

Star Advertiser

TO:

Sen. Rosalyn Baker, Chair
Sen. Clayton Hee, Co-Chair
Sen. Brickwood Galuteria, Manager
Sen. Michelle Kidani, Manager
Sen. Sam Slom, Manager

Rep. Robert Herkes, Co-Chair
Rep. Gilbert Keith Agaran, Co-Chair
Rep. Isaac Choy, Co-Chair
Rep. Clift Tsuji, Manager
Rep. Gil Riviere, Manager

FR: Dennis Francis, President and Publisher
Honolulu Star-Advertiser

RE: **HB1875 – Relating to Foreclosures – Amendment Requested**
April 20, 2012 – 10 AM
Hawaii State Capitol, Room 016

Aloha Chair Baker, Co-Chairs Herkes, Hee, Keith-Agaran, and Choy and Managers:

The *Honolulu Star-Advertiser* respectfully submits comments and suggests amendments to HB1875 to address issues pertaining to the erosion of due process and non-judicial and judicial foreclosure sale notices requirements contained in this bill.

In our meetings with various legislators, some have expressed concerns regarding the cost of non-judicial foreclosure ads. Effective immediately, we have reduced our rate from \$90 per column inch (pci) to \$45 pci.

With respect to judicial foreclosures, the process dealing with foreclosure sales is overseen by the court pursuant to established practices and procedures. Consequently, we believe that the proposed new publication requirements for notice of public sale should not be necessary for judicial foreclosures and should only be adopted for non-judicial foreclosure sales.

With respect to the non-judicial foreclosure sale public notice requirements, we would like to offer the attached proposed amendments, which we believe address the following points of interest:

- Address potential conflicts of interests of a foreclosure agent, employee, trustee, commissioner or representative of a lender for the foreclosure sale to have a financial interest in a newspaper publishing such a notice or to profit directly or indirectly, based on the publication of such notice of the sale;
- Expands publications to include qualified weekly newspapers of general circulation;

- Recognizes the desire to publish such notices of foreclosure sales in both a qualified newspaper publication and a state website.

A number of western states, including Washington, Oregon and Idaho, have experienced challenges with conflict of interests with the ownership of small weekly newspapers and recent complaints regarding the practice of rates being inflated for the publication of mortgage foreclosure sale notices by vertically integrating the foreclosure service business.

The U.S. Constitution provides due process protections recognizing the legal rights of individuals. The 5th and 14th amendments guarantee that government actions may not “deprive any person of life, liberty or property, without due process of law.” When the State of Hawaii places constraints on the publication of notices concerning the taking of real property such as allowing notice of foreclosure sales on the Internet only, the state essentially uses its power to inhibit the due process protections guaranteed by the U.S. Constitution.

The purpose of notification should be to reach as many people as possible, rather than lowering the standards. Among other things, the notice serves to provide the owner and others that the property will be sold by auction. If such notice is limited to the Internet or newspapers that are not of general circulation only, there is a strong likelihood that the person who stands to lose their house or potential buyers of the property may not see the notice. Such “lack of notice” could lead to legal challenges to the foreclosure process. Just one such successful challenge would chill the entire foreclosure process in Hawaii.

It is important to have policies that ensure that once foreclosure sale notices are printed, they are archived and are secure from modification and tampering. If any of these elements were absent, a legal ad and foreclosure sale notice could not be authenticated and would be subject to challenge. Foreclosure sale notices published in the Honolulu Star-Advertiser are certified by affidavit, for use as evidence in court. This provides proof of publication that is required for foreclosure sale notices.

For these reasons, we respectfully ask for your consideration to amend the language pertaining to the publication of judicial and non-judicial foreclosure notices.

§667-27(d) Publication of notice of public sale. The foreclosing mortgagee shall have the public notice of the public sale:

(1) Printed in not less than seven-point font and published in the classified section of a newspaper of general circulation in the real property tax zone in which the mortgaged property is located, as shown on the applicable county real property tax maps kept by each respective county's real property tax assessment division, except for the county of Kalawao which shall be considered its own geographic area for the purposes of this paragraph. For the purposes of this paragraph, a newspaper is of general circulation if the newspaper:

- (A) Contains news of a general nature and not just news of interest primarily to an organization, group or class; and
- (B) Is distributed within the county where the mortgaged property is located:
 - (i) At least weekly;
 - (ii) Continuously for a minimum of one year ~~six months~~ unless interrupted by strike, natural disaster, or act of war or terror; and
 - (iii) With a circulation equal to or greater than ~~To a minimum of twenty one~~ per cent of the population ~~residents~~ of the county, as determined by the last decennial United States census, and as verified by an independent audit.
- (C) In the English language;

(D) Shall have a policy to print, archive and authenticate all statutorily required legal notices; and

(E) It shall be unlawful for an agent, employee, trustee, commissioner, or representative of a lender conducting a foreclosure sale to have a financial interest in a newspaper publishing such a notice of sale, or to profit directly or indirectly from the publication of notice of such notice sale.

A person may apply to the circuit court for an order confirming a newspaper to be of general circulation for purposes of this paragraph, which the court shall grant upon proof of compliance with this paragraph. The public notice shall be published once each week for three consecutive weeks, constituting three publications. The public sale shall take place no sooner than fourteen days after the date of the publication of the third public notice advertisement; ~~and or~~

(2) Not less than twenty-eight days before the date of the public sale, published on a website maintained by the department; provided that the mortgaged property is owned by an owner-occupant."