

MORTGAGE FORECLOSURE TASK FORCE
Department of Commerce and Consumer Affairs
State of Hawaii

MINUTES OF MEETING

The agenda for this meeting was filed with the Office of the Lieutenant Governor as required by section 92-7(b), Hawaii Revised Statutes ("HRS").

Date: November 16, 2011

Time: 9:30 a.m.

Place: Queen Liliuokalani Conference Room
King Kalakaua Building, 1st Floor
335 Merchant Street
Honolulu, Hawaii 96813

Present: Everett S. Kaneshige, Chairperson
Marvin S.C. Dang, Esq., Vice Chairperson
Iris K.I. Catalani, Member
Jeff Gilbreath, Member
Steven Guttman, Esq., Member
Lorin Hirano, Member
Gary Y. Kawamoto, Member
Bruce B. Kim, Member
John Morris, Member
Kevin Oda, Member
Jane Sugimura, Member
Joan Takano, Member
Steven Tam, Member
Julia H. Verbrugge, Member
Colin A. Yost, Member
Ryker J. Wada, Member
George J. Zweibel, Member
James C. Paige, Deputy Attorney General
Seth Corpuz-Lahne, Secretary

Excused: Francis P. Hogan, Esq., Member

Guests: Al Denys, Task Force Committee Member of Condominium and Planned Unit Development Subcommittee Group
Debbie Yeoh, Mediation Center of the Pacific
Gary Fujitani, Hawaii Bankers Association
Becky Gardner, Office of Representative Robert N. Herkes
Christine Karamatsu, Goodwill Anderson Quinn & Stifel LLP
Mary James, Division of Financial Institutions, DCCA
Stefanie Sakamoto, Hawaii Credit Union League
Terrence Lee, Legislative Reference Bureau ("LRB")

Call to Order: There being a quorum present, the meeting was called to order by Chairperson Kaneshige at 9:30 a.m.

Approval of the Minutes of the October 26, 2011 Meeting: It was moved by Mr. Dang to approve the minutes of the October 26, 2011 meeting. Mr. Morris noted that page 2 of minutes indicated that the minutes approved were from October 26, 2011, when it should have read October 5, 2011. Mr. Morris seconded the motion. Chairperson Kaneshige stated that the minutes would be corrected. Motion to approve minutes, as amended, passed unanimously.

Additions to the Agenda: None.

Report of Chairperson: None.

Judiciary Report on Foreclosure Statistics: Chairperson Kaneshige invited Ms. Verbrugge to report on the foreclosure statistics from the Judiciary.

Ms. Verbrugge noted that because the statistics reflect an approximate two week period for November, 2011, it may be difficult to compare with the numbers with monthly statistics.

Total number of judicial conversions is unchanged. There were 8 conversions petitions (to convert non-judicial foreclosures to judicial foreclosures) filed in all circuit courts since Act 48 was signed into law.

Ms. Verbrugge reported that based on reported data generated on the morning of November 14, 2011, the number of new judicial foreclosure actions filed in all circuit courts in November, 2011 was 102.

Ms. Verbrugge also reported that the total month's statistic for judicial foreclosures in October, 2011 was 360.

Mr. Dang requested the statistics for judicial foreclosures in October 2010.

Ms. Verbrugge stated that there were 108 judicial foreclosure filings in October 2010 for all circuits

Investigative
Groups Reports
to the Task Force:

Chairperson Kaneshige indicated that he would like each group to present by subject matter, then individual group members will speak on matters where no group consensus has emerged.

Chairperson Kaneshige stated that there were a number of late submissions.

The first group to present was Investigative Group 2 (Condominium and Planned Unit Development). Mr. Morris addressed members on behalf of Group 2. Mr. Morris indicated that Mr. Kim had items to discuss regarding the subject matter of Group 2

Mr. Kim stated that he submitted a spreadsheet to the Chair regarding OCP's recommendations for amendments to §667-22(c).

Chairman Kaneshige noted that the spreadsheet was not available for distribution yet, and suggested to hold on the subject and move on to the Investigative Group 3 (Counseling).

Investigative Group 3 (Counseling) presented. Mr. Gilbreath stated that Group 3 recommended amendments to §667-C(b)(3) regarding entities DCCA can contract with for services related to MFDR. Group 3 also supported allowing

owner-occupants to elect participation online via a website maintained by the DCCA in §667-78(a)(1). Lastly, Group 3 recommended changing the scheduling window for dispute resolution from 30-60 days from the Notice of Case Opening, to 40-70 days due to the possibility of an impossible counseling deadline.

Ms. Verbrugge stated that the Judiciary did not wish to oversee approved counselors.

Chairperson Kaneshige inquired as to whether the clause requiring Judiciary assistance was the matter of concern.

Ms. Verbrugge confirmed that Judiciary oversight of contracts is the matter of concern.

Chairperson Kaneshige indicated that removing Judiciary oversight over DCCA contracts with approved counselors would not impact the desired result.

Mr. Gilbreath explained that counselors contact the lender on behalf of the borrower to attempt workout options.

Mr. Kawamoto raised concerns that if a borrower elects to participate, pays fee, but is discharged by bankruptcy, they would not be able to get a loan modification.

Chairperson Kaneshige replied that the situation was unusual, but that in a situation where a borrower, discharged by bankruptcy, with no equity or title elects participation, the lender should contact DCCA regarding the discharge. This class of borrower should be filtered out in counseling.

Mr. Oda indicated that there may be a possibility of a double-dip payment if DCCA is paying counselors to resolve disputes.

Chairperson Kaneshige stated that as DCCA is the paying party in both instances, any contract between DCCA and the counselors would be structured so as to ensure against having to pay both counselors and neutral service providers.

Mr. Gilbreath moved to send Group 3's recommended language re: HRS §667-73, §667-78, and §667-79 to LRB, seconded by Ms. Verbrugge, passed unanimously.

Mr. Gilbreath reported that Group 3 had comments regarding Group 1's (Act 48) recommendations, per the "Comments on Act 48 Working Group Recommendations to Part IIA. Mortgage Foreclosure Dispute Resolution, 11.16.11" handout.

Mr. Dang had further questions for Mr. Gilbreath. Mr. Dang said that he read Group 3's comments on Group 1's recommendations, and not all the comments support Group 1's recommendations. He asked Mr. Gilbreath if this was correct.

Mr. Gilbreath said that was correct. He then discussed which changes proposed by Group 1 were not supported by Group 3.

Mr. Oda stated that the amendment to HRS §667-85 (neutral qualifications; status and liability) was necessary so the neutral could be called to testify.

Mr. Gilbreath stated that this would dissuade highly-qualified neutrals from participating in the Program.

Mr. Guttman stated that some members of Group 1 thought that if §667-85 were not modified to allow neutrals to be called to testify, it would be declared unconstitutional due to lack of due process, since fines could be imposed without due process.

Mr. Kim stated that he posed his concerns regarding Group 1's removal of subpoena protection for neutral at the last Task Force meeting, and supports Mr. Gilbreath's and Group 3's position that the subpoena protection should not be deleted, as other parties are present who can be called to testify. He cited HRS Chapter 658A, which does not give the right to subpoena the arbitrator to testify as to why he/she decided the way they did, with the exception of fraud and evident partiality or overreach of powers.

Chairperson Kaneshige stated that this may be an issue where there is no agreement.

Mr. Dang clarified that Group 1 (Act 48) deleted text from §667-85, and that Group 3 (Counseling) disagrees with the deletion.

Mr. Kim restated that the §667-85 text deletion was over his objections.

Investigative Group 1 (Act 48) was presented by Mr. Guttman. He stated that the 45-page document shows deletions and language changes, and cleans up language. Most changes were unanimous, with the exception of the §667-85 text deletion and other areas indicated in the Group 1 cover letter. He indicated that for §667-41 all Group 1 members agreed that the language needed revision, as it was too long, and not written in "plain language". Group 1 was unable to achieve consensus regarding the §667-60 (Unfair or deceptive acts or practices). He then noted that cost of publication has more than doubled, and that the requirement for multiple publications in the newspaper would cause that cost to be passed on to the consumer via deficiency judgments.

Chairperson Kaneshige indicated that a break would be insufficient for members to read all 45 pages of Investigative Group 1's (Act 48) recommendations, and that voting on it may need to be deferred to the next meeting.

Mr. Dang inquired as to how many versions of §667-41 language existed.

Mr. Guttman replied that there were three.

Chairperson Kaneshige had a question regarding the change of the §667-41 effective date of September 1, 2012.

Ms. Catalani indicated that the change in dates related to examination issues related to the DCCA Division of Financial Institutions.

Mr. Guttman further elaborated that the point was to let lenders know what has to be disclosed per §667-41, and the language provides safe harbor. Most consumers do not read the disclosure because it is too long.

Mr. Dang asked what would happen during the interim period for loans that wouldn't be covered by the new language until September 1, 2012.

Mr. Guttman stated that the date may need to be reexamined to avoid that issue.

Mr. Zweibel stated that Group 1 did not discuss the date in depth, and that the substance is the form language, and implementation as soon as possible would be desirable.

Chairperson Kaneshige stated that the two issues are the language and the date.

Mr. Zweibel stated that the main differences are that one version does not allow the public to request the information before they apply for a loan.

Chairperson Kaneshige stated that he hoped Group 1 (Act 48) would be able to reach consensus on the language of §667-41 and the §667-60 UDAP issues.

Ms. Verbrugge posed a question regarding publishing of nonjudicial foreclosure publication and the possibility of public confusion as to where notice must be published on Hawaii Island due to the statute cited delineating the boundary between West and East Hawaii. She suggested the use of Judiciary maps as a guideline for publication requirements.

Mr. Guttman indicated that Group 1 was aware of the problem, but had not come to consensus as to how to resolve the issue.

Ms. Verbrugge distributed two handouts to the MFTF and public regarding Judiciary's concerns as to the MFTF's recommendations.

Ms. Verbrugge and Mr. Morris discussed the definition of "served" within the context of the service of nonjudicial foreclosure notices pursuant to HRS 667-5 & 667-22 and the need to clarify it, with input from Mr. Hirano.

Ms. Verbrugge proposed that upon the repeal of the judicial conversion section, its language would revert to its pre-Act 48 state.

Chairman Kaneshige suggested that since Ms. Verbrugge was proposing language, it should be circulated for review and voted on, and he suggested that Group 1 take Ms. Verbrugge's comments regarding the sunset of judicial conversion, and comments regarding Judiciary's other concerns, under advisement.

Chairman Kaneshige asked the Task Force and members of the public if they were aware of requests to the Executive Branch regarding the possibility of an electronic filing system for foreclosure notices.

Public guest, Ms. Gardner, of State House Committee on Consumer Protection and Commerce noted that the committee was aware of the issue, and that it would defer to the Task Force on how the Committee would approach the issue.

Mr. Zweibel noted that there was disagreement in Group 1 as to the possibility of allowing notice to be served via the internet. He further stated that it may be worth it in the future, but for the present the statute should not be modified because consumers would not be well-served.

Chairman Kaneshige stated that Group 1 was not prepared for a motion to approve, and requested that, because Group 1 was planning to meet again in the near future, the resulting drafts needed to be submitted for distribution as soon as possible.

Mr. Dang asked Mr. Zweibel about the §667-60 UDAP issue and Group 1.

Chairman Kaneshige recommended a five minute break before the Mr. Zweibel addressed the question.

The Task Force recessed at 11:11 AM.

At 11:23 AM the Task Force reconvened

Mr. Zweibel stated that the most important provision for borrowers and lenders was the HRS 667-60 UDAP section. He further stated that private enforcement is the most effective deterrent to noncompliance, and that Group 1 had endeavored to carve out a safe harbor, where possible and reasonable, for lenders. He also discussed the possibility that a foreclosing mortgagee might complete a foreclosure by action only to have it set aside by a UDAP suit. The resulting list of sections to be covered by HRS 667-60 represented a compromise between lenders and consumer protection interests, and that his revision is meant to replace HRS 667-60 as it exists after Act 48, SLH 2011. Lenders representatives in Group 1 felt the list was too long. Mr. Zweibel noted that the sections cited are important consumer rights created by Act 48, SLH 2011.

Mr. Dang, Mr. Zweibel, Mr. Guttman, and Mr. Morris discussed the proposed draft further. Mr. Guttman noted that Group 1 would continue to discuss the issue.

Chairman Kaneshige stated that he appreciated Mr. Zweibel's willingness to address the HRS 667-60 UDAP issue and his structuring of the issue for discussion.

Chairman Kaneshige stated that Investigative Group 2 (Condominium and Planned Unit Development) should present regarding Mr. Kim's handout.

Mr. Kim stated that regarding §667-22, section 2, that the repayment plan should be from six to twelve months, provided that, where a debtor is unable to pay in six to twelve months because of extenuating circumstances, they should be allowed a longer repayment period. He also stated that he thinks two years is a reasonable amount of time for expiration of association lien foreclosures under HRS 421J. He further clarified that associations should not be allowed to foreclose solely for fines, penalties, or late fees. Mr. Kim then asked whether the prohibited conduct section should be included in association foreclosures.

Mr. Morris had no objection to "reasonable payment plans", but he had problems with "discretionary income", because he was unclear as to its definition. He stated that making acceptance of repayment plans longer than 12 months mandatory would impact consumers negatively, as other members of the association were also consumers who were owners that were not delinquent and would have to make up the difference. He expressed no objection to a prohibition for foreclosing solely for fines, penalties, or late fees, or to a prohibited practices clause provided it was simple.

Ms. Sugimura offered comments in support of Mr. Morris' statements.

Mr. Kim stated that Mr. Hogan had cited a federal loan program that defined "discretionary income". Mr. Kim said that his proposed amendment was intended to address situations where a person legitimately suffers a loss of income, such as loss of employment, where they would need additional time to repay the default.

Mr. Morris responded that the amendment would further complicate a sophisticated process where unsophisticated owners would need to make a decision. He stated that if

a person was unable to afford their association dues or an extended payment plan to address unpaid dues, they should consider not living there, as nonpayment amounts to the other owners subsidizing the delinquent owner.

Chairman Kaneshige inquired as to whether Group 2 would be meeting on this issue further, and whether or not the definition of "reasonable plan" could be connected to a known definition of "discretionary income".

Mr. Morris replied that no such meeting was planned.

Chairman Kaneshige stated that if Mr. Morris and Mr. Kim were unable to reconcile their mutual drafts to amend HRS §667-21.6 that the Task Force Members would need to vote on their competing versions at the next meeting.

Mr. Dang inquired as to whether it would be appropriate at this time to have LRB comment on the LRB draft of the Task Force recommendations.

Chairman Kaneshige concurred.

Mr. Lee of LRB explained how to read the LRB draft of the Task Force recommendations, and indicated that a draft version of HRS 667 as amended by Act 48, SLH 2011 had also been distributed. He particularly noted a reference to §421J where there were competing Investigative Group drafts.

Mr. Dang inquired as to why the LRB draft bill was titled "Relating to Real Property".

Mr. Lee replied that, while last year's Act 48, SLH 2011, bill had been titled, "Relating to Mortgage Foreclosures", LRB was unsure whether or not certain provisions within the Task Force's proposed amendments would be germane under such a title, specifically amendments to §421 J-B in part III of the LRB draft pertaining to unpaid assessments. The new title, "Relating to Real Property", better encompassed those subject matters within the Task Force amendments than

“Relating to Mortgage Foreclosures”, but that if the Task Force wished, LRB would change the title.

Vice-Chair Dang observed that as the current LRB draft was 108 pages long, the Task Force was outdoing Act 48, SLH 2011, which was only 101 pages.

Ms. Catalani raised concerns that language in the LRB draft related to Judiciary fees may not be related to “Real Property”.

Mr. Lee replied that as the fees being adjusted were related to the Mortgage Foreclosure Dispute Resolution Program, they were connected to “Real Property”.

Action on
Reports and
Recommendations
of Investigative
Groups

None.

Discussion and
Action on
Task Force
Recom-
mendations
To Hawaii
Legislature

Chairperson Kaneshige stated that as the next meeting would involve votes on a number of items to send to LRB for drafting, it was very important for all members to try and make then next meeting. In the best case scenario, the Task Force would be voting on the final language to send to the LRB for all items not yet sent. There will be two primary votes at the next meeting, one on all language sent to LRB to-date from a substantive standpoint, and one on any new language that will be sent to LRB.

Mr. Zweibel expressed concerns that he be allowed to address two dispute resolution provisions currently in the draft LRB bill, and whether they were considered “accepted” recommendations.

Chairman Kaneshige replied that Mr. Zweibel would be so allowed, and that the recommendations were not officially a part of the LRB draft bill until voted on by the Task Force.

Mr. Zweibel asked whether or not it would be possible to make a motion to restore sections of HRS 667 that were repealed by Act 48, SLH 2011, at the next meeting.

Mr. Paige inquired whether or not it was something that Mr. Zweibel wished to put it on the agenda for the next meeting.

Mr. Zweibel indicated that he did not wish to do so.

Mr. Paige replied that if the proposed amendments would not be considered a major or significant item that it could be added to the agenda with a 2/3 majority of the Task Force, but if it was significant it must be on the agenda.

Chairman Kaneshige stated that if it wasn't something discussed at today's meeting, in order to discuss it and vote on it at the next meeting it would need to be put on the agenda.

Scheduling of
Next Meeting(s):

November 30, 2011 at 9:30 am
Queen Liliuokalani Conference Room
King Kalakaua Building, 1st Floor
335 Merchant Street
Honolulu, Hawaii 96813

and

December 5, 2011 at 9:30 am
Queen Liliuokalani Conference Room
King Kalakaua Building, 1st Floor
335 Merchant Street
Honolulu, Hawaii 96813

and

December 14, 2011 at 9:30 am
Queen Liliuokalani Conference Room
King Kalakaua Building, 1st Floor
335 Merchant Street
Honolulu, Hawaii 96813

Adjournment: There being no further business to discuss, it was moved by Chairperson Kaneshige, seconded by Mr. Dang, and unanimously carried to adjourn the meeting at 12:30 p.m.

Taken and recorded by:



Seth Corpuz-Lahne
Secretary

Reviewed and approved by:



Everett S. Kaneshige
Chairperson

12/13/11

Minutes approved as is.

Minutes approved with changes. See Minutes of _____.