

HAWAII LEGISLATIVE  
ACTION COMMITTEE

  
**community**  
ASSOCIATIONS INSTITUTE

P.O. Box 976  
Honolulu, Hawaii 96808

March 27, 2019

Honorable Chris Lee, Chair  
Honorable Joy A. San Buenaventura, Vice-Chair  
Committee on Judiciary  
415 South Beretania St.  
Honolulu, HI 96813

Re: SB 551 SD1 HD1-SUPPORT

Dear Chair Lee, Vice-Chair San Buenaventura and Members:

SB 551 SD1 HD1 deserves passage. This is so regardless of any perspective about the merits of condominium or planned community association governance.

As noted in Section 1 of SB 551 SD1 HD1:

SECTION 1. In 1999, the legislature passed Act 236, Session Laws of Hawaii 1999, authorizing condominium associations to conduct nonjudicial foreclosures. In 2012, through Act 182, Session Laws of Hawaii 2012, the legislature enacted a new part of the foreclosure law—part VI of chapter 667, Hawaii Revised Statutes—creating a nonjudicial foreclosure process specifically for associations. During that time, **in reliance on the legislature's actions**, associations have conducted nonjudicial foreclosures as part of their efforts to collect delinquencies and sustain their financial operations. Associations have done so subject to the restrictions on nonjudicial foreclosures and other collection options imposed by the legislature. (Emphasis added)

The point is well stated. Associations acted in reliance on the legislature's actions.

Thus, the question now is whether consumers should pay *judgments* flowing from reliance upon statutory authority. The question is **not** something else.

Honorable Chris Lee, Chair  
Honorable Joy A. San Buenaventura, Vice-Chair  
March 27, 2019  
Page 2

Owners of units whose associations relied upon express statutory authority should not be exposed to liability because they followed the law as written. That is the issue.

Thus, arguments to the effect that the legislature should not have expressly authorized associations to use a nonjudicial foreclosure process are beside the point. The point is that the legislature did authorize associations to do so.

In doing so, the legislature did not condition use of that process on the existence of a power of sale provision. Thus, passage of SB 551 SD1 HD1 will spare consumers from unexpected liability arising from the Intermediate Court of Appeals' decision in Sakal v. Association of Apartment Owners of Hawaiian Monarch, 143 Haw. 219, 426 P.3d 443 (2018).

SB 551 SD1 HD1 will supply the evidence of legislative intent that the court was unable to discern and unwilling to assume. Owners of units in associations have a reasonable expectation that the legislature will take this opportunity to protect them from liability in this circumstance.

Liability, loss of insurance, loss of equity, the unavailability of lenders willing to lend and other ill effects are obvious consequences that will flow from the Sakal decision in the absence of clarifying legislation. Such consequences should not flow from reliance upon enacted legislation.

A judgment against a condominium is paid by the consumers who own the condominium units. SB 551 SD1 HD1 should be passed to protect those consumers.

Community Associations Institute, by

*Philip Nerney*

For its Legislative Action Committee

**ADDENDUM**

Part VI of Chapter 667 of the Hawaii Revised Statutes, titled Association Alternate Power of Sale Foreclosure Process, expressly provides for condominiums to conduct non-judicial foreclosures. Part VI does not condition use of the process on the existence of a power of sale provision in the condominium's governing documents.

The legislature declared that the power to use non-judicial foreclosure processes existed at least as long ago as 1999. Act 236 (1999) began as follows:

SECTION 1. The legislature finds that associations of apartment owners are increasingly burdened by the costs and expenses connected with the collection of delinquent maintenance and other common expenses.

The legislature further finds that the number of foreclosures in this State has greatly increased, and that associations of apartment owners are often required to bear an unfair share of the economic burden when purchasers in foreclosure actions exercise rights of ownership over purchased apartments without paying their share of common maintenance fees and assessments.

The legislature further finds that more frequently associations of apartment owners are having to increase maintenance fee assessments due to increasing delinquencies and related enforcement expenses. This places an unfair burden on those non-delinquent apartment owners who must bear an unfair share of the common expenses, and is particularly inequitable when a delinquent owner is also an occupant who has benefited from the common privileges and services.

The legislature further finds that there is a need for clarification regarding the authority of associations of apartment owners to use non-judicial and power of sale foreclosure procedures to enforce liens for unpaid common expenses. \*\*\*

The purpose of this Act is to: \*\*\*

**(4) Clarify that associations of apartment owners may enforce liens for unpaid common expenses by non-judicial and power of sale foreclosure procedures, as an alternative to legal action; (Bold added)**

The legislature responded to the burden that defaulting owners place on consumers who pay condominium expenses. The legislature did not limit its grant of authority to those rare condominiums that have power of sale language in governing documents. Rather, the legislature amended §514A-82(b), Hawaii Revised Statutes, by (among other things) adding subsection 13, to read as follows:

(13) A lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including non-judicial or power of sale foreclosure procedures authorized by chapter 667, as that chapter may be amended from time to time.

**SB-551-HD-1**

Submitted on: 3/27/2019 4:02:58 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Ken Watson	Hawaii Kai Peninsula AOAO	Support	No

Comments:

I support this bill and believe it provides the necessary provisions needed by the AOAO's to speed up the processes and help keep the courts schedules clear of unnecessary cases. It also reduces the burden of excess legal cost for the associations memberships. I ask that SB551 be approved.

Ken Watson

President, Hawaii Kai Peninsula AOAO



**SB-551-HD-1**

Submitted on: 3/27/2019 3:54:55 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Richard Emery	Associa	Support	Yes

Comments:

For years, associations by statute have used the power of sale to foreclose on non-paying homeowners. Association budgets depend on 100% of all owners paying their maintenance fees; otherwise, the other paying owners have to subsidize the difference.

Recent appellate court cases have questioned the authority of an association to foreclose under power of sale; a process used by associations for more than a decade. Unless corrected, it will cause major risks for the paying owners and rewarding the non paying owner by class action litigation. Already Directors and Officers Liability insurance carriers are adding endorsements eliminating defense coverage costs.

This Bill corrects and establishes a standard practice to the benefit of the owners. We strongly support.

**SB-551-HD-1**

Submitted on: 3/27/2019 4:05:11 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Kevin Agena	Hawaiian Properties, Ltd.	Support	No

Comments:

This bill just clarifies the law and allows all Association's to perform nonjudicial foreclosures.

**SB-551-HD-1**

Submitted on: 3/27/2019 4:23:29 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Glenn S. Horio	Anderson Lahne & Fujisaki	Support	No

Comments:

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance

upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Glenn S. Horio

**SB-551-HD-1**

Submitted on: 3/27/2019 4:49:32 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
arvi black	Mott smith laniloa	Support	No

Comments:

**SB-551-HD-1**

Submitted on: 3/27/2019 4:32:58 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mark McKellar	Law Offices of Mark K. McKellar, LLLC	Support	No

Comments:

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community

associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner’s failure to pay assessments are comparable to a property owner’s failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that “[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667.” That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted



a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

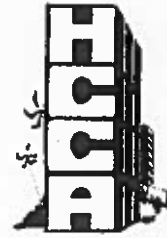
Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Mark McKellar



**Hawaii Council of Associations  
of Apartment Owners**  
**DBA: Hawaii Council of Community Associations**  
1050 Bishop Street, #366, Honolulu, Hawaii 96813



March 28, 2019

Rep. Chris Lee, Chair  
Rep. Joy San Buenaventura, Vice-Chair  
House Committee on Judiciary

Re: Testimony in support of  
SB551, SD1, HD1 RELATING TO CONDOMINIUMS  
Hearing: Friday, March 29, 2019, 2:05 p.m., Conf. Rm. #325

Chair Lee, Vice-Chair San Buenaventura and Members of the Committee:

I am Jane Sugimura, President of the Hawaii Council of Associations of Apartment Owners (HCAAO dba HCCA).

HCCA supports SB551 and urges this Committee to pass it and incorporate stronger consumer protection language suggested by Anne Anderson's testimony<sup>1</sup> in support of this bill.

HCCA was involved in the original 1999 legislation that allowed associations to conduct non-judicial foreclosures. The reason why the law was passed was because of long delays to complete judicial foreclosure<sup>2</sup>, which was causing financial hardships to the associations who rely on the collection of monthly maintenance fees from their unit owners to operate the building. If all of the units do not pay their monthly maintenance fees as and when they become due, the owners that pay end up subsidizing the units that are not paying – and this is totally unfair to the owners who comply with their obligations to pay every month. The default of unit owners specifically hurt owners on fixed income and younger residents who are just starting out in life and are earning just enough to get by on. They end up contributing amounts to cover the maintenance fees that should have been paid by

---

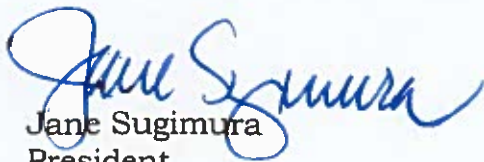
<sup>1</sup> Anne Anderson is a partner in the firm of Anderson Lahne and Fujisaki, LLP and she suggests *inter alia* that (i) additional disclaimers to be required in the association's notice of default and intent to foreclose, and that (ii) non-judicial foreclosure not be used where the debt arose due to late fees, fines, penalties or legal fees; or where the unit is owned by active military or the owner is on a payment plan authorized by HRS 667 -92(c).

<sup>2</sup> Due to the recession in the early-mid 1990's, there were so many foreclosures that it was taking over a year to complete a judicial foreclosure and associations were unable to collect their maintenance fees and defaulting owners were allowed to stay in their units and use the electricity, water and sewage and amenities like the Pool and rec rooms without paying their fair share.

the defaulting owners. This is why the associations have to resort to foreclosure if a unit owner does not pay his or her monthly maintenance fees.

If this Committee defers this bill, the foreclosures will not stop. The associations will just have to resort to judicial foreclosures, which are more expensive (e.g., court filing fees, service fees, more attorneys' fees and costs) and could result in a deficiency judgment against the owner<sup>3</sup>. In any foreclosure, the owner is liable for the fees and costs incurred by the association to complete that foreclosure. Because non-judicial foreclosures do not involve the court process, the fees and costs to the defaulting owners are less than in a judicial foreclosure.

For all of these reasons, HCCA respectfully asks you to pass this bill with the suggested revisions. Thanks for the opportunity to testify on this very important issue.



Jane Sugimura  
President

---

<sup>3</sup> The association cannot get a judgment in a non-judicial foreclosure.

**SB-551-HD-1**

Submitted on: 3/27/2019 6:18:14 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mike Golojuch	Palehua Townhouse Association	Support	No

Comments:

We strongly support SB551. Please pass.

Mike Golojuch, Sr.

President, Palehua Townhouse Association

**SB-551-HD-1**

Submitted on: 3/28/2019 7:50:01 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Carlos F. Gonzales	Kulana Knolls AOA	Support	No

Comments:

**Date: March 18, 2019**

**Name: Carlos F. Gonzales**

**Address: 94-542 Kupuohi St. Waipahu, HI 96798**

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters [514A](#), 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter [514A](#). To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner’s failure to pay assessments are comparable to a property owner’s failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the

benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that “[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667.” That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters [514A](#), 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the times being proposed to provide additional protection to consumers.

Respectfully submitted,

Carlos F. Gonzales

Sent from my iPhone



**SUBJ: TESTIMONY ON SB 551, SD1, HD 1**  
**TO: COMMITTEE ON JUDICIARY**  
**DATE: MARCH 29, 2019; 2:05PM**  
**PLACE: CONFERENCE ROOM 325**  
**FROM: JAMES ALBERS, PRESIDENT, ASSOCIATION OF APARTMENT OWNERS OF THE FAIRWAYS AT MAUNA LANI**

Dear Chair Lee and Members of the Committee:

I am James Albers and I offer this testimony today in support of SB 551, SD 1, HD 1 in my capacity as President of the Association of Apartment Owners of The Fairways at Mauna Lanī. The Fairways is a condominium with 126 units on the Kohala Coast of the Big Island.

In 1999 this legislature recognized the need to authorize nonjudicial foreclosures for all condominium associations. The legislature confirmed that right in 2012 while at the same time prescribing statutory protections and statutory due process rights for owners subject to the procedure if they were delinquent in the payment of their common expense assessments.

Subsequent court decisions have impaired the operation of that legislation, contrary to legislative intent. The legislature should act now to restore the availability of this procedure to ensure the efficient and cost-effective operations of associations throughout this state.

Associations do not undertake enforcement action arising from delinquencies lightly; rather, boards of directors dealing with these issues engage in sober and deliberative review of each and every situation, to balance the rights of all interested parties, before employing available remedies when essential to ensure the financial viability of associations.

An association's board of directors owes a fiduciary duty – to all owners – to operate the property in a fiscally sound manner. When a board is compelled to address an owner's common assessments delinquency, it works diligently to find any available solution short of foreclosure. When that effort fails, the board is compelled to act to protect the interests of the vast majority of owners who pay their common expense assessments on time every month.

An owner who fails to pay his common expense assessments is transferring his financial burden to all other unit owners of his property. This is patently unfair to those other owners. When the association, acting as a matter of last resort to protect the interests of those other owners, is deprived of the option of nonjudicial foreclosure, the consequence is simply this: The association must resort to more costly and more time-consuming alternatives whose outcome will be the same, but unfortunately will burden innocent owners with more cost and more delay.

Owners who pay their assessments in a timely manner deserve better. I strongly urge this committee to fulfill its duty to say what the legislature's intent was in 1999 and 2012 by reporting out this legislation favorably, and its members to vote to enact this remedial legislation to avoid imposing additional costs and delays on the vast majority of owners/voters who regularly honor their commitments and legal responsibilities to the association and to each other.

Thank you for your attention.



# Collection Law Section

Reply to: **STEVEN GUTTMAN, CHAIR**  
**220 SOUTH KING STREET SUITE 1900**  
**HONOLULU, HAWAII 96813**  
**TELEPHONE: (808) 536-1900**  
**FAX: (808) 529-7177**  
**E-MAIL: sguttman@kdubm.com**

**Chair:**  
Steven Guttman

**Vice Chair:**  
William J. Plum

**Secretary:**  
Thomas J. Wong

**Treasurer:**  
Arlette S. Harada

**Directors:**  
Ann Correa  
Marvin S.C. Dang  
Karyn A. Doi  
Christopher Shea Goodwin  
Steven Guttman  
Arlette S. Harada  
James Hochberg  
Francis P. Hogan  
Steven Idemoto  
William J. Plum  
Charles Prather  
Yuriko J. Sugimura  
Thomas J. Wong  
Reginald K.T. Yee

HOUSE COMMITTEE ON JUDICIARY  
REGARDING SENATE BILL 551, SENATE DRAFT 1

Hearing Date: Tuesday, March 29, 2019  
Time : 2:05 p.m.  
Place : Conference Room 325

Dear Chairman Lee, Vice Chair San Buenaventura and Members of the Committee:

The Collection Section of the Hawaii State Bar Association strongly supports SB 551 SD1. This testimony reflects the opinions of the Collection Section only and is not representative of the Hawaii State Bar Association.

Section 1 of the bill accurately reflects the history of association non-judicial foreclosures in Hawaii. Enactment of the bill is necessary as a result of the ruling in Sakal v. Association of Apartments Owners of Hawaiian Monarch to have the Legislature clarify its original intention in 1999, when it authorized non-judicial foreclosure for all condominium associations in the State and in 2012, by adopting Part VI of Chapter 667 which created a specific process to be followed in association foreclosures. Part VI of Chapter 667 corrected many of the issues which arose regarding providing owners being foreclosed with appropriate notice and time before the non-judicial foreclosure auction could be held. During the four month minimum notice period created under Part VI, the owner could enter into a payment plan agreement with the association or initiate a lawsuit to seek an injunction to stop the non-judicial foreclosure from proceeding if they believe they were being foreclosed wrongfully.

SB 551 SD 1 does not propose to retroactively apply a new law but rather to clarify that it was always the intention of the Legislature to allow all condominium associations, and later, other planned communities, to be able to foreclose through the non-judicial process, regardless whether their governing documents specifically provided for use of non-judicial foreclosure.

At the time the original non-judicial foreclosure proposal was made in 1999, condominium associations and their members were suffering because many owners were not paying their assessments. At the time, condominium associations could only foreclose through the judicial foreclosure process and because of the recession and all of the foreclosures that were being filed, the court's calendar for foreclosures was backed up. It was taking an average of 6 months to get a hearing for a foreclosure order.

Many of the governing documents for associations created after 1999, include language which recognizes that foreclosure of the association's lien may be accomplished by power of sale foreclosure with language such as: "In the event the foreclosure is under power of sale, the Board, or any person designated by it in writing shall be entitled to actual expenses . . ." The language does not specifically state that power of sale foreclosure is authorized by the bylaws and therefore, the Sakal decision might preclude use of non-judicial foreclosure for these associations but there can be no doubt that the thought process behind the drafting of the documents was recognition that Hawaii law authorized non-judicial foreclosure for all condominium associations.

Part VI built in protections for homeowners facing non-judicial foreclosure, requiring foreclosing associations to provide time for the owners to either pay in full or arrange for a reasonable payment plan with the association. Notices are provided to all interested parties and the owners are kept informed of the progress through required notices. The non-judicial foreclosure process is less expensive, mostly because commissioner's fees and costs are an expense of judicial foreclosure. The cost of either the judicial or non-judicial foreclosure in attorneys' fees and costs and commissioner's fees and costs are included in the amounts owed by the homeowners, and may be included in a deficiency judgment sought by the foreclosing mortgagee or association. Therefore, it may be in the interest of an owner who will be foreclosed anyway to have the foreclosure move faster and to cost less because the deficiency amount would be smaller.

Small associations in particular suffer when even one owner does not pay their assessments. The rest of the owners of a condominium association must each pay more to cover the expenses of operating the condominium when an owner does not pay their share. The Legislature recognized that it was not fair to paying owners to allow a non-paying owner to continue to not pay while going through the lengthy judicial foreclosure process. Due to the expense involved in that process which includes payment of commissioner fees and costs, many associations waited for the mortgagees to foreclose. As such, the foreclosure process was not within the control of the associations and it could take years for the mortgagees to foreclose. The non-judicial foreclosure process can be completed quickly allowing associations time to rent out the unit to improve the cash flow for the association until the mortgagee's foreclosure is completed.

Several of the people and organizations submitting testimony on this bill have expressed concern for kupuna who are unable to pay their assessments. The testimony makes assumptions that the inability to pay is because their association is mismanaged resulting in large increases in assessments or special assessments. That assumption is unfair given that most associations are well managed by professional management and a volunteer board of owners and large increases can result from higher electrical costs, insurance premiums or other unanticipated expenses. Some owners simply are unable to keep up with their payments, even without an increase or special assessment.

When someone does not pay their share of their assessments, the rest of the owners, including other kupuna end up paying more in maintenance fees to make up for the people who are not paying. Is it fair to kupuna who may be struggling themselves but are making their payments to allow owners to not pay, continue to live at the project, essentially for free, and leave it for others to pay their way? A condominium association is not a charitable organization. People who bought into condominium associations agreed that they would share common expenses and that each owner would carry their share of the burden pursuant to the percentage of common interest for their unit. When associations foreclose on units prior to the lender foreclosing, there is no windfall to the association. The associations are trying to make the best of a bad situation.

For the foregoing reasons, the Collection Section urges the Committee to pass SB 551 SD1.

Please contact me at 536-1900, if you have any questions. Thank you for this opportunity to testify.

Very truly yours,

Steven Guttman, Chair

cc: Pat Shimizu, Director, Hawaii State Bar Association



IMANAKA ASATO  
A LIMITED LIABILITY LAW COMPANY  
TOPA FINANCIAL CENTER, FORT STREET. TOWER  
745 FORT STREET MALL, 17<sup>TH</sup> FLOOR  
HONOLULU, HAWAII 96813

ImanakaAsato.com  
TIMOTHY E. HO  
ASSOCIATE ATTORNEY  
THO@IMANAKA-ASATO.COM

## House Committee on Judiciary

Testimony of: Timothy Ho  
Date: March 29, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

I am an associate attorney with Imanaka Asato. My law firm represents many of the homeowners who were victimized by aggressive Homeowner Associations and their predatory law firms. I write to provide you some history and background on how power of sale foreclosure came to be abused, and later, repealed.

Foreclosure under power of sale, §667-5, Hawaii Revised Statutes (“HRS”), originated in 1874. It is commonly known as the law that was used to steal land from Hawaiians. Private land ownership was a concept familiar primarily to western civilization. Hawaiians, like Native Americans, believed that the land was owned by everyone, and no one – the land belonged to nature. After the Great Mahele, and the Alien Land Ownership Act of 1850, private land ownership began falling into the hands of the foreign, white people.

Hawaiians also did not understand the concept of finance and banking. Hawaiians that did own land in the late 1800’s fell victim to foreigners who offered them money in exchange for a mortgage on their land. In 1874, the Hawaii Legislature, now controlled by white foreigners, passed the “Non-Judicial Mortgage Act.”<sup>1</sup> This act lacked consumer safeguards. There was no obligation for the lender to obtain the best price; to keep the borrower from losing their property; to preclude conspiracy with bidders to keep the auction price low; to share with the borrower any proceeds from the sale. Unable to pay their mortgage, their lenders conducted power of sale foreclosures which enabled them to quickly gain title while avoiding judicial oversight. Between 1874 and 2012, when §667-5, HRS (hereafter referred to as “Part I”) was repealed, the law changed very little.

Chapter 667, Part I (2010) stated in pertinent part as follows: (a) **When a power of sale is contained in a mortgage**, and where the mortgagee, the mortgagee’s successor in interest, or any person authorized by the power to act in the premises, desires to foreclose under power of sale **upon breach of a condition in the mortgage**, the mortgagee, successor, or person shall be

---

<sup>1</sup> “An Act to Provide for the Sale of Mortgaged Property Without Suit and Decree of Sale,” Act 33 of the 1874 Hawai’i Legislature.

represented by an attorney licensed to practice law in the State and is physically located in the State:  
(Emphasis added)

Quite obviously, nonjudicial foreclosures under Part I were reserved avenues for foreclosure for mortgagees, or persons holding a mortgage with a power of sale clause. A power of sale is a contractual clause contained in a mortgage in which the borrower agrees (by executing the mortgage) to pre-authorize the nonjudicial sale of their property to pay off the balance of the loan in the event of default. **Homeowner associations do not hold a mortgage with individual homeowners. Association bylaws do not contain a power of sale. Quite clearly, homeowner associations were never entitled to conduct power of sale foreclosure.**

The associations and their attorneys have submitted written and oral testimony explaining to you that they had been conducting nonjudicial foreclosures for decades, without any problems. When they tell you that the way they had been conducting business was the accepted standard of practice in the industry, they are not telling you the truth. Milton Motooka, Esq., an attorney who specialized in representing condominium associations, did not pursue Part I nonjudicial foreclosures, because he believed that associations did not possess a contractual power of sale, which was required in Part I foreclosures. In 2010, Mr. Motooka sent his association clients a letter warning them of the perils of conducting nonjudicial foreclosures, and informing them that he would not pursue nonjudicial foreclosures.<sup>2</sup> Mr. Motooka's reward for his legal analysis and high ethical standards was to lose clients to the same law firms who come before you today to urge you to pass this measure. I know that Mr. Motooka lost clients to other law firms, because in many of his judicial foreclosure cases, he was replaced by a new attorney, who would then dismiss the judicial foreclosure action and proceed to quickly take title to the homeowner's property pursuant to a Part I nonjudicial power of sale foreclosure. Homeowner associations, by and through their attorneys, did not misinterpret the legislature's intent, or mistakenly utilize Part I (§667-5, HRS) to conduct power of sale foreclosures. They made a choice. They intentionally pursued nonjudicial power of sale foreclosures in order to bypass the consumer safeguards in Part II.

Homeowner associations have argued that §514B-146 granted them the right to utilize Part I to conduct nonjudicial foreclosure even though they do not hold a mortgage or a mortgage containing a power of sale. The Hawai'i appellate courts and U. S. District Court of Hawai'i disagree. **In *Sakal v. Assn. of Apt. Owners of Hawaiian Monarch*, 143 Haw. 219 (2018), and *Malabe v. Ass'n. of Apt. Owners of Exec. Ctr.*, 2018 Haw. App. Lexis 474 (2018), the Intermediate Court of Appeals (ICA) held that a power of sale must be included in an association's bylaws in order for it to conduct a nonjudicial foreclosure.** The U.S. District Court of Hawai'i has also held that associations that conducted nonjudicial power of sale foreclosures under Part I wrongfully foreclosed on homeowners.<sup>3</sup>

The proponents of this measure claim that S.B. 551, HD1 attempts to clarify the legislature's intent to permit associations to conduct nonjudicial foreclosures without a power of sale. If

---

<sup>2</sup> Nov. 16, 2010 Letter from Milton Motooka & April 2011 Legal Update are attached to this testimony.

<sup>3</sup> *Galima v. Ass'n. of Apt. Owners of Palm Court*, 2017 U.S. Dist. LEXIS 47715, and *Brown v. Kiakona*, 2017 U.S. Dist. LEXIS 139724,

anything, the legislative intent was that homeowner associations would not be able to recover unpaid assessments by conducting nonjudicial foreclosures under Part I. In 1998, this legislature enacted Chapter 667, Part II, which contained more consumer safeguards, and in 2011, permitted it to apply to planned communities and condominiums. In 2012, this legislature added Chapter 667, Part VI, which was enacted specifically to apply to homeowner association foreclosures. In 2011, as a result of widespread abuse, this legislature placed a moratorium on Part I foreclosures, and in 2012, it repealed §667-5, HRS in its entirety. Utilizing Part I, homeowner associations conducted nonjudicial foreclosures on some homeowners that had sent checks to the associations that if deposited, would have resulted in eliminating their deficiency. They went ahead with foreclosures on homeowners that had arranged for short-sales of their properties. Could the legislature intended for homeowner associations to behave in this manner?

With a judicial foreclosure, a judge oversees and gives final approval of the foreclosure sale. A trustee is appointed to ensure that the property is sold for a fair and reasonable price. A nonjudicial foreclosure does not have any oversight, and is subject to abuse. This is a classic case of the fox guarding the henhouse. There were and are other alternatives: Part II foreclosure, Part VI foreclosure, judicial foreclosure, and a deficiency action (suit). Moving forward, associations can amend their bylaws, to include a power of sale clause.

A power of sale is a contractual provision that is included in a mortgage contract. It does not exist in condominium bylaws. Homeowner associations by and through their attorneys, come before you to ask you to pass legislation that would give them the right to conduct nonjudicial power of sale foreclosures, where no such language exists. We believe it violates the Hawai'i and U.S. Constitution, and will be struck down by the courts, if not vetoed by the Governor.

Please defer S.B. 551, HD1. Thank you for the opportunity to provide testimony on this matter.

**MOTOOKA YAMAMOTO & REVERE**

NA LAN  
MILTON M. MOTOOKA  
TODD R. MOULTON  
CARLOS PEREZ-MESA  
CHERRYLINA C. PIEDAD  
TERRANCE M. REVERE  
CAROL A.L. ROSENBERG  
HWA KYUNG SONG  
ANNA T. VALIENTE\*  
CLAY W. VALVERDE  
MYLES T. YAMAMOTO

ATTORNEYS AT LAW  
A LIMITED LIABILITY LAW CORPORATION  
1000 BISHOP STREET, SUITE 801  
HONOLULU, HAWAII 96813

TELEPHONE: (808) 532-7900  
FAX: (808) 532-7910  
<http://www.myrbahawaii.com>

\*Licensed in California

November 16, 2010

Confidential  
Attorney – Client Privilege

Board of Directors  
of \_\_\_\_\_  
c/o \_\_\_\_\_

\_\_\_\_\_  
Honolulu, HI 96813

**Re: Lawsuit Challenges Legality of Association Non-Judicial Foreclosure**

Dear Clients:

We write to update you on a significant development regarding non-judicial foreclosures ("NJF") in Hawaii. We note that Hawaii Associations are increasingly opting for non-judicial foreclosures ("NJF") as a quick, effective and inexpensive way to foreclose on delinquent owners. The wisdom of that trend has recently been called into question by a Honolulu lawsuit alleging the illegality of a NJF brought by the Association-defendant under Part 1 of the NJF statute.

The lawsuit, in and of itself, highlights the litigation risks associated with an Association pursuing a NJF on questionable legal grounds. More importantly, the lawsuit calls into question whether Associations can reliably count on NJFs – past, present and future - to deliver what Associations have been led to expect, namely foreclosures that are legally effective and binding. If not, the adverse consequences could become quite excruciating.

We share with you, our clients, the information in this letter to better understand why our firm has strict procedures relating to NJFs and to enable you to make an informed decision whether, in light of the risks, it's in your best interests to continue with NJFs, particularly those brought under Part 1 of the NJF statute. Among the risks to consider are the potential of: 1) Court invalidation of the NJF sales; 2) Monetary liability for consequential damages and/or attorneys' fees and costs; 3) Legal expenses incurred in defending such actions; 4) Potential exposure to

*Galima vs AOA of Palm Court; Civil No. 16-00023 LEK-KSC  
Records from Milton M. Matooka, Esq. taken on 06/08/2018*

liability not covered by insurance; and 5) Difficulty obtaining/affording liability insurance in the future.

**Background**

On November 3, 2010, a complaint was filed in the Circuit Court of the First Circuit, State of Hawaii, in Civil No. 10-1-2345-11, by Wells Fargo Bank against Daniel Omiya, the purchaser of a property at a Part 1 NJF sale, and an Association (the foreclosing party). The complaint alleged the Association failed to give proper notice of the nonjudicial foreclosure to Wells Fargo Bank, who at the time was the record legal owner, having previously foreclosed on the subject property pursuant to a defaulted mortgage.

Significantly, the complaint also alleged that the Association's Part 1 NJF was legally defective, because Associations, unlike mortgagee-banks, have no statutory right to foreclose under Part 1 of the NJF statute. The bank argued that, without a contractual power of sale – such as exists in bank mortgage agreements - Associations cannot legally foreclose under Part 1. Wells Fargo's complaint asked the court to invalidate the Association's NJF sale, and restore Wells Fargo to its pre-NJF rights, including declaring Wells Fargo the rightful owner of the property. Wells Fargo also requested attorneys' fees and expenses and other appropriate remedies, which presumably included money damages caused by the alleged statutory violation.

Following are significant excerpts from the bank's complaint:

16. Defendant (name of Association) could have but chose not to foreclose the Property by judicial foreclosure but elected to proceed by power of sale under HRS Section 667-5 through 667-10. Defendant (name of Association)'s power of sale foreclosure of the Property was legally defective because there is no specific means to provide the required statutory notice and there are no power of sale rights granted to Defendant (name of Association) for it to have exercised. Defendant (name of Association) did not and could not satisfy the legal requirements of HRS Section 667-5 (a)(2) which provides:

"Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

17. There is no mortgage between Plaintiff and Defendant (name of Association). As a result Defendant (name of Association) cannot give the required notices to Plaintiff as required by the mortgage. Additionally, there is no underlying mortgage that authorizes Defendant (name of Association) to exercise any power of sale as required by HRS Section 667-5. Plaintiff never expressly granted any power of sale



rights to Defendant (name of Association) under any mortgage or other voluntary instrument.

**Implications and Potential Consequences**

Hawaii Revised Statutes ("HRS") Chapter 667 governs non-judicial foreclosures in Hawaii. The Chapter is divided into two parts. Part 1 provides a simple and fast NJF procedure. On its face, however, Part 1 is limited to mortgagees or others having a contractual power of sale. Associations are given a statutory right to pursue NJFs only under Part 2 of the same statute. Part 2, however, requires far more from the foreclosing party in terms of required notice and other prerequisites. Because of the ease, speed, simplicity, and reduced cost of proceeding under Part 1, many Associations have eschewed Part 2 in favor of Part 1. We have always maintained that this is quite dangerous, as the Wells Fargo complaint demonstrates, because of the risk that Hawaii courts could ultimately rule that Association NJFs brought under Part 1 are illegal and invalid, and therefore voidable. Such a ruling would give rise to the specter of not just wholesale reversals of Association NJF's, but also open-ended exposure to claims for consequential money damages. In the Wells Fargo case, for example, if the court rules in favor of Wells Fargo, it might, in lieu of divesting the bona fide purchaser of title to the property, grant Wells Fargo money damages instead. Such a result would thrill Wells Fargo, which alleges facts supporting damages in excess of \$300,000.

The 1998 enactment of Part 2 of the NJF statute supports Wells Fargo's argument that Associations are not entitled to proceed under Part 1. Section 667-40 of Part 2 states:

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. (emphasis added)

Prior to the above enactment, Associations had no recognized right to pursue NJFs. The enactment of Part 2 was thus seen as the enabling "law" that provided condominium associations the right to pursue NJFs, notwithstanding their lack of a mortgage agreement containing a contractual power of sale. That Associations were specifically identified as Part 2 beneficiaries reinforces the view that the Legislature did not, at the time of Part 2 enactment, consider Associations entitled to proceed under Part 1, which references only mortgage-based foreclosures. Part 2, however, is procedurally much more difficult and costly to comply with. This led many Associations to nevertheless proceed under Part 1, notwithstanding that it was Part 2 alone that conferred on Condominium Associations the right and ability to pursue NJFs.

Some attorneys have sought to defend Associations' right to foreclose under Part 1 by citing HRS Section 514B-146 which provides in part:

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.

As Wells Fargo points out in its complaint, however, the Association possesses no contractual power of sale, a key prerequisite under Part 1.

#### Recommendations

This firm's recommendation to Association clients is, and has been, to pursue NJF's only via Part 2. We believe the risks and potentially adverse consequences of a wrongful NJF under Part 1 are far too great, notwithstanding the apparent savings in time and cost under Part 1. Non-judicial foreclosures are increasingly being challenged in different parts of the mainland by an ever-growing cottage industry of plaintiffs' lawyers. We believe it only a matter of time before the phenomenon becomes prevalent in Hawaii as well. We urge caution, including carefully monitoring of developments in this fast-evolving area.

We are also concerned of the potential liability exposure, not only of Associations, but their directors as well. We fear that cases such as the one brought by Wells Fargo, and others likely to follow, could be used by opposing attorneys to prove that Associations, as well as their directors, had "notice" of the legal infirmities of Part 1 NJFs. The argument in cases subsequent to Wells Fargo is that, having received such notice, an Association's continued pursuit of Part 1 NJF's elevates the wrongdoing from mere negligence to "reckless or intentional disregard" for the rights of owners, a standard under Hawaii law sufficient to trigger punitive damages. Since Boards operate as fiduciaries with respect to their owner constituency, it's not difficult to envision such arguments as effective in creating punitive damages liability against Board members seen as intentionally or recklessly pursuing illegal Part 1 NJFs. Such punitive liability is frequently not covered under standard policies of liability insurance.

Also of concern is the possibility that Wells Fargo's complaint will not long remain an isolated incident. If Hawaii follows in the footsteps of foreclosure-ridden states like Florida and California, en masse litigation challenging NJFs on a wholesale basis may not be long in arriving.

#### Conclusion

In summary, we recommend Associations carefully consider the ramifications of Part 1 NJF in light of the foregoing. While our firm will not support a decision to pursue Part 1 NJFs, if you are inclined to pursue Part 1 NJF's notwithstanding the above, we suggest you consider

Board of Directors  
of \_\_\_\_\_  
November 16, 2010  
Page 5

soliciting a second opinion from a qualified attorney with no financial interest in the outcome. Clearly, the risks involved are sufficient to warrant the time and expense of obtaining confirmation of your decision, whatever it is.

Enclosed also is a recent in-depth article by investigative reporter, Ian Lind, related to the subject above. Unfortunately, at the time it was written, Mr. Lind did not have the benefit of having read or known of the Wells Fargo complaint discussed above.

Thank you for taking the time to read and consider this letter. We hope it serves you well.

Sincerely,

Milton M. Motooka

Enclosure

P:\O - MMM\Letters\Client letter re NJFs.doc

# Legal Update



## Overview Message—Milton Motooka

It's the end of the first quarter and nearing the end of "annual meeting season." It seems that annual meetings are becoming more contentious. This is undoubtedly related to the heightened stress level, which the long recession has caused. And it's no surprise that a hot topic continues to be delinquent homeowners and related collection issues, especially foreclosures.

Our firm experienced the loss of some long-standing clients because "Milton's office doesn't do non-judicials." In fact, our firm does pursue non-judicial foreclosures but only following what we strongly believe is the letter and the spirit of the law. This means there has to be effective notice and the owner must execute the conveyance document as required by statute. This is possible when a delinquent owner is willing to sign the conveyance document transferring title to his unit in exchange for the Association not seeking a deficiency judgment against the owner.

Last year we mailed a detailed review of non-judicial foreclosure issues and risks to all our clients. We've included this in this newsletter as well. It is long and involved but we believe it will help boards make a sound decision when considering a foreclosure. It should be noted that a second suit against an Association has recently been filed alleging the non-judicial foreclosure filed by the Association was illegal.

The controversy over Association non-judicial foreclosure may become a moot point, depending on the outcome of legislative bills currently being considered. We noted several bills in the legislature relating to foreclosures and while there were different proposals, we believe most give further support to our interpretation of the current laws. One bill seeks to give Associations the same non-judicial foreclosure rights as Lenders currently have. Obviously, this wouldn't be necessary if those rights existed now. Another bill that just passed the House proposes to do away with all non-judicial foreclosures and to require mediation for any foreclosure.

Other legislation that we're following out relates to the possibility of the loss of tax exemption for non profits – including Associations. That would mean Associations would need to pay the general excise tax on maintenance fees. Associations currently only need to pay the general excise tax on non-exempt items, like fines. Other proposed legislation, like the ban on leaf blowers may not seem important, but there are costs involved with any change in common practice.

Motooka Yamamoto & Revere  
Attorneys at Law

### Inside this issue:

Law Suit Challenges Legality of Association Non-Judicial Foreclosures

Page 2

On Line Resources for Homeowners and Board Members

Page 11

# Lawsuit Challenges Legality of Association Non-Judicial Foreclosure

By Milton M. Motooka, Esq.

Hawaii Associations that have opted for non-judicial foreclosures ("NJF") as a quick and inexpensive way to foreclose on delinquent owners may be facing challenges to that process. The trend toward NJF has recently been called into question by a Honolulu lawsuit alleging the illegality of a NJF by the Association-defendant under Part 1 of the NJF statute.

The lawsuit, in and of itself, highlights the litigation risks associated with an Association pursuing a NJF on questionable legal grounds. More importantly, the lawsuit calls into question whether Associations can reliably count on NJF – past, present and future - to deliver what Associations have been led to expect, namely foreclosures that are legally effective and binding.

Our firm has strict procedures relating to NJF because of the risks and our beliefs about what the letter of the law requires. Among the risks to consider are the potential of: 1) Court invalidation of the NJF sales; 2) Monetary liability for consequential damages and/or attorneys' fees and costs; 3) Legal expenses incurred in defending such actions; 4) Potential exposure to liability not covered by insurance; and 5) Difficulty obtaining/affording liability insurance in the future.

## Background

On November 3, 2010, a complaint was filed in the Circuit Court of the First Circuit, State of Hawaii, in Civil No. 10-1-2345-11, by Wells Fargo Bank against Daniel Omiya, the purchaser of a property at a Part 1 NJF sale, and an Association (the foreclosing party). The complaint alleged the Association failed to give proper notice of the nonjudicial foreclosure to Wells Fargo Bank, who at the time was the record legal owner, having previously foreclosed on the subject property pursuant to a defaulted mortgage.

Significantly, the complaint also alleged that the Association's Part 1 NJF was legally defective, because Associations, unlike mortgagee-banks, have no statutory right to foreclose under Part 1 of the NJF statute. The bank argued that without a contractual power of sale – such as exists in bank mortgage agreements - Associations cannot legally foreclose under Part 1. Wells Fargo's com-

plaint asked the court to invalidate the Association's NJF sale, and restore Wells Fargo to its pre-NJF rights, including declaring Wells Fargo the rightful owner of the property. Wells Fargo also requested attorneys' fees and expenses and other appropriate remedies, which presumably included money damages caused by the alleged statutory violation.

Following are significant excerpts from the bank's complaint:

Defendant (name of Association) could have but chose not to foreclose the Property by judicial foreclosure but elected to proceed by power of sale under HRS Section 667-5 through 667-10. Defendant (name of Association)'s power of sale foreclosure of the Property was legally defective because there is no specific means to provide the required statutory notice and there are no power of sale rights granted to Defendant (name of Association) for it to have exercised. Defendant (name of Association) did not and could not satisfy the legal requirements of HRS Section 667-5 (a)(2) which provides:

"Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

There is no mortgage between Plaintiff and Defendant (name of Association). As a result Defendant (name of Association) cannot give the required notices to Plaintiff as required by the mortgage. Additionally, there is no underlying mortgage that authorizes Defendant (name of Association) to exercise any power of sale as required by HRS Section 667-5. Plaintiff never expressly granted any power of sale rights to Defendant (name of Association) under any mortgage or other voluntary instrument."

## Implications and Potential Consequences

Hawaii Revised Statutes ("HRS") Chapter 667 governs

(Continued on page 3)



(Continued from page 2)

non-judicial foreclosures in Hawaii. The Chapter is divided into two parts. Part I provides a simple and fast NJF procedure. On its face, however, Part 1 is limited to mortgagees or others having a contractual power of sale. Associations are given a statutory right to pursue NJF only under Part 2 of the same statute. Part 2, however, requires far more from the foreclosing party in terms of required notice and other prerequisites. Because of the ease, speed, simplicity, and reduced cost of proceeding under Part 1, many Associations have eschewed Part 2 in favor of Part 1. We have always maintained that this is quite dangerous, as the Wells Fargo complaint demonstrates, because of the risk that Hawaii courts could ultimately rule that Association NJF brought under Part 1 are illegal and invalid, and therefore voidable. Such a ruling would give rise to the specter of not just wholesale reversals of Association NJF, but also open-ended exposure to claims for consequential money damages. In the Wells Fargo case, for example, if the court rules in favor of Wells Fargo, it might, in lieu of divesting the bona fide purchaser of title to the property, grant Wells Fargo money damages instead. Such a result would thrill Wells Fargo, which alleges facts supporting damages in excess of \$300,000.

The 1998 enactment of Part 2 of the NJF statute supports Wells Fargo's argument that Associations are not entitled to proceed under Part 1. Section 667-40 of Part 2 states:

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. (emphasis added)

Prior to the above enactment, Associations had no recognized right to pursue NJF. The enactment of Part 2 was thus seen as the enabling "law" that provided condominium associations the right to pursue NJF, notwithstanding their lack of a mortgage agreement containing a contractual power of sale. That Associations were specifically identified as Part 2 beneficiaries reinforces the view that the Legislature did not, at the time of Part 2 enactment, consider Associations entitled to proceed under Part 1, which references only mortgage-based foreclosures. Part 2, however, is procedurally much more difficult and costly to comply with. This led many Associations to nevertheless proceed under Part 1, notwithstanding that it was Part 2 alone that conferred on Condominium Associations the right and ability to pursue NJF.

Some attorneys have sought to de-

Hawaii courts could rule that Association NJF brought under Part 1 are illegal and invalid, and therefore voidable.

fend Associations' right to foreclose under Part 1 by citing HRS Section 514B-146 which provides in part:

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.

As Wells Fargo points out in its complaint, however, the Association possesses no contractual power of sale, a key prerequisite under Part 1.

**Recommendations**

This firm's recommendation to Association clients is, and has been, to pursue NJF only via Part 2. We believe the risks and potentially adverse consequences of a wrongful NJF under Part 1 are far too great, notwithstanding the



apparent savings in time and cost under Part 1. Non-judicial foreclosures are increasingly being challenged in different parts of the mainland by an ever-growing cottage industry of plaintiffs' lawyers. We believe it only a matter of time before the phenomenon becomes prevalent in Hawaii as well. We urge caution, including carefully monitoring of developments in this fast-evolving area.

(Continued on page 4)

## CAI On Line Resources for Homeowners, Board Members

CAI offers a variety of resources to help people who own, rent or are considering a home in a homeowners association, condominium or cooperative. The following can help you better understand the nature, benefits, and obligations of living in an association.

Board Member Basics, a six-part online learning program that gives community association board members and other homeowner leaders the information and guidance they need to govern their communities effectively and responsibly.

An Introduction to Community Association Living, a two-hour primer that introduces and explains the nature of community associations, including the roles and functions of boards, committees and community managers.

Community Association Fundamentals, a summary of 10 core principles that address the basic function of associations, the obligations and expectations of homeowners and the underlying principles of the association model.

**Legal Update is provided as a service to clients of Motooka Yamamoto & Revere and is intended to offer general information on topics of current interest. It is not a substitute for obtaining legal or other professional advice that is necessary to address specific circumstances and concerns. Articles in this issue can be reproduced with permission. Send requests for reprints to [lindsay@myrhawaii.com](mailto:lindsay@myrhawaii.com).**

(Continued from page 3)

We are also concerned of the potential liability exposure, not only of Associations, but their directors as well. We fear that cases such as the one brought by Wells Fargo, and others likely to follow, could be used by opposing attorneys to prove that Associations, as well as their directors, had "notice" of the legal infirmities of Part 1 NJF. The argument in cases subsequent to Wells Fargo is that, having received such notice, an Association's continued pursuit of Part 1 NJF elevates the wrongdoing from mere negligence to "reckless or intentional disregard" for the rights of owners, a standard under Hawaii law sufficient to trigger punitive damages. Since Boards operate as fiduciaries with respect to

Interesting to note the following type of help wanted ad: "Hawaii Attorneys wanted—looking for aggressive teachable attorneys that will work with attorneys in different parts of the country using proprietary foreclosure defenses strategies defending homeowners . . . We have hundreds of cases that need representation."

intentionally

their owner constituency, it's not difficult to envision such arguments as effective in creating punitive damages liability against Board members seen as or recklessly pursuing illegal Part 1 NJF. Such punitive liability is frequently not covered under standard policies of liability insurance.

Also of concern is the possibility that Wells Fargo's complaint will not long remain an isolated incident. If Hawaii follows in the footsteps of foreclosure-ridden states like Florida and California, en masse litigation challenging NJF on a wholesale basis may not be long in arriving.

## On Line Resources— Government and Other Websites

The following links provide access to information and resources available from the U.S. government and other organizations. Just click on the link.

[Free housing-related publications \(PDFs\) from the Federal Citizen Information Center](#)

[Making home affordable](#)

[Home foreclosure resources](#)

[Fair housing laws](#)

[Fair lending practices](#)

[Home improvements](#)

[Do-it-yourself home repair and remodeling](#)

[Emergency preparedness—get a kit, make a plan, be informed](#)

[Disaster information](#)

[Tax information for homeowners](#)

[Buying and selling a home](#)

[Green ideas for homeowners and communities](#)

[Sierra Club--Reduce, Reuse, Recycle](#)

[Home Safety Council](#)

[National Crime Prevention Council--Home and Neighborhood](#)

# MYR Firm Directory

## Attorneys:

Milton M. Motooka: 532-7214; [milton@myrhawaii.com](mailto:milton@myrhawaii.com)  
Myles T. Yamamoto: 532-7215; [myles@myrhawaii.com](mailto:myles@myrhawaii.com)  
Terrance M. Revere: 532-7216; [terry@myrhawaii.com](mailto:terry@myrhawaii.com)  
Anna T. Valiente: 532-7238; [anna@myrhawaii.com](mailto:anna@myrhawaii.com)  
Carlos Perez-Mesa: 532-7239; [carlos@myrhawaii.com](mailto:carlos@myrhawaii.com)  
Carol A.L. Rosenberg: 532-7244; [carol@myrhawaii.com](mailto:carol@myrhawaii.com)  
Cherrylina C. Piedad: 532-7249; [cheryl@myrhawaii.com](mailto:cheryl@myrhawaii.com)  
Clay W. Valverde: 532-7217; [clay@myrhawaii.com](mailto:clay@myrhawaii.com)  
H. Kyung Song: 532-7269; [kyung@myrhawaii.com](mailto:kyung@myrhawaii.com)  
Katherine A. Holstead: 532-7262; [katherine@myrhawaii.com](mailto:katherine@myrhawaii.com)  
Na Lan: 532-7261; [nalan@myrhawaii.com](mailto:nalan@myrhawaii.com)  
Todd Moulton: 532-7218; [todd@myrhawaii.com](mailto:todd@myrhawaii.com)

## Legal Assistants/Paralegals

Carla Soekias: 532-7264; [carla@myrhawaii.com](mailto:carla@myrhawaii.com)  
Christine George: 532-7248; [christine@myrhawaii.com](mailto:christine@myrhawaii.com)  
David Fonseca: 532-7260; [david@myrhawaii.com](mailto:david@myrhawaii.com)  
Debra Veje: 532-7252; [debra@myrhawaii.com](mailto:debra@myrhawaii.com)  
Fredelie Fletcher: 532-7268; [fredelie@myrhawaii.com](mailto:fredelie@myrhawaii.com)  
Garrett Halydier: 532-7267; [garrett@myrhawaii.com](mailto:garrett@myrhawaii.com)  
James Manarpaac: 532-7251; [james@myrhawaii.com](mailto:james@myrhawaii.com)  
Joseph Megill: 532-7255; [megill@myrhawaii.com](mailto:megill@myrhawaii.com)  
Joseph Sweeney: 532-7243; [joseph@myrhawaii.com](mailto:joseph@myrhawaii.com)  
Elikapeka Miyasato: 532-7258; [kapeka@myrhawaii.com](mailto:kapeka@myrhawaii.com)  
Lisa Halvorson: 532-7243; [lisa@myrhawaii.com](mailto:lisa@myrhawaii.com)  
Lowell Gerry: 532-7219; [lowell@myrhawaii.com](mailto:lowell@myrhawaii.com)  
Mark Batis: 532-7242; [mark@myrhawaii.com](mailto:mark@myrhawaii.com)  
Melanie Oyama: 532-7266; [mel@myrhawaii.com](mailto:mel@myrhawaii.com)  
Michael Antone: 532-7256; [michael@myrhawaii.com](mailto:michael@myrhawaii.com)  
Moana Melendez: 532-7270; [moana@myrhawaii.com](mailto:moana@myrhawaii.com)  
Shirley Akamine: 532-7908; [shirley@myrhawaii.com](mailto:shirley@myrhawaii.com)

## Fax Numbers

Accounting/Litigation: 532-7910  
Condo Associations/Collections: 532-7911

## Dedicated/Special Services

Client Services: 532-7240; [clientservice@myrhawaii.com](mailto:clientservice@myrhawaii.com)  
Homeowner/Debtors: 532-7246; [help@myrhawaii.com](mailto:help@myrhawaii.com)

## Other Inquires

Lindsay Oyama, Operations: 532-7254; [lindsay@myrhawaii.com](mailto:lindsay@myrhawaii.com)  
Lynn Lau, Accounting: 532-7263; [lynn@myrhawaii.com](mailto:lynn@myrhawaii.com)  
Mea Mitchell, Assistant Office Mgr: 532-7259; [mea@myrhawaii.com](mailto:mea@myrhawaii.com)  
Rigo Trujillo, Billing: 532-7257; [rigo@myrhawaii.com](mailto:rigo@myrhawaii.com)

To download all contact information on Vcards for Outlook, go to [www.myrhawaii.com](http://www.myrhawaii.com) and select Resource Center.

## Motooka Yamamoto & Revere Client Seminars

**Kona: Friday, September 2**—King Kamehameha's Kona Beach Hotel  
**Oahu: Friday, September 23**—Japanese Cultural Center

*Firm seminars are offered by invitation only to our clients and invited guests.*

## Seminars

**Thursday, June 2:** Condo Wars  
**Friday, June 3:** Kona: Condo Wars  
**Thursday, July 14:** Legislative Update  
**Thursday, August 25:** Dealing with the Dark Side, Druggies, Dogs  
**Thursday, October 13:** Covenants Enforcement



**\$50 for members; \$60 for non-members; \$10 discount for early registrations. Includes lunch and handouts.**





House Committee on Judiciary

Testimony of: Steven K. S. Chung

Date: March 29, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

Position: I strongly oppose S.B. No. 551. HD1

My name is Steven Chung, and I am an attorney who represents a number of former homeowners who lost their condominium apartments as a result of the improper use of the nonjudicial foreclosure process. I oppose the proposed legislation as it may improperly affect the claims of my clients.

Prior to its repeal in 2012, *Hawai'i Revised Statutes* § 667-5 allowed a creditor holding a mortgage containing a power of sale to sell a debtor's home in as little as 36 days after declaring a default. In 2011, prior to its repeal in 2012, the legislature placed a moratorium on the use of HRS § 667-5, referring to it as "one of the most draconian (nonjudicial foreclosure statutes) in the country" that was enacted in 1874 and "originally designed to make it easy to take land away from Native Hawaiians."<sup>1</sup>

Even though condominium associations did not hold mortgages containing powers of sale, they used HRS § 667-5 to sell the homes of more than 600 families who fell behind in paying their common assessments before HRS § 667-5 was repealed. Now, many of those families who lost their homes but remained liable on their mortgages are seeking to obtain compensation for the unlawful foreclosures that occurred, and those families are concerned that the proposed legislation may adversely affect their claims.

---

<sup>1</sup> 2011 House Journal – 59<sup>th</sup> Day, Conf. Com. Rep. No. 133 and S.B. No. 651, SD 2, CD 1. Representative Herkes is on record as stating that "And in the last 10 to 15 years [HRS § 667-5] had been the mechanism to non-judicially foreclose on homeowners, often without their knowledge and without providing them a fair opportunity to save their homes. In Act 48, we just put a stop to it. Now we've gotten rid of it." Conf. Com. Report No. 63-12, in 2012 House Journal, at 817.

In 1998, the legislature had enacted the “Alternate Power of Sale Foreclosure Process,” codified at HRS §§ 667-21 through 667-42, for condominium associations to use. That alternate process, which is labeled Part II, contained substantial safeguards designed to protect consumers from abusive collection practices. Because of those safeguards, the condominium associations that conducted the 600 foreclosures mentioned above did not use Part II. Instead, they used HRS § 667-5, which contained no protection for consumers, despite the fact that they did not hold mortgages containing powers of sale.

In a case called *In re W.H. Shipman, Ltd.*, the Supreme Court said that the seizure and sale of land is one of the most potent weapons that can be used to collect a debt as the consequences are often staggering and irreversible. This is especially true when a junior lien like the lien of a condominium association is foreclosed, and a family loses their home but remain liable for the mortgage loan. With their finances in disarray, they struggle to find new housing, in purchasing transportation to go to work, and with their careers, especially if they are service members.

I object to the proposed legislation as it may constitute an ex post facto law that may legalize the improper nonjudicial foreclosures that condominium associations conducted using HRS § 667-5 and prevent the families whose homes were unlawfully taken from obtaining appropriate redress.

To assist the committee in understanding why the use of HRS § 667-5 by condominium associations was unlawful, I attach the following excerpts from the appellate brief I filed in a successful appeal challenging the use of Part I by condominium associations.

**A. Associations were not authorized to use § 667-5**

In 2010, the authority of a homeowner association to foreclose a lien for unpaid assessments was governed by HRS Chapters 514A, 514B and 667. Chapter 514A, enacted in 1977 as the Condominium Property Act, applied to condominiums that were created prior to July 1, 2006. Chapter 514B, enacted in 2004, replaced Chapter 514A as the Condominium Property Act as of July 1, 2006.<sup>2</sup> Chapter 667 governed foreclosures and in 2010 consisted of Part I (HRS §§ 667-1 to 667-10) and Part II (HRS §§ 667-21 to 667-42).

---

<sup>2</sup> HRS § 514A-1.5 and § 514B-21.



HRS §§ 667-1 to 667-10 were originally enacted in the 19<sup>th</sup> century, long before condominiums existed. HRS § 667-1 permitting foreclosure by action, and HRS § 667-5, which was repealed in 2012, provided a nonjudicial foreclosure process for mortgages containing a power of sale. By its terms, HRS § 667-5 could only be used “when a power of sale is contained in a mortgage” and required the foreclosing party to “give any notices and do all acts as are authorized or required by the power contained in the mortgage.” It also required the mortgagee to “give notice of the ... intention to foreclose the mortgage and of the sale of the mortgaged property” by publishing notice of public sale once a week for three successive weeks. The mortgagee could then hold a public sale no less than fourteen days after the final notice was published, allowing a nonjudicial foreclosure to take place in as little as 36 days.<sup>3</sup>

When Chapter 514A was enacted in 1977, it included HRS § 514A-90, which authorized associations to place a lien on apartments for unpaid common assessments and to enforce the lien “by action by the manager or board of directors, acting on behalf of the apartment owners, in like manner as a mortgage of real property.”<sup>4</sup> This meant that associations could only enforce their liens by judicial action pursuant to HRS § 667-1.

In 1998, financial institutions and condominium associations sought a nonjudicial foreclosure option, and the legislature responded by enacting the “Alternate Power of Sale Foreclosure Process,” codified at HRS §§ 667-21 through 667-42.<sup>5</sup> Because of concerns regarding the rights of homeowners, the legislature included substantial consumer protection safeguards in Part II.<sup>6</sup> They included: (1) that the homeowner be given at least sixty days to cure any default (HRS §667-22(a)(6)); (2) actual service of the notice of default on the homeowner in the same manner as service of process (HRS §667-22(c)); (3) at least sixty days advance notice before the public sale (HRS § 667-25); (4) at least two open houses of the mortgaged property (HRS § 667-26); (5) that the homeowner sign the conveyance document (HRS § 667-31(a) [1998]); and (6) a bar against deficiency judgments (HRS § 667-38). Pursuant to HRS § 667-40, the nonjudicial foreclosure process set out in Part II was specifically made available to condominium associations. It provided

---

<sup>3</sup> HRS. § 667-5 contains identical language.

<sup>4</sup> HRS §514A-90 (1998).

<sup>5</sup> H.B. 2506, H.D. 1, 19<sup>th</sup> Leg., Reg. Sess. (1998).

<sup>6</sup> *Id.*

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.

Despite the enactment of Part II in 1998, however, HRS § 514A-90 was not changed and continued to provide that the lien for unpaid assessments had to be foreclosed “by action... in like manner as a mortgage of real property.”<sup>7</sup> In 1999, therefore, the legislature sought to remedy this oversight and “clarify that associations of apartment owners may enforce liens for unpaid common expenses by non-judicial and power of sale foreclosure procedures, as an alternative to legal action.”<sup>8</sup> Pursuant to Act 236, HRS § 514A-90 was amended in 1999 to provide that the lien of an association could be foreclosed “by action or non-judicial or power of sale procedures set forth in chapter 667.”<sup>9</sup> In addition, Act 236 added HRS § 514A-82(b)(13), by which the bylaws of all condominium projects existing as of January 1, 1988, or created thereafter were deemed to include the following language:

A lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale foreclosure procedures authorized by chapter 667.

This, of course, was intended to provide the “law or written document” that HRS § 667-40 required for a condominium association to be authorized to use the nonjudicial foreclosure process set forth in Part II. When Chapter 514B became the Condominium Property Act, it included HRS § 514B-146(a), which repeated verbatim the language of HRS § 514A-90.<sup>10</sup> None of these amendments, however, changed HRS § 667-5 in any way, and it continued to be available only when a “power of sale is contained in a mortgage.”<sup>11</sup>

Because of the repeated abuse of HRS § 667-5, which was used to strip consumers of their homes, a moratorium was placed on its use in 2011, and it was repealed in 2012. Today, a

---

<sup>7</sup> HRS § 514A-90 (1998).

<sup>8</sup> 1999 Act 236, §1.4.

<sup>9</sup> Hereafter, HRS § 514A-90 refers to HRS § 514A-90 (1999), which remained unchanged between 1999 and 2010.

<sup>10</sup> HRS §514B-146 (2004)

<sup>11</sup> HRS § 667-5 (1999)



condominium association may only foreclose by action under Part I, as amended, by using Part II to conduct a nonjudicial foreclosure, or by using an alternative nonjudicial process codified as HRS §§ 667-91 to 667-104 (“Part VI”), which was enacted in 2012 and contains many of the consumer safeguards that originated in Part II.<sup>12</sup> They include a requirement that notice of default be served on the homeowner in the same manner as service of process and that an opportunity to cure the default be provided.<sup>13</sup>

### **B. The legislative intent**

The foremost obligation of a court when construing a statute is “to ascertain and give effect to the intention of the legislature.”<sup>14</sup> As repeal by implication is disfavored, the intention for the legislature to repeal a statute by implication must be “clear and manifest.”<sup>15</sup> Here, the clearly-delineated legislative intent of Part II—to provide a nonjudicial foreclosure process which would protect the rights and interests of homeowners—can only be upheld by a determination that condominium associations wishing to conduct nonjudicial foreclosures in 2010 were required to use Part II.

Courts must construe a statute in a manner consistent with its purpose and with reference to other laws regarding the same issue, rejecting interpretations that are absurd, unjust or clearly inconsistent with the purposes and policies of the statute.<sup>16</sup> As discussed above, the legislature included substantial safeguards in Part II to protect consumers from abusive collection practices. The legislature believed that these safeguards were “needed to protect the interests of consumers.”<sup>17</sup>

In 2011, when the legislature examined § 667-5, a moratorium was placed on its use and it was referred to as “one of the most draconian (nonjudicial foreclosure statutes) in the country”

---

<sup>12</sup> Part II was amended when Part VI was adopted.

<sup>13</sup> HRS § 667-92(e)

<sup>14</sup> *Franks v. Honolulu*, 74 Hawai’i 328, 335, 843 P.2d 668, 671 (1993)

<sup>15</sup> *Richardson v. City and County of Honolulu*, 76 Hawai’i 46, 55, 868 P.2d 1193, 1202 (1994); *Posadas v. Nat’l City Bank*, 296 U.S. 497, 504 (1936); *accord State v. Kuuku*, 61 Hawai’i 79, 82, 595 P.2d 291, 294 (1979).

<sup>16</sup> *Haole v. State*, 111 Hawai’i 144, 149, 140 P.3d 377, 382 (2006); *State v. McKnight*, 131 Hawai’i 379, 389, 319 P.3d 298, 308 (2013) (citation omitted).

<sup>17</sup> *Aames Funding Corp. v. Mores*, 107 Hawai’i 95, 102, 110 P.3d 1042, 1049 (2005) (quoting Conf. Com. Rep. No. 75, in 1998 House Journal, at 979).

that “was originally designed to make it easy to take land away from Native Hawaiians.”<sup>18</sup> In 2012, the legislature repealed HRS § 667-5 in order to “provide a single nonjudicial foreclosure process under Part II of [chapter 667].”<sup>19</sup> This history makes it clear that the legislature had a negative view of HRS § 667-5 and never intended to allow its use by condominium associations. Given the legislature’s desire to protect homeowners, it is illogical to conclude that a year after enacting Part II the legislature gave condominium associations the ability to bypass the safeguards in Part II by using HRS § 667-5.

Furthermore, there is absolutely no evidence that the legislature ever intended to authorize condominium associations to use HRS § 667-5 if they did not independently hold a mortgage containing a power of sale. Act 236, which added HRS § 514A-82(b)(13) and amended HRS § 514A-90 was passed in 1999, a year after Part II with its substantial consumer protection safeguards was enacted. Given this sequence of events, it is illogical to conclude that the legislature intended to give associations access to HRS § 667-5 a mere year after creating Part II. That interpretation would effectively repeal Part II, and no evidence or legislative history supports that result.

In *Galima v. AOA Palm Court*, LEK-KSC, Civil No. 16-00023, 2017 U.S. Dist. LEXIS 47715, the U.S. District Court was called upon to decide the same issues involved in this appeal. After carefully analyzing the issues and legislative history of the statutes involved, the District Court ruled that condominium associations were not authorized to use § 667-5. Predicting that the Hawai’i Supreme Court would find it clear from the language of the statutes at issue that condominium associations were only authorized to use Part II, the District Court said that a contrary conclusion “is an illogical, and almost absurd, interpretation of § 514B-146(a) (2010) because it would render Chapter 667, Part II meaningless in the context of condominium association liens.”

---

<sup>18</sup> 2011 House Journal – 59<sup>th</sup> Day, Conf. Com. Rep. No. 133 and S.B. No. 651, SD 2, CD 1. Representative Herkes is on record as stating that “And in the last 10 to 15 years [HRS § 667-5] had been the mechanism to non-judicially foreclose on homeowners, often without their knowledge and without providing them a fair opportunity to save their homes. In Act 48, we just put a stop to it. Now we’ve gotten rid of it.” Conf. Com. Report No. 63-12, in 2012 House Journal, at 817.

<sup>19</sup> Conf. Com. Rep. 63-12, in 2012 House Journal, at 1631.



Public policy favors giving a defaulting property owner “every reasonable opportunity to redeem his property.”<sup>20</sup> The Supreme Court has said that the seizure and sale of land is one of the most potent weapons that can be used to collect a debt and “the consequences of seizure and sale of land are often staggering and irreversible,” as it deprives the landowner of significant capital investment or a source of income.<sup>21</sup> Hawaii courts, therefore, have interpreted statutes which provide for government seizure and sale of land in favor of the taxpayer, rather than the government.<sup>22</sup>

The Supreme Court has noted that in sales contracts, “the penalty of forfeiture is designed as a mere security.”<sup>23</sup> Therefore, barring deliberate bad faith or gross negligence, forfeiture is disfavored. *Id.* The same logic applies to the lien of an association for unpaid assessments. It should provide security to ensure the payment of the assessments rather than a tool to strip owners of their homes.

---

<sup>20</sup> *Hawaiian Oceanview Estates v. Yates* 58 Hawai'i 53, 58, 564 P.2d 436, 440 (1977).

<sup>21</sup> *In re W.H. Shipman, Ltd.*, 84 Hawai'i 360, 368, 934 P.2d 1, 9 (Haw. Ct. App. 1997).

<sup>22</sup> *Id.*

<sup>23</sup> *Jenkins v. Wise*, 58 Hawai'i 592, 597, 574 P.2d 1337, 1341 (1978).

House Committee on Judiciary

Testimony of: Rebecca Corby  
Date: March 27, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

My name is Rebecca Corby. In 2006, I purchased an apartment in the Tradewinds Plaza Condominium in Waikiki. I purchased my apartment for use as a vacation home and rental. My business suffered as a result of the great recession, and by 2009, I could not stay current with my AOA fees. **In 2010, my AOA conducted a nonjudicial foreclosure and sold my apartment to itself for \$1.00, while I remained liable for the mortgage.**

I tried everything in my power to stave off foreclosure. My AOA refused to communicate with me, and referred me to their attorney, Philip Nerney. On November 4, 2009, Mr. Nerney sent me a demand letter, and on December 11, 2009, Mr. Nerney informed me over the telephone that I needed to send my AOA a cashier's check for \$2,989.34 to cure the default. That very same day, on December 11, 2009, I sent a cashier's check for \$2,989.34 to my AOA. My AOA did not cash my check. It held on to my check, and rather than applying the check to my outstanding balance, my AOA, conducted a nonjudicial foreclosure, and took title to my apartment.

I immediately felt that something was wrong. How could my AOA refuse to cash my check that was written for the exact amount that Mr. Nerney had quoted me? I made inquiries with attorneys, but could not get any answers. It wasn't until 2016, after hearing about nonjudicial foreclosures in the news, did I find out that Mr. Nerney and my AOA did not follow the law in handling the foreclosure of my apartment.

I found out that a power of sale is a contract, or agreement generally contained in a mortgage's acceleration clause. My AOA did not hold a mortgage on my apartment, and that there was no power of sale clause in the condominium bylaws. My AOA used Part I of the foreclosure statutes that was enacted in 1874 and was used at the time to steal land from native Hawaiians. **If my AOA had foreclosed under Part II, I they would not have been able to take my apartment from me for a dollar.**

SB 551 is not about allowing AOA's to recover unpaid assessments. If all they were concerned about was collecting outstanding fees, why didn't they cash my check? This bill is about making it easier for AOA and their attorneys to take property away from homeowners. **Please vote NO on SB 551. Thank you.**



House Committee

Testimony of: Daisy Malabe  
Date: 3/22/2019

Re: S.B. NO. 551, HD1  
RELATING TO CONDOMINIUMS

Dear Chairman and Members of the Committee:

Position: I strongly oppose S.B. No. 551, HD1

My name is Daisy Malabe. In 2005, I purchased an apartment in Executive Centre on Bishop St, Honolulu, HI. In 2010 my HOA conducted a nonjudicial foreclosure and sold my apartment to itself for a nominal amount.

When I received notice of the impending foreclosure, I was given no options to counter this. I reached out to my bank (Bank of Hawaii) but was rejected any assistance or requests for payment options. At some point I stopped seeking additional help as it was all for not and I couldn't handle it any more on an emotional level. I was married with two children to care for and this put me through such distress which still affects me today.

I was told by the HOA attorney that the HOA bought the property and my property manager notified me of the need to move out. I informed them to just take whatever inside property they wanted.

Having gone through what my family did, I feel giving HOAs the right to conduct nonjudicial power of sale foreclosures is a detriment to hardworking families who are contributing to our state and only trying to make a living in return.

Chairman, I stand in strong opposition to S. B. 551, HD1. I ask that you deny this measure. Thank you for the opportunity to present my testimony to your committee.

House Committee on Judiciary

Testimony of: Glorielyn Pascual

Date: March 29, 2019

Re: S.B. NO. 551, HD1  
RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

Position: I strongly oppose S.B. No. 551, HD1

In 2007 I purchased an apartment at Royal Palms. Jovencio and I were working full-time jobs at that time. My youngest daughter was getting sick more often and since Jovencio work income was greater than mine we both agreed that I would stay home from work and care for my daughter if she gets sick. That is one reason we fell behind on our HOA payments. As the bill of my HOA payments started to add up as the months went by I started to panic because I didn't want to lose my house. I called the HOA office many times each month for some guidance and for help with my situation to try to see if I could do a payment plan on my past due. All I got from the office each time I called was a NO answer and threats stating that "it's too late we can't do anything to help you so we will take your house away." I started making calls to all my family and friends across the state for financial help, but that was not a success because they also had financial problems of their own. I felt so stressed out and helpless; it led to depression, and I started not eating for days. I didn't know what else to do to save my home, so my family and I started packing our belongings and walked away from our house we once called home.

After losing my home, my children and I jumped home to home, sleeping in the living room with our suitcase and black plastic garbage bags. What breaks my heart the most was seeing my children's faces be the happiest of having a good home for them to be the saddest face when we had to walk away from our home. My children went to different schools every year because I couldn't stay focus anymore due to the emotional stress it caused, and I felt I let my family down. Losing my home made me file for bankruptcy which made my financial status turn for the worse. It was about nine years ago when the one thing I worked so hard for as a homeowner has been taken away from my family and me in just a blink of an eye. Losing my home I've been so traumatized and I never owned another home since then. I had to move to the mainland because it had too many memories of what I once had. What kept me alive in my heart after losing my home all these years was my children, they reminded me every day to stay blessed no matter what and as long as we're together as a family, it's the biggest gift. After losing my home and not being a homeowner anymore, I thought I would never do anything good in my life again, but I came back up in life and became a nurse helping sick people get better. I took my children's advice that they told me when we lost our home that it's not a bad life, we just have to always look forward to better days.

I disagree with giving the HOA the right to conduct nonjudicial power of sale foreclosures because I am afraid they would take away other peoples' homes like they've done to me and others.

Chair Lee, I stand in strong opposition to S. B. 551, HD1. I ask that you defer this measure. Thank you for the opportunity to present my testimony to your committee.



House Committee on Judiciary

Testimony of: Herbert Parks  
Date: March 29, 2019

Re: S.B. NO. 551, HD1  
RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

My name is Bert Parks. In 2003, my wife Yvonne and I purchased a condominium unit in the Makaha Surfside Condominium. We purchased our apartment as our primary residence. Makaha Surfside is beachfront property, and located on the beautiful Waianae coast. We believed that our Makaha Surfside apartment was going to be our lifetime home.

I worked as a handyman remodeling homes for a living. During the great recession, people either did not have money, or did not want to spend money remodeling their homes. If I didn't work, I didn't get paid. As a result of the recession, I was unable to stay current with my association dues. In order to keep my apartment, I asked my AOA for one year to pay my outstanding association dues, which they refused. I finally accepted a friend's offer to loan me the money to pay the AOA. The AOA refused my offer to pay the entire outstanding amount of my association dues, which at the time was \$2,200.00. They informed me that with the addition of legal fees from the Porter, McGuire law firm, the amount was now \$5,000. At that point, I gave up, because I knew that I could not afford to pay \$5,000 to the AOA, or ask my friend for more money.

**In 2010, my AOA conducted a nonjudicial foreclosure and sold our apartment to itself for \$1.00. The AOA continues to possess and rent out our apartment, as I remain liable for the mortgage.** After being served with an eviction notice, my wife and her children moved to Hawai'i Island, and I stayed behind to clean out our apartment.

After vacating our apartment, I became homeless, and due to the stress of losing our dream home, our marriage failed. During my time living without a home, I lost all of my personal and family mementos to the elements. When I found out that the legislature is proposing changing the law to permit Associations to conduct nonjudicial power of sale foreclosures again, it brought up a lot of bad memories and feelings that I had worked hard to suppress.

I strongly oppose the legalization of nonjudicial AOA foreclosures. Thank you for the opportunity to present my testimony to your committee.

House Committee on Judiciary

Testimony of: MSgt. Rudy Galima  
Date: March 29, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

ChairLee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

Aloha, my name is Rudy Galima. I am a Master Sergeant in the U.S. Marines. I enlisted in January 2000, and have been proudly serving my country for 19 years. I have been married to my wife Roxana for 13 years, and together, we have 3 children, ages 12, 10 and 7. In 2006, my wife and I purchased a condominium unit in Palm Court, located in Ewa Beach, Hawai'i. We purchased the Palm Court apartment to use as our primary residence while I was on active military duty and stationed on O'ahu. In 2008, I was reassigned to another duty station on the mainland. After leaving Hawai'i, we rented our apartment through 21<sup>st</sup> Century Realty, with the intent to return to Hawai'i after I retired from the military. Our tenant fell behind in his rent, and unable to evict him due to his military service member status, we were unable to stay current on our homeowner assessments and mortgages. We arranged a payment plan with our lenders, paid off our second mortgage, and listed our apartment for sale.

While arranging to sell our apartment, we asked the AOA of Palm Court for a payment plan, and they refused. Instead, the AOA conducted a nonjudicial foreclosure in 2010, and took title to our apartment. **At the nonjudicial foreclosure auction, AOA of Palm Court sold our unit to themselves for \$1.00. Palm Court continues to own our apartment, renting it out for \$1,500 per month, while we remain liable to our lender for the mortgage.** We did not receive notice from Palm Court that they had taken the title to our apartment. We were not aware of the foreclosure until our broker for the short sale informed us that the AOA had foreclosed and the short sale had fallen through as a result.

The **AOAO was represented by the Porter McGuire Kiakona & Chow** law firm. They conducted the nonjudicial foreclosure with complete disregard for the physical, emotional and financial well-being of my family. Their behavior toward my wife and I has been infuriating, to say the least. They knew that I was an active duty service member, yet they submitted a form purporting to show that I was not an enlisted military service member. We had arranged for a sale of our apartment, a sale that was approved by our mortgage company. We would have paid off our mortgage, and eventually paid off the AOA. To add insult to injury, **in 2015, the Porter McGuire law firm filed a lawsuit against us for the outstanding homeowner assessments, while they continue to make money from the rental of our apartment.**

It was not until I contacted a lawyer to help me with the AOA's law suit that I was informed that they did not have the legal right to take my apartment from me by conducting a nonjudicial power of sale foreclosure. My lawyer explained to me that a power of sale is a contract, or agreement generally contained in a mortgage's acceleration clause. This power of sale clause explains the procedure for handling the default on a mortgage. My lawyer also explained to me that my AOA did not hold a mortgage on my apartment, and that there was



no power of sale clause in the condominium bylaws. I also found out that the Porter McGuire firm used Part I of the foreclosure statutes that was enacted in 1874 and was used at the time to steal land from native Hawaiians. **If my AOA had foreclosed under Part II, I would have been able to complete the sale of my apartment, pay off my mortgage and outstanding assessments, and avoid foreclosure.**

Homeowner associations, through their law firms, should not be able to conduct nonjudicial foreclosures. Nonjudicial foreclosures are not being used to recover unpaid assessments. They are being used to steal property from homeowners, while lining the pockets of the attorneys representing them with money.

Thank you for the opportunity to present my testimony to your committee.

House Committee on Judiciary

Testimony of: Stephen Paia Henry Wong  
Date: March 29, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

My name is Stephen Paia Henry Wong. In 2005, I purchased a condominium unit in the Harbor Square Condominium, in downtown Honolulu for \$450,000. During the great recession, my income suffered, and with the added costs of special assessments, I could not keep up with my homeowner association dues. **In 2011, my AOA conducted a nonjudicial foreclosure and sold my apartment to themselves for \$1.00.** Nine years later, my AOA continues to own and rent my apartment, while I remain liable for the mortgage. In 2012, my AOA filed a suit to collect unpaid assessments, even though they owned and were collecting rental income from my apartment.

The foreclosure absolutely turned my life upside down. I am financially ruined. I was unable to borrow money or obtain a credit card until just this year. I am grateful that my daughter has taken me in, or I would have become homeless.

My association was represented by the Porter, McGuire, Kiakona & Chow law firm. When Porter McGuire took my property from me, I did not understand the difference between Part I and Part II foreclosure. I did not even consider the fact that these lawyers would lie and misuse the law in order to benefit themselves and my AOA. They lie, in their testimony to you right now. How can you, the legislature, trust a single word they say, when **they abused a law passed in 1874 to steal land from native Hawaiians? A law they used to continue to steal land from this native Hawaiian.**

I oppose the legalization of nonjudicial foreclosures. Thank you for the opportunity to present my testimony to your committee.



House Committee on Judiciary

Testimony of: Maureen D. Nolan, Trustee for Mary E. Nolan Trust  
Date: March 29, 2019

Re: S.B. NO. 551, HD1  
RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

My name is Maureen Nolan. In October 2003, my mother purchased an apartment in (Sun Village, Lihue Kauai). In 2010, the HOA conducted a nonjudicial foreclosure and sold my mother's apartment to themselves for a nominal amount of \$15,000. They proceeded to transfer ownership of the condo to a woman that demonstrated predatory activity costing us our ability to rent, sell and use the condo for 6 months prior to the foreclosure.

My mother died suddenly after a long career as a teacher. She retired after serving as the director of Head Start for the Island of Kauai. She loved teaching the keikis on the island and she enjoyed the home she made in Lihue. She acquired her doctorate in education while being a mother to seven of her own children. She was an extremely, warm, nurturing, creative and driven educator. There were points in her career that she worked three jobs to make ends meet. The family she left behind was devastated by her sudden loss. The only asset of value she left behind for her seven children after her long career was the condo she owned at Sun Village.

The Trust did not have enough in assets to keep the HOA payments current. Amounts were paid when possible and the trust attempted to negotiate with the HOA to allow the sale of the condo and pay outstanding fees at the time of closing. At some point the HOA hired Ekimoto and Morris. They delivered a notice of foreclosure. At that point **any attempt to negotiate a fair resolution to the HOA payments became impossible and Ekimoto and Morris proceeded to accelerate the amount owed, including egregious legal fees making it impossible to resolve the outstanding balance, so the foreclosure took place despite much protest.**

The actions that the Sun Village HOA took were draconian. They showed no compassion and appeared to disregard any humanity to another HOA member and their personal assets. My mother considered these people her friends and neighbors. They were no less than the children in the "Lord of the Flies". In fact, it appeared that their desire to foreclose started the day my mother died. It also appeared that the HOA board colluded with the person they eventually transferred the property to. They did not care about the homeowner and only demonstrated an extremely callous and corrupt desire to foreclose with no other reasonable considerations.

The actions that Sun Village took were beyond devastating. As the representative of the Trust I lost the "love and affection" of family. I was blamed for the loss. The value of the asset



was lost as two members of the family were deployed overseas serving active duty and/or serving the military in Public Health. Other members were struggling with the responsibilities of raising young families. In addition, there was a family member fragile and dependent on the trust. That family member became homeless, and in 2013 was murdered on the island of Oahu. The evil, greedy, motivation of the Sun Village HOA resulted in a compounding, indescribable destruction to an already devastated, grieving family.

Giving any HOA the right to conduct a “non-judicial” foreclosure is like giving a group of people the right to take another’s property for any reason. It completely disregards normal property rights that every human should enjoy in the United States of America.

HOA’s are not created equally. They are subject to the personalities and skill level of the board members. Which in turn are subject to normal human foibles, their own personal motivations, or the corrupt motivation of their professional managers. The HOA should demonstrate some level of caring for their neighbors. If there is no incentive to work out solutions within the HOA outside of their professional managers, the expansion of corruption merely expands. This was most evident with the failure of the Sun Village HOA to engage and speak to the homeowner to develop a reasonable, solvable solution prior to the taking of property through an unwise, misguided and illegal “non-judicial” foreclosure.

Chair Lee, I stand in strong opposition to S. B. 551, HD1. I ask that you defer this measure. Thank you for the opportunity to present my testimony to your committee.

## House Committee on Judiciary

Testimony of: James B. Busby Sr.

Date: March 29, 2019

Re: **S.B. NO. 551, HD1  
RELATING TO CONDOMINIUMS**

Chair Lee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

My name is James B. Busby Sr. In 2005, I purchased an apartment in Palm Court. In 2010, my HOA conducted a nonjudicial foreclosure and sold my apartment to themselves for a nominal amount of \$1.00.

In 2006, I had recently gotten married and began a new job with the Department of the Army. My wife, an Army Lieutenant, was preparing to deploy to Iraq for (18) months. I had placed a great deal of my savings in the stock market, which had sustained a downturn. Also, unfortunately, my job was in jeopardy, which required me to take a lower salary. The unfortunate pressure of losing money in the stock market, the preparation of my wife leaving during the beginning phase of our marriage, and the reduction in pay quickly piled up. This led to a great deal of frustration and emotional highs and lows. We quickly fell on hard times, which led to me not being able to keep up with the payments. Mortgage payments began to pile up, which placed an extra strain on my marriage. The culmination of it all, specifically, the beginning of the foreclosure process forced me out of the home, and cause irreplaceable damages to my marriage and physical well-being.

Prior to falling behind, I communicated on a number of occasions with the Mortgage Company and the local association (AOAO). The mortgage company provided me with hardship documentation, in which I filled out and resubmitted in hopes of receiving a payment plan that would forgo the need for a foreclosure. Unfortunately, I got the run around until my loan was sold to another mortgage company. The AOAO was informed of everything that was going on prior to the final sale of the property in 2010.

**It wasn't until early 2011 that I found out via Hawaii property tax site to verify ownership of the property and was stunned to know that the property was sold for only a \$1 and the association owned the property.** Prior to this action I was still seeking help through the new mortgage company to arrange for partial payment of the overdue balance, which would have kept me as owner of the property. **Also, I was shocked to know that the mortgage company who held the mortgage for the home was totally unaware that the association had conducted a nonjudicial foreclosure on the property. I was never provided with an eviction notice from the property.**

The foreclosure was devastating to me. I certainly blame the foreclosure for the demise of my marriage, along with other mental and physical conditions that I've faced over the years. This was my very first home and I felt as if I failed as a human being. The foreclosure of the home impacted my ability to purchase a home in 2012 and 2014, simply because lenders would not offer me a loan, although I had immaculate credit and great income. I had two contracts written with builders that were unable to be executed because of a fraudulent nonjudicial foreclosure, which almost caused my current wife to walk away from our marriage.

HOA's should not have the power to conduct nonjudicial power of sale foreclosures. They should not have this power because they do not represent the interest of the homeowner. HOA's are positioned to care for the interest of the association and their board members, and not the consumer. Giving them this kind of control is an unfair advantage that will result in homeowner's rights being violated before their case can be heard in a court of law. The justice system should have the right to interpret the laws that govern consumer rights, especially when it comes to foreclosures.

Chair Lee, I stand in strong opposition to S. B. 551, HD1. I ask that you defer this measure. Thank you for the opportunity to present my testimony to your committee.



House Committee on Judiciary

Testimony of: Donna Kuewa  
Date: March 29, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

My name is Donna Kuewa. In 2006, my (now former) husband Alex and I purchased a condominium unit in the Mililani Town Houses Condominium, in Mililani, Hawai'i for \$460,000. We purchased the apartment to live in, as primary residence. We have two adult children, Keoni and Aldon. **In 2011, our AOA conducted a nonjudicial foreclosure and sold our apartment to itself for \$1.00.**

I was employed at Aloha Airlines from 1994 until it shut down in 2008. At that time, my unemployment compensation was one-third of my salary at Aloha, and my husband and I began falling behind on our association dues. Within a year, I was able to find full-time employment, but at a much lower salary than what I was making at Aloha.

Our AOA, through Hawaiiana Management, began sending letters to us demanding full payment of the outstanding association fees. Hawaiiana Management refused to communicate with us, and informed us that all AOA communications were being handled by the Ekimoto & Morris law firm. However, **each time we spoke with the law firm, they billed us, not the AOA, for their time. We discovered that their legal fees were being added to the amount we owed to the AOA.** Ekimoto & Morris' paralegal was cocky and rude to Alex and me. She made us feel like we were losers and failures. We began to feel like losers and failures. It cost us our marriage. Because Alex and I remained liable for the mortgage, the bank eventually foreclosed on our former home. Unlike Ekimoto & Morris, the bank's attorneys were courteous and professional.

When Ekimoto & Morris took our property from us and sold it to our AOA for a dollar, we did not understand the difference between Part I and Part II foreclosure. We did not even consider the fact that these lawyers would misuse the law in order to benefit themselves and our AOA. It wasn't until 2016 that we discovered that these law firms chose to foreclose under Part I instead of Part II, which was enacted specifically for condominiums, in order to bypass the consumer safeguards that Part II provided. Within a month of being informed that the AOA intended to foreclose, we were ordered to vacate our home. It infuriated me when I found out that they used a law enacted in 1874 that was designed to steal land from the Hawaiians.

I oppose the legalization of nonjudicial foreclosures. Thank you for the opportunity to present my testimony to your committee.

House Committee on Judiciary

Testimony of: Brooke Takara  
Date: March 29, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

My name is Brooke Takara. My mother passed away in 2017, so I am testifying on behalf of both of us. In 2003, my mother and I purchased a condominium unit in the Harbor Pointe Condominium, in Aiea, Hawai'i for \$185,000. We purchased the apartment for use as my primary residence. **In 2010, my AOA conducted a nonjudicial foreclosure and sold my apartment to themselves for \$1.00.** Nine years later, my AOA continues to own and rent my apartment, while I remain liable for the mortgage.

At the time of the foreclosure, I was employed at Fidelity National Title. In 2008, I began falling behind on my association dues after taking a pay cut due to the great recession and resulting real estate crisis. We were unable to sell our home because the market was dismal. **My AOA stopped communicating with me and referred me to their lawyers, who billed me for each communication, even though I was not their client. One day, I came home from work and found out that my association had locked me out of my own house.**

The foreclosure absolutely turned our life upside down. I had a two-year old daughter and I was pregnant with my 2<sup>nd</sup> child. We had to move out with no notice, which understandably, caused a huge amount a stress and emotional trauma. **The law utilized by my AOA did not require them to give me notice, and they didn't.** Eventually, both my mother and I needed to file for bankruptcy due to the foreclosure, the effects of which I'm still feeling to this day.

My association was represented by the Ekimoto & Morris law firm. When Ekimoto & Morris took my property from me, I did not understand the difference between Part I and Part II foreclosure. I did not even consider the fact that these lawyers would misuse the law in order to benefit themselves and my AOA. It wasn't until 2016 that I discovered that these law firms chose to foreclose under Part I instead of Part II, which was enacted specifically for condominiums, in order to bypass the consumer safeguards that Part II provided. If condominium associations foreclosed only to collect unpaid assessments, why did they sell it to themselves for a dollar? Why didn't they sell it to a third-party for the amount of the unpaid assessments? Why didn't they surrender my apartment to the bank after recovering the amount I owed in rental income?

I oppose the legalization of nonjudicial foreclosures. Thank you for the opportunity to present my testimony to your committee.



House Committee on Judiciary

Testimony of: Maytrie Greger  
Date: March 29, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

**Position: I strongly oppose S.B. No. 551, HD1**

My name is Maytrie Greger. In 2007, my husband and I purchased a condominium unit in Mawaena Kai, in Hawai'i Kai. We purchased our apartment initially to rent, and to use later as a retirement home. In 2011, my HOA conducted a nonjudicial foreclosure and sold my apartment to themselves for \$1.00. This is not a typographical error. **The Association of Apartment Owners of Mawaena Kai bought our unit for \$1.00.**

Prior to the foreclosure, our second and final tenant gave notice, and we were unable to find another replacement tenant. With a vacant property, we were unable to pay the rent and the HOA fees, and thus fell behind. After being unable to secure tenants, we made several attempts with the assistance of our realtor to present four (4) short sale offers to our bank. Short sales at that time were backlogged and none of the offers were approved. Because the property was vacant, **the HOA placed a padlock and falsely labeled the property as "distressed."** The HOA sent notices for several auction dates they were supposed to hold to sell our property, but then they would purposely reschedule the times for later dates and no one would show up. They labeled our condo as a "distressed" property, presumably to stall our sale long enough until there were no other buyers, which enabled them to purchase our condo for a dollar.

The nonjudicial foreclosure practically destroyed my husband because it worried him so deeply that we would be unable to pay the amount due and we were falling behind. Along with all of this we had to go through, we also had to file bankruptcy. During this time, my husband Victor was the victim of discriminatory employment practices based on his age and disability status (he suffered from Parkinson's disease). Watching my husband's mental, physical, and emotional deterioration resulting from these two events was excruciating for me.

The HOA was represented by the Ekimoto & Morris law firm. They conducted the nonjudicial foreclosure with complete disregard to the physical, emotional and financial well-being of my husband and me.

I vehemently oppose the legalization of nonjudicial foreclosures. Thank you for the opportunity to present my testimony to your committee.

House Committee on Judiciary

Testimony of: Joseph and Calandra Hicks

Date: March 29, 2019

Re: S.B. NO. 551, HD1  
RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

Position: I strongly oppose S.B. No. 551, HD1

My wife and I decided we wanted to retire in Hawaii. So, we looked into purchasing a condo at Makaha Valley Plantation in Waianae. I lived there while assigned to Tripler Army Hospital years before. I borrowed 45,000.00 on my home in Virginia for a down payment. This reduced the cost to 116,000.00. Our goals were to use the condo as vacation property until we retired. I used Inga's realty to facilitate the purchase and maintain the property by renting it out when we were not vacationing there. After about three years the condo fee kept increasing. I was paying more in mortgage and property fees than the rental brought in. Eventually,, I fell behind in my property fees but not the mortgage. The rent coming in helped pay the mortgage to my main land lender. One day I got an email and phone call from Inga's realty telling me the Association had filed a quitclaim on the property and all rent would be given to them via court order. My mortgage lender assured me if I kept paying my mortgage everything was okay as they owned the property. I made several payments without getting any rental income. I contacted Tom Sowell who told me I had lost the property and it would be auctioned off, but it would not affect my credit as this happened to other soldiers who bought properties at Makaha Valley Plantation. I lost my investment, of forty-five thousand, I was still paying the second mortgage I secured for the down payment. Eventually, I was forced to sell my home in a short sell.

Chair Lee, I stand in strong opposition to S. B. 551, HD1. I ask that you defer this measure. Thank you for the opportunity to present my testimony to your committee.

**SB-551-HD-1**

Submitted on: 3/28/2019 1:38:55 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower	Hui `Oia`i`o	Oppose	No

Comments:

In Hawaii, there are owners who were deprived of their properties without knowing that they had been or were in the process of being foreclosed upon, the most punitive action that can be foisted upon any property owner. They learned from third parties like their insurance companies, their mortgage lenders, and the property tax office, that they no longer owned or would shortly no longer own their properties.

They were the subjects of **non-judicial foreclosures**. A non-judicial foreclosure is the repossession and subsequent sale of property that takes place without a court order, without judicial oversight. Non-judicial foreclosures apparently can occur in as short a time as three months from the time an owner allegedly defaults on his/her obligations.

Without a judge, there is no one to halt the foreclosure when the conditions of that foreclosure are unfair, incorrect, or even unlawful.

In many cases, it was not the owner's lender who foreclosed, but their condominium association which processed a non-judicial foreclosure despite lacking any explicit authority in the association's governing documents or through laws. And until Act 195 was enacted last year, these foreclosures could occur because of defaulted late fees, fines, and other non-essential assessments which were deducted from payments made towards common expense assessments, giving the appearance that these owners defaulted on their common expense assessments. Until last year, associations could require that these non-essential assessments be paid first, before an owner had an opportunity to dispute them.

Hawaii State and C&C of Honolulu websites document a non-judicial foreclosure of a condo unit which was acquired for \$730,000 and sold through non-judicial foreclosure



for \$3000 just three years later. The outstanding judgment in favor of the foreclosing Association was \$15,566 of which the defaulted amount was \$8900.

It is likely that a judge would have halted the foreclosure based on the inequity between what was owed (\$15,566) versus the market value of the property (\$730,000 three years earlier) and likely would have required that the Association and owner negotiate a re-payment program.

Another case was reported by Leila Fujimori of the Star-Advertiser, "Disabled Marine veteran Charles Hicks, 66, and his wife, Deneen, 51, first-time homeowners, lost their condo to their homeowners association...Shortly after moving into their Makaha Valley Plantation condo in November 2008, a storm hit and the unit was inundated with water from external leaks. Later their ceiling collapsed after upstairs tenants left the water running before vacating the unit, the couple said. They had been dealing with mounting repair and mold remediation bills when they fell behind by \$2,500 on maintenance fees and said they asked the association whether they could work out a payment plan. Instead, they said, they received a letter from the association attorneys, and attorneys' fees and costs were added to the \$2,500 they owed...Charles Hicks said the homeowners association should have investigated the leaks and taken care of the problem, as well as other problems, but instead foreclosed on the condo in 2014. The couple moved to Georgia in 2014 and have been without a permanent home since."

Then a third local case is that of the Browns. The Browns purchased a condo unit for \$270,000 in 2004. They lost possession of their home through a non-judicial foreclosure because of a lien of \$1,488 in 2011 after the husband suffered a stroke. The default amount was less than 1% of the original value of their property. They attempted to sell the unit, but the foreclosure occurred faster. The Browns later became plaintiffs in a class action suit.

The defendants in the class action suit were two law firms and the 72+ condo associations they represented in approximately 160 non-judicial foreclosures.

Eventually the class action suit was denied for technical reasons, however the foreclosed owners--plaintiffs like the Browns--were allegedly advised to individually sue their associations to recover.

Allegedly to lessen the damage to these associations--including owners, managers, and board directors—by potential suits filed by “wrongfully foreclosed” owners, SB551 was initiated to legitimize non-judicial foreclosures, to do through the Legislature what could not be done through the Courts.

Should this Senate measure become enacted, it will legitimize and make it possible for all condo associations throughout the state to utilize non-judicial foreclosures.

Judicial safeguards are necessary to prohibit unfair, incorrect, or unlawful foreclosures, and to ensure that all requirements, especially notification, are properly fulfilled before foreclosure is processed.

**SB-551-HD-1**

Submitted on: 3/28/2019 1:41:59 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Daniel Kent	Hawaiian Properties, Ltd.	Support	No

Comments:

To the honorable Representative Lee and members of the House Judiciary Committee,

I am testifying in support of this important measure that is required to ensure the countless condominium owners in our state receive the necessary legal protections and rights for their shared communities to function properly.

Thank you.

-Daniel Kent

# Dubin Law Offices

55 Merchant Street  
Harbor Court, Suite 3100  
Honolulu, Hawaii 96813

---

(808) 537-2300 (808) Dubin Law  
Facsimile (808) 523-7733  
Toll Free (888) Dubin Law  
Writer's E-Mail: [farensmeyer@dubinlaw.net](mailto:farensmeyer@dubinlaw.net)  
[www.dubinlaw.net](http://www.dubinlaw.net)

March 28, 2019

Via Electronic Submission  
Hawaii House of Representatives  
Committee on Judiciary

**Re: Senate Bill 551 Relating to Condominiums, Testimony in Opposition**

Dear Ladies and Gentlemen:

I write to respectfully recommend that you reject Senate Bill 551. Although this legislation appears on its face to be strongly supported in the community, such support is merely an illusion. This bill is being promoted by local law firms who have, for their own interests and profit, for years disregarded Hawaii foreclosure law and association governing documents, and have misadvised condominium associations and their managing agents, all to the detriment of those associations and their members. Thus, it is obvious that the vast majority of those testifying in support of this bill are attorneys from those very law firms, as well as association board members and managing agents to whom those attorneys have no doubt solicited for testimony in support. This legislation, however, will not help consumers, homeowners, or condominium associations, but will only purport to absolve a special interest from the consequences of years of bad practice.

Those testifying in support of this legislation claim that this Legislature years ago intended to create a blanket power of sale for all condominium associations in the state to conduct foreclosures without judicial oversight, regardless of whether they wanted that or not. Those testifying in support, however, could not be more mistaken. The decision of whether associations can allow nonjudicial foreclosure has always been left to the will of the members of each association. This bill seeks to strip away those rights of self-governance, and impose the will of a special interest on everyone.

I am the attorney who represents the homeowner, Christian Sakal, in Sakal v. AOA Hawaiian Monarch, 426 P.3d 443 (Haw. Ct. App. 2018), which this proposed legislation seeks to nullify. That matter is currently under review in the Hawaii Supreme Court pursuant to Mr. Sakal's Application for Writ of Certiorari in SCWC-15-0000529, wherein Mr. Sakal seeks to recover title to his home that was illegally sold by the Defendant AOA to a third party, without judicial supervision.

The Intermediate Court of Appeals' decision in Sakal did not change the law. It merely upheld the long-standing principal that a power of sale is a contractual power, and must be included in an association's bylaws in order for it to proceed with foreclosure without judicial oversight. That part of the ICA's decision has been upheld by the Hawaii Supreme Court, when it rejected AOA Hawaiian Monarch's

***Hawaii House of Representatives  
Committee on Judiciary  
March 28, 2019***

---

Application for Writ of Certiorari in December 2018, and later granted Christian Sakal's application in January 2019.

Senate Bill 551 is the result of a powerful special interest lobby, is ill-advised, and is contrary to the will and constitutional rights of Hawaii homeowners like Mr. Sakal. This legislation will perpetuate undue harm to Hawaii homeowners, foster instability in the local housing market, and cause wasteful future litigation costing condominium owners far more money than could ever be saved by the "inexpensive" nonjudicial foreclosure process touted by its proponents. Because of the atrocities that have been committed against homeowners during nonjudicial foreclosures conducted by condominium associations due to the absence of judicial oversight, I urge you to reject this legislation. In addition, if passed, such legislation will violate constitutional guarantees of due process, private property rights, and interfere with private contracts. In my opinion, this legislation, if enacted, will ultimately be struck down in the courts, at great loss and unnecessary expense to condominium associations and their members.

A power of sale is an interest in real property, similar to a mortgage. It is something that is bargained for, and is part of the contractual consideration when a person negotiates for the purchase of a condominium unit. The State, by unilaterally taking that interest away from the homeowner and blanket granting it to the various condominium associations who otherwise have not enacted such a power in their governing documents, would be engaging in an unconstitutional regulatory taking of private property without just compensation to the impacted homeowners. Such legislative action would violate the guarantees of due process and private property ownership under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 20 of the Hawaii State Constitution. It would also violate the Contracts Clause of Article I, Section 10, clause 1 of the United States Constitution. A brief discussion of those issues is included in my attached opposition to AOA Hawaiian Monarch's Application for Writ of Certiorari, which I filed on behalf of Christian Sakal in the Hawaii Supreme Court last December. A courtesy copy is attached. Again, AOA Hawaiian Monarch's application was denied by the Supreme Court, and for good reason.

Finally, it is very important that members of this committee hear from some of the victims of wrongful association nonjudicial foreclosures, many of whom my office has represented in recent years, before further advancing this legislation seeking to remove judicial oversight from the foreclosure process. Without judicial oversight, the foreclosure process is ripe for abuse. We have had cases where associations have sought to foreclose over a mere several hundred dollar delinquency; their law firms having racked up tens of thousands of dollars in attorneys' fees seeking to collect such a small amount, making it impossible for homeowners to recover. We have clients whose families, including children and elderly, were evicted by surprise, thrown out on the street without food, clothing, medication, and important documents.

**Hawaii House of Representatives**  
**Committee on Judiciary**  
**March 28, 2019**

---

We have clients whose personal belongings were stolen during the eviction by the “buyers” and process servers, only to discover their personal belongings were sold by those utilizing and seeking to profit from a foreclosure system lacking judicial oversight.

Given the difficulty of organizing victims to testify in opposition given such short notice of hearing on this bill, enclosed as an example of typical misconduct committed against homeowners during unsupervised nonjudicial foreclosures by condominium associations, is a copy of my office’s First Amended Complaint filed January 23, 2017 in Richard Sampaio, Jr., et al. vs. Mililani Town Association, et al., Civil No. 17-1-0044. That case is pending in the Circuit Court of the First Circuit.

In closing, I caution the Legislature from advancing this bill, which will only interfere with the private rights of condominium associations and their members, and harm consumers. I remind you that there is nothing preventing each individual condominium association from amending their own bylaws should they determine on a case-by-case basis that power of sale foreclosure is something that would benefit the management of their individual associations (or to the contrary, should certain associations wish to abolish their existing powers of sale). Doing so is a business decision best left to each association and its members (who have always had that power), without unnecessary legislative overreach. Changing the law at this time to rescue a handful of local law firms who have for years misadvised association boards and disregarded Hawaii foreclosure law and association governing documents in order to line their own pockets, is hardly a worthy reason to advance this detrimental legislation.

Thank you for your consideration.

Sincerely,

/s/ Frederick J. Arensmeyer

Enclosures (2)

GARY VICTOR DUBIN 3181  
KATHERINE S. BELFORD 10352  
Dubin Law Offices  
Suite 3100, Harbor Court  
55 Merchant Street  
Honolulu, Hawaii 96813

Telephone: (808) 537-2300  
Facsimile: (808) 523-7733  
Email: gdubin@dubinlaw.net  
Email: kbelford@dubinlaw.net

Attorneys for Plaintiffs  
Richard Milikona Sampaio, Jr.  
and Kelly Kalanikapulahaole Sampaio

FIRST CIRCUIT COURT  
STATE OF HAWAII  
FILED

2017 JAN 23 PM 4:08

N. MEYATA  
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

RICHARD MILIKONA SAMPAIO, JR. and  
KELLY KALANIKAPULAHAOLE  
SAMPAIO,

Plaintiffs,

vs.

MILILANI TOWN ASSOCIATION; ZJD  
REAL ESTATE, LLC; ZACHARY J.  
DUNCAN; ASSOCIATION OF  
APARTMENT OWNERS OF NOB HILL,  
A HAWAII NONPROFIT  
CORPORATION; NATIONSTAR  
MORTGAGE LLC; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC., SOLELY AS  
NOMINEE FOR FIRST MAGNUS  
FINANCIAL CORPORATION; JOHN  
DOES 1-20; JANE DOES 1-20, DOE  
PARTNERSHIPS 1-20; DOE  
CORPORATIONS 1-20; DOE ENTITIES  
1-20; and DOE GOVERNMENTAL  
UNITS 1-20,

Defendants.

) CIVIL NO. 17-1-0044-02 VLC  
) (Other Civil Action)  
)  
)

) FIRST AMENDED COMPLAINT; EXHIBIT  
) A; RENEWED DEMAND FOR JURY  
) TRIAL; AMENDED SUMMONS

SUMMONS

DEEMED

LEGAL NOTICE

I do hereby certify that this is a full, true, and  
correct copy of the original on file in this office.

Clerk, Circuit Court, First Circuit

## FIRST AMENDED COMPLAINT

COME NOW Plaintiffs RICHARD MILIKONA SAMPAIO, JR. and KELLY KALANIKAPULAHAOLE SAMPAIO, by and through their undersigned attorneys, and for their First Amended Complaint against the above-named Defendants, herein allege and aver as follows:

### Jurisdiction and Venue

1. This Complaint is filed in part pursuant to (a) the written contractual agreements specified herein below, (b) Chapters 632-1, 667 and 669 of the Hawaii Revised Statutes, and (c) common law doctrines of wrongful foreclosure, fraud, breach of fiduciary duties, conversion, trespass, theft, unjust enrichment, property damage, tortious interference, and intentional infliction of emotional distress.

2. Venue is proper in this Circuit pursuant to Section 603-36 of the Hawaii Revised Statutes and where the subject property is located, and where the claims for relief stated herein arose.

### Parties

3. Plaintiffs RICHARD MILIKONA SAMPAIO, JR. (“Mr. Sampaio”) and KELLY KALANIKAPULAHAOLE SAMPAIO (“Ms. Sampaio”) (collectively “Plaintiffs” or “Sampaios”) are and at all times relevant were residents of the County of Honolulu, State of Hawaii.

4. At all times relevant, the Sampaios were the rightful owners of the real property located at 94-190 Anania Drive, Apartment 325, Mililani, Hawaii 96789, TMK 1-9-4-005-030-0025 (“Property”) in fee as tenants by entirety pursuant to the Apartment Deed recorded in the Land Court of the State of Hawaii on May 16, 2007 as Document No. 3602553. The Property is



the subject matter of this foreclosure action and is more fully described in Exhibit “A” attached to this complaint and incorporated by reference.

5. Upon information and belief, Defendant MILILANI TOWN ASSOCIATION (“MTA”) is and at all times relevant was a planned community association established and existing pursuant to the laws of the State of Hawaii.

6. Upon information and belief, Defendant ZJD REAL ESTATE, LLC (“ZJD”) is and at all times relevant was a domestic limited liability company doing business in the County of Honolulu, State of Hawaii.

7. Upon information and belief, Defendant ZACHARY J. DUNCAN is and at all times relevant was a resident of the County of Honolulu, State of Hawaii, and the sole manager and owner of ZJD.

8. Upon information and belief, Defendant ASSOCIATION OF APARTMENT OWNERS OF NOB HILL, A HAWAII NONPROFIT CORPORATION (“Nob Hill”) is and at all times relevant was a condominium association established and existing pursuant to the laws of the State of Hawaii.

9. Upon information and belief, Defendant NATIONSTAR MORTGAGE LLC (“Nationstar”) is and was at all times relevant a Delaware limited liability company doing business in the County of Honolulu, State of Hawaii.

10. Upon information and belief, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., SOLELY AS NOMINEE FOR FIRST MAGNUS FINANCIAL CORPORATION (“MERS”) is and was at all times relevant a corporation doing business in the County of Honolulu, State of Hawaii.

11. Defendants JOHN DOES 1-20; JANE DOES 1-20, DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20; and DOE GOVERNMENTAL UNITS 1-20 (collectively "Doe Defendants") are persons, partnerships, corporations, entities, or governmental units whose names and identities are presently unknown to Plaintiffs and Plaintiffs' attorneys despite diligent and good-faith efforts to ascertain their true names, identities and capacities, who may be, or are, responsible and/or liable to Plaintiffs (individually or collectively) for the injuries and damages sustained by Plaintiffs by acting in a negligent, wrongful and/or tortious manner presently unknown to Plaintiffs which proximately caused and/or contributed to the damages sustained by Plaintiffs. Accordingly, Plaintiffs have sued the unidentified Doe Defendants herein with fictitious names pursuant to Rule 17(d) of the Hawaii Rules of Civil Procedure. Plaintiffs will seek leave of Court to amend this Complaint to allege the true names of the Doe Defendants and describe their activities, responsibilities and/or capacities when the same are ascertained.

### **Facts**

12. The Sampaios are the rightful owners of the subject real Property located at 94-190 Anania Drive, Apartment 325, Mililani, Hawaii 96789, TMK 1-9-4-005-030-0025 ("Property") in fee as tenants by entirety.

13. The Property was, prior to the events herein complained of, used as the primary and only residence of the Sampaios and their young children.

### **Nob Hill Action**

14. On April 24, 2014, Nob Hill filed a Complaint seeking foreclosure in the First Circuit Court of the State of Hawaii in Civil No. 14-1-1066-04, alleging the Sampaios' nonpayment of certain sums due.

15. Before the Sampaios were served with Nob Hill's Complaint, they entered into a payment plan to pay off the debt Nob Hill claimed they owed, on which plan payments of \$300.00 per month were made for at least the following six months.

16. The Sampaios were thereafter served with Nob Hill's Complaint on or around November 30, 2014. They did not receive a list of approved credit counselors from Nob Hill at that time. At that point, the Sampaios were already making payments to resolve the issues raised by Nob Hill per their superseding payment agreement.

17. In early 2015, when the Sampaios contacted Nob Hill to request a new payment plan and ensure the debt claimed could still be worked out, they were informed that no payment plan would be considered unless the Sampaios proposed to pay the entire amount owed immediately in a lump sum or, possibly, two partial lump sums.

18. While the Sampaios could afford a monthly payment plan, they could not afford the type of immediate payment in full "plan" Nob Hill demanded at that time.

19. On March 19, 2015, default was entered against the Sampaios in Civil No. 14-1-1066-04.

*MTA's Illegal Nonjudicial Foreclosure Auction*

20. During 2015 and early 2016, the Sampaios received increasingly frequent visits by solicitors at their home who somehow seemed to know about a pending foreclosure. These solicitors included both those claiming they could help the Sampaios to avoid foreclosure by paying them large amounts of money, as well as individuals interested in buying their home. At the time, the Sampaios assumed these visits pertained to Nob Hill's pending action. In any event, the same visits became extremely disruptive to the Sampaios, as each of their three

children was under the age of ten, one of whom has autism. He, in particular, became increasingly distraught by the constant influx of strangers on the property.

21. Around early 2016, the Sampaios had a few schedule changes at work and found themselves temporarily working overnight shifts. For this reason, and due to the disruptive stream of trespassers on their property, in early January 2016, the Sampaios and their three children began staying overnight with Ms. Sampaio's sister or mother nearly every night. Because the situation was temporary and they did not intend by any means to move out of their home, they left all of their belongings, with the exception of a few clothes, at their Property.

22. On Monday, February 1, 2016 at 12:24 p.m., Ms. Sampaio received a text message from a phone number unknown to her, listed as (808) 304-9418 ("Sender"). The Sender informed Ms. Sampaio that he/she had bought an iPad from someone at the "Kam Swap Meet," but once he/she started playing with it, the device locked and prompted him/her to call (808) 295-7667, which was Ms. Sampaio's phone number.

23. Ms. Sampaio immediately drove to the Kam Swap Meet in Aiea, arriving around 1:00 p.m., but it was closed. Ms. Sampaio texted the Sender, who replied in kind informing her that the iPad had been purchased the day before by the Sender's "friend." The seller, according to the Sender, was a lawyer named Damon Senaha.

24. At 2:00 p.m., Ms. Sampaio drove to her home, the Property, and found a lock box on the door. She also noticed that the window curtains were gone. Ms. Sampaio could not see any of her family's belongings inside. The Sampaio family, including their three young children, one of whom is disabled and requires special care, was unable to get inside, suddenly homeless.

25. Ms. Sampaio then contacted Nob Hill to ask about who was in her property and why the locks had been changed, making sure management was informed of the situation. Nob

Hill's management team informed her that they had no idea who was on her property. Ms. Sampaio requested that Nob Hill assist her in removing whoever had illegally broken in and occupied her property or, at the very least, provide her access to her property. Nob Hill refused to help the Sampaios or provide information, insisting that Nob Hill could not and would not do anything, despite the clear fact that in no way had the right to own or possess the Sampaio's property been granted or transferred to anyone else, and certainly whoever had locked the Sampaio family out of their home had not/could not have demonstrated any right to do so.

26. Ms. Sampaio then contacted Nob Hill's attorneys at Case, Lombardi & Pettit to inform them of the situation and request help. The attorney with whom she spoke informed her that **a nonjudicial foreclosure auction had been conducted by Mililani Town Association ("MTA"), the parent association of Nob Hill, on January 8, 2016,** but was of no further assistance.

27. The news of MTA's unlawful auction of their property on January 8, 2016 surprised the Sampaios for a number of reasons, including i.) the fact that **they had never received any notice from MTA or their attorneys that an auction of their property was to occur,** and thus had no chance to cure the default claimed and prevent the auction, and ii.) the fact that MTA's bylaws contained no "power of sale" provision allowing nonjudicial foreclosure.

28. Upon learning the news of the nonjudicial auction, Ms. Sampaio immediately looked up "Damon Senaha" on the search engine Google and found his office phone number. She called and spoke with a male-sounding person and explained the situation regarding the Property. The male speaker conveyed to her that he "knows Damon buys properties" but did not

know whether the Sampaios' home was "one of his." The speaker could not guarantee Ms. Sampaio a call-back, but said he would give Mr. Senaha the message.

29. Later that evening, on February 1, 2016, Mr. Senaha returned Ms. Sampaio's call. Mr. Senaha seemed rude and condescending, telling Ms. Sampaio that if she wanted a chance to get her "stuff" back, she should cooperate with him. He became very defensive during the telephone discussion, telling Ms. Sampaio that she would never find anything proving that he bought her property. He requested the Sender's name and number so that he could find out if any of his "investors" bought the Property.

30. On the morning of Wednesday, February 3, 2016, Ms. Sampaio called the office of MTA's attorneys, Ekimoto & Morris. The attorney with whom Ms. Sampaio spoke told her that she and her husband were still the owners, that there had been no transfer of title, and that no one else should be in the Sampaios' home.

31. At that time, Ms. Sampaio also asked if she could pay MTA the full balance it claimed to be owed to cure the default and get back in her home. The attorney replied that she could not.

32. Early that afternoon, another Ekimoto & Morris attorney with the last name Harada called Ms. Sampaio and asked if anyone had paid the Sampaios \$1,000.00 to get into their home. After double checking with Mr. Sampaio, Ms. Sampaio explained that neither of them had engaged in any such transaction whatsoever, nor had they ever been approached by anyone with such a proposal.

33. Attorney Harada acknowledged that the situation was "wrong," but told Ms. Sampaio that there was nothing her office or MTA could do to help or to remove the high bidder at MTA's illegal and unannounced auction from the Sampaios' home. Even though title was in

the Sampaios' name and no instrument whatsoever had been recorded transferring title to MTA's bidder, a stranger to the property, MTA's attorneys insisted that they could not ask their bidder to leave the Property.

34. At 3:00 p.m., Ms. Sampaio dropped her children off with her sister, returned to her property, and called the police. Officer Petersen of the Wahiawa Police Station arrived soon after, and she explained the entire situation to him. He told Ms. Sampaio he could not do anything without a deed showing that she was the owner. Ms. Sampaio called the attorneys of Ekimoto & Morris again, who were of no assistance in helping her to access her property or procuring a deed or any other documentation. Officer Petersen told Ms. Sampaio that she would have to go to the Bureau of Conveyances and get a deed, after which she could call the police again for assistance.

35. At 5:00 p.m., Ms. Sampaio called Mr. Senaha again and politely informed him that she was now working with the police on this matter and thus did not need or want him to find out which of his so-called investors claimed to have bought her property at auction. In response to this, Mr. Senaha told her not to get the police involved and instead let him handle the matter, also telling Ms. Sampaio that he would instruct said investor to either return her personal property items or give her money for them. Because the fact remained that his purported "investor" did not own the Property by any instrument and had no right to break in and possess it, yet somehow the Sampaios' children remained homeless and without any of their school clothes, Ms. Sampaio informed him that she was not interested in pursuing matters in the way he was suggesting and would continue to work with the police instead.

36. An hour later, at 6:00 p.m., Mr. Senaha telephoned Ms. Sampaio again and told her that he "found the guy" who claimed to have purchased her home, and gave her that person's

phone number. Ms. Sampaio thanked Mr. Senaha for his time but reiterated that she was not comfortable talking with directly with said person as Mr. Senaha suggested. Fifteen minutes later, the number Mr. Senaha provided called her three times in a row. Ms. Sampaio was at work and did not answer. The caller did not leave a message.

37. The next morning, on Thursday, February 4, 2016, Ms. Sampaio sent a text message to the caller from the night before, asking for the caller's identity. The caller sent a reply text message identifying himself as Zachary Duncan ("Duncan"). Duncan would not thereafter explain how he got Ms. Sampaio's phone number. In follow-up text messages, he asked her to meet him to discuss monetary settlement for occupying her home. Though he still did not have any sort of right of possession and no transfer of title had occurred which would entitle him to be in the Property at all, he refused to agree to let Ms. Sampaio access her home, stating that he was already leasing it to renters. Duncan informed her that the Sampaio family's personal property was not even in their home, and had not been there for "at least three weeks." Then, in an apparent attempt to atone for the fact that he had stolen the family's home and everything in it and continued to personally profit at their devastating expense, Duncan offered to try to "track down" some of their items. He refused to discuss anything further with Ms. Sampaio unless she agreed to meet in person.

38. Later that morning, Ms. Sampaio was finally able to get a copy of their deed from the Bureau of Conveyances, after which she returned to her property and called the police again. Officer Lee of the Wahiawa Police Station arrived shortly thereafter. When she approached her property with Officer Lee, Ms. Sampaio was met by individuals claiming to be tenants, who conveyed that they "just came from the lawyer's office to sign a two-year lease." Officer Lee then called Duncan to request his presence. When Duncan arrived ten minutes later, he told



Officer Lee and Ms. Sampaio that he owned the property and was allowed to have tenants inside. This was, of course, not true. Duncan refused to let Ms. Sampaio inside, despite the fact that he had no deed or other instrument which could possibly demonstrate his right to possess the Property, and Ms. Sampaio did. Duncan lied to Officer Lee, insisting that he would be getting the deed in two hours and that he had an electronic copy of the same on his phone, which he clearly did not. In fact, Duncan had nothing more than a receipt from the wrongful nonjudicial foreclosure auction showing that he had been the highest bidder. Duncan also conveyed to Officer Lee that MTA's lawyers had told him he owned the Sampaios' home.

39. Officer Lee then called Ekimoto & Morris and apparently spoke to attorney Dan Oyasato. After hanging up the phone, Officer Lee said the entire matter was a civil issue, not a criminal one, despite the fact that the Sampaios' home had clearly been burglarized, the entire family displaced, and the perpetrator, who stood in front of Ms. Sampaio calling her "sweetheart," continued to occupy and lock the Sampaio family out of their home. Ms. Sampaio asked to speak to a Lieutenant, who called her and also insisted that the matter was a civil issue.

40. Ms. Sampaio eventually convinced Officer Lee to let her walk through her home. When she did, there was absolutely nothing left belonging to Ms. Sampaio or her family. Every childhood photo of all three of the children, every personal and confidential document, every irreplaceable keepsake passed down by the family's Hawaiian relatives: it was all gone. Ms. Sampaio was devastated and very emotional. Duncan repeated that he had every right to have his tenants occupy her home – though, again, he had in fact broken in, locked the Sampaios out, and stolen or sold all of their possessions, all the while and still lacking any instrument or proof of title – and refused to have his illegal renters leave. Officer Lee eventually gave Ms. Sampaio a report number.

41. Around 6:00 p.m. that day, February 4, 2016, Ms. Sampaio went to the Wahiawa Police Station in person to again try to report the incident as a burglary. She met with Officer Oshiro and another officer and explained the situation. They decided to refile the previously provided case number as a burglary.

42. The next day, February 5, 2016, Ms. Sampaio and her mother called Ekimoto & Morris again and spoke with attorney Dan Oyasato. Ms. Sampaio asked for a copy of the paperwork that Ekimoto & Morris had provided to Duncan when he allegedly won the illegal auction of the Property and what the procedure going forward would be, including what steps he would be taking to try to become the owner. Attorney Oyasato informed Ms. Sampaio that he did not believe Duncan was given anything but a receipt at the auction, and that MTA normally does not provide any information to winning bidders regarding the transfer of ownership process. Attorney Oyasato also conveyed that the law firm representing Duncan had bought homes from auctions before, and that said firm should be aware of the process.

43. Ms. Sampaio again requested to pay the full amount MTA claimed was owed. Attorney Oyasato replied that it was too late. The Sampaios were taken aback by being told that it was “too late” repeatedly, as they had not even been notified of the auction, the auction date, or their right to cure at any time before the auction took place and their home was burglarized by the high bidder.

44. Ms. Sampaio and her mother also asked Attorney Oyasato whether Duncan/ZJD’s actions constituted breach of some sort of buyer’s contract or nonjudicial foreclosure auction rules. Attorney Oyasato replied that

*the problem on the Sampaios’ end, and reason they were in this position, was that there were “no laws” protecting them. He*

stated that his firm and MTA were worried that the Sampaios' case would shine a light on non-judicial foreclosures and affect their ability to conduct future non-judicial foreclosures.

45. MTA thereafter recorded its Association's Quitclaim Deed, purporting to transfer title to the subject Property to ZJD, on February 11, 2016 as Document No. T-9537221 in the Land Court of the State of Hawaii after claiming the right to foreclose a lien created by HRS 421J-10.5.

46. The Association's Quitclaim Deed also referenced its previously recorded Association's Affidavit of Foreclosure Under Power of Sale, which was recorded as Document No. T-9514214 in the Land Court of the State of Hawaii on January 19, 2016. In the Association's Affidavit of Foreclosure Under Power of Sale, the MTA claimed to have complied with the requirements of Part IV of HRS Chapter 667. MTA did not, however, comply with the relevant statutory requirements as claimed, and further lacked a power of sale in its bylaws to conduct a nonjudicial foreclosure on the Property.

47. Upon information and belief, Duncan and/or his business, ZJD Real Estate, LLC ("ZJD") continues to exercise wrongful dominion over the Sampaios' property as the result of their own criminal and tortious actions stemming from a wrongful, illegal and thus void nonjudicial foreclosure sale conducted by MTA.

48. The Sampaios wrongfully lost not only all of their possessions, property, and their children's sense of safety and security, but also their ability to negotiate as "owners in possession" in the pending judicial foreclosure actions as a result of the combined acts and omissions of Duncan, ZJD, MTA, and Nob Hill.

Nationstar Action

49. Meanwhile, on June 30, 2015, Nationstar filed a separate Complaint for Mortgage Foreclosure against the Sampaios in the First Circuit Court of the State of Hawaii as Civil No. 15-1-1273-06. The two pending cases, Civil No. 14-1-1066-04 and Civil No. 15-1-1273-06 (“Consolidated Cases”), were consolidated by stipulation between Nob Hill and Nationstar on November 20, 2015.

50. Several months thereafter, on April 1, 2016, in the midst of the aforementioned set of events, the Sampaios were apparently served by publication of summons with Nationstar’s Complaint, according to a separate Affidavit of Publication filed therein on April 8, 2016.

51. On May 4 and 5, 2016, the clerk entered default against each of the Sampaios on Nationstar’s Complaint.

52. The Sampaios did not see the published summons or otherwise become aware of having been allegedly served until after their time to file an Answer had expired and default had already been entered against them.

53. The Sampaios did not know of Nationstar’s case against them whatsoever until receiving a copy of one of its later filings regarding another aspect of the apparently consolidated lawsuit, dated May 27, 2016, in the mail.

54. After learning of Nationstar’s lawsuit, the Sampaios contacted Nationstar several times on the telephone to ask about loss mitigation options and request to apply for a loan modification. The Sampaios were told by a Nationstar representative that they would not be allowed to pursue a loan modification. The Sampaios inquired as to whether they could apply for any other loss mitigation option with Nationstar. The representative with whom they spoke told them that any type of loss mitigation application they were to submit would similarly “not be processed.”

55. The Sampaios retained the Dubin Law Offices to represent them in August 2016. They were not represented by counsel at any time before then.

56. On October 28, 2016, the Sampaios filed their *HRCP 55(c) Motion to Set Aside Clerk's Entry of Default* ("55(c) Motion") in the Consolidated Cases pending against them in the First Circuit Court.

57. The Court, without further explanation, denied the Sampaios' 55(c) Motion in a Minute Order dated November 16, 2016.

**COUNT ONE**  
**Wrongful Foreclosure – MTA**

58. Paragraphs 1 through 57 above are incorporated herein by reference.

59. MTA's governing bylaws, recorded in the Land Court of the State of Hawaii as Document No. 441561 on April 19, 1968, lacked a power of sale as required to conduct a nonjudicial foreclosure in the State of Hawaii.

60. MTA failed to provide the Sampaios with statutorily-required notice of any auction which occurred on January 8, 2016.

61. MTA failed to provide the Sampaios the statutorily-required notice or opportunity to cure any alleged debt owed by the Sampaios.

62. MTA's actions constitute wrongful foreclosure, which foreclosure resulted in damages to the Sampaios.

63. MTA's alleged nonjudicial foreclosure sale, and any attempted transfer of property rights to ZJD, Zachary Duncan, or any other entity thereafter, is void as a matter of law.

64. The Sampaios are thus entitled to a declaration quieting title in the name of the Sampaios and declaring void and striking by Order of the Court any attempted transfer of

property rights following MTA's attempted foreclosure, damages, and any other and further relief as this Court may deem just and equitable.

**COUNT TWO**  
**Fraud on the Court – MTA**

65. The Sampaios incorporate by reference the allegations above.

66. MTA and its attorneys, in recording both their Affidavit of Foreclosure Under Power of Sale and their Quitclaim Deed, knowingly and materially misrepresented having conducted their alleged nonjudicial foreclosure pursuant to the statutory requirements of the State of Hawaii, which misrepresentations constitute fraud on the Court.

67. MTA and its attorneys further committed fraud on the Court in attaching and relying on documents from an entirely separate property and matter to their Affidavit of Foreclosure Under Power of Sale, and by relying on the same to attempt to transfer title to the subject Property.

68. The same fraud on the Court resulted in numerous and serious damages to the Sampaios.

**COUNT THREE**  
**Breach of Contract and Breach of Fiduciary Duty – MTA**

69. The Sampaios incorporate by reference the allegations above.

70. MTA owed a fiduciary to the Sampaios as owners and under its bylaws, recorded in the Land Court of the State of Hawaii as Document No. 441561 on April 19, 1968.

71. MTA breached those duties and its bylaws, and compromised the security of the entire MTA/Nob Hill complex by allowing Duncan and/or ZJD to illegally access the Sampaios' locked property following its unannounced, illegal auction of said property.



72. MTA further breached those duties and its own bylaws by failing to provide the alleged high bidder at its auction any instructions or information on proper protocol following the auction, and in failing to allow or to attempt to allow the Sampaios access to their property after Duncan and ZJD had burglarized and illegally occupied the same.

73. MTA's breach of contract and breach of fiduciary duty resulted in serious damages to the Sampaios.

**COUNT FOUR**  
**Trespass – Duncan/ZJD**

74. The Sampaios incorporate by reference the allegations above.

75. Upon information and belief, Duncan and/or ZJD, and or their agents or assignees remain on the property as trespassers of the Sampaios.

**COUNT FIVE**  
**Ejectment**

76. The Sampaios incorporate by reference the allegations above.

77. Pursuant to HRS Section 603-36, the Sampaios seek a Writ of Ejectment against Defendants Duncan and ZJD, and all parties claiming under, by and through them.

78. The Sampaios have been and are being damaged by Duncan and/or ZJD's continued occupancy of their Property and are entitled to damages in an amount as shall be proven at trial.

**COUNT SIX**  
**Conversion**

79. The Sampaios incorporate by reference the allegations above.

80. Duncan and/or ZJD, in concert with MTA and Nob Hill, have committed and continue to commit wrongful conversion of the Sampaios' Property.

81. The Sampaios have been and are being damaged by said wrongful conversion and are entitled to damages in an amount as shall be proven at trial.

**COUNT SEVEN**  
**Burglary and Theft**

82. The Sampaios incorporate by reference the allegations above.

83. Duncan and/or ZJD, alone or in concert with other heretofore unnamed individuals, in wrongfully entering the home of the Sampaios and taking, then selling and/or destroying virtually all of the Sampaios' personal property, committed both burglary and theft against the Sampaios.

84. The Sampaios have been and are being damaged by the same burglary and/or theft, and are entitled to damages in an amount as shall be proven at trial.

**COUNT EIGHT**  
**Unjust Enrichment**

85. The Sampaios incorporate by reference the allegations above.

86. Upon information and belief, Duncan and/or ZJD have leased and/or continue to lease the property to renters. Duncan and/or ZJD have profited and/or continue to profit from their illegal occupation of the Sampaios' property in the form of rental income and other various forms of income or equity in connection to the property.

87. Thus, alternatively, if title cannot be quieted to the Sampaios as a result of the illegal and fraudulent transfer by MTA to Duncan and/or ZJD, the Sampaios are entitled to monetary compensation in the form of actual damages in the amount MTA, Duncan, and/or ZJD has been unjustly enriched.

**COUNT NINE**

**Breach of Contract and Breach of Fiduciary Duty – Nob Hill**

88. The Sampaios incorporate by reference the allegations above.

89. Nob Hill owed a fiduciary as well as a contractual duty under its bylaws to the Sampaios as owners.

90. Nob Hill breached those duties, and compromised the security of the entire Nob Hill complex, by allowing Duncan and/or ZJD to illegally access the Sampaios' locked property following the unannounced, illegal auction of said property by its parent association, MTA.

91. Nob Hill further breached those duties by refusing to allow the Sampaios access to their property after Duncan and/or ZJD had burglarized and illegally occupied the same.

92. Nob Hill's governing documents provide for a situation in which emergency entry is required to prevent damage or to correct a condition threatening an apartment or its surrounding apartment. The Restatement of Declaration of Horizontal Property Regime of Nob Hill, recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 2494177 on October 20, 1998 provides, on page 7, paragraph 8(c):

The Association of Apartment Owners shall have the right, to be exercised by its Board of Directors or the Managing Agent, to enter each apartment . . . as may be necessary for the operation of the Project or for making emergency repairs therein necessary to **prevent damage to any apartments or common elements.**

(emphasis added). The Restatement of the Bylaws of the Association of Apartment Owners of Nob Hill, recorded in the Bureau of Conveyances of the State of Hawaii as Document No. 2494176 on October 20, 1998 similarly provides, on page 23, section 6:

An Apartment Owner shall grant a right of access to his Apartment to the Manager and/or the Managing Agent and/or any other person authorized by the Board of Directors, the Manager or the Managing Agent, **for the purpose of correcting any condition existing in his Apartment and threatening another Apartment or common element . . .** In case of an emergency, such right of

entry shall be deemed granted, to be effective immediately, whether the Owner is present at the time or not. (emphasis added).

93. In failing to secure the property and in failing to thereafter correct the serious and time-sensitive security threat of which it was made aware, Nob Hill negligently and intentionally breached its contract with the Sampaios as owners, resulting in loss and damages to the Sampaios and their young and disabled children in amounts to be proven at trial.

#### **COUNT TEN**

##### **Violation of Foreclosure Statutes and Unclean Hands – Nob Hill**

94. The Sampaios incorporate by reference the allegations above.

95. Nob Hill failed to comply with HRS Section 667-19 as well as the implied covenant of good faith and fair dealing in failing to provide the Sampaios with a list of approved housing counselors and budget and credit counselors, as well as in failing to honor or adhere to any reasonable payment plan to resolve the Sampaios' alleged debt, as required before and when pursuing foreclosure. Such conduct further rises to the level of the "[u]nscrupulous practices, overreaching, concealment, trickery or other unconscientious conduct" prohibited in Hawaii, precluding Nob Hill from foreclosure and resulting in actual damages to the Sampaios in amounts to be proven at trial.

#### **COUNT ELEVEN**

##### **Violation of Foreclosure Statutes and Unclean Hands – Nationstar**

96. The Sampaios incorporate by reference the allegations above.

97. Nationstar has continued to pursue foreclosure in this matter without giving the Sampaios any opportunity to submit a loss mitigation application, in breach of both 12 C.F.R. Section 1024.41(g) and the implied covenant of good faith and fair dealing. Such conduct further rises to the level of the "[u]nscrupulous practices, overreaching, concealment, trickery or other

unconscientious conduct” prohibited in Hawaii, precluding Nationstar from foreclosure and resulting in actual damages to the Sampaios in amounts to be proven at trial.

**COUNT TWELVE**  
**Tortious Interference**

98. The Sampaios incorporate by reference the allegations above.

99. MTA, Duncan, ZJD, and/or Nob Hill were aware of the Sampaios’ other existing contracts and liens on the property, the terms of which contracts cannot be completed due to the willful acts, conduct and omissions of MTA, Duncan, ZJD, and Nob Hill. These actions, without justification, constitute tortious interference with contract and make the aforesaid Defendants liable for the damages arising out of said interference(s), including pecuniary losses, consequential losses, and emotional distress damages in amounts to be proven at trial.

**COUNT THIRTEEN**  
**Unfair and Deceptive Acts and Practices**

100. The Sampaios incorporate by reference the allegations above.

101. The Sampaios are natural persons who have committed money, property or services in a personal investment.

102. Based upon the facts set forth above, Nob Hill engaged in unfair and deceptive acts and practices in violation of Chapter 480 of the Hawaii Revised Statutes in a.) failing to provide the Plaintiffs with information regarding approved credit counselors, b.) proceeding forward with their Complaint for foreclosure and, unbeknownst to the Plaintiffs, seeking an entry of default, while the Plaintiffs were paying their alleged debt to Nob Hill in good faith under a superseding payment plan, and c.) illegally allowing a known trespasser to occupy and burglarize the Sampaios’ Property, all the while rendering the Sampaios’ and their three children homeless without any cause.

103. Based upon the facts set forth above, Duncan and/or ZJD engaged in unfair and deceptive acts and practices in violation of Chapter 480 of the Hawaii Revised Statutes in a.) illegally gaining access to the Sampaio's property, b.) locking the Sampaio's out of their Property, c.) taking and selling and/or destroying virtually all of the Sampaio's personal property burglarizing and further damaging their property, d.) knowingly misleading police officers and other unknown entities in order to continue to wrongfully occupy the Sampaio's property, e.) skimming equity and rental income from the Sampaio's property while in wrongful possession; and f.) engaging in wrongful conversion of the property.

104. Based upon the facts set forth above, MTA engaged in unfair and deceptive acts and practices in violation of Chapter 480 of the Hawaii Revised Statutes in a.) conducting an auction of the Sampaio's property without any prior notice to the Sampaio's, b.) allowing its high bidder at said auction to illegally access and convert the Sampaio's property, c.) preventing the Sampaio's from any opportunity to regain access to their property by paying the amount claimed to be owed to MTA, despite the Sampaio's repeated attempts to do the same, and d.) conducting a power of sale foreclosure without having any power to do so in its own bylaws.

105. As a result of the deceptive actions of each of the aforesaid Defendants, Plaintiffs suffered damages in an amount to be proven at trial, and is further entitled to treble damages pursuant to HRS Section 480-13.

**COUNT FOURTEEN**  
**Intentional Infliction of Emotional Distress**

106. The Sampaio's incorporate by reference the allegations above.

107. Duncan and/or ZJD acted intentionally and unreasonably by a.) gaining access to and occupying the Sampaio's property illegally and without any right or possession or title to the



property, fully knowing that he/ZJD had no such right of possession; b.) locking the Sampaios out of their property; c.) selling and/or destroying the Sampaios' personal property which was found on the property, which property Duncan/ZJD had knowingly illegally accessed, and which personal property Duncan/ZJD thus knew or should have known was not simply abandoned; d.) refusing to allow the Sampaios to access their property, even with a police officer present, after knowingly and admittedly occupying the property by illegally and wrongfully.

108. MTA acted intentionally and unreasonably a.) by conducting an illegal auction of the Sampaios' property without any adequate notice to the Sampaios and without a power of sale; b.) by refusing to remove or assist in removing its high bidder which had thereafter illegally occupied and burglarized the Sampaios' property; c.) by refusing to allow the Sampaios to redeem the property through full payment of the alleged amount owed to MTA after the Sampaios learned of said auction, despite the Sampaios' repeated attempts to do so; and d.) knowingly and fraudulently recording an inadequate and false affidavit of foreclosure in order to wrongfully transfer title to the property to Duncan/ZJD, well after admitting the underlying foreclosure was "wrong."

109. Nob Hill acted intentionally and unreasonably by a.) pursuing a foreclosure on the Sampaios' property while the Sampaios were making payments on a superseding payment plan regarding the alleged debt; b.) seeking a default judgment against the Sampaios when it knew the Sampaios were making and/or attempting to continue to make payments toward the alleged amount owed and knew the same were not aware of the status of their Court proceeding; and c.) refusing to allow the Sampaios access to their property, despite knowing that the Sampaios were the rightful title owners to the same and that the property had been illegally broken into and occupied.

110. As a result of Duncan's, ZJD's, MTA's, and Nob Hill's intentional and unreasonable actions, the Sampaios lost access to their property and thus the day-to-day stability so critically needed by their disabled/special-needs child, permanently lost all of their possessions, were forced to live transiently with their children in the homes of relatives with very few possessions, and lost their negotiating power in other contracts involving the property.

111. As a direct result of the actions of the above-named Defendants, the Sampaios' have experienced extreme undue stress as well as emotional trauma and setbacks for their children, including and especially their child with a disability and special needs, during critical developmental years. The Sampaios are thus entitled to damages in amounts to be proven at trial.

**COUNT FIFTEEN**  
**Negligent Infliction of Emotional Distress**

112. The Sampaios incorporate by reference the allegations above.

113. Duncan, ZJD, MTA, and Nob Hill each had an independent duty to use reasonable care to avoid causing emotional distress to the Sampaios and their children.

114. MTA and Nob Hill each additionally owed a fiduciary duty to the Sampaios.

115. Duncan, ZJD, MTA, and Nob Hill each breached those duties.

116. The acts of Duncan, ZJD, MTA, and Nob Hill which led to the Sampaios' emotional distress at a minimum are negligent as it was reasonably foreseeable that those acts would cause emotional distress to the Sampaios and their young and disabled children.

117. Each of the above-named Defendants' actions resulting in the Sampaios' emotional distress entitles the Sampaios to damages in amount to be proven at trial.

**COUNT SIXTEEN**  
**Punitive Damages**


118. The Sampaios incorporate by reference the allegations above.

119. With respect to each of the counts above, the Sampaios are entitled to punitive damages due to the fraudulent and/or criminal actions and omissions, as well as indifference to the finances, health and well-being of the Sampaios and their young children, of the above-named Defendants in a multiple of ten times their actual damages, or as this Court shall determine to be just.

WHEREFORE, the Sampaios request as follows:

- A. A Writ of Ejectment be awarded against Duncan, ZJD, and all other persons claiming by, under or through them;
- B. An order and judgment quieting title in favor of the Sampaios and striking and expunging the aforementioned title documents recorded by MTA and/or ZJD, and all subsequently recorded title documents;
- C. A permanent injunction preventing MTA and/or ZJD from further transferring title to the subject property;
- D. Actual, treble, and punitive damages against the above named Defendants and/or specific performance of contract;
- E. Costs of suit in an amount to be determined by the Court;
- F. Attorneys' fees in an amount to be determined by statute and/or the Court; and
- G. Such other and further relief as deemed just and proper by the Court.

DATED: Honolulu, Hawaii; January 23, 2017.

  
\_\_\_\_\_  
GARY VICTOR DUBIN  
KATHERINE S. BELFORD  
Attorneys for Plaintiffs  
Richard Milikona Sampaio and  
Kelly Kalanikapulahaole Sampaio



# **EXHIBIT A**

207K  
3/29



L-178 STATE OF HAWAII  
OFFICE OF ASSISTANT REGISTRAR  
RECORDED  
MAY 16, 2007 08:01 AM  
Doc No(s) 3602553  
on Cert(s) 643,716  
Issuance of Cert(s) 858,662



20 1/3 Z5

Is/ CARL T. WATANABE  
ASSISTANT REGISTRAR  
CTax (10): \$350.00

I hereby certify that this is  
a true copy from the records  
of the Bureau of Conveyances.

*Nickie Ann Murray*  
Registrar of Conveyances  
Assistant Registrar, Land Court  
State of Hawaii

Ka

LAND COURT SYSTEM

REGULAR SYSTEM

Return by: Mail (✓) Pickup ( )  
First Magnus Financial Corporation  
603 N. Wilmot  
Tucson, AZ 85711

(L/C) (1)

FNTIC # 1102767  
1 pages

APARTMENT DEED

Grantor: JOSHUA TERRY KAHEALANI KAMAU'U

Grantee: RICHARD MILIKONA SAMPAIO, JR. and KELLY  
KALANIKAPULAHAOLE SAMPAIO

Property Description:

Apartment No. 325, Nob Hill III  
TMK: (Oahu) 9-4-005-030 (CPR 0025)

THIS INDENTURE, made this 14<sup>th</sup> day of May, 2007, by  
JOSHUA TERRY KAHEALANI KAMAU'U, unmarried, hereinafter called "Grantor",  
for TEN DOLLARS (\$10.00) and other valuable consideration to the Grantor paid by





RICHARD MILIKONA SAMPAIO, JR. and KELLY KALANIKAPULAHAOLE  
SAMPAIO, husband and wife, whose mailing address is 95-210 Waioleia Street, #44,  
Mililani, Hawaii 96789, hereinafter called "Grantee", the receipt whereof is hereby  
acknowledged, does hereby grant, bargain, sell and convey unto the Grantee, as Tenants  
by the Entirety, with full rights of survivorship, their assigns and the heirs, personal  
representatives and assigns of the survivor of them, all of the following property:

All of that certain real property more particularly described in  
Exhibit "A" attached hereto and made a part hereof.

TO HAVE AND TO HOLD the same, together with the reversions,  
remainders, rents, issues and profits thereof, and all rights, easements, privileges and  
appurtenances thereunto belonging or appertaining, all of the estate, right, title and  
interest of the Grantor both at law and in equity therein and thereto, unto the Grantee, in  
the tenancy as aforesaid, absolutely and forever.


AND the Grantor does hereby covenant and agree with the Grantee that  
the Grantor is lawfully seized in fee simple of the premises hereby conveyed; that the  
same are free and clear of all encumbrances, except as aforesaid and except for the lien of  
real property taxes not yet by law required to be paid; that the Grantor is the sole and  
absolute owner of said personal property, if any, and that said personal property is free  
and clear of all encumbrances except as aforesaid; that the Grantor has good right to sell  
and convey said premises and said personal property, if any, as aforesaid; and that the  
Grantor will WARRANT AND DEFEND the same unto the Grantee against the lawful  
claims and demands of all persons except as aforesaid, forever.

The Grantee does hereby covenant and agree, for the benefit of the owners from time to time of all other apartments in the condominium property regime described in Exhibit "A", to observe and perform at all times all of the terms, covenants, conditions and restrictions set forth in the Declaration and Bylaws referred to in Exhibit "A", as the same may from time to time be amended, on the Grantee's part to be observed and performed as and when required to do so, and to indemnify and hold and save harmless the Grantor from any failure so to observe and perform any of such terms, covenants, conditions and restrictions.

The terms "Grantor" and "Grantee", or any pronoun in place thereof, as and when used herein, shall mean and include the masculine, feminine or neuter, the singular or plural number, individuals, trustees, partnerships, or corporations, and their and each of their respective successors, heirs, personal representatives, successors in trust and assigns. All covenants and obligations undertaken by two or more persons shall be joint and several unless a contrary intention is clearly expressed elsewhere herein.

The parties hereto agree that this instrument may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding that all of the parties are not signatory to the original or the same counterparts. For all purposes, including, without limitation, recordation, filing and delivery of this instrument, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

IN WITNESS WHEREOF, the undersigned executed these presents as of  
the day and year first above written.

  
\_\_\_\_\_  
JOSHUA TERRY KAHEALANI  
KAMAU'U  
Grantor

STATE OF HAWAII )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

On this 10<sup>th</sup> day of May, 2007, before me  
personally appeared JOSHUA TERRY KAHEALANI KAMAU'U, to me known to be  
the person described in and who executed the foregoing instrument and acknowledged  
that he executed the same as his free act and deed.

\_\_\_\_\_  
Notary Public, State of Hawaii  
My commission expires: \_\_\_\_\_  
Darrelle Glushenko  
My commission expires: 12-7-2010

Us

Richard Milikona Sampaio Jr.  
RICHARD MILIKONA SAMPAIO, JR.

Kelly Kalanikapulahaole Sampaio  
KELLY KALANIKAPULAHAOLE

SAMPAIO

Grantee

STATE OF HAWAII )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

On this 11<sup>th</sup> day of May, 2007, before me personally appeared RICHARD MILIKONA SAMPAIO, JR. and KELLY KALANIKAPULAHAOLE SAMPAIO, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

\_\_\_\_\_  
Notary Public, State of Hawaii

My commission expires: \_\_\_\_\_

Daralle Glushenko

My commission expires 12-4-2010

46

**EXHIBIT "A"**

**FIRST:** Apartment No. 325 (hereinafter called the "Apartment") comprising a portion of "NOB HILL III", a condominium project (hereinafter called the "Project") as described in and established by Declaration of Condominium Property Regime dated April 26, 1974, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 678748, as the same may have been amended from time to time (hereinafter called the "Declaration") and as shown on the plans of the Project filed in said Office as Condominium Map No. 207, as the same may have been amended from time to time (hereinafter called the "Condominium Map").

Together with appurtenant easements as follows:

(a) An exclusive easement to use Parking Space No. 325A and 325B as shown on said Condominium Map.

(b) Non-exclusive easements in the common elements designed for such purposes for ingress to, egress from, utility services for and support of said apartment; in the other common elements for use according to their respective purposes.

(c) Exclusive easements to use other limited common elements appurtenant thereto designated for its exclusive use by the Declaration, as amended.

**SECOND:** An undivided .610% interest in all common elements of the project and in the land on which said project is located as established for said Apartment by the Declaration, as amended, or such other percentage interest as hereinafter established for said apartment by any amendment of the Declaration, as tenant in common with the other owners and tenants thereof.

Being the same apartment and interest conveyed by Apartment Deed dated April 22, 2003, filed in said Office as Document No. 2920569, noted on Transfer Certificate of Title No. 643,716.

The land upon which said condominium project is situate is more particularly described in said Declaration, which description is incorporated herein by reference.

**SUBJECT, HOWEVER,** without limitation to the generality of the foregoing, to the following:

1. Condominium Map No. 207.
2. Covenants, agreements, obligations, conditions, easements and other provisions as contained in said Declaration, as amended.

3. Terms, provisions and conditions as contained in the Original Apartment Deed and the effect of any failure to comply with such terms, provisions and conditions.

4. Any and all easements encumbering the apartment herein mentioned, and/or the common interest apartment thereto, as created by or mentioned in said Declaration, as said Declaration may be amended from time to time in accordance with the law and/or in the Original Apartment Deed, and/or as delineated on said Condominium Map.

TOGETHER WITH all furniture, fixtures, appliances, and other items listed on any contract of sale between the parties hereto, which by reference is incorporated herein.





IN THE CIRCUIT COURT OF THE FIRST CIRCUIT


STATE OF HAWAII

RICHARD MILIKONA SAMPAIO, JR. and	)	CIVIL NO. 17-1-0044-01 VLC
KELLY KALANIKAPULAHAOLE	)	(Other Civil Action)
SAMPAIO,	)	
	)	RENEWED DEMAND FOR JURY TRIAL
Plaintiffs,	)	
vs.	)	
	)	
MILILANI TOWN ASSOCIATION; ZJD	)	
REAL ESTATE, LLC; ZACHARY J.	)	
DUNCAN; ASSOCIATION OF	)	
APARTMENT OWNERS OF NOB HILL,	)	
A HAWAII NONPROFIT	)	
CORPORATION; NATIONSTAR	)	
MORTGAGE LLC; MORTGAGE	)	
ELECTRONIC REGISTRATION	)	
SYSTEMS, INC., SOLELY AS NOMINEE	)	
FOR FIRST MAGNUS FINANCIAL	)	
CORPORATION; JOHN DOES 1-20;	)	
JANE DOES 1-20, DOE PARTNERSHIPS	)	
1-20; DOE CORPORATIONS 1-20; DOE	)	
ENTITIES 1-20; and DOE	)	
GOVERNMENTAL UNITS 1-20,	)	
	)	
Defendants.	)	
	)	

**RENEWED DEMAND FOR JURY TRIAL**

Plaintiffs Richard Milikona Sampaio and Kelly Kalanikapulahaole Sampaio, by and through their undersigned attorneys, hereby renew their demand for a jury trial on all claims set forth in their First Amended Complaint.

DATED: Honolulu, Hawaii; January 23, 2017.

  
 \_\_\_\_\_  
 GARY VICTOR DUBIN  
 KATHERINE S. BELFORD  
 Attorneys for Plaintiffs  
 Richard Milikona Sampaio and  
 Kelly Kalanikapulahaole Sampaio

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

RICHARD MILIKONA SAMPAIO, JR. and KELLY KALANIKAPULAHAOLE SAMPAIO,	)	CIVIL NO. 17-1-0044-01 VLC
	)	(Other Civil Action)
	)	
Plaintiffs,	)	AMENDED SUMMONS
vs.	)	
	)	
MILILANI TOWN ASSOCIATION; ZJD REAL ESTATE, LLC; ZACHARY J. DUNCAN; ASSOCIATION OF APARTMENT OWNERS OF NOB HILL, A HAWAII NONPROFIT CORPORATION; NATIONSTAR MORTGAGE LLC; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., SOLELY AS NOMINEE FOR FIRST MAGNUS FINANCIAL CORPORATION; JOHN DOES 1-20; JANE DOES 1-20, DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20; and DOE GOVERNMENTAL UNITS 1-20,	)	
	)	
Defendants.	)	
	)	
	)	

**SUMMONS**

*TO THE ABOVE-NAMED DEFENDANTS:*

You are hereby summoned and required to file with the court and serve upon Plaintiff's attorneys, Gary Victor Dubin and Katherine S. Belford, at the Dubin Law Offices, Suite 3100, Harbor Court, 55 Merchant Street, Honolulu, Hawaii 96813, an Answer to the First Amended Complaint which is herewith attached.

This action on your part must be taken within twenty (20) days after service of this Summons upon you, exclusive of the day of service.

If you fail to make your Answer within twenty (20) days, judgment by default will be taken against you for the relief demanded in the Complaint.

This Summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on the Summons, personal delivery during those hours.

Failure to obey this Summons may result in an entry of default and default judgment against the disobeying person or party.

DATE ISSUED: \_\_\_\_\_

SUMMONS

DENIED

\_\_\_\_\_  
Clerk, First Circuit Court

SCWC-15-0000529

IN THE SUPREME COURT OF THE STATE OF HAWAII

CHRISTIAN SAKAL, ) CIVIL NO. 14-1-1118  
)  
Respondent/Plaintiff-Appellant, ) APPEAL FROM THE:  
)  
vs. ) (1) ORDER GRANTING DEFENDANT  
) JONAH SCOTT KOGEN'S MOTION TO  
ASSOCIATION OF APARTMENT OWNERS ) DISMISS COMPLAINT FILED MAY 5,  
OF HAWAIIAN MONARCH, ) 2014 WITH PREJUDICE, filed October 21,  
) 2014;  
Petitioner/Defendant-Appellee, )  
) (2) ORDER GRANTING DEFENDANT  
and ) ASSOCIATION OF APARTMENT  
) OWNERS OF HAWAIIAN MONARCH'S  
JONAH SCOTT KOGEN; K&F 1984 LLC; ) MOTION TO DISMISS COMPLAINT  
and JOHN AND MARY DOES 1-10, ) FILED MAY 5, 2014 WITH PREJUDICE,  
) filed June 16, 2015; and  
Defendants-Appellees. )  
) (3) FINAL JUDGMENT, filed August 5,  
) 2015.  
)  
) CIRCUIT COURT OF THE FIRST CIRCUIT  
) HONORABLE BERT I. AYABE,  
) PRESIDING  
)  
\_\_\_\_\_ )

**RESPONDENT/PLAINTIFF-APPELLANT CHRISTIAN SAKAL'S RESPONSE TO  
APPLICATION FOR WRIT OF CERTIORARI**

---

**GARY VICTOR DUBIN 3191  
FREDERICK J. ARENSMEYER 8471  
Dubin Law Offices  
Harbor Court, Suite 3100  
55 Merchant Street  
Honolulu, Hawaii 96813  
(808) 537-2300  
farensmeyer@dubinlaw.net  
Attorneys for Respondent/Plaintiff-Appellant  
Christian Sakal**

IN THE SUPREME COURT OF THE STATE OF HAWAII

CHRISTIAN SAKAL,	)	CIVIL NO. 14-1-1118
	)	
Plaintiff/Appellant,	)	APPEAL FROM THE:
	)	
vs.	)	(1) ORDER GRANTING DEFENDANT
	)	JONAH SCOTT KOGEN’S MOTION TO
ASSOCIATION OF APARTMENT OWNERS	)	DISMISS COMPLAINT FILED MAY 5,
OF HAWAIIAN MONARCH; JONAH	)	2014 WITH PREJUDICE, filed October 21,
SCOTT KOGEN; K&F 1984 LLC; and JOHN	)	2014;
AND MARY DOES 1-10,	)	
	)	(2) ORDER GRANTING DEFENDANT
Defendants/Appellees.	)	ASSOCIATION OF APARTMENT
	)	OWNERS OF HAWAIIAN MONARCH’S
	)	MOTION TO DISMISS COMPLAINT
	)	FILED MAY 5, 2014 WITH PREJUDICE,
	)	filed June 16, 2015; and
	)	
	)	(3) FINAL JUDGMENT, filed August 5,
	)	2015.
	)	
	)	CIRCUIT COURT OF THE FIRST CIRCUIT
	)	HONORABLE BERT I. AYABE,
	)	PRESIDING
	)	

---

**RESPONDENT/PLAINTIFF-APPELLANT CHRISTIAN SAKAL’S RESPONSE TO  
APPLICATION FOR WRIT OF CERTIORARI**

---

COMES NOW Respondent/Plaintiff-Appellant Christian Sakal, by and through his undersigned attorneys, and in accordance with Rule 40.1(e) of the Hawaii Rules of Appellate Procedure, hereby opposes Petitioner/Defendant-Appellee Association of Apartment Owners of Hawaiian Monarch’s “Application for Writ of Certiorari,” filed November 30, 2018. The application should be rejected for the following reasons:

In its application, Petitioner (hereinafter the “AOAO”) argues that the Intermediate Court of Appeals’ (“ICA”) published opinion in *Sakal v. Ass’n of Apartment Owners of Hawaiian*



*Monarch*, 143 Hawaii 219, 426 P.3d 443 (App. 2018) should be vacated, because Petitioner asserts that the Legislature somehow created a power of sale in enacting Section 514A-82(b)(13) of the Hawaii Revised Statutes, and incorporated that power of sale into every set of condominium bylaws in the State—contrary to the private property rights of individual owners. The plain language of that statute, however, provides otherwise.

The provision the AOA now relies upon, which was incorporated into condominium bylaws by the Legislature, provides that, “A lien created pursuant to section 514A-90 may be enforced by the association in any manner **permitted by law**, including nonjudicial or power of sale foreclosure procedures **authorized by chapter 667.**” (Emphases added). Even if that language has been incorporated by statute into every set of condominium bylaws in the State, said language clearly does not create a power of sale. Instead, just like the mortgage at issue in *Santiago v. Tanaka*, 137 Hawaii 137, 366 P.3d 612 (2016),<sup>1</sup> said statutory language allows nonjudicial or power of sale foreclosure only where otherwise “permitted by law” or “authorized by chapter 667.”

On page 17 of the ICA’s published decision herein, the court considered the similar language contained in Sections 514A-90 and 514B-146 of the Hawaii Revised Statutes, both of which provided for nonjudicial foreclosure where authorized by Chapter 667 of the Hawaii Revised Statutes.<sup>2</sup> The ICA correctly concluded that, Chapter 667 “does not **authorize** a nonjudicial or power of sale foreclosure absent a power of sale.” *Sakal*, 143 Hawaii at 228, 426 P.3d at 452 (emphasis added). Again, although Section 514A-82(b)(13) allows nonjudicial foreclosure where “authorized by chapter 667,” that provision clearly does not purport to itself

---

<sup>1</sup> The mortgage at issue in *Santiago* allowed for nonjudicial foreclosure “as now or then provided by law.” This Court concluded that such contractual language did not create a power of sale.

<sup>2</sup> Both sections provide that “[t]he 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 . . . .”

create a power of sale. The ICA correctly recognized on page 11 of its published opinion that, “no Hawai‘i statute, including HRS chapter 667 provides mortgagees the right to proceed by nonjudicial foreclosure; rather, HRS § 667-5 only allows for the creation of a power of sale, if the parties choose to do so, within the four corners of a contract.” *Id.* at 225, 426 P.3d at 449, (citing *Santiago*, 137 Hawaii at 155, 366 P.3d at 630; *Lee v. HSBC Bank USA*, 121 Hawaii 287, 289, 218 P.3d 775, 777 (2009); *Apao v. Bank of N.Y.*, 324 F.3d 1091, 1095 (9th Cir. 2003)). The same rational applies here. Therefore, the Application for Writ of Certiorari should be denied as a matter of plain statutory language.

Meanwhile, even if Section 514A-82(b)(13) somehow did purport to create and incorporate a power of sale into the bylaws of all condominiums in the State, such a statutory enactment would not pass constitutional muster. Not only would such a statutory provision amount to a regulatory taking of private property without due process or just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 20 of the Hawaii State Constitution, but it would also violate the Contracts Clause of Article I, section 10, clause 1.<sup>3</sup>

Under the Contracts Clause, a state law must not substantially impair a contractual relationship. Second, the state must have a significant and legitimate purpose behind the regulation, such as the remedying of a broad and general social or economic problem. Third, the law must be reasonable and appropriate for its intended purpose. *Energy Reserves Group v. Kansas Power & Light.*, 459 U.S. 400, 411-13 (1983).

---

<sup>3</sup> The Contracts Clause provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

If Section 514A-82(b)(13) were interpreted to create and incorporate a power of sale into every set of condominium bylaws in the state, as the AOA argues, that legislative act would substantially impair the contractual relationships between apartment owners and their governing bodies. See Willens v. 2720 Wisconsin Ave. Co-op. Ass'n, Inc., 844 A.2d 1126, 1135 (D.C. 2004) (the bylaws constitute a contract governing the legal relationship between the association and the unit owners); Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass'n, 548 A.2d 87, 91 (D.C. 1988) (“The condominium instruments, including the bylaws and the sales agreement, are a contract that governs the legal rights between the Association and unit owners.”). In addition, a legislative act awarding a power of sale to every condominium association over every condominium unit owned by its members would not serve a legitimate public purpose. Instead, such an act would provide a benefit to special interests, *i.e.*, condominium associations and their attorneys. *Energy Reserves Grp.*, 459 U.S. at 412 (“The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.”).

Because a statutorily imposed power of sale in favor of every condominium association in the State would substantially impair the contractual relationship between condominium owners and their governing bodies, and because such a legislative act would not serve a legitimate public purpose, but instead would award a benefit and an interest in private property to special interests at the expense of property owners, Section 514A-82(b)(13) must not be interpreted to unconstitutionally create and incorporate a power of sale into the bylaws of every condominium association in the state.

Moreover, even if a legislative award of a power of sale to every association for every condominium unit in the state at the expense of each and every apartment owner were somehow

deemed to serve a public purpose, such a regulatory taking of an interest in private property would require payment of just compensation to every apartment owner who had not previously contractually granted their governing associations powers of sale with respect to their private properties. The Takings Clause of the Fifth Amendment of the United States Constitution provides that “private property [shall not] be taken for public use, without just compensation.” Although the Fifth Amendment by itself only applies to actions by the federal government, the Fourteenth Amendment extends the Takings Clause to actions by state and local government as well. Meanwhile, Article 1, Section 20 of the Hawaii State Constitution provides that, “Private property shall not be taken or damaged for public use without just compensation.”

Section 514A-82(b)(13) contains no provision for compensation by the State to affected homeowners. As such, any interpretation of that statute awarding a power of sale to the governing association of every condominium unit owner in the State, would violate the takings requirements of the United States and State of Hawaii Constitutions.

For each and all of the foregoing reasons, Respondent Christian Sakal respectfully requests that the AOA’s Application for Writ of Certiorari be rejected.

DATED: Honolulu, Hawaii; November 30, 2018.

/s/ Frederick J. Arensmeyer

---

GARY VICTOR DUBIN  
FREDERICK J. ARENSMEYER  
Attorneys for Respondent  
Christian Sakal

**LATE**

**SB-551-HD-1**

Submitted on: 3/29/2019 7:29:28 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Thomas Maadie	AOAO Harbour Ridge	Support	No

Comments:

Our Home Owners Association needs to be assured of its authority to foreclose.

Thomas Maadie, Treasurer & Board Member, AOAO Harbour Ridge

COMMITTEE ON JUDICIARY

DATE: Friday, March 29, 2019

TIME: 2:05pm

PLACE: Conference Room 325

Re: Testimony on SB 551, SD1, HD 1.

Chair Lee and Members of the Committee:

My name is John Morris and I am testifying in support of SB 551, SD 1 because it is necessary to preserve the financial viability of associations when delinquencies rise. The legislature recognized this back in 1999, when, after associations had been overwhelmed by years of large delinquencies, the legislature first authorized nonjudicial foreclosures for all condominium associations. The legislature fine-tuned and expanded that right in 2012, when it passed a section of the foreclosure law, Part VI, that: (i) specifically authorized nonjudicial foreclosures by all associations but (ii) included built-in protections for owners.

Despite the legislature's clear intent, two recent Hawaii appellate court decisions questioned whether that was the legislature's intent if the association's governing documents do not specifically provide for that right. This bill will confirm of the legislature's original intent, namely, that associations should have the right to conduct nonjudicial foreclosures under the law, even if the association's governing documents do not specifically provide for that right.

1) Many of the comments in opposition to SB 551, SD 1 and the association's right to conduct nonjudicial foreclosures fail to recognize the adverse impact of an owner's delinquency on all other members of the association. Association members should not be required to subsidize members of their association who cannot afford to pay their share of the maintenance fees.

2) If a senior or retiree cannot afford to pay his or her share of the association's assessments, all the other owners must make up the difference. Those other owners often include other seniors and retirees who may be barely making their own payments. If the legislature makes it even more difficult for associations to collect delinquencies, those other seniors and retirees will have even more problems making their payments when assessments must rise to cover delinquencies. Ignoring the rights of owners who do pay is not fair. Associations have very few effective remedies, anyway, and eliminating their right to conduct nonjudicial foreclosures only makes the problem worse.

3) Criticizing boards as irresponsible or negligent for imposing additional assessments is unfair. Boards are not miracle workers. Even with the assistance of engineers, boards cannot always predict an association's financial needs with complete accuracy. For example, many older associations are now faced with replacing cast-iron piping at great expense. Reserve studies for associations in Hawaii were based on experience on the East Coast, where cast-iron pipes routinely lasted for 70 years and more. Unfortunately, recent experience has shown that cast-iron pipes in Hawaii are often lasting for less than 50 years. Since Hawaii's reserve study law

only requires associations to begin collecting reserves when the anticipated useful life of an item is less than 20 years, many associations that must now replace the cast-iron piping had not yet even included those pipes in their reserve studies.

4) The first and most important point overlooked by those testifying in opposition to SB 551, SD 1 is that, ultimately, a court must always be involved in a nonjudicial foreclosure, unless the owner simply abandons the unit. More specifically, even assuming an association goes ahead with a nonjudicial foreclosure, at the end of the nonjudicial foreclosure, if the owner refuses to leave the unit, the association will have to go to court for a writ of possession from the court. No association can simply remove an owner from the unit by physical force without causing a breach of the peace and the intervention of the police. Therefore, if the owner has a legitimate objection to the nonjudicial foreclosure, the owner can raise that objection with the court when the association seeks a writ of possession for the unit.

5) In addition, as with removing an owner from a unit, associations can only obtain a deficiency judgement through the court, at which point any owner who has a legitimate defense can raise that defense. Moreover, associations can only obtain a deficiency judgement if they fail to recover the delinquency from a delinquent owner through the nonjudicial foreclosure process.

6) The claim that associations can foreclose solely for penalties, fines, et cetera, is not true. Since 2012, section 514B-146 (a) of the condominium law has stated: "*[P]rovided that no association may exercise the nonjudicial or power of sale remedies provided in chapter 667 to foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees, and the foreclosure of any such lien shall be filed in court pursuant to part IA of chapter 667 [i.e., as a judicial foreclosure].*"

7) Some of those submitting testimony argue that their properties were “wrongfully” nonjudicially foreclosed, while admitting that they were not paying their maintenance fees. That testimony overlooks the fact that even without nonjudicial foreclosure, the association could have ultimately foreclosed judicially anyway. Requiring only judicial foreclosures will not prevent an association from foreclosing; it will simply make the process more time consuming and expensive for the owners who are paying their maintenance fees. In a judicial foreclosure, the foreclosing party must only prove that: (i) the defendant is the owner of a unit managed by the association and (ii) the defendant has not paid his or her share of the maintenance fees. Under those circumstances, the judge might delay the foreclosure briefly but cannot prevent the foreclosure from going ahead if those two facts are proven. If an owner’s inability to pay were a defense to a judicial foreclosure, there could never be a judicial foreclosure.

8) Unlike the judicial foreclosure law, the NONjudicial foreclosure law already has mandatory delays built into it. Under section 667-92, after the association serves notice of nonjudicial foreclosure on an owner, the association can take no further action for 60 days and the notice must inform the owner of that deadline. This delay allows the owner to take action to resolve the delinquency.

9) The notice of nonjudicial foreclosure must also inform the owner that the owner has 30 days to submit a payment plan, and the law requires an association to accept a payment plan from the



owner if the plan is less than 12 months. Claims that associations refused payment plans are difficult to accept given that the law requires associations to accept payment plans of less than 12 months.

10) Section 667-92 (d) requires the following: "*The notice of default and intention to foreclose shall also include contact information for approved housing counselors and approved budget and credit counselors.*" In other words, every owner who is the subject of a nonjudicial foreclosure must be provided with information on how to contact knowledgeable people who can assist the owner in dealing with the situation

11) The argument that an association may sell a unit for less than its full value overlooks an important point. The sales price of a unit in an association foreclosure has nothing to do with its value. If the mortgage lien on the unit was recorded before the association's maintenance fee lien, by law, the association is forced to sell the unit subject to the mortgage. For example, if the mortgage is \$500,000 but the value of the unit is only \$400,000, the unit has a negative value because the mortgage will remain on the property after the association's foreclosure auction. In that case, no one is going to pay even \$400,000 for a unit that will remain subject to a mortgage of \$500,000. Someone might pay a few thousand dollars for the unit in the hope of renting it out for as long as possible before the lender forecloses (as most associations are forced to do). Nevertheless, no one is not going to pay anywhere close to market value in those circumstances.

12) The sales price of a unit in an association auction is also depressed by the fact that the lender is almost always in first position. As a result, the lender can foreclose and wipe out the interest of the association OR anyone who may have purchased a unit from the association in an association foreclosure. This possibility further diminishes the value of a unit that is sold in an association foreclosure. In contrast, since the lender typically has the first lien, it can sell the property free and clear of all other liens, thereby enhancing the value of the property.

13) These circumstances explain why the main purpose of an association conducting a nonjudicial foreclosure is to pressure the owner to pay, not to sell (or buy) the unit. These circumstances also explain why forcing an association to conduct a judicial foreclosure impacts the association so severely. For example, since NONjudicial foreclosure costs \$4000-\$6000, while a judicial foreclosure costs \$12,000-\$14,000, an association may spend \$6000-\$8,000 more just to conduct a judicial foreclosure. Similarly, if the nonjudicial foreclosure takes 5 to 6 months to complete, while a judicial foreclosure takes 12 months to 16 months to complete, with a monthly maintenance fee of \$500, the association may lose \$3000 in the nonjudicial foreclosure but \$6000-\$8000 in a judicial foreclosure. Spending two to three times as much and taking two to three times as long to complete a judicial foreclosure for the same questionable result is unfair to the association and the members who are paying their share of the maintenance fees. If other delinquencies arise, those losses are multiplied by the number of delinquencies.

14) The claims of lack of service or notice provide no specifics. If an owner is living in the unit, it is difficult to understand how or why the owner would not receive notice unless the owner was intentionally evading service. Under standard collection practices, the association's managing agent will send the delinquent owner 2 to 3 notices of delinquency and the association's attorney will send another 2 notices of delinquency before the nonjudicial foreclosure even starts. If the

owner does not live in the unit but has not provided a current address, the association might have problems serving the owner. In that case, section 667-92 (f) provides the following requirement:

*(f) If the association is unable to serve the notice of default and intention to foreclose on the unit owner or any other party listed in subsection (e)(2) to (5) within sixty days, the association may:*

*(1) File a special proceeding in the circuit court of the circuit in which the unit is located, for permission to proceed with a nonjudicial foreclosure by serving the unit owner or any other party listed in subsection (e)(2) and (e)(5) by publication and posting;*

*(2) Proceed with a nonjudicial foreclosure of the unit; provided that if the association proceeds without the permission of the court, the association shall not be entitled to obtain a deficiency judgment against the unit owner, and the unit owner shall have one year from the date the association records the deed in the nonjudicial foreclosure to redeem the unit by paying the unit owner's delinquency to the association;*

Most responsible attorneys use option (1), which requires the permission of the court. Those who do not, must give an owner one year to redeem the unit. Unless an owner is completely sleeping on the owner's rights, one year would be more than enough time to discover the foreclosure has taken place and redeem the property. Regardless, if option (2) is creating confusion about service, the legislature could eliminate that option to prevent even a suggestion of lack of notice. Then, service on a missing owner would have to be made through the court.

15) Section 667-92 (f) provides a third option for the association if the unit is abandoned and the owner cannot be found: take over the unit, rent it out, and try to generate income unless or until the owner of the unit reappears. The association must keep a careful accounting of the rental and refund any surplus proceeds to the owner of the unit. The legislature included this option because of the frequency with which owners would simply abandon underwater units in an economic downturn and disappear, putting the association in a very difficult position.

16) Finally, as to deficiency judgments, it is not clear why a delinquent owner should be absolved for all responsibility for the owner's delinquency if all the other owners must make up the difference. Moreover, obtaining a deficiency judgement is often only the first step; actually recovering on the deficiency judgement may be far more problematic. For example, if owners are of retirement age (unless they own other property or are still employed), it can be difficult or almost impossible to collect a deficiency judgment from someone who is only receiving social security, a pension and/or is living off retirement savings. Even if the association can recover under a deficiency judgement, the non-judicial foreclosure process reduces the amount of the judgement because it is quicker and cheaper than judicial foreclosure (which, in turn, reduces the delinquent maintenance fees, legal fees and costs charged back to the owner). Finally, as noted above, a deficiency judgement can only be obtained through the court, so at that time an owner can raise any valid objections to the court.

Thank you for this opportunity to testify.

John Morris

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner’s failure to pay assessments are comparable to a property owner’s failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations

regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that “[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667.” That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to consider amending the bill in the manner set forth in the attachment. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

M. Anne Anderson

1           SECTION 1. In 1999, the legislature passed Act 236,  
2 Session Laws of Hawaii 1999, authorizing condominium  
3 associations to conduct nonjudicial foreclosures. In 2012,  
4 through Act 182, Session Laws of Hawaii 2012, the legislature  
5 enacted a new part of the foreclosure law—part VI of chapter  
6 667, Hawaii Revised Statutes—creating a nonjudicial foreclosure  
7 process specifically for associations. During that time, in  
8 reliance on the legislature's actions, associations have  
9 conducted nonjudicial foreclosures as part of their efforts to  
10 collect delinquencies and sustain their financial  
11 operations. Associations have done so subject to the  
12 restrictions on nonjudicial foreclosures and other collection  
13 options imposed by the legislature.

14           These restrictions 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 up to  
20 twelve months; and

21           (3) Requiring associations to provide owners with contact  
22 information for approved housing counselors and approved budget  
23 and credit counselors.

24           The intermediate court of appeals in Sakal v. Association  
25 of Apartment Owners of Hawaiian Monarch, 143 Haw. 219, 426 P.3d  
26 443 (2018), held that the legislature intended that associations  
27 can only conduct nonjudicial foreclosures if they have specific  
28 authority to conduct nonjudicial foreclosures in their  
29 declaration or bylaws or in an agreement with the owner being  
30 foreclosed upon.

31           The legislative history indicates this was not the intent  
32 of the legislature in 2012, nor in legislatures that have made

1 subsequent amendments. Therefore, this Act confirms the  
2 legislative intent that associations should be able to use  
3 nonjudicial foreclosure to collect delinquencies without having  
4 specific authority to conduct nonjudicial foreclosures in an  
5 agreement with a delinquent owner or in the association's  
6 declaration or bylaws.

7 SECTION 2. Section 421J-10.5, Hawaii Revised Statutes, is  
8 amended by amending subsection (a) to read as follows:

9 "(a) All sums assessed by the association, but unpaid for  
10 the share of the assessments chargeable to any unit, shall  
11 constitute a lien on the unit. The priority of the  
12 association's lien shall, except as otherwise provided by law,  
13 be as provided in the association documents or, if no priority  
14 is provided in the association documents, by the recordation  
15 date of the liens; provided that any amendment to the  
16 association documents that governs the priority of liens on the  
17 unit shall not provide that an association lien shall have  
18 priority over a mortgage lien that is recorded before the  
19 amendment is recorded. A lien recorded by an association for  
20 unpaid assessments shall expire six years from the date of  
21 recordation unless proceedings to enforce the lien are  
22 instituted prior to the expiration of the lien; provided that  
23 the expiration of a recorded lien shall in no way affect the  
24 association's automatic lien that arises pursuant to this  
25 subsection or the association documents. Any proceedings to  
26 enforce an association's lien for any assessment shall be  
27 instituted within six years after the assessment became due;  
28 provided that if the owner of a unit subject to a lien of the  
29 association files a petition for relief under the United States  
30 Bankruptcy Code (11 U.S.C. §101 et seq.), the period of time for  
31 instituting proceedings to enforce the association's lien shall  
32 be tolled until thirty days after the automatic stay of

1 proceedings under section 362 of the United States Bankruptcy  
2 Code (11 U.S.C. §362) is lifted.

3           The lien of the association may be foreclosed by  
4 action or by nonjudicial or power of sale foreclosure procedures  
5 set forth in chapter 667, regardless of the presence or absence  
6 of power of sale language in an association's governing  
7 documents, by the managing agent or board, acting on behalf of  
8 the association and in the name of the association; ~~provided~~  
9 ~~that no association may exercise the nonjudicial or power of~~  
10 ~~sale remedies provided in chapter 667 to foreclose a lien~~  
11 ~~against any unit that arises solely from fines, penalties, legal~~  
12 ~~fees, or late fees, and the foreclosure of any such lien shall~~  
13 ~~be filed in court pursuant to part IA of chapter 667. In~~  
14 ~~addition to the wording required by section 667-92(b), the~~  
15 ~~association's notice of default and intention to foreclose shall~~  
16 ~~also contain wording substantially similar to the following in~~  
17 ~~all capital letters and printed in not less than fourteen-point~~  
18 ~~font which states:~~

19  
20           THIS NOTICE PERTAINS TO AMOUNTS DUE AND OWING TO THE  
21 ASSOCIATION FOR WHICH THE ASSOCIATION HAS A STATUTORY OR  
22 RECORDED LIEN. THIS NOTICE DOES NOT PERTAIN TO OBLIGATIONS OWED  
23 BY YOU TO OTHER CREDITORS, INCLUDING ANY OUTSTANDING MORTGAGE  
24 DEBT. YOU SHOULD CONSULT YOUR OTHER CREDITORS, INCLUDING YOUR  
25 MORTGAGEES, IF ANY, AS TO THE EFFECT THE FORECLOSURE OF THE  
26 ASSOCIATION'S LIEN WILL HAVE ON YOUR OTHER OUTSTANDING DEBTS.

27  
28           The association's power of sale provided in this section  
29 may not be exercised against:



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

4 (2) Any unit owned by a person who is on active duty in any  
5 branch of the United States military, and the foreclosure of any  
6 such lien shall be filed in court pursuant to part IA of chapter  
7 667; and/or

8 (3) Any unit while the nonjudicial foreclosure has been  
9 stayed pursuant to section 667-92(c).

10  
11 In any association foreclosure, the unit owner shall be  
12 required to pay a reasonable rental for the unit, if so provided  
13 in the association documents or the law, and the plaintiff in  
14 the foreclosure shall be entitled to the appointment of a  
15 receiver to collect the rental owed by the unit owner or any  
16 tenant of the unit. If the association is the plaintiff, it may  
17 request that its managing agent be appointed as receiver to  
18 collect the rental from the tenant. The managing agent or  
19 board, acting on behalf of the association and in the name of  
20 the association, may bid on the unit at foreclosure sale and  
21 acquire and hold, lease, mortgage, and convey the unit  
22 thereafter as the board deems reasonable. Action to recover a  
23 money judgment for unpaid assessments shall be maintainable  
24 without foreclosing or waiving the lien securing the unpaid  
25 assessments owed.

26 In the case of a voluntary conveyance, the grantee of a  
27 unit shall be jointly and severally liable with the grantor for  
28 all unpaid assessments against the latter for the grantor's  
29 share of the common expenses up to the time of the grant or  
30 conveyance, without prejudice to the grantee's right to recover  
31 from the grantor the amounts paid by the grantee. Any such  
32 grantor or grantee is entitled to a statement from the board,

1 either directly or through its managing agent or resident  
2 manager, setting forth the amount of the unpaid assessments  
3 against the grantor. The grantee is not liable and the unit  
4 conveyed is not subject to a lien for any unpaid assessments  
5 against the grantor in excess of the amount set forth in the  
6 statement, except as to the amount of subsequently dishonored  
7 checks mentioned in the statement as having been received within  
8 the thirty-day period immediately preceding the date of such  
9 statement."

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

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

16 (1) Liens for real property taxes and assessments lawfully  
17 imposed by governmental authority against the unit; and

18 (2) Except as provided in subsection (j), all sums unpaid  
19 on any mortgage of record that was recorded prior to the  
20 recordation of a notice of a lien by the association, and costs  
21 and expenses including attorneys' fees provided in such  
22 mortgages;

23 provided that a lien recorded by an association for unpaid  
24 assessments shall expire six years from the date of  
25 recordation unless proceedings to enforce the lien are  
26 instituted prior to the expiration of the lien; provided further  
27 that the expiration of a recorded lien shall in no way affect  
28 the association's automatic lien that arises pursuant to this  
29 subsection or the declaration or bylaws. Any proceedings to  
30 enforce an association's lien for any assessment shall be  
31 instituted within six years after the assessment became due;

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

8           The lien of the association may be foreclosed by  
9 action or by nonjudicial or power of sale foreclosure procedures  
10 set forth in chapter 667, regardless of the presence or absence  
11 of power of sale language in an association's governing  
12 documents, by the managing agent or board, acting on behalf of  
13 the association and in the name of the association; ~~provided that~~  
14 ~~no association may exercise the nonjudicial or power of sale~~  
15 ~~remedies provided in chapter 667 to foreclose a lien against any~~  
16 ~~unit that arises solely from fines, penalties, legal fees, or~~  
17 ~~late fees, and the foreclosure of any such lien shall be filed~~  
18 ~~in court pursuant to part IA of chapter 667. In addition to the~~  
19 ~~wording required by section 667-92(b), the association's notice~~  
20 ~~of default and intention to foreclose shall also contain wording~~  
21 ~~substantially similar to the following in all capital letters~~  
22 ~~and printed in not less than fourteen-point font which states:~~

23  
24           THIS NOTICE PERTAINS TO AMOUNTS DUE AND OWING TO  
25 THE ASSOCIATION FOR WHICH THE ASSOCIATION HAS A STATUTORY OR  
26 RECORDED LIEN. THIS NOTICE DOES NOT PERTAIN TO OBLIGATIONS OWED  
27 BY YOU TO OTHER CREDITORS, INCLUDING ANY OUTSTANDING MORTGAGE  
28 DEBT. YOU SHOULD CONSULT YOUR OTHER CREDITORS, INCLUDING YOUR  
29 MORTGAGEES, IF ANY, AS TO THE EFFECT THE FORECLOSURE OF THE  
30 ASSOCIATION'S LIEN WILL HAVE ON YOUR OTHER OUTSTANDING DEBTS.

31

1       The association's power of sale provided in this section  
2 may not be exercised against:

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

6       (2) Any unit owned by a person who is on active duty in any  
7 branch of the United States military, and the foreclosure of any  
8 such lien shall be filed in court pursuant to part IA of chapter  
9 667; and/or

10       (3) Any unit while the nonjudicial foreclosure has been  
11 stayed pursuant to section 667-92(c).

12  
13       In any such foreclosure, the unit owner shall be required  
14 to pay a reasonable rental for the unit, if so provided in the  
15 bylaws or the law, and the plaintiff in the foreclosure shall be  
16 entitled to the appointment of a receiver to collect the rental  
17 owed by the unit owner or any tenant of the unit. If the  
18 association is the plaintiff, it may request that its managing  
19 agent be appointed as receiver to collect the rent from the  
20 tenant. The managing agent or board, acting on behalf of the  
21 association and in the name of the association, unless  
22 prohibited by the declaration, may bid on the unit at  
23 foreclosure sale, and acquire and hold, lease, mortgage, and  
24 convey the unit. Action to recover a money judgment for unpaid  
25 common expenses shall be maintainable without foreclosing or  
26 waiving the lien securing the unpaid common expenses owed."

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

30       ""Power of sale" or "power of sale foreclosure" means a  
31 nonjudicial foreclosure when [~~the~~]:

1        (1) The mortgage contains, authorizes, permits, or  
2 provides for a power of sale, a power of sale foreclosure, a  
3 power of sale remedy, or a nonjudicial foreclosure[-]; or

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

9        SECTION 5. If any provision of this Act, or the application  
10 thereof to any person or circumstance, is held invalid, the  
11 invalidity does not affect other provisions or applications of  
12 this Act that can be given effect without the invalid provision  
13 or application, and to this end the provisions of this Act are  
14 severable.

15        SECTION ~~5~~6. Statutory material to be repealed is bracketed  
16 and stricken. New statutory material is underscored.

17        SECTION ~~6~~7. This Act shall take effect on July 1, 2050;  
18 provided that the amendments made to section 514B-146(a), Hawaii  
19 Revised Statutes, by section 3 of this Act shall not be repealed  
20 when that section is reenacted on June 30, 2020, pursuant to  
21 section 6 of Act 195, Session Laws of Hawaii 2018.

22

**SB-551-HD-1**

Submitted on: 3/28/2019 8:15:10 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Paul A. Ireland Koftinow	Individual	Support	Yes

Comments:

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below.

The legislature gave associations the power to foreclose nonjudicially *via* Act 236 (1999). Many associations have acted in reliance on those amendments for nearly twenty years. In addition, since 1999, the legislature continuously amended nonjudicial foreclosure procedures to increase consumer protections. For example, Act 182 (2012) created a nonjudicial foreclosure process for all associations under a newly added Part VI of Chapter 667. Part VI of Chapter 667 was the result of years of work by legislators and members of the Mortgage Foreclosure Task Force. The goal of Part VI was to give associations their own set of procedures, while also providing procedural protections (such as personal service of notices, requirements to allow payment plans, and disallowing nonjudicial foreclosures of liens that arose from fines, penalties, legal fees, or late fees).

Today, the ability of associations to foreclose nonjudicially is in question because of the decision rendered by the Hawaii Intermediate Court of Appeals (**ICA**) in *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). In *Sakal*, the ICA held that there was no clear legislative act to authorize associations to foreclose by power of sale.

Despite the ICA's holding in *Sakal*, it is clear that the legislature gave associations the power to foreclose nonjudicially in 1999. In fact, legislatures in many other states have provided associations a statutory lien for unpaid assessments **with the statutory power to foreclose nonjudicially or by power of sale**. In the following statutes, the statutory power of sale given to community associations contains language **similar to HRS §§ 514B-146(a) and 421J-10.5(a)**:

- **Ala. Code § 35-8A-316, Alabama Commentary:** "Subsection (a) permits the association's assessment lien to be foreclosed in the manner of a realty mortgage. This is intended to mean a mortgage that includes a power of sale."

- **Cal. Civ. Code § 5700:** “[T]he lien may be enforced in any manner permitted by law, including sale by the court, sale by the trustee designated in the notice of delinquent assessment, or sale by a trustee substituted pursuant to Section 2934a.”
- **Idaho Code Ann. § 55-1518:** “Such lien may be enforced by sale by the management body, its attorney or other person authorized to make the sale, after failure of the owner to pay such an assessment in accordance with its terms, such sale to be conducted in the manner permitted by law for the exercise of powers of sale in deeds of trust or any other manner permitted by law.”
- **Mich. Comp. Laws Ann. § 559.208:** “The lien may be foreclosed by an action or by advertisement by the association of co-owners in the name of the condominium project on behalf of the other co-owners. . . A foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action except that to the extent the condominium documents provide, the association of co-owners is entitled to reasonable interest, expenses, costs, and attorney fees for foreclosure by advertisement or judicial action.”
- **Miss. Code. Ann. § 89-9-21:** “Such lien against any unit may be enforced by sale of same by the management body, its attorney or other person authorized to make the sale, after failure of the owner to pay such an assessment in accordance with its terms, such sale to be conducted in accordance with the provisions of Section 89-1-55, applicable to the exercise of powers of sale in mortgages and deeds of trust, or in any other manner permitted by law.”
- **Mo. Ann. Stat. § 448.3-116:** “The association’s lien may be foreclosed in like manner as a mortgage on real estate or a power of sale pursuant to chapter 443.”
- **Nev. Rev. Stat. Ann. § 117.070:** “Such lien may be enforced by sale . . . The sale shall be conducted in accordance with the provisions of Covenants Nos. 6, 7 and 8 of NRS 107.030, and NRS 107.090 insofar as they are consistent with the provisions of NRS 117.075, or in any other manner permitted by law.”

In addition, the language authorizing condominium associations to foreclose nonjudicially under HRS § 514B-146, is similar to language used by the legislature and the counties to authorize nonjudicial foreclosure of real property tax liens. For example, Section 8 5.2 of the Revised Ordinances of Honolulu (**ROH**) provides that, “[a]ll real property on which a lien for taxes exists may be sold by way of foreclosure without suit by the director[.]”). ROH Section 8-5.2 is based upon HRS § 246 56 (repealed), where the legislature also used the word “may” to authorize nonjudicial foreclosures of real property tax liens.

There is no reason to treat condominium associations any different from counties in this respect. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a

property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Paul A. Ireland Koftinow



**SB-551-HD-1**

Submitted on: 3/28/2019 9:29:09 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Christian Porter	Individual	Support	Yes

Comments:

Chair Lee and Committee Members,

I am an attorney that practices in the area of association collections. This Bill is important to all condo associations as it gives them a tool to address delinquencies that the other paying owners eventually have to carry and pay. Condo associations are "zero based budget" entities. That means that they collect only what the association needs, and they do not budget for delinquent owners not paying. So any non-payment affects the majority.

I support providing measures that protect any debtor that wants to avoid a non-judicial foreclosure by paying in full, or arranging for a payment plan that does not extend beyond the association's fiscal year. These type of protections can be built in, and at the same time allowing condo associations to protect their fiscal interests and not burden the owners that pay. Non-judicial foreclosures have been a tremendous option for condo associations and those paying owners know that this tool can be used to mitigate the harm to them. This Bill ensures that this tool can continue to be used.

Thank you for your time and understanding, and I am willing to work with the Chair and Committee to come up with language that will address any alleged issues with nonjudicial foreclosures.

Chris Porter

**SB-551-HD-1**

Submitted on: 3/27/2019 3:05:09 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Raelene Tenno	Individual	Oppose	No

Comments:

Strongly Oppose

**SB-551-HD-1**

Submitted on: 3/27/2019 3:37:33 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Marcia Kimura	Individual	Oppose	No

Comments:

This is not to claim that there should be no consequences for those who fail to regularly pay their common element dues necessary to maintain condominiums. But I oppose this measure because as I've said many times, it would violate the constitutional rights of due process and home protection for condominium owners who are **American citizens as individuals, before and above their memberships in any institution, private or not.**

The condo industry principals need to stop trying to deny owners these basic rights, on the basis of their claims that Federal laws do not apply to private business entities. If they have their way about this, they will proceed to try to deny any and all liberties that are our birthright, in the name of higher, unlimited gain for industry interests like attorneys who quite frankly would rather avoid court oversight and regulation of their unlimited legal charges which have caused the unjustifiable and needless loss of so many homeowners' properties. Then, there are those who, after wrongful seizure of properties, have amassed tremendous fortunes by purchasing the properties for pennies on the dollar, doubtless, a significant motivating factor behind hasty, nonjudicial foreclosure actions.

I doubt that it was ever the original intent of our legislature to allow unconditional foreclosure proceedings by condo associations, as the condo industry claims it was.

I ask that you seriously consider the grave injustices of SB551.

**SB-551-HD-1**

Submitted on: 3/27/2019 3:40:31 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Jim Dodson	Individual	Support	No

Comments:

I support this bill. In addition, in the matter before the US Supreme Court of *Obduskey v McCarthy & Holthus LLC*,

On March 20, 2019, the U.S. Supreme Court rendered its decision. The case had originated in Colorado and had been appealed to SCOTUS (Supreme Court of the United States) from a Tenth Circuit Court of Appeals decision. In a 9-0 ruling, the court held that non-judicial foreclosures are not subject to the main provisions of the FDCPA. The court narrowly interpreted the wording of Section 1692a(6) of the law which, according to the court, exempted enforcers of security interests from the most onerous provisions of the law. The court invited Congress, through new legislation, to clarify the wording of the law, if it so desired. The court also stated that the applicability of the FDCPA to judicial foreclosures was a question "for another day".

**SB-551-HD-1**

Submitted on: 3/27/2019 4:01:27 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Philip L. Lahne	Individual	Support	No

Comments:

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other

owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying

legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Philip L. Lahne

**SB-551-HD-1**

Submitted on: 3/27/2019 4:10:42 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Beverly FeBenito	Individual	Support	No

Comments:

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a



matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Beverly J. FeBenito



March 28, 2019

Linda Coloma  
71-045 Kam Hwy, Unit 105  
Wahiawa, Hawaii 96786

Re: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I am in strong **SUPPORT** of the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property

Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Due to the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Linda Coloma

**SB-551-HD-1**

Submitted on: 3/27/2019 4:25:46 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Bradford Lee Hair	Individual	Support	No

Comments:

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a

matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.



I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Brad Hair

**SB-551-HD-1**

Submitted on: 3/27/2019 4:55:19 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Dante K. Carpenter	Individual	Support	No

Comments:

**SB 551 SD1 HD1**

The Honorable Chair, Rep. Chris Lee, VP Rep. Joy San Buenaventura, and Members of the Senate Judiciary Committee:

My name is Dante Carpenter, a resident owner of a condominium association unit in the AOA Country Club Village, Phase 2, located in Moanalua-Salt Lake are of Honolulu. The AOA CCV2 is comprised of 469 units located in two, 20-story Buildings. I have been an elected member of the Board of Directors for over 20 years and am in strong support of SB 551 SD1 JD1, Relating to Nonjudicial Foreclosures.

A recent decision by the Intermediate Court of Appeals held that the provisions in the Condominium Property Act determined that language which reads "the lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures" does not empower associations to conduct nonjudicial or power of sale forclosures unless nonjudicial power of sale foreclosure provisions are contained in the association's project documents.

SB 551 SD1 HD1 clarifies that Condominium Associations are, and always have been empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The ability of condominium associations to utilize nonjudicial or power of sale foreclosures to collect unpaid common expense assessments benefits both associations and delinquent owners. Judicial fore-closures take much longer to complete, during which time the amount owed by the delinquent owner continues to grow. Also, the attorney's fees and costs incurred by associations in judicial foreclosures are higher than nonjudicial or power of sale foreclosures because of the need to prepare complaints and motions, make court apperances, prepare orders and judgements, pay commisioners's fees and costs, and pay court filing fees. Nonjudicial power of sale foreclosures are much faster and less costly.

Given the recent decision by the ICA, this legislation is needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. Fot this and the above stated reasons I am in strong support of SB551 SD1 HD1.

Respectfully submitted,

/s/ Dante  
Carpenter  
ctor, AOA CCV2

Dire

**SB-551-HD-1**

Submitted on: 3/27/2019 7:26:48 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Marilyn Joyce Oka	Individual	Support	No

Comments:

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Marilyn Joyce Oka

**SB-551-HD-1**

Submitted on: 3/27/2019 7:27:52 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Grant Oka	Individual	Support	No

Comments:

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Grant Oka

**SB-551-HD-1**

Submitted on: 3/27/2019 10:55:12 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Steve Glanstein	Individual	Support	No

Comments:

I strongly support S.B. 551 SD1 HD1. Condominium associations in Hawai'i have relied upon legislation authorizing non-judicial foreclosures for years.

Non-defaulting owners bear extra costs of judicial foreclosures, especially if there is a deficiency or extended foreclosure process.

The legislature wisely enacted the non-judicial foreclosure process which reduced costs to the non-defaulting owners and in many cases, resulted in owners who would pay the common assessments.

A recent court ruling in Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 426 P.3d 443 (Haw. Ct. App. 2018) created an unfair and onerous burden to our Hawai'i condominium associations notwithstanding the obvious plain language in HRS §514B-146.

S.B. 551, SD1 HD1 it clarifies that condominium associations and planned community associations (collectively, "community associations") are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations used the remedy of nonjudicial foreclosure in reliance upon the law.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, SD1, HD1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners who are delinquent in their obligations, non-defaulting owners, and the entire association. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson, Esq. These amendments will provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying



legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent ICA decision, this legislation is greatly needed to affirm and clarify the ability of associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, SD1 HD1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to ALL consumers.

Please pass S.B. 551 SD1 HD1 with the amendments proposed by Ms. Anderson.

**SB-551-HD-1**

Submitted on: 3/28/2019 5:55:15 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Richard Jones	Individual	Support	No

Comments:

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the

Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Richard M. Jones

**SB-551-HD-1**

Submitted on: 3/28/2019 9:39:15 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
lynne matusow	Individual	Support	No

Comments:

Please accept this testimony as strong support of SB551, SD1, HD1. Recently the Hawai'i Intermediate Court of Appeals held that the provisions in the Condominium Property Act stating that "the lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures" does not empower associations to conduct nonjudicial or power of sale foreclosures unless nonjudicial or power of sale foreclosure provisions are contained in the association's project documents.

S.B. 551, S.D.1, HD1 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The ability of condominium associations to utilize nonjudicial or power of sale foreclosures to collect unpaid common expense assessments benefits both associations and delinquent owners. Judicial foreclosures take much longer to complete, during which time the amount owed by the delinquent owner continues to grow. Also, attorneys' fees and costs incurred by associations in judicial foreclosures are higher than in nonjudicial or power of sale foreclosures. Nonjudicial or power of sale foreclosures are much faster and less expensive.

Given the recent decision by the ICA, this legislation is needed to affirm and clarify the ability of condominium associations to conduct nonjudicial. Please move this bill forward. As a condo owner I know how the ICA decision has harmed us. We have better uses for our money, like avoiding deferred maintenance, structural upgrades, etc.

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with proposed amendments discussed below. The Hawaii Intermediate Court of Appeals (“ICA”) recently ruled that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations, despite the fact that the legislature years ago granted condominium associations the authority to pursue the remedy of power of sale or nonjudicial foreclosure under HRS Chapters 514A, 514B, and 667.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A.

In Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch, 143 Hawaii 219, 426 P.3d 443, (App. 2018), the ICA held that these provisions do not empower condominium owners associations to conduct nonjudicial or power of sale, foreclosures. Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is required to clarify that condominium associations and planned community associations (collectively, “community associations”) are authorized under Hawaii law to conduct nonjudicial or power of sale foreclosures. The legislature gave condominium associations the power to foreclose nonjudicially in Act 236 (SLH 1999) and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. Thereafter, the legislature gave planned community associations the power to foreclose nonjudicially in HRS 421J-10.5.

The power to foreclose nonjudicially is an essential remedy for community associations. Condominium and community associations need authority under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except in reference to the statutory power that associations have previously relied on, which the Sakal court said is not sufficient. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to perform their duty to operate the projects without unfairly burdening all of the other paying members in their respective associations because, when owners do not pay their share of assessments, the other owners who are paying their share have to carry that burden, a burden that is exacerbated if the community association must always foreclose its lien for unpaid assessments through the longer and more expensive judicial foreclosure process.

The burdens caused by a unit owner’s failure to pay assessments are comparable to a property owner’s failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain

Date: Thursday, March 28, 2019

Name: Curtis W. Conley  
Address: 651 Akau st. Unit #46  
Wahiawa, Hi 96786

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the



reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Curtis W. Conley

**SB-551-HD-1**

Submitted on: 3/28/2019 10:11:27 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Fuatino S Docktor	Individual	Support	No

Comments:

28 March 2019

Fuatino S Docktor

731 Nui Avenue

Wahiawa, HI 96786

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose

nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right

balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons. Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Fuatino S Docktor

**SB-551-HD-1**

Submitted on: 3/28/2019 10:19:24 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Sandie Wong	Individual	Support	No

Comments:

I am a condo owner and I support this bill. I agree with the testimony by Hawaii Council of Community Associations.

**SB-551-HD-1**

Submitted on: 3/28/2019 10:41:25 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
ismet bracic	Individual	Support	No

Comments:

As a homeowner and a managing agent, the mehtod of non-judicial foreclosures helps AOA's recoup monies owed more efficiantly and effectively. Passing the bill is important to save all homeowners on island time and money, to collect what is justly owed.

Thank You

**House Judiciary Committee Hearing**  
*Friday, 3-29-19, 2:05 pm, Capitol Rm 325*

**RE: SB551, SD1, HD 1, Relating to NJF's & Power of Sale**

**Chair Rep. Lee, V. Chair San Buenaventura & JUD Committee Members:**

**I oppose the passage of SB551, SD1, HD1** because the Non-judicial Foreclosure (NJF) process has been misused against owners who do not have the means to fight back! I have been assisting elderly and immigrant owners for the past 6 years and have encountered a number of cases where the NJF process stemmed from a disputed fine or fee (which is supposedly illegal). The amount in dispute started off at a couple hundred dollars and then ballooned up to about \$10,000, of which the biggest amount owed was for (unnecessary) legal fees.

The owners were forced to pay for the AOA's legal fees because it was added to the owner's maintenance fees, although the legal fees DID NOT BENEFIT THE OWNER in anyway because the attorney represented the AOA Board and not the owner! Where was the owner's due process rights in this matter?!

The most bothersome issues I found when I helped to investigate the disputed fine/fee were the irregularities and the very questionable and/or unethical business practices used against the owner; and could possibly be "illegal." Again, the original fee/fine often started off at less and \$100 to several \$100 dollars. By the time I investigated the matter, the amount owed was in the thousands of dollars because of the mounting legal fees.

**I strongly recommend that SB551, SB1, HD1, be DEFERRED until the following questions can be answered:**

- 1) What is the "true" purpose of SB551, SD1, HD1? What added benefit will SB551, SD1, HD1 provide to the owners, the AOA's and the state?
- 2) Will SB551, SD1, HD1 "even the playing field" for the owners & AOA's or is the "true" intent really to make it easier for certain "parties" to reap more profits from the unsuspecting owners?
- 3) If SB551, SD1, HD1, is supposed to better protect the AOA's and owners, then shouldn't there be provisions that cap the attorney fees at reasonable costs and no more than 25% of the monetary judgement as per HRS 607-14.7 for judicial monetary debt awards?

*In my experience statutorily established schedule of fees, such as attorney fees set for judicial processes is the standard used across the state in a variety of arenas.*

*For example, I have been involved with mediation to settle unpaid debts between family members; and the attorney fees charged followed the prescribed schedule of fees (HRS 607-14.7).*

- 4) If the intent of SB551, SD1, HD1 is to protect the AOA's and owners, then why is the language from Act 195 not included in this bill?  
Act 195, which mandates that maintenance fees be paid towards the operating expenses first, before paying for the AOA's legal fees, should be included in a bill that is trying to establish a process to allow for non-judicial foreclosures to continue.

*Act 195 will expired next year (2020) so it would be prudent to include the language from Act 195 in a bill that addresses non-judicial foreclosures.*

- 5) If the HI Real Estate Commission, the DCCA, RICO, and certain parties who claim to be "experts" in condo business, have recently made a concerted effort to revise the HRS 514B-161 section on Dispute Resolution for Condominium to mandate that disagreements between owners and the AOA be taken to mediation first and then to arbitration before going to court; Why is there No Language on dispute resolution and the requirement to first go to mediation before the NJF process is pursued in SB551, SD1, HD1?

*Is this bill really a mechanism certain 'parties' are trying to institute to get around the statutorily based schedule of fees for attorneys for debt collection via the judicial process?*

In closing, **SB551, SD1, HD1** should be **DEFERRED** permanently or until the aforementioned questions are answered.

Thank you,



Laurie Hirohata, MSW, MEd,  
Community Advocate



**§607-14.7 Attorney's fees, costs, and expenses; judgment creditors.**

In addition to any other attorney's fees, costs, and expenses, which may or are required to be awarded, and notwithstanding any law to the contrary, the court in any civil action may award to a judgment creditor, from a judgment debtor, reasonable attorney's fees, costs, and expenses incurred by the judgment creditor in obtaining or attempting to obtain satisfaction of a money judgment, whether by execution, examination of judgment debtor, garnishment, or otherwise. The court may award attorney's fees that it determines are reasonable, but shall not award fees in excess of the following schedule:

- (1) Twenty-five per cent on the first \$1,000 or fraction thereof;
- (2) Twenty per cent on the second \$1,000 or fraction thereof;
- (3) Fifteen per cent on the third \$1,000 or fraction thereof;
- (4) Ten per cent on the fourth \$1,000 or fraction thereof;
- (5) Five per cent on the fifth \$1,000 or fraction thereof; and
- (6) 2.5 per cent on any amount in excess of \$5,000.

The fees shall be assessed on the amount of judgment, exclusive of costs and all other attorney's fees. [L 1985, c 288, §2; am L 2016, c 55, §22]

## D. ALTERNATIVE DISPUTE RESOLUTION

**§514B-161 Mediation.** (a) *[Section effective until January 1, 2019. For section effective January 2, 2019, see below.]* If an apartment owner or the board of directors requests mediation of a dispute involving the interpretation or enforcement of the association of apartment owners' declaration, bylaws, or house rules, the other party in the dispute shall be required to participate in mediation. Each party shall be wholly responsible for its own costs of participating in mediation, unless both parties agree that one party shall pay all or a specified portion of the mediation costs. If a party refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorneys' fees.

(b) Nothing in subsection (a) shall be interpreted to mandate the mediation of any dispute involving:

- (1) Actions seeking equitable relief involving threatened property damage or the health or safety of association members or any other person;
- (2) Actions to collect assessments;
- (3) Personal injury claims; or
- (4) Actions against an association, a board, or one or more directors, officers, agents, employees, or other persons for amounts in excess of \$2,500 if insurance coverage under a policy of insurance procured by the association or its board would be unavailable for defense or judgment because mediation was pursued.

(c) If any mediation under this section is not completed within two months from commencement, no further mediation shall be required unless agreed to by the parties.

(a) *[Section effective January 2, 2019, until June 29, 2023. For section effective until January 1, 2019, see above. Reenacted on June 30, 2023, as January 1, 2019 version.]* The mediation of a dispute between a unit owner and the board, unit owner and the managing agent, board members and the board, or directors and managing agents and the board shall be mandatory upon written request to the other party when:

- (1) The dispute involves the interpretation or enforcement of the association's declaration, bylaws, or house rules;
- (2) The dispute falls outside the scope of subsection (b);
- (3) The parties have not already mediated the same or a substantially similar dispute; and
- (4) An action or an arbitration concerning the dispute has not been commenced.

(b) The mediation of a dispute between a unit owner and the board, unit owner and the managing agent, board members and the board, or directors and managing agents and the board shall not be mandatory when the dispute involves:

- (1) Threatened property damage or the health or safety of unit owners or any other person;
- (2) Assessments;
- (3) Personal injury claims; or
- (4) Matters that would affect the availability of any coverage pursuant to an insurance policy obtained by or on behalf of an association.



(c) If evaluative mediation is requested in writing by one of the parties pursuant to subsection (a), the other party cannot choose to do facilitative mediation instead, and any attempt to do so shall be treated as a rejection to mediate.

(d) A unit owner or an association may apply to the circuit court in the judicial circuit where the condominium is located for an order compelling mediation only when:

- (1) Mediation of the dispute is mandatory pursuant to subsection (a);
- (2) A written request for mediation has been delivered to and received by the other party; and
- (3) The parties have not agreed to a mediator and a mediation date within forty-five days after a party receives a written request for mediation.

(e) Any application made to the circuit court pursuant to subsection (d) shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed \$1,500.

(f) Each party to a mediation shall bear the attorneys' fees, costs, and other expenses of preparing for and participating in mediation incurred by the party, unless otherwise specified in:

- (1) A written agreement providing otherwise that is signed by the parties;
- (2) An order of a court in connection with the final disposition of a claim that was submitted to mediation;
- (3) An award of an arbitrator in connection with the final disposition of a claim that was submitted to mediation; or
- (4) An order of the circuit court in connection with compelled mediation in accordance with subsection (e).

(g) Any individual mediation supported with funds from the condominium education trust fund pursuant to section 514B-71:

- (1) Shall include a fee of \$375 to be paid by each party to the mediator;
- (2) Shall receive no more from the fund than is appropriate under the circumstances, and in no event more than \$3,000 total;
- (3) May include issues and parties in addition to those identified in subsection (a); provided that a unit owner or a developer and board are parties to the mediation at all times and the unit owner or developer and the board mutually consent in writing to the addition of the issues and parties; and
- (4) May include an evaluation by the mediator of any claims presented during the mediation.

(h) A court or an arbitrator with jurisdiction may consider a timely request to stay any action or proceeding concerning a dispute that would be subject to mediation pursuant to subsection (a) in the absence of the action or proceeding, and refer the matter to mediation; provided that:

- (1) The court or arbitrator determines that the request is made in good faith and a stay would not be prejudicial to any party; and
- (2) No stay shall exceed a period of ninety days.

**[§514B-162] Arbitration.** (a) At the request of any party, any dispute concerning or involving one or more unit owners and an association, its board, managing agent, or one or more other unit owners relating to the interpretation, application, or enforcement of this chapter or the association's declaration, bylaws, or house rules adopted in accordance with its bylaws shall be submitted to arbitration. The arbitration shall be conducted, unless otherwise agreed by the parties, in accordance with the rules adopted by the commission and of chapter 658A; provided that the rules of the arbitration service conducting the arbitration shall be used until the commission adopts its rules; provided further that where any arbitration rule conflicts with chapter 658A, chapter 658A shall prevail; and provided further that notwithstanding any rule to the contrary, the arbitrator shall conduct the proceedings in a manner which affords substantial justice to all parties. The arbitrator shall be bound by rules of substantive law and shall not be bound by rules of evidence, whether or not set out by statute, except for provisions relating to privileged communications. The arbitrator shall permit discovery as provided for in the Hawaii rules of civil procedure; provided that the arbitrator may restrict the scope of such discovery for good cause to avoid excessive delay and costs to the parties or the arbitrator may refer any matter involving discovery to the circuit court for disposition in accordance with the Hawaii rules of civil procedure then in effect.

(b) Nothing in subsection (a) shall be interpreted to mandate the arbitration of any dispute involving:

- (1) The real estate commission;
- (2) The mortgagee of a mortgage of record;
- (3) The developer, general contractor, subcontractors, or design professionals for the project; provided that when any person exempted by this paragraph is also a unit owner, a director, or managing agent, such person in those capacities, shall be subject to the provisions of subsection (a);
- (4) Actions seeking equitable relief involving threatened property damage or the health or safety of unit owners or any other person;
- (5) Actions to collect assessments which are liens or subject to foreclosure; provided that a unit owner who pays the full amount of an assessment and fulfills the requirements of section 514B-146 shall have the right to demand arbitration of the owner's dispute, including a dispute about the amount and validity of the assessment;
- (6) Personal injury claims;
- (7) Actions for amounts in excess of \$2,500 against an association, a board, or one or more directors, officers, agents, employees, or other persons, if insurance coverage under a policy or policies procured by the association or its board would be unavailable because action by arbitration was pursued; or
- (8) Any other cases which are determined, as provided in subsection (c), to be unsuitable for disposition by arbitration.

(c) At any time within twenty days of being served with a written demand for arbitration, any party so served may apply to the circuit court in the judicial circuit in which the condominium is located for a determination that the subject matter of the dispute is unsuitable for disposition by arbitration.

In determining whether the subject matter of a dispute is unsuitable for disposition by arbitration, a court may consider:

- (1) The magnitude of the potential award, or any issue of broad public concern raised by the subject matter underlying the dispute;



- (2) Problems referred to the court where court regulated discovery is necessary;
- (3) The fact that the matter in dispute is a reasonable or necessary issue to be resolved in pending litigation and involves other matters not covered by or related to this chapter;
- (4) The fact that the matter to be arbitrated is only part of a dispute involving other parties or issues which are not subject to arbitration under this section; and
- (5) Any matters of dispute where disposition by arbitration, in the absence of complete judicial review, would not afford substantial justice to one or more of the parties.

Any such application to the circuit court shall be made and heard in a summary manner and in accordance with procedures for the making and hearing of motions. The prevailing party shall be awarded its attorneys' fees and costs in an amount not to exceed \$200.

(d) In the event of a dispute as to whether a claim shall be excluded from mandatory arbitration under subsection (b)(7), any party to an arbitration may file a complaint for declaratory relief against the involved insurer or insurers for a determination of whether insurance coverage is unavailable due to the pursuit of action by arbitration. The complaint shall be filed with the circuit court in the judicial circuit in which the condominium is located. The insurer or insurers shall file an answer to the complaint within twenty days of the date of service of the complaint and the issue shall be disposed of by the circuit court at a hearing to be held at the earliest available date; provided that the hearing shall not be held within twenty days from the date of service of the complaint upon the insurer or insurers.

(e) Notwithstanding any provision in this chapter to the contrary, the declaration, or the bylaws, the award of any costs, expenses, and legal fees by the arbitrator shall be in the sole discretion of the arbitrator and the determination of costs, expenses, and legal fees shall be binding upon all parties.

(f) The award of the arbitrator shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and shall be served by the arbitrator on each of the parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the arbitration may apply to the circuit court of the judicial circuit in which the condominium is located for an order confirming the award. The court shall grant the order confirming the award pursuant to section 658A-22, unless the award is vacated, modified, or corrected, as provided in sections 658A-20, 658A-23, and 658A-24, or a trial de novo is demanded under subsection (h), or the award is successfully appealed under subsection (h). The record shall be filed with the motion to confirm award, and notice of the motion shall be served upon each other party or their respective attorneys in the manner required for service of notice of a motion.

(g) Findings of fact and conclusions of law, as requested by any party prior to the arbitration hearing, shall be promptly provided to the requesting party upon payment of the reasonable cost thereof.

(h) Any party to an arbitration under this section may apply to vacate, modify, or correct the arbitration award for the grounds set out in chapter 658A. All reasonable costs, expenses, and attorneys' fees on appeal shall be charged to the nonprevailing party.

**[§514B-163] Trial de novo and appeal.** (a) The submission of any dispute to an arbitration under section 514B-162 shall in no way limit or abridge the right of any party to a trial de novo.

**SB-551-HD-1**

Submitted on: 3/28/2019 11:14:41 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lance S. Fujisaki	Individual	Support	No

Comments:

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other

owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying

legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Lance Fujisaki



R. Laree McGuire, Esq.  
Porter McGuire Kiakona & Chow, LLP  
841 Bishop Street, Suite 1500  
Honolulu, Hawaii 96813

March 28, 2019

VIA WEB TRANSMITTAL

Hearing Date: Friday, March 29, 2019

Time: 2:05 p.m.

Place: Conference Room 325

Committee on Judiciary  
House of Representatives, the 30<sup>th</sup> Legislature  
Regular Session of 2019

**Re: Testimony in Support of SB 551**

Dear Chair Lee, Vice Chair San Buenaventura and Members of the Committee:

I am writing as a member of the Hawaii State Bar Association whose law firm represents hundreds of condominium and homeowner associations across the State of Hawaii and also as a home owner.

This testimony is in strong support of SB 551. The purpose of SB 551 "is to clarify that associations may exercise the **remedy** of nonjudicial foreclosures regardless of the presence or absence of power of sale language within their governing documents." Emphases added.

For decades, associations have been authorized to conduct nonjudicial foreclosures and more recently, in 2012, the Legislature amended Haw. R. Stat. ("HRS") § 514B-146(a), the second paragraph, which now reads:

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 and in the name of the association; provided that no association may exercise the nonjudicial or power of sale remedies provided in chapter 667 to foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees[.]" Emphases added.

See also the identical companion provision stated in HRS § 421J-10.5(a), second paragraph, with respect to homeowners associations.

The language quoted above addresses the nonjudicial foreclosure “**remedies provided**” in HRS Chapter 667 and available to both condominium owners and homeowners associations. In 2012, pursuant to Act 182, the Legislature enacted Part VI entitled “Association Alternate Power of Sale Foreclosure Process.” This section was devoted solely to associations<sup>1</sup> and provided in-depth procedures for conducting power of sale foreclosures. The language quoted above regarding HRS § 514B-146(a) and HRS § 421J-10.5(a), when read in conjunction with Part VI of HRS, Chapter 667, left no doubt that all associations were authorized to conduct nonjudicial foreclosures notwithstanding that their governing documents did not contain power of sale provisions. As a result, associations conducted hundreds of nonjudicial foreclosures.

In July 2018, however, the Intermediate Court of Appeals (“ICA”) ignored the statutory references in HRS § 514B-146(a) and HRS § 421J-10.5(a) to “**remedies provided in [C]hapter 667**” and held that the Hawaii Foreclosures statutes, HRS, Chapter 667, “sets forth procedures for foreclosure in Hawaii and does not create a right to foreclose, either through a judicial process or a nonjudicial process.” *Sakal v. Hawaiian Monarch*, 143 Hawai‘i 219 (Haw. App. 2018). The ICA concluded that the right must be contained in an association’s governing documents. In other words, there are no power of sale remedies in Chapter 667. This appellate decision ignores decades of legislative history and the plain language of HRS § 514B-146(a) and HRS § 421J-10.5(a) to the detriment and damage of all of those associations that conducted nonjudicial foreclosures in reliance on the aforementioned statutes.

As a result of this appellate decision, hundreds of lawsuits will soon be filed against those associations who conducted nonjudicial foreclosures and these associations will be forced to pay for the protracted litigation that will soon ensue, notwithstanding that they believed they were acting in compliance with the law. These lawsuits will be paid for by all of the owners and members of the associations who have never defaulted on the payment of their assessments and who will soon be forced to pay special assessments generated to pay for these lawsuits.

In addition, these same associations will tender the defense of these lawsuits to their insurance companies and as such, when they seek to renew their insurance

---

<sup>1</sup> As opposed to Parts I and II of HRS, Chapter 667 which is also authorizes Lender/Mortgagee foreclosures.

coverage, their rates will skyrocket, or they may lose coverage or be forced into a higher risk category wherein their deductibles will escalate. All of these scenarios are detrimental to the individual member/owners who will be forced to pay these insurance premiums and deductibles.

With respect to those owners who are in default and on whom the association will foreclose in the future, they will now be forced to go through the judicial foreclosure process which can take literally years to complete and in the end, when a judgment is entered by the court, the defaulting homeowner will be forced to pay those legal fees in addition to the outstanding assessments for which they are being foreclosed. Many of these owners will then file bankruptcy and when they do, their debts will be paid, once again, by the non-defaulting homeowners. In the meantime, while the case is pending in the court, the defaulting homeowner will not be paying these assessments (i.e., maintenance and reserve fees).

Eventually, these assessments will be paid by the non-defaulting owners--many of whom are retired seniors living on a fixed income. Keep in mind, when these non-defaulting owners budgeted to purchase their homes, they budgeted with a mind toward paying their mortgage and their maintenance fees. They did not budget to pay their defaulting neighbors' maintenance fees and as a result, many of them will be at risk of defaulting due to no fault of their own.

The nonjudicial foreclosure process is a fair process that provides defaulting owners with numerous opportunities to settle or cure their debt, including opportunities to enter into payment plans that will allow them to pay their debt over time. The process takes approximately 8 months to complete. If an owner is unable to settle their delinquency, then they are in a much better position if they go through the nonjudicial process because it is far less costly and the chance that they will have to later file bankruptcy is slim unlike if they go through the protracted litigation of the judicial foreclosure process. If the association is unable to serve the delinquent owner, then --if the unit is vacant--the association may rent out that unit and apply the rents received toward payment of the debt until that debt has been paid in full. Once paid, the unit is returned to the owner and everyone wins. The owner keeps the unit, and the association is paid in full.

Lastly, I also respectfully request that SB 551 be amended to include a provision which would make the Act, assuming it passes, retroactive.

It is well-established in this jurisdiction that “the legislature has the power to enact a retrospective law unless it contravenes some constitutional inhibition.” *Oleson v. Borthwick*, 33 Haw. 766 (Haw. 1936). Significantly, the Attorney General of the State of Hawaii issued an opinion in 1969 that provides:

“The legislature may validly provide for the retrospective application of a statute if it does not affect vested rights[.]” 69 Haw. Op. Attorney Gen. No. 6 (1969).

Haw. R. Stat. (“HRS”) § 1-3 provides: “No law has any retrospective operation, unless otherwise expressed or obviously intended.”

Notwithstanding the “obvious intent” of the Legislature to enact the power of sale “remedies provided in Chapter 667, HRS, the ICA in the recent *Sakal* decision held:

After an exhaustive review, we have concluded that over a number of years the Legislature has worked to craft workable, nonjudicial foreclosure procedures, available to associations as well as lenders, **but at no point did the Legislature take up the issue of whether to enact a blanket grant of powers of sale over all condominiumized properties in Hawaii**. Accordingly, we conclude that a power of sale in favor of a foreclosing association must otherwise exist, in the 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 HRS Chapter 667.

*Sakal*, at 2 (underscoring in original; boldface added).

In *Sakal*, the lower court had ruled on a motion to dismiss and had dismissed Plaintiff’s claim for wrongful foreclosure. Specifically, the court ruled: “The Court finds that HRS [§ 514B-146] provides the association with broad powers, including foreclosure and [it] doesn’t make any sense for the association to have to amend its bylaws every time the Legislature amends the law.”

Significantly, in considering the issue of wrongful foreclosure, the ICA did not determine that the language of any one statute was vague and ambiguous such that the ICA was required to look to the legislative intent of the statute; rather, the ICA opined that **no statute currently existed** which gave condominiums the power to sell another unit owner’s unit extrajudicially. The ICA made crystal clear: **“we will not infer that the**

power to extrajudicially sell another person's property was granted, in the absence of a clear legislative act doing so." *Sakai*, at 15. Consequently, in the light of the ICA's reading, **if SB 551 becomes law, the ICA will likely construe it as a new law and apply it prospectively and not retrospectively.** As noted above, this will result in an untold number of wrongful foreclosure lawsuits against associations and their boards of directors who previously foreclosed based on what they believed to be the clear legislative intent to allow nonjudicial foreclosures pursuant to HRS, Chapter 667, HRS § 514B and HRS § 421J, to the detriment and damage of the condominium and homeowner association community.

Based on the foregoing, I and my law firm strongly support SB 551. We respectfully submit the Committee should utilize its statutory authority established in HRS § 1-3 to provide for the retrospective application of SB 551 and should pass SB 551 out of Committee. Thank you for your time and consideration.

Sincerely yours,



R Laree McGuire

Porter McGuire Kiakona & Chow, LLP

**Date: 3/28/2019**

**Name: Richard Harrison**

**Address: 94-496 Kupuohi St, Atp 102, Waipahu HI. 96797**

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner's failure to pay assessments are comparable to a property owner's failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that "[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667." That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the

Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Richard Donald Harrison



House Committee on Judiciary

Testimony of: Charissa Wong

Date: March 29, 2019

Re: S.B. NO. 551, HD1 RELATING TO CONDOMINIUMS

Chair Lee and Members of the Committee:

Position: I strongly oppose S.B. No. 551, HD1

My name is Charissa Wong and my father was victimized by the cruel and devastating actions of his AOA and the Porter, McGuire, Kiakona & Chow law firm. My father purchased an apartment in 2005 at Harbor Square Condominium located in downtown Honolulu. **In 2011, this AOA conducted a nonjudicial foreclosure and sold his apartment to itself for \$1.00.** During this time he was going through financial hardship and was struggling to make ends meet. He was not offered a payment plan nor did they attempt to work with him. Instead, they elected to take his property from him. Not only did they take his property, but he was not even compensated for the difference of how much his condo was worth at the time versus the actual debt he owed. **I cannot fathom how anyone would be allowed to foreclose on a property worth well over the purchase price of \$450,000 to settle a debt of only \$30,000** and not only keeping the profit but also renting out the property and keeping the rental income. As of today, they are still renting out his condo and has collected rent ever since. Because the property was foreclosed on by the AOA and not by his mortgage lender, he still owes the lender for the mortgage AND interest. **How is this legal?**

The result of their actions have left my father broken. He was left homeless and I had to take him in. Since the illegal foreclosure, he has been living off of his retirement and social security checks, which are not much and barely get him through the month. He frequently borrows money from me to pay for unexpected bills like medical care and other expenses. Home ownership was a lifelong dream of his, and he was so very proud to have finally accomplished that dream. My father and I did not have much when he was raising me - what little he had he would use to put me through school. So for him, going from having nothing to owning his own property was a huge life goal he accomplished at age 58. Unfortunately, because of the actions of the AOA, that dream was short-lived.

As a daughter who will always see my father as my hero no matter what, it has been so very painful to see how much this has devastated my father. He is ashamed of himself and has lost his confidence and has been haunted by this ordeal for the last eight years. My hero has been broken. I do what I can to help him, but his life has been a month-to-month existence ever since.

Please do not give HOA's this power and please do not let them devastate another family like this. SB551 is wrong and unjust.

**SB-551-HD-1**

Submitted on: 3/28/2019 1:55:08 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Sialasa Sanborn	Individual	Support	No

Comments:

**date: 03/28/2019**

RE: S.B. 551, S.D.1, H.D.1

Dear Representative Lee, Chair, Representative San Buenaventura, Vice Chair, and Members of the Committee:

I strongly **SUPPORT** the passage of S.B. 551, S.D.1, H.D.1, with amendments as discussed below. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (“ICA”). Despite the fact that condominium associations have, for years, relied upon HRS Chapters 514A, 514B, and 667 as expressly granting to them the right to pursue the remedy of power of sale or nonjudicial foreclosure, the ICA has recently determined that there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or nonjudicial foreclosure absent a power of sale provision in the project documents of said associations.

HRS Chapter 514B provides that 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. A similar provision was found in HRS Chapter 514A. To the surprise of condominium associations throughout the entire state, in 2018, the ICA held that these provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. See *Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch*, 143 Hawaii 219, 426 P.3d 443, (App. 2018). Planned community associations may face similar rulings under HRS Chapter 421J.

S.B. 551, S.D.1, H.D.1 is much-needed legislation because it clarifies that condominium associations and planned community associations (collectively, “community associations”) are empowered to conduct nonjudicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this power to foreclose nonjudicially almost twenty years ago, in Act 236 (SLH 1999), and a great number of condominium associations have used the remedy of nonjudicial foreclosure in reliance upon the law. The legislature thereafter gave planned community associations the power to foreclose nonjudicially via HRS 421J-10.5.

The power to foreclose nonjudicially has been an essential remedy for community associations for years. When owners do not pay their share of assessments, other owners who are paying their share of assessments have to carry that burden. Condominium and community associations need to have sufficient power under the Condominium Property Act and HRS Chapter 421J, respectively, to enforce the collection of assessments because the vast majority of project documents do not contain express power of sale provisions, except as created by statute as is discussed below. If S.B. 551, S.D.1, H.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening all of the other paying members in their respective associations.

The burdens caused by a unit owner’s failure to pay assessments are comparable to a property owner’s failure to pay real property tax assessments. Community associations, like counties, need to collect assessments to be able to maintain property and carry out their other duties and obligations. Counties are able to foreclose by power of sale without a power of sale provision in a written contract with the property owner. Like counties, community associations are not lenders and do not have the option to review and evaluate the ability of potential owners to afford a property before they become owners of an apartment or a lot. In addition, similar to counties which regulate and maintain county property for the benefit of the public, community associations regulate and maintain common elements or common property, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to community associations the remedy of power of sale or nonjudicial foreclosure.

It should also be noted that prior to its repeal effective January 1, 2019, HRS § 514A-82(b)(13) provided that “[a] lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale procedures authorized by Chapter 667.” That provision was deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all

condominium projects created after that date up through June 30, 2006. Accordingly, not only did the legislature give condominium associations the remedy of nonjudicial foreclosure by virtue of HRS Chapters 514A, 514B, and 667, but the legislature adopted a law incorporating such a provision into the bylaws of all condominium associations existing as of June 30, 2006.

I understand that this committee deferred action on H.B.76, the companion bill to S.B.551, because of testimony received by persons alleging that there has been a misuse of the nonjudicial foreclosure process by associations. It is likely that those same persons will submit similar testimony in opposition to S.B. 551, S.D.1, H.D.1. Rather than deferring the present bill as the committee did with H.B. 76, I urge the committee to take a different approach. I urge the Committee to find the right balance between the rights and needs of owners and their associations. This can be done by amendments to the bill.

As a means of striking a balance and compromise, I urge the committee to adopt the amendments being proposed in the testimony submitted by M. Anne Anderson. These amendments are intended to provide additional consumer protections to owners whose units may be the subject of a nonjudicial foreclosure, while at the same time clarifying legislative intent with respect to nonjudicial foreclosures. The proposed amendments offer a reasonable and fair solution to the issues raised.

I understand that in another bill considered by your committee this session, concerns were raised about squatters on property during the foreclosure process. Ensuring that condominium associations have the remedy of nonjudicial foreclosure will help to expedite the foreclosure process, allowing new owners to take title and possession and remove any unauthorized persons.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of community associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1. H.D.1 and urge the committee to adopt the bill with the changes being proposed to provide additional protection to consumers.

Respectfully submitted,

Sialasa Sanborn

TESTIMONY OF BRYSON CHOW IN SUPPORT OF SB 551, SD 1, HD 1, RELATING TO CONDOMINIUMS

March 29, 2019

To: Chairman Chris Lee and Members of the House Committee on Judiciary:

My name is Bryson Chow and I am testifying in support of SB 551, SD 1, HD 1, and am proposing amendments to address consumer protection concerns previously raised in opposition to this measure.

As an attorney practicing in the area of condominium and homeowners' association law, I can confidently assert that this bill is necessary to confirm the legislature's previous and ongoing intent to allow condominiums and homeowners' associations to conduct nonjudicial foreclosures, notwithstanding any lack of express power-of-sale language in the association's governing documents.

Delinquencies represent a tremendous burden on paying owners in the association. These paying owners are ultimately responsible for the cost of not only their neighbor's shortfall, but the cost of collection, and foreclosure. It is for this reason that the legislature previously passed laws allowing associations to foreclose by the more efficient nonjudicial process. Unfortunately, creative and somewhat opportunistic plaintiffs' attorneys have convinced certain members of the judiciary that the legislature intended that only associations that had very specific language in their documents should be permitted to foreclose by way of nonjudicial foreclosure. These attorneys are now filing lawsuits against various associations (and thereby the associations' paying owners) and demanding large monetary sums related to allegedly improper nonjudicial foreclosures. To avoid such lawsuits, in which previously delinquent owners are again attempting to make money off their former neighbors, it is necessary that this bill is passed to provide definitive instruction to the judiciary regarding the legislature's intent regarding association's nonjudicial foreclosure rights.

In response to concerns which have been expressed by a small number of previous debtors, I have prepared an amended version of the bill which includes various additional protections for delinquent owners. These additional consumer protections should safeguard delinquent owners from the main concerns they have expressed in testimony, regardless of whether such concerns are well-founded or not. The proposed amendments are notated in redline format below. Thank you.

SECTION 1. In 1999, the legislature passed Act 236, Session Laws of Hawaii 1999, authorizing condominium associations to conduct nonjudicial foreclosures. In 2012, through Act 182, Session Laws of Hawaii 2012, the legislature enacted a new part of the foreclosure law—part VI of chapter 667, Hawaii Revised Statutes—creating a nonjudicial foreclosure process specifically for associations. During that time, in reliance on the legislature's actions, associations have conducted nonjudicial foreclosures as part of their efforts to collect delinquencies and sustain their financial operations. Associations have done so subject to the restrictions on nonjudicial foreclosures and other collection options imposed by the legislature.

These restrictions include:

- (1) Prohibiting the use of nonjudicial foreclosure to collect fines, penalties, legal fees, or late fees;
- (2) Requiring associations to give an owner sixty days to cure a default before proceeding with the nonjudicial foreclosure and to accept reasonable payment plans of up to twelve months; and
- (3) Requiring associations to provide owners with contact information for approved housing counselors and approved budget and credit counselors.

The intermediate court of appeals in Sakal v. Association of Apartment Owners of Hawaiian Monarch, 143 Haw. 219, 426 P.3d

443 (2018), held that the legislature intended that associations can only conduct nonjudicial foreclosures if they have specific authority to conduct nonjudicial foreclosures in their declaration or bylaws or in an agreement with the owner being foreclosed upon.

The legislative history indicates this was not the intent of the legislature in 2012, nor in legislatures that have made subsequent amendments. Therefore, this Act confirms the legislative intent that associations should be able to use nonjudicial foreclosure to collect delinquencies without having specific authority to conduct nonjudicial foreclosures in an agreement with a delinquent owner or in the association's declaration or bylaws.

SECTION 2. Section 421J-10.5, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) All sums assessed by the association, but unpaid for the share of the assessments chargeable to any unit, shall constitute a lien on the unit. The priority of the association's lien shall, except as otherwise provided by law, be as provided in the association documents or, if no priority is provided in the association documents, by the recordation date of the liens; provided that any amendment to the association documents that governs the priority of liens on the unit shall not provide that an association lien shall have priority over a mortgage lien that is recorded before the amendment is recorded. A lien recorded by an association for unpaid assessments shall expire six years from the date of recordation unless proceedings to enforce the lien are instituted prior to the expiration of the lien; provided that the expiration of a recorded lien shall in no way affect the association's automatic lien that arises pursuant to this subsection or the association documents. Any proceedings to



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

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

The association's nonjudicial power of sale provided in this section may not be exercised against:

(1) Any lien that arises solely from fines, penalties, legal fees, or late fees, unless the lien, or any portion thereof, has been outstanding for a period of one (1) year or longer;

(2) Any unit owned by a person who is on military deployment outside the United States as a result of active duty military status with any branch of the United States military. This subsection shall not apply if the lien, or any portion thereof, has been outstanding for a period of one (1) year or longer; and

(3) Any unit owner who, at any time prior to the commencement of the nonjudicial foreclosure auction contemplated herein, fully cures the delinquency by payment of the association's lien including, but not limited to, payment of any fees and costs related to releasing the lien and cancelling the foreclosure auction.

In any association foreclosure, the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the association documents or the law, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed by the unit owner or any tenant of the unit. If the association is the plaintiff, it may request that its managing agent be appointed as receiver to collect the rental from the tenant. The managing agent or board, acting on behalf of the association and in the name of the association, may bid on the unit at foreclosure sale and acquire and hold, lease, mortgage, and convey the unit thereafter as the board deems reasonable. Action to recover a money judgment for unpaid assessments shall be maintainable without foreclosing or waiving the lien securing the unpaid assessments owed.

In the case of a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the latter for the grantor's share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee. Any such grantor or grantee is entitled to a statement from the board, either directly or through its managing agent or resident manager, setting forth the amount of the unpaid assessments against the grantor. The grantee is not liable and the unit

conveyed is not subject to a lien for any unpaid assessments against the grantor in excess of the amount set forth in the statement, except as to the amount of subsequently dishonored checks mentioned in the statement as having been received within the thirty-day period immediately preceding the date of such statement."

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

"(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 real property taxes and assessments lawfully imposed by governmental authority against the unit; and

(2) Except as provided in subsection (j), all sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association, and costs and expenses including attorneys' fees provided in such mortgages;

provided that a lien recorded by an association for unpaid assessments shall expire six years from the date of recordation unless proceedings to enforce the lien are instituted prior to the expiration of the lien; provided further that the expiration of a recorded lien shall in no way affect the association's automatic lien that arises pursuant to this subsection or the declaration or bylaws. Any proceedings to enforce an association's lien for any assessment shall be instituted within six years after the assessment became due; provided that if the owner of a unit subject to a lien of the association files a petition for relief under the United States Bankruptcy Code (11 U.S.C. §101 et seq.), the period of time for instituting proceedings to enforce the association's lien shall

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

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

The association's nonjudicial power of sale provided in this section may not be exercised against:

(1) Any lien that arises solely from fines, penalties, legal fees, or late fees, unless the lien, or any portion thereof, has been outstanding for a period of one (1) year or longer;

(2) Any unit owned by a person who is on military deployment outside the United States as a result of active duty military status with any branch of the United States military. This subsection shall not apply if the lien, or any portion thereof, has been outstanding for a period of one (1) year or longer; and

(3) Any unit owner who, at any time prior to the commencement of the nonjudicial foreclosure auction contemplated herein, fully cures the delinquency by payment of the Association's lien including, but not limited to, payment of any fees and costs related to releasing the lien and cancelling the foreclosure auction.

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

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

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

(1) 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[-]; or

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

SECTION 5. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of this Act that can be given effect without the invalid provision or application, and to this end, the provisions of this Act are severable.

SECTION ~~5~~6. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION ~~6~~7. This Act shall take effect on July 1, 2050; provided that the amendments made to section 514B-146(a), Hawaii Revised Statutes, by section 3 of this Act shall not be repealed when that section is reenacted on June 30, 2020, pursuant to section 6 of Act 195, Session Laws of Hawaii 2018.

**SB-551-HD-1**

Submitted on: 3/28/2019 2:08:21 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mark R. Hagadone, Ph.D., FACFE	Individual	Support	No

Comments:

SB 551 SD1 HD1 should be passed. Consumers should not have to pay judgements flowing from reliance upon statutory authority. Owners of units whose associations were depending expressly upon statutory authority should not be exposed to liability because the law was followed.

A judgement against a condominium is paid by the consumers who own the condominium units. SB 551 SD1 HD1 should be passed to protect those consumers.

I urge you to pass this Bill.

**SB-551-HD-1**

Submitted on: 3/28/2019 9:04:05 PM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Tim Aplcella	Individual	Support	No

Comments:

March 27, 2019

Honorable Chris Lee, Chair

Honorable Joy A. San Buenaventura, Vice-Chair

Committee on Judiciary

415 South Beretanis St.

Honolulu, HI 96813

RE: SB 551 SD1 HD1-Support

Dear Chair Lee, Vice-Chair San Buenaventura and Members:

Please pass this bill. As a condo owner, I wish to avoid potential liability for past non-judicial foreclosures enacted by our association. Although the By-Laws of our association did not include verbiage pertaining to non-judicial foreclosures, it was thought that the State of Hawaii approved the use of this tool to limit the loss of non-payment of those in default of their homeowner dues. Please address and correct this recent court ruling and restore that which was intended by the legislature many years ago.

Thank you for your consideration in this matter.

Sincerely,

Tim Apicella



Condo Owner

Hawaii Kai

**SB-551-HD-1**

Submitted on: 3/29/2019 7:36:19 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Brooke Takara	Individual	Oppose	Yes

Comments:

**LATE**

**SB-551-HD-1**

Submitted on: 3/29/2019 11:23:22 AM

Testimony for JUD on 3/29/2019 2:05:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Lorie Sides	Individual	Support	No

Comments:

I support this bill and would like the legislature to pass it. Thank you.