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

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Testimony of the Department of Commerce and Consumer Affairs

**Before the
House Committee on Judiciary
Thursday, February 14, 2019
2:05 p.m.
State Capitol, Conference Room 325**

**On the following measure:
H.B. 1557, H.D. 1, RELATING TO UNOCCUPIED RESIDENTIAL PROPERTIES**

Chair Lee and Members of the Committee:

My name is Stephen Levins, and I am the Executive Director of the Department of Commerce and Consumer Affairs' (Department) Office of Consumer Protection. The Department offers comments on this bill.

The purpose of this bill is to impose fines on a homeowner, foreclosing party, or prevailing purchaser in foreclosure auctions when a vacant residential property subject to foreclosure remains unoccupied during the foreclosure process. The underlying policy is to guard against having vacant properties fall into disrepair.

The Department has serious concerns with this measure. Among other things, it authorizes penalizing a homeowner who holds legal title to property and legal right to occupancy during the pendency of a foreclosure merely for keeping the property vacant. Imposing such a fine would likely raise constitutional due process concerns.

If the purpose of this measure is to address the possible deterioration of vacant property, other viable alternatives can address this problem. County building inspectors

can cite homeowners who violate applicable county building codes, and if the citations are valid, the homeowners will be subject to fines. Consequently, instead of fining a homeowner for keeping a housing unit unoccupied, the homeowner will be fined for not maintaining it properly. This would specifically address the problem being postured and using processes authorized by law.

Thank you for the opportunity to testify on this bill.

VALERIE T. POINDEXTER

Council Member

Chair, Committee on Parks and Recreation

Council District 1



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HAWAI'I COUNTY COUNCIL

County of Hawai'i

Hawai'i County Building

25 Aupuni Street, Suite 1402

Hilo, Hawai'i 96720

February 13, 2019

Committee on Judiciary

Representative Chris Lee, Chair

Representative Joy A. San Buenaventura, Vice Chair

Email: replee@capitol.hawaii.gov

Email: repsanbuenaventura@capitol.hawaii.gov

Subject: Testimony Supporting HB1557 HD1, Relating to Unoccupied Residential Properties
Hearing: February 14, 2019, 2:05 p.m., Conference Room 325

Dear Chair and Vice Chair:

On behalf of myself and the constituents of Council District 1, Hāmākua, County of Hawai'i, I would like to express our support of HB1557 HD1, and submit a brief testimony as follows:

Hawai'i has the longest foreclosure process, making it convenient for squatters to illegally occupy a vacant home. I have witnessed homes in my district being occupied by squatters become the center of criminal activity. We have had to involve our Prosecutor's Office and our Police Department to help resolve the community's concerns of drug and other illegal activity. This process of involving them was very costly, however, we felt it necessary to protect the health and safety of our people.

I strongly support and urge the enactment of HB1557 HD1 to eliminate the dangers posed by squatters illegally occupying vacant homes. Thank you for your time and consideration.

Sincerely,

Valerie T. Poindexter



February 12, 2019

VIA WEB TRANSMITTAL

Hearing Date: Thursday, February 14, 2019

Time: 2:05 p.m.

Place: Conference Room 325

Committee on Judiciary
House of Representatives, the 30th Legislature
Regular Session of 2019

Re: Community Associations Institute's **Testimony opposing** HB 1557

Dear Chair Lee, Vice Chair San Buenaventura and Committee members:

I am a member of the Hawaii Chapter of the Community Associations Institute Legislative Action Committee ("CAI"). We represent the condominium and community association industry.

This testimony is in opposition to HB 1557. The purpose of the Act is to prevent residential property subject to judicial foreclosure actions from becoming unoccupied following a homeowner's receipt of the notice of judicial foreclosure by:

- (1) Making the homeowner liable for a fine if the homeowner fails to occupy or rent the foreclosed property thirty days after the notice of foreclosure has been served; [and]
- (2) Transferring liability to pay a fine from a homeowner to the foreclosing party if the sale of the foreclosed property is postponed or cancelled[.]

Our opposition addresses these two provisions.

With respect to the first proviso, instead of fining an owner for vacating the property following receipt of the notice of foreclosure, the focus of the statute should be on requiring the foreclosure notice to inform the homeowner that until the sale closes and the property is conveyed to a new purchaser, the homeowner will remain liable for the payment of the maintenance and reserve fees--if the home is within a condominium or a homeowner's association-- and for their mortgage, if applicable. Most homeowners vacate their units based on the mistaken belief that if they move out, they will no longer be responsible/liable for the payments. As a result, they often end up paying rent to reside elsewhere and then finding out that they are still responsible for the payments incurred as to the property on which their lender or their association is foreclosing, notwithstanding that the owner prematurely vacated the same.

In addition, this first proviso also fails to provide for a means to appeal the fine such that if the owner can show good cause as to why they have been absent from the unit, then the fine could be waived. For example, if an owner is active duty military and their duty required them to be off island for undetermined periods of time such that it is not feasible for them to rent the unit, then good cause may exist to support a waiver of the fine. Any fine system should include an appeal process to ensure the homeowner is provided due process.

With respect to the second proviso, transferring liability to pay a fine of \$1,000/day from a homeowner to the foreclosing party if the sale of the foreclosed property is postponed or cancelled, the language fails to take into consideration that there may be valid reasons for postponing or canceling the foreclosure. For example, the sale may need to be postponed so the parties will have more time to reach a settlement so the homeowner can keep his/her home. The language of this proviso, as drafted, should be void as against public policy because it will serve to discourage associations and lenders from entering into any settlement discussions if those discussions might require the sale be postponed.

Moreover, as with the first proviso, this second proviso also fails to provide for a means to appeal the fine such that if the foreclosing party can show good cause as to why it was necessary to postpone or cancel the sale, then the fine could be waived. For example, if the sale was postponed to allow the parties additional time to settle the case then this would arguably qualify as good cause for postponement. The postponement is thus beneficial to both parties and benefits society as a whole because it promotes continued homeownership. As noted above, any fine system should include an appeal process to ensure the foreclosing party is provided due process.

House Committee on Judiciary

February 12, 2019

Page 3

Based on the foregoing, we respectfully submit that HB 1557 should be held.
Thank you for your time and consideration.

Sincerely yours,

R Laree McGuire
CAI LAC Hawaii

Presentation to The
Committee on Judiciary
February 14, 2019 at 2:05 P.M.
State Capitol Conference Room 325

Testimony in Opposition to House Bill 1557, S.D. 1

TO: The Honorable Chris Lee, Chair, Committee on Judiciary
The Honorable Joy A. San Buenaventura, Vice Chair Committee on Judiciary
Members of the Committee

My name is Neal K. Okabayashi, the Executive Director of the Hawaii Bankers Association (HBA). HBA is the trade association representing banks with branches in Hawaii.

It appears that the intent of this measure is to clean unkempt property which is undergoing a foreclosure by forcing the property to be occupied in the hopes that an occupied property will become a clean property. The method to accomplish this goal will not be effective because the strategy is to impose a large fine on those who did not cause the property to be vacant, and have absolutely no legal right or power to rent the property.

The bill is justified by the length of time to conduct a judicial foreclosure. Normally, it takes 210 to 330 days to complete a judicial foreclosure, not the time implied in the preamble to the bill. One cause of a delay is a delinquent borrower evading service which results in the need to conduct service by publication. Another cause, especially on the Neighbor Islands, is the lack of judges. Another cause of delay in foreclosure, is delinquent borrowers seeking loan mitigation, sometimes serially, which sometimes is motivated by a desire to delay foreclosure to stay in the house longer at no cost.

We contend that if unkempt property is the result of a delay in the foreclosure proceedings, it is a better alternative to address the unkempt property by accelerating the judicial foreclosure process rather than by the measures contemplated by this bill, which will not be effective.

The measure seeks to fine the foreclosing lender to the tune of \$1,000 a day even though the lender has no legal power and right to take any action regarding the property such as cleaning it or renting it. In other words, it would be illegal for the lender to take the steps contemplated by this measure.

To highlight some of the unfair issues regarding banks, the bank can be fined \$1,000 a day if the public sale is postponed or cancelled. See page 7, lines 4-6. It is the commissioner who decides if the sale is postponed or cancelled, albeit often at the request of a party. It can happen for reasons beyond the control of the bank or commissioner such as the borrower filing for bankruptcy or an appeal. A delay of the sale can occur if the borrower asks for a postponement so loan mitigation efforts can be undertaken. It is unfathomable that the bank would be fined \$1,000 a day or as much as \$31,000 a month for engaging in workout efforts with the borrower.

The bank can also be fined \$1,000 a day if the property was rented by the owner to another person who wrongfully abandoned the property unless the bank rents the property although the bank has no right and power to rent the property at such time.

It should be noted that the buyer at the foreclosure sale can be fined \$1,000 a day if the buyer does not obtain title before a certain date but the closing of the sale can be delayed by factors other than the buyer's action or inaction. Such delay may result from a filing of an appeal or a bankruptcy.

The possibility of a \$1,000 a day fine on the buyer will certainly chill the potential buyer's willingness to make a bid on the property or to lower the bid price to account for the potential of a \$1,000 a day fine, which means even a delay of one month will lead to a \$30,000 loss. Thus, any diminution of the bid price will be borne by the delinquent borrower or bank.

In many cases, the bank sells the mortgage to Fannie Mae or Freddie Mac, and this will be a disincentive for Fannie or Freddie to buy mortgages made in Hawaii, and hurt housing sales in Hawaii to the detriment of Hawaii residents.

This bill assumes that any unkept condition is the result of lack of occupancy but sometimes, it is the result of the occupancy by either the borrower or tenant. There were two recent examples of this occurrence.

In July 2018, after years of attempting to clean a residence which had turned into a dump site, Honolulu was able to obtain a court order that allowed the city to do a cleanup at the owner's expense. In July 2015, the city hired a contractor do haul trash, debris, and green waste at the owner's house. In both cases, the city agency was the Department of Planning and Permitting.

We contend that going through the legal process by a county agency is a far better alternative that the dubious method of imposing a large fine on banks that cannot take the action desired.

It is not normally the case that the foreclosing property is vacant during foreclosure unless the borrower abandons the property. Local banks do not normally attempt to evict the borrower or occupant, unless there are attempts to damage the property. Absent the potential for damage, it is in the better interests of the banks to let the borrower remain in the property.

Until the Court has granted summary judgement for foreclosure and appointed a commissioner to handle the foreclosure, no one other than the borrower has the power to maintain and improve the condition of the property. Certainly not the banks and interestingly, the only person who has the power to maintain and improve the condition of the property or rent the property is the foreclosure commissioner after court appointment, and the commissioner is not including in the definition of "renting party". See page 5, lines 1-3.

There are other issues such as medical cannabis and domestic violence raised in this bill but it may be better to address them in a bill addressing the Hawaii Landlord Tenant Code rather than create special circumstances in the foreclosure chapter.

Thank you for the opportunity to submit this testimony on HB 1557, HD 1 and for the reasons set forth herein, we oppose this bill. Please let us know if we can provide further information.

Neal K. Okabayashi
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HAWAII FINANCIAL SERVICES ASSOCIATION

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February 14, 2019

LATE

Rep. Chris Lee, Chair
Rep. Joy A. San Buenaventura, Vice Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **H.B. 1557, H.D. 1 (Unoccupied Residential Properties)**
Hearing Date/Time: Thursday, February 14, 2019, 2:05 p.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.

This Bill (a) imposes fines on a homeowner, foreclosing party, or prevailing purchaser in foreclosure auctions when a vacant residential property subject to foreclosure remains unoccupied during the foreclosure process, and (b) establishes conditions under which a property may be rented.

This Bill imposes a fine of \$1,000 per day on the foreclosing party (e.g. a mortgage lender) if the public judicial foreclosure sale is postponed or cancelled and if the foreclosed property is unoccupied. The foreclosing party would be unfairly forced to pay this daily fine even for circumstances that are not within its control.

There are various circumstances where a judicial foreclosure sale would be postponed or cancelled. One would be if the homeowner, over the objection of the foreclosing party, obtains an order from a judge to postpone or cancel the scheduled sale.

A second circumstance would be if the homeowner timely sends to the servicer for the foreclosing party a loss mitigation application package before the date of the scheduled foreclosure sale. Under federal rules, the foreclosing party can’t move forward with the foreclosure sale until (a) the homeowner is notified that the homeowner isn’t eligible for any loss mitigation option, and the homeowner has exhausted the appeals process, or (b) the homeowner rejects all loss mitigation offers, or (c) the homeowner doesn’t comply with the terms of the loss mitigation agreement.

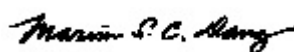
A third circumstance would be if the homeowner decides to file a federal bankruptcy petition. The filing would then result in a “stay” that would force the postponement or cancellation of the foreclosure sale.

Under this Bill, the foreclosing party would be unfairly required to pay \$1,000 per day for these and other circumstances that were caused by the homeowner or by others, and not by the foreclosing party.

The rental provisions in this Bill are problematic. They don’t consider the situation where a foreclosure commissioner has been appointed by the judge to take possession of the property and to schedule the public sale.

Better solutions to deal with these vacant properties would be to enable foreclosures to move faster through the court process and to enable receivers to be more easily appointed by judges.

Accordingly, we ask that your Committee “hold” this Bill and not pass it. Thank you.



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



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Unite
for
Good

Testimony to the House Committee on Judiciary
Thursday, February 14, 2019, 2:00 pm
Hawaii State Capitol, Room 329

LATE

In Opposition to HB 1557 HD1, Relating to Unoccupied Residential Properties

To: The Honorable Chris Lee, Chair
The Honorable Joy San Buenaventura, Vice-Chair
Members of the Committee

My name is Stefanie Sakamoto, and I am testifying on behalf of the Hawaii Credit Union League, the local trade association for 51 Hawaii credit unions, representing over 800,000 credit union members across the state. We offer the following testimony in opposition to HB 1557, Relating to Unoccupied Residential Properties.

The majority of Hawaii's credit unions currently offer mortgage loans. This bill imposes fines on a homeowner, foreclosing party, or prevailing purchaser in foreclosure auctions when a vacant residential property subject to foreclosure remains unoccupied during the foreclosure process, and establishes conditions under which a property may be rented. This bill also imposes a fine of \$1,000 per day on the foreclosing party (such as a mortgage lender), if the public judicial foreclosure sale is postponed or cancelled and if the foreclosed property is unoccupied. The foreclosing party would be unfairly forced to pay this daily fine even for circumstances that are not within its control.

This bill would cause an undue hardship upon both homeowners who may be going through foreclosure, and the financial institution foreclosing on a residential property. The foreclosure process can be an extremely long process, and imposing such a large fine could be debilitating. Further, the length of the foreclosure process is often beyond the control of the lender or the borrower. While we understand that the intent of the measure is to prevent neighborhood blight from abandoned homes, it is in the best interest of the foreclosing party (the lender) to care for the property so that it retains its value.

Thank you for the opportunity to provide testimony in opposition.

LATE

HSBA

Hawaii State Bar Association

Collection Law Section

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William J. Plum

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Reply to: **STEVEN GUTTMAN, CHAIR**

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February 14, 2019

Re: H.B. 1557 (Unoccupied Residential Properties)
Hearing Date/Time: Thursday, February 14, 2019, 2:05 p.m.

I am Charles R. Prather, Esq., Director, Collection Law Section ("CLS"). The CLS is a division of the Hawaii State Bar Association and is comprised of attorneys who handle, among other things, summary possession, eviction and foreclosure proceedings that frequently involve abandoned properties.

The CLS **opposes** this Bill.

This Bill seeks to make a homeowner liable for a fine if the homeowner does not occupy or rent a foreclosed property within thirty days of the notice of foreclosure being served. Further, once an auction date has been set for the foreclosed property, if the auction is postponed, the foreclosing party would then be liable for the fine. Next, the prevailing purchaser at the foreclosure auction may be liable for a fine should the prevailing purchaser fail to transfer title to the foreclosed property within a specified time after the sale.

With regard to the fine proposed against the foreclosing party, such a penalty does not take into consideration potential delays that may occur with regard to the auction of the foreclosed property that are out of the control of the foreclosing party. Frequently auctions are postponed in order to accommodate the homeowner and to comply with state and federal law. Section 454M-5.5(k) of the Hawaii Revised Statutes states that “[a] mortgage servicer shall avoid taking steps to foreclose . . . if the borrower has requested and is being considered for a loss mitigation option or if the borrower is in a trial or permanent loan modification and is not more than thirty days in default under the loan modification agreement.” Likewise, federal law generally prohibits a lender from moving for order of sale or conducting a foreclosure sale if a borrower submits a complete loss mitigation application more than 37 days before a foreclosure sale. See 12 CFR § 1024.41(g).

Therefore, even after an auction date is set for a foreclosed property, homeowners are still permitted to work with their lender to pursue alternatives to foreclosure such as loan modifications, deficiency waivers, short sales and deeds in lieu of foreclosure. Foreclosing parties, such as lenders, frequently continue auctions to allow homeowners to pursue these alternatives rather than proceed with the foreclosure. If the homeowner is able to reach an agreement with the lender for an alternative to foreclosure, this benefits not only the homeowner, but also any tenants and neighboring property owners as well as any homeowner association that may be involved.

Homeowners may, following a judgment of foreclosure, motion the appropriate court for a stay or other relief that would result in a court order preventing the foreclosing party from moving forward with the auction. This Bill, as currently drafted, would penalize the foreclosing party for obeying a lawful order of a court of competent jurisdiction. Frequently, following a judgment of foreclosure, homeowners elect to pursue an appeal and move for a stay of the foreclosure proceedings during the pendency of the appeal. If the homeowner obtains a stay and posts the appropriate bond, the foreclosing party is unable to move forward with any auction until the appeal has been resolved.

The proposed penalty for prevailing purchasers would likely having a “chilling” effect on bidding on foreclosed properties. If a potential bidder faces a fine, such as the one in this Bill, when bidding on an unoccupied foreclosed property, the potential bidder will likely be less inclined to bid up to an amount resembling the value of the foreclosed property. Encouraging healthy and competitive bidding benefits all parties including the homeowner. If the prevailing bid on a foreclosed property exceeds the amounts due and owing to any lienholders, pursuant to the applicable statute, the excess proceeds can be awarded to the homeowner which can ultimately help the homeowner obtain new housing following foreclosure.

Foreclosing parties, such as mortgagees, have limited authority to enter foreclosed properties prior to obtaining a foreclosure judgment. After a foreclosure judgment is obtained, a court-appointed commissioner is vested with legal and equitable title to the property and then becomes responsible for the condition of the property as well as any tenants and rental income. However, even the court-appointed commissioner lacks the power to remove squatters. A foreclosing mortgagee does not obtain title to the foreclosed property unless and until it is the highest bidder at auction, the sale at auction has been confirmed and a deed has been recorded awarding the foreclosing mortgagee title.

While the terms of the typical mortgage provide that a mortgagee may “make reasonable entries upon and inspection of the Property”, this provision is rarely interpreted to allow mortgagees to enter a foreclosed property, prior to obtaining title, and remedy the issues outlined in this Bill. Instead, in cases of extreme waste or abuse of the foreclosed property, a mortgagee’s only recourse is to seek the appointment of receiver. However, the standard for appointment of a receiver is difficult to satisfy and the courts will only appoint a receiver where the foreclosed property, or the income arising from it, is in danger of loss from the neglect, waste, misconduct or insolvency of the homeowner or other occupant. The courts are rarely willing to appoint a receiver given the foregoing standard because it is difficult for a mortgagee to obtain the appropriate evidence especially where the foreclosed property is occupied by individuals involved in criminal activity. Currently, mortgagees, and their agents, face potential civil and criminal liability for entering a foreclosed property to prevent abuse and destruction prior to obtaining title. At a minimum, mortgagees, and their agents, should be provided some sort of exemption from such liability if they are to be held responsible, in the amount proposed by this Bill, for the condition of the foreclosed property.

As an alternative, the CLS recommends that a receiver, or other individual with court-appointed authority, be established at the outset of a foreclosure action where the foreclosing party is able to demonstrate that the foreclosed property is unoccupied or occupied by persons not authorized by the homeowner to be in the property. The court-appointed individual will be empowered to enter upon and maintain the foreclosed property in the manner contemplated by this Bill. Such an appointment would benefit neighboring homeowners as the foreclosed property would be maintained and trespassers would be prevented from occupying the foreclosed property. Further, homeowner’s associations would benefit from the appointment of such an individual given that they will be able to more easily monitor and enforce compliance with applicable governing documents and house rules and collect assessments when appropriate. Homeowners would also benefit given that foreclosed properties are frequently owned by homeowners who are not present in the jurisdiction. Homeowners who have walked away from foreclosed properties, or who may not be responding to a foreclosure action, would avoid facing a daily fine, and further financial hardship, if a court-appointed individual is responsible for the foreclosed property. Ultimately, court enforced oversight of a foreclosed property is more likely to prevent waste and abuse of a foreclosed property than a daily fine that will likely not be collected from an already financially distressed homeowner or a helpless mortgagee who lacks the authority to enter the foreclosed property and resolve the issues complained of in this Bill.

Accordingly, we ask that your Committee “hold” this Bill and not pass it and consider the alternative presented herein.

Thank you for considering our testimony.

A handwritten signature in black ink, appearing to read 'C. Prather', with a stylized flourish at the end.

CHARLES R. PRATHER, ESQ.
Attorney for Collection Law Section

The comments and recommendations submitted reflect the position/viewpoint of the Collection Law Section of the Hawaii State Bar Association only. The position/viewpoint has not been reviewed or approved by the HSBA Board of Directors.

February 14, 2019

The Honorable Chris Lee, Chair
House Committee on Judiciary
State Capitol, Room 309
Honolulu, Hawaii 96813

LATE

RE: H.B. 1557, HD1, Relating to Unoccupied Residential Properties

HEARING: Thursday, February 14, 2019, at 2:05 p.m.

Aloha Chair Lee, Vice Chair San Buenaventura, and Members of the Committee,

I am Ken Hiraki Government Affairs Director, testifying on behalf of the Hawai'i Association of REALTORS® (“HAR”), the voice of real estate in Hawai'i, and its over 9,500 members. HAR **opposes** H.B. 1557, HD1, which imposes fines on a homeowner, foreclosing party, or prevailing purchaser in foreclosure actions when a vacant residential property subject to foreclosure remains unoccupied during the foreclosure process. Establishes conditions under which a property may be rented.

Under this measure, a homeowner would be subject to fines of up to \$1,000, per day simply for keeping a property vacant. HAR would note that there are numerous valid reasons why a property could be left vacant, including a homeowner trying to work with the lender on a settlement process.

Additionally, a property could already be in disrepair and therefore difficult to rent. As such, HAR has concerns that under this measure a homeowner would be penalized even if there are good reasons for leaving the property unoccupied

Mahalo for the opportunity to testify.