

Honolulu, Hawaii

April 27, 2012

RE: H.B. No. 1875
H.D. 2
S.D. 2
C.D. 1

Honorable Calvin K.Y. Say
Speaker, House of Representatives
Twenty-Sixth State Legislature
Regular Session of 2012
State of Hawaii

Honorable Shan S. Tsutsui
President of the Senate
Twenty-Sixth State Legislature
Regular Session of 2012
State of Hawaii

Sirs:

Your Committee on Conference on the disagreeing vote of the House of Representatives to the amendments proposed by the Senate in H.B. No. 1875, H.D. 2, S.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO FORECLOSURES,"

having met, and after full and free discussion, has agreed to recommend and does recommend to the respective Houses the final passage of this bill in an amended form.

The purpose of this measure is to implement the final recommendations of the Mortgage Foreclosure Task Force, which were submitted to the Legislature for the Regular Session of 2012, and other best practices to improve the mortgage foreclosures law and address related issues affecting homeowner association liens and the collection of unpaid assessments.

Specifically, this measure, among other things:

- (1) Amends section 667-60, Hawaii Revised Statutes, which makes any violation of the mortgage foreclosure law under Chapter 667, Hawaii Revised Statutes, an unfair or



deceptive act or practice subject to enhanced penalties under Chapter 480, Hawaii Revised Statutes, to:

- (A) Specify the types of violations under Chapter 667 that constitute unfair or deceptive acts or practices;
 - (B) Limit the types of violations that may void a title transfer of foreclosed property; and
 - (C) Establish a time limit for filing actions to void title transfers of foreclosed property;
- (2) Repeals the nonjudicial foreclosure process under Part I of Chapter 667, Hawaii Revised Statutes, to provide for a single nonjudicial foreclosure process under Part II of that chapter;
- (3) Makes permanent the process under Act 48, Session Laws of Hawaii 2011, for converting nonjudicial foreclosures of residential property to judicial foreclosures;
- (4) With regard to the temporary mortgage foreclosure dispute resolution program under Part V of Chapter 667, Hawaii Revised Statutes, for owner-occupants of residential property facing nonjudicial foreclosure:
- (A) Makes the program permanent by repealing its sunset date;
 - (B) Repeals the prohibition against participants of the program converting their nonjudicial foreclosure proceedings to judicial actions; and
 - (C) Streamlines the dispute resolution process;
- (5) With regard to condominium and planned community associations:
- (A) Establishes an alternate power of sale process for the collection of unpaid assessments, modeled after the process set forth in Part II of Chapter 667, Hawaii Revised Statutes, as amended by the task force's recommendations;



- (B) Places a time limit on recorded liens for unpaid assessments, excluding liens that automatically arise pursuant to law or the governing documents of the association, and provides that the recorded lien will not expire if proceedings to enforce the lien are instituted prior to the end of the time limit;
 - (C) Prohibits nonjudicial foreclosures of association liens arising solely from fines, penalties, legal fees, or late fees;
 - (D) Provides associations with notice of an owner-occupant's decision to participate in the mortgage foreclosure dispute resolution program; and
 - (E) Allows associations to proceed with a nonjudicial foreclosure, notwithstanding a stay of foreclosure proceedings arising from a dispute resolution case opening, if the association has not been notified of the foreclosure action by the foreclosing mortgagee or of the dispute resolution case opening;
- (6) With regard to planned community associations organized under Chapter 421J, Hawaii Revised Statutes:
- (A) Provides these associations with the same options and protections as condominium associations with regard to association liens for assessments and the collection of unpaid assessments from tenants or rental agents; and
 - (B) Exempts these associations from the requirements of the mortgage foreclosure dispute resolution program and the process allowing owner-occupants to convert nonjudicial foreclosures to judicial foreclosures, to parallel the existing exemptions for condominium associations; and
- (7) Clarifies, improves, and corrects provisions of Act 48, Session Laws of Hawaii 2011, relating to mortgage foreclosures.

Your Committee on Conference finds that Act 162, Session Laws of Hawaii 2010, established the Mortgage Foreclosure Task Force to recommend policies and procedures to improve the way mortgage foreclosures are conducted in the State. Act 162 required the task



force to submit its findings and recommendations, including any proposed legislation, to the Legislature for the regular sessions of 2011 and 2012.

Some of the task force's initial recommendations in its report to the Legislature for the Regular Session of 2011 were included in Act 48, Session Laws of Hawaii 2011, a far-reaching mortgage foreclosure reform measure. This measure implements the recommendations in the task force's final report to the Legislature for the Regular Session of 2012, along with other best practices, to further improve the mortgage foreclosures law and address related issues affecting homeowner association liens for unpaid assessments.

Your Committee on Conference finds that section 667-60, Hawaii Revised Statutes, currently provides that any violation of the mortgage foreclosures law under Chapter 667, Hawaii Revised Statutes, is an unfair or deceptive act or practice (UDAP) under section 480-2, Hawaii Revised Statutes. While this measure amends section 667-60 to enumerate specific UDAP violations under Chapter 667, this list of violations is not intended to be exhaustive. It should be noted that the federal Ninth Circuit Court of Appeals recently affirmed a federal bankruptcy court decision rendered before the enactment of section 667-60 and holding that a nonjudicial foreclosure violation for failure to publicly announce the postponement of a foreclosure sale constituted a deceptive practice under section 480-2 (*Kekauoha-Alisa v. Ameriquest Mortgage Company, et al.*, No. 09-60019 (9th Cir. March 26, 2012)). It is the intent of your Committee on Conference to uphold the ability of courts, in appropriate circumstances, to determine UDAP liability for violations of the mortgage foreclosures law that are not specifically listed in section 667-60.

In addition, your Committee on Conference finds merit in the provision from the S.D. 1 of this measure requiring that attorneys filing a judicial foreclosure action relating to a mortgage on residential property sign and submit an affirmation that the attorney has verified the accuracy of the documents submitted in the filing, under penalty of perjury and subject to applicable rules of professional conduct. This provision is modeled after a requirement established by the New York Judiciary to maintain the integrity of the foreclosure process. Your Committee on Conference notes a recent news report concerning an audit by San Francisco county officials of approximately four hundred foreclosures in the county from January 2009 to November 2011 that found about eighty-four percent of foreclosure sale files contained clear violations of the law and two-thirds had at least four violations or irregularities



("Audit Uncovers Extensive Flaws in Foreclosures, The New York Times, February 15, 2012). Such reports suggest how pervasive foreclosure abuses and irregularities may be across the nation. An attorney affirmation requirement will promote diligence and accountability in judicial foreclosure filings and help ensure that Hawaii's courts are not used as instruments of fraud in foreclosure actions.

Your Committee on Conference has amended this measure by:

- (1) With regard to attorney affirmations for judicial foreclosure filings relating to mortgages on residential property:
 - (A) Restoring the attorney affirmation provision from the S.D. 1 of this measure;
 - (B) Clarifying that the affirmation provision applies to attorneys filing on behalf of a mortgagee;
 - (C) Providing that the attorney affirmation provision applies to all pending judicial foreclosure actions filed by mortgagees for residential property prior to, as well as on and after, the effective date of this measure; and
 - (D) On July 1, 2017:
 - (i) Repealing the attorney affirmation provision described in subparagraph (A); and
 - (ii) Putting into effect an alternate provision requiring an attorney who files a mortgage foreclosure action to affirm in writing, under penalty of perjury, that to the best of the attorney's knowledge, information, and belief the allegations in the complaint are warranted by existing law and have evidentiary support;
- (2) Restoring the provisions in current law prohibiting participants of the mortgage foreclosure dispute resolution program under Part V of Chapter 667, Hawaii Revised Statutes, from converting their nonjudicial foreclosure proceedings to judicial actions;



- (3) With regard to the time limit on filing actions to void the transfer of title to the purchaser in a foreclosure sale:
- (A) Reducing the time limit from one hundred eighty days after recordation of the affidavit after public sale, to sixty days after recordation; and
 - (B) Applying the time limit only to nonjudicial foreclosures under Part II of Chapter 667, Hawaii Revised Statutes;
- (4) With regard to deficiency judgments to collect on any insufficiency of foreclosure sale proceeds to satisfy the debt:
- (A) Deleting the new provision that would prohibit deficiency judgments against owner-occupants of residential properties sold in judicial foreclosures; and
 - (B) For nonjudicial foreclosures of mortgages conducted under Part II of Chapter 667, Hawaii Revised Statutes, prohibiting deficiency judgments only with respect to owner-occupant residential properties, unless the debt is secured by other collateral;
- (5) With regard to the new publication requirements for public notices of public sale for judicial foreclosures, nonjudicial foreclosures under Part II of Chapter 667, Hawaii Revised Statutes, and association nonjudicial foreclosures for the collection of unpaid assessments under the new part established in Chapter 667:
- (A) Adding associations to the types of foreclosing entities subject to the new publication requirements for judicial foreclosures;
 - (B) For newspaper publications:
 - (i) Requiring that the newspaper be distributed within the geographic area of the property for at least one year, rather than six months, and to at least three percent of the residents of that geographic area, rather than at least one percent of those residents;



- (ii) Defining "geographic area" to mean the real property tax zone of the property if located in the County of Hawaii, or otherwise the county in which the property is located; and
 - (iii) Repealing the newspaper criteria two years after the effective date of this measure, and thereafter requiring that the public notice appear in a newspaper that is published at least weekly and has a general circulation in the county in which the property is located;
- (C) For website publications:
- (i) Requiring the public notice to be published at least once by newspaper at least fourteen days prior to the public sale;
 - (ii) Authorizing publication on a state website at the discretion of the agency that maintains the website, but requiring that for owner-occupant mortgaged properties facing nonjudicial foreclosure under Part II of Chapter 667, Hawaii Revised Statutes, the public notice shall be published on a website maintained by the Department of Commerce and Consumer Affairs;
 - (iii) Specifying a filing fee of \$300 for publishing the public notice of public sale for owner-occupant mortgaged properties on the Department of Commerce and Consumer Affairs' website; and
 - (iv) Requiring the Department of Commerce and Consumer Affairs to make its website available for posting public notices of public sale for nonjudicial foreclosures of owner-occupant mortgaged properties under Part II of Chapter 667, Hawaii Revised Statutes, by August 30, 2012; and
- (D) For nonjudicial foreclosures under Part II of Chapter 667, Hawaii Revised Statutes, and association nonjudicial foreclosures under the new part established in Chapter 667, changing the required foreclosure notice statement concerning publication



of public notice of the public sale to specifically include the option to publish by newspaper, as well as on the Department of Commerce and Consumer Affairs' website;

- (6) Deleting the amendments to section 667-56, Hawaii Revised Statutes, to allow foreclosing mortgagees to complete nonjudicial foreclosure proceedings while the mortgagor is seeking a loan modification from the mortgagee or applying for a federal loan modification program, if the mortgagor is applying to the same entity for more than the third time;
- (7) Amending the title of Chapter 667, Hawaii Revised Statutes, from "Mortgage Foreclosures" to "Foreclosures", to accommodate the new provisions added by this measure that do not directly relate to mortgages;
- (8) Adding a severability clause;
- (9) Adding a savings clause;
- (10) Making this measure effective upon its approval; and
- (11) Making technical nonsubstantive amendments for the purposes of clarity, consistency, and style.

As affirmed by the record of votes of the managers of your Committee on Conference that is attached to this report, your Committee on Conference is in accord with the intent and purpose of H.B. No. 1875, H.D. 2, S.D. 2, as amended herein, and recommends that it pass Final Reading in the form attached hereto as H.B. No. 1875, H.D. 2, S.D. 2, C.D. 1.

Respectfully submitted on behalf
of the managers:

ON THE PART OF THE SENATE

ON THE PART OF THE HOUSE



ROSALYN H. BAKER, Chair



ROBERT N. HERKES, Co-Chair

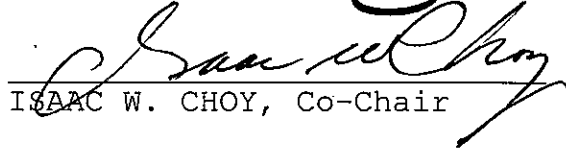




CLAYTON HEE, Co-Chair



GILBERT KEITH-AGARAN, Co-Chair



ISAAC W. CHOY, Co-Chair



Record of Votes of a Conference Committee

Bill / Concurrent Resolution No.: HB 1875, HD 2, SD 2 Date/Time: 4.27.12 9:52 AM

The recommendation of the House and Senate managers is to pass with amendments (CD).

The Committee is reconsidering its previous decision.

The recommendation of the Senate Manager(s) is to AGREE to the House amendments made to the Senate Measure

The recommendation of the House Manager(s) is to AGREE to the Senate amendments made to the House Measure.

Table with columns for Senate Managers and House Managers, and sub-columns for A, WR, N, E. Includes names like BAKER, Rosalyn H., Chr. and HERKES, Robert N., Co-Chr. with handwritten marks.

A = Aye WR = Aye with Reservations N = Nay E = Excused

Senate Recommendation is: [X] Adopted [] Not Adopted

House Recommendation is: [X] Adopted [] Not Adopted

Senate Lead Chair's or Designee's Signature: [Handwritten Signature]

House Lead Chair's or Designee's Signature: [Handwritten Signature]

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