



HAWAII BANKERS ASSOCIATION

1000 BISHOP ST., SUITE 301B • HONOLULU, HAWAII 96813-4203
PHONE: (808) 524-5161 • FAX: (808) 521-4120

Presentation to the House Committee on Consumer Protection & Commerce and
Committee on Judiciary
Monday, February 23, 2009, at 2:00PM

Testimony for HB 202, HD1 Relating to Foreclosures

TO: The Honorable Robert Herkes, Chair
The Honorable Glenn Wakai, Vice Chair
Members of the House Committee on Consumer Protection & Commerce

TO: The Honorable Jon Karamatsu, Chair
The Honorable Ken Ito, Vice Chair
Members of the House Committee on Judiciary

My name is Neal Okabayashi and I testify for the Hawaii Bankers Association. We support this bill because it balances the interests of lenders and tenants who happen to live in a property that is being foreclosed on.

We understand that the Hawaii Association of Realtors is asking for a November 1, 2009 effective date in order to modify their forms. The HBA does not object to such effective date.

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law

P.O. Box 4109

Honolulu, Hawaii 96812-4109

Telephone No.: (808) 521-8521

Fax No.: (808) 521-8522

February 23, 2009

Rep. Robert N. Herkes, Chair
and members of the House Committee on Consumer Protection & Commerce
Rep. Jon Riki Karamatsu, Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **House Bill 202, HD 1 (Foreclosures)**
Hearing Date/Time: Monday, February 23, 2009, 2:00 P.M.

I am the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is the trade association for Hawaii's financial services loan companies which are regulated by the Hawaii Commissioner of Financial Institutions under the Code of Financial Institutions (Chapter 412, Article 9 of the Hawaii Revised Statutes).

The HFSA **opposes** this Bill as drafted.

The purpose of this Bill is to provide for notice to tenants of rental properties that are foreclosed upon.

While there is some merit with the intent of this Bill, we believe that the Bill should be improved as follows:

1. In Section 1, on page 1 beginning on line 4, the "successor in interest" must give the existing tenant 45 days notice to vacate the property. Because this is the same amount of time a landlord needs to give a month-to-month tenant under the Residential Landlord Tenant Code, this requirement seems reasonable.

However, we recommend adding two subsections in Section 1:

"(c) For the purposes of this section, "successor in interest" means a person who acquired an interest in the property through a foreclosure.

"(d) This section shall not apply if a borrower, guarantor, or a mortgagor under the promissory note or mortgage that is the subject of the foreclosure remains on the property as a tenant or subtenant after the foreclosure."

The proposed subsection (c) clarifies that this section only applies when the "successor in interest" is the new owner who purchased the property at a foreclosure sale. This is similar to the wording on page 5, beginning on line 19 of this Bill.

Rep. Robert N. Herkes, Chair
and members of the House Committee on Consumer Protection & Commerce
Rep. Jon Riki Karamatsu, Chair
and members of the House Committee on Judiciary
February 23, 2009
Page 2

Under the proposed subsection (d), once the foreclosure is completed, if any borrower, guarantor, or mortgagor under the note or mortgage stays on the property as a tenant or subtenant, the new owner can give those individuals notice to immediately vacate (rather than 45 days notice to vacate).

2. In Section 2, on page 5 beginning on line 1, the new owner is to notify the tenant of the foreclosure.

We urge you to delete the additional requirement that the notice of the foreclosure be given at least "forty-five days prior to the date of the summary proceeding for possession."

Generally a summary possession proceeding (i.e. an eviction action) is filed with the court only when a tenant does not vacate after being given proper advance notice to do so. Under the wording in Section 1 of this Bill, the tenant already needs to be given 45 days notice to vacate. Under the wording in Section 2, if the new owner fails to notify the tenant about the foreclosure, then the new owner won't be able to terminate the tenancy. Thus, the tenant is sufficiently protected. It is unnecessary to additionally require that the notice about the foreclosure be given 45 days before filing a summary possession action.

3. In Section 3, on page 8 beginning on line 1, a tenant must be notified 15 days before the sale (auction) of the property. This provision is being added to Hawaii Revised Statutes ("HRS") Sec. 667-5 which only applies to non-judicial foreclosures.

Before beginning a non-judicial foreclosure proceeding and even during that foreclosure proceeding, the foreclosing mortgagee (lender) and its attorney do not always know whether there is a tenant on the property. The foreclosing lender and its attorney should not be the ones responsible for notifying the tenant about an upcoming auction. Instead, the landlord should be the one to give the notice to the tenant.

Accordingly, we recommend that subsection (d) be reworded as follows:

"(d) The landlord shall notify a tenant in possession of a mortgaged property about the sale of the property at least fifteen days before the day of the sale."

4. HRS 667-5, referred to above, is part of the old (1874) non-judicial foreclosure statute. On the other hand, Part II of HRS Chapter 667 (HRS Sections 667-21 through 667-51) is the "Alternate Power of Sale Foreclosure Process", which was enacted in 1998. An amendment that is to be made to HRS 667-5, such as the one to require the landlord to give a tenant 15 days notice before a foreclosure sale, should also be made to Part II.

We suggest that Part II be amended in HRS Sec. 667-27 (which relates to the public notice

Rep. Robert N. Herkes, Chair

and members of the House Committee on Consumer Protection & Commerce

Rep. Jon Riki Karamatsu, Chair

and members of the House Committee on Judiciary

February 23, 2009

Page 3

of the public sale) by adding a subsection (e):

“(e) The landlord shall notify a tenant in possession of a mortgaged property about the public sale of the property at least fifteen days before the date of the public sale.”

5. I was involved in drafting the Part II “Alternate Power of Sale Foreclosure Process” during the 1997 and 1998 legislative sessions. However, before the legislation passed in 1998, the legislature made certain changes to Part II that made it unusable and unworkable. As a result, no lender uses the Part II alternate power of sale provisions which are in the HRS Sections 667-21 through 667-51. Instead, all non-judicial foreclosures in Hawaii use the provisions in HRS Sections 667-5 through 667-10, some of which were first enacted 135 years ago in 1874.

There are at least 3 sections in Part II which should be amended in order to make it usable and workable. Here are our recommendations:

a. Section 667-31(a), Hawaii Revised Statutes, is amended to read as follows:

“~~[[§667-31]]~~ Conveyance of property on payment of purchase price; distribution of sale proceeds. (a) After the purchaser completes the purchase by paying the full purchase price and the costs for the purchase, the mortgaged property shall be conveyed to the purchaser by a conveyance document. The conveyance document shall be in a recordable form and shall be signed by the foreclosing mortgagee in the foreclosing mortgagee's name. ~~[The mortgagor or borrower shall sign the conveyance document on his or her own behalf.]~~”

Reason for amendment: It is unrealistic and impractical to expect the mortgagor or borrower who is being foreclosed on to sign the conveyance document.

b. Section 667-41, Hawaii Revised Statutes, is repealed:

“~~[[§667-41]]~~ ~~[Public information requirement. All financial institutions, mortgagees, lenders, business entities and organizations without limitation, and persons, who intend to use the power of sale foreclosure under this part, under the conditions required by this part, shall also develop informational materials to educate and inform borrowers and mortgagors. These materials shall be made available to the public, including the borrowers at the time of application for a mortgage or loan, or other contract containing a power of sale foreclosure provision. These materials, among other things, shall inform the borrower that the financial institution and other business entities and persons who are authorized under this part to exercise the power of sale foreclosure, in the event~~

Rep. Robert N. Herkes, Chair
and members of the House Committee on Consumer Protection & Commerce
Rep. Jon Riki Karamatsu, Chair
and members of the House Committee on Judiciary
February 23, 2009
Page 4

~~of the borrower's default, have the option of pursuing either a judicial or nonjudicial foreclosure as provided by law. These informational materials shall fully and completely explain these remedies.]”~~

Reason for deletion: It is unreasonable to require a lender to make available to a loan applicant certain written information about foreclosures. This is not an appropriate way to start the loan application process.

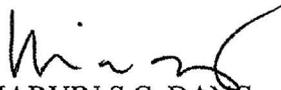
c. Section 667-42, Hawaii Revised Statutes, is amended to read as follows:

“~~[[~~§667-42~~]]~~ Application of this part. The requirements of this part shall apply ~~[only]~~ to ~~[new]~~ mortgages, loans, agreements, and contracts containing power of sale foreclosure language executed by the borrowers or mortgagors ~~[after July 1, 1999].”~~

Reason for amendment: Part II should apply to all mortgages containing a power of sale provision, not just those made after July 1, 1999.

We willing to work with your Committee on any revisions to this Bill.

Thank you for considering our testimony.


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

(MSCD/hfsa)



The REALTOR® Building
1136 12th Avenue, Suite 220
Honolulu, Hawaii 96816

Phone: (808) 733-7060
Fax: (808) 737-4977
Neighbor Islands: (888) 737-9070
Email: har@hawaiiirealtors.com

February 20, 2009

The Honorable Robert N. Herkes, Chair
House Committee on Consumer Protection & Commerce
The Honorable Jon Riki Karamatsu, Chair
House Committee on Judiciary
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: H.B. 202, H.D. 1 Relating to Foreclosures

HEARING DATE: Monday, February 23, 2009 at 2:00 p.m.

Aloha Chair Herkes, Chair Karamatsu, and Members of the Joint Committees:

I am Myoung Oh, here to testify on behalf of the Hawai'i Association of REALTORS® (HAR) and its 9,600 members. HAR **supports the intent** of H.B. 202, H.D. 1, which provides for notice to tenants of rental properties that are foreclosed upon.

HAR agrees generally that tenants who have paid their rents diligently may find that they have to search for another rental unit without adequate time and notice.

HAR suggests the following amendment to this measure:

HAR requests that an effective date of November 1, 2009 be inserted, so that HAR may review and revise its standard Rental Agreement and other forms accordingly.

Mahalo for the opportunity to testify.