



SB 1241, SD 2 Relating to Mortgages
Committee on Consumer Protection & Commerce

March 16, 2009
325

2:15 p.m.

Room

The Office of Hawaiian Affairs supports the purpose and intent of SB 1241, SD 2 to prohibit a deed restriction or covenant that requires a transferee of real property to pay a transfer fee to the person imposing the deed restriction or covenant, in connection with a transfer of real property.

Consumer protection laws benefit all of Hawaii's residents which include the beneficiaries of the Office of Hawaiian Affairs.

When it is very clear actions taken in real estate transactions are not for any legitimate purpose and serve only to enrich someone, consumer protection laws are needed. This law will help to protect our consumers in real estate transaction.

Mahalo nui loa for the opportunity to provide this testimony and we urge your support.

**SB 1241 SD2
RELATING TO REAL PROPERTY TRANSACTIONS**

**PAUL T. OSHIRO
MANAGER – GOVERNMENT RELATIONS
ALEXANDER & BALDWIN, INC.**

MARCH 16, 2009

Chair Herkes and Members of the House Committee on Consumer Protection & Commerce:

I am Paul Oshiro, testifying on behalf of Alexander & Baldwin, Inc. (A&B) on SB 1241 SD2, "A BILL FOR AN ACT RELATING TO REAL PROPERTY TRANSACTIONS."

The purpose of this bill is to prohibit deed restrictions or covenants that require a transferee of real property to pay a transfer fees to the person imposing the deed restriction or covenant in connection with a transfer of real property. The bill also provides an exemption for certain usual and customary fees, assessments, or charges encompassed in various real property transactions.

In an effort to alleviate economic speculation for residential real property sold at prices below the prevailing market value, shared appreciation requirements have been utilized for a specified period of time following the initial real property transaction. We respectfully request your indulgence and assistance to incorporate into the exemption section of this bill consideration payable for shared appreciation interest, profit participation, or other consideration for residential real property that was either initially

transferred at a price below the then prevailing market value of the real property or as required by a government entity. We have attached language for your consideration.

Thank you for the opportunity to testify.

SB 1241 SD2 (HD1 Proposed)

RELATING TO REAL PROPERTY TRANSACTIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 502, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§502- **Prohibition of transfer fees; covenants.** (a) A deed restriction or other covenant running with the land applicable to the sale of residential real property that requires a transferee of residential real property, or the transferee's heirs, successors, and assigns, to pay to a declarant or other person imposing a deed restriction or covenant on the property or a third party designated by a transferor of the property, a fee in connection with a future transfer of the property shall be prohibited and unenforceable. A deed restriction or other covenant running with the land that violates this section, or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable.

(b) This section shall not apply to any of the following fees or charges required by a deed restriction or other covenant

running with the land in connection with the transfer of residential real property:

- (1) Any interest, charge, fee, or other amount payable by a borrower to a lender pursuant to a loan secured by residential real property, including any fee payable to the lender for consenting to an assumption of the loan or transfer of the residential real property, for providing an estoppel letter or certificate, or for any shared appreciation interest, profit participation, or other consideration payable to the lender in connection with the loan;
- (2) Any fee or charge payable to a residential real property homeowners' association, condominium association, cooperative association, or property owners' association pursuant to a declaration, covenant, or law applicable to the association, including a fee or charge for association records for the owner of the residential real property or to provide an estoppel letter or certificate;
- (3) Any fee or charge payable to a landlord under a lease of residential real property, including a fee or charge payable to the landlord for consenting to an assignment of the lease, for providing an estoppel letter or certificate, or to change the landlord's

records as to the owner of the lessee's interest in the lease;

(4) Any consideration payable to the holder of an option to purchase an interest in residential real property or the holder of a right of first refusal or first offer to purchase an interest in residential real property for waiving, releasing, or not exercising the option or right upon transfer of the residential real property to another person;

(5) Any consideration payable for shared appreciation interest, profit participation, or other consideration for residential real property either initially transferred at a price below the then prevailing market value of the real property or as required by a government entity; or

(6) Any fee or charge payable to a government entity.

(c) As used in this section, unless the context requires otherwise, "residential real property" means fee simple or leasehold property on which is currently situated:

(1) From one to four dwelling units; or

(2) A residential condominium or cooperative apartment primarily used for occupancy as a residence."

SECTION 2. Chapter 518, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§518- Prohibition on transfer fees; covenants. (a) A deed restriction or other covenant running with the land applicable to the sale of residential real property that requires a transferee of residential real property, or the transferee's heirs, successors, and assigns, to pay to a declarant or other person imposing a deed restriction or covenant on the property or a third party designated by a transferor of the property, a fee in connection with a future transfer of the property shall be prohibited and unenforceable. A deed restriction or other covenant running with the land that violates this section, or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable.

(b) This section shall not apply to any of the following fees or charges required by a deed restriction or other covenant running with the land in connection with the transfer of residential real property:

- (1) Any interest, charge, fee, or other amount payable by a borrower to a lender pursuant to a loan secured by residential real property, including any fee payable

to the lender for consenting to an assumption of the loan or transfer of the residential real property, for providing an estoppel letter or certificate, or for any shared appreciation interest, profit participation, or other consideration payable to the lender in connection with the loan;

(2) Any fee or charge payable to a residential real property homeowners' association, condominium association, cooperative association, or property owners' association pursuant to a declaration, covenant, or law applicable to the association, including a fee or charge for association records for the owner of the residential real property or to provide an estoppel letter or certificate;

(3) Any fee or charge payable to a landlord under a lease of residential real property, including a fee or charge payable to the landlord for consenting to an assignment of the lease, for providing an estoppel letter or certificate, or to change the landlord's records as to the owner of the lessee's interest in the lease;

(4) Any consideration payable to the holder of an option to purchase an interest in residential real property or the holder of a right of first refusal or first

offer to purchase an interest in residential real property for waiving, releasing, or not exercising the option or right upon transfer of the residential real property to another person;

- (5) Any consideration payable for shared appreciation interest, profit participation, or other consideration for residential real property either initially transferred at a price below the then prevailing market value of the real property or as required by a government entity; or

(6) Any fee or charge payable to a government entity.

(c) As used in this section, unless the context requires otherwise, "residential real property" means fee simple or leasehold property on which is currently situated:

- (1) From one to four dwelling units; or
(2) A residential condominium or cooperative apartment primarily used for occupancy as a residence."

SECTION 3. Chapter 518, Hawaii Revised Statutes, is amended by amending its title to read as follows:

"COVENANTS IN [~~LEASES~~] REAL PROPERTY TRANSACTIONS"

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect on November 1, 2009.

March 14, 2009

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

RE: S.B. 1241, S.D.2 Relating to Real Property Transactions

Hearing Date: Monday, March 16, 2009 at 2:15 p.m.

Aloha Chair Herkes and Members of the Committee:

I am Gary Slovin with Goodwill Anderson Quinn & Stifel, here to testify on behalf of the Hawai'i Association of REALTORS® (HAR) and its 9,600 members in Hawai'i. HAR **supports** S.B. 1241, SD2, which prohibits private transfer fees required by a deed restriction or covenant, with certain exceptions.

S.B. 1241, SD2 would prohibit a deed restriction or covenant that requires a transferee of real property to pay a transfer fee to the person imposing the deed restriction or covenant, in connection with a transfer of real property. 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.

S.B. 1241, SD2, in its present form is fundamentally the same as H.B. 874, HD2. It differs in some respects from the House version which was previously heard by your Committee. The Senate bill has a broader title. That will enable the bill to apply to commercial transactions as well as residential transactions. Accordingly, we would propose changes be made to the bill to allow for this:

First, we would suggest that the reference to "residential" properties be removed from the bill. The rationale behind this is that private transfer fees might also affect properties that do not fit into the "residential" categories (for example, resort condominiums), but still would be harmed by imposing such fees.



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REALTORS®**
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Second, we have included an amendment that seeks to exempt legitimate fees that might be contemplated by and between developers and subdevelopers as opposed to subsequent purchasers. This would be in addition to the other exceptions in the bill that exempt from its coverage traditional fees that are legitimately imposed upon the transfer of property.

Finally, we recommend the placement of the private transfer fee restrictions in HRS Chapters 501 (Land Court) and 502 (Bureau of Conveyances), rather than Chapters 501 and 518, as set forth in S.B. 1241, SD 2. This is primarily a drafting preference, which tracks the language of H.B. 874, HD 2.

We are enclosing a redline and clean copy of the bill for your review, and would be happy to answer any questions you may have.

Mahalo for the opportunity to testify.

A BILL FOR AN ACT

RELATING TO PRIVATE TRANSFER FEES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter ~~502~~,501, Hawaii Revised Statutes, is amended by adding a new section to the part entitled "Miscellaneous Provisions" to be appropriately designated and to read as follows:

~~§501-~~ §502— **Prohibition of transfer fees; covenants.**

(a) A deed restriction or other covenant running with the land applicable to the sale transfer of residential real property that requires a transferee of residential real property, or the transferee's heirs, successors, and or assigns, to pay to a declarant or other person imposing a the deed restriction or covenant on the property or a third party designated by a transferor of the property; a fee in connection with a future transfer of the property shall be prohibited and unenforceable. A deed restriction or other covenant running with the land that violates this section; or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable.

(b) This section shall does not apply to any of the following fees or charges required by a deed restriction or other covenant running with the land in connection with the transfer of residential real property:

(1) Any interest, charge, fee, or other amount amounts payable by a borrower to a lender pursuant to a loan secured by residential real property, including any fee payable to the lender for consenting to an assumption of the loan or transfer of the residential real property, for providing an estoppel letter or certificate, or for any shared appreciation interest, or profit participation, or other consideration payable to the lender in connection with the loan;

(2) Any fee or charge, assessment or fine payable to a residential real property homeowners' association, condominium association, cooperative association, or property owners' association, pursuant to a declaration, covenant, or law applicable to the such association, including a fee or charge for to change the association's records for as to the owner of the residential real property or to provide an estoppel letter or certificate;

(3) Any fee or charge payable to a landlord under a lease of residential real property, including a fee or charge payable to the landlord for consenting to an assignment of the lease, for providing an estoppel letter or certificate, or to change the landlord's records as to the owner of the lessee's interest in the lease;

(4) Any consideration payable to the holder of an option to purchase an interest in residential real property or the holder of a right of first refusal or first offer to purchase an interest in residential real property for waiving, releasing, or not exercising the option or right upon transfer of the residential real property to another person; or

(5) Any fee, charge, shared appreciation interest, profit participation or other consideration, payable by (a) a person engaged in the business of the development of real property for resale to others and not for the person's own use or the use of the

person's parent, affiliates, subsidiaries, or relatives; or (b) a person who acquires the real property for the purpose of engaging in such business or for the purpose of reselling the real property to a person engaged in such business; or

(6) Any fee or charge payable to a government entity.

~~— (c) As used in this section, unless the context requires otherwise, "residential real property" means fee simple or leasehold property on which is currently situated:~~

~~— (1) From one to four dwelling units; or~~

~~— (2) A residential condominium or cooperative apartment primarily used for occupancy as a residence."~~

SECTION 2. Chapter ~~518,502~~, Hawaii Revised Statutes, is amended by adding a new section to the part entitled "Other Provisions" to be appropriately designated and to read as follows:

~~— **"§518—§502 - Prohibition of transfer fees; covenants.**~~

(a) A deed restriction or other covenant running with the land applicable to the sale transfer of residential real property that requires a transferee of residential real property, or the transferee's heirs, successors, and or assigns, to pay to a declarant or other person imposing at the deed restriction or covenant on the property or a third party designated by a transferor of the property, a fee in connection with a future transfer of the property shall be prohibited and unenforceable. A deed restriction or other covenant running with the land that violates this section, or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable.

(b) This section shall does not apply to any of the following fees or charges required by a deed restriction or other covenant running with the land in connection associated with the transfer of residential-real property:

(1) Any interest, charge, fee, or other amount amounts payable by a borrower to a lender pursuant to a loan secured by residential-real property, including any fee payable to the lender for consenting to an assumption of the loan or transfer of the residential-real property, for providing an estoppel letter or certificate, or for any shared appreciation interest, or profit participation, or other consideration payable to the lender in connection with the loan;

(2) Any fee or, charge, assessment or fine payable to a residential real property homeowners'-association, condominium-association, cooperative-association, or property owners' association, pursuant to a declaration, covenant, or law applicable to the such association, including a fee or charge for to change the association's records for as to the owner of the residential real property or to provide an estoppel letter or certificate;

(3) Any fee or charge payable to a landlord under a lease of residential real property, including a fee or charge payable to the landlord for consenting to an assignment of the lease, for providing an estoppel letter or certificate, or to change the landlord's records as to the owner of the lessee's interest in the lease;

(4) Any consideration payable to the holder of an option to purchase an interest in residential-real property or the holder of a right of first refusal or first offer to purchase an interest in residential-real property for waiving, releasing, or not exercising the option or right upon transfer of the residential-real property to another person; or

(5) Any fee, charge, shared appreciation interest, profit participation or other consideration, payable by (a) a person engaged in the business of the development of real property for resale to others and not for the person's own use or the use of the person's parent, affiliates, subsidiaries, or relatives; or (b) a person who acquires the real property for the purpose of engaging in such business or for the purpose of reselling the real property to a person engaged in such business; or

(6) Any fee or charge payable to a government entity.

~~(c) As used in this section, unless the context requires otherwise, "residential real property" means fee simple or leasehold property on which is currently situated:~~

~~(1) From one to four dwelling units; or~~

~~(2) A residential condominium or cooperative apartment primarily used for occupancy as a residence."~~

SECTION 3. ~~Chapter 518, Hawaii Revised Statutes, is amended by amending its title to read as follows:~~

~~"COVENANTS IN [LEASES] REAL PROPERTY TRANSACTIONS"~~

~~SECTION 4.~~ Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION ~~5.4.~~ This Act shall take effect on November 1, 2009.

A BILL FOR AN ACT

RELATING TO PRIVATE TRANSFER FEES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Chapter 501, Hawaii Revised Statutes, is amended by adding a new section to the part entitled "Miscellaneous Provisions" to be appropriately designated and to read as follows:

§501- Prohibition of transfer fees.

(a) A deed restriction or other covenant running with the land applicable to the transfer of real property that requires a transferee of real property, or the transferee's heirs, successors or assigns, to pay a declarant or other person imposing the deed restriction or covenant on the property or a third party designated by a transferor of the property a fee in connection with a future transfer of the property is prohibited. A deed restriction or other covenant running with the land that violates this section or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable.

(b) This section does not apply to any of the following fees or charges required by a deed restriction or other covenant running with the land in connection with the transfer of real property:

(1) Any interest, charge, fee, or other amounts payable by a borrower to a lender pursuant to a loan secured by real property, including any fee payable to the lender for consenting to an assumption of the loan or transfer of the real property, for providing an estoppel letter or certificate, or for any shared appreciation interest or profit participation or other consideration payable to the lender in connection with the loan;

(2) Any fee, charge, assessment or fine payable to a real property homeowners', condominium, cooperative, or property owners' association, pursuant to a declaration, covenant, or law applicable to such association, including a fee or charge to change the association's records as to the owner of the real property or to provide an estoppel letter or certificate;

(3) Any fee or charge payable to a landlord under a lease of real property, including a fee or charge payable to the landlord for consenting to an assignment of the lease, for providing an estoppel letter or certificate, or to change the landlord's records as to the owner of the lessee's interest in the lease;

(4) Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon transfer of the real property to another person;

(5) Any fee, charge, shared appreciation interest, profit participation or other consideration, payable by (a) a person engaged in the business of the development of real property for resale to others and not for the person's own use or the use of the person's parent, affiliates, subsidiaries, or relatives; or (b) a person who acquires the real

property for the purpose of engaging in such business or for the purpose of reselling the real property to a person engaged in such business; or

(6) Any fee or charge payable to a government entity.

SECTION 2. Chapter 502, Hawaii Revised Statutes, is amended by adding a new section to the part entitled "Other Provisions" to be appropriately designated and to read as follows:

§502 - Prohibition of transfer fees.

(a) A deed restriction or other covenant running with the land applicable to the transfer of real property that requires a transferee of real property, or the transferee's heirs, successors or assigns, to pay a declarant or other person imposing the deed restriction or covenant on the property or a third party designated by a transferor of the property a fee in connection with a future transfer of the property is prohibited. A deed restriction or other covenant running with the land that violates this section or a lien purporting to encumber the land to secure a right under a deed restriction or other covenant running with the land that violates this section is void and unenforceable.

(b) This section does not apply to any of the following fees or charges required by a deed restriction or other covenant running with the land associated with the transfer of real property:

(1) Any interest, charge, fee, or other amounts payable by a borrower to a lender pursuant to a loan secured by real property, including any fee payable to the lender for consenting to an assumption of the loan or transfer of the real property, for providing an estoppel letter or certificate, or for any shared appreciation interest or profit participation or other consideration payable to the lender in connection with the loan;

(2) Any fee, charge, assessment or fine payable to a real property homeowners', condominium, cooperative, or property owners' association, pursuant to a declaration, covenant, or law applicable to such association, including a fee or charge to change the association's records as to the owner of the real property or to provide an estoppel letter or certificate;

(3) Any fee or charge payable to a landlord under a lease of real property, including a fee or charge payable to the landlord for consenting to an assignment of the lease, for providing an estoppel letter or certificate, or to change the landlord's records as to the owner of the lessee's interest in the lease;

(4) Any consideration payable to the holder of an option to purchase an interest in real property or the holder of a right of first refusal or first offer to purchase an interest in real property for waiving, releasing, or not exercising the option or right upon transfer of the real property to another person;

(5) Any fee, charge, shared appreciation interest, profit participation or other consideration, payable by (a) a person engaged in the business of the development of real property for resale to others and not for the person's own use or the use of the person's parent, affiliates, subsidiaries, or relatives; or (b) a person who acquires the real property for the purpose of engaging in such business or for the purpose of reselling the real property to a person engaged in such business; or

(6) Any fee or charge payable to a government entity.

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect on November 1, 2009.



Mililani Town Association

95-303 Kaloapau Street
Mililani Town, HI 96789
Phone (808) 623-7300

March 15, 2009

**Representative Robert Herkes, Chair
Representative Glenn Wakai, Vice-Chair
Committee on Consumer Protection &
Commerce
State Capitol
Honolulu, HI 96813**

VIA E-Mail: CPCtestimony@Capitol.hawaii.gov

**Re: S.B. No. 1241 SD 2— Relating to Real Property Transactions
Hearing: Monday, March 16, 2009, 2:15 pm, Conf Room 325**

Dear Chair Herkes, Vice-Chair Wakai and Committee Members:

My name is Eric Matsumoto, Vice-President of the Mililani Town Association (MTA). I have served in MTA leadership capacities for 24 of the last 30 years serving on the board. MTA encompasses 16,000 plus units involving both single family units and townhouse projects.

We support this amended bill with the language incorporated deleting applicability to "... a real property homeowners' association, a condominium association cooperative association, or property owners' association pursuant to a declaration, covenant, or law applicable..;" in SECTION 1, new Section 502(b)(2). The deletion allows for the normal and routine costs associated with processing of new homeowners into the various administrative systems employed by associations.

Sincerely yours,

**Eric M. Matsumoto
Vice-President, Board of Directors**

**Cc: Senator Kidani
Senator Bunda
Representative Lee
Representative Yamane**