

**PRELIMINARY REPORT OF THE  
MORTGAGE FORECLOSURE TASK FORCE  
TO THE LEGISLATURE FOR  
THE REGULAR SESSION OF 2011**

**In Accordance with Act 162,  
Session Laws of Hawaii 2010**

**Prepared by the  
LEGISLATIVE REFERENCE BUREAU**

**On Behalf of the  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

**STATE OF HAWAII**

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**PRELIMINARY REPORT OF THE  
MORTGAGE FORECLOSURE TASK FORCE  
TO THE LEGISLATURE FOR  
THE REGULAR SESSION OF 2011**

**Executive Summary**

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 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. Stephen Levins, representing the Office of Consumer Protection of the Department of Commerce and Consumer Affairs, served as Chair of the task force. Marvin Dang, representing the Hawaii Financial Services Association, served as Vice-Chair.

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 nonjudicial 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, notice of pendency of action, 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.

# **PRELIMINARY REPORT OF THE MORTGAGE FORECLOSURE TASK FORCE TO THE LEGISLATURE FOR THE REGULAR SESSION OF 2011**

## **Act 162, Session Laws of Hawaii, 2010**

Act 162, Session Laws of Hawaii 2010, established a mortgage foreclosure task force 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 listed a number of issues for the task force to study.

As the rationale for the Act, the Legislature found that number of mortgage foreclosures of residential property in the State had reached an alarming level, prompting numerous legislative proposals during the regular session of 2010. The Legislature, however, concluded that a comprehensive evaluation of Hawaii's mortgage foreclosure laws would be necessary before meaningful legislation could be enacted that, on balance, addressed the concerns of both borrowers and lenders, without further overburdening the courts.

The Act placed the mortgage foreclosure task force within the Department of Commerce and Consumer Affairs for administrative purposes. The Act furthermore mandated the task force, with the assistance of the Legislative Reference Bureau, to submit reports of its findings and recommendations, including any proposed legislation, to the Legislature for the 2011 and 2012 regular sessions. In other words, the Act required a preliminary report for 2011 and a final report for 2012.

This report constitutes the task force's preliminary report for 2011.<sup>1</sup> Materials distributed at the public meetings of the task force are attached in the appendix to the report.

## **The Task Force**

Pursuant to Act 162, the task force was formed, consisting of seventeen members. Eleven of the members were from organizations whose representation was expressly required by the Act. The remaining six members were administratively added to the task force in order for the task force to maintain a balanced representation of interests, as authorized under the Act.<sup>2</sup> At its initial public meeting held on July 27, 2010, the task force elected Stephen H. Levins as its chairperson and Marvin S.C. Dang as its vice-chairperson.

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<sup>1</sup> At its final public meeting of 2010, held on December 15, 2010, the task force approved this report for submission to the Legislature.

<sup>2</sup> Section 2(a) of the Act provides that "[t]he chairperson of the task force shall seek to maintain a balanced representation of interests and may select additional task force members at the chairperson's discretion."

The seventeen members are listed below, generally in the order in which their organizations were listed under the Act, with the eleven required members followed by the six additional members:

- (1) Stephen H. Levins, task force chairperson, Department of Commerce and Consumer Affairs, Office of Consumer Protection;
- (2) Marvin S.C. Dang, task force vice-chairperson, Hawaii Financial Services Association;
- (3) Michelle Kauhane, Hawaiian Community Assets (i.e., the mortgage counseling organization approved by the United States Department of Housing and Urban Development);
- (4) Ryker J. Wada, Legal Aid Society of Hawaii;
- (5) Neal Okabayashi, Hawaii Bankers Association of Hawaii;
- (6) Linda Nakamura, Mortgage Bankers Association of Hawaii;
- (7) Stefanie Sakamoto, Hawaii Credit Union League;<sup>3</sup>
- (8) Jane Sugimura, Hawaii Council of Associations of Apartment Owners;
- (9) Steven Guttman, Hawaii State Bar Association Collection Law Section;
- (10) Jerrold K. Guben, Hawaii State Bar Association Bankruptcy Law Section;<sup>4</sup>
- (11) Julia H. Verbrugge, State of Hawaii Judiciary;
- (12) D.B. Griffin, Department of Commerce and Consumer Affairs, Division of Financial Institutions;
- (13) Lorrin Hirano, Title Guaranty of Hawaii, Inc.;
- (14) Joan Takano, Hawaii Government Employees Association;
- (15) Steven Tam, AARP Hawaii Volunteer;
- (16) Colin Yost, an attorney representing borrower mortgagors in the foreclosure process; and
- (17) George J. Zweibel, an attorney representing borrower mortgagors in the foreclosure process.

The task force held several public meetings between July and December of 2010, specifically on July 27, August 31, September 22, October 12, October 18, November 17, December 7, and December 15. All public meetings were held in downtown Honolulu. A quorum of the members was present at each meeting.<sup>5</sup> During these meetings, the task force narrowed the scope of the items to be studied, established a methodology to study those items, and developed recommendations for those items.

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<sup>3</sup> Beginning with the public meeting of December 7, 2010, Francis Hogan replaced Stefanie Sakamoto as the representative for the Hawaii Credit Union League.

<sup>4</sup> At the public meeting of December 7, 2010, Chair Levins informed the task force that a vacancy currently existed on the task force because the Hawaii State Bar Association ceased to have a bankruptcy law section. Section 2(a)(10) of Act 162 requires the task force to have at least one member to represent either "[t]he Hawaii State Bar Association Bankruptcy Law Section or the Bankruptcy Court of the United States District of Hawaii."

<sup>5</sup> The quorum for this seventeen-member task force appears to be nine members. Since Act 162 itself does not specify a number for the quorum, the Sunshine Law, specifically, section 92-15, Hawaii Revised Statutes, is invoked, and section 92-15 provides that:

*...a majority of all the members to which the board or commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the board of commission is entitled shall be necessary to make any action of the board of commission valid...*

## Scope of Study

The task force implicitly narrowed the scope of their study of mortgage foreclosure by focusing upon the items that section 2 of Act 162 requires, or mandates, them to study.<sup>6</sup>

The mandatory items are set forth in sections 2(b), (d)(4) to (6), and (e) of the Act. These subsections and subparagraphs of section 2 require the task force to perform certain specified tasks. The following is the relevant text of section 2 of the Act that forms the focus of the task force's review:

*[(2)] (b) The mortgage foreclosure task force shall 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. In particular, the task force shall consider the following areas for possible improvements:*

- (1) The adequacy of notice given to mortgagors of available mortgage counseling programs and the optimal timing for such notification and counseling;*
- (2) The availability of loan documentation to mortgagors from mortgagees prior to and during the foreclosure process;*
- (3) The establishment of statutory bidding thresholds for properties sold via foreclosure;*
- (4) The statutory timeline for power-of-sale foreclosures;*
- (5) Further regulation of distressed property consultants; and*
- (6) Revisions to part II of chapter 667, Hawaii Revised Statutes, to make it a viable vehicle for power-of-sale foreclosures.*

...

*(d) The mortgage foreclosure task force shall analyze the effectiveness and any defects of the foreclosure procedures currently set in statute for both judicial and power-of-sale foreclosures. In this analysis, the task force:*

...

- (4) Shall comment on the extent to which the existing law does or does not comply with state and federal constitutional due process guarantees;*
  - (5) Shall comment on any effect proposed legislative changes will have on borrowers who are current on their mortgage loans; and*
  - (6) Shall seek to maintain and not erode existing consumer protections.*
- (e) The mortgage foreclosure task force shall comment on the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education. The task force shall propose funding mechanisms to enable the operation of this entity.*

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<sup>6</sup> In the text of the Act, these mandatory items are signaled by the phrases "shall consider," "shall analyze," "shall comment on," "shall seek," and "shall propose." In contrast to the mandatory items are the discretionary items, or items that the task force may study. The discretionary items are signaled by the phrases "may take into account," "may consider and recommend," and "may propose."

Based upon the agenda for the September 22, 2010, public meeting, the task force appears to have interpreted section 2 of the Act to require them to consider possible changes to Hawaii law concerning eight items. These eight items, cross-referenced to the relevant subsections and subparagraphs of section 2 of the Act, are listed below as follows:

- (1) The adequacy of notice to mortgagors, section 2(b)(1);
- (2) The availability of loan documentation, section 2(b)(2);
- (3) The establishment of statutory bidding thresholds, section 2(b)(3);
- (4) The statutory timeline for power-of-sale foreclosures, section 2(b)(4);
- (5) Further regulation of distressed property consultants, section 2(b)(5);
- (6) Possible revisions to part II of chapter 667 of the Hawaii Revised Statutes, section 2(b)(6);
- (7) The effectiveness and any defects of the foreclosure procedures currently set in statute for both judicial and power of sale foreclosures, section 2(d) first sentence; and
- (8) The feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education, and proposing funding mechanism to enable the operation of this entity, section 2(e).

Apparently, a ninth item was added later at the October 18, 2010, public meeting through a draft of a set of motions prepared and distributed by the lender investigative group (to be discussed later). This ninth item is the first sentence of section 2(b):

- (9) Developing both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in the State, section 2(b) first sentence.<sup>7</sup>

Section 2(b) first sentence, on general and specific policies and procedures, and section 2(d) first sentence, on the effectiveness and any defects of the foreclosure procedures currently set in statute, can be construed as miscellaneous categories for the discussion of topics and concerns that were not expressly enumerated among the other mandatory items set out in section 2 of the Act. The difference between the two miscellaneous categories seems to be that with regard to the current foreclosure procedures, section 2(b) first sentence addresses improvements while section 2(d) first sentence addresses the removal of defects.

The mandatory items relate primarily to parts I and II of chapter 667, Hawaii Revised Statutes, on mortgage foreclosures. Part I of chapter 667 authorizes both foreclosure by action (or, the judicial foreclosure process), which has been in the statutes since at least 1859, and foreclosure by power of sale (or, the "old" nonjudicial foreclosure process), which has been in

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<sup>7</sup> Prior to the setting of the agenda for the September 22, 2010, public meeting, the task force appears to have had two other interpretations of the number and identity of the items that section 2 of Act 162 sets out for them to review. At the initial public meeting of July 27, 2010, six items were identified by Chair Levins, specifically: sections 2(b)(1), 2(b)(2), 2(b)(3), 2(b)(4), 2(b)(5), and 2(b)(6). At the next public meeting, held on August 31, 2010, ten items were identified by Vice-Chair Dang, specifically: sections 2(b)(1), 2(b)(2), 2(b)(3), 2(b)(4), 2(b)(5), 2(b)(6), 2(d)(4), 2(d)(5), 2(d)(6), and 2(e).

statutes since at least 1874. Specifically, foreclosure by action comprises sections 667-1 through 667-4, while foreclosure by power of sale comprises sections 667-5 through 667-10. Part II of chapter 667, on the other hand, authorizes the alternate power of sale foreclosure process (or, the "new" nonjudicial foreclosure process), which has been in the statutes since 1998 and comprises sections 667-21 through 667-42.

## Methodology

To study the items presented to the task force under Act 162, the task force created three investigative groups. At the public meetings, the task force defined the investigative groups' scopes of investigation and limited their memberships to constitute less than a quorum. Specifically:

- (1) The borrower investigative group was created to discuss borrower concerns and was comprised of the following six members:
    - Michelle Kauhane;
    - Joan Takano;
    - Steven Tam;
    - Ryker Wada;
    - Colin Yost; and
    - George Zweibel;
  - (2) The lender investigative group was created to discuss lender concerns and was comprised of the following six members:
    - Jerrold Guben;
    - Linda Nakamura;
    - Neal Okabayashi;
    - Stefanie Sakamoto;
    - Jane Sugimura; and
    - Marvin S.C. Dang;
- and
- (3) Investigative group #3 was created to explore possible points of consensus between the borrower investigative group and the lender investigative group and was comprised primarily of members who were representatives from the other two groups. Specifically, investigative group #3 was comprised of the following seven members, five of whom were also on one of the other two investigative groups:
    - Steven Guttman;
    - Lorrin Hirano;
    - Jane Sugimura (lender investigative group);
    - Linda Nakamura (lender investigative group);
    - Stefanie Sakamoto (lender investigative group);
    - Ryker Wada (borrower investigative group); and
    - George Zweibel (borrower investigative group).

The investigative groups met apart from the task force and from each other, but subsequently reported their recommendations to the task force as a whole at the public meetings.<sup>8</sup>

In addition to the reports of the investigative groups, the task force also received overviews or comments at the public meetings by individual task force members and members from the general public on agenda items relating to the mortgage foreclosure process. Specifically, the task force heard overviews or comments on the following agenda items:

- (1) An overview of the judicial foreclosure process and the two nonjudicial foreclosure processes was presented at the August 31, 2010, public meeting by Peter Stone, Esq. In his written report, Mr. Stone indicated that part II of chapter 667, Hawaii Revised Statutes, relating to the alternate power of sale foreclosure process, is considered by lenders and their counsel to be too cumbersome to be practical. He further noted that the Hawaii Supreme Court has ruled that a lender proceeding with a power of sale foreclosure under part I need not comply with the power of sale provisions under part II;
- (2) An overview of the effect of foreclosures upon condominium associations was presented at the September 22, 2010, public meeting by task force member Jane Sugimura. In her written report, Ms. Sugimura indicated that condominium associations file foreclosures against unit owners in order to recover delinquent maintenance fees, however, association liens do not have priority over secured creditors. She also recommended an increase in the lien priority payment and reimbursement of maintenance fees by the secured creditor to the association if foreclosures are not completed within six months;
- (3) Overviews on Hawaii's regulatory framework for mortgage servicers were provided at the September 22, 2010, public meeting by task force member D.B. Griffin III. In his written comments, Mr. Griffin indicated that chapter 454M, Hawaii Revised Statutes, on mortgage servicers, is a registration statute that took effect in July 2010 and authorizes the commissioner to collect data on non-financial institution servicers operating in Hawaii;
- (4) An overview of problems associated with distressed property consultants was presented at the September 22, 2010, public meeting by Michael Moriyama, an attorney with the Office of Consumer Protection. In his written comments, Mr.

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<sup>8</sup> Under the Sunshine Law, boards are authorized to create investigative groups that meet "outside the realm of a public meeting," section 1, Act 267, Session Laws of Hawaii 1996, which established section 92-2.5, Hawaii Revised Statutes, on permitted interactions of board members. In particular, section 92-2.5(b)(1) provides that:

*(b) Two or more members of a board, but less than the number of members which would constitute a quorum for the board, may be assigned to:*

- (1) Investigate a matter relating to the official business of their board; provided that:*
  - (A) The scope of the investigation and the scope of each member's authority are defined at a meeting of the board;*
  - (B) All resulting findings and recommendations are presented to the board at a meeting of the board; and*
  - (C) Deliberation and decisionmaking on the matter investigated, if any, occurs only at a duly noticed meeting of the board held subsequent to the meeting at which the findings and recommendations of the investigation were presented to the board; or*

....

Moriyama indicated that chapter 480E, Hawaii Revised Statutes, on mortgage rescue fraud prevention, regulates distressed property consultants. He further stated that the chapter provides sufficient protection, and no changes are needed or recommended; and

- (5) Comments, as part of the Chair's report, accompanied by copies of correspondence between the Office of the Administrative Director of the Courts and the Hawaii State Bar Association, Collection Law Section, on the locations where nonjudicial foreclosure auctions are conducted, were presented at the October 12, 2010, public meeting by Vice Chair Dang, with the assistance of Lester Leu, Esq. Mr. Dang stated that although nonjudicial foreclosure actions in Hawaii have traditionally been held at court locations, the Administrative Director of the Courts recently took the position that the courts will no longer approve the use of court facilities for the conducting of nonjudicial foreclosure actions. The courts were reportedly concerned that such a use of court facilities might confuse the public about whether or not nonjudicial foreclosures are court-sanctioned.

## **Developing Recommendations to the Legislature**

As stated earlier, Act 162 directed the task force to submit findings and recommendations, including any proposed legislation, to the Legislature. Pursuant to this mandate, the task force focused upon developing recommendations to the Legislature, and developing them with regard to the nine items for review under the Act.

The task force proceeded to develop its recommendations to the Legislature in two general stages. At the first stage, the task force received the initial recommendations from the three investigative groups regarding the items for review under Act 162.

Specifically, at the September 22, 2010, public meeting, the task force received the initial recommendations from the first two groups, specifically, the borrower investigative group and the lender investigative group. Subsequently, at the October 12, 2010, public meeting, the task force received the initial recommendations of the third group, investigative group #3, which had met to find areas of consensus between the initial recommendations of the borrower investigative group and the lender investigative group.

The table below highlights the respective initial recommendations of the three investigative groups as of the October 12, 2010, public meeting. The recommendations of the investigative groups are organized around the particular items for review under Act 162. Several recommendations related to topics and concerns discussed under the two miscellaneous categories of item 2(b) first sentence, on general and specific policies and procedures relating to mortgage foreclosures, and item 2(d) first sentence, on the effectiveness and any defects of the foreclosure procedures currently set in statute. The recommendations under the two miscellaneous categories have been set out and numbered in a point-counterpoint manner:

**Table I**

**INITIAL RECOMMENDATIONS OF THE THREE  
INVESTIGATIVE GROUPS REGARDING  
NINE ITEMS FOR REVIEW UNDER SECTION 2, ACT 162,  
SESSION LAWS OF HAWAII 2010**

<b>Act 162 Items for Review</b>	<b>Lender Group 9/08/10 Report</b>	<b>Borrower Group 9/13/10 Report</b>	<b>Group #3 10/11/10 Report</b>
<p>General and specific policies and procedures §2(b) 1<sup>st</sup> sentence</p>	<p>Opposes:</p> <ol style="list-style-type: none"> <li>(1) Giving the borrower the right to redeem property after foreclosure is completed</li> <li>(2) A blanket elimination of deficiency judgments</li> <li>(3) A statutory establishment of a delay period prior to initiating foreclosure proceedings</li> <li>(4) --</li> <li>(5) The suspension of foreclosure proceedings while loan modifications are pending</li> <li>(6) --</li> <li>(7) Requiring personal service on the borrower in nonjudicial foreclosures</li> </ol> <p>Recommends:</p> <ol style="list-style-type: none"> <li>(8) Requiring that nonjudicial foreclosures be deemed final when the mortgagee's affidavit is recorded at the Bureau of Conveyances</li> </ol>	<p>Recommends:</p> <ol style="list-style-type: none"> <li>(1) Giving the borrower the right to redeem property after a foreclosure sale</li> <li>(2) Amending part I, in conformity with part II, of chapter 667, to prohibit mortgage holders from seeking deficiency judgments</li> <li>(3) Requiring lenders to give borrowers at least ninety days to cure a default before the mortgage is accelerated</li> <li>(4) Requiring the lender to engage in loss mitigation or loan modification with the borrower</li> <li>(5) Suspending foreclosure proceedings pending the outcome of loss mitigation or loan modification efforts</li> <li>(6) Authorizing borrowers to convert nonjudicial foreclosures to judicial foreclosures</li> <li>(7) Requiring personal service on the borrower and mortgagor of both the notice of default and the foreclosure sale notice</li> </ol>	<p>Recommends:</p> <ol style="list-style-type: none"> <li>(1) --</li> <li>(2) Expressly forbidding deficiency judgments in nonjudicial foreclosures under part I of chapter 667 as to only owner-occupants of residential property</li> <li>(3) --</li> <li>(4) --</li> <li>(5) --</li> <li>(6) Clarifying that part I of chapter 667 gives the borrower the right to convert a nonjudicial foreclosure to a judicial foreclosure, but that the borrower has an affirmative duty to exercise that right</li> <li>(7) Amending the notice requirements for nonjudicial foreclosures in part I of chapter 667, in conformity with the notice requirements applicable in serving civil complaints, to require that parties on title are served with actual notice of an intent to foreclose</li> <li>(8) --</li> <li>(9) Amending the nonjudicial</li> </ol>

<b>Act 162 Items for Review</b>	<b>Lender Group 9/08/10 Report</b>	<b>Borrower Group 9/13/10 Report</b>	<b>Group #3 10/11/10 Report</b>
			foreclosure process in part I of chapter 667, in conformity with the judicial foreclosure process, to require the use of the court pleading entitled "Notice of Pendency of Action" (10) Amending chapter 454M to require mortgage service providers to have a Hawaii agent
Notice to mortgagors about counseling §2(b)(1)	Opposes any additional statutory provisions	--	--
Availability of loan documentation §2(b)(2)	--	--	--
Bidding thresholds §2(b)(3)	Opposes the establishment of statutory bidding thresholds	--	Recommends that no statutory thresholds be enacted
Timeline for power-of-sale foreclosures §2(b)(4)	Opposes a statutory timeline	--	--
Distressed property consultants §2(b)(5)	--	--	Recommends adequate levels of funding and staffing for government oversight
Revisions to part II, chap 667 §2(b)(6)	Recommends deferring this very complex subject matter until the 2012 legislature	Recommends repealing sections 667-34 on conclusive presumptions and 667-35 on circuit court appeals	--

<b>Act 162 Items for Review</b>	<b>Lender Group 9/08/10 Report</b>	<b>Borrower Group 9/13/10 Report</b>	<b>Group #3 10/11/10 Report</b>
Effectiveness and any defects of the foreclosure procedures §2(d) 1 <sup>st</sup> sentence	Opposes: (1) The statutory establishment of a redemption period while foreclosure is pending (2) Authorizing a borrower to challenge a nonjudicial foreclosure in court (3) -- (4) --	Recommends: (1) -- (2) -- (3) Giving borrowers the right to reinstate the mortgage until the date of the foreclosure sale (4) Repealing nonjudicial foreclosures under both parts I and II of chapter 667, or at least under part I	
State entity or administrator §2(e)	Recommends instead that the Department of Commerce and Consumer Affairs use its administrative powers to organize a loan modification fair	--	--

As indicated in the table above, the task force was informed by investigative group #3 that the group had reached a consensus for section 2(b)(3), on statutory bidding thresholds, section 2(b)(5), on the regulation of distressed property consultants, and several topics and concerns discussed under section 2(b) first sentence, on general and specific policies and procedures. Specifically, these topics and concerns related to a prohibition against deficiency judgments, the conversion to a judicial foreclosure, the use of the court pleading entitled "Notice of Pendency of Action" in nonjudicial foreclosures, the manner of service of notice in nonjudicial foreclosures, and Hawaii agents of mortgage service providers.

At the second stage in its development of recommendations to the Legislature, the task force received from the investigative groups a set of proposed motions comprised of the task force's taking either of two types of actions on the motions with regard to the items for review under Act 162:

- 1) An action taken on a motion that does not result in the adoption of a recommendation to the Legislature, including:
  - a. Deferring the adoption of a recommendation on an item for review or a topic or concern until the regular session of 2012;
  - b. Not making any recommendation at all on a particular topic or concern;<sup>9</sup> and
  - c. Making a recommendation directed to a different branch of government;<sup>10</sup> or

<sup>9</sup> This particular proposal involved mortgage servicers and was found only in the set of motions submitted by the lender investigative group. It was not included in the set of motions submitted by investigative group #3.

<sup>10</sup> This particular proposal involved the task force's request to the Judiciary to consider creating and adopting a form for the conversion complaint. It was eventually recast as a legislative request to the Judiciary.

- 2) An action taken on a motion that results in the adoption of a recommendation to the Legislature, including:
  - a. Recommendations in opposition to the making of certain amendments to the statutes relating to mortgage foreclosures; and
  - b. Recommendations in support of making certain amendments to the statutes relating to mortgage foreclosures.

Specifically, at the October 18, 2010, public meeting, the task force received an initial set of proposed motions that had been prepared by the lender investigative group. Apparently, the lender investigative group had used the October 11, 2010, report of investigative group #3 as its starting point in drafting the set of motions. Generally, the motions were to make recommendations where investigative group #3 had reached a consensus and to defer the making of recommendations where investigative group #3 had not reached a consensus.

Thereafter, over the course of the public meetings held on November 17, December 7, and December 15, 2010, the task force received three successive revisions of the initial set of motions. At the November 17, 2010, meeting, the first revision was submitted by the lender investigative group, in response to changes to the initial set of motions suggested by investigative group #3. At the December 7 and December 15, 2010, meetings, respectively, a second and a third revision were submitted by investigative group #3.

For the motions that involved adopting recommendations to the Legislature to amend the foreclosure laws, a difference in form evolved between the motions submitted by the lender investigative group and those subsequently submitted by investigative group #3. The recommendations contained in the proposed motions submitted by the lender investigative group were descriptions of the desired amendments to be made to the statutes. In contrast, the recommendations contained in the proposed motions submitted by investigative group #3 set out the actual amendments themselves, in other words, the language for proposed legislation.

The third revision of the initial set of motions, submitted by investigative group #3, constituted the final version of the set of proposed motions. This final version of the proposed motions was incorporated into the draft report submitted to the task force at the December 15, 2010, meeting. The task force took a brief recess to review the draft report and the motions contained therein and reconvened to consider the report and motions. After a brief discussion, the task force voted to approve the draft report and the proposed motions, as stated therein, and then proceeded to consider motions for further revision.

The table below presents the substance of the final version of the set of proposed motions as adopted and further revised by the task force at the December 15, 2010, public meeting. The motions have been reorganized around the particular items for review under Act 162:

**Table II**

**ACTIONS TAKEN BY THE TASK FORCE UPON THE FINAL SET OF  
MOTIONS  
PERTAINING TO THE NINE ITEMS FOR REVIEW UNDER  
SECTION 2, ACT 162, SESSION LAWS OF HAWAII 2010**

<b>Act 162 Items for Review</b>	<b>Motions for the Task Force to Take Action Upon</b>	<b>Actions Taken by the Task Force</b>
<p>General and specific policies and procedures §2(b) 1st sentence</p> <p>(Involves the adoption of recommendations to the Legislature)</p>	<p>The task force submits and recommends proposed legislation that accomplishes the following:</p>	
	<p>(1) Amends section 667-5, on foreclosures under power of sale, to: (A) require that the notice of intent to foreclose be served on all persons entitled to notice under chapter 667 in like manner as the service of a civil complaint under chapter 634, on civil actions and proceedings, and the Hawaii Rules of Civil Procedure; and (B) define an "owner-occupant" and 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 provides that the completed foreclosure upon a mortgage on that residential property does not prohibit subordinate lienholders whose liens are extinguished by the foreclosure sale from pursuing a monetary judgment against an owner-occupant.</p>	<p>Adopted and further revised</p>
	<p>(2) Amends part I of chapter 667 to: (A) authorize an owner-occupant of residential property that is being foreclosed upon under a power of sale to convert the action into a foreclosure by action, under specified conditions, beginning with the filing of a complaint with the appropriate circuit court; (B) require certain information to be included in the complaint; and (C) require that if a notice of intent to foreclose under a power of sale relates to residential property, then the notice of intent to foreclose under a power of sale shall contain a statement to notify the owner-occupant of the right of conversion.</p>	<p>Adopted and further revised</p>
	<p>(3) Amends part I of chapter 667 to: (A) authorize the mortgagee who forecloses under a power of sale 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.</p>	<p>Adopted and further revised</p>
<p>(4) Amends section 501-151, on the recording of notices of pending actions, to authorize the recording of a notice of intent to foreclose.</p>	<p>Adopted</p>	

<b>Act 162 Items for Review</b>	<b>Motions for the Task Force to Take Action Upon</b>	<b>Actions Taken by the Task Force</b>
	(5) Amends part I of chapter 667, in conformity with a recent Hawaii bankruptcy ruling, to specify that for a foreclosure under power of sale, 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.	Adopted
	(6) The Legislature requests the Judiciary of the State of Hawaii to consider creating and adopting a form for the complaint to convert a nonjudicial foreclosure into a judicial foreclosure.	Adopted and further revised
<p>--continued-- §2(b) 1st sentence</p> <p>(Does not involve the adoption of recommendations to the Legislature)</p>	(1) The task force is in the process of reviewing and considering amendments to chapter 454M, on mortgage servicers, in more depth, but did not have sufficient time to consider and make specific recommendations and is therefore making no statements on the merits of this matter. Furthermore, the task force will address this issue as part of its report to the 2012 Legislature and requests that the Legislature defer action on this and related matters until the 2012 regular session.	Adopted
	(2) The task force intends to review and make specific recommendations regarding the foreclosure of condominium association liens and will address these issues as part of its report to the 2012 legislature, as this is a complex area of law involving various chapters of the Hawaii Revised Statutes.	Adopted
Notice to mortgagors about counseling §2(b)(1)	The task force is in the process of reviewing and considering the item in more depth, but did not have sufficient time to consider and make specific recommendations, and is therefore making no statements on the merits of this item. Furthermore, the task force will address this item as part of its report to the 2012 Legislature and requests that the Legislature defer action on this item and related matters until the 2012 regular session.	Adopted
Availability of loan documentation §2(b)(2)	[Same as §2(b)(1)]	Adopted
Bidding thresholds §2(b)(3)	The task force opposes the setting of statutory bidding thresholds for properties sold via foreclosure and, therefore, recommends against any statutory amendments in this regard.	Adopted

<b>Act 162 Items for Review</b>	<b>Motions for the Task Force to Take Action Upon</b>	<b>Actions Taken by the Task Force</b>
Timeline for power-of-sale foreclosures §2(b)(4)	[Same as §2(b)(1)]	Adopted
Distressed property consultants §2(b)(5)	[Same as §2(b)(1)]	Adopted
Revisions to part II, chap 667 §2(b)(6)	[Same as §2(b)(1)]	Adopted
Effectiveness and any defects of the foreclosure procedures §2(d) 1 <sup>st</sup> sentence	[Same as §2(b)(1)]	Adopted
State entity or administrator §2(e)	[Same as §2(b)(1)]	Adopted

Stated otherwise, with reference to the items for review under Act 162, the task force took either of the following two resulting types of actions upon the motions:

- (1) Actions taken on the motions that resulted in deferring the adoption of a recommendation on an item for review or a topic or concern until the regular session of 2012--
  - a. Section 2(b) first sentence, on general and specific policies and procedures, with regard to:
    - i. Amending chapter 454M, Hawaii Revised Statutes, regarding mortgage servicers; and
    - ii. Reviewing and making specific recommendations regarding the foreclosure of condominium association liens;
  - b. Section 2(b)(1), on the adequacy of notice to mortgagors;
  - c. Section 2(b)(2), on the availability of loan documentation;
  - d. Section 2(b)(4), on the statutory timeline for power-of-sale foreclosures;
  - e. Section 2(b)(5), on further regulation of distressed property consultants;
  - f. Section 2(b)(6), on possible revisions to part II of chapter 667 of the Hawaii Revised Statutes;
  - g. Section 2(d), first sentence, on the effectiveness and any defects of the foreclosure procedures currently set in statute for both judicial and power of sale foreclosures; and
  - h. Section 2(e); on the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information,

- and otherwise engaging in consumer education, and proposing funding mechanism to enable the operation of this entity;
- (2) Actions taken on the motions that resulted in the adoption of recommendations to the Legislature, including:
- a. Recommendations in opposition to the making of certain amendments to the statutes relating to mortgage foreclosures--
    - i. Section 2(b)(3), on bidding thresholds. The task force opposed the setting of statutory bidding thresholds for properties sold via foreclosure and, therefore, recommended against any statutory amendments in this regard;
  - b. Recommendations in support of making certain amendments to the statutes relating to mortgage foreclosures--
    - i. Section 2(b) first sentence, on general and specific policies and procedures, with regard to the following five topics or concerns:
      - 1. The mortgagee's service of notice of the intent to foreclose in a foreclosure under power of sale;
      - 2. Conversion by an owner-occupant of residential property of a foreclosure under power of sale to a foreclosure by action;
      - 3. The mortgagee's pursuit of a deficiency judgment against an owner-occupant of residential property following the completion of a foreclosure under power of sale relating to that residential property;
      - 4. The recording of a notice of intent to foreclose in a foreclosure under power of sale as the equivalent of the recording of a notice of pendency of action in a civil action; and
      - 5. The extinguishment of the mortgagor's interest in a foreclosure under power of sale upon recordation of the affidavit; and
  - c. Recommendations in support of requesting the Judiciary to consider creating and adopting a form for the conversion complaint.

## **Recommendations to the Legislature**

In summary, the task force adopted several recommendations to the Legislature relating to section 2(b)(3), on statutory bidding thresholds, and section 2(b) first sentence, on general and specific policies and procedures at its December 15, 2010, public meeting.

Under section 2(b)(3), on statutory bidding thresholds, the task force recommended that statutory bidding thresholds not be established.

Under section 2(b) first sentence, on general and specific policies and procedures, the task force recommended amendments to the old nonjudicial foreclosure process under part I of chapter 667, Hawaii Revised Statutes. The recommendations were cast in the form of language for proposed legislation. Specifically, the language for proposed legislation involved the issues of service of notice, conversion, deficiency judgments, notice of pendency of action, and extinguishment of the mortgagor's interest.

A description of the recommendations embodied within the language for proposed legislation, as adopted and further revised by the task force at its December 15, 2010, public meeting, is as follows:

- (1) Amend section 667-5, on foreclosures under power of sale, 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 chapter 667 in the same manner as the service of a civil complaint under chapter 634, on civil actions and proceedings, and the Hawaii Rules of Civil Procedure; and
  - 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.
- (2) Amend part I of chapter 667 to:
  - a. Authorize an owner-occupant of residential property that is being foreclosed upon nonjudicially 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 nonjudicial foreclosures of association liens that arise under a declaration filed pursuant to 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 nonjudicially relates to property that is improved and used for residential purposes, the notice of intent to foreclose nonjudicially shall contain a statement to notify the owner-occupant of the right of conversion;
- (3) Amend part I of 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;
- (4) Amend section 501-151, on the recording of notices of pending actions, to authorize the recording of a notice of intent to foreclose;
- (5) Amend part I of chapter 667 to specify that, for a foreclosure under power of sale, 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; and
- (6) Request the Judiciary to consider creating and adopting a form for the conversion complaint.

## Language for Proposed Legislation

The resulting language for proposed legislation, as adopted by the task force, is set out below:

### *Proposed Legislation Relating to Mortgage Foreclosures*

SECTION 1. The legislature finds that Act 162, Session Laws of Hawaii 2010, created a mortgage foreclosure task force 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 legislature further finds that the Act directed the task force to submit two reports, a preliminary report for the regular session of 2011 and a final report for the regular session of 2012.

The legislature finds that in the preliminary report for the regular session of 2011, the task force recommended proposed legislation that amends the old nonjudicial foreclosure process, which is established as the foreclosure by power of sale process under part I of chapter 667, Hawaii Revised Statutes. The legislature further finds that implementing the task force recommendations will help modernize the present law, by providing it with increased clarity, certainty, efficiency, and fairness to both borrowers and lenders.

The purpose of this Act is to implement the recommendations for proposed legislation that were adopted by the mortgage foreclosure task force and submitted in the preliminary report to the legislature for the regular session of 2011.

More specifically, the purposes of this Act are to accomplish the following:

- (1) Require that for a foreclosure under power of sale, 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 in the same manner as the service of a civil complaint under chapter 634, Hawaii Revised Statutes, and the Hawaii rules of civil procedure;
- (2) Prohibit a mortgagee who completes a foreclosure under power of sale upon a mortgage on residential property from subsequently pursuing or obtaining a deficiency judgment against certain owner-occupants of that residential property;
- (3) Authorize an owner-occupant of residential property that is being subjected to a foreclosure under power of sale to convert the action into a foreclosure by action;
- (4) Authorize the mortgagee conducting a foreclosure under power of sale to record with the land court or the bureau of conveyances a copy of the notice of intent to foreclose, and to furthermore give the recorded copy of the notice the same effect as a notice of pendency of action in a civil action, such as the foreclosure by action;
- (5) Authorize the land court to record the notice of intent to foreclose; and
- (6) Adopt a portion of the 2005 ruling of the United States Bankruptcy Court for the District of Hawaii in *In re Hoopai*, 2005 WL 1156091 (Bankr. D. Hawaii January 12, 2005) (No. 04-02511), order affirmed by *In re Hoopai*, 2005 WL 2864748 (D. Hawaii October 14, 2005) (No. CV.05-00186 DAE-KSC, CV.05-00187 HG-BMK), by specifying that for a foreclosure under power of sale, the mortgagor's interest is extinguished upon the recordation of the affidavit in the bureau of conveyances or in the land court, as the case may be, within thirty days of the date of sale.

SECTION 2. Chapter 667, Hawaii Revised Statutes, is amended by adding five new sections to part I to be appropriately designated and to read as follows:

**§667-A Definitions.** As used in this part, unless the context requires otherwise:

"Association" has the same meaning as the term is defined in section 514B-3.

"Nonjudicial foreclosure" means foreclosure under power of sale.

"Owner-occupant" means a person who, at the time that a notice is served of the intent to foreclose under the power of sale:

(1) Owns an interest in the residential property, and the interest is encumbered by the mortgage being foreclosed; and

(2) The residential property is and has been the person's primary residence for a continuous period of not less than one-hundred eighty days immediately preceding the date on which the notice is served.

"Residential property" means real property that is improved and used for residential purposes.

**§667-B Conversion; residential property; conditions.** (a) An owner-occupant of a residential property that is being foreclosed nonjudicially under this part may convert the action to a judicial foreclosure under the following conditions:

(1) A complaint conforming to section 667-C shall be filed with the circuit court in the circuit where the residential property is located, stating that the owner-occupant of the property elects to convert the nonjudicial foreclosure to a judicial foreclosure proceeding;

(2) The complaint described in paragraph (1) shall be filed with the circuit court no later than twenty days after the notice of the nonjudicial foreclosure action is served on the owner-occupant as required by section 667-5(a)(1)(A);

(3) Within ninety days of the filing of the complaint, all owners of an interest in the residential property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors, shall file a statement in the circuit court action that they agree to submit themselves to the judicial process and the jurisdiction of the circuit court. If this condition is not satisfied, the circuit court action shall be dismissed with prejudice as to any owner-occupant's right to convert the action to a judicial proceeding, and the mortgagee may proceed nonjudicially;

(4) The filing of the complaint shall automatically stay the nonjudicial foreclosure action unless and until the judicial proceeding has been dismissed;

(5) The person filing the complaint shall have an affirmative duty to promptly notify the Hawaii attorney who is handling the nonjudicial foreclosure about the filing of the conversion;

(6) All parties joined in the converted judicial proceeding may assert therein any claims and defenses that they could have asserted had the action originally been commenced as a judicial foreclosure action; and

(7) Notwithstanding chapter 607, the fee for filing the complaint shall be not more than \$ \_\_\_\_.

(b) This section shall not apply to nonjudicial foreclosures of association liens that arise under a declaration filed pursuant to chapters 514A or 514B.

**§667-C Complaint; residential property; required contents.** The complaint authorized under section 667-B shall contain at a minimum the following:

- (1) A caption setting forth the name of the court, the title of the action, and the file number. The title of the action shall include the names of the filing party as plaintiff and the foreclosing party as the defendant;
- (2) The name, mailing address, and telephone number of the filing party;
- (3) The address or tax map key number of the property subject to the foreclosure action;
- (4) A statement identifying all other owners of an interest in the residential property whose interests are pledged or otherwise encumbered by the mortgage that is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage that is being foreclosed, including without limitation co-obligors and guarantors;
- (5) A certification under penalty of perjury that the filing party is an owner-occupant of the subject property and seeks to convert the nonjudicial foreclosure to a judicial proceeding;
- (6) A statement certifying that the filing party served a copy of the complaint on the attorney identified in the notice of intent to foreclose either by personal delivery at, or by postage prepaid United States mail to, the address of the attorney as set forth in the notice of intent to foreclose; and
- (7) A copy of the notice of intent to foreclose that was served on the filing party and for which the filing party is seeking to convert to a judicial proceeding.

**§667-D Notice of intent to foreclose; residential property; required statement on conversion.** (a) The notice of intent to foreclose nonjudicially that is served and posted as required under sections 667-5(a)(1)(A) and 667-5(b)(2) shall include, in addition to the contents required under section 667-7, a statement printed in not less than 14-point font as follows:

"IF THE PROPERTY BEING FORECLOSED IS IMPROVED AND USED FOR RESIDENTIAL PURPOSES, AN OWNER-OCCUPANT OF THE PROPERTY (DEFINED UNDER PART I OF CHAPTER 667 OF THE HAWAII REVISED STATUTES, AS A PERSON WHO, AT THE TIME THIS NOTICE IS SERVED, OWNS AN INTEREST IN THE RESIDENTIAL PROPERTY THAT IS SUBJECT TO THE MORTGAGE BEING FORECLOSED AND THE RESIDENTIAL PROPERTY HAS BEEN THE PRIMARY RESIDENCE CONTINUOUSLY FOR NOT LESS THAN ONE-HUNDRED EIGHTY DAYS) HAS THE RIGHT TO CONVERT A NONJUDICIAL FORECLOSURE PROCEEDING TO A JUDICIAL FORECLOSURE WHERE CLAIMS AND DEFENSES MAY BE CONSIDERED BY A COURT OF LAW. TO EXERCISE THIS RIGHT, THE OWNER-OCCUPANT SHALL COMPLETE AND FILE THE ATTACHED FORM WITH THE CIRCUIT COURT IN THE CIRCUIT WHERE THE PROPERTY IS LOCATED WITHIN TWENTY DAYS AFTER SERVICE OF THIS NOTICE.

IN ADDITION, ALL OWNERS OF AN INTEREST IN THE RESIDENTIAL PROPERTY WHOSE INTERESTS HAVE BEEN PLEDGED OR OTHERWISE ENCUMBERED BY THE MORTGAGE THAT IS BEING FORECLOSED AND ALL PERSONS WHO HAVE SIGNED THE PROMISSORY NOTE OR OTHER INSTRUMENT EVIDENCING THE DEBT SECURED BY THE MORTGAGE THAT IS BEING FORECLOSED, INCLUDING, WITHOUT LIMITATION, CO-OBLIGORS AND GUARANTORS, SHALL FILE A STATEMENT IN THE CIRCUIT COURT ACTION THAT THEY AGREE TO SUBMIT THEMSELVES TO THE JUDICIAL PROCESS AND THE JURISDICTION OF THE CIRCUIT COURT WITHIN NINETY DAYS OF THE FILING OF THE ATTACHED FORM. FAILURE TO SATISFY THIS CONDITION WILL RESULT IN DISMISSAL OF THE CIRCUIT COURT ACTION.

AN OWNER-OCCUPANT SHALL PROMPTLY NOTIFY THE HAWAII ATTORNEY LISTED IN THIS NOTICE ABOUT THE FILING OF THE CONVERSION FORM.

A FORECLOSING LENDER WHO COMPLETES A NONJUDICIAL FORECLOSURE OF RESIDENTIAL PROPERTY SHALL BE PROHIBITED UNDER HAWAII LAW FROM PURSUING A DEFICIENCY JUDGMENT AGAINST AN OWNER-OCCUPANT WHO DOES NOT OWN A FEE SIMPLE OR LEASEHOLD INTEREST IN ANY OTHER RESIDENTIAL REAL PROPERTY. IF THIS ACTION IS CONVERTED TO A JUDICIAL PROCEEDING, HOWEVER, THEN ALL REMEDIES AVAILABLE TO A LENDER MAY BE ASSERTED, INCLUDING THE RIGHT TO SEEK A DEFICIENCY JUDGMENT."

(b) The statement required by this section shall not be required to be included in the notice of sale published pursuant to section 667-5(a)(1)(B). Nothing in this section shall be construed to set a minimum font size for the published notice of sale.

**§667-E Recordation of notice of intent to foreclose.** The foreclosing mortgagee may record a copy of the notice of intent to foreclose with the office of the assistant registrar of the land court or the bureau of conveyances, as the case may be, in a manner similar to recordation of notices of pendency of action under section 501-151 or section 634-51, or both, as applicable. The recorded notice shall have the same effect as a notice of pendency of action. From and after the recordation of the notice, any person who becomes a purchaser or encumbrancer of the mortgaged property shall be deemed to have constructive notice of the power of sale foreclosure and shall be bound by the foreclosure."

SECTION 3. Section 501-151, Hawaii Revised Statutes, is amended to read as follows:

**"§501-151 Pending actions, judgments; recording of, notice.** No writ of entry, action for partition, or any action affecting the title to real property or the use and occupation thereof or the buildings thereon, and no judgment, nor any appeal or other proceeding to vacate or reverse any judgment, shall have any effect upon registered land as against persons other than the parties thereto, unless a full memorandum thereof, containing also a reference to the number of certificate of title of the land affected is filed or recorded and registered. Except as otherwise provided, every judgment shall contain or have endorsed on it the State of Hawaii general excise taxpayer identification number, the federal employer identification number, or the last four digits only of the social security number for persons, corporations, partnerships, or other entities

against whom the judgment is rendered. If the judgment debtor has no social security number, State of Hawaii general excise taxpayer identification number, or federal employer identification number, or if that information is not in the possession of the party seeking registration of the judgment, the judgment shall be accompanied by a certificate that provides that the information does not exist or is not in the possession of the party seeking registration of the judgment. Failure to disclose or disclosure of an incorrect social security number, State of Hawaii general excise taxpayer identification number, or federal employer identification number shall not in any way adversely affect or impair the lien created upon recording of the judgment. This section does not apply to attachments, levies of execution, or to proceedings for the probate of wills, or for administration in a probate court; provided that in case notice of the pendency of the action has been duly registered it is sufficient to register the judgment in the action within sixty days after the rendition thereof.

As used in this chapter "judgment" includes an order or decree having the effect of a judgment.

Notice of the pendency of an action in a United States District Court, as well as a court of the State of Hawaii, may be recorded.

A notice of intent to foreclose as provided in section 667-E may be recorded.

The party seeking registration of a judgment shall redact the first five digits of any social security number by blocking the numbers out on the copy of the judgment to be filed or recorded."

SECTION 4. Section 667-3, Hawaii Revised Statutes, is amended to read as follows:

"**§667-3 Proceeds, how applied.** Mortgage and other creditors shall be entitled to payment according to the priority of their liens, and not pro rata; and judgments of foreclosure and foreclosures under power of sale that are conducted in compliance with this part and for which an affidavit is recorded as required under section 667-5 shall operate to extinguish the liens of subsequent mortgages and liens of the same property, without forcing prior mortgagees or lienors to their right of recovery. The surplus after payment of the mortgage foreclosed, shall be applied pro tanto to the next junior mortgage[;] or lien, and so on to the payment, wholly or in part, of mortgages and liens junior to the one assessed."

SECTION 5. Section 667-5, Hawaii Revised Statutes, is amended to read as follows:

"**§667-5 Foreclosure under power of sale; notice; affidavit after sale[.]; deficiency judgments.** (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

(1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property[~~, by~~] as follows:

(A) By serving, not less than twenty-one days before the date of sale, written notice of the intent to foreclose on all persons entitled to notice under this part in the same manner as service of a civil complaint under chapter 634 and the Hawaii rules of civil procedure, as they may be amended from time to time; and

(B) By publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the

day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and

- (2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.
  - (b) Copies of the notice required under subsection (a) shall be:
    - (1) Filed with the state director of taxation; and
    - (2) Posted on the premises not less than twenty-one days before the day of sale.
  - (c) Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information:
    - (1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request; and
    - (2) The sale price of the mortgaged property once auctioned.
  - (d) Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. Upon request made by any person who is entitled to notice pursuant to section 667-5.5 or 667-6, or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction, or if the auction is canceled, information that the auction was canceled. The mortgagee within thirty days after selling the property in pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

(e) The mortgagee or other person who completes, pursuant to this part, the nonjudicial foreclosure of a mortgage or other lien on residential property shall not be entitled to pursue or obtain a deficiency judgment against an owner-occupant of the residential property who, at the time the notice of intent to foreclose is served, does not have a fee simple or leasehold ownership interest in any other residential real property; provided, however, that nothing herein shall prohibit any other mortgagee or person who holds a lien on the residential property subject to the nonjudicial foreclosure, whose lien is subordinate to the mortgage being foreclosed and is extinguished by the nonjudicial foreclosure sale, from pursuing a monetary judgment against that owner-occupant.

~~[(e)]~~ (f) The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.

~~[(f)]~~ (g) This section is inapplicable if the mortgagee is foreclosing as to personal property only."

SECTION 6. Section 667-8, Hawaii Revised Statutes, is amended to read as follows:

**"§667-8 Affidavit as evidence, when.** If it appears by the affidavit that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed. The interests of the mortgagor, and all those claiming under, by, or through the mortgagor, in the property being foreclosed by exercise of a power of sale under this part, including land whose title is not registered in the land

court under chapter 501, shall be deemed extinguished upon the recordation of the affidavit in the bureau of conveyances or in the office of the assistant registrar, as the case may be, within thirty days of the date of sale of the property at public auction."

SECTION 7. Upon the effective date of this Act, the judiciary is requested to consider creating and adopting a form for the conversion complaint established under section 2 of this Act.

SECTION 8. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 9. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 10. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 11. This Act shall take effect on \_\_\_\_\_ ; provided that the requirements under this Act shall apply only to foreclosures initiated after the effective date of this Act.

## **Remaining Issues**

The task force is aware that several items required for review under Act 162 were left unresolved prior to the convening of the regular session of 2011. Accordingly, the task force will continue to meet in 2011 in order to resolve those remaining items. The task force intends to present the remainder of its recommendations to the Legislature in its final report for 2012.

**APPENDIX TO THE PRELIMINARY REPORT  
OF THE MORTGAGE FORECLOSURE TASK FORCE  
TO THE LEGISLATURE FOR THE REGULAR SESSION OF 2011**

**(Includes the Following Materials Distributed at the  
Public Meetings as of December 15, 2010)**

- (1) Act 162, Session Laws of Hawaii 2010
- (2) List of Mortgage Foreclosure Task Force members

**August 31, 2010**

- (3) Hawaii Judicial Foreclosure in a Nutshell, presented by Peter T. Stone, a member of the public, at the August 31, 2010, public meeting
- (4) Hawaii Non-Judicial Foreclosures in a Nutshell, presented by Peter T. Stone, a member of the public, at the August 31, 2010, public meeting
- (5) "Losing Your Home," Honolulu Star-Advertiser, July 25, 2010, distributed by the Vice-Chair, Marvin Dang, at the August 31, 2010, public meeting
- (6) "Facing Foreclosure," Honolulu Star Bulletin, March 22, 2009, distributed by the Vice-Chair, Marvin Dang, at the August 31, 2010, public meeting

**September 22, 2010**

- (7) "Foreclosures hit all-time high," Honolulu Star-Advertiser, September 16, 2010, distributed at the September 22, 2010, public meeting
- (8) How Foreclosures Affect Condominiums, dated September 21, 2010, presented by Jane Sugimura, a task force member, at the September 22, 2010, public meeting
- (9) Hawaii Regulatory Framework for Mortgage Servicers, dated September 22, 2010, presented by D.B. Griffin III, Commissioner, Division of Financial Institutions, Department of Commerce and Consumer Affairs, and task force member, at the September 22, 2010, public meeting
- (10) Mortgage Foreclosure Rescue Fraud Investigations, dated September 22, 2010, presented by Michael Moriyama, Office of Consumer Protection, at the September 22, 2010, public meeting
- (11) Report of the Borrower Investigative Group, dated September 13, 2010, presented at the September 22, 2010, public meeting
- (12) Report of the Lender Investigative Group, dated September 8, 2010, presented at the September 22, 2010, public meeting

**October 12, 2010**

- (13) Correspondence between the Office of the Administrative Director of the Courts and the Hawaii State Bar Association, Collection Law Section, dated June 23, July 26, and August 2, 2010, relating to Non-Judicial Foreclosure Auctions, distributed by the Vice Chair, Marvin Dang, at the October 12, 2010, public meeting
- (14) Report of Investigatory Group #3 to the task force, dated October 11, 2010, presented at the October 12, 2010, public meeting

**October 18, 2010**

- (15) Motions pertaining to task force recommendations, distributed by the Lender Investigative Group at the October 18, 2010, public meeting

**November 17, 2010**

- (16) Report of Investigatory Group #3 to the task force, dated November 16, 2010, presented at the November 17, 2010, public meeting
- (17) Revised motions pertaining to task force recommendations, distributed by the Lender Investigative Group at the November 17, 2010, public meeting

**December 7, 2010**

- (18) Motions pertaining to task force recommendations, dated December 6, 2010, distributed by Investigative Group #3 at the December 7, 2010, public meeting
- (19) Investigative Group #3 Discussion Draft Only, dated December 1, 2010, distributed by Investigative Group #3 at the December 7, 2010, public meeting

**December 15, 2010**

- (20) Revised motions pertaining to task force recommendations, dated December 8, 2010, distributed by Investigative Group #3 at the December 15, 2010, public meeting

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## A BILL FOR AN ACT

RELATING TO MORTGAGE FORECLOSURES.

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

1           SECTION 1. The legislature finds that the number of  
2 mortgage foreclosures of residential property has reached an  
3 alarming level. The legislature acknowledges that this  
4 situation is not unique to Hawaii and is part of a nationwide  
5 economic downturn and resulting upheaval throughout the home  
6 lending industry. Because of these concerns, there have been  
7 numerous measures proposed during the 2010 legislative session  
8 to address foreclosure-related issues. However, it is unclear  
9 whether any of these approaches will improve the conditions  
10 relating to foreclosures or improve the current foreclosure  
11 laws.

12           The legislature further finds that a comprehensive  
13 evaluation of Hawaii's mortgage foreclosure laws is necessary  
14 before the enactment of meaningful legislation that, on balance,  
15 addresses the concerns of both borrowers and lenders involved in  
16 mortgage foreclosures without further overburdening the courts.

17           The purpose of this Act is to create a mortgage foreclosure  
18 task force to conduct an extensive analysis of all factors



1 affecting mortgage foreclosures in the state and to recommend  
2 appropriate legislation.

3 SECTION 2. (a) There is established a mortgage  
4 foreclosure task force within the department of commerce and  
5 consumer affairs for administrative purposes. The director of  
6 commerce and consumer affairs shall select the initial members  
7 of the task force and shall invite at least one member from each  
8 of the following:

- 9 (1) The department of commerce and consumer affairs'  
10 office of consumer protection;
- 11 (2) A mortgage counseling organization approved by the  
12 United States Department of Housing and Urban  
13 Development, preferably with expertise in consumer  
14 credit counseling;
- 15 (3) The Legal Aid Society of Hawaii;
- 16 (4) The Hawaii Financial Services Association;
- 17 (5) The Hawaii Bankers Association;
- 18 (6) The Mortgage Bankers Association of Hawaii;
- 19 (7) The Hawaii Credit Union League;
- 20 (8) The Hawaii Council of Associations of Apartment  
21 Owners;



1 (9) The Hawaii State Bar Association Collection Law  
2 Section;

3 (10) The Hawaii State Bar Association Bankruptcy Law  
4 Section or the Bankruptcy Court of the United States  
5 District of Hawaii; and

6 (11) The Hawaii state judiciary.

7 The members of the mortgage foreclosure task force shall elect a  
8 chairperson from among its membership. The chairperson of the  
9 task force shall seek to maintain a balanced representation of  
10 interests and may select additional task force members at the  
11 chairperson's discretion.

12 (b) The mortgage foreclosure task force shall undertake a  
13 study to develop both general and specific policies and  
14 procedures necessary to improve the manner in which mortgage  
15 foreclosures are conducted in the state. In particular, the  
16 task force shall consider the following areas for possible  
17 improvements:

18 (1) The adequacy of notice given to mortgagors of  
19 available mortgage counseling programs and the optimal  
20 timing for such notification and counseling;



- 1           (2) The availability of loan documentation to mortgagors  
2           from mortgagees prior to and during the foreclosure  
3           process;
- 4           (3) The establishment of statutory bidding thresholds for  
5           properties sold via foreclosure;
- 6           (4) The statutory timeline for power-of-sale foreclosures;
- 7           (5) Further regulation of distressed property consultants;  
8           and
- 9           (6) Revisions to part II of chapter 667, Hawaii Revised  
10          Statutes, to make it a viable vehicle for power-of-  
11          sale foreclosures.
- 12          (c) In undertaking the study, the mortgage foreclosure  
13 task force may take into account any of the following factors:
- 14          (1) Existing regulation, on both the state and federal  
15          levels;
- 16          (2) The state of the national and local economy, mortgage  
17          loan default rates, and unemployment rates;
- 18          (3) Local borrowing and lending practices vis-à-vis  
19          mainland practices;
- 20          (4) Standard mortgage loan qualifications;
- 21          (5) Language barriers and other cultural factors unique to  
22          this state;



- 1           (6) The extent to which predatory mortgage lending, abuse  
2           of collection procedures, and otherwise unfair,  
3           fraudulent, and deceptive practices have impacted  
4           mortgagors;
- 5           (7) The effect of various mortgage loan terms, interest  
6           rates, fees, risk-based pricing, single-premium credit  
7           insurance, financing, and payment structures;
- 8           (8) The extent to which mortgage loan terms and conditions  
9           are disclosed to and understood by borrowers;
- 10          (9) A borrower's ability to negotiate mortgage loan terms  
11          and prices;
- 12          (10) The role of mortgage servicing agents and their  
13          practices;
- 14          (11) The availability, consumer knowledge, and use of  
15          mortgage counseling;
- 16          (12) The availability, consumer knowledge, and use of loan  
17          modification processes;
- 18          (13) The length of time and expense associated with  
19          completing the foreclosure process;
- 20          (14) The extent to which mortgagees provide mortgagors with  
21          mortgage documents when requested;



- 1           (15) The impact on the state's judicial system and the  
2                   timely resolution of foreclosure disputes;
- 3           (16) The extent to which mortgage foreclosures go  
4                   uncontested;
- 5           (17) The proof required to establish standing for  
6                   foreclosing mortgagees;
- 7           (18) Association and maintenance fees and other costs borne  
8                   by neighbor unit holders in condominium or community  
9                   associations when mortgagors are in default;
- 10          (19) Abuses of the existing law by mortgagors and  
11                   mortgagees;
- 12          (20) The effect of certain inefficiencies and barriers  
13                   under the current law relating to foreclosures, such  
14                   as serving process upon absent or deceased mortgagors;  
15                   and
- 16          (21) The extent to which the above factors impact power-of-  
17                   sale vis-à-vis judicial foreclosures.
- 18          (d) The mortgage foreclosure task force shall analyze the  
19                   effectiveness and any defects of the foreclosure procedures  
20                   currently set in statute for both judicial and power-of-sale  
21                   foreclosures. In this analysis, the task force:



- 1           (1) May consider and recommend alternative procedures for  
2           timeshare property;
- 3           (2) May consider and recommend alternative procedures for  
4           foreclosures sought by junior lien holders such as  
5           condominiums, co-op apartments, and community  
6           associations collecting maintenance fees;
- 7           (3) May propose measures to clarify the application of  
8           chapter 567, Hawaii Revised Statutes, to other  
9           property statutes;
- 10          (4) Shall comment on the extent to which existing law does  
11          or does not comply with state and federal  
12          constitutional due process guarantees;
- 13          (5) Shall comment on any effect proposed legislative  
14          changes will have on borrowers who are current on  
15          their mortgage loans; and
- 16          (6) Shall seek to maintain and not erode existing consumer  
17          protections.
- 18          (e) The mortgage foreclosure task force shall comment on  
19          the feasibility of establishing a state entity or administrator  
20          to focus on addressing the concerns of mortgagors, disseminating  
21          information, and otherwise engaging in consumer education. The



1 task force shall propose funding mechanisms to enable the  
2 operation of this entity.

3 (f) Members of the mortgage foreclosure task force shall  
4 serve without compensation and shall not be reimbursed for  
5 expenses.

6 (g) The mortgage foreclosure task force shall submit a  
7 report of its findings and recommendations, including any  
8 proposed legislation, to the legislature no later than twenty  
9 days prior to the convening of the 2011 and 2012 regular  
10 sessions, and shall participate in a joint informational session  
11 upon request of the legislature.

12 (h) The legislative reference bureau shall assist the task  
13 force in preparing its findings, recommendations, and proposed  
14 legislation; provided that the chairperson of the task force  
15 shall submit the task force's proposals to the legislative  
16 reference bureau for drafting no later than November 1, 2010 for  
17 the report to the 2011 regular session and no later than  
18 November 1, 2011, for the report to the 2012 regular session.

19 (i) The mortgage foreclosure task force shall cease to  
20 exist on June 30, 2012.

21



1 SECTION 3. This Act shall take effect upon its approval.

2



**Report Title:**

Mortgage Foreclosures; Task Force

**Description:**

Establishes a task force to analyze factors affecting mortgage foreclosures in Hawaii, including relevant laws. Effective upon approval. (CD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*



## MORTGAGE FORECLOSURE TASK FORCE

1. **Stephen H. Levins, Chair MFTF**  
**Executive Director, DCCA-OCP**
2. **Marvin S.C. Dang, Vice Chair MFTF**  
**Hawaii Financial Services Association**
3. **D.B. Griffin III, Commissioner**  
**Division of Financial Institutions, DCCA**
4. **Jerrold K. Guben**  
**Chair, HSBA Bankruptcy Law Section**
5. **Steven Guttman**  
**Chair, HSBA Collection Law Section**
6. **Lorin Hirano**  
**Sr. Vice President & Legal Counsel**  
**Title Guaranty of Hawaii, Inc.**
7. **Michelle Kauhane, Executive Director**  
**Hawaiian Community Assets**
8. **Linda Nakamura**  
**Mortgage Bankers Association of Hawaii**
9. **Neal Okabayashi**  
**Chair, Hawaii Bankers Association Legislative Committee**
10. **Stefanie Sakamoto**  
**Legislative Officer**  
**Hawaii Credit Union League**
11. **Jane Sugimura, President**  
**Hawaii Council of Associations of Apartment Owners**
12. **Joan Takano**  
**Field Support Specialist**  
**Hawaii Government Employees Association**

## MORTGAGE FORECLOSURE TASK FORCE

13. Steven Tam, Advocacy Consultant  
AARP Hawaii Volunteer
14. Julia H. Verbrugge, Staff Attorney  
First Circuit Court, State of Hawaii Judiciary
15. Ryker J. Wada  
Consumer Unit Supervisor/Staff Attorney  
Legal Aid Society of Hawaii
16. Colin A. Yost  
Attorney At law
17. George J. Zweibel  
Attorney At Law

## **Hawaii Judicial Foreclosure In A Nutshell**

**Civil Action.** A judicial foreclosure is a specific type of civil action in which a party that is owed money secured by a lien (mortgage, condo fees, judgment and tax liens) on the real property, request the Court to have the property sold to pay the amount due. The action is commenced by the filing of a Complaint in the State Circuit Court in which the real property is located.

**Who is the Plaintiff?** The Plaintiff can be any number of parties with a mortgage or other lien interest: a first or second mortgage lender, a condo association, the State and Federal governments with tax liens or the State of Hawaii with a shared appreciation interest in the real property once it is resold.

**Who are the Defendants?** In addition to the persons that owe the money to the Plaintiff, Hawaii law requires every person with any interest in the property be joined and made a party to the lawsuit. These parties are named as Defendants although they may not owe the Plaintiff any money. To make sure all proper parties are joined in the lawsuit, the Plaintiff will order a Litigation title policy that will name all the parties that should be named in the lawsuit.

**Notice of Pendency of Action.** After the lawsuit is filed, the Plaintiff will also prepare for filing with the Court and for recordation in the Regular System and/or Land Court systems at the Bureau of Conveyances, a notice of pendency of action which provides notice of record that the action is pending and that if anyone subsequently acquires an interest in the property, such interest will be subject to the results of the lawsuit. The recordation of this notice of pendency of action effectively prevents the owner from borrowing against the real property or selling it to a third party. This NOPA recording also relieves the Plaintiff to join additional parties to the lawsuit that acquire an interest in the property.

**Mortgage vs. Deed of Trust:** Hawaii is a lien state which is different that other states like California that have Deeds of Trust. In Hawaii, borrower/owner ("mortgagor") owns both the legal and equitable title to the property subject to the lender's ("mortgagee's") lien. This is an important distinction that drives the process because the legal proceedings involve the legal termination of the borrowers' ownership interest in the property through the foreclosure sale.

**Service of Complaint:** Borrowers/owners, like all civil defendants, are constitutionally guaranteed the right to reasonable notice and an opportunity to be heard. This right is only satisfied when the Court record establishes that the Complaint was personally served upon the borrower by a process server or after securing a prior Court order authorizing substitute service. Substitute service is completed through certified mail, return receipt with restricted delivery to addressee only or by newspaper publication.

*Peter T. Stone, Esq.  
RCO Hawaii, LLLCe  
pstone@rcolegal.com*

## **Hawaii Judicial Foreclosure In A Nutshell**

The inability to serve the borrower/owner is often the biggest roadblock to the timely completion of a judicial foreclosure. Alternative service such service by newspaper publication is time consuming and expensive.

**Motion for Summary Judgment & Decree of Foreclosures:** After service is completed, most cases move forward with the filing of a Motion for Summary Judgment in which lender's counsel proves to the Court through presentation of the loan documents, a sworn declaration of the amounts due that the lender is entitled to foreclose and have the property to satisfy the debt. At the hearing on this Motion, contested issues are raised and are usually reserved if everyone agrees that the foreclosure sale should proceed without delay. If the contested issues are material, the case may have to be litigated at trial to resolve any disputes

**Commissioner's Sale of Property:** If the Court grants the Motion for Summary Judgment, the commissioner is appointed by the Court and is a neutral officer of the Court that sells the property at an auction on the Court house steps. The Commissioner is provided with a set of instructions from the Court on the number of open houses to be held and the newspaper publications required before the property is auctioned in front of the Courthouse on the designated date. The Commissioner usually pre-registers bidders and secures proof of their ten percent (10%) minimum cash down payment of their maximum bid price. This is how the commissioner is assured ahead of time that the bidders have the 10% minimum cash down payment required to be declared the highest bidder.

**Court Confirmation of Sale:** After the auction, lender's counsel files a Motion for the Court to confirm the sale. The Court will reopen bidding if someone presents a cashier's check for a new 10% deposit for a new bid price that is at least 5% more than the highest bid at the auction. Once this Court order is filed, the borrowers' rights in and to the property are forever cut off.

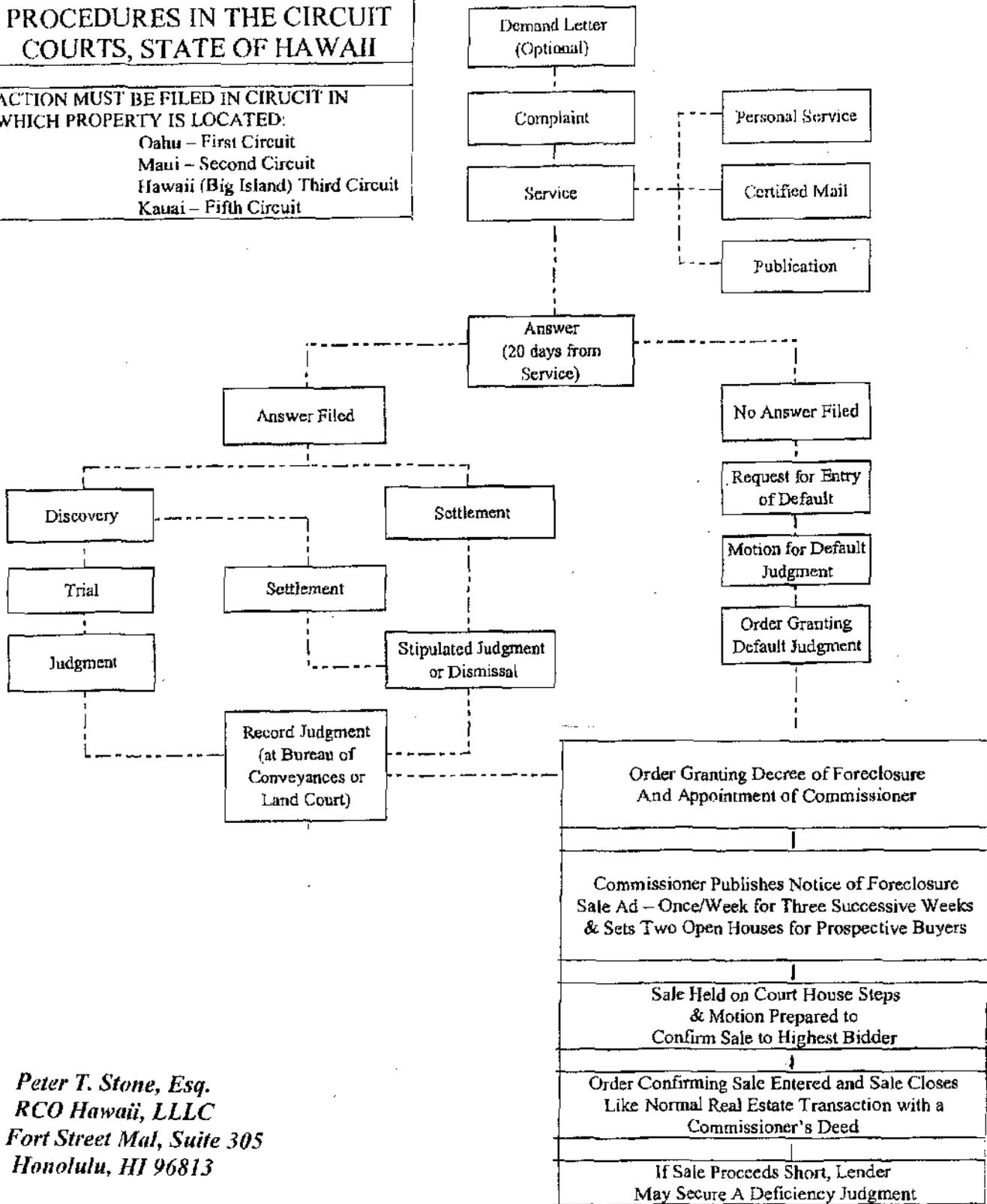
**Post Foreclosure Escrow Closing:** The sale usually closes within 30 days of the filing of the Court order and title is conveyed to the highest bidder or its nominee by a Commissioner's Deed.

**Attachment: Judicial Foreclosure Procedures in the Circuit Courts, State of Hawaii**

*Peter T. Stone, Esq.  
RCO Hawaii, LLCe  
pstone@rcolegal.com*

**JUDICIAL FORECLOSURE  
PROCEDURES IN THE CIRCUIT  
COURTS, STATE OF HAWAII**

**ACTION MUST BE FILED IN CIRCUIT IN  
WHICH PROPERTY IS LOCATED:**  
 Oahu – First Circuit  
 Maui – Second Circuit  
 Hawaii (Big Island) Third Circuit  
 Kauai – Fifth Circuit



*Peter T. Stone, Esq.*  
 RCO Hawaii, LLC  
 900 Fort Street Mal, Suite 305  
 Honolulu, HI 96813

## **Hawaii Non-Judicial Foreclosures In A Nutshell**

**A Power of Sale Foreclosure Is "Non-Judicial" Foreclosure.** Most mortgages provide as standard term that the lender may, upon the borrower's default, foreclose the property under a power of sale provided the borrower is given notice in accordance with the Mortgage and applicable Hawaii law.

**Hawaii Has Two Alternative Power of Sale Foreclosure Statutes.** Almost all lenders foreclose under part I of HRS Chapter 667, specifically Sections 667-5 through 667-10, copy attached. Part II, Alternative Power of Sale Foreclosure Process, Sections 667-21 through 667-42 is considered by lenders as and their counsel as too cumbersome to be practical. The Hawaii Supreme Court has ruled that a lender proceeding with a power of sale foreclosure under Part I, need not comply with the power of sale provisions under Part II.

**Recent Increase in Power of Sale Foreclosures.** Up until ten years ago, almost all Hawaii foreclosures were processed as judicial foreclosures. The reluctance of the Hawaii title companies to insure power of sale foreclosures effectively prevented the wide spread use of power of sale foreclosures. Due to the increased costs and time delays inherent in judicial foreclosures and pressure from the lenders, Hawaii title companies now will insure power of sale foreclosures provided their underwriting guidelines are met.

### **Key Parts of the Power of Sale Process Under Part I, HRS 667-5.**

The foreclosure must be handled by an attorney licensed in Hawaii and comply with the requirements of the mortgage and Hawaii law.

Notice of the foreclosure must be published in a newspaper of general circulation in the county where the property is located, at least once in three successive weeks with the last publication not less than 14 days before the sale date.

Copies of the Notice of foreclosure must be filed with the State Director of Taxation and posted on the property not less than 21 days before the sale date.

**Conduct of The Sale.** The sale is usually conducted by a third party hired by the lender to call the sale or any postponement. Postponements may be orally called out from time to time without having to republish a new sale date. Unlike a judicial foreclosure, the person crying the sale is not an officer of the Court.

**Down Payment.** The lender can set the terms of sale however it cannot require a cash deposit of more than 10% of the highest bid.

**Affidavit of Sale.** The Affidavit of Sale must be recorded in the Regular System or the Land Court system and must have the minimum contents set in HRS Section 667-7. The Affidavit of Sale is intended to be a record made by the lender that it properly conducted the sale in accordance with the mortgage and Hawaii law and it is admissible as evidence that the power of sale was duly executed. HRS Section 667-8. The act of recording Affidavit of Sale in the Land Court or Regular System cuts off the borrower/owner's interest in the property.

**Personal Service on Borrower/Owner.** The statute does not require personal service of the Notice on the owner/borrower. While the lender must comply with the mortgage requirements, all it requires is that notice be mailed to the borrower/owners at the property address or any new address provided to the lender. However, Hawaii title companies require lenders to provide proof of personal service or service by certified mail, return receipt, restricted delivery to addressee only.

**Quitclaim Deed by Foreclosing Lender.** Under the power of sale granted to the lender under the mortgage, the lender conveys title to the property to the highest bidder which may be a third party, its nominee or the lender by way of credit bid.

**Attachment: Excerpts of HRS 667-5 to 667-8.**

*Peter T. Stone, Esq.  
RCO Hawaii, LLC  
pstone@rcolegal.com*

**CHAPTER 667**  
**MORTGAGE FORECLOSURES**

Part I. Foreclosure by Action or Foreclosure by Power  
of Sale

## Section

- 667-1 Foreclosure by action
- 667-2 Other mortgagees joined
- 667-3 Proceeds, how applied
- 667-4 Defenses
- 667-5 Foreclosure under power of sale; notice; affidavit  
after sale
- 667-5.5 Foreclosure notice
- 667-5.7 Public sale
- 667-6 Notice to mortgage creditors
- 667-7 Notice, contents; affidavit
- 667-8 Affidavit as evidence, when
- 667-9 Dower barred, when
- 667-10 Power unaffected by transfer; surplus after sale
- 667-11 to 13 Repealed

Part II. Alternate Power of Sale Foreclosure Process

- 667-21 Alternate power of sale process; definitions
- 667-22 Notice of default; contents; distribution
- 667-23 Recordation of notice of default
- 667-24 Cure of default
- 667-25 Date, place of public sale of mortgaged property
- 667-26 Public showing of mortgaged property
- 667-27 Public notice of public sale; contents; distribution;  
publication
- 667-28 Postponement, cancellation of sale
- 667-29 Authorized bidder; successful bidder
- 667-30 Successful bidder's failure to comply; forfeiture of  
downpayment
- 667-31 Conveyance of property on payment of purchase price;  
distribution of sale proceeds
- 667-32 Affidavit after public sale; contents
- 667-33 Recordation of affidavit, conveyance document; effect
- 667-34 Foreclosure sale; conclusive presumptions
- 667-35 Appeal to circuit court
- 667-36 Sale of property separately
- 667-37 Judicial action of foreclosure before public sale
- 667-38 Recordation; full satisfaction of debt by borrower
- 667-39 Right to enforce this part
- 667-40 Use of power of sale foreclosure in certain  
non-mortgage situations
- 667-41 Public information requirement
- 667-42 Application of this part

Part III. Other Provisions

667-51 Appeals

Part IV. Time Share Interest Foreclosures

667-61 Definitions

667-62 Time share interest foreclosure under power of sale;  
notice; affidavit after sale

667-63 Notice to mortgage creditors

667-64 Affidavit as evidence

667-65 Application of time share interest power of sale  
requirements

**Note**

As to procedural statutes superseded by the rules of court, see note preceding Title 32.

**Cross References**

Mortgage rescue fraud prevention act, see chapter 480E.

Secure and fair enforcement for mortgage licensing act, see chapter 454F.

**Law Journals and Reviews**

Timesharing in the 1990s. I HBJ No. 13, at pg. 89.

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**§667-5 Foreclosure under power of sale; notice; affidavit after sale.** (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

(1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and

(2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

(b) Copies of the notice required under subsection (a) shall be:

(1) Filed with the state director of taxation; and

(2) Posted on the premises not less than twenty-one days before the day of sale.

(c) Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information:

(1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request; and

(2) The sale price of the mortgaged property once auctioned.

(d) Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. Upon request made by any person who is entitled to notice pursuant to section 667-5.5 or 667-6, or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction, or if the auction is canceled, information that the auction was canceled. The mortgagee within thirty days after selling the property in pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

(e) The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.

(f) This section is inapplicable if the mortgagee is foreclosing as to personal property only. {L 1874, c 33, §1; am L 1907, c 59, §1; am L 1911, c 108, §1; am L 1915, c 121, §1; RL 1925, §2879; RL 1935, §4724; am L 1937, c 138, §1; RL 1945, §12424; RL 1955, §336-5; am L

**[§667-5.7] Public sale.** At any public sale pursuant to section 667-5, the successful bidder at the public sale, as the purchaser, shall not be required to make a downpayment to the foreclosing mortgagee of more than ten per cent of the highest successful bid price. [L 2006, c 275, §1]

**§667-7 Notice, contents; affidavit.** (a) The notice of intention of foreclosure shall contain:

- (1) A description of the mortgaged property; and
- (2) A statement of the time and place proposed for the sale thereof at any time after the expiration of four weeks from the date when first advertised.

(b) The affidavit described under section 667-5 may lawfully be made by any person duly authorized to act for the mortgagee, and in such capacity conducting the foreclosure. [L 1890, c 9, §1; am L 1915, c 121, §2; RL 1925, §2880; RL 1935, §4725; RL 1945, §12425; RL 1955, §336-6; HRS §667-7; am L 2008, c 138, §2]

**§667-8 Affidavit as evidence, when.** If it appears by the affidavit that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed. [L 1874, c 33, §2; RL 1925, §2881; RL 1935, §4726; RL 1945, §12426; RL 1955, §336-7; HRS §667-8; am L 1972, c 90, §9(g); gen ch 1985]

## LOSING YOUR HOME

After a homeowner falls behind on mortgage payments, the lender usually sends a letter demanding the loan be made current. If that doesn't work, a letter demanding full payment of the loan is issued, often triggering the foreclosure process. Lenders have two options to choose from: a judicial process through the courts or a non-judicial one. The latter is mostly used. Here are the main steps for each one:

### JUDICIAL

- >> Foreclosure complaint filed by lender's attorney in court and served on homeowner
- >> Homeowner files response with court
- >> Lender seeks summary judgment to foreclose on property and have commissioner appointed to sell it
- >> Hearing on summary judgment request held, typically one to two months later, depending on court docket
- >> Once foreclosure approved, commissioner appointed, open houses held and newspaper ads publicizing auction published for three consecutive weeks
- >> Auction generally held about two weeks after last ad runs
- >> One to two months later, hearing held to confirm sale. A bidder willing to pay at least 5 percent over auction price may step forward.
- >> Sale must close within 35 days of judge issuing confirmation order

TOTAL TIME: ROUGHLY EIGHT TO 12 MONTHS

### NON-JUDICIAL (1874 LAW)\*

- >> Homeowner gets notice of foreclosure from lender or lender's attorney
- >> Notice must be posted on property 21 days before auction
- >> Scheduled auction advertised three successive weeks in newspaper
- >> Final advertisement must be at least two weeks before auction
- >> Auction generally held about one and a half to two months after initial foreclosure notice sent
- >> Within 30 days of auction, lender files affidavit with Bureau of Conveyances describing what was done in foreclosure process
- >> Deed for new owner recorded

ROUGHLY 2 TO 4 MONTHS

\* Hawaii has another alternative non-judicial process with enhanced procedural requirements. But no lender uses it because of problematic provisions in the statute.

Source: Foreclosure attorney Marvin Dang

LAW OFFICES OF  
MARVIN S.C. DANG,  
A LIMITED LIABILITY LAW COMPANY

**MARVIN S.C. DANG**  
ATTORNEY AT LAW

P.O. BOX 4109  
HONOLULU, HAWAII  
96812-4109

Phone: (808) 521-8521  
Fax: (808) 521-8522  
E-mail: dangm@aloha.net

Internet: [www.lawyers.com/marvindang](http://www.lawyers.com/marvindang)

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## Facing The Challenges Of Today's Real Estate Marketplace

# Facing Foreclosure



Marvin S. C. Dang  
Attorney and  
Managing Member  
Law Offices of  
Marvin S. C. Dang, L.L.C.

Foreclosure is a financial disaster home owners hope they will never have to face. Not only does foreclosure mean the loss of their real property - probably their biggest personal investment - but their credit is severely damaged and chances of obtaining another mortgage loan substantially diminished.

Attorney Marvin Dang has handled foreclosures as an attorney for lenders for 30 years and as a commissioner for 28 years. He believes many foreclosures could be avoided if the home owner acknowledged potential problems before they reached crisis proportions and contacted their lender to try to work out a solution.

He noted that there are many reasons why a borrower might be unable to continue making mortgage payments: loss of job, reduction in working hours and salary, huge medical bills, break-up of a marriage, an increase in the monthly mortgage payment, etc.

"Although there is no guarantee that a lender will make accommodations, chances are better that the lender will not start a foreclosure if the borrower contacts him with an explanation instead of simply halting payments," Dang said.

"Generally, lenders prefer to work out a 'win-win' solution rather than resort to foreclosure. The foreclosure process is costly and time consuming. It is a 'lose-lose' scenario. The only one who potentially benefits from a foreclosure is a buyer who manages to



pick up a foreclosed property at a bargain price at a foreclosure auction."

Dang explained that after one or two payments are missed, a lender will contact the borrower and mail out reminders to pay. If no mutual arrangement is made, a lender may refer the account to an attorney after three or four missed payments. But it could be sooner if the property is abandoned.

"Usually the first notification from the lender's attorney to the property owner is a letter confirming the default. This is sent out before the attorney begins the foreclosure proceeding. Once the borrower gets the attorney's letter, it still may be possible to work with the lender, so the property owner

should not ignore the letter," Dang said.

"If the borrower consults with a third party for assistance, it's also important to check the credentials of that person, as there are local and Mainland scam artists who have taken advantage of inexperienced Hawaii home owners with devastating results. It's best to talk with a Hawaii-based credit counseling service or a Hawaii real estate professional, rather than getting advice from the internet. People can also meet with a bankruptcy attorney to decide what their best course may be."

Dang noted that in Hawaii there are two types of foreclosure actions, judicial and non judicial. The judicial process is run through the court system. The lender files a complaint with the court regarding the delinquent loan and requests that the court allow the lender to foreclose on the mortgage on the real property. After the borrower is served with the complaint by a process server, the borrower needs to file a written answer with the court. If the borrower fails to respond, they will be in default as to the complaint.

The lender will ask the court to schedule a hearing to appoint a foreclosure commissioner to auction the property. At the hearing, the party being foreclosed on has an opportunity to tell the judge why a commissioner should not be appointed: for example, the property is in the process of being voluntarily sold and should close in a few months or the borrower is getting money to bring the loan current. If the judge is convinced that such a sale will close, or believes the loan can be reinstated he or she may be willing to delay the foreclosure proceeding for a short period.

If the property owner is able to pay off the loan or bring it current, the foreclosure can be dismissed.

"In a judicial foreclosure, the commissioner

# Facing Foreclosure

Continued from page 1

who is usually either an attorney or a real estate professional, is accountable to and acts on behalf of the court...not on behalf of the lender," Dang said. "It will be the responsibility of the commissioner to get access to the property to inspect it. Generally, during the foreclosure, the commissioner will not evict the home owner or the tenant of the property. But any tenant will now need to pay rent to the commissioner and not to the landlord.

"The commissioner will hold two open houses at the property, usually on Saturdays and Sundays, and place ads in newspapers, such as the Honolulu Star-Bulletin. The ads must run once each week for three consecutive weeks announcing the date and time of the open houses and the date, time, and place of the auction. The last ad needs to appear at least two weeks before the auction is to be held. In Honolulu, the foreclosure auctions are held Monday through Friday beginning at 12 noon at the Ewa Lanai at First Circuit Court at 777 Punchbowl Street, where notices of upcoming auctions are posted. There could be more

than one property being auctioned at the same time by more than one commissioner."

According to Dang, anyone planning to bid at the auction will be required to show the commissioner before the auction proof of having a deposit in the form of a cashier's check or money order or cash, since the highest bidder needs to give the commissioner ten percent of the bid price at the end of the auction. The rules of the auction are announced by the commissioner and there is usually no upset price.

"Often the lender jumps in and bids at the auction," Dang said. "These lenders could be local and Mainland banks, credit unions, and other parties who may have bought the loan being foreclosed. Before they bid, lenders would have researched the condition and value of the property being foreclosed. Other bidders should do the same. The lender is not always the highest bidder. Investors and potential home buyers sometimes outbid the lenders.

"The highest bidder needs to understand that the judicial foreclosure sale is sub-

ject to court approval. After the auction, the commissioner will file a report with the court. The lender's attorney will schedule a court hearing to approve the sale, at which time the judge will ask if anyone wants to reopen the bidding for five percent higher than the auction price. Whoever is the highest bidder either from the first public auction or at the reopening at the hearing, is generally approved by the court. The winning bidder has about 35 days to come up with the rest of the money to close the sale. Upon closing, the foreclosure commissioner will sign a deed to convey the property in 'as is' condition to the buyer. When the deed is recorded at Bureau of Conveyances, the title to the property is transferred."

Dang said that the second type of foreclosure in Hawaii, the non-judicial foreclosure, was rarely held until the late 1990s but now accounts for about 75 percent or more of foreclosure proceedings here.

"There are several basic differences between a non-judicial foreclosure and a judicial procedure," Dang pointed out. "A judicial foreclosure can take six to nine

months, whereas a non-judicial foreclosure takes two to three months since there are no court filings, no open houses, and no hearings. However, one similarity is that a newspaper ad announcing an auction will be required to run in a local newspaper once each week for three consecutive weeks, the last ad to appear at least two weeks prior to the auction. The notice of the non-judicial foreclosure sale needs to be mailed to the borrower and should be served by a process server. The notice must be posted on the property. No open houses are required to be held at the property, and there is no opportunity to inspect it in advance of the auction.

"For non-judicial foreclosures the auction and bidding procedures are similar to those of a judicial foreclosure. However, a non-judicial foreclosure auction is conducted by the lender's attorney or representative rather than a court appointed commissioner. At the conclusion of the non-judicial auction, the buyer pays the ten percent deposit. The rest of the sales price must be paid within thirty days

after the auction. Once the sales price is paid, the buyer will get a deed and becomes the owner of the property after the deed is recorded at the Bureau of Conveyances.

"For both judicial and non-judicial foreclosures, the new owner, that is, the successful bidder, is responsible for obtaining possession of the property. The new owner can keep the occupants there or can ask them to move out. In cases where occupants refuse to move, the new owner may need to go to

court to ask the judge to issue an order to evict them."

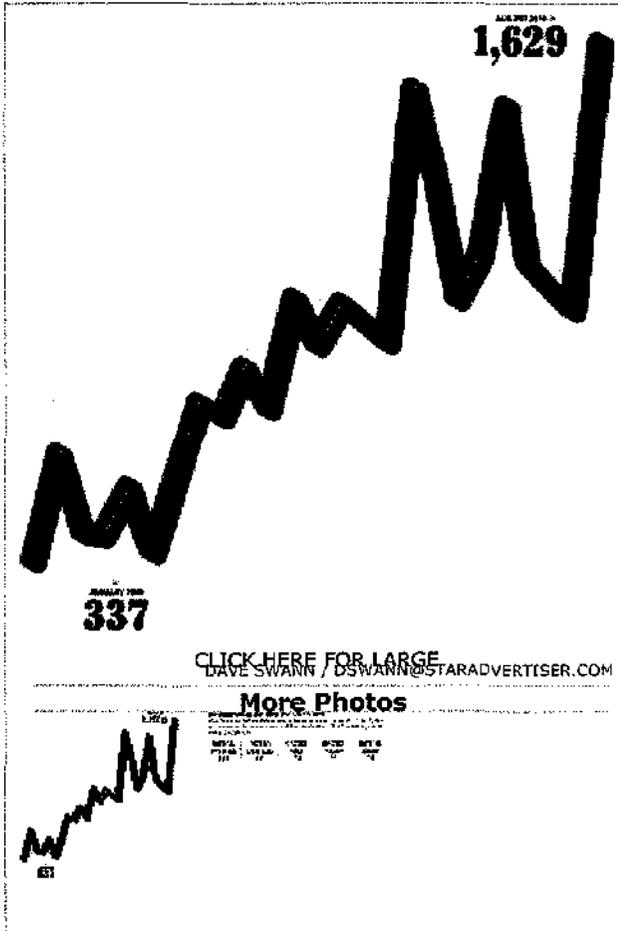
"The entire foreclosure process could possibly be avoided if the borrower simply phoned the lender before missing that first payment," Dang said. "And people who find themselves facing possible foreclosure should keep in mind that, even if the foreclosure is started, it can be delayed and the auction can be postponed if the borrower is able to work out an arrangement with the lender."

# Star Advertiser

## Foreclosures hit all-time high

By Andrew Gomes

POSTED: 01:30 a.m. HST, Sep 16, 2010



of property foreclosure filings statewide, volume in August soared to a new high.

A report from real estate research firm RealtyTrac Inc. said there were 1,629 Hawaii foreclosure filings last month, which eclipsed the prior record of 1,534 in December and was almost twice as many as the 869 filings in August 2009.

The surge last month followed a 6 percent decline in July filings over the same month a year earlier. The July dip represented the first year-over-year decrease for any month since May 2007, before financial and real estate markets came unglued.

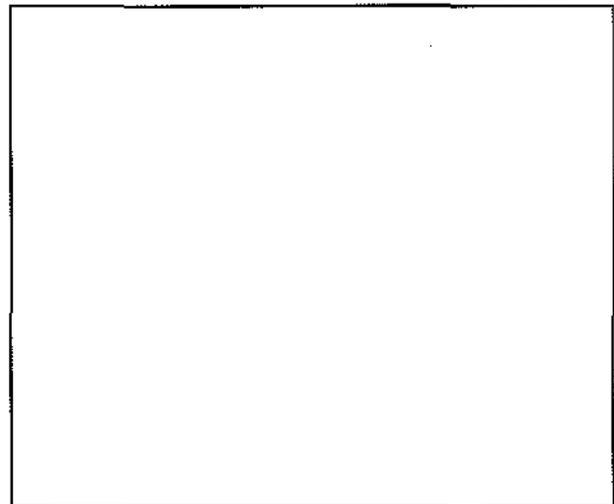
Year-over-year increases in May and June also were relatively small.

### CORRECTION

» The zip code for Lahaina on the second picture is incorrect. Lahaina's zip code is 96761.

So much for a decline in foreclosure activity in Hawaii.  
After three months of what looked like subsiding levels

ADVERTISEMENT



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# Star Advertiser

## NO PLACE TO CALL HOME

Hawaii's monthly foreclosures over the past year, including the year-over-year percentage gain.

2010		
MONTH	TOTAL	PCT. CHANGE
August	1,629	+87.5%
July	930	-6.1%
June	1,000	+41.6%
May	1,055	+29.3%
April	1,474	+115.5%
March	1,097	+51.5%
February	972	+81.0%
January	1,302	+286.4%
2009		
MONTH	TOTAL	PCT. CHANGE
December	1,534	+207.4%
November	872	+121.9%
October	925	+134.2%
September	969	+63.1%
August	869	+158.6%
July	990	+332.3%
June	706	+426.9%
May	816	+397.6%
April	684	+216.7%
March	724	+503.3%
February	537	+275.5%
January	337	+174.0%

Source: RealtyTrac

But local foreclosure attorneys suspected in recent months that the slack was perhaps due to lender processing issues, and wasn't a sign that fewer Hawaii homeowners were defaulting on their mortgages or losing their homes.

August's record appears to bear that out.

The number of foreclosure filings last month equated to one filing per 315 households.

Compared with other states, Hawaii's rate was 10th highest, which is the worst position Hawaii has occupied since RealtyTrac began its reports in 2005. Hawaii had the 10th-highest rate in December, as well.

Nevada had the highest rate at one filing per 84 households. Vermont had the lowest rate at one filing per 18,389 households.

Nationally, there was one foreclosure filing for every 381 households. There were 338,836 filings nationally in August, which was down 5.5 percent from the same month last year.

RealtyTrac noted that nearly a third of the filings, or 95,364, in August were lender repossessions. That was a record, and suggests that troubled properties are exiting foreclosure and alleviating a backlog. RealtyTrac said foreclosure starts nationally have been declining.

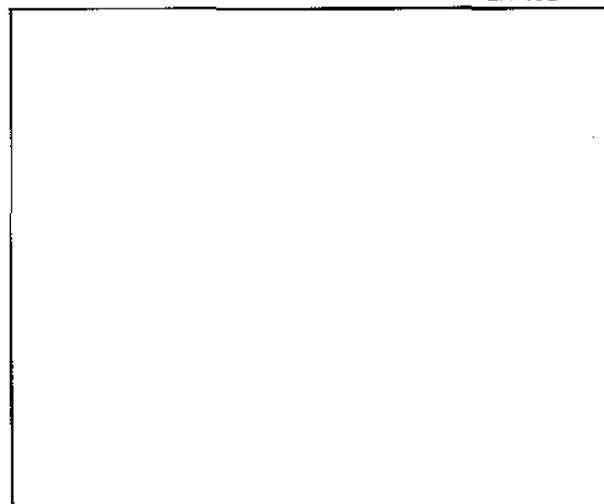
By county, Maui had the worst foreclosure rate, at one filing per 187 households, or 353 filings in all.

The Big Island had the next worst rate at one filing per 205 households, based on 389 total filings.

Kauai's rate was one filing per 342 households, based on 87 filings.

Honolulu had the most filings with 800, but it had the lowest rate, at one filing for every 421 households.

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TO: MORTGAGE FORECLOSURE TASK FORCE  
FROM: JANE SUGIMURA  
DATE: September 21, 2010  
RE: HOW FORECLOSURES AFFECT CONDOMINIUMS

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I. Condominiums are created by statute – HRS Chapters 514A and 514B. The Declaration of Condominium Property Regime that creates a condominium is recorded with the Bureau of Conveyances and describes what makes up the condominium, *inter alia*, how many units in the building and on each floor, the dimensions of each apartment, what are the common elements and the limited common elements that are attached to each unit, who manages and operates the condominium and the rights and obligations of unit owners and the Association of Unit Owners (the “Association”).

II. Common Interests and Expenses. The Declaration also sets out each unit owner’s common interest percentage, which is determined by dividing the area of the unit by the area of the entire building to come up with a fraction, and that fraction is used to determine the common expenses to be paid by each unit. The common expenses that are charged to all unit owners are called maintenance fees or assessments, which are used to maintain the common elements (as defined by the Declaration and which typically include hallways, the exterior of the building, parking lots, swimming pools, elevators) and to pay common expenses that benefit all unit owners (e.g., utilities, insurance, employee expenses).

III. The Budget. Annually in the Fall of each year, the Board of Directors prepares a budget based on actual expenditures of the previous year (see Exhibit “A”). Once the total budget is determined, they take each unit’s percentage interest and apply it against the budget amount to get each unit’s monthly maintenance fee for the following year. Attached (Exhibit “B”) is a sample of a common interests list for a 300-unit building and the calculation of the annual maintenance fee for each unit based on the budget in Exhibit “A”.

IV. The Maintenance Fee Delinquency. A 2-bedroom unit has a monthly maintenance fee of \$573.74. If it fails to pay the maintenance fee for 30 days, it gets a dunning letter from the Association. After 60-days of non-payment, the delinquency is turned over to the Association’s attorneys for collection. Because the homeowner is usually a consumer, the attorney has to give another 30-day notice before a foreclosure can be filed. A foreclosure takes about 6-8 months to complete depending on whether it’s a judicial or non-

judicial foreclosure. By this time 12 months have gone by and the delinquency has caused a \$6,884.88 shortfall in the Association's budget.

Assuming ten 2-bedroom units in that 300-unit building (3%) are delinquent and proceed to foreclosure, in 1 year the shortfall to the Association is \$68,848.80. If ten 2-bedroom units and ten 1-bedroom units (total 7% of the units) are delinquent and proceed to foreclosure, in 1 year the shortfall to the Association is \$128,188.80.

V. How this affects the Association.

1. Increases the maintenance fee the following year to make up for the shortfall and this puts marginal unit owners at risk of becoming delinquent and going into foreclosure, which results in another revenue shortfall which results in a maintenance fee increase the following year.
2. Reduces the funds available to the Association to repair and maintain their building, including the ability to keep their employees. This deferral of maintenance causes the condition and appearance of the project to deteriorate and results in diminution in value to the units in the project.
3. If Associations use their reserves to pay for maintenance and repairs or just to pay their bills, they risk losing their insurance coverage and having lenders decline to give mortgages to prospective buyers because of the financial insecurity of the project.
4. Bankruptcy.

VI. Foreclosure Issues.

1. Association liens do not have priority over secured creditors, i.e., mortgagees. By statute, Associations have a lien priority that allows them to recover the lesser of 6 months of maintenance fees or \$3,600 from the lender when the foreclosed unit is sold at auction. Since most foreclosures take more than 6 months to complete, the Associations would like to see an increase in the lien priority payment they currently receive or a way to speed up foreclosures to minimize their losses.
2. While a lender is foreclosing on a unit - and this usually takes over 1 year - that unit is not paying maintenance fees, which means that the other unit owners in the project are subsidizing that unit (i.e., paying the electricity, water and sewage, insurance and

maintenance) for the benefit of the delinquent unit owner and the secured creditor. Since the Association is bearing the cost of maintaining the collateral and since the secure creditor has legal recourse against its own borrower, we believe that if the foreclosure is not completed within 6 months, that the secured creditor should compensate the Association for the expenses incurred that benefit the unit involved.

3. If a lender does not initiate foreclosure in a timely manner, the Association is forced to do so since it is losing money every month that the maintenance fee is not being paid and this results in higher legal expenses to the Association and if the lender subsequently decides to initiate its own foreclosure, the lender and not the Association has priority (except for the statutory lien priority) as to the foreclosure sale proceeds.

DESCRIPTION	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	ANNUAL
REVENUE	2010	2010	2010	2010	2010	2010	2010	2010	2010	2010	2010	2010	TOTAL
MAINTENANCE FEES	156,313	156,313	156,313	156,313	156,313	156,313	156,313	156,313	156,313	156,313	156,313	156,313	1,875,756
INVESTMENT INTEREST	100	100	100	100	100	100	100	100	100	100	100	100	1,200
CHECKING INTEREST	5	5	5	5	5	5	5	5	5	5	5	5	60
VENDING MACHINES	50	50	50	50	50	50	50	50	50	50	50	50	600
PARKING	1,800	1,800	1,800	1,800	1,800	1,800	1,800	1,800	1,800	1,800	1,800	1,800	21,600
LATE CHARGES	200	200	200	200	200	200	200	200	200	200	200	200	2,400
FINES	25	25	25	25	25	25	25	25	25	25	25	25	300
TOTAL REVENUE	158,493	158,493	158,493	158,493	158,493	158,493	158,493	158,493	158,493	158,493	158,493	158,493	1,901,916

UTILITIES	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	TOTAL
ELECTRICITY	45,500	45,500	45,500	45,500	45,500	45,500	45,500	45,500	45,500	45,500	45,500	45,500	546,000
WATER	4,920	4,920	4,920	4,920	4,920	4,920	5,412	5,412	5,412	5,412	5,412	5,412	61,992
SEWER	14,660	14,660	14,660	14,660	14,660	14,660	17,300	17,300	17,300	17,300	17,300	17,300	191,760
TELEPHONE	700	700	700	700	700	700	700	700	700	700	700	700	8,400
TOTAL UTILITIES	65,780	65,780	65,780	65,780	65,780	65,780	68,912	68,912	68,912	68,912	68,912	68,912	808,152

CONTRACT SERVICES	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	TOTAL
ELEVATOR	2,840	2,840	2,840	2,840	2,840	2,840	2,840	2,840	2,840	2,840	2,840	2,840	34,080
REFUSE	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	30,000
TOTAL CNTRCT SVCS	5,340	5,340	5,340	5,340	5,340	5,340	5,340	5,340	5,340	5,340	5,340	5,340	64,080

MAINTENANCE	JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC	TOTAL
BUILDING MAINTENANCE	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	24,000
GROUNDS	150	150	150	150	150	150	150	150	150	150	150	150	1,800
ELECTRICAL/LIGHTING	200	200	200	200	200	200	200	200	200	200	200	200	2,400
PLUMBING - GENERAL	600	600	600	600	600	600	600	600	600	600	600	600	7,200
POOL EQUIPMENT	150	150	150	150	150	150	150	150	150	150	150	150	1,800
SECURITY EQUIPMENT	50	50	50	50	50	50	50	50	50	50	50	50	600
HEAT PUMP	250	250	250	250	250	250	250	250	250	250	250	250	3,000
MISC RPRS & PURCHS	450	450	450	450	450	450	450	450	450	450	450	450	5,400
BUILDING - PURCHASING HU	50	50	50	50	50	50	50	50	50	50	50	50	600
TOTAL MAINTENANCE	3,900	3,900	3,900	3,900	3,900	3,900	3,900	3,900	3,900	3,900	3,900	3,900	46,800

EXHIBIT A



Apartment	% Common Interest	Sq. Ft. of Units Assigned	No. of Bed-Rooms	Sq. Ft. Living Area	Sq. Ft. Innet	Sq. Ft. Ratio	Sq. Ft. Total
2D (Dlx)	-	304	2	918	35*	84	1,037
1B	.312	218	1	605	157	199	951
1F	.312	219	1	603	157	199	959
10	.362	82	2	840	64	53	957
11	.362	83	2	840	64	53	957
13	.312	220	1	603	157	199	959
1K	.312	221	1	603	157	199	961
2A	.362	151	2	840	64	51	957
2B	.312	217	1	603	157	199	959
2C	.312	202	1	605	157	"	762
2D	.362	97	2	928	35*	"	963
2E	.312	299	1	603	157	"	762
2F	.312	294	1	603	157	"	760
2G	.362	126	2	840	64	"	904
2H	.362	128	2	840	64	"	904
2J	.312	299	1	603	157	"	760
2K	.312	300	1	605	157	"	762
2L	.362	93	2	884	97	"	981
2M*	.312	222	1	605	157	105	867
2N	.312	223	1	603	157	107	959
2P	.362	84	2	840	64	53	957
2A	.362	129	2	840	64	"	904
3B	.312	288	1	603	157	"	760
3C	.312	289	1	605	157	"	762
3D	.362	143	2	928	35*	"	963
3E	.312	290	1	603	157	"	762
3F	.312	291	1	603	157	"	760
3G	.362	124	2	840	64	"	904
3H	.362	127	2	840	64	"	904
3J	.312	295	1	603	157	"	760
3K	.312	296	1	605	157	"	762
3L	.362	118	2	884	97	"	981
3M	.312	297	1	603	157	"	762
3N	.312	298	1	603	157	"	760
3P	.362	121	2	840	64	"	904
4A	.362	129	2	840	64	"	904
4B	.312	200	1	603	157	"	760
4C	.312	201	1	603	157	"	762
4D	.362	98	2	928	35*	"	963
4E	.312	202	1	603	157	"	762
4F	.312	203	1	603	157	"	760
4G	.362	120	2	840	64	"	904
4H	.362	121	2	840	64	"	904
4J	.312	204	1	603	157	"	760
4K	.312	205	1	603	157	"	762
4L	.362	151	2	884	97	"	981
4M	.312	206	1	603	157	"	762
4N	.312	207	1	603	157	"	760
4P	.362	122	2	840	64	"	904
5A	.362	114	2	840	64	"	904
5B	.312	272	1	603	157	"	760
5C	.312	273	1	605	157	"	762
5D	.362	83	2	928	35*	"	963
5E	.312	274	1	603	157	"	762
5F	.312	275	1	603	157	"	760
5G	.362	115	2	840	64	"	904
5H	.362	116	2	840	64	"	904
5J	.312	276	1	603	157	"	760
5K	.312	277	1	605	157	"	762
5L	.362	162	2	884	97	"	981
5M	.312	278	1	603	157	"	762

**CALCULATION OF MONTHLY MAINTENANCE FEE**

**\$1,901,916**  
**ANNUAL BUDGET FOR 300-UNIT BUILDING**

$$\begin{aligned} &.00312 \times \$1,901,916 \\ &\div 12 \text{ mos.} = \$494.50 \end{aligned}$$

**1 Bedroom**

$$\begin{aligned} &.00362 \times \$1,901,916 \\ &\div 12 \text{ mos.} = \$573.74 \end{aligned}$$

**2 Bedroom**

Remarks by D.B. Griffin III, Commissioner, Division of Financial Institutions, State of Hawaii on STATE OF HAWAII MORTGAGE SERVICING at meeting of Mortgage Foreclosure Task Force, October 22, 2010, Honolulu Hawaii.

**GOOD MORNING**

**MY NAME IS NICK GRIFFIN**

**I AM THE COMMISSIONER OF FINANCIAL INSTITUTIONS FOR THE STATE OF HAWAII**

**STEVE LEVINS ASKED ME TO PROVIDE SOME COMMENTS ON THE HAWAII REGULATORY FRAMEWORK FOR MORTGAGE SERVICERS.**

**FIRST SOME HISTORY**

**HAWAII FORECLOSURES BEGAN INCREASING IN 2007**

- **INITIAL WAVE OF FORECLOSURES IN HAWAII INVOLVED**
  - **MAINLAND AND FOREIGN LENDERS**
  - **INVESTMENT, VACATION RENTAL, CONDOTEL AND TIME SHARE PROPERTIES**
  - **NEIGHBOR ISLANDS**
  
- **SUBSEQUENT WAVE OF FORECLOSURES IN HAWAII INCLUDED**
  - **LOCAL LENDERS**
  - **HAWAII RESIDENTS**
  - **ALL ISLANDS**

**WHEN MORTGAGE LOANS WERE PRIMARILY MADE BY LOCAL LENDERS AND SERVICED BY THEM AFTER SALE MORTGAGORS UNDERSTOOD THE PROCESS AND WERE ABLE TO READILY CONTACT LENDERS/SERVICERS AS NECESSARY.**

**HOWEVER THE UNDERWRITE AND SELL MODEL COUPLED WITH THE SECURITIZATION OF THE UNDERLYING MORTGAGES HAS MADE THE SERVICER NOT ONLY THE PRIMARY CONTACT, BUT IN MOST CASES THE ONLY CONTACT FOR MORTGAGORS WITH QUESTIONS OR COMPLAINTS.**

**DETERIORATION IN MORTGAGE PORTFOLIOS HAS INCREASED THE NUMBER OF CALLS TO DFI FROM MORTGAGORS WHO WERE PRIMARILY INTERESTED IN CONTACTING**

**OR COMPLAINING  
ABOUT THE SERVICER OF THEIR LOANS.**

**WHILE DFI DID NOT, IN MOST CASES,  
HAVE ANY REGULATORY AUTHORITY OVER THESE MORTGAGE  
SERVICERS  
IT WAS CLEAR THAT SOME REFERRAL SYSTEM  
WAS BECOMING NECESSARY.**

**DFI THEREFORE INTRODUCED A MORTGAGE SERVICER REGISTRATION  
BILL  
IN THE 2009 LEGISLATIVE SESSION.  
THE BILL,  
WHICH WAS PRIMARILY INTENDED TO PROVIDE THE AUTHORITY  
TO COLLECT DATA ON NON-FINANCIAL INSTITUTION SERVICERS  
OPERATING IN HAWAII,  
WAS PASSED IN THE 2009 SESSION,  
HOWEVER THE LEGISLATURE  
DEFERRED IMPLEMENTATION OF THE STATUTE UNTIL JULY 2010.**

**CHAPTER 454 M HAWAII REVISED STATUTES  
HAS TO DATE RESULTED IN THE REGISTRATION  
OF MORE THAN 50 NON-FINANCIAL INSTITUTION SERVICERS  
OPERATING IN HAWAII.  
AND THE NAMES OF NEW REGISTRANTS CONTINUE TO BE ADDED THE  
DFI WEBSITE.**

**AS NOTED, THE STATUTE,  
WHILE SPECIFYING "LICENSING",  
IS ESSENTIALLY A REGISTRATION PROGRAM  
AND CONTAINS LIMITED PROHIBITIONS AND REPORTING  
REQUIREMENTS.  
THERE ARE NO DEDICATED STAFF  
AND FIELD EXAMINATIONS ARE NOT CONTEMPLATED AT THIS TIME.  
ANY REGULATORY ACTIONS TAKEN BY DFI ARE COMPLAINT DRIVEN.**

**I HAVE A FEW COPIES OF THE STATUTE HERE**

**AND IT IS ALSO AVAILABLE ON THE DFI WEB SITE.**

**APPROXIMATELY 35 STATES  
NOW HAVE SOME FORM OF MORTGAGE SERVICER REGULATION.  
MANY OF THESE STATES  
HAVE FAR MORE ROBUST MORTGAGE SERVICER REGULATORY  
PROGRAMS THAN HAWAII –  
AMONG THEM NEW YORK, MASSACHUSETTS AND NORTH CAROLINA,  
ALL OF WHICH HAVE A LONG HISTORY OF VIGOROUS CONSUMER  
PROTECTION ACTIVITIES  
IN THE MORTGAGE SECTOR.**

**FOR EXAMPLE:**

- **NM – RESTRICTIONS ON LATE PAYMENT FEES, DEFERRAL FEES  
ETC.**
- **NY – RESTRICTIONS ON INTEREST RATE RESETS, FEES, CHARGES  
AND FORCED PLACED INSURANCE.**
- **CA, MD, NJ, NC – REGULAR REPORTING OBLIGATIONS ON  
SERVICING ACTIVITIES.**
- **MD – MANDATORY FRAUD REPORTING**

**WHILE STATES HAVE ARGUABLY LIMITED ABILITY  
TO ENACT LAWS THAT RETROACTIVELY MODIFY EXISTING CONTRACTS  
BETWEEN PRIVATE PARTIES,  
SOME STATES HAVE ENACTED MORATORIUM AND FORBEARANCE  
STATUTES (CA, NJ,NC)  
OR IMPLEMENTED RESTRICTIONS AND GUIDELINES  
TO ESSENTIALLY DELAY THE FORECLOSURE PROCESS.**

**THE FEDERAL SAFE ACT,  
STATE VERSIONS OF WHICH HAVE BEEN PASSED TO GOVERN THE  
ACTIVITIES MORTGAGE LOAN ORIGINATORS –  
WHAT HAWAII CURRENTLY CALLS MORTGAGE BROKERS AND  
SOLICITORS –  
HAS LANGUAGE BROAD ENOUGH  
TO CAPTURE MORTGAGE SERVICERS**

PROVIDING LOAN MODIFICATION AND LOSS MITIGATION ACTIVITIES UNDER ITS PROVISIONS.

HUD, OR ITS SUCCESSOR AGENCY, WILL REPORTEDLY DETERMINE IF IT WAS THE SAFE ACTS' INTENT TO REACH THAT FAR.

THAT DECISION WILL IMPACT BOTH HAWAII'S MORTGAGE SERVICER STATUTE AND ITS MORTGAGE LOAN ORIGINATOR STATUTE, WHICH GOES INTO EFFECT IN JANUARY 2011.

THIS INTERPRETATION COULD ALSO IMPACT COLLECTION AGENCIES, ESCROW AGENTS, DEBT ADJUSTERS AND FORECLOSURE CONSULTANTS TO NAME BUT A FEW OTHER INDUSTRIES.

ANOTHER SERVICER INITIATIVE RELATES TO POST FORECLOSURE RESPONSIBILITIES.

CITIES HAVE RECENTLY PASSED LOCAL LAWS IMPOSING AN OBLIGATION ON LENDERS AND/OR SERVICERS FOR THE MAINTENANCE OF VACANT AND/OR FORECLOSING PROPERTIES.

LOS ANGELES ORDINANCE NO. 181185 PASSED IN MAY 2010

REQUIRES REGISTRATION AND MAINTENANCE OBLIGATIONS ON POST FORECLOSURE HOLDERS OF RESIDENTIAL (INCLUDING MULTI-FAMILY) PROPERTY

OR THEIR AGENTS

IN ORDER TO PREVENT OR CURE NEIGHBORHOOD BLIGHT AND REDUCE THE OPPORTUNISTIC USE OF THESE SITES FOR ILLICIT PURPOSES.

PENALTIES FOR NON-COMPLIANCE RANGE UP TO \$100,000 PER PROPERTY.

DEVELOPMENT IN THE REGULATION AND SUPERVISION OF MORTGAGE SERVICERS IS CLEARLY A GROWTH AREA AND AS SUCH MAY BECOME A TOPIC OF INCREASED LEGISLATIVE INTEREST GOING FORWARD.

**QUESTIONS ?**

**9/22/10**

MORTGAGE FORECLOSURE TASK FORCE (Act 162 (2010))  
Mortgage Foreclosure Rescue Fraud Investigations  
September 22, 2010

I. The State Office of Consumer Protection ("OCP") investigates mortgage foreclosure rescue fraud primarily under Hawaii Revised Statutes ("HRS") section 480-2, 481A-3 and chapter 480E.

A. "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." HRS § 480-2.

1. HRS 480-3.1 allows for civil penalties.
2. HRS 480-12 renders contracts void if in violation of chapter 480.
3. HRS 480-15 (and 487-15) provides injunctive relief.
4. HRS 480-13.5 provides for enhanced penalties for violations that were directed toward, targeted, or injured an elder (62 years old or older).
5. 487-14 allows for restitution and increased restitution for elderly victims.

B. HRS 481A-3 lists specific acts that would constitute a deceptive trade practice.

C. Chapter 480E was enacted in 2008 and governs transactions involving "distressed properties."

1. "Distressed property" means any residential real property that:

- (1) Is in foreclosure or at risk of foreclosure because payment of any loan that is secured by the residential real property is more than sixty days delinquent;
- (2) Had a lien or encumbrance charged against it because of nonpayment of any taxes, lease assessments, association fees, or maintenance fees;
- (3) Is at risk of having a lien or encumbrance charged against it because the payments of any taxes, lease assessments, association fees, or maintenance fees are more than ninety days delinquent;
- (4) Secures a loan for which a notice of default has been given; or
- (5) Secures a loan that has been accelerated."

HRS § 480E-2.

2. Chapter 480E distinguishes between a consultant and a buyer in a distressed property transaction.

- (a) "Distressed property consultant" means any person who performs or makes any solicitation, representation, or offer to perform any of the following relating to a distressed property:
- (1) Stop or postpone the foreclosure sale . . . ;
  - (2) Stop or postpone the charging of any lien . . . for the nonpayment of any taxes, lease assessments, association fees, or maintenance fees;
  - (3) Obtain any forbearance from any beneficiary or mortgagee . . . ;
  - (4) Assist the owner to exercise any cure of default arising under Hawaii law;
  - (5) Obtain any extension of the period within which the owner may reinstate the owner's rights with respect to the property;
  - (6) Obtain any waiver of an acceleration clause . . . ;
  - (7) Assist the owner in foreclosure, loan default, or post-tax sale redemption period to obtain a loan or advance of funds;
  - (8) Avoid or ameliorate the impairment of the owner's credit resulting from the recording or filing of a notice of default or the conduct of a foreclosure sale or tax sale; or
  - (9) Save the owner's residence from foreclosure or loss of home due to nonpayment of taxes."

HRS § 480E-2.

- (b). "Distressed property purchaser" means any person who acquires any interest in a distressed property directly or indirectly through a distressed property conveyance or distressed property conveyance contract." HRS § 480E-2.
- (c) A consultant cannot be a purchaser for the same property. "A distressed property consultant shall not: . . . (10) Acquire any interest, directly or indirectly, or by means of a subsidiary or affiliate, in a distressed property from a distressed property owner with whom the distressed property consultant has contracted[.]" HRS § 480E-10(a)(10).

3. HRS 480E provides sufficient protection and no changes are needed or recommended.

## II. Types of mortgage foreclosure rescue fraud.

### A. In general, there are two types of mortgage foreclosure rescue fraud:

1. Advance fee scheme where the rescuer collects a fee for stopping the foreclosure. Most of the cases OCP investigates involve advance fee type schemes. Majority of cases involve a mainland rescuer with no Hawaii agent.
2. Equity stripping scheme where the rescuer, or related person, takes title to a property with equity, refinances the existing mortgage for more than the outstanding balance, and then takes a cash payment at closing for the amount that the new mortgage loan exceeds the prior existing mortgage balance. OCP has investigated or sued four rescuers involved in equity stripping type schemes.

### B. Trends:

1. Most rescuers identify potential victims by reading public notices of foreclosure. Some victims find rescuers online or through commercials, flyers or posted announcements. Some victims are referred to rescuers by business associates of the rescuers or other victims.
2. Attorneys started getting involved rescue schemes. HRS 480E-2 excludes, "Licensed attorneys engaged in the practice of law[]" from the definition of a "distressed property consultant." Several other states have a similar exclusion.
3. Self-proclaimed forensic auditors are the newest trend. Forensic auditors claim to 'audit' loan documents to identify violations (Truth in Lending Act (TILA), Home Ownership and Equity Protection Act (HOEPA), Real Estate Settlement Procedures Act (RESPA), etc). Auditor then refers borrower to a consultant or attorney.

**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.<sup>1</sup>
- (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.<sup>2</sup>

**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.<sup>3</sup>

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

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

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

**LENDER INVESTIGATIVE GROUP MEETING**  
**September 8, 2010**

**Initial topics discussed:**

1. Statutory Redemption by Borrower After a Foreclosure is Completed.

Oppose. Currently borrowers can generally cure before the auction. A statutory redemption after the foreclosure is completed will lead to uncertainty in any foreclosure sale (judicial or non-judicial). The result will be to chill bidding at foreclosure sales and lead to more foreclosures and harm the housing market.

2. Deficiency Judgments for Lender.

Oppose a blanket elimination of deficiency judgments. Note that Part II (the alternate non-judicial foreclosure statute) bars a deficiency judgment. Should deficiency judgments be eliminated only in non-judicial foreclosures of owner-occupied properties? This proposal would increase foreclosures and harm the housing market.

3. Mortgage Servicers.

The Division of Financial Institutions is registering mortgage servicers. DFI should examine the statutory provisions to see if they are adequate.

4. Time and Delay in Foreclosure Process.

- (a) Judicial
- (b) Non-Judicial

5. Stay of Foreclosure Process Pending Negotiation.

- (a) Bankruptcy Court
- (b) State Court
- (c) Alternative Dispute Resolution

Because there is enough "delay" in the process, a statutory delay period is not necessary. A delay period already occurs before the initiation of the foreclosure. The lender allows four months before starting the foreclosure process even without a statutory delay period. Lenders already give written notices to delinquent borrowers at 30 days, 35 days, and even after that. Calls are made to the borrowers and some lenders go as far as to send handwritten letters.

The various federal modification programs, including Freddie/Fannie and HAMP program, all have built in delays and statutory/regulatory suspensions. When there is a pending HAMP request, the lender may not foreclose. National data indicates that many borrowers remain in the house rent free for over a year, which is one reason the graceful exit programs have not worked.

While loan modifications are pending, there should not be a suspension of foreclosure proceedings, such as with the Third Circuit Court's Pilot Program or with Magistrate Kevin Chang's program. A suspension is unnecessary because of the existing built-in delays in the foreclosure system especially on the neighbor islands.

6. Due Process Aspects of Judicial and Non-Judicial Foreclosure --Service of Notice.

Discussed the methods of service by mail, posting, or publication as satisfying due process requirements.

7. Local Legislation for Control of Servicers.

8. Non-Judicial Sale – Rights of BFP – Cutting Off Rights of Borrower Against Lender Who is Considered BFP See section 7.e. below.

9. Modification Program – Impact of Federal Law on Foreclosures and Modification.

It's not a simple matter of putting a borrower into a loan modification. The borrower needs to give the lenders all the documents before the lender can consider a modification. Lenders turn down HAMP requests of borrowers because of insufficient income, or lack of employment or full employment.

10. We should discuss whether we should bar the "subject to" foreclosure sales since that just leads to two foreclosure proceedings which benefits no one.

**Discussion about specific topics in Act 162 (creating the Mortgage Foreclosure Task Force):**

1. The adequacy of notice given to mortgagors of available mortgage counseling programs and the optimal timing for such notification and counseling.

Oppose any additional statutory provisions regarding counseling.

2. The availability of loan documentation to mortgagors from mortgagees prior to and during the foreclosure process.

Loan documents are always available to the borrowers. They are entitled to get the documents when they get a default notice. The foreclosure should not be held up with the borrowers are requesting documents or when the lender is sending the documents to the borrowers.

Perhaps the borrower can be given notice up front of a deadline to request copies of the loan documents. If the borrower makes a request for the documents after the deadline, the lender can proceed with the foreclosure without having to wait to produce a copy of the loan documents.

3. The establishment of statutory bidding thresholds for properties sold via foreclosure.

Oppose. Lenders should just be obligated to follow foreclosure (judicial or non-judicial) procedures.

4. The statutory timeline for power-of-sale foreclosures.

Oppose.

5. Further regulation of distressed property consultants.

Is the DCCA even enforcing the existing law?

6. Revisions to part II of chapter 667, Hawaii Revised Statutes, to make it a viable vehicle for power-of-sale foreclosures.

Wait until 2012 legislature. Very complex subject.

7. The mortgage foreclosure task force shall analyze the effectiveness and any defects of the foreclosure procedures currently set in statute for both judicial and power-of-sale foreclosures.

a. Serving notice in non-judicial foreclosures. In a non-judicial foreclosure, if there is service by posting at property, attempted service of the borrower at the address on the note and mortgage, attempted service of the borrower at the address given to the lender and attempted service at the property, and if there is no personal service after doing all of that, that should be sufficient for the lender to move forward with the foreclosure. These efforts would be separate from newspaper publication of the sale. Should this be put in the non-judicial foreclosure statute?

b. Redemption during foreclosure. Should there be in the statute a time period that the borrower can redeem while the foreclosure is pending? No.

c. Conversion from non-judicial to judicial. The right to convert from a non-judicial to judicial already exists, but conversion is not common. Should the conversion process from non-judicial to a judicial foreclosure be more pronounced?

d. Challenge in court to non-judicial foreclosure. Should a borrower be able to challenge a non-judicial foreclosure in court? No.

e. Finality. When is the foreclosure considered final under state law? Is it when the auction is completed? For a non-judicial foreclosure, it should be when the affidavit is recorded at the Bureau.

8. The mortgage foreclosure task force shall comment on the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education. The task force shall propose funding mechanisms to enable the operation of this entity.

Should the DCCA organize a loan modification fair in which lenders can participate? DCCA might oversee loan modification. This would be an informal, non-statutory recommendation. Hawaii Home Ownership Center could be involved. This would be a cheap and proven way to do modifications.



**Office of the Administrative Director – Staff Attorney • THE JUDICIARY • STATE OF HAWAII**  
417 SOUTH KING STREET, HONOLULU, HAWAII 96813-2902 • TEL. (808)539-4990 • FAX (808)539-4794

**Thomas R. Keller**  
ADMINISTRATIVE DIRECTOR

June 23, 2010

**Susan Pang Gochros**  
INTERGOVERNMENTAL & COMMUNITY RELATIONS  
DIRECTOR

**Walter M. Ozawa**  
DEPUTY ADMINISTRATIVE DIRECTOR  
Via Email

**Lynn Minagawa Inafuku**  
STAFF ATTORNEY

David B. Rosen, Esq.  
810 Richards St., Suite 880  
Honolulu, Hawaii 96813

Re: Non-Judicial Foreclosure Auctions

Dear Mr. Rosen:

This letter is to inform you of the latest developments regarding the above-referenced matter. This week, the Chief Judges of the First, Second, and Fifth Circuits discussed the matter of holding non-judicial foreclosure auctions on court property. The Chief Judges agreed with the position taken by Third Circuit Court, i.e., it is inappropriate for private, commercial activities to take place on Judiciary premises.

In my previous letter, I informed you that persons who wish to use court facilities must submit an application to the court. Please be advised, however, that based on the Chief Judges' discussion, Administrative Director Thomas Keller will not approve any applications to use court facilities for the purpose of conducting non-judicial foreclosure auctions.

Again, if you have concerns that you wish to express to Mr. Keller, please submit them in writing to him.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lynn Inafuku".

Lynn Inafuku  
Judiciary Staff Attorney

c: Thomas R. Keller



## Collection Law Section

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Reply to:

STEVEN GUTTMAN, CHAIR  
220 SOUTH KING STREET, SUITE 1900  
HONOLULU, HAWAII 96813  
TELEPHONE: (808) 536-1900  
FAX: (808) 529-7177 E-MAIL: sguttman@kdubm.com

July 26, 2010

TRANSMITTED VIA E-MAIL AND REGULAR MAIL

Lynn M. Inafuku, Esq.  
Staff Attorney  
Office of the Administrative Director  
State of Hawaii Judiciary  
417 South King Street, Suite 209  
Honolulu, Hawaii 96813

Dear Ms. Inafuku:

We understand that David Rosen has been in contact with the Office of the Administrative Director regarding the conduct of power of sale foreclosure auctions, also known as non-judicial foreclosure auctions, outside the courthouses in the various state circuits. Mr. Rosen is a director of the Collection Law Section of the Hawaii State Bar Association and he forwarded your letters of June 21 and 23, 2010 to the other Section directors since they address interests of the practitioner members of our section as well as the general public. We also recently received the press release that was sent announcing the banning of auctions at all the courthouses. I am sending this to you on behalf of the Collection Law Section's Board of Directors.

Your correspondence advised Mr. Rosen of the Office of the Administrative Director's recent position that "it is inappropriate for private, commercial activities to take place on Judiciary premises." You also advised that any request "to use court facilities for the purposes of conducting non-judicial foreclosure auctions" would not be approved. You stated that "there is no reason to conduct the activity [i.e., non-judicial foreclosure auctions] on court grounds . . ." and that "the court does not want to give the impression that it sanctions the activity[.]"

We do not understand why this position is being taken after decades of auctions, both for judicial and non-judicial foreclosures, being conducted at the courthouses with no disruptions or confusion occurring amongst the parties, bidders or the general public. As you may know, auctions were and, still are, traditionally conducted on the courthouse steps by the foreclosure commissioners appointed by the courts. These central gathering places came about through practice over many years as did the practice of holding auctions at noon. As such, the commissioners, practitioners and the public could be assured that the auctions for

Lynn M. Inafuku, Esq.  
Office of the Administrative Director  
July 26, 2010  
Page Two

property in a particular circuit would be held at a certain time and place during the day and that interested bidders could attend the auctions for all properties designated for auction on a particular day. This practice allowed bidders to participate in the bidding for several properties on the same day.

When the number of non-judicial foreclosures increased substantially due to the availability of title insurance for non-judicial foreclosures, these auctions naturally were held in the place and times to which the public had become accustomed, Noon on the courthouse steps.

If the practice of having the auctions held at a central location at the same time is curtailed by this policy change, we predict that confusion and conflicts will result. We do not believe that the bidders at auction are confused into believing that the auction is court sanctioned purely because a non-judicial foreclosure auction occurs outside the courthouse. Rather, in either judicial or non-judicial foreclosure auctions, potential bidders knew where and when they would need to be for the conduct of either type of auction.

If the non-judicial foreclosures are not allowed to be held at the courthouses and the judicial foreclosures are to continue to be held there, the bidders would need to choose which auction to attend. Since a non-judicial foreclosure is final and a judicial foreclosure is subject to the confirmation hearing where the sale may be reopened, one could see the potential for bidders choosing to attend a non-judicial foreclosure sale over the judicial sale because it would be possible to reopen the bidding at the confirmation hearing. This would be contrary to the concerns raised by some of the judges sitting on foreclosure matters that all interested bidders come in with their best offers at the time of auction and not wait until the confirmation hearing to bid.

Having as many potential bidders available is in the interest of the foreclosed owners as well as the public good in order to obtain the best possible price so that the owners' liability to junior lienors might be reduced or eliminated by proceeds in excess of the amounts owed to foreclosing lienor. In some instances, the owners can receive the excess proceeds from the sale if all of the lienors are paid. This cannot happen without a number of interested bidders for a particular auction so the high bid is the best possible price.

In addition to these public policy reasons for having all auctions conducted at the same place and time on a given day, the reason given in your letter for prohibiting

Lynn M. Inafuku, Esq.  
Office of the Administrative Director  
July 26, 2010  
Page Three

the auctions as commercial activity is contrary to the current state of activities taken at the judiciary sites in the State. For example, commercial tours are conducted in front of and through the Hawaii Supreme Court Building. Tour buses regularly drop off tourists to take photographs at the Kamehameha Statue fronting the Supreme Court building. Weddings are conducted in the various courthouses and photographers take wedding photographs at the Supreme Court building. Private service providers deliver/pick up documents to/from the courthouses or utilize court resources and records for commercial sale. We do not advocate restricting these activities but the conduct of auctions at the courthouses is no more commercial than these types of activities. The Courts are not islands onto themselves but are living, working parts of the larger society. As such, it is appropriate that they reflect as much without compromising their positions as a distinct and respected branch of government.

Since non-judicial foreclosures are carried out under the express provisions of HRS § 667-5 et seq., there are circumstances where issues involving the conduct of a non-judicial foreclosure auction are decided by the courts. For example, the validity of the power of sale foreclosure process was recently affirmed by the Hawaii Supreme Court in Lee v. HSBC Bank USA, 121 Haw. 287, 289, 218 P.2d 775, 777 (S. Ct. 2009). Therein, the Hawaii Supreme Court recognized: (i) the "legislature's intent to promote the finality of properly conducted [non-judicial] sales." Id., 121 Haw. at 292, 210 P.2d at 780; (ii) the public policy in favor of allowing power of sale foreclosures. Id., f.n. 4 ("the "legislature sought to 'provide[ ] an alternate nonjudicial foreclosure process which *reduces the time and cost of the current foreclosure process . . .* '"); and (iii) the importance of encouraging competitive bidding at said auctions. Id., 121 Haw. at 295, 210 P.2d at 783 ("Plaintiffs are correct that encouraging competitive bidding promotes the protection of mortgagors, one of the purposes of HRS section 667-5.").

Therefore, the factors and policies discussed in Lee are consistent with and supported by the conducting of foreclosure auctions, judicial and non-judicial, in a recognized public location. Until your letter, said auctions had been conducted in front of the various circuit courthouses on each island (Kona and Hilo being somewhat of the exceptions).

After Mr. Rosen made the Section and practitioners in this area aware of this issue, some discussion has occurred as to where public auctions might be held instead. No other locations at which the auctions might be held have been

Lynn M. Inafuku, Esq.  
Office of the Administrative Director  
July 26, 2010.  
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identified except the practice of holding the auctions at the flagpole at Hale Halawai, Alii Drive, in Kailua-Kona. Other government locations discussed would have similar issues to that of the courts and would have less connection to the foreclosure function than would the courts.

Furthermore, foreclosures of all types are carried out pursuant to statute – not merely as a result of private contracts as you suggest – and are enforceable judicially if carried out properly. Therefore, both types of foreclosures are subject to court approval if an issue is raised about the conduct of the auction. If the Court is concerned that the public would be confused about whether non-judicial foreclosures are court sanctioned if conducted on the courthouse steps, the concern could be addressed simply via a disclaimer prior to an auction, probably in the published auction notice, as a condition of use of the courthouse location for the auction.

Lastly, the Lee decision encourages use of the non-judicial foreclosure process as quicker and more economical than judicial foreclosure. The judicial foreclosure calendars are more manageable because the non-judicial foreclosure process has come into regular use and the judiciary can focus on those cases requiring court action.

We request that the Office of the Administrative Director reconsider its decision regarding the conduct of non-judicial foreclosures on the courthouse steps at the various circuit courts throughout the State for the reasons stated above. I have copied the Administrative/Chief Judges for the various circuits as well as the Chief Justice as I understand that the issue was broached with the administrative judges and that their further input may be necessary as part of any review process.

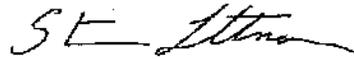
If the reconsideration of the decision to ban non-judicial foreclosures is denied, we request clarification on the specific date from which the court will enforce the ban. According to the press release, it appears the Office of the Administrative Director believes that only a few auctions will be affected. Auctions are scheduled every day of the week by the various foreclosure practitioners. One practitioner alone has over 2,600 auctions currently noticed on its website scheduled for the State of Hawaii. As you may know, auctions are scheduled on a minimum of five weeks notice (with many notices being published for auctions on substantially more than the minimum notice) and many pending auctions have been postponed after the published auction date by public announcement that might have pushed the auction off for months. Therefore, the practitioners are

Lynn M. Inafuku, Esq.  
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looking at how we are going to be both at the courthouse to notify the public of the change of venue and also be at the new auction site to conduct auctions. It is not easy to change the venue without sufficient notice due to the volume of non-judicial foreclosures that are being conducted. If there is a specific date set for a minimum of three months from now, the practitioners can plan accordingly and set auctions for a new venue starting on a specific date.

Thank you for your consideration of these remarks and anticipated response.

Sincerely,



STEVEN GUTTMAN  
President  
Collection Law Section

cc: The Honorable Ronald T.Y. Moon  
The Honorable Bert I. Ayabe  
The Honorable Shackley Raffetto  
The Honorable Ronald Ibarra  
The Honorable Randal Valenciano



Office of the Administrative Director – Staff Attorney • THE JUDICIARY • STATE OF HAWAII  
417 SOUTH KING STREET, HONOLULU, HAWAII 96813-2902 • TEL. (808)539-4990 • FAX (808)539-4794

Thomas R. Keller  
ADMINISTRATIVE DIRECTOR

August 2, 2010

Susan Pang Gochros  
INTERGOVERNMENTAL & COMMUNITY RELATIONS  
DIRECTOR

Walter M. Ozawa  
DEPUTY ADMINISTRATIVE DIRECTOR

Lynn Minagawa Inafuku  
STAFF ATTORNEY

Via Email and U.S. Mail

Steven Guttman, Chair  
HSBA Collection Law Section  
220 S. King St., Suite 1900  
Honolulu, Hawai'i 96813

Re: Non-Judicial Foreclosure Auctions

Dear Mr. Guttman:

Thank you for your letter dated July 26, 2010 on the above-referenced subject. Pursuant to that letter, the Collection Law Section asks the Office of the Administrative Director of the Courts to reconsider its decision to prohibit non-judicial foreclosure auctions from taking place on court property.

We recognize that with the exception of the Third Circuit, both judicial and non-judicial foreclosure auctions have been conducted at the courthouses for a long time. However, this does not preclude the Judiciary from reviewing existing processes or implementing new policies.

In the past year, the Administrative Director heard concerns from court staff about the practice of holding non-judicial foreclosure auctions on court property. One of the concerns was that by allowing such auctions to take place on court property, some homeowners may believe that the court sanctions the auction, when in fact, it does not. In the recent article about non-judicial foreclosure auctions in *The Honolulu Star Advertiser*, Rob Perez wrote that consumer advocates claim that the rights of homeowners are not adequately safeguarded during non-judicial foreclosures. Because there may be subsequent legal challenges to the sale of property through non-judicial foreclosure auctions, it is important for the courts to maintain their reputation as impartial and neutral adjudicators. Accordingly, the Administrative Director's decision to prohibit non-judicial foreclosure auctions at the courthouse stands.

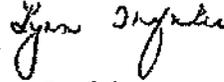
In light of the number of auctions that already have been scheduled, however, we recognize that it may take some time for practitioners to find alternate auction sites and to

Steven Guttman, Chair  
August 2, 2010  
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amend notices of auctions. Please be advised, then, that the courts in the First, Second, and Fifth Circuits will not begin to enforce the policy until **November 1, 2010**. As of that date, there should be no non-judicial foreclosure auctions taking place on court property. This letter does not change the current practices in the Third Circuit, where non-judicial foreclosure auctions already are not conducted at the courthouses.

Thank you for bringing the Section's concerns to our attention.

Sincerely,



Lynn Inafuku  
Judiciary Staff Attorney

c: Thomas R. Keller  
Honorable Derrick H.M. Chan  
Honorable Shackley F. Raffetto  
Honorable Ronald Ibarra  
Honorable Randal G.B. Valenciano  
Chief Court Administrators

William P. Kenoi  
Mayor



Lincoln S.T. Ashida  
Corporation Counsel

Katherine A. Garson  
Assistant Corporation  
Counsel

**COUNTY OF HAWAII**  
**OFFICE OF THE CORPORATION COUNSEL**

101 Aupuni Street, Suite 325 • Hilo, Hawaii 96720-4262 • (808) 961-8251 • Fax (808) 961-8622  
E-mail: [corp-counsel@co.hawaii.hi.us](mailto:corp-counsel@co.hawaii.hi.us)

September 30, 2010

Dear Fellow Attorney,

The County of Hawai'i has received in recent weeks numerous complaints from the public concerning judicial and non-judicial foreclosure auctions occurring on County sidewalks, specifically that portion between the County and State Buildings in Hilo.

Section 22-2.5 of the Hawai'i County Code 1983 (2005 Edition) (hereinafter "Code") provides as follows:

**Section 22-2.5. Commercial use of County streets.**

Except as otherwise permitted by law, no person shall use any portion of a County street for the purpose of displaying, vending, hawking, selling, renting or leasing any goods, wares, food, merchandise or other kinds of property.

(2002, Ord. No. 02-67, sec. 2.)

Section 22-1.2(16) of the Code defines "street" as follows:

(16) "Street" means the entire width between property lines of any County owned and maintained street, avenue, road, alley, highway, lane, path or other place opened, improved and established for the use of vehicles, pedestrians or both.

Unfortunately, there is no application process in our local ordinances that would allow for the granting of a permit to conduct this activity on our County sidewalks. For this reason, we are kindly asking attorneys who conduct these auctions not to use County sidewalks for this purpose.

Thank you very much for your anticipated cooperation, and if you have any questions, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lincoln S.T. Ashida".

Sep 30 2010 1:33 PM

LINCOLN S. T. ASHIDA  
Corporation Counsel

KESSNER UMEBAYASHI  
BAIN & MATSUNAGA

220 SOUTH KING STREET  
SUITE 1900  
HONOLULU, HAWAII 96813

ATTORNEYS AT LAW  
A LAW CORPORATION

TELEPHONE: (808) 536-1900  
TELECOPIER: (808) 529-7177  
E-MAIL: sguttman@kdbm.com

October 11, 2010

TO: Stephen H. Levins, Esq.  
Chairman, Mortgage Foreclosure Task Force

FROM: Steven Guttman, Esq. *SG*

RE: Investigatory Group 3 Meeting

---

On October 5, 2010, the investigatory group consisting of Ryker Wada, Lorrin Hirano, Jane Sugimura, George Zweibel, Linda Nakamura and Stefanie Sakamoto met. Ms. Sakamoto invited attorney Frank Hogan to the meeting and he participated in the discussion. The purpose of this memo is to provide you with a summary of the investigatory group's discussion and recommendations. The investigatory group's discussion focused on whether there were points of consensus as to the issues presented to the Task Force.

The investigatory group noted the eight categories outlined in the enabling legislation and enumerated on the September 22 Agenda of the Task Force. The first item discussed by the investigatory group was Agenda item number X 3: "the establishment of statutory bidding thresholds". Your investigatory group recommends that the Task Force's report state that no statutory thresholds be enacted.

Agenda item X 5 listed "further regulation of distressed property consultants". The investigatory group believes that the Task Force's report should state that the government oversight under existing statutes has not been adequately funded and that the lack of staffing to address the problem needs to be addressed.

The investigatory group also discussed the present statutory structure regarding regulation of mortgage service agents. As you know, the present statute only requires them to register but does not require them to have a Hawaii agent for purposes of accepting service or to address any consumer or regulatory complaint. Your investigatory group recommends that the Task Force's report include a recommendation that the existing statutory framework be revised to mandate that mortgage service providers have a Hawaii agent. This recommendation by the investigatory group closes an obvious defect in the existing statute which could easily be fixed by the legislature in 2011. Your investigatory group is prepared to further review the existing statutory

KESSNER UMEBAYASHI  
BAIN & MATSUNAGA

Stephen H. Levins, Esq.  
Chairman, Mortgage Foreclosure Task Force  
October 11, 2010  
Page 2

RE: Investigatory Group 3 Meeting

framework to determine if it can reach a consensus on whether additional amendments or changes should be made and if so, the substance of these revisions.

The investigatory group discussed possible discrete changes to Part I of Chapter 667, Hawaii Revised Statutes, for consideration during the 2011 Legislative session. A more comprehensive review should be undertaken by the Task Force over the next several months (see e.g., next to last paragraph below), but for the present the following recommendations apply primarily to Part I of Chapter 667.

The investigatory group discussed the fact that there is no statutory guidance as to how a borrower can convert a non-judicial sale to a judicial sale. If a borrower believes that a foreclosure should be reviewed by the judiciary, the present system makes it quite difficult and expensive to accomplish. The law should be clear that the right to convert to a judicial foreclosure exists but it is the affirmative duty of the borrower to file the appropriate pleading with the Circuit Court to convert the non-judicial foreclosure to a judicial foreclosure. As to the pleading filing deadline date for the conversion, the investigatory group did not reach an agreement. The statute allowing for the conversion to a judicial proceeding needs to expressly state that the borrower who files the conversion notice is submitting himself/herself to the jurisdiction of the Circuit Court by filing the pleading. The filing of the notice pleading will automatically place a hold on the non-judicial auction but the borrower has an affirmative duty to promptly notify the Hawaii attorney who is handling the auction of the conversion notice. Hawaii law already requires the involvement of a Hawaii attorney in all non-judicial auctions and the attorney's name is listed on the non-judicial auction notice. As to the form of the notice pleading, the investigatory group did not reach a consensus, but agreed that it should not place an onerous burden on the borrower/defendant.

In a judicial foreclosure, the filing of a court pleading entitled "Notice of Pendency of Action" allows a foreclosure to proceed to conclusion even if a subsequent party obtains or alleges to have obtained an interest in the real property without this party having to be served with any court pleading. There is no equivalent procedure in a non-judicial setting and the non-judicial foreclosure statutory framework needs to be amended to allow for a similar notice to be filed with the Bureau of Conveyances and, if applicable, Land Court. The Land Court Chapter of Hawaii Revised Statutes will have to be specifically amended to require that Land Court accept such notice of a non-judicial sale for filing.

KESSNER UMEBAYASHI  
BAIN & MATSUNAGA

Stephen H. Levins, Esq.  
Chairman, Mortgage Foreclosure Task Force  
October 11, 2010  
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RE: Investigatory Group 3 Meeting

The non-judicial statutes need to be amended to provide that there be actual notice to the parties on title of the lender or other foreclosing party having issued a notice of intention to foreclose and intending for a non-judicial auction to occur with the notice process being defined in the manner current state law handles the issue for serving a civil complaint, including the process outlined in rules of civil procedure and existing case law. There was not a consensus as to whether the actual notice requirement should be expanded from parties listed on a title report to all borrowers such as a loan guarantor who has no ownership interest in the real property being foreclosed.

The issue of expressly forbidding a deficiency judgment in a non-judicial auction as to an owner-occupant of residential property was discussed and most of the members of the investigatory group were inclined to endorse such a provision as long as it was clear it only applied to homeowners and not investor or commercial property. The investigatory group may have a consensus on this issue by the time of the next task force meeting.

The investigatory group discussed foreclosure mediation but did not reach a consensus. The investigatory group also discussed limiting part I of the non-judicial statute to time share properties, associations and for commercial property but did not reach a consensus.

The investigatory group discussed eliminating the borrower signature requirement in part II of the non-judicial statute, everyone recognizing that this has been a major impediment to using part II, but some members were not willing to endorse the elimination without other changes being made to part II. As to other changes, the investigatory group members were provided with the legislation that was passed in 1999 to amend part II but vetoed by the governor. Your investigatory group is prepared to further meet and include in its discussion the prior legislation along with other amendments. The investigatory group acknowledges part II can only become operational with it being amended but more time is needed for discussion on what are appropriate amendments with some committee members believing that any non-judicial framework will have inherent flaws.

Thank you for considering these comments by Investigatory Group 3.

Motions pertaining to paragraph (b) of Act 162 regarding developing both general and specific policies and procedures necessary to improve the manner in which mortgage foreclosures are conducted in Hawaii.

1. I move that the task force state that at this time it does not have any recommendations to amend HRS Chapter 454M, regarding mortgage servicers.

2. I move that the task force recommend that the Hawaii foreclosure statute (HRS Chapter 667) be amended for non-judicial foreclosures to allow an owner-occupant of a residential property that is being foreclosed non-judicially to convert the action to a judicial foreclosure under the following circumstances:

(a) "Owner-occupant" is a person who, at the time that a notice is given of the intent to foreclose non-judicially:

- i. is living at the residential property at the time the notice is given,
- ii. has been living at the residential property for a continuous period of one year immediately before the notice is given, and
- iii. does not have an interest in any other residential property.

(b) An appropriate pleading must be filed with the Circuit Court where the residential property is located stating that the owner-occupant of the property wants to convert the non-judicial foreclosure to a judicial foreclosure proceeding.

(c) All title holders of the residential property and all borrowers and obligors on the mortgage note must sign the conversion pleading and must state that they agree to submit themselves to the jurisdiction of the Circuit Court by the filing of the pleading.

(d) The conversion pleading must be filed with the Circuit Court no later than 20 days after the notice of the non-judicial foreclosure action is posted on the property.

(e) The filing of the notice pleading will automatically place a hold on the non-judicial foreclosure action.

(f) The owner-occupant has an affirmative duty to promptly notify the Hawaii attorney who is handling the non-judicial foreclosure about the filing of the conversion.

3. I move that the task force recommend that the appropriate provisions of the Hawaii Revised Statutes be amended, including, but not limited to, Chapter 667 (mortgage foreclosures), Chapter 501 (land court registration), and Chapter 502 (bureau of conveyances), to:

(a) Require that a notice of intent to foreclose non-judicially be accepted for recording at the land court and the bureau of conveyances, as appropriate, and

(b) Require the recorded notice to have the same effect as a notice of pendency of action or "lis pendens" in a judicial foreclosure under HRS Sec. 634-51 so that a

person who obtains or alleges to have obtained an interest in the property after the recording of the notice shall be deemed to have notice of the non-judicial foreclosure action and shall be subject to the non-judicial foreclosure action.

4. I move that the task force recommend that the Hawaii foreclosure statute (HRS Chapter 667) be amended for non-judicial foreclosures to provide that the title holders of the property being foreclosed on be given notice in the same manner that a civil complaint is served under the Hawaii Rules of Civil Procedure.

5. I move that the task force recommend that the Hawaii foreclosure statute (HRS Chapter 667) be amended for non-judicial foreclosures to state that a person or entity that is initiating a non-judicial foreclosure against an owner-occupant of a residential property cannot pursue a deficiency judgment after the foreclosure sale of that property under the following circumstances:

(a) "Owner-occupant" is a person who, at the time that a notice is given of the intent to foreclose non-judicially:

- i. is living at the residential property at the time the notice is given,
- ii. has been living at the residential property for a continuous period of one year immediately before the notice is given, and
- iii. does not have an interest in any other residential property.

(b) Any other person or entity that has a lien against the residential property can pursue a deficiency judgment against the owner-occupant if that other person or entity didn't initiate the non-judicial foreclosure action.

6. I move that the task force recommend that the Hawaii foreclosure statute (HRS Chapter 667) be amended to be consistent with recent Hawaii bankruptcy cases (in re Parrish and in re Hoopai) as follows:

(a) For a judicial foreclosure, the mortgagor's interest in the mortgage property is completely extinguished when the court enters a written order confirming the sale, and

(b) For a non-judicial foreclosure, the mortgagor's interest in the mortgage property is completely extinguished when the affidavit of non-judicial foreclosure sale is recorded within 30 days after the auction is held.

Motions pertaining to paragraphs (b)(1)-(6) of Act 162, i.e. the task force shall consider 6 areas for possible improvements:

1. Regarding paragraph (b)(1) of Act 162 (i.e. the adequacy of notice given to mortgagors of available mortgage counseling programs and the optimal timing for such notification and counseling), I move that the task force state that at this time it does not have any recommendations in this area.

2. Regarding paragraph (b)(2) of Act 162 (i.e. the availability of loan documentation to mortgagors from mortgagees prior to and during the foreclosure process), I move that the task force state that at this time it does not have any recommendations in this area.

3. Regarding paragraph (b)(3) of Act 162 (i.e. the establishment of statutory bidding thresholds for properties sold via foreclosure), I move that the task force oppose this concept and state that no statutory thresholds should be enacted.

4. Regarding paragraph (b)(4) of Act 162 (i.e. the statutory timeline for power-of-sale foreclosures), I move that the task force state that at this time it does not have any recommendations in this area..

5. Regarding paragraph (b)(5) of Act 162 (i.e. further regulation of distressed property consultants), I move that the task force state that at this time it does not have any recommendations in this area.

6. Regarding paragraph (b)(6) of Act 162 (i.e. revisions to part II of chapter 667, Hawaii Revised Statutes, to make it a viable vehicle for power-of-sale foreclosures), I move that the task force undertake a comprehensive review of part II so that the task force can make recommendations to the 2012 legislature (rather than the 2011 legislature).

Motion pertaining to paragraph (d) of Act 162, i.e. the task force shall analyze the effectiveness and any defects of the foreclosure procedures currently set in statute for both judicial and power-of-sale foreclosures:

1. Regarding paragraph (d) of Act 162 (i.e. the task force shall analyze the effectiveness and any defects of the foreclosure procedures currently set in statute for both judicial and power-of-sale foreclosures), I move that the task force state that at this time it does not have any recommendations or comments in this area, other than its recommendations relating to paragraph (b) of Act 162, and further that the task force should analyze this area for any recommendations or comments to the 2012 legislature (rather than the 2011 legislature).

Motion pertaining to paragraph (e) of Act 162, i.e. the task force commenting on the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors.

disseminating information, and otherwise engaging in consumer education, and having the task force propose funding mechanisms to enable the operation of this entity:

1. Regarding paragraph (e) of Act 162 (i.e. the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education, and having the task force propose funding mechanisms to enable the operation of this entity), I move that the task force state that at this time it does not have any recommendations or comments in this area.

KESSNER UMEBAYASHI  
BAIN & MATSUNAGA

220 SOUTH KING STREET  
SUITE 1900  
HONOLULU, HAWAII 96813

ATTORNEYS AT LAW  
A LAW CORPORATION

TELEPHONE: (808) 536-1900  
FLEX OFFICE: (808) 529-7177  
E-MAIL: [sguttman@kubm.com](mailto:sguttman@kubm.com)

November 16, 2010

TO: Stephen H. Levins, Esq.  
Chairman, Mortgage Foreclosure Task Force

FROM: Steven Guttman, Esq. SG

RE: Investigative Group 3 Meeting

---

On November 3, 2010, a meeting of the members of the Investigative Group 3 was held, with one member, George Zweibel, participating via telephone. Also participating in the Group 3's discussion was attorney Frank Hogan, who was invited to the meeting by Stefanie Sakamoto. The Group focused its discussion on the Creditor Group handout provided to the Task Force members by Marvin Dang at the most recent Task Force meeting. The Creditor Group handout appeared to be a response to my memo dated October 11, 2010 as to the prior Investigative Group 3 meeting.

For convenience purposes only, this Memo will present the Investigative Group 3's viewpoints in the order that is set forth in the Creditor Group handout.

1. Chapter 454M: Mortgage Services. While certain members of the Investigative Group 3 were surprised by the reaction to its prior comments about inadequate funding and lack of staffing, there appears to be a consensus that at the present time, the Hawaii statutes on the subject do not need to be amended.
2. Chapter 667: Non-Judicial Foreclosures: The Investigative Group 3 concurs that the non-judicial foreclosure statute should be amended to contain a definition of "Owner-Occupant" and that an individual who meets the criteria should not be subject to a deficiency judgment from the party initiating the foreclosure process.

The Creditor Group set forth three criteria for an individual to be an "Owner-Occupant". The Investigative Group 3 concurs that the person must be "living at the residential property at the time the notice is given." The notice being referred to is the notice of a foreclosure occurring. The second criterion is the length of time the individual must have resided at the property prior to receiving the notice. The Creditor Group handout stated one year. After extensive discussion, Investigative Group 3 came to a consensus that the period should be 180 days. Any statutory revision needs to reference the time line in days so that there is no confusion or ambiguity as to the required time line. The third criterion set forth by the Creditor Group was that the individual "does not have an interest in any other residential property" even if the interest is a fractional percentage. Your Investigative Group 3 is at an impasse on this issue.

3. Conversion of a Non-Judicial Foreclosure to a Judicial Foreclosure: Investigative Group 3 reiterated its support for the conversion process which is also set forth in the Creditor Group 2(b) handout. Creditor Group 2( c) placed a qualifier on the right to conversion. After extensive discussion, Investigative Group 3 agreed to the following language: "All title holders of the residential property must state that they agree to submit themselves to the judicial process and the jurisdiction of the Circuit Court by the filing of an appropriate pleading within ninety days of the conversion pleading being filed." The Investigative Group 3 was okay with the Creditor Group handout provisions 2(d) and 2(e). As to 2(f), the word "convertor" should be substituted for "owner-occupant".
4. Creditor Group's 3(a) and 3(b) was adding specificity to the recommendations previously made by Investigative Group 3 and the additional detail was approved.
5. As to Creditor Group's 4, the only change recommended by the Investigative Group 3 was the addition of the words "and Hawaii Revised Statutes" to the end of the sentence.
6. Creditor Group's 5(a) regarding a monetary judgment is discussed above in reference to Creditor Group's 2. As to Creditor Group's 5(b), the word "deficiency" should be eliminated.
7. Creditor Group's 6 is a codification of rulings made by the Bankruptcy Court and the Investigative Group concurs with the recommendation, with the qualifier that the statute will need to address a timely appeal.
8. The recommendations of the Creditor Group on pages 3 and 4 of the handout was interpreted by the Investigative Group as stating that the Task Force does not have sufficient time this calendar year to address all the issues and additional time is needed by the Task Force. As such, the legislature should defer action until the following legislative session. The Task Force report needs to be clear that it is not making any statement on the merits.

Due to a court scheduling conflict, it appears I will not be present at the next meeting of the Task Force scheduled for Wednesday, November 17, 2010. Lorrin Hirano will present the information outlined above on behalf of Investigative Group 3.

11/17/10 (revised from 10/18/10)

**MOTIONS PERTAINING TO PARAGRAPH (B) OF ACT 162 REGARDING DEVELOPING BOTH GENERAL AND SPECIFIC POLICIES AND PROCEDURES NECESSARY TO IMPROVE THE MANNER IN WHICH MORTGAGE FORECLOSURES ARE CONDUCTED IN HAWAII:**

1. I move that the task force state that at this time it does not have any recommendations to amend HRS Chapter 454M, regarding mortgage servicers.

2. I move that the task force recommend that the Hawaii foreclosure statute (HRS Chapter 667) be amended for non-judicial foreclosures to allow an owner-occupant of a residential property that is being foreclosed non-judicially to convert the action to a judicial foreclosure under the following [circumstances] conditions:

(a) "Owner-occupant" is a person who, at the time that a notice is given of the intent to foreclose non-judicially:

- i. is living at the residential property [at the time the notice is given],
- ii. has been living at the residential property for a continuous period of [one year] 180 days immediately before the notice is given, and
- iii. does not have an interest in any other residential property.

(b) An appropriate pleading must be filed with the Circuit Court where the residential property is located stating that the owner-occupant of the property wants to convert the non-judicial foreclosure to a judicial foreclosure proceeding.

(c) [All title holders of the residential property and all borrowers and obligors on the mortgage note must sign the conversion pleading and must state that they agree to submit themselves to the jurisdiction of the Circuit Court by the filing of the pleading.] All title holders of the residential property must state that they agree to submit themselves to the judicial process and the jurisdiction of the Circuit Court by the filing of an appropriate pleading within 90 days of the conversion pleading being filed.

(d) The conversion pleading must be filed with the Circuit Court no later than 20 days after the notice of the non-judicial foreclosure action is posted on the property.

(e) The filing of the [notice] conversion pleading will automatically place a hold on the non-judicial foreclosure action.

(f) The [owner-occupant] converter has an affirmative duty to promptly notify the Hawaii attorney who is handling the non-judicial foreclosure about the filing of the conversion.

3. I move that the task force recommend that the appropriate provisions of the Hawaii Revised Statutes be amended, including, but not limited to, Chapter 667 (mortgage foreclosures), Chapter 501 (land court registration), and Chapter 502 (bureau of conveyances), to:

(a) Require that a notice of intent to foreclose non-judicially be accepted for

recording at the land court and the bureau of conveyances, as appropriate, and

(b) Require the recorded notice to have the same effect as a notice of pendency of action or "lis pendens" in a judicial foreclosure under HRS Sec. 634-51 so that a person who obtains or alleges to have obtained an interest in the property after the recording of the notice shall be deemed to have notice of the non-judicial foreclosure action and shall be subject to the non-judicial foreclosure action.

4. I move that the task force recommend that the Hawaii foreclosure statute (HRS Chapter 667) be amended for non-judicial foreclosures to provide that the title holders of the property being foreclosed on be given notice in the same manner that a civil complaint is served under the Hawaii Rules of Civil Procedure and the Hawaii Revised Statutes.

5. I move that the task force recommend that the Hawaii foreclosure statute (HRS Chapter 667) be amended for non-judicial foreclosures to state that a person or entity that is initiating a non-judicial foreclosure against an owner-occupant of a residential property cannot pursue a deficiency judgment after the foreclosure sale of that property under the following [circumstances] conditions:

(a) "Owner-occupant" is a person who, at the time that a notice is given of the intent to foreclose non-judicially:

i. is living at the residential property [at the time the notice is given],

ii. has been living at the residential property for a continuous period of [one year] 180 days immediately before the notice is given, and

iii. does not have an interest in any other residential property.

(b) Any other person or entity that has a lien against the residential property can pursue a [deficiency] judgment against the owner-occupant if that other person or entity didn't initiate the non-judicial foreclosure action.

6. I move that the task force recommend that the Hawaii foreclosure statute (HRS Chapter 667) be amended to be consistent with recent Hawaii bankruptcy cases (in re Parrish and in re Hoopai) as follows:

(a) For a judicial foreclosure, the mortgagor's interest in the mortgage property is completely extinguished when the court enters a written order confirming the sale, and

(b) For a non-judicial foreclosure, the mortgagor's interest in the mortgage property is completely extinguished when the affidavit of non-judicial foreclosure sale is recorded within 30 days after the auction is held.

**MOTIONS PERTAINING TO PARAGRAPHS (B)(1)-(6) OF ACT 162, I.E. THE TASK FORCE SHALL CONSIDER 6 AREAS FOR POSSIBLE IMPROVEMENTS:**

1. Regarding paragraph (b)(1) of Act 162 (i.e. the adequacy of notice given to mortgagors of available mortgage counseling programs and the optimal timing for such notification and counseling), I move that the task force state that [at this time it does not have any recommendations in this area.] because it does not have sufficient time to address this issue as part of its report to the 2011 legislature, it will address this issue as part of its report to the 2012 legislature.

2. Regarding paragraph (b)(2) of Act 162 (i.e. the availability of loan documentation to mortgagors from mortgagees prior to and during the foreclosure process), I move that the task force state that [at this time it does not have any recommendations in this area.] because it does not have sufficient time to address this issue as part of its report to the 2011 legislature, it will address this issue as part of its report to the 2012 legislature.

3. Regarding paragraph (b)(3) of Act 162 (i.e. the establishment of statutory bidding thresholds for properties sold via foreclosure), I move that the task force [oppose this concept and state that no statutory thresholds should be enacted.] state that because it does not have sufficient time to address this issue as part of its report to the 2011 legislature, it will address this issue as part of its report to the 2012 legislature.

4. Regarding paragraph (b)(4) of Act 162 (i.e. the statutory timeline for power-of-sale foreclosures), I move that the task force state that [at this time it does not have any recommendations in this area.] because it does not have sufficient time to address this issue as part of its report to the 2011 legislature, it will address this issue as part of its report to the 2012 legislature.

5. Regarding paragraph (b)(5) of Act 162 (i.e. further regulation of distressed property consultants), I move that the task force state that [at this time it does not have any recommendations in this area.] because it does not have sufficient time to address this issue as part of its report to the 2011 legislature, it will address this issue as part of its report to the 2012 legislature.

6. Regarding paragraph (b)(6) of Act 162 (i.e. revisions to part II of chapter 667, Hawaii Revised Statutes, to make it a viable vehicle for power-of-sale foreclosures), I move that the task force [undertake a comprehensive review of part II so that the task force can make recommendations to the 2012 legislature (rather than the 2011 legislature).] state that because it does not have sufficient time to address this issue as part of its report to the 2011 legislature, it will address this issue as part of its report to the 2012 legislature.

**MOTION PERTAINING TO PARAGRAPH (D) OF ACT 162, I.E. THE TASK FORCE SHALL ANALYZE THE EFFECTIVENESS AND ANY DEFECTS OF THE FORECLOSURE PROCEDURES CURRENTLY SET IN STATUTE FOR BOTH JUDICIAL AND POWER-OF-SALE FORECLOSURES:**

1. Regarding paragraph (d) of Act 162 (i.e. the task force shall analyze the effectiveness and

any defects of the foreclosure procedures currently set in statute for both judicial and power-of-sale foreclosures), I move that the task force state that at this time it does not have any other recommendations or comments in this area, other than its recommendations relating to paragraph (b) of Act 162, and further that the task force [should analyze this area for any recommendations or comments to the 2012 legislature (rather than the 2011 legislature).] state that it will address this area as part of its report to the 2012 legislature.

**MOTION PERTAINING TO PARAGRAPH (E) OF ACT 162, I.E. THE TASK FORCE COMMENTING ON THE FEASIBILITY OF ESTABLISHING A STATE ENTITY OR ADMINISTRATOR TO FOCUS ON ADDRESSING THE CONCERNS OF MORTGAGORS, DISSEMINATING INFORMATION, AND OTHERWISE ENGAGING IN CONSUMER EDUCATION, AND HAVING THE TASK FORCE PROPOSE FUNDING MECHANISMS TO ENABLE THE OPERATION OF THIS ENTITY:**

1. Regarding paragraph (e) of Act 162 (i.e. the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education, and having the task force propose funding mechanisms to enable the operation of this entity), I move that the task force state that [at this time it does not have any recommendations or comments in this area.] because it does not have sufficient time to address this issue as part of its report to the 2011 legislature. it will address this issue as part of its report to the 2012 legislature.

**MOTIONS PERTAINING TO SECTION 2(b) OF ACT 162 REGARDING DEVELOPING BOTH GENERAL AND SPECIFIC POLICIES AND PROCEDURES NECESSARY TO IMPROVE THE MANNER IN WHICH MORTGAGE FORECLOSURES ARE CONDUCTED IN HAWAII:**

\_\_\_\_\_, being a member of Investigative Group 3 of the Mortgage Foreclosure Task Force ("Task Force"), respectfully moves as follows:

Motion 1: that the Task Force recommend that HRS §667-5 be amended as follows:

**"§667-5 Foreclosure under power of sale; notice; affidavit after sale.** (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale (also referred to herein as a "non-judicial foreclosure") upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

- (1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property (hereinafter "notice of intent to foreclose" or "notice") as follows: (A) by serving written notice of the intent to foreclose on all persons entitled to notice under this Chapter in like manner as service of a civil complaint personally or by registered or certified mail under Chapter 634, HRS, and the Hawaii Rules of Civil Procedure, as they may be amended from time to time; and (B) by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and
  - (2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.
- (b) Copies of the notice required under subsection (a) shall be:
- (1) Filed with the state director of taxation; and

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(2) Posted on the premises not less than twenty-one days before the day of sale.

(c) Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information:

(1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request; and

(2) The sale price of the mortgaged property once auctioned.

(d) Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. Upon request made by any person who is entitled to notice pursuant to section 667-5.5 or 667-6, or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction, or if the auction is canceled, information that the auction was canceled. The mortgagee within thirty days after selling the property in pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

(e) The mortgagee or other person who completes the non-judicial foreclosure of a mortgage or other lien on real property improved and used for residential purposes pursuant to this chapter shall not be entitled to pursue or obtain a deficiency judgment against any Owner-occupant of the subject real property who, at the time the notice of intent to foreclose is served, does not have a fee simple ownership interest in any other residential real property. "Owner-occupant" as defined in this chapter means a person who, at the time that a notice is given served of the intent to foreclose under the power of sale:

(1) is living at the residential property; and

(2) has been living at the residential property for a continuous period of not less than one-hundred eighty (180) days immediately preceding the date on which the notice is sent served.

provided, however, that nothing herein shall prohibit any other mortgagee or person who holds a lien on the residential real

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property subject to the non-judicial foreclosure from pursuing a monetary judgment against an Owner-occupant.

(~~ef~~) The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.

(~~fg~~) This section is inapplicable if the mortgagee is foreclosing as to personal property only.

Motion 32: that the Task Force recommend that new §§667-5.8, 667-5.9 and 667-5.10 be added to Chapter 667, HRS, as follows:

“§667-5.8. An Owner-occupant of a residential property that is being foreclosed non-judicially under this Chapter may require the foreclosing lienor to convert the action to a judicial foreclosure under the following conditions:

(a) A pleading conforming to section 667-5.9 ~~below~~ must be filed with the Circuit Court in the circuit where the residential property is located stating that the Owner-occupant of the property elects to convert the non-judicial foreclosure to a judicial foreclosure proceeding.

(b) The conversion pleading described in section 667-5.8(a) ~~above~~ must be filed with the Circuit Court no later than 20 days after the notice of the non-judicial foreclosure action is served on the Owner-occupant as required by section 667-5(a)(1)(a).

(c) Within ninety (90) days of the filing of the conversion pleading, all owners of an interest in the residential property whose interests are pledged or otherwise encumbered by the lien which is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage which is being foreclosed, including without limitation co-obligors and guarantors, must file a statement in the Circuit Court action that they agree to submit themselves to the judicial process and the jurisdiction of the Circuit Court. If this condition is not satisfied, then the Circuit Court action shall be ~~automatically~~-dismissed with prejudice as to any ~~and all~~ Owner-occupant's right to convert the action to a judicial proceeding, and the lienor may proceed non-judicially.

(d) The filing of the conversion pleading will automatically stay the non-judicial foreclosure action unless and until the judicial proceeding has been dismissed.

(e) The person filing the conversion pleading has an affirmative duty to promptly notify the Hawaii attorney who is handling the non-judicial foreclosure about the filing of the conversion.

(f) All parties joined in the converted judicial proceeding may assert therein any claims and defenses which they could assert as though the action were originally commenced as a judicial foreclosure action.

“§667-5.9. The conversion pleading required by ~~this chapter~~ section 667-5.8 shall be on

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white paper, 8 inches wide by 11 ½ inches long, and shall contain at a minimum the following:

- (a) A caption setting forth the name of the court, the title of the action, and the file number. The title of the action shall include the names of the ~~filing party~~ and the foreclosing party as plaintiff and the filing party as the defendant.
- (b) The name, mailing address, and telephone number of the filing party.
- (c) The address or tax map key number of the property subject to the foreclosure action.
- (d) A statement identifying all other owners of an interest in the residential property whose interests are pledged or otherwise encumbered by the lien which is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the lien which is being foreclosed, including without limitation co-obligors and guarantors.
- (e) A certification under penalty of perjury that the filing party is an Owner-occupant of the subject property and seeks ~~in good faith~~ to convert the non-judicial foreclosure to a judicial proceeding.
- (f) A statement certifying that the filing party served a copy of the conversion pleading on the attorney identified in the notice of intent to foreclose either by personal delivery at, or by postage prepaid U. S. Mail to, the address of the attorney as set forth in the notice of intent to foreclose.
- (g) A copy of the notice of intent to foreclose which was served on the filing party and for which the filing party is seeking to convert to a judicial proceeding.

“§667-5.10. The notice of intent to foreclose non-judicially which is served and posted as required under sections 667-5(a)(1)(aA) and 667-5(b)(2) ~~above~~ shall include a statement printed in not less than 14-point font as follows, provided however that this statement is not required to be included in the notice of sale published pursuant to section 667-5.5(a)(1)(B), and provided further that nothing herein shall be construed to set a minimum font size for the published notice of sale:

‘If the property being foreclosed is improved and used for residential purposes, an Owner-occupant of the property (defined as a person who, at the time this notice is served, is living at the residential property ~~at the time this notice is given~~ and has been continuously living there for ~~at the residential property for a continuous period of~~ not less than one-hundred eighty (180) days ~~immediately preceding the date on which this notice was sent~~) has the right to convert a non-judicial foreclosure proceeding to a judicial foreclosure where claims and defenses may be considered by a court of law. To exercise this right, the Owner-occupant must complete and file the attached form a ~~conversion pleading conforming to Hawaii Revised Statutes Section 667-5.9~~ with the Circuit Court in the circuit where the property is located within twenty (20) days after service of this notice ~~of the non-judicial foreclosure~~.

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'In addition, all owners of an interest in the residential property whose interests have been pledged or otherwise encumbered by the lien which is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the lien which is being foreclosed, including without limitation co-obligors and guarantors must file a statement in the Circuit Court action that they agree to submit themselves to the judicial process and the jurisdiction of the Circuit Court within ninety (90) days of the filing of the ~~conversion pleading~~ attached form. Failure to satisfy this condition will result in dismissal of the Circuit Court action ~~and no Owner-occupant may then convert this non-judicial foreclosure to a judicial proceeding.~~

'An Owner-occupant must promptly notify the Hawaii attorney listed in this notice about the filing of the conversion ~~pleading~~ form.'

Motion 3: that the Task Force request an appropriate Judiciary Committee to consider creating a form for the conversion pleading that can be appended to the Hawaii Rules of Civil Procedure.

Motion 5A4: that the Task Force recommend that the following new section 667-5.6 be added to Chapter 667, HRS, as follows:

"§667-5.6. **Recordation of notice of intent to foreclose.** The foreclosing mortgagee or lienor may record a copy of the notice of intent to foreclose with the office of the assistant registrar of the Land Court or the bureau of conveyances in a manner similar to recordation of notices of pendency of action under section 501- 151 or section 634-51, or both, as applicable. The recorded notice shall have the same effect as a notice of pendency of action. From and after the recordation of the notice, any person who becomes a purchaser or encumbrancer of the mortgaged property shall be deemed to have constructive notice of the power of sale foreclosure and shall be bound by the foreclosure.

Motion 5B5. that the Task Force recommend that the following HRS section 501-151 of ~~the Hawaii Revised Statutes~~ be amended as follows:

**§501-151 Pending actions, judgments; recording of, notice.** No writ of entry, action for partition, or any action affecting the title to real property or the use and occupation thereof or the buildings thereon, and no judgment, nor any appeal or other proceeding to vacate or reverse any judgment, shall have any effect upon registered land as against persons other than the parties thereto, unless a full memorandum thereof, containing also a reference to the number of certificate of title of the land affected is filed or recorded and registered. Except as otherwise provided, every judgment shall contain or have endorsed on it the State of Hawaii general excise

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taxpayer identification number, the federal employer identification number, or the last four digits only of the social security number for persons, corporations, partnerships, or other entities against whom the judgment is rendered. If the judgment debtor has no social security number, State of Hawaii general excise taxpayer identification number, or federal employer identification number, or if that information is not in the possession of the party seeking registration of the judgment, the judgment shall be accompanied by a certificate that provides that the information does not exist or is not in the possession of the party seeking registration of the judgment. Failure to disclose or disclosure of an incorrect social security number, State of Hawaii general excise taxpayer identification number, or federal employer identification number shall not in any way adversely affect or impair the lien created upon recording of the judgment. This section does not apply to attachments, levies of execution, or to proceedings for the probate of wills, or for administration in a probate court; provided that in case notice of the pendency of the action has been duly registered it is sufficient to register the judgment in the action within sixty days after the rendition thereof.

As used in this chapter "judgment" includes an order or decree having the effect of a judgment.

Notice of the pendency of an action in a United States District Court, as well as a court of the State of Hawaii, may be recorded.

A notice of intent to foreclose as provided in section 667-5.6 may be recorded.

The party seeking registration of a judgment shall redact the first five digits of any social security number by blocking the numbers out on the copy of the judgment to be filed or recorded.

Motion 6: that the Task Force recommend that the ~~Hawaii foreclosure statute~~ (HRS Section 667-8) be amended to define the "completion" of a non-judicial foreclosure of unregistered land to be consistent with recent Hawaii bankruptcy cases (in re Parrish and in re Hoopai) as follows:

**§667-8 Affidavit as evidence, when.** If it appears by the affidavit that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed. ~~For land whose title is not registered in the land court under Chapter 501, the mortgagor's interest in such land will be deemed extinguished upon the recordation of the affidavit in the bureau of conveyances within thirty days of the date of the sale of the property at public auction.~~ The interests of the mortgagor, and all those claiming under, by or through the mortgagor, in the property being foreclosed by exercise of a power of sale under the statute, including land whose title is not registered in the land court under Chapter 501, will be deemed extinguished upon the recordation of the affidavit in the bureau of conveyances or in the office of the assistant registrar, as the case may be, within thirty days of the date of sale of the property at public auction.

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**Motion 7:** that the Task Force report that it has considered the establishment of statutory bidding thresholds for properties sold via foreclosure, as described in Section 2(b)(3) of Act 162, and that it opposes the setting of such thresholds, and that it therefore recommends against any statutory amendments in this regard.

**Motion 8:** that the Task Force include in its report to the Hawaii State Legislature for the legislative session beginning January 2011, that it is in the process of reviewing and considering in more depth the following sections of Act 162 (2010 Session Laws), but that the Task Force did not have sufficient time to consider and make specific recommendations as to, and is therefore making no statements on the merits of, these matters; further, that the Task Force report to the Legislature that it will address these issues as part of its report to the 2012 Legislature and request that the Legislature to defer action on these and related matters until the 2012 Legislative Session:

(1) Section 2(b)(1) of Act 162 (i.e. the adequacy of notice given to mortgagors of available mortgage counseling programs and the optimal timing for such notification and counseling).

(2) Section 2(b)(2) of Act 162 (i.e. the availability of loan documentation to mortgagors from mortgagees prior to and during the foreclosure process).

(3) Section 2(b)(4) of Act 162 (i.e. the statutory timeline for power-of-sale foreclosures).

(4) Section 2(b)(5) of Act 162 (i.e. further regulation of distressed property consultants).

(5) Section 2(b)(6) of Act 162 (i.e. revisions to part II of chapter 667, Hawaii Revised Statutes, to make it a viable vehicle for power-of-sale foreclosures).

(6) Section 2(d) of Act 162 (the effectiveness and any defects of the foreclosure procedures currently set forth in the statutes for both judicial and power-of-sale foreclosures).

(7) Section 2(e) of Act 162 (i.e., the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education, and having the Task Force propose funding mechanisms to enable the operation of this entity).

(8) Amendments to HRS Chapter 454M regarding mortgage servicers.

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**LENDERS GROUP'S AMENDMENTS OF GROUP #3'S PROPOSED MOTIONS PERTAINING TO SECTION 2(b) OF ACT 162 REGARDING DEVELOPING BOTH GENERAL AND SPECIFIC POLICIES AND PROCEDURES NECESSARY TO IMPROVE THE MANNER IN WHICH MORTGAGE FORECLOSURES ARE CONDUCTED IN HAWAII (with comments):**

\_\_\_\_\_, being a member of the Lenders Group of the Mortgage Foreclosure Task Force ("Task Force"), respectfully moves to amend Group #3's Motion 1 as follows:

Amended Motion 1: that the Task Force recommend that HRS §667-5 be amended as follows:

**"§667-5 Foreclosure under power of sale; notice; affidavit after sale. (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale (also referred to herein as a "non-judicial foreclosure") upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:**

- (1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property (hereinafter "notice of intent to foreclose" or "notice") as follows: (A) by serving written notice of the intent to foreclose on all persons entitled to notice under this Chapter in like manner as service of a civil complaint personally or by registered or certified mail under Chapter 634, HRS, and the Hawaii Rules of Civil Procedure, as they may be amended from time to time; and (B) by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and
- (2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

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(b) Copies of the notice required under subsection (a) shall be:

- (1) Filed with the state director of taxation; and
- (2) Posted on the premises not less than twenty-one days before the day of sale.

(c) Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information:

- (1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request; and
- (2) The sale price of the mortgaged property once auctioned.

(d) Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. Upon request made by any person who is entitled to notice pursuant to section 667-5.5 or 667-6, or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction, or if the auction is canceled, information that the auction was canceled. The mortgagee within thirty days after selling the property in pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

(e) The mortgagee or other person who completes the non-judicial foreclosure of a mortgage or other lien on real property improved and used for residential purposes pursuant to this chapter shall not be entitled to pursue or obtain a deficiency judgment against any Owner-occupant of the subject real property who, at the time the notice of intent to foreclose is served, does not have a fee simple ownership interest in any other residential real property. "Owner-occupant" as defined in this chapter means a person who, at the time that a notice is given of the intent to foreclose under the power of sale:

- (1) is living at the residential property; and
- (2) has been living at the residential property for a continuous period of not less than one-hundred eighty (180) days immediately preceding the date on which the notice is sent.

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provided, however, that nothing herein shall prohibit any other mortgagee or person who holds a lien on the residential real property subject to the non-judicial foreclosure from enforcing that person's lien by judicial or nonjudicial foreclosure or from pursuing a monetary judgment against an Owner-occupant.

(f) The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.

(~~g~~) This section is inapplicable if the mortgagee is foreclosing as to personal property only.

COMMENT: The Lender's Group believes that the change to the proposed amendment is necessary to recognize that the amendment does not have any effect on the rights of other persons with respect to the subject property or the Owner-occupant.

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\_\_\_\_\_, being a member of the Lenders Group of the Mortgage Foreclosure Task Force ("Task Force"), respectfully moves to amend Group #3's Motion 2 as follows:

Amended Motion 2: that the Task Force recommend that new §§667-5.8, -5.9 and -5.10 be added to Chapter 667, HRS, as follows:

"§667-5.8. An Owner-occupant of a residential property that is being foreclosed non-judicially under this Chapter may require the foreclosing lienor to convert the action to a judicial foreclosure under the following conditions:

(a) A complaint conforming to section 667-5.9 below must be filed with the Circuit Court in the circuit where the residential property is located stating that the Owner-occupant of the property elects to convert the non-judicial foreclosure to a judicial foreclosure proceeding.

(b) The complaint described in section 667-5.8(a) above must be filed with the Circuit Court no later than ten (10) days prior to the first date of the nonjudicial sale set forth in the notice required to be served on the Owner-occupant by section 667-5(a)(1)(a). This deadline shall be strictly enforced.

(c) Within ninety (90) days of the filing of the complaint described in section 667-5.8(a) above, all owners of an interest in the residential property whose interests are pledged or otherwise encumbered by the lien which is being foreclosed, and all co-obligees of the obligation secured by the lien, including but not limited to cosigners, guarantors and accommodation mortgagees, must file a statement in the Circuit Court action that they agree to submit themselves to the judicial process and the jurisdiction of the Circuit Court. This deadline shall be strictly enforced. If this condition is not satisfied, then the Circuit Court action shall be automatically dismissed with prejudice as to the right of any and all Owner-occupant's to convert the action to a judicial proceeding, and the lienor may proceed non-judicially.

(d) The filing of the complaint described in section 667-5.8(a) above will automatically stay the non-judicial foreclosure action unless and until the judicial proceeding has been dismissed.

(e) The person filing the complaint described in section 667-5.8(a) above has an affirmative duty to send, on the date that the person files the complaint, by first class mail, postage prepaid, a copy of the complaint to the Hawaii attorney identified in the notice required to be served on the Owner-occupant by section 667-5(a)(1)(a).

(f) All parties joined in the judicial proceeding commenced under section 667-5.8(a)

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above may assert therein any claims and defenses which they could assert as permitted by the rules of court.

“§667-5.9. The conversion pleading required by this chapter shall be on white paper, 8 inches wide by 11 ½ inches long, and shall contain at a minimum the following:

- (a) A caption setting forth the name of the court, the title of the action, and the file number. The title of the action shall include the names of the filing party and the foreclosing party.
- (b) The name, mailing address, and telephone number of the filing party.
- (c) The address or tax map key number of the property subject to the foreclosure action.
- (d) A certification under penalty of perjury that the filing party is an Owner-occupant of the subject property and seeks in good faith to convert the non-judicial foreclosure to a judicial proceeding.
- (e) A statement certifying that the filing party served a copy of the conversion pleading on the attorney identified in the notice of intent to foreclose either by personal delivery at, or by postage prepaid U. S. Mail to, the address of the attorney as set forth in the notice of intent to foreclose.
- (f) A statement identifying all those persons who are known to the person filing of the complaint described in section 667-5.8(a) above to have a present interest in the property that is subject to foreclosure, and all those persons who are known to the person filing the complaint described in section 667-5.8(a) above to be co-obligors, guarantors, accommodation mortgagors or otherwise subject to the foreclosure of the subject lien or mortgage.
- (g) A copy of the notice of intent to foreclose which was served on the filing party and for which the filing party is seeking to convert to a judicial proceeding.

“§667-5.10. The notice of intent to foreclose non-judicially which is served as required under section 667-5(a)(1)(a) above shall include a statement printed in not less than 14-point font as follows:

‘If the property being foreclosed is improved and used for residential purposes, an Owner-occupant of the property (defined as a person who is living at the residential property at the time this notice is given and has been living at the residential property for a continuous period of not less than one-hundred eighty (180) days immediately preceding the date on which this notice was sent) has the right to convert a non-judicial foreclosure proceeding to a judicial foreclosure where claims and defenses may be considered by a court of law. To exercise this right, the Owner-occupant must file a conversion pleading conforming to Hawaii Revised Statutes Section 667-5.9 with the Circuit Court in the circuit where the property is located not less than ten (10) days prior to the date of the nonjudicial foreclosure sale set forth in

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this notice of intent to foreclose. In addition, all owners of an interest in the residential property whose interests have been pledged or otherwise encumbered by the lien which is being foreclosed, and all those persons who are known to the person filing the complaint described in section 667-5.8(a) above to be co-obligors, guarantors, accommodation mortgagors or otherwise subject to the foreclosure of the subject lien or mortgage, must file a statement in the Circuit Court action that they agree to submit themselves to the judicial process and the jurisdiction of the Circuit Court within ninety (90) days of the filing of the conversion pleading. Failure to satisfy this condition will result in dismissal of the Circuit Court action and the Owner-occupant may then convert this non-judicial foreclosure to a judicial proceeding. An Owner-occupant must promptly notify the Hawaii attorney listed in this notice about the filing of the conversion pleading. The deadlines in this notice shall be strictly enforced. '

COMMENT:

(1) The Lender's Group believes that the "conversion pleading" should be called what it is, a complaint in a civil case, and that would eliminate the need to specify page size and color.

(2) If you have 20 days from service, there is no bright line as to the conversion pleading deadline. If you have husband and wife, and you serve at different times, then you have two separate pleading deadlines and perhaps, the deadline may be after the auction, depending on date of service (or does the statute say you can't auction until so many days have elapsed after service).

(3) Use of the date set for the sale is unambiguous and less likely to lead to collateral disputes. The Lender's Group believes that it is the intent of Group #3 that there be no extensions of the deadline and the new sections should say so.

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Motion 6: that the Task Force recommend that the ~~Hawaii foreclosure statute~~ (HRS Section 667-8) be amended to define the "completion" of a non-judicial foreclosure of unregistered land to be consistent with recent Hawaii bankruptcy cases (in re Parrish and in re Hoopai) as follows:

**§667-8 Affidavit as evidence, when.** If it appears by the affidavit that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed. ~~For land whose title is not registered in the land court under Chapter 501, the mortgagor's interest in such land will be deemed extinguished upon the recordation of the affidavit in the bureau of conveyances within thirty days of the date of the sale of the property at public auction.~~ The interests of the mortgagor, and all those claiming under, by or through the mortgagor, in the property being foreclosed by exercise of a power of sale under the statute, including land whose title is not registered in the land court under Chapter 501, will be deemed extinguished upon the recordation of the affidavit in the bureau of conveyances or in the office of the assistant registrar, as the case may be, within thirty days of the date of sale of the property at public auction.

*COMMENT: The Lender's Group believes the reference to In re Parish in the motion should be deleted as it refers to a judicial foreclosure, which this section no longer addresses.*

**MOTIONS PERTAINING TO SECTION 2(b) OF ACT 162 REGARDING DEVELOPING BOTH GENERAL AND SPECIFIC POLICIES AND PROCEDURES NECESSARY TO IMPROVE THE MANNER IN WHICH MORTGAGE FORECLOSURES ARE CONDUCTED IN HAWAII:**

\_\_\_\_\_, being a member of Investigative Group 3 of the Mortgage Foreclosure Task Force ("Task Force"), respectfully moves as follows:

Motion 1: whereas current HRS section 667-5 does not contain a specific method for service of a notice of intention to foreclosure under power of sale; and whereas the Task Force feels that due process standards for service of the notice should be inserted into HRS section 667-5; and whereas the requirements set by Hawaii law for service of a civil complaint are reasonable to satisfy due process; and whereas the Task Force also feels that Owner-occupants who own no other residential real property and whose ownership interests in their residence are foreclosed under a power of sale should be exempted from having the additional financial burden of a deficiency judgment; that the Task Force therefore recommends that HRS §667-5 be amended as follows:

**"§667-5 Foreclosure under power of sale; notice; affidavit after sale.** (a) When a power of sale is contained in a mortgage, and where the mortgagee, the mortgagee's successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale (also referred to herein as a "non-judicial foreclosure") upon breach of a condition of the mortgage, the mortgagee, successor, or person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

- (1) Give notice of the mortgagee's, successor's, or person's intention to foreclose the mortgage and of the sale of the mortgaged property (hereinafter "notice of intent to foreclose" or "notice") as follows: (A) by servicing written notice of the intent to foreclose on all persons entitled to notice under this Chapter in like manner as service of a civil complaint—personally—~~or by registered or certified mail~~ under Chapter 634, HRS, and the Hawaii Rules of Civil Procedure, as they may be amended from time to time; and (B) by publication of the notice once in each of three successive weeks (three publications), the last publication to be not less than fourteen days before

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the day of sale, in a newspaper having a general circulation in the county in which the mortgaged property lies; and

(2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

(b) Copies of the notice required under subsection (a)

shall be:

(1) Filed with the state director of taxation; and

(2) Posted on the premises not less than twenty-one days before the day of sale.

(c) Upon the request of any person entitled to notice pursuant to this section and sections 667-5.5 and 667-6, the attorney, the mortgagee, successor, or person represented by the attorney shall disclose to the requestor the following information:

(1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs, and all other fees and costs estimated to be incurred by the foreclosing mortgagee related to the default prior to the auction within five business days of the request; and

(2) The sale price of the mortgaged property once auctioned.

(d) Any sale, of which notice has been given as aforesaid, may be postponed from time to time by public announcement made by the mortgagee or by some person acting on the mortgagee's behalf. Upon request made by any person who is entitled to notice pursuant to section 667-5.5 or 667-6, or this section, the mortgagee or person acting on the mortgagee's behalf shall provide the date and time of a postponed auction, or if the auction is canceled, information that the auction was canceled. The mortgagee within thirty days after selling the property in pursuance of the power, shall file a copy of the notice of sale and the mortgagee's affidavit, setting forth the mortgagee's acts in the premises fully and particularly, in the bureau of conveyances.

(e) The mortgagee or other person who completes the non-judicial foreclosure of a mortgage or other lien on real property improved and used for residential purposes pursuant to this chapter shall not be entitled to pursue or obtain a deficiency judgment against any Owner-occupant of the subject real property who, at the time the notice of intent to foreclose is served, does not have a fee simple ownership interest in any other residential real property. "Owner-occupant" as defined in this chapter means a person who, at the time that a notice is served of the intent to foreclose under the power of sale:

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(1) owns an interest in the residential property, which interest is encumbered by the mortgage being foreclosed;  
(2) is living at the residential property; and  
(3) has been living at the residential property for a continuous period of not less than one-hundred eighty (180) days immediately preceding the date on which the notice is served.

provided, however, that nothing herein shall prohibit any other mortgagee or person who holds a lien on the residential real property subject to the non-judicial foreclosure, whose lien is subordinate to the mortgage being foreclosed and is extinguished by the non-judicial foreclosure sale, from pursuing a monetary judgment against an Owner-occupant.

(F) The affidavit and copy of the notice shall be recorded and indexed by the registrar, in the manner provided in chapter 501 or 502, as the case may be.

(g) This section is inapplicable if the mortgagee is foreclosing as to personal property only.

Motion 2: whereas the Task Force feels that there is a need to address the concerns of Owner-occupants who want judicial oversight of the foreclosure of their homes; and whereas the Task Force feels that a reasonably simple procedure should be available to these Owner-occupants to convert a non-judicial foreclosure to a judicial proceeding, but in fairness to the secured lender all persons who have an interest in the residential property or who are obligated to pay the debt secured by the mortgage must agree to join in the judicial proceeding and be subject to the orders and judgments resulting from the judicial proceeding; that the Task Force therefore recommends that new §§667-5.8, 667-5.9 and 667-5.10 be added to Chapter 667, HRS, as follows:

“§667-5.8. An Owner-occupant of a residential property that is being foreclosed non-judicially under this Chapter may ~~require the foreclosing lienor to~~ convert the action to a judicial foreclosure under the following conditions:

(a) A ~~pleading~~ complaint conforming to section 667-5.9 must be filed with the Circuit Court in the circuit where the residential property is located stating that the Owner-occupant of the property elects to convert the non-judicial foreclosure to a judicial foreclosure proceeding.

(b) The ~~conversion~~ pleading ~~complaint~~ described in section 667-5.8(a) must be filed with the Circuit Court no later than 20 days after the notice of the non-judicial foreclosure action is served on the Owner-occupant as required by section 667-5(a)(1)(aA).

(c) Within ninety (90) days of the filing of the ~~conversion~~ pleading ~~complaint~~, all owners of an interest in the residential property whose interests are pledged or

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otherwise encumbered by the lien which is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the mortgage which is being foreclosed, including without limitation co-obligors and guarantors, must file a statement in the Circuit Court action that they agree to submit themselves to the judicial process and the jurisdiction of the Circuit Court. If this condition is not satisfied, then the Circuit Court action shall be dismissed with prejudice as to any Owner-occupant's right to convert the action to a judicial proceeding, and the lienor may proceed non-judicially.

(d) The filing of the ~~conversion pleading complaint~~ will automatically stay the non-judicial foreclosure action unless and until the judicial proceeding has been dismissed.

(e) The person filing the ~~conversion pleading complaint~~ has an affirmative duty to promptly notify the Hawaii attorney who is handling the non-judicial foreclosure about the filing of the conversion.

(f) All parties joined in the converted judicial proceeding may assert therein any claims and defenses which they could assert as though the action were originally commenced as a judicial foreclosure action.

~~§667-5.9. The conversion pleading required by section 667-5.8 shall be on white paper, 8 inches wide by 11 ½ inches long, and shall contain at a minimum the following:~~

- (a) A caption setting forth the name of the court, the title of the action, and the file number. The title of the action shall include the names of the ~~foreclosing~~ filing party as plaintiff and the ~~filing~~ foreclosing party as the defendant.
- (b) The name, mailing address, and telephone number of the filing party.
- (c) The address or tax map key number of the property subject to the foreclosure action.
- (d) A statement identifying all other owners of an interest in the residential property whose interests are pledged or otherwise encumbered by the lien which is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the lien which is being foreclosed, including without limitation co-obligors and guarantors.
- (e) A certification under penalty of perjury that the filing party is an Owner-occupant of the subject property and seeks to convert the non-judicial foreclosure to a judicial proceeding.
- (f) A statement certifying that the filing party served a copy of the conversion pleading on the attorney identified in the notice of intent to foreclose either by personal delivery at, or by postage prepaid U. S. Mail to, the address of the attorney as set forth in the notice of intent to foreclose.
- (g) A copy of the notice of intent to foreclose which was served on the filing party and for which the filing party is seeking to convert to a judicial proceeding.

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§667-5.10. The notice of intent to foreclose non-judicially which is served and posted as required under sections 667-5(a)(1)(A) and 667-5(b)(2) shall include a statement printed in not less than 14-point font as follows, provided however that this statement is not required to be included in the notice of sale published pursuant to section 667-5-5(a)(1)(B), and provided further that nothing herein shall be construed to set a minimum font size for the published notice of sale:

'If the property being foreclosed is improved and used for residential purposes, an Owner-occupant of the property (defined as a person who, at the time this notice is served, owns an interest in the residential property which is subject to the mortgage being foreclosed, is living at the residential property and has been continuously living there for not less than one-hundred eighty (180) days) has the right to convert a non-judicial foreclosure proceeding to a judicial foreclosure where claims and defenses may be considered by a court of law. To exercise this right, the Owner-occupant must complete and file the attached form with the Circuit Court in the circuit where the property is located within twenty (20) days after service of this notice.

'In addition, all owners of an interest in the residential property whose interests have been pledged or otherwise encumbered by the lien which is being foreclosed and all persons who have signed the promissory note or other instrument evidencing the debt secured by the lien which is being foreclosed, including without limitation co-obligors and guarantors must file a statement in the Circuit Court action that they agree to submit themselves to the judicial process and the jurisdiction of the Circuit Court within ninety (90) days of the filing of the attached form. Failure to satisfy this condition will result in dismissal of the Circuit Court action.

'An Owner-occupant must promptly notify the Hawaii attorney listed in this notice about the filing of the conversion form.

A foreclosing lender who completes a non-judicial foreclosure of residential property may be prohibited under Hawaii law from pursuing a deficiency judgment against an Owner-occupant who does not own a fee simple interest in any other residential real property. If this action is converted to a judicial proceeding, however, then all remedies available to a lender may be asserted, including the right to seek a deficiency judgment.'

Motion 3: whereas the Task Force intends that the process for conversion be uniform and convenient, that the Task Force request the Hawaii State Judiciary an appropriate Judiciary

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Committee to consider creating and adopting a form for the conversion pleading complaint that can be appended to the Hawaii Rules of Civil Procedure.

Motion 4: whereas the Task Force feels that there should be certainty as to effect of the non-judicial foreclosure sale on the title to the foreclosed property, which would benefit both lenders and borrowers in maximizing the price that could be obtained in a public auction, and whereas there is no current statutory provision for insuring that an encumbrancer whose lien arises after the initial service of the notice of non-judicial foreclosure is bound by the nonjudicial foreclosure sale, that the Task Force therefore recommends that the following new section 667-5.6 be added to Chapter 667, HRS, as follows:

“§667-5.6. Recordation of notice of intent to foreclose. The foreclosing mortgagee or lienor may record a copy of the notice of intent to foreclose with the office of the assistant registrar of the Land Court or the bureau of conveyances in a manner similar to recordation of notices of pendency of action under section 501-151 or section 634-51, or both, as applicable. The recorded notice shall have the same effect as a notice of pendency of action. From and after the recordation of the notice, any person who becomes a purchaser or encumbrancer of the mortgaged property shall be deemed to have constructive notice of the power of sale foreclosure and shall be bound by the foreclosure.

Motion 5. whereas in order to implement proposed new section 667-5.6, HRS §501-151 should be amended to allow the office of the assistant registrar of the land court to accept for filing notices of intention to foreclose under power of sale, that the Task Force therefore recommends that the following HRS section 501-151 be amended as follows:

**§501-151 Pending actions, judgments; recording of, notice.** No writ of entry, action for partition, or any action affecting the title to real property or the use and occupation thereof or the buildings thereon, and no judgment, nor any appeal or other proceeding to vacate or reverse any judgment, shall have any effect upon registered land as against persons other than the parties thereto, unless a full memorandum thereof, containing also a reference to the number of certificate of title of the land affected is filed or recorded and registered. Except as otherwise provided, every judgment shall contain or have endorsed on it the State of Hawaii general excise taxpayer identification number, the federal employer identification number, or the last four digits only of the social security number for persons, corporations, partnerships, or other entities against whom the judgment is rendered. If the judgment debtor has no social security number, State of Hawaii general excise taxpayer identification number, or federal employer identification number, or if that information is not in the possession of the party seeking registration of the judgment, the judgment shall be accompanied by a certificate that provides that the information does not exist or is not in the possession of the party seeking registration of the judgment. Failure to disclose or disclosure of an incorrect social security number, State of Hawaii general excise

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taxpayer identification number, or federal employer identification number shall not in any way adversely affect or impair the lien created upon recording of the judgment. This section does not apply to attachments, levies of execution, or to proceedings for the probate of wills, or for administration in a probate court; provided that in case notice of the pendency of the action has been duly registered it is sufficient to register the judgment in the action within sixty days after the rendition thereof.

As used in this chapter "judgment" includes an order or decree having the effect of a judgment.

Notice of the pendency of an action in a United States District Court, as well as a court of the State of Hawaii, may be recorded.

A notice of intent to foreclose as provided in section 667-5.6 may be recorded.

The party seeking registration of a judgment shall redact the first five digits of any social security number by blocking the numbers out on the copy of the judgment to be filed or recorded.

Motion 6: whereas the Task Force feels that it is beneficial to lenders and mortgagors to define finality as to the effect of the non-judicial foreclosure sale and to clarify the point at which the interest of the mortgagor and those claiming under, by or through the mortgagor are extinguished, and that it would further benefit both lenders and mortgagors to maximize the price at which the foreclosed property may be sold a public auction, that the Task Force therefore recommends that HRS Section §667-8 be amended to define the "completion" of a non-judicial foreclosure of unregistered land to be consistent with recent Hawaii bankruptcy cases (in re Parrish and see, e.g., in re Hoopai 581 F.3d 1090 (9<sup>th</sup> Cir. Sept. 14, 2009)), and further to amend HRS §667-3, as follows:

**§667-8 Affidavit as evidence, when.** If it appears by the affidavit that the affiant has in all respects complied with the requirements of the power of sale and the statute, in relation to all things to be done by the affiant before selling the property, and has sold the same in the manner required by the power, the affidavit, or a duly certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed. The interests of the mortgagor, and all those claiming under, by or through the mortgagor, in the property being foreclosed by exercise of a power of sale under the statute, including land whose title is not registered in the land court under Chapter 501, will be deemed extinguished upon the recordation of the affidavit in the bureau of conveyances or in the office of the assistant registrar, as the case may be, within thirty days of the date of sale of the property at public auction.

**§667-3 Proceeds, how applied.** Mortgage and other creditors shall be entitled to payment according to the priority of their liens, and not pro rata; and judgments of foreclosure and foreclosures under power of sale which are conducted in compliance with this chapter and for which an affidavit is recorded as required by section 667-5 shall operate to extinguish the liens of

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subsequent mortgages and liens of the same property, without forcing prior mortgagees or lienors to their right of recovery. The surplus after payment of the mortgage foreclosed, shall be applied pro tanto to the next junior mortgage or lien, and so on to the payment, wholly or in part, of mortgages and liens junior to the one assessed.

Motion 7: that the Task Force report that it has considered the establishment of statutory bidding thresholds for properties sold via foreclosure, as described in Section 2(b)(3) of Act 162, and that it opposes the setting of such thresholds, and that it therefore recommends against any statutory amendments in this regard.

Motion 8: that the Task Force include in its report to the Hawaii State Legislature for the legislative session beginning January 2011, that it is in the process of reviewing and considering in more depth the following sections of Act 162 (2010 Session Laws), but that the Task Force did not have sufficient time to consider and make specific recommendations as to, and is therefore making no statements on the merits of, these matters; further, that the Task Force will address these issues as part of its report to the 2012 Legislature and request that the Legislature defer action on these and related matters until the 2012 Legislative Session:

(1) Section 2(b)(1) of Act 162 (i.e. the adequacy of notice given to mortgagors of available mortgage counseling programs and the optimal timing for such notification and counseling).

(2) Section 2(b)(2) of Act 162 (i.e. the availability of loan documentation to mortgagors from mortgagees prior to and during the foreclosure process).

(3) Section 2(b)(4) of Act 162 (i.e. the statutory timeline for power-of-sale foreclosures).

(4) Section 2(b)(5) of Act 162 (i.e. further regulation of distressed property consultants).

(5) Section 2(b)(6) of Act 162 (i.e. revisions to part II of chapter 667, Hawaii Revised Statutes, to make it a viable vehicle for power-of-sale foreclosures).

(6) Section 2(d) of Act 162 (the effectiveness and any defects of the foreclosure procedures currently set forth in the statutes for both judicial and power-of-sale foreclosures).

(7) Section 2(e) of Act 162 (i.e., the feasibility of establishing a state entity or administrator to focus on addressing the concerns of mortgagors, disseminating information, and otherwise engaging in consumer education, and having the Task Force propose funding mechanisms to enable the operation of this entity).

(8) Amendments to HRS Chapter 454M regarding mortgage servicers.

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Motion 9: whereas Investigative Group 3 recognizes that the Legislature intended by its adoption of Act 236 (1999 Session Laws) to amend HRS §514A-90 to allow Condominium Associations to foreclose their liens in a manner similar to the procedure set forth in HRS Chapter 667 for non-judicial foreclosures of mortgages (and which language was incorporated into §514B-146 when Chapter 514B was adopted in 2005); however, due to the difference in the liens not all of the provisions of HRS Chapter 667 are specifically applicable to foreclosures of Condominium Association liens; that the Task Force include in its report to the Hawaii State Legislature for the legislative session beginning January 2011, that it intends to further review and make specific recommendations regarding the foreclosure of Condominium Association liens, and that it will address these issues as part of its report to the 2012 Legislature as this is a complex area of law involving various chapters of the Hawaii Revised Statutes.