From: Antonette Port [portr001@hawaii.rr.com]
Sent: Tuesday, January 26, 2010 3:02 PM
To:
Subject: Testimony: HB2196

Richard J. Port
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Representative Rida Cabanilla, Chair
Representative Pono Chong, Vice Chair
Committee on Housing

Testimony: HB 2196 Relating to Condominiums

Dear Representatives:

This testimony is to provide support for HB 2196. It is appropriate for lenders to make the payments that are proposed in this House Bill. The condominium associations are not parties to any agreements between the lender and the owner of a unit that is facing foreclosure. To force condominium associations to pay fees and taxes pertaining to the foreclosed unit is unreasonable. Therefore, I am submitting this testimony in support of HB 2196.

Thank you for this opportunity to testify in support of HB 2196

Richard Port

From: Mike Gardner [mike@sumikranch.com]
Sent: Monday January 25, 2010 6:57 PM
To:
Subject: Testimony for the passage of HB 2196

Aloha,

I represent a medium sized homeowners association on the Big Island, in Waikoloa. The name of the complex is Fairway Terrace. I am the President of the Board, and have been for 3 years. During my tenure I have seen and experienced severe hardships on my friends and neighbors, who are trying to do the right thing.

When the housing market and the economy were in full tilt, many people believed the media and the so called experts and "mortgaged their future" allowing first, second and many times third mortgages for double, and even triple, what the property was worth. Many people on the mainland saw the opportunity to own property in paradise, with seemingly little risk.

About 18 months ago we saw a disturbing trend. Many mainlanders were losing jobs, and the seconds and thirds were coming due. In order to save their primary residence on the mainland, they were letting the home on the islands go back to the bank. Then we saw the "bubble" hit Hawaii, and many locals and others started to take the hit, of job loss and job cut backs.

So, many homeowner associations just felt that this would pass and took the loss in stride, as it sometimes happens. Then the number started to double in the past year.

We at Fairway Terrace availed ourselves of good legal and business advice and via state regulations, made non-judicial foreclosures to protect the overall well being of the property.

Then the "banks" came in and started their judicial foreclosures. All things not being equal, the banks, don't have to pay any maintenance fees while they are in their foreclosure status.

Now leaving many of us paying for property services that others can't or won't pay.

In 2009 Fairway Terrace lost $199,000 dollars in revenue for routine maintenance, daily living costs, and mandatory reserves, which the state requires us to keep. So, if my neighbors and I wish to have water, lights, trash pickup and other common amenities, we have to raise the monthly maintenance fees to make those things work. Now on paper that sounds good, but we have retired people, some former 2 income households that now have one income, or 2 people in one household job sharing with others, that have mortgage payments upwards of $1500, plus or minus, and rising maintenance fees to the tune of $500 or more. All the while lending institutions are sitting on homes for more than 2 years in some cases and do not contribute to the maintenance fees or expenses during that time. Lenders benefit from nice, well maintained properties when they sell the unit.

The good, hard working people who pay their bills, and their taxes, who have supported the banks and lenders via bail outs are now victimized by the lenders.

We the people, in the Great State of Hawaii, cannot take much more, we will end up with worthless properties if this continues, as lenders turn a deaf ear to us, we helped them, they need to now help us, from this point forward.

I AM URGING ALL OF YOU ON THE COMMITTEE TO PASS THIS LEGISLATION, AND STOP THE BLEEDING, PLEASE PASS HB 2196 onto the next level.

Respectively

Michael Gardner

President of the Board

Fairway Terrace AHOA

Hawaii Bankers
Association

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January 25, 2010

The Honorable Rida Cabanilla, Chair
Committee on Housing
State House of Representatives

Testimony in **Strong Opposition to HB 2196** (Relating to Condominiums)

Dear Representative Cabanilla and Committee Members:

I am Roy Amemiya, speaking on behalf of the Hawaii Bankers Association (HBA). Last session, HBA worked with the condo association industry on a compromise bill that raised the amount of super liens for the benefit of condo associations from $1,800 to a new maximum of $3,600 – a 100% increase. That bill, SB 298, enacted into law as Act 10, allows condominium associations to receive six months of delinquent maintenance fees up to $3,600 on foreclosed properties.

It was represented to us by condo industry proponents that if HBA supported passage of the bill, they would not support further legislation requiring mortgage holders to absorb larger loan losses for their benefit. Unfortunately, HB 2196 does just that. It would require mortgage holders to pay association and maintenance fees accruing six months from the date on which foreclosure action is taken through the date on which the foreclosure is finalized.

Please note that as values of properties have declined, mortgage holders have experienced larger losses in foreclosure situations. Increasing these losses will eventually have the unintended consequence of restricting future loans to the condo market and/or increase borrowing costs. Already we have witnessed tighter underwriting requirements in the condo market. Such restrictive lending terms negatively impacts condo sales.

Accordingly, we request that you hold HB 2196.

Thank you for the opportunity to testify.

Aloha,

Roy K. Amemiya, Jr.

Hawaii Council of Associations of Apartment Owners

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January 26, 2010

Rep. Rida Cabanilla, Chair
Rep. Pono Chong, Vice-Chair
House Committee on Housing

RE: TESTIMONY IN OPPOSITION TO HB 2196 RE CONDOMINIUMS
Hearing: Wednesday, Jan 27, 2010, 11 a.m. Conf. Rm. #325

Chair Cabanilla, Vice-Chair Chong and Members of the Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCAAO). HCAAO has some concerns with this bill and ask that you hold it.

First, it purports to require lenders, who are not "apartment owners" under HRS 514A or "unit owners" under HRS 514B, to pay maintenance fees on units in foreclosure despite the fact that they (i.e., the lenders) do not have legal title to those units[1] and may not ever get legal title unless they are the successful bidder at the foreclosure sale. There are some very serious legal issues that need to be resolved before serious consideration should be given to this bill.

Second, last year the Legislature passed SB 298 (Act 10) that increased the amount of delinquent maintenance fees that condominium associations could recover in foreclosures from a maximum of $1,800 to $3,600. The condos get this lien priority amount even if the banks are not able to fully recover their mortgage loan. This law was the result of negotiations and discussions between HCAAO, CAI, HICCO and other condo activists with local mortgage bankers.

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[1] Title would be transferred to the lender at the end of the foreclosure when the unit is conveyed to the lender if it were, in fact, the highest bidder at the foreclosure sale.

In foreclosures in this current market, neither side can expect to recover 100% of their delinquency or loan. Although Act 10 may not result in full recovery to all condo associations of delinquent maintenance fees when the unit is foreclosed, HCAAO believes that the lien priority is a fair accommodation or compromise between the competing interests during a recession of condo associations, who are obligated to recover as much as they can for the benefit of their members, and the mortgage lenders who are seeking to recover the monies lent to borrowers under a contract.

This bill does not reflect the negotiation and discussion between condo associations and condos that occurred in the passage of Act 10 and until it does, I suggest that this bill be held.

Thank you for the opportunity to testify.

Jane Sugimura
President

PORTER TOM QUITIQUIT CHEE & WATTS, LLP
ATTORNEYS AT LAW

TESTIMONY

To: Members of the Housing Committee

From: R. Laree McGuire

Date: January 26, 2010

Subject: Testimony in support of the passage of House Bill 2196

Aloha,

My name is R. Laree McGuire, and I am a partner with the law firm of Porter Tom Quitiquit Chee & Watts, LLP, and for years now our firm has represented numerous condominium associations located throughout the State of Hawaii. In the context of that representation, I was asked by one of our clients, the Association of Apartment Owners of Fairway Terrace located in Waikoloa on the Big Island, to summarize the challenges faced by Associations attempting to recover unpaid common assessments in the foreclosure process. Portions of that summary are submitted herewith as my testimony:

Today, condominium associations ("Associations") are faced with increasing difficulties in the collection of delinquencies. As a result of current market conditions, the market value of property is often less than the senior liens that encumber that property. Consequently, instead of paying those liens, many owners are walking away from the property. As a result, the holders of those liens (i.e., lenders and associations) are foreclosing on the properties.

These foreclosures often present challenges for Associations that are not experienced by lenders who are foreclosing on their mortgage liens. First, Associations are typically in a second or third position behind a first mortgagee and any other mortgages recorded before the Association files a "notice of lien" giving notice to the world that there are outstanding fees[1] owed to the Association. As a result of its junior position, when an Association forecloses on a property, the buyer purchases the unit at issue "subject to" the senior lien interests including real property taxes, ground lease rents and any mortgages of record.

Second, under the current economy, an Association will often not receive payment in full of the debt owed by an owner. In many cases, owners continue to pay their mortgage but not their Association dues or assessments. Consequently, out of necessity, Associations have to apply several means in order to accomplish the goal of recovering the debt owed. When an owner fails to pay its delinquent assessments, in addition to continuing in its efforts to collect on those assessments, the Association may also seek to recover any rent owed to the owner (in the event the owner has a tenant in the unit), terminate the utilities and access to the common areas (if the unit is owner-occupied) in order to reduce future expenses incurred by the Association as a result of that owner's use of the property, obtain possession of the property, rent the property, and obtain a new owner through foreclosure via auction.

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[1]Monthly common area maintenance fees, late fees, attorneys' fees and the like.

II. Laws Enacted to Assist Associations in the Recovery of Delinquent Assessments

As you are well aware, in the last decade, the legislature has sought to provide Associations with authority to accomplish the above goals. For example, the condominium statutes such as Hawaii Revised Statutes ("HRS"), Chapters 514A and 514B contain laws that allow Associations to collect rent or deny an owner access to utilities and services provided by the Association. Specifically, HRS § 514B-145 allows an Association to collect rents from the owner's tenant provided that it take certain actions to authorize said conduct (i.e., the enactment of a resolution to that effect). HRS § 514B-146(e) and (f) allow Associations to terminate utility services and access to common elements.

One of the most beneficial of the new laws enacted to assist Associations is found in HRS § 514B-146(g) and (h), commonly referred to as Act 39 (or more recently, Act 10[2]), which was the act number of the original enactment of the provisions, as HRS § 514A-90. Act 10 currently provides for the recovery of six (6) months of maintenance fees up to $3,600 from a non-lender purchaser of a condominium unit in foreclosure or from a purchaser who subsequently purchased the unit from a lender that previously purchased the unit at auction in a prior foreclosure.[3] Act 10 was enacted to increase the cap on an association's recovery

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[2]See Senate Bill No. 298 re Act 10. According to the legislative history, "prior to Act 39, associations frequently received nothing from the sale of an apartment in foreclosure because all of the proceeds from the foreclosure auction would go to the holder of the first mortgage. The purpose of Act 39 was to allow condominium associations some recovery from the foreclosure of the condominium apartment, even if the holder of the first mortgage was not paid in full. The provision recognized that, since the association maintained and insured the condominium apartment and the project in which it was located, the association should recover something from the foreclosure of the apartment."

[3]Relevant portions of HRS §514B-146 are quoted below, as follows:

§514B-146 Association fiscal matters; lien for assessments. (a) All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit with priority over all other liens, except:

(1) Liens for taxes and assessments lawfully imposed by governmental authority against the unit; and

(2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association, and costs and expenses including attorneys' fees provided in such mortgages.

. . . .

(b) Except as provided in subsection (g), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns **shall not be liable** for the share of the common expenses or assessments by the association chargeable to the unit which became due prior to the acquisition of title to the unit by the acquirer. **The unpaid**

(continued...)

to six months of maintenance fees or $3,600, whichever is less. The legislature believed that the increase from $1,800 to $3,600 would, in effect, allow associations "to receive a fair share of the proceeds from the foreclosure auction of the condominium apartment, [and would] compensate the association for its role in maintaining the value of the condominium apartment, before, during, and after the foreclosure." Unfortunately, as a result of loopholes in the law that favor lender/mortgagees, Associations are not receiving a "fair share" or more to the point, lender/mortgagees are not being required to pay their "fair share".

III. Issues Arising Out of HRS § 514B-146 (b), (g) and (h).

As noted above in HRS § 514B-146 (b), when a property is purchased in foreclosure, the purchaser "shall not be liable" for the share of common assessments owed to the Association by the prior owner in accordance with the Association's notice of lien. Instead, these unpaid assessments are "deemed to be common expenses collectible from *all* of the unit owners, including the acquirer and the acquirer's successors and assigns." Thus, all unit owners are required to inherit and pay for the debt of the prior owner on a pro rata basis

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[3](...continued)
share of common expenses or assessments shall be deemed to be common expenses collectible from *all* of the unit owners, including the acquirer and the acquirer's successors and assigns. . . . .

(g) Subject to this subsection, and subsections (h) and I), the board may specially assess the amount of the unpaid regular monthly common assessments for common expenses against a person who, in a judicial or nonjudicial power of sale foreclosure, purchases a delinquent unit; **provided that**:

(1) **A purchaser who holds a mortgage on a delinquent unit** that was recorded prior to the filing of a notice of lien by the association and who acquires the delinquent unit through a judicial or nonjudicial foreclosure proceeding, including purchasing the delinquent unit at a foreclosure auction, **shall not be obligated to make, nor be liable for, payment of the special assessment as provided for under this subsection**; and

(2) A person who subsequently purchases the delinquent unit from the mortgagee referred to in paragraph (1) **shall be obligated to make, and shall be liable for, payment** of the special assessment provided for under this subsection; and provided further that the mortgagee or subsequent purchaser may require the association to provide at no charge a notice of the association's intent to claim lien against the delinquent unit for the amount of the special assessment, prior to the subsequent purchaser's acquisition of title to the delinquent unit. The notice shall state the amount of the special assessment, how that amount was calculated, and the legal description of the unit.

(h) The amount of the special assessment assessed under subsection (g) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the six months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure. **In no event shall the amount of the special assessment exceed the sum of $3,600**.

until such time as the Association can collect, if ever, from the prior owner by way of a separate legal action. This is true notwithstanding the other association owner/members' lack of fault and inability to limit the accruing debt.

In light of the obvious inequity of this situation, the legislature also enacted subsection (g) which allows the Association to recover from the non-mortgagee purchaser in a foreclosure, the total amount of unpaid regular monthly common assessments that were assessed during the six months immediately preceding the completion of the foreclosure, but in no event may this amount exceed $3,600. If the purchaser happens to be the lender/mortgagee, as a direct result of the lender/mortgagee loopholes provided in HRS § 514B-146 (b) and (g), the Association must wait until the lender resells the unit to recover the Act 10 payment.

While the above provision does provide some relief, that relief is limited by the narrow definition of "regular monthly common assessments." Note, this amount may not include: 1) the fees and costs incurred in collecting the delinquent amounts; 2) late fees, or fines; or 3) interest.

IV. Issues Arising Out of a Foreclosure That Directly Support the Passing of HB 2196.

When an Association forecloses on a unit, due to a lack of bidders and as a result of its junior position, it often ends up purchasing that unit at auction subject to the prior mortgage liens. Once the unit has been conveyed to the Association, the Association may rent out the property and use that money to pay the current monthly assessments. However, because the prior owner typically stops paying the mortgage, the lender often soon thereafter forecloses on the property, and once the lender submits notice of the foreclosure, it now has a right to recover the rents being obtained by the Association. On the other hand, tragically for the Association, the lender is not required to pay the ongoing "regular monthly common assessments" out of those rents. Rather, the Association's remaining owners, once again get saddled with the payment of these assessments. Moreover, because the unit contains renters, the Association may not terminate the utilities in order to minimize the increasing debt.

In the same vein, if a lender chooses the option of proceeding with a judicial foreclosure, the action could be pending in the courts for an extended period of time. All the while, the Association (i.e., the owners) is required to pay the monthly assessments, including the ever-increasing real property taxes. While a commissioner is appointed to take possession of the property and use "best efforts" to hold the auction within eight (8) to nine (9) weeks after the commissioner is appointed by the court, he or she may give the parties "reasonable" extensions of time to work out a settlement of the debt. These extensions often result in the auction being cancelled and/or rescheduled several times such that the foreclosure can remain pending for, literally, years–all to the detriment and damage of the Association which will in no event recover more than $3,600. This situation becomes even more harsh when a lender starts with a nonjudicial foreclosure and then cancels the auction and files a judicial foreclosure. Again, this process can potentially go on for years, especially since every time an auction is cancelled or postponed, the lender must again publish notice of the rescheduled auction.

If the prior owner files bankruptcy during the pendency of the foreclosure, the situation will only go from bad to worse because the foreclosure action must be stayed until the bankruptcy action is completed.

To place the above nightmare in perspective, one needs to consider that last year, alone, more than 20 units within the Fairway Terrace project went through foreclosure. The blood-letting now experienced by Associations must stop; otherwise, Associations will no longer be able to maintain their common areas and will no longer be able to pay utilities, property taxes, and/or any of the other fees that encompass the monthly assessments, not to mention that Associations will no longer be able to maintain the reserve levels mandated by law.

The upshot is with foreclosures on the rise, Association owners are being unfairly saddled with more and more debt, thereby causing some of these owners to lose their properties to foreclosure, when they otherwise would not have been at risk. Mortgage lenders, on the other hand, are obtaining more and more benefits from the government via legal loopholes (such as those seen in HRS § 514B-146) and TARP funds–to name a few, notwithstanding that they negotiated the bad debt, including the rate of interest they deemed reasonable to leverage the risk of that debt.