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PRESENTATION OF THE
OFFICE OF CONSUMER PROTECTION

TO THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

TWENTY-SIXTH LEGISLATURE
Regular Session of 2011

Friday, January 28, 2011
9:30 a.m.

**INFORMATIONAL BRIEFING -- RELATING TO THE PRELIMINARY REPORT OF THE
MORTGAGE FORECLOSURE TASK FORCE.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR, AND MEMBERS OF THE
COMMITTEE:

Thank you for inviting me to address the Senate Committee on Commerce and Consumer Protection regarding the Preliminary Report of the Mortgage Foreclosure Task Force. My name is Stephen Levins, and I am the Executive Director of the Office of Consumer Protection and Chair of the Mortgage Foreclosure Task Force.

Act 162, Session Laws of Hawaii, 2010, established a mortgage foreclosure task force within the Department of Commerce and Consumer Affairs to undertake a study to develop both general and specific policies and procedures necessary to improve the

manner in which mortgage foreclosures are conducted in the State.

The Act directed the task force to submit reports of its findings and recommendations, including any proposed legislation, to the Legislature for the regular sessions of 2011 and 2012.

Pursuant to the Act, the task force was formed, consisting of seventeen members representing public and private interests. I represented the Office of Consumer Protection of the Department of Commerce and Consumer Affairs, and served as Chair of the task force. Marvin Dang, represented the Hawaii Financial Services Association, and served as Vice-Chair. Attorney George Zweibel was appointed because he has extensive experience as legal counsel for homeowners facing foreclosure.

The task force held several public meetings over the legislative interim of 2010 to discuss the various items for review raised under the Act. The task force also created investigative groups that met apart from the task force but reported their recommendations to the task force at the public meetings.

Based upon its discussions and actions taken, the task force adopted several recommendations, including proposed legislation, in its report to the Legislature for the Regular Session of 2011. The proposed legislation primarily involved the non-judicial foreclosure process authorized under part I of chapter 667, Hawaii Revised Statutes.

Specifically, the proposed legislation dealt with the issues of service of notice, conversion to foreclosure by action, deficiency judgments, and extinguishment of the mortgagor's interest. The task force also adopted a recommendation that did not involve proposed legislation, which was related to the issue of statutory bidding thresholds.

Although the specific recommendations are carefully detailed in the Preliminary Report of the Mortgage Foreclosure Task Force, submitted to the Legislature on December 28, 2010, the following brief summary highlight the main points of the report.

Service of Notice

Most members of the task force believed that the notice provisions of the current non-judicial foreclosure law needed to be improved. In this regard, it recommended that section 667-5 of the Hawaii Revised Statute be amended to require that the notice of intent to foreclose be served, not less than twenty-one days before the date of sale, on all persons entitled to notice under chapter 667, in the same manner as the service of a civil complaint.

Conversion to Judicial Foreclosure

The task force also believed that it would be helpful to homeowners subject to foreclosure if a procedure were readily available to mortgagors to convert a non-judicial foreclosure to a judicial foreclosure. Consequently, subject to some conditions, the task

force recommended that a conversion process be created which would allow this to occur.

Deficiency Judgments

Additionally, the task force recommended that under certain circumstances, deficiency judgments should be disallowed to mortgagees for non-judicial foreclosures. In particular, it recommended that a mortgagee who completes a foreclosure upon a mortgage on residential property be prohibited from subsequently pursuing or obtaining a deficiency judgment against certain owner-occupants of that residential property.

Extinguishment of Mortgagor's Interest by Recordation

In an attempt to harmonize Hawaii law with a 2005 Hawaii Bankruptcy Court decision, the task force advocated for the extinguishment of the mortgagor's interest by allowing the foreclosing mortgagee or lienor to record a copy of the notice of the intent to foreclose with the Land Court or the Bureau of Conveyances and by giving the recorded copy of the notice the same effect as a notice of pendency of action in a civil action.

Statutory Bidding Thresholds

Lastly, the task force recommended that statutory bidding thresholds not be established.

The task force worked extremely hard to arrive at these recommendations and

remains committed to meet during the next year to try to provide additional recommendations to the Hawaii Legislature designed to improve the foreclosure process in Hawaii.

Thank you again for inviting me to present the findings of the task force. I will be happy to answer any questions that the members of the Committee may have.

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January 28, 2011

Sen. Rosalyn H. Baker, Chair,
Sen. Brian T. Taniguchi, Vice Chair,
and members of the Senate Committee on Commerce and Consumer Protection
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: **Informational Briefing on the 2011 Preliminary Report of the Hawaii Mortgage
Foreclosure Task Force**
Briefing Date/Time: Friday, January 28, 2011, 9:30 A.M.

I am pleased to be invited to participate in today's Informational Briefing on the **2011 Preliminary Report of the Hawaii Mortgage Foreclosure Task Force** ("Task Force Report"). I am the Vice Chairperson of the Task Force. On the Task Force, I am the designee of the Hawaii Financial Services Association. As an attorney in private practice, I have handled mortgage foreclosures since 1978 for Hawaii lenders. I have also served as a court-appointed foreclosure Commissioner.

My presentation to you this morning is on behalf of the Hawaii mortgage lenders on the Task Force. The four Hawaii mortgage lender organizations represented on the 17 member Task Force are:

Hawaii Bankers Association (Neal Okabayashi)
Hawaii Credit Union League (Stefanie Sakamoto, initially, and then Frank Hogan)
Mortgage Bankers Association of Hawaii (Linda Nakamura)
Hawaii Financial Services Association (Marvin Dang)

The members of these organizations have offices and employees in the State of Hawaii.

A. Views of Hawaii mortgage lenders regarding foreclosures.

In dealing with the foreclosure issue on the Task Force, Hawaii mortgage lenders were guided by the following views and perspective:

- A foreclosure of a delinquent mortgage loan is the last option for a mortgage lender. Before assigning a delinquent loan to an attorney for foreclosure, the lender will send notices to the borrower. The lender will attempt to personally contact the delinquent borrower to determine the situation. Various options are explored including, loan workouts, loan modifications, short sales,

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and deeds in lieu of foreclosure. As appropriate, the lender and the borrower can use the Obama Administration's federal initiative called Making Home Affordable Program, which has components called Home Affordable Refinance Program (HARP), Home Affordable Modification Program (HAMP), and Home Affordable Foreclosure Alternatives (HAFA). If there is no acceptable resolution of the delinquency, only then will the lender consider the last alternative of either a judicial or non-judicial foreclosure.

- If a lender is not able to resolve the default with the borrower, the lender would want to have a foreclosure process that is not costly and not time consuming.

- The number of foreclosures in Hawaii is affected by economic factors. Family problems (such as divorces) and medical expenses will always be factors in mortgage delinquencies. However, in a down economy, more borrowers will be unemployed or underemployed ... and they will be more likely to become delinquent in paying their mortgage loans. During the current down turn in Hawaii's economy, foreclosures have been increasing. We saw a similar trend in the mid-1990's to early 2000's. On the other hand, during the mid-2000's, as Hawaii's economy prospered, the number of foreclosures was relatively low. There will always be these cyclical peaks and valleys.

- Recent media coverage have focused on internal problems of out-of-state mortgage lenders and servicers in communicating with their customers and in handling the foreclosure process. These servicing issues involve out-of-state lenders which don't have servicing offices and employees in Hawaii. Sometimes a mortgage loan is owned by a mainland lender or investor, but the loan is serviced by other companies which collect the payments and interact with the borrowers. These third party servicers usually do not have offices and employees in Hawaii.

- National factors affect the foreclosure process:

- Hawaii lenders are sometimes the servicers of mortgage loans which are owned or guaranteed by Fannie Mae (Federal National Mortgage Association) or Freddie Mac (Federal Home Loan Mortgage Corporation), which are federal government-sponsored enterprises. In these instances, Hawaii lenders must follow the servicing guidelines of Fannie Mae or Freddie Mac regarding delinquency management and default prevention. Failure to comply could result in the Hawaii lender being forced to repurchase the loan.

- Actions by Congress and federal agencies impact foreclosures. Any Hawaii legislative initiative regarding foreclosures should not be at odds with what is happening in Washington, D.C.

- There should not be permanent legislative solutions to temporary problems. Hawaii will not always have the same amount of foreclosures as the present. Servicing concerns will diminish as out-of-state lenders and their out-of-state servicers improve their procedures.

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- In considering legislative solutions for foreclosures, the questions that must be asked are: Who are we helping? How do we help them? Who will be hurt by the legislation? Will there be unintended negative consequences?

- The medical adage of “do no harm” seems appropriate in dealing with Hawaii legislative solutions for foreclosures:

- Don’t make it harder for Hawaii and out-of-state lenders to collect and foreclose. If the foreclosure process takes longer and becomes more costly and complex because of additional statutory foreclosure requirements, lenders might have to start the foreclosure process sooner for delinquent loans. This change will in turn increase the number of foreclosures. For this reason, Hawaii lenders would oppose mandatory mediation which could unproductively delay the foreclosure process.

- Don’t harm Hawaii’s economy. Don’t harm the mortgage market. Don’t make it harder for future borrowers get loans because of additional statutory foreclosure requirements which can result in borrowers having to pay higher interest rates and being required to make a larger down payment (such as 30%) so that there is a lower loan-to-value ratio (such as 70%).

- Legislative solutions in other states should not automatically be copied for Hawaii. Hawaii’s unique situation is different from that in other states.

- Non-legislative solutions to foreclosure issues should be considered. For example, the Neighborhood Assistance Corporation of America (“NACA”), a HUD-certified counseling agency, describes on its website a “Save the Dream Tour”. Here’s the link: https://www.naca.com/index_main.jsp . According to the NACA website:

“These events are the most effective and the only viable solution for large numbers of homeowners with an unaffordable mortgage. No where else can homeowners can meet with their Lender/Service to address their personal circumstances and get a same day solution. Hundreds of thousands of participants have participated at NACA’s Save-the-Dream events nationwide with over 30,000 people at each one. Thousands of homeowners received same day solutions with many having their interest rates permanently reduced to 4%, 3%, and 2% and in some also having their outstanding principal reduced. Homeowners saved hundreds of dollars a month and some over a thousand dollars. NACA provides the most effective long-term solutions because it has secured legally binding agreements with all the major servicers/lenders and the major investors (i.e. Fannie Mae and Freddie Mac) which cover approximately 90% of the country’s

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at-risk homeowners. NACA has established the national standard in providing long-term affordable solutions for at-risk homeowners - All of NACA's services are FREE."

Such an event in Hawaii, organized by NACA or another other entity, would have the benefit of Hawaii borrowers meeting face-to-face with their out-of-state lenders and servicers to discuss loan modifications.

B. Hawaii mortgage lenders support the recommendations of the Mortgage Foreclosure Task Force.

Hawaii mortgage lenders support the recommendations in the Task Force Report. The approaches taken by the recommendations are consistent with the above-stated views and perspective of Hawaii mortgage lenders regarding foreclosures. The recommendations to the legislature provide meaningful improvements to the non-judicial foreclosure process. Where existing law is silent regarding certain steps and procedures in the non-judicial foreclosure process, the Task Force recommendations provide substance. These recommendations benefit both lenders and borrowers.

The following summarizes the recommendations and gives the lenders' comments about how the recommendations compare to the current non-judicial foreclosure law:

1. Amend Hawaii Revised Statutes Section 667-5, on foreclosures under power of sale (non-judicial foreclosure), to:

- a. Require that the notice of intent to foreclose be served, not less than twenty-one days before the date of sale, on all persons entitled to notice under HRS Chapter 667 in the same manner as the service of a civil complaint under HRS Chapter 634, on civil actions and proceedings, and the Hawaii Rules of Civil Procedure.

Lenders' comment: The existing law is silent.

- b. Prohibit a mortgagee who completes a foreclosure upon a mortgage on residential property from subsequently pursuing or obtaining a deficiency judgment against certain owner-occupants of that residential property; but

- i. Provides that the completed foreclosure upon a mortgage on that residential property does not prohibit any subordinate lienholders whose liens are extinguished by the foreclosure sale from pursuing a monetary judgment against those certain owner-occupants.

Lenders' comment: The existing law is silent.

2. Amend Part I of HRS Chapter 667 to:

a. Authorize an owner-occupant of residential property that is being foreclosed upon non-judicially to convert the action into a judicial foreclosure, under specified conditions, beginning with the filing of a complaint with the appropriate circuit court; but

i. Provides that the authorization to convert the action into a judicial foreclosure does not apply to non-judicial foreclosures of association liens that arise under a declaration filed pursuant to HRS Chapters 514A or 514B;

b. Require certain information to be included in the complaint; and

c. Require that if a notice of intent to foreclose non-judicially relates to property that is improved and used for residential purposes, the notice of intent to foreclose non-judicially shall contain a statement to notify the owner-occupant of the right of conversion.

Lenders' comment: *The existing law does not have such a procedure.*

3. Request the Judiciary to consider creating and adopting a form for the conversion complaint.

Lenders' comment: *The existing law does not have such a procedure.*

4. Amend Part I of HRS Chapter 667 to:

a. Authorize the foreclosing mortgagee or lienor to record a copy of the notice of intent to foreclose with the Land Court or the Bureau of Conveyances; and

b. Give the recorded copy of the notice the same effect as a notice of pendency of action in a civil action.

Lenders' comment: *The existing law is silent.*

5. Amend HRS Section 501-151, on the recording of notices of pending actions, to authorize the recording in the Land Court system of a notice of intent to foreclose.

Lenders' comment: *The existing law is silent.*

6. Amend part I of HRS Chapter 667 to specify that, for a non-judicial foreclosure,

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the mortgagor's interest shall be extinguished upon the recordation of the affidavit in the Bureau of Conveyances or in the Office of the Assistant Registrar of the Land Court, as the case may be, within thirty days of the date of sale.

Lenders' comment: The existing law is silent.

C. Hawaii mortgage lenders recommend that the following two additional issues be addressed in the 2011 legislature.

There are two additional issues that Hawaii mortgage lenders believe should be addressed by the 2011 legislature:

1. The first issue relates to the Task Force recommendation which is described in item 1(b) in Section B, above, relating to deficiencies against an owner-occupant after a non-judicial foreclosure sale. As drafted in the proposed legislation accompanying the Task Force recommendation (see page 22 of the Task Force Report), if an owner-occupant who is being foreclosed on has "a fee simple or leasehold ownership interest in any other residential real property", the foreclosing lender can pursue or obtain a deficiency judgment against that person.

That provision is unduly restrictive. Mortgage lenders should be allowed to also pursue an owner-occupant for a non-judicial foreclosure deficiency if that person owns any non-residential property (e.g. commercial property, etc.).

The legislation should delete the word "residential". The phrase should read: "a fee simple or leasehold ownership interest in any other real property".

2. A second issue was brought to the attention of the Task Force at its October 12, 2010 meeting involving locations where non-judicial foreclosure auctions can and cannot be conducted. The information regarding this issue are part of the Task Force Report (see page 25 and the related attachments).

Judicial foreclosure auctions and non-judicial foreclosure auctions in the State have usually been held at court locations. On the Big Island, they have been held at a State building (Hilo) and a public park (Kona). Late last year, the Department of Accounting and General Services stated that it would not allow foreclosure auctions at the State building in Hilo. The Judiciary took the position that it will not approve the use of any court facilities in the entire State for the purpose of conducting non-judicial foreclosure auctions. The Judiciary was concerned that the public would be confused about whether or not non-judicial foreclosures are court-sanctioned. In Hilo, there is an additional issue of whether the non-judicial foreclosure auctions can be conducted on public sidewalks adjacent to court buildings and other State buildings.

This issue, which was not voted on by the Task Force, is urgent enough that it needs to be addressed legislatively this session to codify what has been a general practice. Unless this problem is corrected, non-judicial foreclosure auctions might have to take place at numerous, inconvenient locations. This could discourage members of the public who would want to attend and bid at the

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auctions. It is in the interest of both the lenders and the borrowers to have members of the public bidding at non-judicial foreclosures.

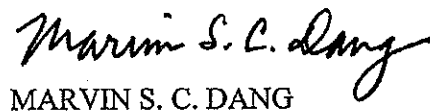
The legislative wording to correct this problem is simple. It should state that the auction, i.e. the public sale, should be allowed to take place at a court building in the county where the property is located, subject only to reasonable conditions on the time, place and manner of the public sale. However, if the borrower, the mortgagor, and the foreclosing lender (mortgagee) all agree, the public sale may be held at a court building in a different county in the State.

D. Remaining issues from the point-of-view of Hawaii's mortgage lenders.

Hawaii lenders support the Task Force recommendation that other issues, including possible revisions to the alternate power of sale statute (Part II of HRS Chapter 667), be addressed by the Task Force. The Task Force can then make any recommendations on these other issues in its Final Report to the 2012 legislature.

* * *

Thank you for allowing me to share with you the views of the Hawaii mortgage lenders on the Task Force.


MARVIN S. C. DANG

Mortgage Foreclosure Task Force

Borrower Investigative Group

September 13, 2010

INITIAL BORROWER CONCERNS AND SOLUTIONS

Concern 1: Non-judicial foreclosure does not allow borrowers to get errors corrected or to raise legal claims or defenses

Option One Solution: [PREFERRED]

Eliminate non-judicial foreclosure (repeal H.R.S. §§ 667-5 through 667-42).

OR

Option Two Solution:

Improve non-judicial foreclosure by doing all of the following –

- (1) Create a hybrid system that retains non-judicial foreclosure but allows conversion to judicial foreclosure at the request of the borrower.
- (2) Repeal H.R.S. Ch. 667, Part I (§§ 667-5 through 667-10).
- (3) Repeal § 667-34, which allows mortgage holder/purchasers with notice of possible fraud or other legal problems to enjoy “bona fide purchaser” protection intended for innocent third-party purchasers and creates potentially inaccurate conclusive presumptions, *e.g.*, that the mortgagee affidavit is accurate and that the sale price equals fair market value.
- (4) Repeal § 667-35, which cuts off borrowers’ right to challenge wrongful foreclosures as well as the accuracy of certain material facts after 30 days.

Concern 2: Loan modifications should be utilized whenever possible to prevent the unnecessary loss of homes

Solution: Amend Ch. 667 to do all of the following –

- (1) Require the mortgage holder or servicer to engage in meaningful loss mitigation efforts, including consideration of loan modification and other workout alternatives, before a mortgage can be foreclosed.
- (2) Require the mortgage holder or servicer, prior to starting a foreclosure, to provide the borrower with written notification stating the specific reasons for the loss mitigation decision and giving the borrower a reasonable period in which to submit additional or corrected information that may affect that decision.
- (3) Give borrowers the right, early in the foreclosure process, to participate in foreclosure mediation, and require the mortgage holder or servicer to participate meaningfully and in good faith in such mediation.
- (4) Require that the federal Home Affordable Modification Program ("HAMP") be complied with, and that a certificate of compliance be recorded before a foreclosure is started.
- (5) Prohibit proceeding with foreclosure while a borrower is being considered under HAMP or any other loan modification or loss mitigation program and/or a trial loan modification has begun and payments are current.
- (6) Prohibit the denial of a permanent loan modification if the borrower has complied with the trial modification for the agreed period of time, and prohibit the imposition of less favorable terms in the permanent loan modification than those that applied in the trial modification.

Concern 3: Lenders are not required to give borrowers a reasonable time to cure defaults

Solution: Amend Ch. 667 to –

- (1) Give the borrower at least 90 days to cure an alleged default before the mortgage can be accelerated and before default fees can be charged.
- (2) Require that both the notice of default and foreclosure sale notice be personally served on each borrower and mortgagor.¹
- (3) Require the mortgage holder or servicer to respond within ten (10) business days and in writing to a request from a borrower or mortgagor for an itemized statement of the reinstatement amount.
- (4) Give borrowers the right to reinstate until the date of the foreclosure sale.
- (5) Give borrowers a reasonable time after the foreclosure sale in which to redeem and reacquire title to their home, by paying the sale price, interest and costs of the sale to the purchaser.²

Concern 4: A deficiency judgment may leave a borrower with insurmountable debt even after the home is lost, often forcing him or her to file bankruptcy

Solution: Amend Ch. 667 to prohibit mortgage holders from seeking deficiency judgments after judicial and non-judicial foreclosures.³

¹ Ch. 667, Part II already includes this requirement for the notice of default.

² About half of the states have laws allowing homeowners to redeem and set aside foreclosures for a stated period of time after the sale.

³ Under current law, deficiencies are already barred in Ch. 667, Part II. See § 667-38.