

STAND. COM. REP. NO.

98

Honolulu, Hawaii

FEB 07 2019

RE: S.B. No. 551
S.D. 1

Honorable Ronald D. Kouchi
President of the Senate
Thirtieth State Legislature
Regular Session of 2019
State of Hawaii

Sir:

Your Committee on Commerce, Consumer Protection, and Health,
to which was referred S.B. No. 551 entitled:

"A BILL FOR AN ACT RELATING TO CONDOMINIUMS,"

begs leave to report as follows:

The purpose and intent of this measure is to clarify that
condominium associations may exercise the remedy of nonjudicial
foreclosure regardless of the presence or absence of power of sale
language within their governing documents.

Your Committee received testimony in support of this measure
from the Real Estate Commission; Hawaii Council of Association of
Apartment Owners; Community Associations Institute, Hawaii
Chapter; Hawaiian Properties, Ltd.; Associa; Palehua Townhouse
Association; Sailors Realty; Aina Nalu; Kai Makani Condominium
Board; Board of Directors of Kaioo Terrace; Board of Directors of
Coolidge Villa; Board of Directors of Coronet; Board of Directors
of Wiliwili Vista; Board of Directors of 1134 Kinau; Board of
Directors of Kapiolani Banyan; Board of Directors of Palolo
Garden; Law Offices of Mark K. McKellar, LLC; Motooka Rosenberg
Lau and Oyama, LLC; and thirty individuals. Your Committee
received testimony in opposition to this measure from the Kokua
Council; Hui 'Oia'i'o; and nine individuals. Your Committee
received comments on this measure from the Department of the
Attorney General.



Your Committee finds that condominium associations have relied on the remedy of nonjudicial foreclosure for years as a way of collecting delinquent maintenance fees, which are necessary for the basic operations of associations. Judicial foreclosures alternatively can take far longer to resolve, create judicial backlog, and cost three to four times more than nonjudicial foreclosure actions, the fees for which are ultimately passed on to non-defaulting owners.

Your Committee further finds that a recent Intermediate Court of Appeals case, Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 426 P.3d 443 (Haw. Ct. App. 2018), held that power of sale language must exist in a condominium association's bylaws or another enforceable agreement with its unit owners in order for the association to avail itself of the nonjudicial power of sale foreclosure procedures set forth in chapter 667, Hawaii Revised Statutes. According to testimony received by your Committee, the Sakal ruling is contrary to clear prior legislative intent and came as a surprise to condominium associations who have, for years, relied in good faith upon the law and its intended meaning.

Your Committee also finds that under the Sakal decision, many associations have lost the benefit of the nonjudicial foreclosure process. Concerns have been raised that, as a result, an association's ability to conduct a nonjudicial foreclosure will no longer depend on legislative intent, but whether specific language in the declaration or bylaws was included when the project was first created. This measure therefore clarifies that the governing documents of every association are deemed to include a power of sale provision, sufficient to enable the exercise of nonjudicial foreclosure remedy, regardless of the presence or absence of power of sale language in an association's documents.

Your Committee has heard the concerns raised by the Department of the Attorney General that this measure, as written, may raise an impairment of contracts challenge. Your Committee understands these concerns and concludes that amendments to this measure are necessary. However, your Committee has also heard additional concerns that if this measure is not expressly applied retroactively, it may impact or set aside years of prior nonjudicial foreclosure proceedings, potentially resulting in untold numbers of lawsuits for wrongful foreclosure, due to the presumption that the Sakal decision applies retroactively unless



there is substantial prejudice. Your Committee finds that these issues and concerns merit further consideration and requests that your Committee on Judiciary further examine those issues and concerns raised by the testifiers on this measure.

Your Committee has amended this measure by:

- (1) Incorporating language suggested by the Attorney General that:
 - (A) Removes language that would have specified that the governing documents of every association were deemed to include a power of sale provision sufficient to enable the exercise of a nonjudicial foreclosure remedy; and
 - (B) Clarifies that associations are permitted to pursue foreclosure by action or nonjudicial or power of sale foreclosure remedies, regardless of the presence or absence of power of sale language in the governing documents;
- (2) Inserting an effective date of July 1, 2050, to encourage further discussion; and
- (3) Making technical, nonsubstantive amendments for the purposes of clarity and consistency.

As affirmed by the record of votes of the members of your Committee on Commerce, Consumer Protection, and Health that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 551, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 551, S.D. 1, and be referred to your Committee on Judiciary.



Respectfully submitted on
behalf of the members of the
Committee on Commerce, Consumer
Protection, and Health,

Rosalyn H Baker

ROSALYN H. BAKER, Chair



The Senate
Thirtieth Legislature
State of Hawai'i

Record of Votes
Committee on Commerce, Consumer Protection, and Health
CPH

Bill / Resolution No.:* SB 551	Committee Referral: CPH, JDC	Date: 1/31/19		
<input type="checkbox"/> The Committee is reconsidering its previous decision on this measure. If so, then the previous decision was to: _____				
The Recommendation is: <input type="checkbox"/> Pass, unamended 2312 <input checked="" type="checkbox"/> Pass, with amendments 2311 <input type="checkbox"/> Hold 2310 <input type="checkbox"/> Recommit 2313				
Members	Aye	Aye (WR)	Nay	Excused
BAKER, Rosalyn H. (C)	✓			
CHANG, Stanley (VC)	✓			
KEOHOKALOLE, Jarrett	✓			
NISHIHARA, Clarence K.	✓			
RUDERMAN, Russell E.	✓			
THIELEN, Laura H.	✓			
FEVELLA, Kurt	✓			
TOTAL	7			
Recommendation: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted				
Chair's or Designee's Signature:				
Distribution: Original Yellow Pink Goldenrod File with Committee Report Clerk's Office Drafting Agency Committee File Copy				

*Only one measure per Record of Votes