

March 25, 2009

The Honorable Jon Riki Karamatsu, Chair
House Committee on Judiciary
State Capitol, Room 302
Honolulu, Hawaii 96813

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

Hearing Date: Friday, March 27, 2009 at 2:00 p.m.

Aloha Chair Karamatsu 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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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.

In its present form the bill applies retroactively. We suggest the insertion of a severability clause in the event it is found that retroactive application is unconstitutional.

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 saletransfer 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 saletransfer 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 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.

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF 1250 OCEANSIDES PARTNERS REGARDING S.B. NO. 1241, SD 2

March 23, 2009

To: Chairman Jon Riki Karamatsu and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of 1250 Oceansides Partners (“Oceansides”) regarding S.B. No. 1241, SD 2.

Oceansides opposes the current version of this bill because of the adverse impact on the Foundation that was created to benefit the Kona community arising out of a settlement agreement on its residential real estate project on the Big Island. The Hawaii Board of Realtors have proposed amendments to HRS Chapters 501 and 502 embodied in this bill which are intended to prohibit private transfer fees required by a deed restriction or covenant.

All residential lots in the Oceansides Hokuli’a project are subject to a transfer fee pursuant to a Settlement Agreement between Oceansides and various parties including the County of Hawaii. Pursuant to the Settlement Agreement Oceansides created a “tax exempt” foundation called the Hokuli’a Foundation which has the purpose of advancing within the Kona community the concepts of affordable housing, health care, education and Native Hawaiian culture. The Foundation receives funding from transfer fees consisting of a percentage of the gross sales price of all lots sold within Hokuli’a. These proceeds are then allocated to specific community benefit projects in the Kona area.

If this committee intends to pass this bill forward, we request that the following amendments be included in the Senate draft:

1. Adding a specific exemption for covenants that require transfer fees to be payable to not-for-profit organizations, entities exempt from tax under Section 501 (c) of the Internal Revenue Code, or other organizations organized to benefit the community in which the real estate is located; and

2. Adding a specific exemption from the prohibition against transfer fees for covenants recorded against real property prior to the effective date of this bill.

Oceansides also requests that it will need confirmation that an association such as the Hokuli'a Park and Cultural Sites Association falls within exemption (b) (2) on page 2 of this bill and/or that it is made clear in this bill and/or the committee report that it falls within the exemption provision.

Thank you for the opportunity to testify on this measure.



Mililani Town Association

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March 25, 2009

Representative Jon Karamatsu, Chair
Representative Ken Ito, Vice-Chair
Committee on Judiciary
State Capitol
Honolulu, HI 96813

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

Re: S.B. No. 1241 SD 2 – Relating to Real Property Transactions
Hearing: Friday, March 27, 2009, 2:00 pm, Conf Room 325

Dear Chair Karamatsu, Vice-Chair Ito and Committee Members:

My name is Will Kane, Vice-President of the Mililani Town Association (MTA). As you may know, 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,

Will Kane
Vice-President, Board of Directors

Cc: Senator Kidani
Senator Bunda
Representative Lee
Representative Yamane