

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2024**

ON THE FOLLOWING MEASURE:

S.B. NO. 2861, S.D. 1, RELATING TO EXCLUSIVE LISTING AGREEMENTS.

BEFORE THE:

HOUSE COMMITTEES ON JUDICIARY AND HAWAIIAN AFFAIRS AND ON
CONSUMER PROTECTION AND COMMERCE

DATE: Thursday, March 21, 2024 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 329 and Videoconference

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Tina M. Tsuchiyama or Shari J. Wong, Deputy Attorneys General

Chairs Tarnas and Nakashima and Members of the Committees:

The Department of the Attorney General provides the following comments on this bill.

This bill invalidates certain exclusive listing agreements for the sale of residential real property and prohibits the recording of any exclusive listing agreement for the sale of residential real property with the bureau of conveyances.

This bill may raise constitutionality concerns under Article I, Section 10, Clause 1, or the Contract Clause of the U.S. Constitution because it invalidates certain exclusive listing agreements currently in effect.

To strengthen the bill against potential Contract Clause challenges, we recommend inserting a purpose section. Even where a law is found to substantially impair a pre-existing contract, a court may uphold the law if the state law advances a significant and legitimate public purpose. See *Galima v. Ass'n of Apartment Owners of Palm Ct. by & Through Bd. of Directors*, 453 F. Supp. 3d 1334, 1355 (D. Haw. 2020). In *Galima*, the U.S. District Court for the District of Hawaii applied a two-step test and concluded that Act 282, Session Laws of Hawaii 2019, was unconstitutional because (1) the act substantially impaired pre-existing contracts, and (2) the act did not address a significant and legitimate public good but rather benefitted a favored group and not a basic societal interest. See *id.* at 1355-1356. This bill plainly impairs certain pre-

existing exclusive listing agreements by invalidating them altogether. As such, to guard the bill against potential challenges, the purpose section of the bill should not only identify a significant and legitimate public purpose, but also explain how the remedies in the bill appropriately and reasonably advance the bill's stated purpose.

For example, the purpose section could provide some background on recent practices that have occurred on the mainland, wherein companies target vulnerable property owners to sign long-term listing agreements in exchange for a few hundred dollars upfront and recording these agreements, creating a lien on the home that would become due when the home was sold or when homeowners attempt to cancel the agreement. These complex contracts are essentially high interest loans that make selling, refinancing, or transferring real estate difficult for homeowners, and can deprive homeowners of the equity in their home. Such unfair and deceptive practices led other states to pass legislation banning this practice and initiate lawsuits against companies that participate in such predatory business practices.¹ The purpose section can clarify that this bill is intended to stop such unfair business practices from becoming prevalent in the state.

If the bill was not intended to be applied retroactively, we recommend adding a section to the bill as follows:

SECTION ____. This Act shall not be applied so as to impair any contract existing as of the effective date of this Act in a manner violative of either the Constitution of the State of Hawai'i or Article I, Section 10, of the United States Constitution.

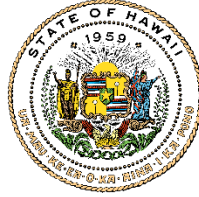
Thank you for the opportunity to offer comments.

¹ As of the date of this writing, Florida, North Carolina, Indiana, Ohio, Massachusetts, Pennsylvania, and New Jersey have filed complaints against companies that have engaged in such practices. The American Land Title Association has provided a summary of current legislation and complaints on the following website: <https://www.alta.org/advocacy/housing-opportunities/non-title-recorded-agreements-for-personal-service>

The following is a link to the complaint filed in North Carolina: <https://ncdoj.sharefile.com/share/view/s4f2bf770a0cc40459fefbeee55f4f923>. North Carolina enacted similar legislation in August 2023, a link of which can be found here: <https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H422v6.pdf>

JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



**STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA**

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CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
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MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES
ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

**Testimony of
DAWN N. S. CHANG
Chairperson**

**Before the House Committees on
JUDICIARY & HAWAIIAN AFFAIRS
And
CONSUMER PROTECTION & COMMERCE**

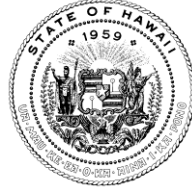
**Thursday, March 21, 2024
2:00 PM
State Capitol, Conference Room 329**

**In consideration of
SENATE BILL 2861, SENATE DRAFT 1
RELATING TO EXCLUSIVE LISTING AGREEMENTS**

Senate Bill 2861, Senate Draft 1 proposes to make void and enforceable under state law that governs unfair and deceptive practices certain exclusive listing agreements for the sale of residential real property; prohibits the recording of exclusive listing agreements of any duration for the sale of residential real estate with the Bureau of Conveyances; and establishes that certain exclusive listing agreements shall not be enforceable, have any legal effect, or provide actual or constructive notice, or operate as a lien, encumbrance, or security interest. The bill also establishes certain remedies for the parties that may have been affected by these exclusive listing agreements. **The Department of Land and Natural Resources (Department) supports this measure.**

The Department appreciates the amendments made by the Senate Committee on Commerce and Consumer Protection in response to previously raised concerns by the Bureau of Conveyance and stands in support of this SD1 version of the bill that will better protect the Hawai'i homeowners from unfair and deceptive practices.

Mahalo for the opportunity to testify in support of this measure.



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DEPUTY DIRECTOR | KA HOPE LUNA HO'OKELE

Testimony of the Department of Commerce and Consumer Affairs

Office of Consumer Protection

Before the
House Committee on Judiciary & Hawaiian Affairs
and
House Committee on Consumer Protection & Commerce
Thursday, March 21, 2024
2:00 PM
Via Videoconference
Conference Room 329

On the following measure:

S.B. 2861, S.D. 1, RELATING TO EXCLUSIVE LISTING AGREEMENTS

Chair Tarnas, Chair Nakashima, and Members of the Committees:

My name is Mana Moriarty, and I am the Executive Director of the Department of Commerce and Consumer Affairs (Department) Office of Consumer Protection (OCP). The Department strongly supports this bill to prohibit one-sided, predatory exclusive listing agreements and prohibit recording of these agreements at the Department of Land and Natural Resources Bureau of Conveyances. The Department has grave concerns about reported investigations of, and state attorney general lawsuits against, companies who take unfair advantage of homeowners by offering to provide listing services and then record an agreement to provide those services against the title to the property. Here is an example of how the agreement works and how the harm occurs:

- A company targets homes in specific areas of a community, typically elderly and vulnerable populations, offering cash, as little as a few hundred dollars, in return for 40-year listing agreements.
- The company records the agreement as a lien that runs with the property. Therefore, anyone who inherits the property is subject to the terms of the agreement.
- The agreement clouds the property's title and hampers the homeowner's ability to borrow money through a mortgage or home equity loan.
- The agreement entitles the company to a fee, or triggers a default, when the home changes hands without consent or affirmation of the company.
- Attorney general investigations and lawsuits assert that the companies deceptively advertise the agreement's terms and fail to fully disclose the terms to the homeowner.

Across the nation, seven state attorney generals have filed lawsuits against a Florida-based company, MV Realty, that operated a predatory real estate scheme targeting financially vulnerable homeowners in 33 states.

In fifteen states since 2021, consumer protection advocates and real estate and title industry representatives have worked with their state legislatures to combat these anti-consumer real estate schemes. If this bill passes, Hawaii will join Alabama, California, Colorado, Florida, Georgia, Idaho, Iowa, Maine, Maryland, Nevada, North Carolina, North Dakota, Ohio, Tennessee, and Utah in banning predatory exclusive listing agreements.

Since this bill was introduced in the Hawaii State Senate, the Department has worked with DLNR to create a homeowner right to obtain a court order declaring an unlawful agreement void and unenforceable, and authorize a homeowner who successfully brings a court action the right to recover actual damages, costs, and attorney's fees, which may not be offset by the service provider. It is the Department's position that a homeowner who successfully brings an action for a violation of this law retains the right to recover treble damages against a service provider pursuant to

Hawaii Revised Statutes section 480-13, notwithstanding references to “actual damages” on page 4, line 18 to page 5, line 5.

The Department has also narrowed the scope and type of real property to which this bill applies by amending the definition of “residential real property” on page 5, lines 14-16. With the amendment, the bill no longer prohibits developers from entering into exclusive listing agreements to sell residential real property if the real property includes more than four dwelling units.

The Department’s amendments also eliminate procedural hurdles for a homeowner to clear title to the property. Page 4, lines 3-6 states that “[n]o owner or buyer shall be required to record any document to remove an exclusive listing agreement that is made or is presented for recording or filing with the bureau of conveyances in violation of this section.”

As amended in the Senate Draft 1, this bill provides important protections for homeowners and is narrowly tailored to deter the type of anti-consumer business practices that have already spread throughout 33 states. We respectfully urge you to pass the bill out of your Committees.

Thank you for the opportunity to testify on this bill.

March 21, 2024

The Honorable David A. Tarnas, Chair
House Committee on Judiciary & Hawaiian Affairs

The Honorable Mark M. Nakashima, Chair
House Committee on Consumer Protection & Commerce
State Capitol, Conference Room 329 & Videoconference

RE: Senate Bill 2861, SD1, Relating to Exclusive Listing Agreements

HEARING: Thursday, March 21, 2024, at 2:00 p.m.

Aloha Chair Tarnas, Chair Nakashima, and Members of the Joint Committees:

My name is Lyndsey Garcia, Director of Advocacy, testifying on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawaii and its over 11,000 members. HAR **supports** Senate Bill 2861, SD1, which establishes as void and enforceable under state law that governs unfair and deceptive practices, certain exclusive listing agreements for the sale of residential real property. Prohibits the recording of exclusive listing agreements of any duration for the sale of residential real estate with the Bureau of Conveyances. Establishes that certain exclusive listing agreements shall not be enforceable, have any legal effect, or provide actual or constructive notice, or operate as a lien, encumbrance, or security interest. Establishes certain remedies. Takes effect 7/1/2040.

HAR supports this measure as it provides safeguards for consumers. This measure seems to address a bad practice in the real estate market where a company contracts the exclusive right to list an owner's home for up to 40 years in exchange for a modest up-front cash payment, with stiff penalties for terminating the agreement. While this extreme practice does not appear to exist in Hawaii, it has been a problem in 33 other states with the attorney generals in Florida, Massachusetts, and Pennsylvania suing a Florida-based company that engaged in this practice.

We do not approve of such bad practices as they are detrimental to our clients and the real estate industry in general. The National Association of REALTORS® ("NAR") believes that consumers should be aware of all aspects of any listing agreement and should consider consulting with a professional advisor regarding the obligations and any potential risks.

However, we would note that there may be situations where it is necessary to have a listing agreement extend beyond one year. **We seek clarity that this measure will allow for situations where upon expiration, both parties can agree to extend their existing agreement for another year or at the very least are not prohibited from entering into another one-year agreement.**

Mahalo for the opportunity to testify.

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The State Legislature
House Committee on Judiciary and Hawaiian Affairs
House Committee on Consumer Protection and Commerce
Thursday, March 21, 2024
Conference Room 329, 2:00 p.m.

TO: The Honorable David Tarnas, Chair
The Honorable Mark Nakashima, Chair
FROM: Keali'i Lopez, State Director, AARP Hawaii
RE: Strong Support for S.B. 2861, SD1 -Relating to Exclusive Listing Agreements

Aloha Chairs Tarnas and Nakashima, and Members of the Committees:

My name is Keali'i Lopez, and I am the State Director for AARP Hawai'i. AARP is a nonpartisan, social impact organization that advocates for individuals age 50 and older. We have a membership of nearly 38 million nationwide and nearly 140,000 in Hawaii. We advocate at the state and federal level for the issues that matter most to older adults and their families.

AARP strongly supports S.B 2861 SD1 which makes it unlawful for an exclusive listing agreement to last longer than 12 months from the date the agreement was made. It also makes it unlawful to present for recording or filing including to attempt to record or file, an exclusive listing agreement of any duration.

For many Hawaii residents, their home is their most important asset and the cornerstone of their financial stability. They rely upon federal, state, and local policymakers to safeguard them against fraud, deception, and unfair practices. Straightforward business practices, marketing materials and contracts empower consumers to understand both the benefits and risks of products and services so they can make informed choices – including engaging in an agreement for future services.

Older homeowners are not immune from the effects of recent economic trends and the resulting stress placed on family budgets. Rising home values are leading to higher property taxes. The greater frequency of natural disasters is leading to increases in the cost of homeowner's insurance. And inflation is driving prices higher for most necessities, like food, prescription drugs, and utilities. These price increases affect older people more deeply since they are more likely to be retired and live on a fixed income.

We know that older adults want to stay in their homes and communities as they age, yet many already face tremendous challenges as property taxes soar beyond their reach. As they search for the supportive services that will enable them to live with dignity and independence in their own homes, many are now being confronted with the offer of an unfair exclusive listing agreement promising quick cash as a marketing technique. Older adults can be especially vulnerable and need extra safeguards in order to be protected from such an unfair, deceptive, and abusive practice. Furthermore, failing to disclose or misleading consumers about the way that these agreements for future services will slow or prevent a consumer from refinancing or tapping into their home equity – denying them either the opportunity to save money or to access much-needed capital. We encourage you to vote in favor of SB 2861, SD1 to protect our homeowners.

Thank you for the opportunity to strongly support S.B. 2861, SD1.