

STAND. COM. REP. NO.

2945

Honolulu, Hawaii

MAR 23 2012

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

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

Sir:

Your Committee on Commerce and Consumer Protection, to which was referred H.B. No. 1875, H.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO FORECLOSURES,"

begs leave to report as follows:

The purpose of this measure is to implement the recommendations of the Mortgage Foreclosure Task Force 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.

Your Committee received testimony in support of this measure from the Department of Commerce and Consumer Affairs; Office of Consumer Protection; Legal Aid Society of Hawaii; and one individual.

Your Committee received testimony in opposition to this measure from Hawaii Financial Services Association; Hawaii State Bar Association; Bayshore Towers Association of Apartment Owners; Mililani Town Association; AOA Harbor Square; Hawaii Credit Union League; Royal Kunia Community Association; Country Club Village, AOA; Hawaii Bankers Association; and eight individuals.

Your Committee received comments on this measure from Hawaii Association of Realtors; RCO Hawaii; Anderson Lahne & Fujisaki, LLP; Community Associations Institute; Palehua Community

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Association; Villages of Kapolei Association; Outrigger Enterprises Group; and one individual.

Your Committee has amended this measure by replacing its entire contents with the similar provisions of S.B. No. 2429, S.D. 1, which is the companion bill to this measure. As amended, this measure implements the final recommendations of the Mortgage Foreclosure Task Force and other best practices by, among other things:

- (1) Amending 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) Repealing 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) Making 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) Making the program permanent by repealing its sunset date;



- (B) Repealing the prohibition against participants of the program converting their nonjudicial foreclosure proceedings to judicial actions; and
 - (C) Streamlining the dispute resolution process;
- (5) With regard to condominium and planned community associations:
- (A) Establishing 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) Placing a time limit on recorded liens for assessments, and prohibiting the foreclosure of liens arising solely from fines, penalties, legal fees, or late fees;
 - (C) Providing associations with notice of an owner-occupant's decision to participate in the mortgage foreclosure dispute resolution program; and
 - (D) Allowing 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) Providing 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) Exempting 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) Clarifying, improving, and correcting provisions of Act 48, Session Laws of Hawaii 2011, relating to mortgage foreclosures.

Your Committee 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, as amended by Act 48, and address related issues affecting homeowner association liens and the collection of unpaid assessments.

Your Committee acknowledges the concerns raised regarding whether a two-year expiration date for recorded association liens would provide condominium and planned community associations sufficient time to act on these liens. This may be particularly problematic for planned community associations, which seldom rush to foreclose upon a recorded lien because the dollar amounts at stake are typically low and do not justify incurring the expense of foreclosure. Your Committee was informed that it is not uncommon for large planned community associations to have low annual assessments, such that lien debt accrues slowly for these associations. If planned community associations are forced to foreclose before the lien expires within two years, many of these associations could either face incurring thousands of dollars in attorneys' fees and costs to foreclose on debts of a few hundred dollars or less or risk losing their liens.

Your Committee also notes concerns that prohibiting association foreclosures of liens against a unit that arise solely



from fines, penalties, legal fees, or late fees would remove a key tool for collecting on debts that otherwise would have to be borne by the entire membership of the association.

Further, your Committee believes that certain amendments made by this measure to nonjudicial foreclosure processes should also be applied to judicial foreclosures for purposes of equity and fairness. These amendments concern:

- (1) Providing for unit owner payment plans to avoid association foreclosures; and
- (2) Allowing notices of public sale to be published in a wider variety of newspapers or, if the subject property is owned by an owner-occupant, posted on a website maintained by the Department of Commerce and Consumer Affairs;

Accordingly, your Committee has further amended this measure by:

- (1) With regard to condominium and planned community association liens:
 - (A) Extending the time limit for recorded association liens for unpaid assessments from two years to six years, and providing that the recorded lien will not expire if proceedings to enforce the lien are instituted prior to the end of the six-year time period;
 - (B) Clarifying that the expiration of a recorded association lien does not affect liens that automatically arise pursuant to law or the governing documents of the association;
 - (C) Specifying that proceedings to enforce an association's lien for any assessment must be instituted within six years after the assessment became due, except that if the unit owner files for bankruptcy, the period of time for instituting proceedings shall be tolled until thirty days after the automatic stay of proceedings under the federal bankruptcy laws is lifted;



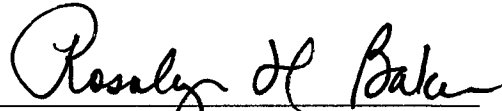
- (D) In light of the time limit for recorded association liens, deleting the provisions establishing a process for unit owners to request or sue an association for the release of recorded liens upon full satisfaction of the recorded lien and discharge of any secured debt; and
 - (E) Applying the prohibition against association foreclosures of liens that arise solely from fines, penalties, legal fees, or late fees to nonjudicial foreclosures only. Accordingly, this amendment allows only judicial foreclosures of these liens as supervised by the courts;
- (2) With regard to judicial foreclosures:
- (A) Establishing processes for unit owners to avoid association foreclosures of liens for assessments by curing the default or submitting a payment plan, similar to the processes for nonjudicial foreclosures under this measure;
 - (B) Incorporating the notice of public sale publication requirements and options already provided for nonjudicial foreclosures in this measure; and
 - (C) Incorporating a provision from the H.D. 2 version of this measure, as received by your Committee, that requires attorneys filing a judicial foreclosure action for residential property to 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;
- (3) Revising for accuracy the portion of the public information statement required under section 667-41(b), Hawaii Revised Statutes, as amended by this measure, describing the distribution of sale proceeds in nonjudicial foreclosures and the ability of foreclosing mortgagees to collect on any deficiency of the proceeds to satisfy the debt;
- (4) Changing the effective date to June 30, 2020, to facilitate further discussion on this measure; and



- (5) Making technical, nonsubstantive amendments for the purposes of clarity, consistency, and style.

As affirmed by the record of votes of the members of your Committee on Commerce and Consumer Protection that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1875, H.D. 2, as amended herein, and recommends that it pass Second Reading in the form attached hereto as H.B. No. 1875, H.D. 2, S.D. 1, and be referred to the Committee on Judiciary and Labor.

Respectfully submitted on
behalf of the members of the
Committee on Commerce and
Consumer Protection,



ROSALYN H. BAKER, Chair



The Senate
 Twenty-Sixth Legislature
 State of Hawai'i

Record of Votes
Committee on Commerce and Consumer Protection
CPN

Bill / Resolution No.:*	Committee Referral:	Date:		
HB 1875, HD2	CPN, JPL	3-14-12		
<input type="checkbox"/> The committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
BAKER, Rosalyn H. (C)	✓			
TANIGUCHI, Brian T. (VC)	✓			
GALUTERIA, Brickwood	✓			
GREEN, M.D., Josh	✓			
NISHIHARA, Clarence K.	✓			
SOLOMON, Malama	✓			
SLOM, Sam				✓
TOTAL	6	0	0	1
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature:				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Only one measure per Record of Votes