



Mortgage Bankers Association of Hawaii
P.O. Box 4129, Honolulu, Hawaii 96812

February 3, 2009

The Honorable Robert Herkes, Chair and
Members of the House Committee on
Consumer Protection and Commerce
State Capitol, Room 320
Honolulu, Hawaii 96813

Re: House Bill 874 Relating to Residential Real Property

Dear Chair Herkes and members of the House Committee on Consumer Protection and
Commerce:

I am Rick Tsujimura, representing the Mortgage Bankers Association of Hawaii
("MBAH"). The MBAH is a voluntary organization of real estate lenders in Hawaii.
Our membership consists of employees of banks, savings institutions, mortgage bankers,
mortgage brokers, and other financial institutions. The members of the MBAH originate
the vast majority of residential and commercial real estate mortgage loans in Hawaii.
When, and if, the MBAH testifies on legislation, it is related only to mortgage lending.

MBAH opposes House Bill 874 Relating to Residential Real Property.

House Bill 874 is intended to prohibit fees required by a deed restriction or
covenant running with the land. Neither the term "deed restriction" nor "covenant
running with land" is defined in the section or the chapter and thus must be given its
usual meaning. Typically deed restrictions and covenants running with the land are a
result of agreements contained in an agreement to sell which is ultimately contained in a
deed, an instrument transferring ownership of property from one owner to another. This
agreement to sell formalized in a deed is a contract between a buyer and a seller. While
covenants are one way executory contracts which are to be performed by the person
covenanting, or in lay parlance, promising to do something, in this case usually the buyer.
This bill generally voids and renders unenforceable such deed restrictions and covenants
"provided that the deed restriction or covenant requires a ... fee upon a future transfer of
the property." But the deed restriction and covenant may be a part of the contract to sell
between the transferor and transferee.

The United States Constitution provides in Article 1 Section 10 that:

Section 10. *No state shall* enter into any treaty, alliance, or confederation; grant
letters of marque and reprisal; coin money; emit bills of credit; make anything but
gold and silver coin a tender in payment of debts; *pass any* bill of attainder, ex
post facto law, or *law impairing the obligation of contracts*, or grant any title of
nobility.

[Emphasis added]

This measure clearly impairs the obligation of such a contract, which may only be evidenced by existing deed restrictions and covenants, and is therefore facially violative of article 1 section 10.

The most common usage in Hawaii of a deed restriction or covenant may be seen in the planned communities such as found in Mililani, and in condominiums. This particular bill focuses however upon fees to be paid upon a future transfer. Such restrictions commonly appear in commercial transactions wherein a prior seller in order to limit the practice of "flipping", the quick sale of a property, in some cases back to back with the original sale. It is unclear if this type of transaction was envisioned when this bill was drafted but it would be clearly impacted by the bill's passage. In any event this measure cannot have any retroactive impact since voiding existing deed restrictions and covenants would amount to an unconstitutional taking, since the government would be eliminating the property rights of the person[s] for whom the deed restriction or covenant was enacted.

Government might also be impacted by the enactment of this measure because counties usually execute a unilateral agreement in consideration of the grant of a zoning or development plan change. Such unilateral agreements are recorded as liens, deed restrictions or covenants running with the land and may provide for fees in connection with a subsequent transfer of the property to another, especially if the "fee" amounts to a charge for infrastructure improvements, school improvements, etc.

For these reasons MBAH requests that this measure be held. Thank you for the opportunity to present this testimony.



P.O. Box 976
Honolulu, Hawaii 96808

The Honorable Robert N. Herkes, Chair
and Members of the Committee on
Consumer Protection & Commerce

RE: MEASURE: HB874
HEARING: FEBRUARY 4, 2009, 2:00 P.M., RM 325
COPIES: 1

Dear Rep. Herkes and Members of the Committee:

My name is Philip L. Lahne and I am the Co-Chair of the Hawai'i Legislative Action Committee of the Community Associations Institute ("CAI"). CAI is a non-profit national and statewide organization whose members include condominium associations, planned community associations, residential cooperatives, homeowners, managing agents, and others involved in creating, managing, servicing, and living in common interest communities.

The Hawai'i LAC supports the intent and purpose of HB874 to prevent developers from using so-called transfer fees from every future sale of homes and apartments in common interest communities as a "cash cow" to generate income long after the initial sale. The LAC is concerned, however, that the broad language of the bill may inadvertently include within its scope various kinds of usual and customary fees that are collected when homes and apartments within common interest communities are conveyed. This is because the obligation to pay various types of assessments, fees and charges is incorporated in declarations of condominium property regime and declarations of covenants, conditions and restrictions as covenants running with the land and such governing documents and the homes and apartments within common interest communities are conveyed subject to those covenants. In order to address these concerns, the LAC respectfully requests that the proposed Section 508D-4(b) be amended to read as follows:

(b) Any provision contained in a deed or other covenant running with the land contained in an instrument that encumbers residential real property that requires the payment of any fees in connection with a future transfer of the property, other than usual and customary escrow and title fees and usual and customary fees charged by associations of unit owners as defined by chapter 514B, cooperative housing corporations as defined by chapter 421I and planned community associations as defined by chapter 421J or their managing agents for updating ownership records,

is void and unenforceable. Any lien that either encumbers or purports to encumber the real property to secure a right under any provision of a deed or covenant that this subsection renders void and unenforceable shall also be void and unenforceable.

This subsection shall not apply to: (i) any provision of a deed or other covenant running with the land that requires a fee associated with the conveyance of property to be paid to a government entity or

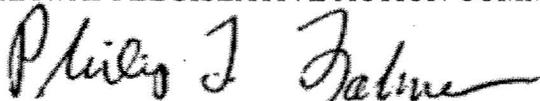
(ii) any fee, charge, assessment, fine, or other amount payable to an association of unit owners, cooperative housing corporation, planned community association or their authorized agents pursuant to a declaration or other recorded covenant, articles of incorporation, deed, proprietary lease, applicable law or authorized agent's managerial relationship with such entities, including, but not limited to, fees or charges payable for estoppel letters or certificates issued by the such an entity or its authorized agent, or

(iii) any special assessment for unpaid common expenses in accordance with section 514B-146.

This subsection shall also not apply to the sale of residential real property in bulk, such as where a developer undertakes to develop and then sells all or substantially all of the developer's entire inventory of residential real property in a development to a purchaser who is a developer.

Thank you for the opportunity to submit this testimony. If you have any questions, I can be reached at 536-8177 or by email at plahne@alf-hawaii.com.

COMMUNITY ASSOCIATIONS INSTITUTE
HAWAII LEGISLATIVE ACTION COMMITTEE



PHILIP L. LAHNE, Co-Chair



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 3, 2009

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

RE: H.B 874 Relating to Residential Real Property

HEARING DATE: Wednesday, February 4, 2009 at 2:00 p.m.

Aloha Chair Herkes and Members of the Committee:

On behalf of our 9,600 members in Hawai'i, the Hawai'i Association of REALTORS® (HAR) **supports the intent** of H.B. 874, which prohibits private transfer fees required by a deed restriction or covenant.

Private transfer fees are deed restrictions or covenants imposed by an owner of real property, which require a fee to be paid to a specific individual or entity every time the property is sold. These restrictions run with the land and, oftentimes, are not disclosed to subsequent buyers until the closing of a property sale. Sometimes, such fees may be imposed as part of a new housing development upon the buyer and subsequent purchasers of the property. Presently, there is no regulation over the imposition of such fees, no limitation on the application of the fees, and no accountability or oversight of the recipients of the fees.

HAR believes that private transfer fees may create significant barriers to homeownership, particularly because these fees are typically imposed at the closing of a transaction. This puts a burden on the homeowner, at a critical time when money may already be short.

HAR supports the intent of H.B. 874 and is continuing to review this bill. At this time, HAR believes that additional technical amendments would help to clarify the measure, and looks forward to providing its further comments to the Committee.

Mahalo for the opportunity to testify on this measure.