

SB 960

Measure Title: RELATING TO FORECLOSURES.

Report Title: Prohibited Conduct; Foreclosures; Public Sales; Zombie Title

Description: Establishes that it is a prohibited practice for a foreclosing mortgagee or foreclosing association to cancel a public sale at any time before the date of the public sale without written notification of the cancelation delivered to the mortgagor, the borrower, and other specified persons.

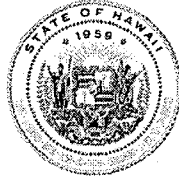
Companion:

Package: None

Current Referral: CPN, JDL

Introducer(s): ENGLISH, BAKER, KAHELE, KEITH-AGARAN, NISHIHARA, SOLOMON, Kouchi, Slom

<u>Sort by</u> <u>Date</u>		Status Text
1/24/2013	S	Introduced.
1/24/2013	S	Passed First Reading.
1/24/2013	S	Referred to CPN, JDL.
1/29/2013	S	The committee(s) on CPN has scheduled a public hearing on 02-05-13 8:30AM in conference room 229.



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 COMMERCE AND CONSUMER PROTECTION

THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2013

TUESDAY, FEBRUARY 5, 2013
8:30 A.M.

TESTIMONY ON SENATE BILL NO. 960, RELATING TO FORECLOSURES.

TO THE HONORABLE ROSALYN 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 S.B. 960, Relating to Foreclosures. My name is Bruce B. Kim and I am the Executive Director of OCP.

OCP supports the intent of S.B. 960 but offers the following comments:

1. Under Act 48, in a non-judicial foreclosure, the foreclosing mortgagee is legally required to provide notice of the postponement or the cancellation of the public sale "to any other person who is entitled to receive the notice of default under section 667-22", including the mortgagor and the borrower, if the foreclosure sale is either

postponed or cancelled by the foreclosing mortgagee. HRS § 667-28(a). A copy of HRS § 667-28(a) is attached.

The foreclosing mortgagee's failure to notify the persons and entities identified in § 667-22(e) of the postponement or cancellation of the foreclosure sale constitutes prohibited conduct under HRS §§ 667-56(1) and (3).

It is also an unfair or deceptive act or practice under HRS § 480-2 if the foreclosing mortgagee fails to provide a borrower or mortgagor with, or failing to serve as required, the information required by section 667-22; engaging in conduct prohibited under HRS § 667-56; and holding a public sale in violation of § 667-25. HRS §§ 667-60(1), (4) and (5).¹

2. S.B. 960 simply replicates the notice requirements already imposed on a foreclosing mortgagee under § 667-28.

If the intent is to include such protections in Part I judicial foreclosures, then the language found in § 667-28 dealing with the notice of postponement or cancellation of sale should be included in a separate section entitled "Postponement, cancellation of sale" with language identical to HRS § 667-28.

Thank you for the opportunity to submit testimony on S.B. 960. I would be happy to answer any questions members of the committee may have.

¹ Indeed in a case decided last year, the Ninth Circuit Court of Appeals held that the foreclosing mortgagee's failure in a non-judicial foreclosure to give notice of cancellation of the foreclosure sale as required by law violated HRS § 480-2. In Re Kekaouha-Alisa, 647 F.3d 1083 (9th Cir. 2012).

West's Hawai'i Revised Statutes Annotated
Division 4. Courts and Judicial Proceedings
Title 36. Civil Remedies and Defenses and Special Proceedings
Chapter 667. Foreclosures (Refs & Annos)
Part II. Power of Sale Foreclosure Process (Refs & Annos)

HRS § 667-28

§ 667-28. Postponement, cancellation of sale

Currentness

(a) The public sale may be either postponed or canceled by the foreclosing mortgagee. Notice of the postponement or the cancellation of the public sale shall be:

(1) Announced by the foreclosing mortgagee at the date, time, and place of the last scheduled public sale; and

(2) Provided to any other person who is entitled to receive the notice of default under section 667-22.

(b) If there is a postponement of the public sale of the mortgaged property, a new public notice of the public sale shall be published once in the format described in section 667-27. The new public notice shall state that it is a notice of a postponed sale. The public sale shall take place no sooner than fourteen days after the date of the publication of the new public notice. Not less than fourteen days before the date of the public sale, a copy of the new public notice shall be posted on the mortgaged property or on another real property of which the mortgaged property is a part, and it shall be mailed or delivered to the mortgagor, to the borrower, and to any other person entitled to receive notice under section 667-22(e).

(c) Upon the fourth postponement of every series of four consecutive postponements, the foreclosing mortgagee shall follow all of the public notice of public sale requirements of section 667-27, including the requirements of mailing and posting under section 667-27(c) and of publication under section 667-27(d).

(d) The default under the mortgage agreement may be cured no later than three business days before the date of the public sale of the mortgaged property by paying the entire amount which would be owed to the foreclosing mortgagee if the payments under the mortgage agreement had not been accelerated, plus the foreclosing mortgagee's attorney's fees and costs, and all other fees and costs incurred by the foreclosing mortgagee related to the default, unless otherwise agreed to between the foreclosing mortgagee and the borrower. There is no right to cure the default or any right of redemption after that time. If the default is so cured, the public sale shall be canceled.

Credits

Laws 1998, ch. 122, § 1; Laws 2008, ch. 138, § 4, eff. June 3, 2008; Laws 2011, ch. 48, § 27, eff. May 5, 2011; Laws 2012, ch. 182, § 21, eff. June 28, 2012.

H R S § 667-28, HI ST § 667-28

Current with amendments through Act 329 of the 2012 Regular Session.



P.O. Box 976
Honolulu, Hawaii 96808

February 4, 2013

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

Re: **SB 960/SUPPORT WITH SUGGESTED AMENDMENT**

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 SB 960 and offers a suggested amendment.

The current laws allows for associations to proceed with non-judicial foreclosure actions even though a unit owner cannot be personally served with the Notice of Default and Intent to Foreclose. Therefore, with the current wording of SB 960, an association that wishes to cancel an auction would have to again attempt to personally serve the owner and the other parties as required by current law. However, if the owner cannot be located (or other parties) then the association will be at risk of committing a "prohibited act."

CAI respectfully suggests an amendment that if the association is going to cancel a public sale, the association will provide prior notice of this cancellation to the unit owner(s) at his or her last known address and all required parties by mailing such notice via first class regular mail and certified mail return receipt requested. We have incorporated this language in the attached revisions to SB 960.

This suggested revision would accomplish the intent of SB 960 of providing notice of cancellation to the unit owner(s).

Honorable Rosalyn H. Baker
Honorable Brickwood Galuteria
February 4, 2013
Page 2 of 2

CAI represents the association industry, and endorses this approach. We respectfully request the Committee to pass SB 960 with CAI's suggested amendment. Thank you.

Very truly yours,

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

Christian P. Porter

JAN 24 2013

A BILL FOR AN ACT

RELATING TO FORECLOSURES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that one little-known
2 problem of the national foreclosure crisis occurs when banks or
3 other mortgagees walk away from a foreclosure. This problem,
4 sometimes referred to as the "zombie title" problem, occurs when
5 homeowners move out after receiving notice of a foreclosure
6 sale. Prior to a public sale, the bank, mortgagee, or other
7 financial institution may walk away from the foreclosure process
8 and cancel the sale without notifying the homeowners.

9 The legislature further finds that homeowners legally own
10 their property and the homeowners' names remain on the title
11 until the date of public sale. Without a public sale, the
12 foreclosure process is left in limbo. Homeowners may be left
13 with all of the responsibilities for a property but none of the
14 rights that existed prior to the start of the foreclosure
15 process. Unfortunately for homeowners, there are no regulations
16 that require foreclosing mortgagees to inform a homeowner when a
17 bank decides not to foreclose. Unsuspecting homeowners may



1 suffer severe financial penalties as a result of canceled
2 foreclosure sales they knew nothing about.

3 Therefore, the purpose of this Act is to specify that it
4 shall be a prohibited practice for a foreclosing mortgagee or
5 foreclosing association to cancel a public sale at any time
6 before the date of the public sale without written notification
7 of the cancellation delivered to the mortgagor, the borrower,
8 and other specified persons.

9 SECTION 2. Section 667-56, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "§667-56 Prohibited conduct. It shall be a prohibited
12 practice for any foreclosing mortgagee to engage in any of the
13 following practices:

14 (1) Holding a public sale on a date, at a time, or at a
15 place other than that described in the public notice
16 of the public sale or a properly noticed postponement;

17 (2) Specifying a fictitious place in the public notice of
18 the public sale;

19 (3) Conducting a postponed public sale on a date other
20 than the date described in the new public notice of
21 the public sale;

22 (4) Canceling a public sale at any time before the date of



1 the public sale without written notification of the
2 cancelation delivered to the mortgagor, the borrower,
3 and any other person previously entitled to receive
4 notice under section 667-22(e); provided that this
5 paragraph shall not apply to a public sale canceled
6 after cure of default under section 667-28(d);

7 ~~[(4)]~~ (5) Delaying the delivery of the recorded, conformed
8 copy of the conveyance document to a bona fide
9 purchaser who purchases in good faith for more than
10 sixty days after the completion of the public sale;

11 ~~[(5)]~~ (6) Completing nonjudicial foreclosure proceedings
12 during short sale escrows with a bona fide purchaser
13 if the short sale offer is at least ten per cent
14 greater than the public sale price; provided that
15 escrow is opened within ten days and closed within
16 forty-five days of the public sale; and provided
17 further that a bona fide short sale purchaser shall
18 have priority over any other purchaser;

19 ~~[(6)]~~ (7) Completing nonjudicial foreclosure proceedings
20 during bona fide loan modification negotiations with
21 the mortgagor; or



1 ~~[(7)]~~ (8) Completing nonjudicial foreclosure proceedings
2 against a mortgagor who has been accepted or is being
3 evaluated for consideration for entry into any federal
4 loan modification program before obtaining a
5 certificate or other documentation confirming that the
6 mortgagor is no longer eligible for, or an active
7 participant of, that federal program."

8 SECTION 3. Section 667-104, Hawaii Revised Statutes, is
9 amended to read as follows:

10 "~~[(1)]~~§667-104~~[(1)]~~ **Prohibited conduct.** It shall be a
11 prohibited practice for any association to engage in any of the
12 following practices:

13 (1) Holding a public sale on a date, at a time, or at a
14 place other than that described in the public notice
15 of the public sale or a properly noticed postponement;

16 (2) Specifying a fictitious place in the public notice of
17 the public sale;

18 (3) Conducting a postponed public sale on a date other
19 than the date described in the new public notice of
20 the public sale; ~~[(1)]~~

21 (4) Canceling a public sale at any time before the date of
22 the public sale without written notification of the



or registered mail

sent by first class mail and certified mail return receipt requested to the unit owner's last known address

960

to

1 cancelation delivered to the unit owner and any other
2 person previously entitled to receive notice under
3 section 667-92(e); provided that this paragraph shall
4 not apply to a public sale canceled after cure of
5 default under section 667-97(d); or

6 [+4] (5) Completing or attempting to complete nonjudicial
7 foreclosure proceedings against a unit owner in
8 violation of section 667-92(c)."

9 SECTION 4. Statutory material to be repealed is bracketed
10 and stricken. New statutory material is underscored.

11 SECTION 5. This Act shall take effect upon its approval.

12

INTRODUCED BY:

J. Alan Bosh

Randy H. Bell

Scott Ager

Malcolm Jones

Yolanda K. Baker

Clarence K. Richardson

James M. Stone

Will

