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# A BILL FOR AN ACT

RELATING TO FORECLOSURES.

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

1           SECTION 1. 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; assessments  
5 following mortgage foreclosure. (a) After completion of the  
6 foreclosure of a mortgage of record that was recorded prior to  
7 the recordation of a notice of a lien by the association, any  
8 unpaid share of common expenses or assessments attributable to  
9 the foreclosed unit shall be deemed to be a common expense  
10 collectible from all the unit owners, including the acquirer and  
11 the successors and assigns of the acquirer; provided that:

12           (1) Any purchaser of the unit at auction, other than the  
13           mortgagee, shall be liable to the association for  
14           unpaid regular monthly common assessments that were  
15           assessed during the six months immediately preceding  
16           the completion of the mortgage foreclosure; and

17           (2) If the mortgagee is the purchaser at auction, then any  
18           successor or assign of the mortgagee shall be liable



1           to the association for unpaid regular monthly common  
2           assessments that were assessed during the six months  
3           immediately preceding the completion of the mortgage  
4           foreclosure. The mortgagee shall not be liable for  
5           any amount assessed prior to its acquisition of title.

6           (b) The cost of a release of any lien imposed by this  
7           section shall be paid by the party requesting the release.

8           (c) After completion of a mortgage foreclosure, any  
9           purchaser, including the mortgagee, shall be deemed to acquire  
10           title and to be obligated to pay the share of common expenses  
11           and assessments attributable to the unit beginning:

12           (1) Thirty-six days after the order confirming the sale to  
13           the purchaser has been filed with the court;

14           (2) Sixty days after the hearing at which the court grants  
15           the motion to confirm the sale to the purchaser;

16           (3) Thirty days after the public sale in a nonjudicial  
17           power of sale foreclosure pursuant to section 667-5;

18           or

19           (4) Upon the recordation of the affidavit of sale  
20           described in section 514B-146(c)(3),

21           whichever occurs first; provided that the mortgagee of record or  
22           other purchaser of the unit shall not be deemed to acquire title



1 under paragraph (1), (2), or (3), if transfer of title is  
2 delayed past the time frame specified in paragraphs (1), (2), or  
3 (3), when a person who appears at the hearing on the motion or a  
4 party to the foreclosure action requests reconsideration of the  
5 motion or order to confirm sale, objects to the form of the  
6 proposed order to confirm sale, appeals the decision of the  
7 court granting the motion to confirm sale, or the debtor or  
8 mortgagor declares bankruptcy or is involuntarily placed into  
9 bankruptcy. In any such case, the mortgagee of record or other  
10 purchaser of the unit shall be deemed to acquire title upon  
11 recordation of the instrument of conveyance.

12 As used in this section:

13 "Completion" means:

- 14 (1) In a nonjudicial power of sale foreclosure, when the  
15 affadavit required under section 667-5 is filed; and  
16 (2) In a judicial foreclosure, when a purchaser is deemed  
17 to acquire title pursuant to subsection (c).

18 "Regular monthly common assessments" shall not include:

- 19 (1) Any special assessment, except for a special  
20 assessment imposed on all units as part of a budget  
21 adopted pursuant to section 514B-148;  
22 (2) Late charges, fines, or penalties;



- 1        (3) Interest assessed by the association;
- 2        (4) Any lien arising out of the assessment; or
- 3        (5) Any fees or costs related to the collection or
- 4        enforcement of the assessment, including attorneys'
- 5        fees and court costs."

6        SECTION 2. Section 514B-146, Hawaii Revised Statutes, is  
7 amended to read as follows:

8        "**§514B-146 Association fiscal matters; lien for**  
9 **assessments~~[-]~~; foreclosure.** (a) All sums assessed by the  
10 association but unpaid for the share of the common expenses  
11 chargeable to any unit shall constitute a lien on the unit with  
12 priority over all other liens, except:

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

20 All costs and expenses including attorneys' fees and costs  
21 provided in section 514B-157 shall be secured by said lien. The  
22 lien of the association may be foreclosed by action or by



1 nonjudicial or power of sale foreclosure procedures set forth in  
2 [~~chapter 667,~~] this section by the managing agent or board,  
3 acting on behalf of the [~~association, in like manner as a~~  
4 ~~mortgage of real property.~~] association. In any such  
5 foreclosure, the unit owner shall be required to pay a  
6 reasonable rental for the unit, if so provided in the bylaws,  
7 and the plaintiff in the foreclosure shall be entitled to the  
8 appointment of a receiver to collect the rental owed. The  
9 managing agent or board, acting on behalf of the association,  
10 [~~unless prohibited by the declaration,~~] may bid on the unit at  
11 foreclosure sale, and acquire and hold, lease, mortgage, and  
12 convey the unit[~~,-~~], unless prohibited by the declaration.  
13 Action to recover a money judgment for unpaid common expenses  
14 shall be maintainable without foreclosing or waiving the lien  
15 securing the unpaid common expenses owed.

16 [~~(b) Except as provided in subsection (g), when the~~  
17 ~~mortgagee of a mortgage of record or other purchaser of a unit~~  
18 ~~obtains title to the unit as a result of foreclosure of the~~  
19 ~~mortgage, the acquirer of title and the acquirer's successors~~  
20 ~~and assigns shall not be liable for the share of the common~~  
21 ~~expenses or assessments by the association chargeable to the~~  
22 ~~unit which became due prior to the acquisition of title to the~~



1 ~~unit by the acquirer. The unpaid share of common expenses or~~  
2 ~~assessments shall be deemed to be common expenses collectible~~  
3 ~~from all of the unit owners, including the acquirer and the~~  
4 ~~acquirer's successors and assigns. The mortgagee of record or~~  
5 ~~other purchaser of the unit shall be deemed to acquire title and~~  
6 ~~shall be required to pay the unit's share of common expenses and~~  
7 ~~assessments beginning:~~

- 8       ~~(1) Thirty six days after the order confirming the sale to~~  
9           ~~the purchaser has been filed with the court;~~
- 10       ~~(2) Sixty days after the hearing at which the court grants~~  
11           ~~the motion to confirm the sale to the purchaser;~~
- 12       ~~(3) Thirty days after the public sale in a nonjudicial~~  
13           ~~power of sale foreclosure pursuant to section 667-5;~~  
14           ~~or~~
- 15       ~~(4) Upon the recording of the instrument of conveyance;~~  
16 ~~whichever occurs first; provided that the mortgagee of record or~~  
17 ~~other purchaser of the unit shall not be deemed to acquire title~~  
18 ~~under paragraph (1), (2), or (3), if transfer of title is~~  
19 ~~delayed past the thirty six days specified in paragraph (1), the~~  
20 ~~sixty days specified in paragraph (2), or the thirty days~~  
21 ~~specified in paragraph (3), when a person who appears at the~~  
22 ~~hearing on the motion or a party to the foreclosure action~~



1 ~~requests reconsideration of the motion or order to confirm sale,~~  
2 ~~objects to the form of the proposed order to confirm sale,~~  
3 ~~appeals the decision of the court to grant the motion to confirm~~  
4 ~~sale, or the debtor or mortgagor declares bankruptcy or is~~  
5 ~~involuntarily placed into bankruptcy. In any such case, the~~  
6 ~~mortgagee of record or other purchaser of the unit shall be~~  
7 ~~deemed to acquire title upon recordation of the instrument of~~  
8 ~~conveyance.~~

9 ~~(c) No unit owner shall withhold any assessment claimed by~~  
10 ~~the association. A unit owner who disputes the amount of an~~  
11 ~~assessment may request a written statement clearly indicating:~~

12 ~~(1) The amount of common expenses included in the~~  
13 ~~assessment, including the due date of each amount~~  
14 ~~claimed;~~

15 ~~(2) The amount of any penalty, late fee, lien filing fee,~~  
16 ~~and any other charge included in the assessment;~~

17 ~~(3) The amount of attorneys' fees and costs, if any,~~  
18 ~~included in the assessment;~~

19 ~~(4) That under Hawaii law, a unit owner has no right to~~  
20 ~~withhold assessments for any reason;~~

21 ~~(5) That a unit owner has a right to demand mediation or~~  
22 ~~arbitration to resolve disputes about the amount or~~



1 ~~validity of an association's assessment, provided the~~  
2 ~~unit owner immediately pays the assessment in full and~~  
3 ~~keeps assessments current; and~~

4 ~~(6) That payment in full of the assessment does not~~  
5 ~~prevent the owner from contesting the assessment or~~  
6 ~~receiving a refund of amounts not owed.~~

7 ~~Nothing in this section shall limit the rights of an owner to~~  
8 ~~the protection of all fair debt collection procedures mandated~~  
9 ~~under federal and state law.~~

10 ~~(d) A unit owner who pays an association the full amount~~  
11 ~~claimed by the association may file in small claims court or~~  
12 ~~require the association to mediate to resolve any disputes~~  
13 ~~concerning the amount or validity of the association's claim.~~

14 ~~If the unit owner and the association are unable to resolve the~~  
15 ~~dispute through mediation, either party may file for arbitration~~  
16 ~~under section 514B 162; provided that a unit owner may only file~~  
17 ~~for arbitration if all amounts claimed by the association are~~  
18 ~~paid in full on or before the date of filing. If the unit owner~~  
19 ~~fails to keep all association assessments current during the~~  
20 ~~arbitration, the association may ask the arbitrator to~~  
21 ~~temporarily suspend the arbitration proceedings. If the unit~~  
22 ~~owner pays all association assessments within thirty days of the~~





1 ~~date of suspension, the unit owner may ask the arbitrator to~~  
2 ~~recommence the arbitration proceedings. If the owner fails to~~  
3 ~~pay all association assessments by the end of the thirty day~~  
4 ~~period, the association may ask the arbitrator to dismiss the~~  
5 ~~arbitration proceedings. The unit owner shall be entitled to a~~  
6 ~~refund of any amounts paid to the association which are not~~  
7 ~~owed.~~

8 ~~(c) In conjunction with or as an alternative to~~  
9 ~~foreclosure proceedings under subsection (a), where a unit is~~  
10 ~~owner occupied, the association may authorize its managing agent~~  
11 ~~or board to, after sixty days' written notice to the unit owner~~  
12 ~~and to the unit's first mortgagee of the nonpayment of the~~  
13 ~~unit's share of the common expenses, terminate the delinquent~~  
14 ~~unit's access to the common elements and cease supplying a~~  
15 ~~delinquent unit with any and all services normally supplied or~~  
16 ~~paid for by the association. Any terminated services and~~  
17 ~~privileges shall be restored upon payment of all delinquent~~  
18 ~~assessments but need not be restored until payment in full is~~  
19 ~~received.~~

20 ~~(f) Before the board or managing agent may take the~~  
21 ~~actions permitted under subsection (e), the board shall adopt a~~  
22 ~~written policy providing for such actions and have the policy~~



1 ~~approved by a majority vote of the unit owners at an annual or~~  
2 ~~special meeting of the association or by the written consent of~~  
3 ~~a majority of the unit owners.~~

4 ~~(g) Subject to this subsection, and subsections (h) and~~  
5 ~~(i), the board may specially assess the amount of the unpaid~~  
6 ~~regular monthly common assessments for common expenses against a~~  
7 ~~person who, in a judicial or nonjudicial power of sale~~  
8 ~~foreclosure, purchases a delinquent unit; provided that:~~

9 ~~(1) A purchaser who holds a mortgage on a delinquent unit~~  
10 ~~that was recorded prior to the filing of a notice of~~  
11 ~~lien by the association and who acquires the~~  
12 ~~delinquent unit through a judicial or nonjudicial~~  
13 ~~foreclosure proceeding, including purchasing the~~  
14 ~~delinquent unit at a foreclosure auction, shall not be~~  
15 ~~obligated to make, nor be liable for, payment of the~~  
16 ~~special assessment as provided for under this~~  
17 ~~subsection; and~~

18 ~~(2) A person who subsequently purchases the delinquent~~  
19 ~~unit from the mortgagee referred to in paragraph (1)~~  
20 ~~shall be obligated to make, and shall be liable for,~~  
21 ~~payment of the special assessment provided for under~~  
22 ~~this subsection; and provided further that the~~



1 ~~mortgagee or subsequent purchaser may require the~~  
2 ~~association to provide at no charge a notice of the~~  
3 ~~association's intent to claim lien against the~~  
4 ~~delinquent unit for the amount of the special~~  
5 ~~assessment, prior to the subsequent purchaser's~~  
6 ~~acquisition of title to the delinquent unit. The~~  
7 ~~notice shall state the amount of the special~~  
8 ~~assessment, how that amount was calculated, and the~~  
9 ~~legal description of the unit.~~

10 ~~(h) The amount of the special assessment assessed under~~  
11 ~~subsection (g) shall not exceed the total amount of unpaid~~  
12 ~~regular monthly common assessments that were assessed during the~~  
13 ~~six months immediately preceding the completion of the judicial~~  
14 ~~or nonjudicial power of sale foreclosure. In no event shall the~~  
15 ~~amount of the special assessment exceed the sum of \$3,600.~~

16 ~~(i) For purposes of subsections (g) and (h), the following~~  
17 ~~definitions shall apply, unless the context requires otherwise:~~

18 ~~"Completion" means:~~

19 ~~(1) In a nonjudicial power of sale foreclosure, when the~~  
20 ~~affidavit required under section 667 5 is filed, and~~

21 ~~(2) In a judicial foreclosure, when a purchaser is deemed~~  
22 ~~to acquire title pursuant to subsection (b).~~



1       ~~"Regular monthly common assessments" does not include:~~  
2       ~~(1) Any other special assessment, except for a special~~  
3       ~~assessment imposed on all units as part of a budget~~  
4       ~~adopted pursuant to section 514B-148;~~  
5       ~~(2) Late charges, fines, or penalties;~~  
6       ~~(3) Interest assessed by the association;~~  
7       ~~(4) Any lien arising out of the assessment; or~~  
8       ~~(5) Any fees or costs related to the collection or~~  
9       ~~enforcement of the assessment, including attorneys'~~  
10       ~~fees and court costs.~~  
11       ~~(j) The cost of a release of any lien filed pursuant to~~  
12       ~~this section shall be paid by the party requesting the release.]~~  
13       (b) In any foreclosure action pursuant to this section:  
14       (1) The circuit court may assess the amount due to the  
15       association, without the intervention of a jury, and  
16       shall render judgment for the amount awarded and the  
17       foreclosure of the association's lien. Execution may  
18       be issued on the judgment, as ordered by the court;  
19       (2) All mortgage creditors whose names are or can be  
20       discovered by the association foreclosing its lien  
21       shall be made parties to the action; provided that the  
22       foreclosure of the association's lien shall not



1 extinguish priority liens as defined in subsection (a)  
2 of this section;

3 (3) Proceeds in excess of amounts secured by the  
4 association's lien, if any, shall be payable to  
5 mortgage creditors according to the priority of their  
6 liens, and not pro rata; and judgments of foreclosure  
7 shall operate to extinguish all liens on the same  
8 property except priority liens as defined in  
9 subsection (a) of this section. Proceeds in excess of  
10 the amounts secured by priority liens shall be payable  
11 to the unit owner or as otherwise determined by the  
12 court in accordance with principles of equity; and

13 (4) Any party may assert any legal or equitable defense to  
14 the foreclosure; provided that a dispute as to the  
15 amount due to the association shall not be allowed as  
16 a defense to the action but shall be subject to the  
17 remedies provided in section 514B-146.2.

18 (c) Non-judicial and power of sale foreclosure of the  
19 association's lien are both authorized in accordance with the  
20 following procedures; provided that non-judicial foreclosure of  
21 the association's lien is authorized whether or not a power of  
22 sale is stated in the association's declaration or bylaws; and



1 provided further that the procedures of this section shall  
2 control over any power of sale provisions in the declaration or  
3 bylaws of an association:

4 (1) The association shall be represented by an attorney  
5 who is both licensed and physically located in this  
6 State;

7 (2) The attorney shall give notice of the association's  
8 intention to foreclose its lien by:

9 (A) Mailing notice, by both first class mail and  
10 certified mail, return receipt requested, not  
11 less than twenty-one days before the day of sale,  
12 to:

13 (i) The unit owner, at the owner's address as  
14 shown in the records of the association and,  
15 if different, at the address of the unit  
16 being foreclosed;

17 (ii) All mortgage creditors whose names are or  
18 can be discovered by the association;

19 (iii) The director of taxation; and

20 (iv) The planned community association in which  
21 the unit is located, if any;



1           (B) Posting notice on the front door or other  
2           conspicuous location on the premises not less  
3           than twenty-one days before the day of sale; and  
4           (C) Publishing notice three times, once in each of  
5           three successive weeks, in a newspaper having  
6           general circulation in the county where the unit  
7           is located, the last publication to be not less  
8           than fourteen days before the day of sale;

9           and

10          (3) Within thirty days after the sale of the property, the  
11          attorney shall record an affidavit at the bureau of  
12          conveyances setting forth fully and particularly the  
13          association's acts consistent with this section. The  
14          affidavit shall include a copy of the notice of sale  
15          as an exhibit and may include other evidence of  
16          compliance with the requirements of this section. The  
17          affidavit, or a certified copy thereof, shall be  
18          admitted as evidence of the completion of the  
19          foreclosure if it demonstrates that the unit was sold  
20          in compliance with the procedures established in this  
21          section. The affidavit shall be recorded and indexed



1           by the registrar, in the manner provided in chapter  
2           501 or chapter 502.

3           (d) The notice referred to in subsection (c) shall:

4           (1) Identify the association foreclosing its lien;

5           (2) Contain a description of the unit being foreclosed  
6           upon; and

7           (3) Contain a statement of the time and place proposed for  
8           the sale, which date may be any time after the  
9           expiration of four weeks from the date the notice was  
10           first published in the newspaper.

11           (e) Any sale scheduled pursuant to subsection (c) may be  
12           postponed from time to time by public announcement made by a  
13           person acting on behalf of the association. The date and time  
14           of the postponed auction, or information that the auction was  
15           canceled, shall thereafter be disclosed to any person entitled  
16           to notice pursuant to subsection (c) who requests that  
17           information.

18           (f) A down payment of no more than ten per cent of the  
19           highest successful bid price shall be paid to the association by  
20           the successful bidder immediately after the completion of the  
21           public sale; provided that the successful bidder shall remain  
22           liable to the association for the balance of the highest





1 successful bid price and for damages, if any, that result from  
2 the successful bidder's failure, neglect, or refusal to complete  
3 the purchase.

4 (g) Any person entitled to notice pursuant to subsection  
5 (c) may request, prior to the sale, for a quote of sums claimed  
6 to be due to the association in relation to the default,  
7 including an estimate of attorney's fees and costs associated  
8 with the default, plus an estimate of all other fees and costs  
9 associated with the default. The association shall disclose the  
10 requested information within five business days after the  
11 request.

12 (h) The association shall disclose the sale price, after  
13 the sale, to any person entitled to notice pursuant to  
14 subsection (c)."

15 SECTION 3. Section 603-21.7, Hawaii Revised Statutes, is  
16 amended to read as follows:

17 "**§603-21.7 Noninjury cases.** The several circuit courts  
18 shall have jurisdiction, without the intervention of a jury  
19 except as provided by statute, as follows:

20 [~~a~~] (1) Of actions or proceedings:

21 [~~1~~] (A) For the determination and declaration of heirs of  
22 deceased persons, which jurisdiction shall be in



1 addition to the probate jurisdiction of the  
2 court;

3 [~~2~~] (B) For the admeasurement of dower and curtesy, or  
4 the partition of real estate; and

5 [~~3~~] (C) For enforcing and regulating the execution of  
6 trusts, whether the trusts relate to real or  
7 personal estate, for the foreclosure of  
8 mortgages, for the foreclosure of condominium  
9 association liens, for the specific performance  
10 of contracts, and except when a different  
11 provision is made they shall have original and  
12 exclusive jurisdiction of all other cases in the  
13 nature of suits in equity, according to the  
14 usages and principles of courts of equity; and

15 [~~b~~] (2) Of actions or proceedings in or in the nature of  
16 habeas corpus, prohibition, mandamus, quo  
17 warranto, and all other proceedings in or in the  
18 nature of applications for writs directed to  
19 courts of inferior jurisdiction, to corporations  
20 and individuals, as may be necessary to the  
21 furtherance of justice and the regular execution  
22 of the law."



1 SECTION 4. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3 SECTION 5. This Act shall take effect on January 1, 2012.

4

INTRODUCED BY: \_\_\_\_\_

*W*

*BR*

JAN 26 2011



**Report Title:**

Mortgage Foreclosures; Liens

**Description:**

Sets forth guidelines for mortgage foreclosures, and liens for assessments.

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

