

SB-551-SD-1

Submitted on: 3/8/2019 3:26:50 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

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

Comments:

SB-551-SD-1

Submitted on: 3/8/2019 5:43:06 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Linda Morabito	Kolea Condominium Villas AOA	Support	No

Comments:

SB-551-SD-1

Submitted on: 3/9/2019 9:32:13 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Joan Plylar	Kolea AOA	Support	No

Comments:

SB-551-SD-1

Submitted on: 3/10/2019 3:14:22 PM

Testimony for CPC on 3/12/2019 2:00:00 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

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

1. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Mark McKellar

SB-551-SD-1

Submitted on: 3/9/2019 11:00:17 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Richard Emery	Associa	Support	Yes

Comments:

Condominiums of relied on current law to foreclose on units that have not paid their assessments by power of sale or nonjudicial foreclosure. Recent appellate court rulings have overturned foreclosures citing the lack of understanding of the legislature's intent. Director and Office Liability Insurers are now declining new coverage and/or adding endorsements excluding liability on foreclosure litigation. In the end, recent cases have been remanded by the circuit court for trial with an potential net result that the owners who paid their maintenance fees will be liable for judgments to the owner who failed to pay their maintenance fees. This Bill only affirms the original intent of the legislature. If it fails to pass, associations statewide may be liable for millions of dollars in damages.

SB-551-SD-1

Submitted on: 3/10/2019 3:26:05 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Sean Cooke	Southpointe at Waiakoa AOAO	Support	No

Comments:

As President of Southpointe AOA in Kihei, I am in support of this bill. Non-judicial foreclosure for unpaid association dues is necessary to help avoid non-payment, help to force payment of delinquent accounts where possible and to avoid allowing owners to not pay dues therefor crippling the associations ability to function.

SB-551-SD-1

Submitted on: 3/11/2019 11:01:22 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Clarke Farden	KEKUILANI VILLAS AOAO	Support	No

Comments:

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

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

S.B. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Clarke Farden

TO: Representative Takumi, Chair
Representative Ichiyama, Vice Chair
Members of the Committee
FROM: Bette Matthews, Secretary, A.O.A.O. Harbour Ridge
DATE: March 10, 2019
RE: S.B. 551, S.D.1

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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 to expressly grant 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.

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S.B. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

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of sale without a power of sale provision in a written contract with the property owner. Like counties, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium associations the remedy of power of sale or nonjudicial foreclosure.

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Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Bette Matthews, Secretary
A.O.A.O. Harbour Ridge

HAWAII LEGISLATIVE
ACTION COMMITTEE


community
ASSOCIATIONS INSTITUTE

P.O. Box 976
Honolulu, Hawaii 96808

March 10, 2019

Honorable Roy M. Takumi, Chair
Honorable Linda Ichiyama, Vice-Chair
Committee on Consumer Protection & Commerce
415 South Beretania St.
Honolulu, HI 96813

Re: SB 551 SD1-SUPPORT

Dear Chair Takumi, Vice-Chair Ichiyama and Members:

SB 551 SD1 is a consumer protection measure of significant importance. This is because a recent decision by the Intermediate Court of Appeals ("ICA") has created substantial exposure for condominium owners.

Condominiums used non-judicial foreclosure procedures in good faith for years, *in reliance upon statutory authority to do so*. The ICA expressed that it was nonetheless unable to discern *legislative intent* that statutory authority alone was sufficient.

Since condominium owners pay the liabilities of the condominium, it is consumers who are at risk from the ICA's decision. Passage of SB 551 SD1 will protect consumers from unwarranted liability. The legislature need only express its intention to be what statutory law has already been.

That is, the question is *not* whether condominiums should be allowed to use non-judicial foreclosure procedures. The legislature long ago decided that question in the affirmative.

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.

Honorable Roy M. Takumi, Chair
Honorable Linda Ichiyama, Vice-Chair
March 10, 2019
Page 3

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

SB 551 SD1 is about protecting *consumers* from liability. It is also about the protecting consumers from the loss of insurance coverage, loss of equity and other adverse impacts.

SB 551 SD1 should be treated on its own terms, quite apart from any perceived grievances that some advocates assert against condominiums. The people who stand to be harmed if SB 551 SD1 fails are consumers.

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

Community Associations Institute, by

Philip Nerney

For its Legislative Action Committee

SB-551-SD-1

Submitted on: 3/11/2019 9:55:29 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jane Sugimura	HI Council of Assoc. of Apt. Owners	Support	No

Comments:

We join in and support the testimony of Community Associations Institute

SB-551-SD-1

Submitted on: 3/11/2019 9:24:02 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Harvey Maxwell Kopper	Porter, McGuire, Kiakona and Chow	Support	No

Comments:

I strongly support this Bill. Non-judicial foreclosures are an important tool condominium associations have been using for years and are integral in allowing associations to remain financially sound.

SB-551-SD-1

Submitted on: 3/10/2019 10:16:55 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
raymond tremblay	AOAO WAIKIKI SUNSET	Support	No

Comments:

SB-551-SD-1

Submitted on: 3/11/2019 7:03:58 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

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

Comments:

We oppose this measure for the following reasons:

While we recognize and agree that owners are obligated to pay common expense assessments to sustain the operations of their Associations, this power of sale provision—if enacted--enables an Association to expeditiously deprive a homeowner of his property should that homeowner default on common fees or assessments, ignoring that an Association’s obligation to maintain that same property is not held to the same standard of enforcement.

Besides the obvious impact that a poorly maintained property has on the financial health of the Association and its owners via increased maintenance fees, special assessments, and lowered property value, there is a secondary problem: owners who complain of maintenance deficiencies are often targeted for their concerns rather than recognized for their diligence.

The targeting of owners, often exercised by using attorneys to intimidate owners and/or bury them under mounting legal fees, was the inspiration for what is commonly-called the “anti-retaliation law” that passed in 2017 as Act 190.

Because of retaliatory practices which include fraudulent charges of rules violations, protections against non-judicial foreclosures must remain in place. Owners should have the right to their "day in court" before Associations can foreclose upon them.

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

But in non-judicial foreclosures, it is possible that owners will have little warning when the power of sale is enforced and the property is sold. 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. 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.

Further, owners who seek enforcement of the Association’s obligation to maintain the property must jump through legal hoops starting with mediation and usually culminating

in costly and lengthy litigation, a process which contrasts unfairly against the expeditious non-judicial “remedy” enforced upon owners.

This measure appears to be an attempt to override the legal precedence established by Sakal v AOA Hawaiian Monarch which was decided just last year. The Sakal case is an example of the inevitable abuse that occurs when an Association employs non-judicial foreclosures rather than to seek the neutral administration of justice.

SB-551-SD-1

Submitted on: 3/11/2019 12:07:44 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Stuart Mumm	Honua Kai Condominium Association	Support	No

Comments:

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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.

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Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Stuart Mumm, President HKCA

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March 11, 2019

Via Electronic Submission
Hawaii House of Representatives

**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. I am an attorney, and I represent the homeowner, Christian Sakal, in Sakal v. AOA Hawaiian Monarch, 426 P.3d 443 (Haw. Ct. App. 2018). 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 above-referenced legislation on its face seeks to nullify the Intermediate Court of Appeals' decision in Sakal, which requires that a power of sale 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 Application for Writ of Certiorari in December 2018, and later granted Christian Sakal's application in January 2019.

We believe that the proposed legislation is the result of a powerful special interest lobby (local private law firms specializing in condominium law), is ill-advised, and is contrary to the will and constitutional rights of Hawaii homeowners like Mr. Sakal. The attorneys in my office and I, who represent homeowners in court on a daily basis, are very much opposed to this legislation, which will perpetuate undue harm to Hawaii homeowners, foster instability in the local housing market, and cause wasteful future litigation. Because of the atrocities that have been committed against homeowners during nonjudicial foreclosures conducted by condominium associations due to the absence of judicial oversight, we urge you to reconsider and 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.

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 awarding it to the various condominium associations who otherwise lack such a power in their governing

Hawaii House of Representatives
March 11, 2019

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. Again, AOA Hawaiian Monarch's application was denied by the Supreme Court, and for good reason.

Finally, I believe it would be very important for the Legislature to hear from some of the victims of wrongful association nonjudicial foreclosures, many of whom my office has represented in recent years, before casting any vote on this legislation seeking to further remove judicial oversight. 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 over \$30,000 of 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. 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.

Enclosed as an example of the consequences of such unsupervised power of sale foreclosures 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 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 their individual associations (or to the contrary, should certain associations wish to abolish their existing powers of sale). Doing so is a decision best left to each association and its members, without unnecessary legislative overreach.

Thank you for your consideration.

Sincerely,

/s/ Frederick J. Arensmeyer

Enclosures (2)

GARY VICTOR DUBIN 3181
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Attorneys for Plaintiffs
 Richard Milikona Sampaio, Jr.
 and Kelly Kalanikapulahaole Sampaio

FIRST CIRCUIT COURT
 STATE OF HAWAII
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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

DECEMBER

LEGAL DEPARTMENT

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 Sampaios' property, b.) locking the Sampaios' out of their Property, c.) taking and selling and/or destroying virtually all of the Sampaios' 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 Sampaios' property, e.) skimming equity and rental income from the Sampaios' 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 Sampaios' property without any prior notice to the Sampaios, b.) allowing its high bidder at said auction to illegally access and convert the Sampaios' property, c.) preventing the Sampaios from any opportunity to regain access to their property by paying the amount claimed to be owed to MTA, despite the Sampaios' 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 Sampaios incorporate by reference the allegations above.

107. Duncan and/or ZJD acted intentionally and unreasonably by a.) gaining access to and occupying the Sampaios' 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

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



20 1/3 Z5

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 14th 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 10th 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 11th 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

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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.



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
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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),¹ 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.² 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

¹ 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.

² 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 1.³

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).

³ 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



Collection Law Section

Reply to: **STEVEN GUTTMAN, CHAIR**
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Steven Guttman

Vice Chair:
William J. Plum

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William J. Plum
Charles Prather
Yuriko J. Sugimura
Thomas J. Wong
Reginald K.T. Yee

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE
REGARDING SENATE BILL 551, SENATE DRAFT 1

Hearing Date: Tuesday, March 12, 2019
Time : 2:00 p.m.
Place : Conference Room 329

Dear Chairman Takumi, Vice Chair Ichiyama 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. 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

SB-551-SD-1

Submitted on: 3/8/2019 3:52:01 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Allen Wilson	Individual	Support	No

Comments:

Hon. Chair Baker and Committee Members,

This testimony is in support of Senate Bill 551. If the non-judicial foreclosure procedure is not re-authorized for condominium associations, they will be rendered nearly helpless in regard to collection of unpaid maintenance fees.

Allen Wilson, Hawaii Kai

SB-551-SD-1

Submitted on: 3/8/2019 3:55:35 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Kekoa Giron	Individual	Support	No

Comments:

SB-551-SD-1

Submitted on: 3/8/2019 4:12:04 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Naomie Ramos	Individual	Support	No

Comments:

SB-551-SD-1

Submitted on: 3/8/2019 5:16:19 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Alex Bresslauer	Individual	Support	No

Comments:

I support the right for associations to use the non judicial foreclosure process. Associations will use the judicial foreclosure process to collect unpaid fees, but that does not benefit the home owner or the association. It only benefits the attorneys. By charging the home owner for a judicial foreclosure it very well could double the amount owed from that delinquent account. Let us not "kick them when they are down".

SB-551-SD-1

Submitted on: 3/8/2019 7:18:44 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Debbie Smee	Individual	Support	No

Comments:

SB-551-SD-1

Submitted on: 3/9/2019 11:55:09 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
lynne matusow	Individual	Support	No

Comments:

Please accept this testimony as strong support of SB551, SD1. the passage of S.B. 551, S.D.1. 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 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.

SB-551-SD-1

Submitted on: 3/8/2019 9:12:53 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Marcia Kimura	Individual	Oppose	No

Comments:

I am against this measure. Courts have already rightly decided that nonjudicial foreclosures are illegal, and since many of these foreclosures are wrongfully and fraudulently imposed, they too easily facilitate the seizure of property.

SB-551-SD-1

Submitted on: 3/9/2019 1:28:00 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jim Dodson	Individual	Support	No

Comments:

I support being able to use non-judicial foreclosures to collect delinquent assessments in condominium and planned communities.

Re: Testimony on SB 551, SD1.
Tuesday, March 12, 2019; 2:00pm
Conference Room 329

Representative Takumi 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 that: (i) specifically authorized nonjudicial foreclosures by all associations but (ii) included built-in protections for owners.

Despite the legislature's clear intent, a recent Hawaii appellate court decision questioned whether that was the legislature's intent. This bill is not retroactive legislation but simply confirmation 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 other members of the 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 their rights 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 has simply abandoned 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) Requiring only judicial foreclosures will not prevent an association from foreclosing. In a judicial foreclosure, the foreclosing party must only merely demonstrate 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 complete 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

SB-551-SD-1

Submitted on: 3/10/2019 2:32:04 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Anne Anderson	Individual	Support	No

Comments:

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

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

S.B. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

M. Anne Anderson

SB-551-SD-1

Submitted on: 3/10/2019 3:14:52 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Bonnie Lau	Individual	Support	No

Comments:

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

As an apartment owner in Salt Lake, I strongly SUPPORT the passage of S.B. 551, S.D.1.

I cannot continue to subsidize others' financial burden when they fail to pay condominium association assessments. I cannot imagine what other homeowners in my association would say if I pass my burden onto others.

Therefore, please pass this S.B. 551, S.D.1.

Respectfully submitted,

Bonnie Lau

SB-551-SD-1

Submitted on: 3/10/2019 4:37:54 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Tom Saxton	Individual	Support	No

Comments:

For the financial health of all HOA's, it's vital for HOA boards to have a method for collecting overdue assessments that isn't cost prohibitive.

SB-551-SD-1

Submitted on: 3/10/2019 4:41:49 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dante K. Carpenter	Individual	Support	No

Comments:

Chair Rep. Takumi, V. Chair Rep. Ichiyama, & Members of the Committee:

My name is Dante Carpenter, testifying in strong support of S. B. 551, SD 1. The passage of this bill is urgently needed because of recent rulings by the Hawaii Intermediate Court of Appeals (ICA). Despite the fact that condominiums have for years relied upon HRS Chapters 514A & B, and 667 as expressly granting 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 the 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 Sakai v. AOA of Hawaiian Monarch, 143 Hawaii 219, 426 P.3d 443, (App. 2018).

Therefore SB 551, SD 1 is much needed legislation because it clarifies that condominium 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. It is the only ultimate remedy available to AOA's when owners are in default of their common expense assessments for exceedingly long periods of time, thus penalizing other owners.

Thank you for your understanding and positive action to correct this problem in Condominium Law.

Sincerely,

Dante Carpenter, Vice President

Country Club Village, Phase 2 AOA (469 Units)

House Consumer Protection & Commerce Committee Hearing
Tuesday, 3-12-19, 2:00 pm, RM 329

RE: SB551, SD1-Relating to Non-judicial Foreclosures

Chair Rep. Takumi, V.Chair Ichiyama & CPC Committee Members:

I am very **opposed to the passage of SB551, SD1** 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 disputed 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 and the legal fees DID NOT BENEFIT THE OWNER in anyway, because the attorney represented the AOA Board and not the owner.

I know of at least 5 elderly owners who died soon after they were "locked out" of their homes and foreclosed on. They were made homeless by the NJF process and had to seek shelter with family & friends elsewhere. I truly believe these elderly and many others who were "kicked out" and foreclosed on died from depression because all they wanted to do was live in their homes until they passed on!

Many of these elderly victims had lived in their homes for over 20-30 years and were foreclosed on because of disputed fees/fines which they disputed; and not because of delinquent mortgage payments, etc.
In fact, most of them owned their property free-and-clear because they had paid up their mortgages years ago.

The issue I found when I helped to investigate the disputed fine or fee, were irregularities in the original fines & fees and very questionable and/ or unethical business practices that could be construed as "illegal."

Act 195 was passed last Session to force the issue that maintenance fees should pay for operating expenses first, before paying for the AOA's legal fees. However, ACT 195 will expire in 2020!

If you truly believe that **SB551, SD1** will be used correctly and "legally" then I strongly implore that if you must pass **SB551, SD1**, then I recommend that you add language that will extend the life of *ACT 195* permanently.

.....

On another note, I have been very fortunate to get a response from Steven Chung, Counsel of Record, for several of the most recent Non-judicial Foreclosure (NJF) class action suits.

He graciously wrote a legal summary on why he objects to the passage of HB76, HD1 & SB551, SD1-Relating to Non-judicial foreclosures.

I have attached Mr. Chung's summary to this testimony.

I humbly ask the House CPC Committee to read Mr. Chung's legal summary, and submit it to the LRB attorney(s) for review and a legal opinion.

I, as a former state planner, who has assisted the LRB attorneys in researching bills in the past would like to know the LRB attorney's opinion on what are the potential legal liabilities and cost to the state taxpayers if SB551, SD1 is enacted and further litigation is pursued?

Thank you,

Laurie Hirohata, MSW, MEd
Community Advocate

The Proposed Legislation May Improperly Affect Existing Claims

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."¹

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.

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

¹ 2011 House Journal – 59th 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.

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.

This writer objects 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.

The following are excerpts from an appellate brief discussing 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, 2006.² 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).

HRS §§667-1 to 667-10 were originally enacted in the 19th 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.³

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.”⁴ 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 667-42.⁵ Because of concerns regarding the rights of homeowners, the legislature included substantial consumer protection

² HRS § 514A-1.5 and § 514B-21.

³ § 667-5 contains identical language.

⁴ HRS §514A-90 (1998).

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

safeguards in Part II.⁶ 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

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.”⁷ 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.”⁸ 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.”⁹ 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 associations to be authorized to use the nonjudicial foreclosure

⁶ *Id.*

⁷ HRS § 514A-90 (1998).

⁸ 1999 Act 236, §1.4.

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

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-90.¹⁰ 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.”¹¹

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 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.¹² 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.¹³

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.”¹⁴ As repeal by implication is disfavored, the intention for the legislature to repeal a statute by implication must be “clear and manifest.”¹⁵ 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.¹⁶ As discussed above, the

¹⁰ HRS §514B-146 (2004)

¹¹ HRS § 667-5 (1999)

¹² Part II was amended when Part VI was adopted.

¹³ HRS § 667-92(e)

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

¹⁵ *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).

¹⁶ *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).

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.”¹⁷

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” that “was originally designed to make it easy to take land away from Native Hawaiians.”¹⁸ In 2012, the legislature repealed HRS § 667-5 in order to “provide a single nonjudicial foreclosure process under Part II of [chapter 667].”¹⁹ 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.

¹⁷ *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).

¹⁸ 2011 House Journal – 59th 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.

¹⁹ Conf. Com. Rep. 63-12, in 2012 House Journal, at 1631.

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."

Public policy favors giving a defaulting property owner "every reasonable opportunity to redeem his property."²⁰ 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.²¹ Hawaii courts, therefore, have interpreted statutes which provide for government seizure and sale of land in favor of the taxpayer, rather than the government.²²

The Supreme Court has noted that in sales contracts, "the penalty of forfeiture is designed as a mere security."²³ 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.

4842-7591-2583, v. 1

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

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

²² *Id.*

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

SB-551-SD-1

Submitted on: 3/10/2019 9:24:46 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
mary freeman	Individual	Support	No

Comments:

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

Again I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

S.B. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Mary S. Freeman

Ewa Beach

SB-551-SD-1

Submitted on: 3/10/2019 9:46:54 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Chandra Kanemaru	Individual	Support	No

Comments:

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D. 1. 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 expressly granting to them the right to pursue the remedy of power of sale or no judicial foreclosure the ICA has recently determine that’s there is no evidence of legislative intent to grant to condominium associations the remedy of power of sale or no judicial foreclosure absent a power of sale provision the project documents of said associations.

HRS Chapter 514B provides that the lien of the association may be foreclosed by action or non judicial or power of sale foreclosure procedure set forth in chapter 667, by the managing agent, or by 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 the provisions do not empower associations to conduct nonjudicial or power of sale foreclosures. SEE Sakai v. Ass’n of Apartment Owners of Hawaiian Monarch. 143 Hawaii 219, 426 P.3d 443, (APP 2018).

S.B. 551, S.D.1 is much needed legislation because it clarifies that condominium associations are empowered to conduct non judicial or power of sale foreclosures as a matter of law. The legislature gave condominium associations this owe 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 power to foreclose nonjudicially has been an essential remedy for condominium associations . When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a vast majority of project documents do not contain express power of sale provisions, as created by statute as is discussed below. If S.B. 551, S.D.1 does not pass,

associations will not be able to function and meet their obligation without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D. 1.

Respectfully submitted,

Chandra R.N. Kanemaru, Condominium Owner & Resident

Country Club Village, Phase 2 AOA Board of Directors, Secretary

SB-551-SD-1

Submitted on: 3/10/2019 9:06:17 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dale	Individual	Oppose	No

Comments:

Aloha:

This bill seems to be a legislative 'end run' around a decision on the issue already issued by the Intermediate Court of Appeals, a decision which should be respected. Therefore, respectfully, I am in opposition to this particular bill.

Something Associations should try is offering advice and counseling to people in financial distress, to include getting a commercial loan to catch up with their outstanding debt.

Could not help but notice the 'boilerplate' similarity in testimony by so many lawyers, as if all were mere deviations from the same sample letter they were given. Shakespeare was right.

Have been a condo resident for over 30 years now. Spent a decade on our Board, and, after a one year hiatus, was just reelected with the highest vote count of any candidate. Associations should be 'user friendly' not adversarial bending to the will of 'for profit' companies eager to make a buck. Much abuse and injustice out there. Have observed any time attorneys jump into it, debt on an owner quickly triples, and more.

Boards of Directors should take delinquent members to Small Claims Court. Also, condo lawyers should be restricted to a 25% payment of whatever funds they recover.

Please vote down this bill and respect the Intermediate Court of Appeals, do not disrespect the Court.

Sincerely, Dale A. Head [sunnymakaha@yahoo.com] (808) 228-8508 Text or Cell

SB-551-SD-1

Submitted on: 3/11/2019 12:53:51 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Steve Glanstein	Individual	Support	No

Comments:

I support SB551 SD1. **Condominium associations have relied upon legislation authorizing non-judicial foreclosures for years.** Without non-judicial foreclosures, the extra costs will be imposed on the non-defaulting owners. A recent court ruling negates the obvious intent of the legislature and poses an unfair and onerous burden on our Hawaii condominium associations and their owners.

SB551 SD1 **clarifies** existing legislation that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures. **Please pass SB551 SD1.**

SB-551-SD-1

Submitted on: 3/11/2019 6:16:18 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Charles Lavis	Individual	Support	No

Comments:

I fully support legislation providing clarity regarding the ability of condominium associations to exercise non-judicial foreclosure. Without this clear language, condominium associations may be forced to use far more expensive judicial foreclosure proceedings. The high cost of this option effectively negates the ability of condominium association to recover association operating costs.

In my experience on an Association Board on the Big Island of Hawaii, there are numerous checks and balances in place before foreclosure proceeding can even be initiated. Numerous further steps are required before any hope of recovering a portion of costs can occur.

SB-551-SD-1

Submitted on: 3/11/2019 7:56:46 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mark R. Hagadone, Ph.D., FACFE	Individual	Support	No

Comments:

SB-551-SD-1

Submitted on: 3/11/2019 8:24:16 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

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

Comments:

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

S.B. 551, S.D.1 is much-needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass,

associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Paul A. Ireland Koftinow

SB-551-SD-1

Submitted on: 3/11/2019 8:37:05 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

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

Comments:

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

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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).

S.B. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Philip L. Lahne

I strongly SUPPORT the passage of S.B. 551, S.D.1 to clarify the legislative intent of existing foreclosure law as it applies to condominium projects. Despite the fact that condominium associations have for years relied on HRS Chapters 514A, 514B, and 667 as granting them the right to pursue the remedy of power of sale, or nonjudicial, foreclosure, the Intermediate Court of Appeals (“ICA”) recently determined that there is no evidence of legislative intent to grant condominium associations the remedy of power of sale or nonjudicial foreclosure unless a power of sale provision is expressed in the associations’ governing documents or other agreement with the owner.

Currently 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 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),

S.B. 551, S.D.1 clarifies that condominium associations are authorized to conduct nonjudicial or power of sale foreclosures. The legislature gave condominium associations this 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.

The power to foreclose nonjudicially is an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who do pay their share of common expenses have to carry that burden. Condominium associations need to have the requisite power under the Condominium Property Act to enforce the collection of assessments because most project documents do not contain express power of sale provisions. If S.B. 551, S.D.1 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other paying members in their respective associations.

The burdens caused by a unit owner’s failure to pay condominium association assessments are comparable to a property owner’s failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. Like counties which use taxes paid to regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members.

Additionally, HRS § 514A-82(b)(13), repealed effective January 1, 2019, 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 through June 30, 2006. The legislature gave condominium associations the remedy of nonjudicial foreclosure in HRS Chapters 514A, 514B, and 667, and also adopted a law to incorporate the remedy into the bylaws of all condominium associations existing as of June 30, 2006.

S.B. 551, S.D.1 is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support passage of S.B. 551, S.D.1.

SB-551-SD-1

Submitted on: 3/11/2019 9:25:33 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Daniel Kent	Individual	Support	No

Comments:

To the honorable Representative Roy M. Takumi and members of the CPC Committee,

I am writing in support of this measure; but specifically for the previously deferred HB 76 which was previously passed through your committee. .

As one of the many advocates for AOAOs, I strongly support ensuring that the countless condominium owners in our state receive the necessary legal protections and rights for their shared communities to function properly. Which HB 76 will greatly assist in, as it relates to non-judicial foreclosures.

Thank you for your continued support of this important measure.

-Daniel Kent

SB-551-SD-1

Submitted on: 3/11/2019 9:27:15 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Christian Porter	Individual	Support	Yes

Comments:

As an attorney representing Condo Associations, it is important to note that they operate on a "zero based budget" meaning that what they collect from their owners the Association's Board spends on operations and building up the its reserves for major projects projected out over 20 years. There is no budget line item for delinquencies. So when an owner does not pay their share of the maintenance fee or assessment, the other paying owners must now "carry" that debtor. So it is important for the Association as a nonprofit and operating on a zero based budget to take all steps to get the delinquent owner to either pay, or take control of the unit as fast as possible so that it can be rented out and the damage to the Association's paying owners mitigated.

It is with this backdrop, and the fact that Association's - Condominiums - are creatures of statute, that Condo Board's have utilized the nonjudicial foreclosure process to lessen the impact to the paying owners by taking control of delinquent owner's units so that they can be rented until such time that a bank forecloses - which could take years. If a delinquent owner can pay, the goal is to work with the owner rather than take control of the unit.

This process has worked so that the majority of owners that pay are not harmed by a long collection process. This Bill is supported by all Condo Associations so that is it clear that they all have this tool in the collection process. The Hawaii Supreme Court has recently questioned this tool, and this Bill is needed to clarify the original intent of the law - *i.e., nonjudicial foreclosures are a tool to all Condo Association's regardless of their governing documents as all Condos are a creature of statute (HRS Ch. 514B) and should have all the benefits of statute.*

Thank you for your consideration.

Christian Porter

House Committee on Consumer Protection & Commerce

Testimony of: Brooke Takara

Date: March 12, 2019

Re: S.B. NO. 551, SD1 RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

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 2nd 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.

SB-551-SD-1

Submitted on: 3/11/2019 11:03:16 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Kapono Kiakona	Individual	Support	No

Comments:

I support S.B. 551 SD1. This bill re-affirms the legislative intent that was expressed in 1999, that, after years of losses from delinquencies, nonjudicial foreclosure helped associations make the best of a bad situation. 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. S.B. 551 SD1 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures.

SB-551-SD-1

Submitted on: 3/11/2019 11:34:33 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Cheryl Fraine	Individual	Support	No

Comments:

Dear Senate Committee:

SB-551 will clarify that all associations should have the right to initiate non-judicial foreclosures - regardless of whether the "power of sale" language is present in the governing documents or not.

Respectfully submitted,

Cheryl Fraine

SB-551-SD-1

Submitted on: 3/11/2019 11:49:06 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Carol Walker	Individual	Support	No

Comments:

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

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

1. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Carol Walker

Lourdes Scheibert
920 Ward Ave #6D
Honolulu, Hawaii 96814

March 11, 2019

Consumer Protection & Commerce
Representative Roy Takumi, Chair
Representative Linda Ichiyama, Vice Chair
Members: Representatives Henry Aquino, Della Au Belatti, Rida Cabanilla Arakawa, Romy Cachola, Sharon Har, Sam Satoru Kong, John Mizuno, Richard Onishi, Lauren Matsumoto

Oppose SB551: Condominiums; Associations; Nonjudicial Foreclosure **Remedy**. Clarifies that a condominium association may exercise nonjudicial or power of sale foreclosure remedies regardless of the presence or absence of power of sale language in an association's governing documents. Takes effect on 7/1/2050. (SD1)

The Court of Appeals found the deficiency to nonjudicial forecloses by condominium associations. This decision effects several associations. Some in question in Ian Lind, Civil Beat: Wrongful Foreclosure Claims Rock The Condo World involving 160 individuals by 72 Associations. An example see, Court of Appeals decision on Sakal V. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawaii 219, 426 P.3d 443 (APP.2018). My opinion, SB551 is an attempt to override the Sakal legal precedence.

SB551 asks to clarify a ruling by the Court of Appeals as a mistaken interpretation by the Judge, the Court of Appeals and the attorney's who argued for Sakal. This landmark case has cost this owner thousands of dollars in legal fees because of legislation that fell short to express themselves on the clarity of HRS 514B Condominium Law that governs 33% of residents in Hawaii who live in condominiums. If SB551, a do over, passes into law then the Sakal's and others like them could open the State of Hawaii to legal challenges that could possibly cost the Hawaii tax payer to reimburse their costs and maybe punitive damages.

Milton M. Motooka, Esq in his newsletter posted on the internet April 2011, "Lawsuit Challenges Legality of Association Non-Judicial Foreclosure" forewarns his colleagues and the entire condominium industry leaders who claim to represent all condominium owners of this very debacle. I bet Motooka can sleep at night.

SB551 not only reverses Sakal precedence, if passed into law will apply to 350 condominium associations identified in the City and County of Honolulu's mandate for Fire Sprinkler Systems.

SB551 is a cookie cutter for all associations. Decades of deferred maintenance and an impending mandate for the installation of Fire Sprinkler Systems can cause looming costly

special assessments. What about the Seniors who have fixed incomes, probably mortgage free who are not able afford these assessments or quality for a mortgage loan because of their limited income? As quick as 3 months an Association can foreclose. Based on \$600 maintenance fees per month, as little as \$1,800 an Association can swiftly foreclose on a Senior. What about this imbalance of money owed in comparison to the equity of the property? When a judge is involved in over-site of a non judicial foreclosure, he is a safety net for due process for the condo owner.

One life lesson my mom taught me, **“A contract is only as good as the hand that signs it”**

SB551 makes a liar out of the contract I signed when I bought my condo without the power of sale.

Thank-you,

Lourdes Scheibert

SB-551-SD-1

Submitted on: 3/11/2019 12:31:53 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Forest Jenkins	Individual	Support	No

Comments:

Dear Chair Baker and Members of the Committee:

I am writing to testify strongly in favor of SB 551, which is imperative to restore condominiums' ability to conduct nonjudicial foreclosures. Nonjudicial foreclosures are vital to condominium association's who face the difficult dilemma of a delinquent owner. Without nonjudicial foreclosures condominium association's must foreclose judicially on a property and cannot do anything to affect the lender's first lien. As such, foreclosing association's would have to sell the mortgaged property with the lender's remaining lien on the property. This often puts the association in the position of trying to auction a property worth less than the remaining lien and is not a viable solution to avoid growing delinquencies with owners simply stop paying their mainenance fees.

Without the power to conduct nonjudicial foreclosures, condominium associations are left without a viable method to remedy units that are not paying maintenance fees. As such, the other owners in condominiums must bear the responsibility for covering the gaps in maintenance fees and all owners bear the brunt of several owners' failure to adhere to the contractually required fees and dues. This raises maintenance fees for owners as a whole. As such, passage of this bill will help all owners of condominiums in the state to keep their maintenance fees lower and will promote more certainty that they will not be penalized for other owners' failure to keep current with their fees and dues. This will provide more financial stability to constituent voters who reside in condominiums. The Hawaii housing market is made up largely of condominiums and any measure to help reduce and stablize maintenance fees will vastly aid in helping condominium owners control their monthly expenses and ultimately save money for the vast majority of condominium owners in the state.

R. Laree McGuire, Esq.
Porter McGuire Kiakona & Chow, LLP
841 Bishop Street, Suite 1500
Honolulu, Hawaii 96813

March 11, 2019

VIA WEB TRANSMITTAL

Hearing Date: Tuesday, March 12, 2019

Time: 2:00 p.m.

Place: Conference Room 329

Committee on Consumer Protection & Commerce
House of Representatives, the 30th Legislature
Regular Session of 2019

Re: Testimony in Support of SB 551

Dear Chair Takumi, Vice Chair Ichiyama and Committee members:

I am writing as a member of the Hawaii 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**” available in HRS Chapter 667. 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 associations¹ and provided the in-depth procedures for conducting power of sale foreclosures. The language quoted above regarding HRS § 514B-146(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 is no power of sale remedy 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 coverage, their rates will skyrocket, or they may lose coverage or be forced into a higher

¹ As opposed to Parts I and II of HRS, Chapter 667 which is also authorizes Lender/Mortgagee foreclosures.

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. 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.

Haw. R. Stat. ("HRS") § 1-3 provides: "No law has any retrospective operation, unless otherwise expressed or obviously intended."

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).

In the recent *Sakal* decision, the ICA 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.” *Sakal*, at 15. Consequently, in the light of the ICA’s reading, **if SB 551 becomes law, the ICA will construe it as a new law and apply it**

March 11, 2019

Page 5

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 and we respectfully submit that SB 551 should be amended to make it retroactive and should be passed out of committee. Thank you for your time and consideration.

Sincerely yours,

A handwritten signature in black ink, appearing to read "R Laree McGuire". The signature is fluid and cursive, with the first name "R" being particularly large and stylized.

R Laree McGuire

Porter McGuire Kiakona & Chow, LLP

SB-551-SD-1

Submitted on: 3/11/2019 1:16:27 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Tim Aplcella	Individual	Support	No

Comments:

March 13, 2019

Honorable Roy M. Takumi, Chair

Honorable Linda Ichiyama, Vice-Chair

Committee on Consumer Protection & Commerce

415 South, Beretania St.

Honolulu, HI 96813

Re: SB 551 SD1-Support

Dear Chair Takumi, Vice-Chair Ichiyama and Members::

I support SB551 SD1 as a condo homeowner due to my concern with potential liability costs as a result of previous non-judicial foreclosures my association was involved with.

Thank you for your consideration and support to pass this bill.

Sincerley,

Tim Apicella

Condo Owner/Board Director

SB-551-SD-1

Submitted on: 3/11/2019 1:36:31 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lance S. Fujisaki	Individual	Support	No

Comments:

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

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

1. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Lance Fujisaki

House Committee on Consumer Protection & Commerce

Testimony of: Brooke Takara
Date: March 12, 2019

Re: S.B. NO. 551, SD1 RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

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 2nd 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 Consumer Protection & Commerce

Testimony of: Donna Kuewa
Date: March 12, 2019

Re: S.B. NO. 551, SD1 RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

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 Consumer Protection & Commerce

Testimony of: Rebecca Corby
Date: March 12, 2019

Re: S.B. NO. 551, SD1 RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

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. I also found out that 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 on Consumer Protection & Commerce

Testimony of: Maytrie Greger
Date: March 12, 2019

Re: S.B. NO. 551, SD1 RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

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 Consumer Protection & Commerce

Testimony of: Maureen D. Nolan, Trustee for Mary E. Nolan Trust
Date: March 12, 2019

Re: S.B. NO. 551, SD1
RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

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 Takumi, I stand in strong opposition to S. B. 551, SD1. I ask that you defer this measure. Thank you for the opportunity to present my testimony to your committee.

House Committee on Consumer Protection & Commerce

Testimony of: Stephen Paia Henry Wong
Date: March 12, 2019

Re: S.B. NO. 551, SD1 RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

My name is Stephen 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 Consumer Protection & Commerce

Testimony of: Herbert Parks
Date: March 12, 2019

Re: S.B. NO. 551, SD1
RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

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 Consumer Protection & Commerce

Testimony of: MSgt. Rudy Galima
Date: March 12, 2019

Re: S.B. NO. 551, SD1 RELATING TO CONDOMINIUMS

Chair Takumi and Members of the Committee:

Position: I strongly oppose S.B. No. 551, SD1

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 21st 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 AOA 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.

SB-551-SD-1

Submitted on: 3/11/2019 2:33:01 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Gary Zanercik	Condominium AOA (non-profit)	Support	No

Comments:

I am and have been President of my condo association for 12 years. My condo Board and others need the right, on behalf of all the condo unit owners, to foreclose on delinquent owners non-judicially. Otherwise, the responsible owners end up footing the bill of the deadbeat owner for years as the judicial foreclosure process continues. We always had this right until an oddball Appeals Court decision misinterpreted the statute. Here is your chance to make it right again. Please vote yes on SB511. Thank you.

House Committee on Consumer Protection & Commerce

Testimony of: Timothy Ho

Date: March 12, 2019

Time: 2:00 p.m.

Re: S.B. NO. 551, SD1 RELATING TO CONDOMINIUMS

Chair Takumi 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.”¹ 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 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 are 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

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

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 are not entitled to conduct power of sale foreclosure.**

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.²

The proponents of this measure claim that S.B. 551, SD1 attempts to clarify the legislature's intent to permit associations to conduct nonjudicial foreclosures without a power of sale. If 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, Associations conducted nonjudicial foreclosures on homeowners that presented checks that if deposited, would have resulted on 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?

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 foreclosures 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, SD1. Thank you for the opportunity to provide testimony on this matter.

² *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,

SB-551-SD-1

Submitted on: 3/11/2019 8:06:58 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Marilyn Joyce Oka	Individual	Support	No

Comments:

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

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

1. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the

Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium 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.

Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Marilyn Joyce Oka

SB-551-SD-1

Submitted on: 3/11/2019 8:17:48 PM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Grant Oka	Individual	Support	No

Comments:

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

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of S.B. 551, S.D.1. 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),

1. 551, S.D.1 is much needed legislation because it clarifies that condominium 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 power to foreclose nonjudicially has been an essential remedy for condominium associations. When owners do not pay their share of common expense assessments, other owners who are paying their share of common expense assessments have to carry that burden. Condominium associations need to have sufficient power under the

Condominium Property Act to enforce the collection of assessments because a 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 does not pass, associations will not be able to function and meet their obligations without unfairly burdening the other members in their respective associations.

The burdens caused by a unit owner's failure to pay condominium association assessments are comparable to a property owner's failure to pay real property tax assessments. Both condominium associations and 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, condominium associations are not lenders and do not have the option to review the ability of potential owners to afford a property before they become owners of an apartment. In addition, similar to counties which regulate and maintain county property for the benefit of the public, condominium associations regulate and maintain common elements, among other things, for the benefit of their members. These are some of the reasons that the legislature granted to condominium associations the remedy of power of sale or nonjudicial foreclosure.

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Given the recent decision by the ICA, this legislation is greatly needed to affirm and clarify the ability of condominium associations to conduct nonjudicial foreclosures. For this reason and the reasons stated herein, I strongly support S.B. 551, S.D.1.

Respectfully submitted,

Grant Oka

SB-551-SD-1

Submitted on: 3/12/2019 10:16:22 AM

Testimony for CPC on 3/12/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Taylor Gray	Individual	Support	No

Comments:

Dear Chair Takumi, Vice Chair Ichiyama, and the Honorable Committee Members,

My name is Taylor Gray and I strongly support SB 551. As an attorney, I have dealt with several Associations impacted by homeowners who do not pay their fair share of common assessments. These neglectful owners create a burden that must be shouldered by the responsible owners. There must be established, effective remedies an Association can use to ensure that all owners pay their fair share. Currently, the only remedy available is judicial foreclosures. By the time an association judicially forecloses on a delinquent owner, the association would have incurred thousands of dollars in attorneys' fees and costs and the bank, which has priority over any of the Association's lien for delinquent assessments, will be close to foreclosing and taking the property for themselves. The outcome of having to wait so long to conduct a judicial foreclosure is that association's are faced with the difficult quandary of foreclosing on a unit which the bank will take back months afterwards. Therefore, judicial foreclosures are not an effective remedy for associations. Accordingly, SB 551 is a necessary remedy for associations and the homeowners they represent.

Aloha Chair Takumi and Vice Chair Ichiyama,

I am submitting my testimony (Late, as it was not uploaded @ 9:00 AM on 3/11/19 when I originally wrote it) in strong support of SB 551. Having served on my HOA Boards of Directors for the past 10 years, I have personally witnessed firsthand the financial burden incurred by the homeowners in my community when a few do not pay their maintenance fees. Currently, one of our HOAs has in excess of \$40,000.00 in outstanding maintenance debt and fees accrued because of a language technicality the courts have injected into the process. Non Judicial Foreclosures are a mechanism that are not only more cost effective but also much faster than Judicial Foreclosures. There are several third party "Investors" in our area who are currently taking advantage of the "Loophole" (One in particular owes our HOA almost \$30,000.00) and pay nothing to the HOAs or AOAOs. The intent is never to take away someone's home or property who may have fallen on hard times, but when it is obvious that an owner is not going to pay their monthly fees, there needs to be a reasonable process that helps the ones who do pay their just debts.

Kevin M. Rathbun

President, Ke'alohe Kai Community Association

President, Ocean Pointe Residential Community Association