



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2012 FEB 10 P 2: 54

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the)	MFDRP-DR-2011-1
Petition for Declaratory Relief of)	
)	DIRECTOR'S FINAL ORDER
EKIMOTO & MORRIS, A Limited)	
Liability Law Company LLLC,)	Special Hearings Officer:
)	Hon. Corinne K.A. Watanabe (Ret.)
Petitioner.)	
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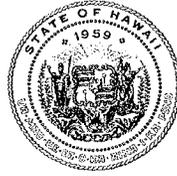
DIRECTOR'S FINAL ORDER

On January 20, 2012, the duly appointed Hearings Officer issued her Recommended Declaratory Ruling in the above-captioned matter. The parties were given an opportunity to file written exceptions. However, no exceptions were filed. Oral argument was not requested.

Upon review of the entire record of this proceeding, the Director adopts the Hearings Officer's Recommended Declaratory Ruling as the Director's Final Order, grants the Petition for Declaratory Relief, and finds and concludes that HRS §667-22(e)(5) is not applicable to condominium associations pursuing a nonjudicial foreclosure pursuant to Part II of HRS Chapter 667.

DATED: Honolulu, Hawai'i, FEB 9 2012


 KEALI'I S. LOPEZ
 Director
 Department of Commerce
 and Consumer Affairs



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2012 JAN 20 P 2: 37

HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the Petition of)	MFDRP-DR-2011-1
)	
EKIMOTO & MORRIS, A Limited)	RECOMMENDED DECLARATORY
Liability Law Company LLLC,)	RULING
Petitioner)	
)	
for Declaratory Relief)	Special Hearings Officer:
_____)	Corinne K.A. Watanabe

RECOMMENDED DECLARATORY RULING

On August 26, 2011, Petitioner Ekimoto & Morris, A Limited Liability Law Company LLLC (Petitioner) filed a Petition for Declaratory Relief (Petition) with the State of Hawai'i Department of Commerce and Consumer Affairs (DCCA or the department), requesting, pursuant to Hawaii Revised Statutes (HRS) § 91-8 (1993)¹ and Hawaii Administrative Rules (HAR) § 16-201-48 et seq.², a declaratory ruling by DCCA's Director on the applicability of

¹Hawaii Revised Statutes (HRS) § 91-8 (1993) provides:

Declaratory rulings by agencies. Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

²Hawaii Administrative Rules (HAR) §§ 16-201-48 through 16-201-64 prescribe the form for petitions to DCCA's Director for declaratory rulings and establish the procedure for the submission, consideration, and prompt disposition of such petitions.

HRS § 667-22(e)(5), as amended by Act 48, 2011 Haw. Sess. L. 84 (Act 48), to condominium associations³ pursuing a nonjudicial foreclosure under Part II of HRS chapter 667 (1993 & Supp. 2010), as amended by Act 48 (Part II). HRS § 667-22(e) states the requirements for service by a “foreclosing mortgagee” of a “notice of default and intention to foreclose addressed to the mortgagor, borrower, and any guarantor” (foreclosure notice). HRS § 667-22(e)(5) requires a “foreclosing mortgagee” to serve the foreclosure notice on DCCA “by filing the notice with [DCCA] when required[.]”

Petitioner states that it “is a law firm that represents many condominium and other types of homeowner associations” and “is pursuing nonjudicial foreclosures on behalf of many of its clients.” Petition at 6. Petitioner acknowledges that HRS § 667-40 (Supp. 2010)⁴ permits condominium associations to conduct nonjudicial foreclosures under Part II, Petition at 3, and states that because the language used throughout Part II “does not distinguish between a

³In the HRS, a “condominium association” is generally referred to as an “association of apartment owners” or a “unit owners' association”.

For example, HRS § 514A-3 (Supp. 2010), which is part of the HRS chapter applicable to condominiums created prior to July 1, 2006, defines “[a]ssociation of apartment owners” for purposes of HRS chapter 514A as “all of the apartment owners acting as a group in accordance with the bylaws and declaration.” HRS § 514A-3 defines “[c]ondominium” as “the ownership of single units, with common elements, located on property within the condominium property regime.”

HRS § 514B-3 (2006), which is part of the HRS chapter applicable to condominiums created after July 1, 2006, defines “[a]ssociation” for purposes of HRS chapter 514B as “the unit owners' association organized under section 514B-102 or under prior condominium property regime statutes.” HRS § 514B-3 also defines “[c]ondominium” as “real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners.”

⁴HRS § 667-40 (Supp. 2010) provides:

[§ 667-40] Use of power of sale foreclosure in certain non-mortgage situations. A power of sale foreclosure under this part may be used in certain non-mortgage situations where a law or a written document contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure. These laws or written documents are limited to those involving time share plans, condominium property regimes, and agreements of sale.

foreclosing mortgagee and a condominium association in application of specific provisions to each[,]" "it appears that a condominium association wishing to pursue a nonjudicial foreclosure under [P]art II must comply with virtually all of the requirements that are stated to apply to a foreclosing 'mortgagee'." Id. at 4. However, Petitioner maintains that the requirement of HRS § 667-22(e)(5) relating to service of a foreclosure notice on DCCA should not apply to a condominium association pursuing a nonjudicial foreclosure under Part II. Id. Petitioner also states that because it is not clear whether HRS § 667-22(e)(5) is applicable to condominium associations,

Petitioner must serve notice pursuant to HRS § 667-22(e). Petitioner must also explain to its clients why, as a precaution, Petitioner is serving [the foreclosure notice] on [DCCA], even though in the opinion of Petitioner, no such service should be required. Therefore, Petitioner is incurring additional expense on behalf of its clients, while nonetheless advising its clients that service on [DCCA] is being made only to prevent a potential claim that its clients are engaged in an unfair and deceptive practice pursuant to section 667-F(b)⁵.

Therefore, Petitioner has a real and existing interest in obtaining this declaratory ruling on its own behalf and for its clients.

Id. at 6.

On October 7, 2011, DCCA, which was served with a copy of the Petition through its Regulated Industries Complaints Office, filed a Statement of No Position on the Petition (Statement) but noted that "the legislature has indicated it intends to revisit the issue at the next legislative session and . . . DCCA reserves the right to amend its position at that time." Statement at 2.

The issue raised by the Petition -- whether a condominium association pursuing a nonjudicial foreclosure pursuant to Part II is required by HRS §667-22(e)(5) to serve a

⁵In accordance with Act 48 § 42, 2011 Haw. Sess. L. 84, 99, the revisor of statutes has codified HRS § 667-F(b) as HRS § 667-76(b).

foreclosure notice on DCCA – involves the interpretation of a statute, which is a question of law. State v. Wheeler, 121 Hawai‘i 383, 390, 219 P.3d 1170, 1177 (2009).

Based on a review of the applicable statutes, rules, legislative history, and case law, it is the recommendation of the undersigned special hearings officer that the Director declare that HRS § 667-22(e)(5) is *not* applicable to condominium associations pursuing a nonjudicial foreclosure pursuant to Part II⁶.

BACKGROUND

A. Pre-Act 48

Prior to the enactment of Act 48 in 2011, HRS chapter 667 provided two nonjudicial processes for foreclosing on real property under a power of sale contained in a mortgage. The simpler process, set forth in Part I of HRS chapter 667 (Part I)⁷, stemmed from a law enacted by the King and Legislative Assembly of the Hawaiian Islands in 1874. *See* Act 33, 1874 Laws of His Majesty Kalakaua 31. Section 40 of Act 48 placed a moratorium on all new nonjudicial foreclosure actions under Part I “for property located in this State, beginning on [May 5, 2011] and ending on July 1, 2012.” Act 48, § 40, 2011 Haw. Sess. L. at 116.

The alternate process, set forth in Part II, had its genesis in a law enacted by the Hawai‘i Legislature and Governor in 1998. *See* Act 122, 1998 Haw. Sess. L. 468. As originally enacted, Part II included twenty-two statutory sections, HRS §§ 667-21 to 667-42, which collectively established the notice and procedural requirements that a “foreclosing mortgagee” had to comply

⁶This recommended declaratory ruling does not address the applicability of HRS § 667-22(e)(5) to other types of homeowner associations, such as planned community associations established pursuant to HRS chapter 421J.

⁷Part I of HRS chapter 667 includes HRS §§ 667-5 to 667-10.

with to conduct a nonjudicial foreclosure of mortgaged real property under Part II. The term “foreclosing mortgagee” was defined in one paragraph as:

the mortgagee that intends to conduct a power of sale foreclosure; provided that the mortgagee is a federally insured bank, a federally insured savings and loan association, a federally insured savings bank, a depository financial services loan company, a nondepository financial services loan company, a credit union insured by the National Credit Union Administration, a bank holding company, a foreign lender as defined in section 207-11, or an institutional investor as defined in section 454-1⁸.

HRS § 667-21(b) (Supp. 2010). “Mortgagee” was defined as “the current holder of record of the mortgagee's or the lender's interest under the mortgage, or the current mortgagee's or lender's duly authorized agent.” Id.

Under the Part II process in existence prior to Act 48, when a mortgagor or borrower breached a mortgage agreement and the mortgagee intended to conduct a power-of-sale foreclosure under Part II, the foreclosing mortgagee was required to serve a “written notice of default addressed to the mortgagor, the borrower, and any guarantor” (default notice)⁹ on the mortgagor, the borrower, certain prior or junior creditors, the state director of taxation, the director of finance of the county where the mortgaged property was located, and others entitled to receive notice. HRS § 667-22(a) (Supp. 2010).

⁸HRS chapter 454, entitled “Mortgage Brokers and Solicitors,” was repealed by Act 84, § 29, 2010 Haw. Sess. L. 134, 156. Prior to its repeal, HRS § 454-1 defined “[i]nstitutional investor” as follows:

“Institutional investor” means and includes (a) banks, savings and loan institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit sharing trusts, any of the class of persons permitted to qualify as foreign lenders under section 207-11, or other financial institutions or institutional buyers, whether acting for themselves or as fiduciaries; (b) the United States or any foreign government, any state or territory thereof, or any agency or corporate or other instrumentality of the United States, a foreign government, or of any state, territory or political subdivision thereof.

⁹For purposes of this recommended declaratory ruling, “default notice” refers to the “written notice of default addressed to the mortgagor, the borrower, and any guarantor” that HRS § 667-22 required a foreclosing mortgagee to serve prior to Act 48, and “foreclosure notice” refers to the “written notice of default and intention to foreclose addressed to the mortgagor, the borrower, and any guarantor” that HRS § 667-22 requires to be served after Act 48.

The default notice, which was recordable as a notice of pendency of action, HRS § 667-23 (Supp. 2010), was required to provide specific information, including: a description of the default; an itemization of the delinquent monetary amount; a deadline date for curing any default; and a warning that if the default were not cured by the deadline date, “the entire unpaid balance of the moneys owed to the mortgagee under the mortgage agreement will be due[.]” Id. Additionally, the default notice was required to contain, in all capital letters, wording substantially similar to that set forth in HRS § 667-22(b).

Part II also provided details about the nonjudicial foreclosure process regarding: recordation of a default notice; cure of a default; date, place, and public notice of a public sale of mortgaged property; public showing of the mortgaged property; postponement or cancellation of a public sale; authorized bidders at a public sale; obligations imposed on successful bidders; conveyance of property following a public sale; affidavit required of a foreclosing mortgagee after a public sale; recordation of the foreclosing mortgagee's affidavit; conclusive presumptions regarding the conduct of a foreclosure sale; right to appeal to circuit court; separate sales of more than one mortgaged property; judicial foreclosure before a public sale; effect of recordation of a conveyance document after a public sale; right to enforce Part II; and development of public informational materials “to educate and inform borrowers and mortgagors” about the remedies, including judicial or nonjudicial foreclosure, which are available against them “in the event of borrower's default.” See Part II of HRS chapter 667 (Supp. 2010).

Although the Part II nonjudicial foreclosure process appears to have been tailored for use upon breach of an agreement in which a mortgage interest in real property was conveyed to secure a loan, its use by condominium associations is also authorized. HRS § 667-40 specifically allows the Part II process to be used in non-mortgage situations involving

condominium property regimes “where a law or a written document contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.” Additionally, HRS § 514A-90, which applies to condominiums created prior to July 1, 2006, provides:

The lien of the association of apartment owners may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board of directors, acting on behalf of the association of apartment owners, in like manner as a mortgage of real property. . . .

(Emphases added.) Similarly, HRS § 514B-146, which applies to condominiums created after July 1, 2006, provides:

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association, in like manner as a mortgage of real property. . . .

(Emphases added.)

B. Act 48

During the 2011 legislative session, the Hawai‘i Legislature passed on final reading Senate Bill No. 651, S.D. 2, H.D. 2, C.D. 1 Relating to Mortgage Foreclosures, which the Governor signed into law as Act 48. According to the Conference Committee that recommended passage of the bill, the bill's purpose was “to implement a comprehensive strategy to reform the foreclosure process by implementing additional protections for homeowners in foreclosure or at-risk [sic] of foreclosure.” Conference Committee Rep. No. 133 at 1.

Act 48 made a number of major reforms to the Hawai‘i foreclosure system.

One major change was the addition to HRS chapter 667 of a new part, now codified as Part V, which established a mortgage foreclosure dispute resolution (MFDR) program in DCCA to provide owner-occupants of residential real property under nonjudicial foreclosure who have lived continuously in their residence for not less than 200 days “an opportunity to negotiate an

agreement that avoids foreclosure or mitigates damages in cases where foreclosure is unavoidable.” HRS § 667-73(a). HRS § 667-71(b) expressly provides, however, that Part V

shall not apply to actions by an association to foreclose on a lien for amounts owed to the association that arise under a declaration filed pursuant to chapter 514A or 514B, or to a mortgagor who has previously participated in dispute resolution under this part for the same property on the same mortgage loan.

Under the MFDR program, before residential property occupied by an owner-occupant as a primary residence may be publicly sold pursuant to a nonjudicial foreclosure, the foreclosing mortgagee is required, at the election of the owner-occupant, to participate in the MFDR program “to attempt to negotiate an agreement that avoids foreclosure or mitigates damages in cases where foreclosure is unavoidable.” HRS § 667-74. The foreclosure notice served by the foreclosing mortgagee pursuant to HRS § 667-22 is also required to include information about the availability of dispute resolution and the MFDR program that is specified in HRS § 667-75(b).

“Within three days after a mortgagee serves a foreclosure notice on an owner-occupant pursuant to section . . . 667-22, the mortgagee shall file the foreclosure notice with [DCCA] and pay a filing fee of \$250, which shall be deposited into the mortgage foreclosure dispute resolution special fund established under section 667-86.” HRS § 667-76(a). Violation of HRS § 667-76 is “an unfair and deceptive act or practice subject to section 480-2.” HRS § 667-76(b).

Within ten days after a mortgagee's filing of a foreclosure notice with DCCA, DCCA is required to mail to the mortgagor written notification of the filing. HRS § 667-77 . “The notification shall inform the mortgagor of an owner-occupant's right to elect to participate in the foreclosure dispute resolution program” and include the information specified in HRS § 667-77.

Pursuant to HRS § 667-78(a), an owner-occupant who elects to participate in the MFDR program shall return to DCCA, within thirty days after DCCA's mailing of the notification: a

completed program-election form; a certification that the mortgagor is an owner-occupant, accompanied by documentation in support of the certification; and a \$300 program fee. Failure to comply with these requirements constitutes a waiver of the right to dispute resolution. HRS § 667-78(b).

If an owner-occupant elects to participate in the MFDR program, HRS § 667-79 requires DCCA to “open a dispute resolution case”; “mail written notification of the case opening to the parties” “[w]ithin twenty days of receipt of the owner-occupant's election form and fee”; and schedule a dispute resolution session “for a date no less than thirty and no more than sixty days from the date of the notification of case opening, unless mutually agreed to by the parties and the neutral.” HRS § 667-79(a). “Dispute resolution” is defined in HRS § 667-72 as “a facilitated negotiation between a mortgagor and mortgagee for the purpose of reaching an agreement for mortgage loan modification or other agreement in an attempt to avoid foreclosure or to mitigate damages if foreclosure is unavoidable.”

The written notification of a case-opening operates as a stay of the foreclosure proceeding and “may be filed or recorded, as appropriate, at the land court or bureau of conveyances.” HRS §§ 667-79(c) and 667-83(a).

The required parties to a dispute resolution process, as well as the process and timetable for dispute resolution, are detailed in HRS § 667-80. Other sections of Part V: require a neutral who facilitated a dispute resolution session to file with DCCA a closing report, which DCCA must forward to the parties, HRS § 667-81; describe what must be contained in the neutral's closing report, HRS §§ 667-81 and 667-82; explain what happens if the parties reach an agreement that resolves the issues in dispute and what happens if they do not, HRS § 667-81(b) -

(d); and provide sanctions for a mortgagee's or owner-occupant's failure to comply with the requirements of the MFDR program. HRS § 667-82.

Act 48 also implemented other changes to the mortgage foreclosure system.

Section 5 of Act 48 added three sections¹⁰ to Part III of HRS chapter 667. Pursuant to HRS § 667-53, an owner-occupant of residential property is allowed to convert a nonjudicial foreclosure under Parts I or II to a judicial foreclosure and “assert therein any claims and defenses” that could have been asserted if the action had “originally been commenced as a judicial foreclosure action[.]” However, HRS § 667-53 is not applicable “to foreclosures of an association lien that arise under a declaration filed pursuant to chapter 514A or 514B” or “a foreclosure for which the mortgagor has elected to participate in the [MFDR] program pursuant to [P]art V.” HRS § 667-53(b) and (c). HRS § 667-54 details the required contents of a petition for conversion, and HRS § 667-55 requires the foreclosure notice served pursuant to HRS § 667-22 to include the following statement, printed in not less than fourteen-point font:

IF THE PROPERTY BEING FORECLOSED IS IMPROVED AND USED FOR RESIDENTIAL PURPOSES, AN OWNER-OCCUPANT OF THE PROPERTY (DEFINED IN 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 TWO HUNDRED 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 THIRTY DAYS AFTER SERVICE OF THIS NOTICE.

IN ADDITION, ALL OWNER-OCCUPANTS AND MORTGAGORS OF 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

¹⁰Pursuant to Act 48, § 45, 2011 Haw. Sess. L. at 117, these statutory sections “shall be repealed on December 31, 2012.”

THEY AGREE TO SUBMIT TO THE JUDICIAL PROCESS AND THE JURISDICTION OF THE CIRCUIT COURT WITHIN FORTY-FIVE DAYS OF THE FILING OF THE ATTACHED FORM. FAILURE TO SATISFY THIS CONDITION MAY RESULT IN DISMISSAL OF THE CIRCUIT COURT ACTION WITH PREJUDICE.

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

MORTGAGE FORECLOSURE DISPUTE RESOLUTION MAY BE AVAILABLE IN NONJUDICIAL FORECLOSURE ACTIONS AS AN ALTERNATIVE FOR OWNER-OCCUPANTS ATTEMPTING TO AVOID FORECLOSURE OR TO MITIGATE THE EFFECTS OF FORECLOSURE ON AN OWNER-OCCUPANT. HOWEVER, IF AN OWNER-OCCUPANT FILES FOR CONVERSION, DISPUTE RESOLUTION MAY NOT BE AVAILABLE UNLESS ORDERED BY A JUDGE.

A FORECLOSING LENDER WHO COMPLETES A NONJUDICIAL FORECLOSURE OF RESIDENTIAL PROPERTY SHALL BE PROHIBITED UNDER HAWAII LAW FROM PURSUING A DEFICIENCY JUDGMENT AGAINST A MORTGAGOR UNLESS THE DEBT IS SECURED BY OTHER COLLATERAL, OR AS OTHERWISE PROVIDED BY LAW. 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.

Section 6 of Act 48 added to Part III of HRS chapter 667 six new sections, which, among other things: prohibited certain conduct by a foreclosing mortgagee, HRS § 668-56; suspended nonjudicial foreclosure actions by junior lienholders upon initiation of a nonjudicial foreclosure action by a foreclosing mortgagee, HRS § 667-57; and declared that “[a]ny foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice section 480-2.” HRS § 667-60.

In addition, Act 48 amended various statutory provisions contained in Part II. Six new definitions¹¹ were added to HRS § 667-21(b). Moreover, the definition of “foreclosing mortgagee” was revised to add a second paragraph.

Act 48 also made changes to HRS § 667-22. As revised by Act 48, and with the deleted statutory material bracketed and stricken and the new statutory language underscored, HRS § 667-22 now reads as follows:

¹¹The definitions added to Part II by Act 48 were for the following terms: “[a]pproved budget and credit counselor”; “[a]pproved housing counselor”; “[a]ssociation”; “[n]onjudicial foreclosure”; “[o]wner-occupant”; and “[r]esidential property”.

§667-22 Notice of default[;] and intention to foreclose; contents; distribution. (a)

When the mortgagor or the borrower has breached the mortgage agreement, and when the foreclosing mortgagee intends to conduct a power of sale foreclosure under this part, the foreclosing mortgagee shall prepare a written notice of default and intention to foreclose addressed to the mortgagor, the borrower, and any guarantor. The notice of default and intention to foreclose shall state:

- (1) The name and address of the current mortgagee;
- (2) The name and last known address of ~~[the mortgagor, the borrower,]~~ all mortgagors, borrowers, and any ~~[guarantor,]~~ guarantors;
- (3) The address or a description of the location of the mortgaged property, ~~[and] the tax map key number, and the certificate of title or transfer certificate of title number if within the jurisdiction of the land court,~~ of the mortgaged property;
- (4) The description of the default~~[-and] or,~~ if the default is a monetary default, an itemization of the delinquent amount ~~[shall be given]~~;
- (5) The action ~~[that must be taken]~~ required to cure the default~~[-]~~ including the delinquent amount ~~[to cure the default, together with]~~ and the estimated amount of the foreclosing mortgagee's attorney's fees and costs, and all other fees and costs related to the default estimated to be incurred by the foreclosing mortgagee ~~[related to the default]~~ by the deadline date;
- (6) The date by which the default must be cured, which ~~[deadline date]~~ shall be at least sixty days after the date of the notice of default~~[-]~~ and intention to foreclose;
- (7) ~~[That]~~ A statement that if the default is not cured by the deadline date stated in the notice of default~~[-]~~ and intention to foreclose, the entire unpaid balance of the moneys owed to the mortgagee under the mortgage agreement will ~~[be]~~ become due, that the mortgagee intends to conduct a power of sale foreclosure to sell the mortgaged property at a public sale without any court action and without going to court, and that the mortgagee or any other person may acquire the mortgaged property at the public sale; ~~[and]~~
- (8) The name, address, ~~[including]~~ electronic address, and telephone number of the attorney who is representing the foreclosing mortgagee; provided that the attorney shall be licensed to practice law in the State and physically located in the State~~[-]~~; and
- (9) Notice of the right of the owner-occupant to elect to participate in any other process as established by law.

(b) The notice of default and intention to foreclose shall also contain wording substantially similar to the following in all capital letters~~[-]~~ and printed in not less than fourteen-point font:

“IF THE DEFAULT OF THE LOAN CONTINUES AFTER THE DEADLINE DATE IN THIS NOTICE, THE MORTGAGED PROPERTY MAY BE FORECLOSED AND SOLD WITHOUT ANY COURT ACTION AND WITHOUT GOING TO COURT.

YOU MAY HAVE CERTAIN LEGAL RIGHTS OR DEFENSES. FOR ADVICE, YOU SHOULD CONSULT WITH AN ATTORNEY LICENSED IN THIS STATE.

AFTER THE DEADLINE DATE IN THIS NOTICE, TWO PUBLIC SHOWINGS (OPEN HOUSES) OF THE PROPERTY BY THE LENDER WILL BE HELD, BUT ONLY IF ALL THE MORTGAGORS (OWNERS) OF THE PROPERTY WHO ALSO CURRENTLY RESIDE AT THE PROPERTY SO AGREE. TO SHOW THAT ALL OWNERS RESIDING AT THE PROPERTY AGREE TO ALLOW TWO OPEN HOUSES BY THE LENDER, ~~[ALL OWNERS]~~ THEY MUST SIGN A LETTER SHOWING THEY AGREE. ~~[ALL OWNERS MUST SEND]~~ THE SIGNED LETTER MUST BE SENT TO THIS OFFICE AT THE ADDRESS GIVEN IN THIS NOTICE.

THIS OFFICE MUST ACTUALLY RECEIVE THE SIGNED LETTER BY THE DEADLINE DATE IN THIS NOTICE. THE SIGNED LETTER MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED.

IF THE SIGNED LETTER IS NOT RECEIVED BY THIS OFFICE BY THE DEADLINE DATE, THE PROPERTY WILL THEN BE SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

EVEN IF THIS OFFICE RECEIVES THE SIGNED LETTER TO ALLOW THE LENDER TO HOLD TWO OPEN HOUSES OF THE PROPERTY, IF ALL OWNERS LATER DO NOT COOPERATE TO ALLOW THE OPEN HOUSES, THE PROPERTY WILL BE SOLD WITHOUT ANY OPEN HOUSES BEING HELD.

ALL FUTURE NOTICES AND CORRESPONDENCE WILL BE MAILED TO YOU AT THE ADDRESS AT WHICH YOU RECEIVED THIS NOTICE UNLESS YOU SEND WRITTEN INSTRUCTIONS TO THIS OFFICE INFORMING THIS OFFICE OF A DIFFERENT ADDRESS. THE WRITTEN INSTRUCTIONS MUST BE SENT TO THIS OFFICE BY CERTIFIED MAIL, REGISTERED MAIL, OR EXPRESS MAIL, POSTAGE PREPAID AND RETURN RECEIPT REQUESTED.”

- (c) The notice of default and intention to foreclose shall include a copy of:
- (1) The original mortgage agreement, and copies of any subsequent mortgage agreements and assignments;
- (2) The promissory note signed by the mortgagor and any endorsements and allonges on the note; and
- (3) Any other documents that amend or alter the terms of the original mortgage agreement that were signed by the mortgagor and the mortgagee or any successors or assigns of the mortgagor and the mortgagee or any successors or assigns of the mortgagor or the mortgagee.

(d) The notice of default and intention to foreclose shall also include contact information for local approved housing counselors and approved budget and credit counselors.

~~[(e)]~~ (e) The foreclosing mortgagee shall have the notice of default and intention to foreclose served on:

- (1) The mortgagor and the borrower[;] in the same manner as service of a civil complaint under chapter 634 or the Hawaii rules of civil procedure, as they may be amended from time to time;
 - (2) Any prior or junior creditors ~~[having]~~ who have a recorded lien on the mortgaged property before the recordation of the notice of default and intention to foreclose under section 667-23;
 - (3) The state director of taxation;
 - (4) The director of finance of the county where the mortgaged property is located; ~~[and]~~
 - (5) The department of commerce and consumer affairs, by filing the notice with the department when required; and
- ~~[(5)]~~ (6) Any other person entitled to receive notice under [section 667-5.5:] this part.

(f) As used in this part, unless the context clearly indicates otherwise, the notice of default and intention to foreclose shall also include any amended notice that results from participation in the mortgage foreclosure dispute resolution program under part ____.”

(Line spaces added to enhance readability).

In addition, Act 48 repealed several provisions in Part II, including HRS § 667-34, pertaining to conclusive presumptions arising out of a foreclosure sale; HRS § 667-35, which provided a right to appeal to circuit court; and HRS § 667-42, regarding the application of Part II “only to new mortgages, loans, agreements, and contracts containing power of sale foreclosure language executed by the borrowers or mortgagors after July 1, 1999.” Act 48, 2011 Haw. Sess. L. at 115.

DISCUSSION

A. General Principles of Statutory Construction

Pursuant to HRS § 1-14 (2009), “[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly

grammatical construction of the words as to their general or popular use or meaning.” HRS

§ 1-15 (2009) also provides:

§ 1-15 Construction of ambiguous context. Where the words of a law are ambiguous:

- (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
- (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
- (3) Every construction which leads to an absurdity shall be rejected.

In addition, HRS § 1-16 (2009) instructs that “[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.”

According to the Hawai‘i Supreme Court, moreover, construction of a statute is guided by several well-established rules:

First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

State v. Hitchcock, 123 Hawai‘i 369, 376, 235 P.3d 365, 372 (2010) (quoting State v. Woodfall, 120 Hawai‘i 387, 391, 206 P.3d 841, 845 (2009)). Additionally, where a statute is ambiguous, we may resort to “extrinsic aids in determining legislative intent” in enacting the statute. Morgan v. Planning Dept. County of Kauai, 104 Hawai‘i 173, 180, 86 P.3d 982, 988-89 (2004) (quoting State v. Sullivan, 97 Hawai‘i 259, 262, 36 P.3d 803, 806 (2001)). “One avenue is the use of legislative history as an interpretive tool.” Id. We “may also consider the reason and spirit of the law, and the cause which induced the legislature to enact [the law.]”. Id.

B. The Language of the Statute

The language of HRS § 667-22(e)(5), which is the fundamental starting point for interpreting the statute, states: “The foreclosing mortgagee shall have the [foreclosure notice] served on . . . [DCCA], by filing the notice with the department when required[.]” (Emphases added.) The foregoing language plainly and unambiguously obligates a “foreclosing mortgagee” to serve a foreclosure notice on DCCA, but only “when required.” What must be determined then are: (1) whether a condominium association pursuing a nonjudicial foreclosure under Part II is a “foreclosing mortgagee,” and (2) when service of a foreclosure notice on DCCA is required.

1. Whether a Condominium Association Pursuing a Part II Foreclosure is a “Foreclosing Mortgagee”

A condominium association would not ordinarily be regarded as a “foreclosing mortgagee” if the words “foreclosing mortgagee” were construed, as HRS § 1-14 instructs, according to “their most known and usual signification” or their “general or popular use or meaning.” The word “mortgagee” is generally or popularly defined as “a person to whom property is mortgaged,” Webster's Universal College Dictionary 521 (2001), and “mortgage” is generally understood or known to be “a conveyance of an interest in property as security for the repayment of money borrowed.” Id. (Emphasis added.) The general or popular meaning of the word “foreclose” is “to deprive (a mortgagor) of the right to redeem a property, esp. after defaulting on mortgage payments[.]” id. at 314, and “mortgagor” is defined as “a person who mortgages property.” Id. at 521.

A condominium association does not *loan* money to the owners of units within a condominium¹², and unit owners do not convey an interest in their respective units as security for the repayment of money *borrowed* from a condominium association. A condominium association incurs expenses to operate a condominium and assesses the owners of the condominium units for their proportional share of the common expenses. HRS §§ 514A-15 (2006)¹³ and 514B-41 (2006)¹⁴. By statute, any unpaid sums assessed by a condominium

¹²Some HRS chapters refer to the individual units of a condominium as “apartments.” *See, e.g.*, HRS chapter 514A.

¹³HRS § 514A-15 (2006), which generally applies to condominiums created prior to July 1, 2006, provides, in relevant part, as follows:

§ 514A-15 Common profits and expenses. (a) The . . . common expenses shall be charged to, the apartment owners, including the developer, in proportion to the common interest appurtenant to their respective apartments; provided that in a mixed-use project containing apartments for both residential and commercial use, such charges and distributions may be apportioned in a fair and equitable manner as set forth in the declaration; provided further that all limited common elements costs and expenses, including but not limited to, maintenance, repair, replacement, additions and improvements shall be charged to the owner of the apartment to which the limited common element is appurtenant in an equitable manner as set forth in the declaration.

(b) An apartment owner, including the developer, shall become obligated for the payment of the share of the common expenses allocated to his [or her] apartment at the time the certificate of occupancy relating to his [or her] apartment is issued by the appropriate county agency; provided that a developer may assume all the actual common expenses in a residential project containing no mixed commercial and residential use, by stating in the abstract as required by section 514A-61 that the apartment owner shall not be obligated for the payment of his [or her] respective share of the common expenses until such time the developer files an amended abstract with the commission which shall provide, that after a date certain, the respective apartment owner shall thereafter be obligated to pay for his [or her] respective share of common expenses that is allocated to his [or her] apartment. . . .

¹⁴HRS § 514B-41 (2006) states, in relevant part, as follows:

[§514B-41] Common profits and expenses. (a) The . . . common expenses shall be charged to, the unit owners, including the developer, in proportion to the common interest appurtenant to their respective units, except as otherwise provided in the declaration or bylaws. In a mixed-use project containing units for both residential and nonresidential use, the charges and distributions may be apportioned in a fair and equitable manner as set forth in the declaration. Except as otherwise provided in subsection © or the declaration or bylaws, all limited common element costs and expenses, including but not limited to maintenance, repair, replacement, additions, and

association for a unit's proportional share of the common expenses constitute a lien against the unit that has priority over all other liens, except liens for taxes or assessments lawfully imposed by a governmental authority and sums unpaid on any mortgage recorded prior to the recordation of notice of a lien by the condominium association. HRS §§ 514A-90 (Supp. 2010)¹⁵ and 514B-146 (2006 & Supp. 2010)¹⁶.

improvements, shall be charged to the owner or owners of the unit or units to which the limited common element is appurtenant in an equitable manner as set forth in the declaration.

(b) A unit owner, including the developer, shall become obligated for the payment of the share of the common expenses allocated to the owner's unit at the time the certificate of occupancy relating to the owner's unit is issued by the appropriate county agency; provided that a developer may assume all the actual common expenses in a project by stating in the developer's public report required by section 514B-54 that the unit owner shall not be obligated for the payment of the owner's share of the common expenses until such time as the developer sends the owners written notice that, after a specified date, the unit owners shall be obligated to pay for the portion of common expenses that is allocated to their respective units. . . .

¹⁵HRS § 514A-90 (Supp. 2010), which generally applies only to condominiums created prior to July 1, 2006, provides, in relevant part, as follows:

§ 514A-90 Priority of lien. (a) All sums assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment constitute a lien on the apartment prior to all other liens, except:

- (1) Liens for taxes and assessments lawfully imposed by governmental authority against the apartment; and
- (2) All sums unpaid on any mortgage of record that was recorded prior to the recordation of notice of a lien by the association of apartment owners, and costs and expenses including attorneys' fees provided in such mortgages.

¹⁶HRS § 514B-146 (2006 & Supp. 2010), which generally applies only to condominiums created after July 1, 2006, provides, in relevant part, as follows:

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

- (1) Liens for taxes and assessments lawfully imposed by governmental authority against the unit; and
- (2) All sums unpaid on any mortgage of record that was recorded prior to the

Therefore, a condominium association's statutory lien securing unpaid assessments for common expenses would not be a "mortgage" under the "general or popular use or meaning" of the word "mortgage," and a condominium association seeking to foreclose on its statutory lien would not ordinarily be regarded as a "foreclosing mortgagee."

However, HRS § 667-22 is included in Part II of HRS chapter 667. Pursuant to HRS § 667-21(b), as amended by Act 48, specific definitions are provided for terms used in Part II that trump the "general or popular use or meaning" of the terms. In relevant part, HRS § 667-21(b) states:

(b) As used in this part:

....

"Foreclosing mortgagee" means the mortgagee that intends to conduct a power of sale foreclosure; provided that the mortgagee is a federally insured bank, a federally insured savings and loan association, a federally insured savings bank, a depository financial services loan company, a nondepository financial services loan company, a credit union insured by the National Credit Union Administration, a bank holding company, a foreign lender as defined in section 207-11, or an institutional investor as defined in section 454-1.

Unless the context clearly indicates otherwise, as used in this part, a "foreclosing mortgagee" shall encompass all of the following entities:

- (1) The foreclosing mortgagee;
- (2) Any person that has an ownership interest in the promissory note on the mortgage agreement or a security interest represented by the mortgage for the subject property;
- (3) Any mortgage servicer, who services the mortgage loan of the mortgagor; and
- (4) The agents, employees, trustees, and representatives of a lender, the foreclosing mortgagee, a mortgagee, and a mortgage servicer.

....

recording of a notice of a lien by the association, and costs and expenses including attorneys' fees provided in such mortgages.

“Mortgage” means a mortgage, security agreement, or other document under which property is mortgaged, encumbered, pledged, or otherwise rendered subject to a lien for the purpose of securing the payment of money or the performance of an obligation.

“Mortgage agreement” includes the mortgage, the note or debt document, or any document amending any of the foregoing.

“Mortgaged property” means the property that is subject to the lien of the mortgage.

“Mortgagee” means the current holder of record of the mortgagee's or the lender's interest under the mortgage, or the current mortgagee's or lender's duly authorized agent.

“Mortgagor” means the mortgagor or borrower named in the mortgage and, unless the context otherwise indicates, includes the current owner of record of the mortgaged property whose interest is subject to the mortgage.

“Nonjudicial foreclosure” means foreclosure under power of sale.

....

“Power of sale” or “power of sale foreclosure” means a nonjudicial foreclosure under this part when the mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.”

HRS § 667-21(b), as amended by Act 48 § 20, 2011 Haw. Sess. L. at 106-107.

Some of the foregoing definitions are circular because the term being defined is used to define the term being defined. For example, “[m]ortgage” is defined partly as “a mortgage . . . or other document under which property is mortgaged[.]” (Emphases added.) “Mortgagee” is defined as “the current holder of record of the mortgagee's . . . interest under the mortgage, or the current mortgagee's . . . duly authorized agent.” (Emphases added.) These definitions fail to adequately describe the essential attributes of the term being defined and are therefore confusing.

The definition of “[f]oreclosing mortgagee,” as amended by Act 48, is especially problematic because it is internally inconsistent and provides a double meaning for the term being defined. The first paragraph of the definition begins with a general statement that “[f]oreclosing mortgagee' means the mortgagee that intends to conduct a power of sale

foreclosure[,]” followed by a proviso that essentially limits “foreclosing mortgagees” to government-regulated entities that make or invest in loans:

provided that the mortgagee is a federally insured bank, a federally insured savings and loan association, a federally insured savings bank, a depository financial services loan company, a nondepository financial services loan company, a credit union insured by the National Credit Union Administration, a bank holding company, a foreign lender as defined in section 207-11, or an institutional investor as defined in section 454-1¹⁷.

Since a condominium association is not one of the entities listed, it is not a “foreclosing mortgagee” under the foregoing proviso.

However, the definition continues after the proviso with a second paragraph that lists entities that are “encompassed” as “foreclosing mortgagees”. Pursuant to the second paragraph of the definition, an entity listed in clauses (1) to (4) is “encompassed” as a “foreclosing mortgagee” “[u]nless the context indicates otherwise,” even though the entity does not qualify as a “foreclosing mortgagee” under the preceding proviso.

For example, pursuant to clause (2) of the second paragraph of the definition, “[a]ny person that has . . . a security interest represented by the mortgage for the subject property” is encompassed within the definition of a “foreclosing mortgagee.” HRS § 667-21(b) defines “mortgage” very broadly to include any “document under which property is . . . encumbered, pledged, or otherwise rendered subject to a lien for the purpose of securing the payment of money or the performance of an obligation.” Under this definition, a document subjecting a condominium unit to a condominium association's statutory lien securing the payment of or obligation to pay common expenses would qualify as a “mortgage” and a condominium association seeking to foreclose on its statutory lien would be a “foreclosing mortgagee” for purposes of HRS § 667-22(e)(5).

¹⁷See footnote 8.

Because the definitions in HRS § 667-21(b), when construed in tandem with HRS § 667-22(e)(5), create “doubt, doubleness of meaning, or indistinctiveness or uncertainty” as to what the term “foreclosing mortgagee” means for purposes of HRS § 667-22(e)(5), the term “foreclosing mortgagee is ambiguous. State v. Hitchcock, 123 Hawai‘i at 376, 235 P.3d at 372.

Where a statute is ambiguous, we would ordinarily resort to extrinsic aids to resolve the ambiguity. However, it is unnecessary to do so for purposes of this Petition because even if the term “foreclosing mortgagee” were construed to encompass a condominium association pursuing a nonjudicial foreclosure under Part II, a condominium association is not be required to file a foreclosure notice with DCCA pursuant to HRS § 667-22(e)(5).

2. *When Service of a Foreclosure Notice on DCCA is Required*

Prior to Act 48, subsection (c) of HRS § 667-22 required a “foreclosing mortgagee” to serve a default notice on the following individuals or entities:

- (1) The mortgagor and the borrower;
- (2) Any prior or junior creditors having a recorded lien on the mortgaged property before the recordation of the notice of default under section 667-23;
- (3) The state director of taxation;
- (4) The director of finance of the county where the mortgaged property is located;
and
- (5) Any other person entitled to receive notice under section 667-5.5.

Act 48 amended HRS § 667-22 by adding three new subsections. The new subsection (c) requires the foreclosure notice to include a copy of: the original mortgage agreement and any subsequent mortgage agreements and assignments; the promissory note signed by the mortgagor and any endorsements and allonges¹⁸ on the note; and other documents amending or altering the

¹⁸An “allonge” is “[a] piece of paper annexed to a bill of exchange or promissory note, on which to write endorsements for which there is no room on the instrument itself.” Black’s Law Dictionary 100 (Rev. 4th ed. 1968).

terms of the original mortgage agreement that were signed by the mortgagor and mortgagee or any successors or assigns of the mortgagor or mortgagee. The new subsection (d) requires the foreclosure notice to include “contact information for local approved housing counselors and approved budget and credit counselors.” And the new subsection (f) requires the foreclosure notice to “also include any amended notice that results from participation in the [MFDR] program under part V.”

Act 48 also amended HRS § 667-22 by renumbering the former subsection (c) as subsection (e) and adding to subsection (e) the requirement, contained in paragraph (5), that a foreclosing mortgagee serve the foreclosure notice on DCCA. However, paragraph (5) expressly provides that service on DCCA is accomplished “by filing the notice with [DCCA] when required.”

The requirement for filing a foreclosure notice with DCCA is found in HRS § 667-76, which is included in Part V. HRS § 667-76 states, in relevant part:

[§ 667-76] Mortgagee's filing of notice with department; filing fee. (a) Within three days after a mortgagee serves a foreclosure notice on an owner-occupant pursuant to section . . . 667-22, the mortgagee shall file the foreclosure notice with [DCCA] and pay a filing fee of \$250, which shall be deposited into the mortgage foreclosure dispute resolution special fund established under section 667-86.

(Emphases added.)

For the following reasons, the foregoing statute does not require a condominium association pursuing a nonjudicial foreclosure of a statutory lien to file a foreclosure notice with DCCA.

First, HRS § 667-76 only obligates a “mortgagee” to file a foreclosure notice with DCCA. HRS § 667-72, which provides definitions for terms that are used in Part V, provides that as used in Part V, “‘mortgagee’ has the same meaning as the term is defined in section 667-21.” HRS § 667-21(b) defines “[m]ortgagee” as “the current holder of the mortgagee's or

the lender's interest under the mortgage, or the current mortgagee's or lender's duly authorized agent.”

As previously discussed, defining “mortgagee” as “the current holder of the mortgagee's interest under the mortgage . . . or the current mortgagee's . . . duly authorized agent” is circular because the word being defined is used to define the word being defined. This part of the definition of “mortgagee” is confusing and may be disregarded because it does not explain what a “mortgagee” is. The remainder of the definition defines “mortgagee” for purposes of Part V as “the current holder of record of . . . the lender's interest under the mortgage . . . or the current . . . lender's duly authorized agent.” Since, as previously discussed, a condominium association is not a lender, it is not, for purposes of HRS § 667-76, a “mortgagee” when it forecloses on a statutory lien securing the payment of assessments for common expenses.

Second, the reason that a foreclosure notice must be filed with DCCA is not applicable to condominium associations. A mortgagee's filing of the foreclosure notice with DCCA triggers a duty on DCCA's part to mail a written notification to the mortgagor. HRS § 667-77 provides as follows:

[§667-77] Notification to mortgagor by department. Within ten days after the mortgagee's filing of a HRS notice of default and intention to foreclose with the department, the department shall mail a written notification by registered or certified mail to the mortgagor that a notice of default and intention to foreclose has been filed with the department. The notification shall inform the mortgagor of an owner-occupant's right to elect to participate in the foreclosure dispute resolution program and shall include:

- (1) Information about the [MFDR] program;
- (2) A form for an owner-occupant to elect or to waive participation in the [MFDR] program pursuant to this part that shall contain instructions for the completion and return of the form to the department and the department's mailing address;
- (3) A statement that the mortgagor electing to participate in the [MFDR] program shall provide a certification under penalty of perjury to the department that the mortgagor is an owner-occupant of the subject property, including a description of acceptable supporting documentation as required by section 667-78(a)(2);

- (4) A statement that the owner-occupant shall elect to participate in the [MFDR] program pursuant to this part no later than thirty days after the department's mailing of the notice or the owner-occupant shall be deemed to have waived the option to participate in the [MFDR] program;
- (5) A description of the information required under section 667-80(c)(2) that the owner-occupant shall provide to the mortgagee and the neutral assigned to the dispute resolution;
- (6) A statement that the owner-occupant shall consult with an approved housing counselor or approved budget and credit counselor at least thirty days prior to the first day of a scheduled dispute resolution session;
- (7) Contact information for all local approved housing counselors;
- (8) Contact information for all local approved budget and credit counselors; and
- (9) Contact information for the department.

The notification shall be mailed to the subject property address and any other addresses for the mortgagor as provided in the mortgagee's notice of dispute resolution under [section] 667-75 and the foreclosure notice under section 667-5 or 667-22(a).

(Emphases added.)

DCCA's written notification thus lets the mortgagor know that a foreclosure notice has been filed with DCCA and provides information about an owner-occupant's right to elect to participate in the MFDR program, the features of the program, and how an owner-occupant may participate in the program. If an owner-occupant elects to participate in the MFDR program, he or she must return to DCCA: a completed program-election form; certification, under penalty of perjury, that he or she is an owner-occupant, accompanied by documents that support his or her owner-occupancy; and a program fee of \$300. HRS § 667-78. Since condominium associations are expressly excluded from participation in the MFDR program, however, there is no reason for DCCA to mail a written notification about the MFDR program to owners of condominium units whose units are being nonjudicially foreclosed by a condominium association.

Third, the history of Senate Bill No. 651, which was signed into law as Act 48, indicates that the Legislature understood that condominium associations pursuing a nonjudicial

foreclosure of a statutory lien must be treated differently from lenders pursuing a nonjudicial foreclosure of a mortgage.

The Senate Committee on Commerce and Consumer Protection, to which the original bill was referred, reported that it had amended the original bill “by deleting its contents and replacing them with provisions to: . . . [s]pecify that the dispute resolution process established by this measure shall be mandatory for all judicial foreclosures and nonjudicial power of sale foreclosures of residential property occupied as the mortgagor’s primary residence excluding actions by an association to collect on a lien owed to the association[.]” Senate Stand. Com. Rep. No. 79 at 3.

In addition, the Conference Committee reporting on the bill commented specifically on why condominium associations were exempted from the MFDR program:

This measure incorporates the recommendations of the Mortgage Foreclosure Task Force convened pursuant to Act 162, Session Laws of Hawaii 2010. Your Committee on Conference notes that the Task Force is directed by its authorizing statute to continue its work throughout the coming year and plans to make recommendations to the Legislature prior to the 2012 Regular Session for further reform of the foreclosure system, particularly in regards to the nonjudicial foreclosure process and its use by condominium associations for collection of common area maintenance fee assessments. The moratorium on nonjudicial foreclosures under part I of chapter 667, Hawaii Revised Statutes, is included in this measure in anticipation of task force recommendations that may include significant changes to the current foreclosure process.

Your Committee on Conference is mindful that the ability of condominium associations to foreclose on liens for past-due assessments for common expenses is affected by this measure. Recognizing that non-payment of common expenses by any one unit in a condominium, planned community, or cooperative housing project results in an increased burden on other homeowners within the association, the Legislature has preserved the right of associations to foreclose on liens under part II of chapter 667, Hawaii Revised Statutes, and has exempted lien foreclosures by an association from dispute resolution and judicial conversion requirements. The special situation of association lien foreclosures and the interests of all association members in timely collection of assessments for common expenses merits special consideration by the Task Force in its recommendations to the Legislature.

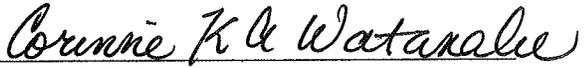
Conference Committee Rep. No. 133 at 3-4.

In summary, because condominium associations are exempt from the MFDR program and are not “mortgagees,” as that term is defined in Part V, they are not required to file a foreclosure notice with DCCA.

RECOMMENDED DECLARATORY RULING

For the reasons discussed above, the undersigned special hearings officer recommends that the Director declare that HRS § 667-22(e)(5) is not applicable to condominium associations pursuing a nonjudicial foreclosure pursuant to Part II of HRS chapter 667.

DATED: Honolulu, Hawaii, January 20, 2012.


CORINNE K. A. WATANABE
Special Hearings Officer
Department of Commerce and Consumer Affairs