
A BILL FOR AN ACT

RELATING TO CONDOMINIUMS.

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

1 SECTION 1. The legislature finds that "Hawaii was the
2 first state to enact statutory provisions enabling the creation
3 of condominiums." State Savings & Loan Association v. Kauaian
4 Development Company, 50 Haw. 540, 546, 445 P.2d 109, 115 n.8
5 (1968). Brought into being by the legislature through Act 180,
6 Session Laws of Hawaii 1961, condominiums are "creature[s] of
7 statute," State Savings & Loan Association, 50 Haw. at 546, 445
8 P.2d at 115, which are governed by *statutes*, as well as their
9 governing documents.

10 The legislature finds that condominiums provide a valuable
11 housing resource in Hawaii, especially with limited space
12 available for new development. The structure of condominium
13 ownership requires each owner to share in the total cost of
14 maintaining common areas such as building exteriors,
15 landscaping, pool, and recreation rooms, in addition to paying
16 insurance premiums. All owners pay for such maintenance through
17 fees or dues. The legislature further finds that it is crucial
18 that condominium associations be able to secure timely payment



1 of dues to provide services to all residents of a condominium
2 community.

3 In 1999, the legislature noted "that more frequently
4 associations of apartment owners are having to increase
5 maintenance fee assessments due to increasing delinquencies and
6 related enforcement expenses. This places an unfair burden on
7 those non-delinquent apartment owners who must bear an unfair
8 share of common expenses" Moreover, lengthy delays in
9 the judicial foreclosure process exacerbated the financial
10 burden on association owners. The legislature determined that
11 associations needed a more efficient alternative, such as power
12 of sale foreclosures, to provide a remedy for recurring
13 delinquencies.

14 Additionally, the legislature finds that condominium
15 associations, since 1999, have been authorized to conduct
16 nonjudicial foreclosures regardless of the presence or the
17 absence of power of sale language in an association's governing
18 documents. Beginning in 1998 with the passage of Act 122,
19 Session Laws of Hawaii 1998, and codified in section 667-40,
20 Hawaii Revised Statutes, condominium associations were
21 authorized to conduct nonjudicial foreclosures if a "law or



1 written document contains, authorizes, permits, or provides for
2 a power of sale, a power of sale foreclosure, a power of sale
3 remedy, or a nonjudicial foreclosure." However, in 1999, the
4 legislature passed Act 236, Session Laws of Hawaii 1999,
5 "[c]larify[ing] that associations of apartment owners may
6 enforce liens for unpaid common expenses by non-judicial power
7 of sale foreclosure procedures, as an alternative to legal
8 action" by:

- 9 (1) Specifying that condominium associations may foreclose
10 liens by nonjudicial or power of sale foreclosure
11 within the statute governing the priority of a
12 condominium association lien (section 514A-90, Hawaii
13 Revised Statutes (repealed January 1, 2019)); and
14 (2) Incorporating into the bylaws of all condominium
15 associations a provision authorizing condominium
16 associations to enforce liens by nonjudicial or power
17 of sale foreclosure pursuant to chapter 667, Hawaii
18 Revised Statutes (section 514A-82, Hawaii Revised
19 Statutes (repealed January 1, 2019)).

20 Thus, Act 236, Session Laws of Hawaii 1999, provided a statutory
21 grant of power and an incorporation into written documents



1 authorizing condominium associations to utilize nonjudicial
2 foreclosure under sections 667-5 (repealed June 28, 2012) and
3 667-40, Hawaii Revised Statutes, to enforce their liens.

4 The legislature also finds that this intent was not
5 abrogated by the recodification of chapter 514A, Hawaii Revised
6 Statutes. First, through Act 164, Session Laws of Hawaii 2004,
7 the language of section 514A-90, Hawaii Revised Statutes, was
8 incorporated with limited amendments while retaining the
9 authorization that condominium associations may foreclose liens
10 by nonjudicial or power of sale foreclosure. Second, while the
11 new statute governing bylaws no longer contained a provision
12 authorizing condominium associations to enforce liens by
13 nonjudicial or power of sale foreclosure, it was not removed out
14 of an intention to revoke this authority from condominium
15 associations but rather out of a desire to enhance the clarity
16 of the condominium law. As stated in the *Final Report to the*
17 *Legislature: Recodification of Chapter 514A, Hawaii Revised*
18 *Statutes (Condominium Property Regimes)*, the "statutory
19 requirements for condominium governing documents should be
20 minimized while incorporating certain provisions . . . in more
21 appropriate statutory sections."



1 Further, the legislature finds that the intent was not
2 abrogated by the creation of the nonjudicial foreclosure process
3 specifically for condominium associations, codified as part VI
4 of chapter 667, Hawaii Revised Statutes, through Act 182,
5 Session Laws of Hawaii 2012. This is evidenced by the lack of a
6 provision constricting its application similar to the language
7 in section 667-40, Hawaii Revised Statutes.

8 Since the enactment of part VI of chapter 667, Hawaii
9 Revised Statutes, associations have conducted nonjudicial
10 foreclosures as part of their efforts to collect delinquencies
11 and sustain their financial operations. Associations have done
12 so subject to the restrictions on nonjudicial foreclosures and
13 other collection options imposed by the legislature, which
14 include:

- 15 (1) Prohibiting the use of nonjudicial foreclosure to
16 collect fines, penalties, legal fees, or late fees;
- 17 (2) Requiring associations to give an owner sixty days to
18 cure a default before proceeding with the nonjudicial
19 foreclosure and to accept reasonable payment plans of
20 up to twelve months; and



1 (3) Requiring associations to provide owners with contact
2 information for approved housing counselors and
3 approved budget and credit counselors.

4 However, the intermediate court of appeals in Sakal v.
5 Association of Apartment Owners of Hawaiian Monarch, 143 Haw.
6 219, 426 P.3d 443 (2018), held that the legislature intended
7 that associations can only conduct nonjudicial foreclosures if
8 they have specific authority to conduct nonjudicial foreclosures
9 in their declaration or bylaws or in an agreement with the owner
10 being foreclosed upon.

11 The legislative history indicates this was not the intent
12 of the legislature in 1999, nor in legislatures that have made
13 subsequent amendments. Therefore, this Act confirms the
14 legislative intent that condominium associations should be able
15 to use nonjudicial foreclosure to collect delinquencies
16 regardless of the presence or absence of power of sale language
17 in an association's governing documents.

18 This Act also provides an additional consumer protection by
19 requiring the foreclosing association to offer mediation with
20 any notice of default and intention to foreclose and the
21 procedures when mediation is chosen by the consumer.



1 SECTION 2. Chapter 514B, Hawaii Revised Statutes, is
2 amended by adding a new section to be appropriately designated
3 and to read as follows:

4 "§514B- Association fiscal matters; supplemental
5 nonjudicial foreclosure notices; restrictions on power of sale.

6 (a) Any notice of default and intention to foreclose given by
7 an association under section 667-92(a) shall, in addition to the
8 requirements of that section, also include a statement that the
9 unit owner may request mediation by delivering a written request
10 for mediation to the association by certified mail, return
11 receipt requested, or hand delivery within thirty days after
12 service of a notice of default and intention to foreclose on the
13 unit owner.

14 If the association does not receive a request for mediation
15 within the thirty-day period, the association may proceed with
16 nonjudicial or power of sale foreclosure, subject to all
17 applicable provisions of this chapter and chapter 667. If the
18 association receives a request for mediation, as set forth in
19 this subsection, from a unit owner within thirty days after
20 service of a notice of default and intention to foreclose upon
21 the unit owner, the association shall agree to mediate and shall



1 be prohibited from proceeding with nonjudicial or power of sale
2 foreclosure until the association has participated in the
3 mediation or the time period for completion of the mediation has
4 elapsed. The mediation shall be completed within sixty days of
5 the date upon which the unit owner delivers a request for
6 mediation upon the association; provided that if the mediation
7 is not commenced or completed within sixty days or the parties
8 are unable to resolve the dispute by mediation, the association
9 may proceed with nonjudicial or power of sale foreclosure,
10 subject to all applicable provisions of this chapter and chapter
11 667.

12 (b) In addition to the wording required by section
13 667-92(b), any notice of default and intention to foreclose
14 given by an association under section 667-92(a) shall also
15 contain wording substantially similar to the following in all
16 capital letters and printed in not less than fourteen-point
17 font:

18 "THIS NOTICE PERTAINS TO AMOUNTS DUE AND OWING TO THE
19 ASSOCIATION FOR WHICH THE ASSOCIATION HAS A STATUTORY OR
20 RECORDED LIEN. THIS NOTICE DOES NOT PERTAIN TO OBLIGATIONS
21 OWED BY YOU TO OTHER CREDITORS, INCLUDING ANY OUTSTANDING



1 MORTGAGE DEBT. YOU SHOULD CONSULT YOUR OTHER CREDITORS,
2 INCLUDING YOUR MORTGAGEES, IF ANY, AS TO THE EFFECT THE
3 FORECLOSURE OF THE ASSOCIATION'S LIEN WILL HAVE ON YOUR
4 OTHER OUTSTANDING DEBTS."

5 (c) The association's power of sale provided in section
6 514B-146(a) may not be exercised against:

7 (1) Any lien that arises solely from fines, penalties,
8 legal fees, or late fees, and the foreclosure of any
9 such lien shall be filed in court pursuant to part IA
10 of chapter 667;

11 (2) Any unit owned by a person who is on military
12 deployment outside of the State of Hawaii as a result
13 of active duty military status with any branch of the
14 United States military. The foreclosure of any such
15 lien shall be filed in court pursuant to part IA of
16 chapter 667, this subsection shall not apply if the
17 lien of the association has been outstanding for a
18 period of one year or longer; or

19 (3) Any unit while the nonjudicial or power of sale
20 foreclosure has been stayed pursuant to section
21 667-92(c)."



1 SECTION 3. Section 514B-146, Hawaii Revised Statutes, is
2 amended by amending subsection (a) to read as follows:

3 "(a) All sums assessed by the association but unpaid for
4 the share of the common expenses chargeable to any unit shall
5 constitute a lien on the unit with priority over all other
6 liens, except:

7 (1) Liens for real property taxes and assessments lawfully
8 imposed by governmental authority against the unit;
9 and

10 (2) Except as provided in subsection (j), all sums unpaid
11 on any mortgage of record that was recorded prior to
12 the recordation of a notice of a lien by the
13 association, and costs and expenses including
14 attorneys' fees provided in such mortgages;
15 provided that a lien recorded by an association for unpaid
16 assessments shall expire six years from the date of recordation
17 unless proceedings to enforce the lien are instituted prior to
18 the expiration of the lien; provided further that the expiration
19 of a recorded lien shall in no way affect the association's
20 automatic lien that arises pursuant to this subsection or the
21 declaration or bylaws. Any proceedings to enforce an



1 association's lien for any assessment shall be instituted within
2 six years after the assessment became due; provided that if the
3 owner of a unit subject to a lien of the association files a
4 petition for relief under the United States Bankruptcy Code (11
5 U.S.C. §101 et seq.), the period of time for instituting
6 proceedings to enforce the association's lien shall be tolled
7 until thirty days after the automatic stay of proceedings under
8 section 362 of the United States Bankruptcy Code (11 U.S.C.
9 §362) is lifted.

10 The lien of the association may be foreclosed by action or
11 by nonjudicial or power of sale foreclosure [~~procedures set~~
12 ~~forth in chapter 667~~], regardless of the presence or absence of
13 power of sale language in an association's governing documents,
14 by the managing agent or board, acting on behalf of the
15 association and in the name of the association; provided that no
16 association may exercise the nonjudicial or power of sale
17 remedies provided in chapter 667 to foreclose a lien against any
18 unit that arises solely from fines, penalties, legal fees, or
19 late fees, and the foreclosure of any such lien shall be filed
20 in court pursuant to part IA of chapter 667.



1 In any such foreclosure, the unit owner shall be required
2 to pay a reasonable rental for the unit, if so provided in the
3 bylaws or the law, and the plaintiff in the foreclosure shall be
4 entitled to the appointment of a receiver to collect the rental
5 owed by the unit owner or any tenant of the unit. If the
6 association is the plaintiff, it may request that its managing
7 agent be appointed as receiver to collect the rent from the
8 tenant. The managing agent or board, acting on behalf of the
9 association and in the name of the association, unless
10 prohibited by the declaration, may bid on the unit at
11 foreclosure sale, and acquire and hold, lease, mortgage, and
12 convey the unit. Action to recover a money judgment for unpaid
13 common expenses shall be maintainable without foreclosing or
14 waiving the lien securing the unpaid common expenses owed."

15 SECTION 4. Section 667-1, Hawaii Revised Statutes, is
16 amended by amending the definition of "power of sale" to read as
17 follows:

18 "Power of sale" or "power of sale foreclosure" means a
19 nonjudicial foreclosure when [the]:

20 (1) The mortgage contains, authorizes, permits, or
21 provides for a power of sale, a power of sale



1 foreclosure, a power of sale remedy, or a nonjudicial
2 foreclosure [-]; or

3 (2) For the purposes of part VI, an association enforces
4 its claim of an association lien, regardless of
5 whether the association documents provide for a power
6 of sale, a power of sale foreclosure, a power of sale
7 remedy, or a nonjudicial foreclosure."

8 SECTION 5. Sections 3 and 4 of this Act shall be applied
9 retroactively to any case, action, proceeding, or claim arising
10 out of a nonjudicial foreclosure under section 667-5 (repealed
11 June 28, 2012), Hawaii Revised Statutes, and parts II and VI of
12 chapter 667, Hawaii Revised Statutes, that arose before the
13 effective date of this Act and in which a final non-appealable
14 judgment has not yet been entered.

15 SECTION 6. This Act shall not be applied so as to impair
16 any contract existing as of the effective date of this Act in a
17 manner violative of either the Hawaii State Constitution or
18 Article I, section 10, of the United States Constitution.

19 SECTION 7. If any provision of this Act, or the
20 application thereof to any person or circumstance, is held
21 invalid, the invalidity does not affect other provisions or



1 applications of the Act that can be given effect without the
2 invalid provision or application, and to this end the provisions
3 of this Act are severable.

4 SECTION 8. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 9. This Act shall take effect upon its approval;
7 provided that the amendments made to section 514B-146(a), Hawaii
8 Revised Statutes, by section 3 of this Act shall not be repealed
9 when that section is reenacted on June 30, 2020, pursuant to
10 section 6 of Act 195, Session Laws of Hawaii 2018.



Report Title:

Associations; Nonjudicial Foreclosure; Power of Sale

Description:

Requires associations to offer mediation with a notice of default and intention to foreclose. Clarifies that the explicit grant of power of sale to associations is not required for the purposes of enforcing association liens under the association alternate power of sale foreclosure process. Applies retroactively to pending matters that arose prior to the effective date. (CD1)

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

