee may have.

Neal Okabayashi  
(808) 525-5785



**Hawaii Council of Associations  
of Apartment Owners**  
**DBA: Hawaii Council of Community Associations**  
1050 Bishop Street, #366, Honolulu, Hawaii 96813



March 26, 2013

Sen. Clayton Hee, Chair  
Sen. Maile Shimabukuro, Vice-Chair  
Senate Committee on Judiciary & Labor

Re: HB25, HD2 SD1 Suspension of Foreclosure Actions by Junior Lienholders  
Hearing: Wednesday, March 27, 2013, 10:50 a.m., Conf. Rm. #106

Chair Hee, Vice-Chair Shimabukuro and Members of the Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCAAO).

HCAAO agrees with the intent and purpose of this bill and urges you to pass it as amended.

Thank you for the opportunity to testify.

Jane Sugimura  
President

HAWAII CHAPTER

  
**community**  
ASSOCIATIONS INSTITUTE

P.O. Box 976  
Honolulu, Hawaii 96808

March 25, 2013

Honorable Clayton Hee  
Honorable Maile S.L. Shimabukuro  
Judiciary and Labor  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: HB25 HD2 SD1/SUPPORT

Dear Chair Hee, Vice-Chair Shimabukuro and Committee Members:

I am the Vice-Chair the CAI Legislative Action Committee.  
CAI has the following comments in support of HB25 HD2 SD1.

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:

Honorable Clayton Hee  
Honorable Maile S.L. Shimabukuro  
March 25, 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.

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.



Honorable Clayton Hee  
Honorable Maile S.L. Shimabukuro  
March 25, 2013  
Page 3 of 3

CAI represents the association industry, and endorses this approach. We respectfully request the Committee to pass HB25 HD2 SD1. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'CP', with a long horizontal flourish extending to the right.

Christian P. Porter

**hee2 - Kathleen**

---

**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Tuesday, March 26, 2013 8:45 AM  
**To:** JDLTestimony  
**Cc:** howecb@hawaii.rr.com  
**Subject:** Submitted testimony for HB25 on Mar 27, 2013 10:50AM

**HB25**

Submitted on: 3/26/2013

Testimony for JDL on Mar 27, 2013 10:50AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Bruce Howe	Individual	Support	Yes

Comments: HB21 is a step in the right direction in allowing community associations to proceed with non judicial foreclosures even while lenders are proceeding with foreclosures. As a property manager with Hawaiiana Management Co., Ltd., I have seen numerous instances over the past six years in which lenders have dragged the process out for four years and longer. This creates huge delinquencies for the associations we manage. Right now I have over \$120,000 in delinquencies in a small (64 unit) townhome complex in Mililani, which my client association is precluded from pursuing because banks refuse to complete foreclosures started years ago. This is not an isolated problem. It is rampant in the communities we manage and is destroying them financially.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email [webmaster@capitol.hawaii.gov](mailto:webmaster@capitol.hawaii.gov)

**hee2 - Kathleen**

---

**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Tuesday, March 26, 2013 11:45 AM  
**To:** JDLTestimony  
**Cc:** twalkey@clearwire.net  
**Subject:** \*Submitted testimony for HB25 on Mar 27, 2013 10:50AM\*

**HB25**

Submitted on: 3/26/2013

Testimony for JDL on Mar 27, 2013 10:50AM in Conference Room 016

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Ted Walkey	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email [webmaster@capitol.hawaii.gov](mailto:webmaster@capitol.hawaii.gov)

SENATE COMMITTEE ON JUDICIARY AND LABOR

TESTIMONY OF NICHOLAS BLONDER  
IN OPPOSITION TO **HOUSE BILL 25**,  
RELATING TO CONDOMINIUMS

TO: **Senate Committee on Judiciary and Labor**

Chair: Hon. Clayton Hee

Vice-Chair: Hon. Maile S. L. Shimabukuro  
and Committee Members

Via email

Hearing Date: March 27, 2013 @ 10:50 a.m.

I own a unit at Kaha Lani, a 74-unit condominium property in Lihue, Kauai. I **oppose** HB 25.

This bill is being touted by supporters as an effective, savvy means for homeowners' associations (HOAs) to recover accrued maintenance fee delinquencies. HB 25 is a Trojan horse; its unstated purposes are:

(1) to distract HOAs and the legislature from supporting HB 21 (as originally introduced), which would provide *complete relief* to HOAs, and

(2) to encourage HOAs to pursue legal-fee-generating foreclosures.

The reality is that there are serious problems with HB 25. Chief among them are:

(1) Acquisition cost: An HB 25 supporter's testimony estimated the legal fees for an HOA nonjudicial foreclosure to be \$5,000-\$6,000.

(2) Rehab costs: Many of the problem units have been long-neglected by their delinquent owners and will require thousands of dollars to restore them to reasonable condition for rental in the contemporary market. When combined with the acquisition cost, a foreclosing HOA's initial investment in a delinquent unit could easily exceed \$10,000.

(3) Underwater unit: Please note that an HOA-foreclosed unit remains *junior* to the bank's mortgage, which can be foreclosed *before* the HOA has even *recouped* its acquisition and rehab costs. Yes, the HOA can foreclose by bidding in the accrued delinquency (i.e., the innocuous "\$1 bid"). But to avoid the bank's separate foreclosure, and preserve its HB 25 "investment," the HOA will inevitably have to refinance an obligation *greater than the unit's fair market value*.

SENATE COMMITTEE ON JUDICIARY AND LABOR

In contrast, the original version of pending HB 21 would have provided an HOA with a *full-priority* lien for *all* of its unpaid common-element maintenance fees. The Hawaii Bankers Association (HBA) opposed HB 21. In testimony before the House CPC Committee, the HBA offered the following bewildering analysis:

[I]f this bill [HB 21] were to become law, there is little incentive for an association to act prudently knowing that eventually the entirety of the delinquent assessments will be paid.

The HBA appeared to be arguing that the “prudent” course for an HOA is to *ignore* the obvious benefit of original HB 21 (i.e., full payment of delinquencies) and, instead, begin investing in underwater units under the authority of HB 25.

I acknowledge there may be some rare situations in which foreclose-and-rent may work as represented. But in the vast majority of circumstances, foreclose-and-rent is at best a dubious investment strategy which, as a practical matter, places the HOA into the shoes of the underwater owner. That is not a position that a properly risk-averse HOA should attempt to acquire.

I would appreciate the opportunity to answer any questions the committee may have regarding HB 25 (and/or HB 21).

Respectfully submitted,

/s/ \_\_\_\_\_  
Nicholas Blonder  
(415) 381-4340 (cell)  
nyblonder@yahoo.com

888 Mililani Street, 2<sup>nd</sup> Floor  
Honolulu, Hawaii 96813-2918  
March 26, 2013

SENATE COMMITTEE ON JUDICIARY AND LABOR  
REGARDING HOUSE BILL 25, HD2, SD1

Hearing Date: WEDNESDAY, March 27, 2013  
Time : 10:50 a.m.  
Place : Conference Room 016

Chair Hee, Vice Chair Shimabukuro, and Members of the Committee,

My name is John Morris and I am testifying in favor of HB 25, HD2, SD1. HB 25, HD2, SD1 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, , SD1, 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,

TESTIMONY REGARDING HOUSE BILL 25, HD2, SD1

March 26, 2013

Page 2

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 because those remedies are only available after an association begins 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, SD1

March 26, 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", written over a horizontal line.

John A. Morris

JAM:alt

G:\C\2013 Testimony HB 25, HD2, SD1 (0326.13)