
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 Act 282, Session
2 Laws of Hawaii 2019 (Act 282), was passed to express the
3 legislative intent that condominium associations have the
4 authority to use a nonjudicial foreclosure process to collect
5 delinquencies regardless of the presence or absence of power of
6 sale language in an association's governing documents. This was
7 in response to Sakal v. Association of Apartment Owners of
8 Hawaiian Monarch, 143 Haw. 219, 426 P.3d 443 (Ct. App. 2018), an
9 intermediate court of appeals case that held the legislature
10 intended that a condominium association must have specific
11 authority in its declaration, bylaws, or in an agreement with
12 the owner, to conduct a nonjudicial foreclosure.

13 The legislature further finds that recent court decisions
14 have created confusion about the right of condominiums to use
15 the nonjudicial foreclosure process. Specifically, the Hawaii
16 Supreme Court held in Malabe v. Ass'n of Apartment Owners of
17 Exec. Ctr., 147 Haw. 330, 465 P.3d 777 (2020), as corrected



1 (June 18, 2020), that in order for a condominium association to
2 utilize statutory nonjudicial power of sale foreclosure
3 procedures, a power of sale in its favor must have existed in
4 the association's bylaws or another enforceable agreement with
5 unit owners.

6 The legislature further finds that the Malabe court misread
7 the intent of the legislature in construing the legislative
8 intent of Act 282 in the narrow manner as described in its
9 holding. The legislature notes that Act 282 reflected the
10 legislature's longstanding position that condominium law enables
11 an association to exercise a nonjudicial foreclosure remedy. As
12 recent court decisions have shown an unwillingness to honor
13 longstanding legislative intent, this Act is necessary to clear
14 up and confirm the intent of the legislature regarding the right
15 of condominium associations to conduct nonjudicial
16 foreclosures -- namely, that a specific grant of power of sale
17 in an condominium association's governing documents is not
18 required for the purposes of enforcement association liens
19 through the nonjudicial foreclosure process.

20 The purpose of this Act is to expressly reiterate and
21 declare that the intent of the legislature is that condominium



1 associations have existing authority to use a nonjudicial
2 foreclosure process to enforce association liens and to also set
3 out specific authority in the law to:

4 (1) Specify a procedure for condominium associations to
5 incorporate power of sale language into their
6 governing documents; and

7 (2) Specify that condominium associations may foreclose on
8 liens if power of sale language is contained within an
9 association's governing documents or within some other
10 agreement with the owner of the unit subject to
11 foreclosure.

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

15 "§514B- Incorporation of power of sale language into
16 governing instruments; procedure; effect. (a) Notwithstanding
17 any other provision of this chapter, statute, or governing
18 document, an association may vote to adopt power of sale
19 language into the declaration or bylaws of the association
20 pursuant to this section.



1 (b) Power of sale language in substantially the following
2 form may be adopted by the board, after giving notice and an
3 opportunity to be heard to the unit owners:

4 "The governing documents of the association shall be deemed
5 to include a power of sale, sufficient in form and
6 substance to enable the foreclosure of the lien of the
7 association. Exercise of the power of sale shall be in
8 compliance with and pursuant to the requirements of
9 chapters 514B and 667 of the Hawaii Revised Statutes."

10 (c) Not less than fourteen days in advance of a board
11 meeting at which adoption of power of sale language will be
12 considered, notice to the owners shall be:

13 (1) Hand-delivered;

14 (2) Sent prepaid by United States mail to the mailing
15 address of each unit or to any other mailing address
16 designated in writing by the unit owner; or

17 (3) At the option of the unit owner, expressed in writing,
18 by electronic mail to the electronic mailing address
19 designated in writing by the unit owner.

20 (d) The notice under this section shall include the text
21 of the proposed power of sale language and inform the owners of



1 the opportunity to be heard on the proposal. The notice shall
2 also include the following language:

3 "An owner may preserve a potential defense that the
4 exercise of a power of sale included in the declaration or
5 bylaws of the association by board action constitutes an
6 impairment of contract, by:

7 (1) Delivering a written objection to the association by
8 certified or registered mail, return receipt
9 requested, within sixty days after a meeting at which
10 the board adopts a proposal to include this language;
11 and

12 (2) Producing, to the association, a return receipt
13 demonstrating delivery within thirty days after
14 service of a notice of default and intention to
15 foreclose upon the owner."

16 The notice shall include an address where the written
17 objection may be delivered.

18 (e) The board may vote to adopt the proposed power of sale
19 language into the declaration or bylaws of the association at
20 any board meeting for which notice has been given in compliance



1 with this section; provided that owners shall first be given an
2 opportunity to be heard.

3 (f) If the board adopts the proposed power of sale
4 language into the declaration or bylaws of the association, then
5 the power of sale language, designated as an amendment to the
6 association's declaration or bylaws, may be recorded.

7 (g) Power of sale language recorded pursuant to subsection
8 (f) shall be deemed to be effective upon recording.

9 (h) The procedures in this section shall be the exclusive
10 procedures for the incorporation of power of sale language into
11 the declaration or bylaws of an association after _____,
12 2021; provided that the power of sale language incorporated into
13 the declaration or bylaws of an association, or other agreement
14 with an owner, in accordance with law prior to that date shall
15 remain valid."

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

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



1 (1) Liens for real property taxes and assessments lawfully
2 imposed by governmental authority against the unit;
3 and
4 (2) Except as provided in subsection (j), all sums unpaid
5 on any mortgage of record that was recorded prior to
6 the recordation of a notice of a lien by the
7 association, and costs and expenses including
8 attorneys' fees provided in such mortgages;
9 provided that a lien recorded by an association for unpaid
10 assessments shall expire six years from the date of recordation
11 unless proceedings to enforce the lien are instituted prior to
12 the expiration of the lien; provided further that the expiration
13 of a recorded lien shall in no way affect the association's
14 automatic lien that arises pursuant to this subsection or the
15 declaration or bylaws. Any proceedings to enforce an
16 association's lien for any assessment shall be instituted within
17 six years after the assessment became due; provided that if the
18 owner of a unit subject to a lien of the association files a
19 petition for relief under the United States Bankruptcy
20 Code (11 U.S.C. §101 et seq.), the period of time for
21 instituting proceedings to enforce the association's lien shall



1 be tolled until thirty days after the automatic stay of
2 proceedings under section 362 of the United States Bankruptcy
3 Code (11 U.S.C. §362) is lifted.

4 The lien of the association may be foreclosed by action or
5 by nonjudicial or power of sale foreclosure [~~7~~, ~~regardless of the~~
6 ~~presence or absence of~~] if power of sale language [~~in~~] is
7 contained within an association's governing documents [~~7~~] or
8 within another agreement with the owner of the unit subject to
9 foreclosure, by the managing agent or board, acting on behalf of
10 the association and in the name of the association; provided that
11 no association may exercise the nonjudicial or power of sale
12 remedies provided in chapter 667 to foreclose a lien against any
13 unit that arises solely from fines, penalties, legal fees, or
14 late fees, and the foreclosure of any such lien shall be filed
15 in court pursuant to part IA of chapter 667.

16 In any such foreclosure, the unit owner shall be required
17 to pay a reasonable rental for the unit, if so provided in the
18 bylaws or the law, and the plaintiff in the foreclosure shall be
19 entitled to the appointment of a receiver to collect the rental
20 owed by the unit owner or any tenant of the unit. If the
21 association is the plaintiff, it may request that its managing



1 agent be appointed as receiver to collect the rent from the
 2 tenant. The managing agent or board, acting on behalf of the
 3 association and in the name of the association, unless
 4 prohibited by the declaration, may bid on the unit at
 5 foreclosure sale, and acquire and hold, lease, mortgage, and
 6 convey the unit. Action to recover a money judgment for unpaid
 7 common expenses shall be maintainable without foreclosing or
 8 waiving the lien securing the unpaid common expenses owed."

9 SECTION 4. Section 667-1, Hawaii Revised Statutes, is
 10 amended by amending the definition of "power of sale" or "power
 11 of sale foreclosure" to read as follows:

12 ""Power of sale" or "power of sale foreclosure" means a
 13 nonjudicial foreclosure when:

14 (1) The mortgage contains, authorizes, permits, or
 15 provides for a power of sale, a power of sale
 16 foreclosure, a power of sale remedy, or a nonjudicial
 17 foreclosure; or

18 (2) For the purposes of part VI, an association enforces
 19 its claim of an association lien [~~7, regardless of~~
 20 ~~whether the association documents provide for]~~
 21 pursuant to a power of sale [~~7, a power of sale~~



1 ~~foreclosure, a power of sale remedy, or a nonjudicial~~
2 ~~foreclosure.]~~ provision that is authorized by statute,
3 contained in the association documents, or contained
4 in another enforceable agreement with the unit owner."

5 SECTION 5. This Act shall not be applied so as to impair
6 any contract existing as of its effective date in a manner
7 violative of either the Hawaii State Constitution or Article I,
8 section 10, of the United States Constitution.

9 SECTION 6. If any provision of this Act, or the
10 application thereof to any person or circumstance, is held
11 invalid, the invalidity does not affect other provisions or
12 applications of the Act that can be given effect without the
13 invalid provision or application, and to this end the provisions
14 of this Act are severable.

15 SECTION 7. Statutory material to be repealed is bracketed
16 and stricken. New statutory material is underscored.

17 SECTION 8. This Act shall take effect on January 1, 2050.



S.B. NO. 191
S.D. 2
H.D. 1

Report Title:

Condominium Associations; Nonjudicial Foreclosure; Power of Sale

Description:

Specifies a procedure for condominium associations to incorporate power of sale language into their governing documents. Clarifies that liens may be foreclosed upon if the power of sale language is contained within an association's governing documents or within some other agreement with the owner of the unit subject to foreclosure. Effective 1/1/2050.
(HD1)

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

