

# SB551

Measure Title: RELATING TO CONDOMINIUMS.

Report Title: Condominiums; Associations; Nonjudicial Foreclosure Remedy

Description: 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 associations governing documents.

Companion:

Package: None

Current Referral: CPH, JDC

Introducer(s): BAKER, S. Chang





**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2019**

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**LATE**

**ON THE FOLLOWING MEASURE:**

S.B. NO. 551, RELATING TO CONDOMINIUMS.

**BEFORE THE:**

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

**DATE:** Thursday, January 31, 2019      **TIME:** 9:30 a.m.

**LOCATION:** State Capitol, Room 229

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Shari Wong, Deputy Attorney General

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Chair Baker and Members of the Committee:

The Department of the Attorney General provides the following comments.

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

On page 3, lines 12 through 14, the bill essentially changes the governing documents of an association to allow for the exercise of a nonjudicial foreclosure remedy. This may raise an impairment of contracts challenge. U.S. Const., Art I, § 10, cl. 1.

This constitutional concern can be avoided by deleting the proposed amendments on lines 12 through 17 on page 3 and restructuring the wording to read as follows: "Regardless of the presence or absence of power of sale language in an association's governing documents, the foregoing remedies may be completed using procedures set forth in chapter 667;".

We respectfully recommend consideration of the deletion of wording referencing the governing documents of an association as it removes the possible question of impairment of contracts.

**LATE**

**Testimony of the Real Estate Commission**

**Before the  
Senate Committee on Commerce, Consumer Protection, and Health  
Thursday, January 31, 2019  
9:30 a.m.  
State Capitol, Conference Room 229**

**On the following measure:  
S.B. 551, RELATING TO CONDOMINIUMS**

**WRITTEN TESTIMONY ONLY**

Chair Baker and Members of the Committee:

My name is Michael Pang, and I am the Chairperson of the Hawaii Real Estate Commission (Commission). The Commission appreciates the opportunity to present written testimony in support of this bill.

The purpose of this bill is to clarify 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.

The Commission believes that for a condominium association to effectively manage its operations, the association must be able to use remedies at its disposal to bring delinquent unit owners into compliance in a reasonable manner. These remedies must be balanced against the delinquent unit owner, the condominium association, and its remaining compliant unit owners. This proposed measure appears to strike that balance.

Thank you for the opportunity to provide written testimony on this bill.

**SB-551**

Submitted on: 1/29/2019 11:26:18 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Jane Sugimura	Testifying for HI Council of Assoc. of Apt. Owners a	Support	No

Comments:



P.O. Box 976  
Honolulu, Hawaii 96808

January 26, 2019

Senator Rosalyn H. Baker, Chair  
Senator Stanley Chang, Vice Chair  
Committee on Commerce, Consumer Protection, and Health  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: SB 551 Support

Dear Chair Baker, Vice Chair Chang and Committee Members:

This testimony is submitted on behalf of the Community Associations Institute ("CAI"). CAI supports SB 551.

This bill is needed because the Intermediate Court of Appeals has held that a power of sale must exist in a condominium association's by-laws or another enforceable agreement to avail itself of the nonjudicial power of sale foreclosure procedures set forth in Chapter 667 of the Hawaii Revised Statutes. See, Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 219, 426 P.3d 443 (App. 2018). That holding has the potential to harm consumers.

Potential liability that may flow from the ICA's holding will fall upon condominium owners who pay the bills of their respective associations. Condominium associations have reasonably regarded statutory authority as sufficient to use non-judicial foreclosure procedures, and SB 551 will protect consumers whose associations have relied upon that understanding. SB 551 will supply the clarity that the ICA perceives to be lacking in current law.

Community Associations Institute, by

*Philip Nerney*

For its Legislative Action Committee



**Kokua Council** is one of Hawaii's oldest Senior Advocacy Group. **Kokua Council** advocates, informs, and educates to improve laws, policies and practices impacting the well-being of seniors, their families and our community.

TESTIMONY RE: **SB551 RELATING TO CONDOMINIUMS**

COMMERCE, CONSUMER AFFAIRS, AND HEALTH COMMITTEE

JANUARY 31, 2019 AT 9:30 A.M

POSITION:

**Kokua Council OPPOSES the basic intent of this bill which attempts to circumvent the administration of neutral justice by expediting the foreclosure of property without addressing a condo association's obligations to its members, many of whom are seniors.**

**Had an association maintained and protected its property by properly budgeting and saving for necessary upkeep and repairs, current owners would not be subject to extraordinary increases in common assessment fees (i.e., maintenance fees) or lump sum special assessments, both of which are far more financially difficult on those with fixed incomes and rare opportunity to raise more funds.**

**Had an association made repairs as it is obligated and for which owners had paid through common assessments, it would be unnecessary for those owners to pay for those repairs on their own just to have a livable home while having to pay common assessment fees on fixed incomes.**

## Priorities for 2019

### General Comments from our Community Partners:

- Senior advocates are not focused on only senior-specific concerns, but see the importance of broader community issues, such as open government, prison reform, education, condo governance, and climate change.
- Highest priorities are for adequate and increased funding for established programs.
- There is increasing concern of how programs are implemented at the state and counties, the transparency of state and county agencies and their budgets, appropriate and effective regulations, and treatment of vendors.
- There is also a growing recognition that the laws and practices of condo governance boards can have a major impact on the safety and quality of life of seniors living in those buildings.

### Kokua Council's Top Five Priorities for 2019

1. Funding, structure, and implementation of the **Kupuna Caregivers Law**.
2. **More funds to serve more seniors** in other programs: Kupuna Care, ADRCs, etc.
3. **Less bureaucracy and timely payments** for vendors delivering Kupuna services.
4. **Condo legal and financial protections** for low income, vulnerable senior residents.
5. **Greater transparency and collaboration** in legislating, designing, and implementing policies, programs and practices impacting seniors & their families.

*To contact Kokua Council, send emails to Jim Shon, President:  
jshon@hawaii.edu.*



**SB-551**

Submitted on: 1/28/2019 1:53:37 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

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

Comments:

We support SB-551, we believe this will clarify the law and allow condominium association the right to conduct NJF, which we beleive was the intent from the beginning.

**SB-551**

Submitted on: 1/26/2019 2:32:17 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

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

## Comments:

This Bill is strongly needed to protect associations and its owners. Associations for years have used nonjudicial foreclosures and some courts are now questioning the authority to the financial detriment of the owners. This Bill reinforces the current law and practice.

**SB-551**

Submitted on: 1/26/2019 8:05:20 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

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

Comments:

Our townhouse association strongly supports this bill.

Michael Golojuch, Sr., President, Palehua Townhouse Association

**SB-551**

Submitted on: 1/29/2019 1:50:44 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Dan O'Hanlon	Testifying for Sailors Realty	Support	No

Comments:

Aloha,

I support this bill.

Upstanding Owners of condominiums already must bear the cost of those in default.

Forcing their Association to spend more in an effort to redeem any portion of what is owed to them seems quite unfair and would just add to the already high cost of housing here.

Please vote in favor of Bill 551.

Mahalo,

Dan O'Hanlon PB R  
O'Maui Enterprise LLC  
DBA Sailors Realty

# KAIOO TERRACE

HONOLULU, HAWAII 96815

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

We think it is important that the law on this issue be consistent for everyone. A recent decision of the Intermediate Court of Appeals results in some associations being able to conduct nonjudicial foreclosures while some others cannot. Under the court decision, the only difference is whether their documents specifically mention nonjudicial or power of sale foreclosure. If they do, the associations can proceed with nonjudicial foreclosures, if they don't, the associations cannot.

Very few if any associations have amended their governing documents to allow nonjudicial foreclosures because until that recent court decision, no one knew they had to. Instead, associations looked at the clear wording of the law allowing them to conduct nonjudicial foreclosures and assumed they had that right.

Now, however, under the court decision, the association's right of nonjudicial foreclosure is based on whether some long-ago attorney thought to include in an association's bylaws the words "nonjudicial" or "power of sale" foreclosure. Instead of relying on that principle, the bills you have introduced to correct this problem should be passed to put this issue back where it belongs, in the control of the legislature.

Therefore, we support bill <sup>SB</sup> 551

BOARD OF DIRECTORS OF KAIOO TERRACE



Leslie Malala  
President

**SB-551**

Submitted on: 1/30/2019 6:59:28 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower	Testifying for Hui `Oia`i`o, a coalition of condo owners	Oppose	No

Comments:

We oppose this measure for the following reasons:

If enacted, the power of sale provision may be retroactively deemed to be a part of an Association's governing documents even if owners who purchased into an Association prior to enactment were not aware of, would not approve of, and would not agree to that provision at the time they contracted to purchase. And if notified in advance, those owners would not have entered into contract with the Association. This is unfair.

This power of sale provision enables the Association to expeditiously deprive a homeowner of his property should that homeowner default on common fees or assessments, however this measure ignores that an Association's obligation to maintain that same property is not held to the same standard of enforcement. This is unfair.

Owners who seek to enforce the Association's obligation to maintain the property must jump through hoops starting with mediation and usually culminating in costly and lengthy litigation, a process which contrasts against the expeditious non-judicial "remedy" enforced upon owners. This is unfair.

In non-judicial foreclosures, it is possible that owners will have little warning after default when the power of sale is enforced and the property is sold. This is unfair.

(We personally know of a foreclosure incident that was halted before the sale, but prior to the dismissal of the foreclosure, it was discovered that notices were sent to the wrong address even though the owner resided in the subject unit. Neighboring board members were prohibited from discussing the pending foreclosure with that owner and thus could not notify the owner of the pending foreclosure. Later it was learned that those Directors were unaware that the owner was also uninformed as to the pending foreclosure. It was only through a mortgage lender's inquiry that the owner had any notification. The lack of proper notification was unfair.)

**This measure appears to be an immediate 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**

Submitted on: 1/29/2019 11:54:35 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
kenneth doolin	Testifying for kai makani condo board	Support	No

Comments:



# CORONET

HONOLULU, HAWAII 96814

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

We think it is important that the law on this issue be consistent for everyone. A recent decision of the Intermediate Court of Appeals results in some associations being able to conduct nonjudicial foreclosures while some others cannot. Under the court decision, the only difference is whether their documents specifically mention nonjudicial or power of sale foreclosure. If they do, the associations can proceed with nonjudicial foreclosures, if they don't, the associations cannot.

Very few if any associations have amended their governing documents to allow nonjudicial foreclosures because until that recent court decision, no one knew they had to. Instead, associations looked at the clear wording of the law allowing them to conduct nonjudicial foreclosures and assumed they had that right.

Now, however, under the court decision, the association's right of nonjudicial foreclosure is based on whether some long-ago attorney thought to include in an association's bylaws the words "nonjudicial" or "power of sale" foreclosure. Instead of relying on that principle, the bills you have introduced to correct this problem should be passed to put this issue back where it belongs, in the control of the legislature.

Therefore, we support ~~SB~~ 551.

BOARD OF DIRECTORS OF CORONET



Brian Isa  
Director

**SB-551**

Submitted on: 1/30/2019 6:51:03 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
C & P Flaker	Testifying for Aina Nalu	Support	No

Comments:

I strongly support the bill.

**SB-551**

Submitted on: 1/29/2019 4:32:39 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mark McKellar	Testifying for Law Offices of Mark K. McKellar, LLLC	Support	No

Comments:

RE: S.B. 551

Dear Senator Baker, Chair, Senator Stanley Chang, Vice Chair, and Members of the Committee:

I strongly support the passage of S.B. 551. In *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawai'i 219, 426 P.3d 443 (App. 2018), the Hawai'i Intermediate Court of Appeals ("ICA") 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. The *Sakal* decision came as a great surprise to condominium associations who have for years relied, in good faith, upon the law and its intended meaning.

1. 551 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws. This clarification is important as the issue of legislative intent will undoubtedly impact future court decisions.

For this reason and the reasons stated herein, I strongly support S.B. 551.

Respectfully submitted,

Mark McKellar

**SB-551**

Submitted on: 1/29/2019 6:21:25 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Carol Rosenberg	Testifying for Motooka Rosenberg Lau & Oyama	Support	No

Comments:

**SB-551**

Submitted on: 1/29/2019 6:01:39 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Janelle Lau	Testifying for Motooka Rosenberg Lau & Oyama	Support	No

Comments:

# COOLIDGE VILLA

HONOLULU, HAWAII 96826

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

We think it is important that the law on this issue be consistent for everyone. A recent decision of the Intermediate Court of Appeals results in some associations being able to conduct nonjudicial foreclosures while some others cannot. Under the court decision, the only difference is whether their documents specifically mention nonjudicial or power of sale foreclosure. If they do, the associations can proceed with nonjudicial foreclosures, if they don't, the associations cannot.

Very few if any associations have amended their governing documents to allow nonjudicial foreclosures because until that recent court decision, no one knew they had to. Instead, associations looked at the clear wording of the law allowing them to conduct nonjudicial foreclosures and assumed they had that right.

Now, however, under the court decision, the association's right of nonjudicial foreclosure is based on whether some long-ago attorney thought to include in an association's bylaws the words "nonjudicial" or "power of sale" foreclosure. Instead of relying on that principle, the bills you have introduced to correct this problem should be passed to put this issue back where it belongs, in the control of the legislature.

Therefore, we support bill 551

BOARD OF DIRECTORS OF COOLIDGE VILLA

*colleen ching*

Colleen Ching  
Secretary/Treasurer

# **CORONET**

HONOLULU, HAWAII 96814

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

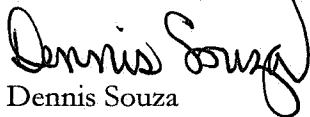
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Therefore, we support bill 551

BOARD OF DIRECTORS OF CORONET



Dennis Souza  
Vice President



# KAPIOLANI BANYAN

HONOLULU, HAWAII 96826

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

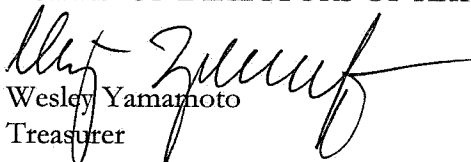
We think it is important that the law on this issue be consistent for everyone. A recent decision of the Intermediate Court of Appeals results in some associations being able to conduct nonjudicial foreclosures while some others cannot. Under the court decision, the only difference is whether their documents specifically mention nonjudicial or power of sale foreclosure. If they do, the associations can proceed with nonjudicial foreclosures, if they don't, the associations cannot.

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Now, however, under the court decision, the association's right of nonjudicial foreclosure is based on whether some long-ago attorney thought to include in an association's bylaws the words "nonjudicial" or "power of sale" foreclosure. Instead of relying on that principle, the bills you have introduced to correct this problem should be passed to put this issue back where it belongs, in the control of the legislature.

Therefore, we support bill 551

BOARD OF DIRECTORS OF KAPIOLANI BANYAN

  
Wesley Yamamoto  
Treasurer

# **PALOLO GARDEN**

HONOLULU, HAWAII 96816

January 24, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

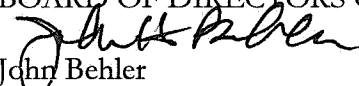
We think it is important that the law on this issue be consistent for everyone. A recent decision of the Intermediate Court of Appeals results in some associations being able to conduct nonjudicial foreclosures while some others cannot. Under the court decision, the only difference is whether their documents specifically mention nonjudicial or power of sale foreclosure. If they do, the associations can proceed with nonjudicial foreclosures, if they don't, the associations cannot.

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Now, however, under the court decision, the association's right of nonjudicial foreclosure is based on whether some long-ago attorney thought to include in an association's bylaws the words "nonjudicial" or "power of sale" foreclosure. Instead of relying on that principle, the bills you have introduced to correct this problem should be passed to put this issue back where it belongs, in the control of the legislature.

Therefore, we support bill 551

BOARD OF DIRECTORS OF PALOLO GARDEN

  
John Behler  
Treasurer

# **PALOLO GARDEN**

HONOLULU, HAWAII 96816

January 24, 2019

Representative Roy M. Takumi  
Chair, Committee on Consumer Protection & Commerce  
Hawaii State Capitol, Room 320  
Honolulu, HI 96813

Dear Representative Takumi,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

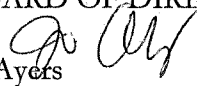
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Therefore, we support bill 76

BOARD OF DIRECTORS OF PALOLO GARDEN

  
Jo Ayers  
President

# WILIWILI VISTA

HONOLULU, HAWAII 96826

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

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Therefore, we support bill 551

BOARD OF DIRECTORS OF WILIWILI VISTA



Kenneth Kwock  
Treasurer

# **CORONET**

HONOLULU, HAWAII 96814

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.


We think it is important that the law on this issue be consistent for everyone. A recent decision of the Intermediate Court of Appeals results in some associations being able to conduct nonjudicial foreclosures while some others cannot. Under the court decision, the only difference is whether their documents specifically mention nonjudicial or power of sale foreclosure. If they do, the associations can proceed with nonjudicial foreclosures, if they don't, the associations cannot.

Very few if any associations have amended their governing documents to allow nonjudicial foreclosures because until that recent court decision, no one knew they had to. Instead, associations looked at the clear wording of the law allowing them to conduct nonjudicial foreclosures and assumed they had that right.

Now, however, under the court decision, the association's right of nonjudicial foreclosure is based on whether some long-ago attorney thought to include in an association's bylaws the words "nonjudicial" or "power of sale" foreclosure. Instead of relying on that principle, the bills you have introduced to correct this problem should be passed to put this issue back where it belongs, in the control of the legislature.

Therefore, we support bill 551

BOARD OF DIRECTORS OF CORONET



Gary Thompson  
Secretary

# 1134 KINAU

HONOLULU, HAWAII 96814

January 22, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

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Therefore, we support bill 551

BOARD OF DIRECTORS OF 1134 KINAU



Arnold Maano

Secretary

# **PALOLO GARDEN**

HONOLULU, HAWAII 96816

January 24, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

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Therefore, we support bill 551

BOARD OF DIRECTORS OF PALOLO GARDEN

Nathan Lee  
Director



# **KAPIOLANI BANYAN**

HONOLULU, HAWAII 96826

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

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Now, however, under the court decision, the association's right of nonjudicial foreclosure is based on whether some long-ago attorney thought to include in an association's bylaws the words "nonjudicial" or "power of sale" foreclosure. Instead of relying on that principle, the bills you have introduced to correct this problem should be passed to put this issue back where it belongs, in the control of the legislature.

Therefore, we support bill 551

BOARD OF DIRECTORS OF KAPIOLANI BANYAN

  
Paul Chun  
President



1/27/19

# 1134 KINAU

HONOLULU, HAWAII 96814

**LATE**

January 22, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

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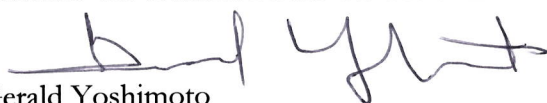
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Therefore, we support bill **551**

BOARD OF DIRECTORS OF 1134 KINAU



Gerald Yoshimoto  
Treasurer

# CORONET

HONOLULU, HAWAII 96814

LATE

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

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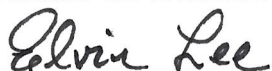
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Therefore, we support bill 551

BOARD OF DIRECTORS OF CORONET



Elvin Lee  
Treasurer

**SB-551**

Submitted on: 1/25/2019 10:59:02 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

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

Comments:

I am against this measure, as it has been associated with too many failures to extend due process rights to owners in default who stand to lose their properties too easily.

Moreover, attorneys involved in the collection process should be required to justify their outrageous, charges to debtors **IN COURT**, and not be able to escape justifying the charges that alone have been responsible for many properties lost in the collection process. When will legislators wake up to these outright thefts of properties by victimized owners?

**SB-551**

Submitted on: 1/26/2019 12:39:56 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
R Laree McGuire	Individual	Support	No

Comments:

**SB-551**

Submitted on: 1/26/2019 1:23:14 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Christian Porter	Individual	Support	No

Comments:

Dear Senate Committee:

Condominium Associations are based on a zero based budget, and count on all owners paying their maintenance fees and common assessments. When someone goes delinquent, everyone else that pays suffers. When that happens Associations utilize various collection tools, including bringing a non-judicial foreclosure action or power of sale action. Such a right should be incorporated by law in all condominium documents. However, the Hawaii Supreme Court has caused confusion in this area and has jeopardized this right by saying that if "power of sale" language is not in the documents, then the association cannot bring a non-judicial foreclosure. Therefore, the current Bill - which I support - will clarify this issue once and for all, i.e., all Associations should have the right and have "always" had the right to initiate non-judicial foreclosures, and that the "power of sale" right exists in all Associations regardless of whether that language is stated in the condominium documents or not. Condominium Associations are a creature of statute, and any right in any statute should automatically be a right of any Association. Thank you for your consideration and efforts in this regard.

Respectfully submitted, Christian P. Porter, Esq.

**SB-551**

Submitted on: 1/28/2019 8:49:48 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Philip L. Lahne	Individual	Support	No

Comments:

**SB-551**

Submitted on: 1/28/2019 10:03:09 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Kapono Kiakona	Individual	Support	No

## Comments:

Making this change will be beneficial to Associations who struggle with delinquencies through no fault of their own. This change clearly supports the legislature's long standing belief that Associations should be allowed to conduct non-judicial foreclosures.



# CHRISTOPHER SHEA GOODWIN

ATTORNEY AT LAW LLLC  
737 BISHOP STREET  
SUITE 1640 MAUKA TOWER  
HONOLULU, HAWAII 96813  
TELEPHONE 808 531-6465  
TELEFAX 808 531-6507

Christopher Shea Goodwin\*  
[chris@christophersheagoodwin.com](mailto:chris@christophersheagoodwin.com)

\*Admitted to practice in HI and TX

Robert S. Alcorn \*  
[robert@christophersheagoodwin.com](mailto:robert@christophersheagoodwin.com)

\*Admitted to practice in HI and TX

Andrew R. Tellio\*\*  
[andrew@christophersheagoodwin.com](mailto:andrew@christophersheagoodwin.com)

\*\*Admitted to practice in HI

January 28, 2019

Sent via email to:

Senator Rosalyn H. Baker, Chair  
Stanley Chang, Vice Chair  
Senate Committee on Commerce, Consumer Protection, and Health

RE: Support of S.B. No. 551 Relating to Condominiums

Dear Chair Baker and Vice Chair Chang:

The undersigned is an attorney representing over 100 condominium and community associations in the State of Hawaii and presents this testimony regarding S.B. No. 551.

The undersigned's support for this bill is based on the economic benefit it will provide the majority of condominium associations in the State of Hawaii. As a result of the recent decision by the Hawaii Intermediate Court of Appeals in Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch (Haw. App., 2018, CAAP-15-0000529 and CAAP-15-0000573), the majority of condominium associations in this state are now faced with the increased burden of being required to conduct judicial foreclosures to collect delinquent maintenance fees and assessments as opposed to utilization of the more efficient and economically viable non-judicial foreclosure process.

The difference in time and costs between these two procedures is dramatic: a non-judicial foreclosure can typically be completed in six (6) months for no more than \$5,000, while a judicial foreclosure often takes 18-24 months and costs more than \$20,000. More importantly, as the costs incurred to conduct either type of foreclosure are rarely recovered against the delinquent owner, it is the other unit owners in the condominium association who must bear these costs.

This bill will simply memorialize current practice in the State of Hawaii which was disrupted by the Sakal decision, and lessen the burden on the overwhelming majority of Hawaii condominium unit owners who timely pay their monthly maintenance fees and assessments.

Thank you for your consideration of this testimony in support of S.B. No. 551 which is supported by an overwhelming majority of the undersigned's condominium association clients.

Very truly yours,



Christopher Shea Goodwin



John A. Morris  
888 Mililani Street, 2<sup>nd</sup> Floor  
Honolulu, HI 96813-2819

January 28, 2019

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH  
REGARDING SENATE BILL 551

Hearing Date : THURSDAY, January 31, 2019  
Time : 9:30 a.m.  
Place : Conference Room 229

Senator Rosalyn H. Baker  
Chair, Committee On Commerce,  
Consumer Protection, and Health

Re: **Testimony In Support Of SB 551**

Dear Chair Baker and Members of the Committee:

I am writing to testify strongly in favor of SB 551, which will clarify the legislature's past intent and restore the ability of condominium associations to conduct nonjudicial foreclosures. My only suggested change is to add the same language to section 421J-10.5 (a), to ensure that non-condominium homeowner associations receive the same benefit.

Almost 20 years ago, in 1999, the legislature amended the law to clearly authorize condominiums to conduct nonjudicial foreclosures. In 2012, the legislature also amended Hawaii's foreclosure law (Chapter 667 HRS) to add a specific part to the law - part VI - for use only by condominium and other homeowner associations.

In 2018, despite that clear legislative intent, the Intermediate Court of Appeals seriously undermined the legislature's efforts in the case of Sakal v. Association of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 219 426 P.3d 443 (2018). In Sakal, the ICA determined that the legislature only intended to allow condominium and other homeowner associations to conduct nonjudicial foreclosures if a separate agreement or the governing documents of the associations included specific language authorizing nonjudicial foreclosure. The ICA determined that the legislature did not intend to allow associations to

conduct nonjudicial foreclosures without language in their documents specifically mentioning "power of sale" or "nonjudicial" foreclosure.

The ICA's conclusion misinterpreted the legislative intent. Back in 1999, the legislature actually added language to Chapter 514A that, by operation of law, deemed the right to conduct nonjudicial foreclosures to be incorporated into the bylaws of every condominium association in the state. Moreover, when the legislature enacted Chapter 514B, it included language in the legislative history indicating that authority was to continue on into chapter 514B.

Thus, in 1999, the legislature recognized that, after years of losses from delinquencies, nonjudicial foreclosure allowed associations to make "the best of a bad situation." The "bad situation" stemmed from the fact that Hawaii's "first in time, first in right" foreclosure law gave the first lien holder almost complete control over the foreclosure process. In almost all cases, the first lien holder was the mortgage company because its lien would attach to property when the property was first sold. In contrast, the association's assessment lien would usually only arise months or years later, when the delinquency occurred.

The "first in time . . ." principle meant that a lender could foreclose on its mortgage lien and wipe out the association's assessment lien, leaving the association to, at best, obtain a deficiency judgment against the owner. Under the same principle, if the association foreclosed, it could do nothing to affect the lender's first lien and would have to sell the property subject to the mortgage - i.e., the mortgage would remain as a lien on the property. This often put the association in the position of, for example, trying to auction a property worth \$400,000 that remained subject to a mortgage of \$500,000. Since the mortgage would remain on the property despite the association's foreclosure, there were often very few buyers.

Despite these disadvantages, associations could often foreclose, buy the property at the auction, and rent out the property while the lender conducted its own collection efforts. Since nonjudicial foreclosures are typically one third the cost of a judicial foreclosure and take one third the time, nonjudicial foreclosures provide a significant benefit to an association. They also allow the association to put cost-effective pressure on a delinquent owner to pay, which is the main purpose of the nonjudicial foreclosure process in the first place.

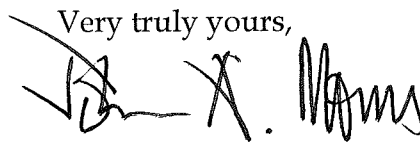
Under the ICA decision in Sakal, many associations have lost the benefit of the nonjudicial foreclosure process if they lack language in their declaration or bylaws specifically permitting nonjudicial foreclosures. In other words, an association's ability to conduct a nonjudicial foreclosure will not depend on legislative intent but on whether some

long-ago developer's attorney thought to add that language to the declaration or bylaws when the project was first created. Thus, an important part of the collection process the legislature created for associations will be totally dependent on the developer's attorney, not the legislature's intent.

Moreover, when the legislature passed part VI of the foreclosure law for associations, it did not forget the individual owners. For example, as part of the changes made in 2012, section 514B-146 (a) and 421J-10.5 (a) both allow associations to nonjudicially foreclose to collect maintenance fees and common expenses but prohibit associations from nonjudicially foreclosing only to collect fines, penalties, legal fees, or late fees. Similarly, under section 667-92, when an association begins a nonjudicial foreclosure, the association must give the owner sixty (60) days to cure the default before the association can proceed with the nonjudicial foreclosure. In addition, an association must accept a "reasonable payment plan", which is defined as a payment plan that will last no more than twelve (12) months. The notice of intent to begin the foreclosure must also include contact information for approved housing counselors and approved budget and credit counselors. (Of course, in 2018, the legislature also passed act 195 that provides for mediation of many disputes about assessments.)

In summary, SB 551: 1) confirms that, since 1999, the legislature intended to allow associations to conduct nonjudicial foreclosures and 2) changes the law to reaffirm that intent. Therefore, the bill should allow the legislature to once again ensure that associations have the nonjudicial foreclosure remedy to realize the benefits that the legislature intended to provide almost twenty (20) years ago. Therefore, I strongly support SB 551.

Thank you for the opportunity to testify. Please contact me at 599-7226 or at [jmorris@hawaiicondolaw.com](mailto:jmorris@hawaiicondolaw.com) if you have any questions.

Very truly yours,  
  
John A. Morris

JAM:alt

**SB-551**

Submitted on: 1/28/2019 6:01:28 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mary Martin	Individual	Support	No

Comments:

This Bill should be approved -- but not only prospectively. It should be amended to include retroactive application, as the premise of authorizing condominium associations to conduct nonjudicial foreclosures was contemplated in 1999, and made law when Act 236 was adopted and codified as HRS 514A-82(b)(13) in the 1999 Session Laws. It has, for 20 years, been relied upon by condominium associations. The ICA recently declined to recognize this fact in Sakal v. Hawaiian Monarch, turning to a convoluted analysis and interpretation of HRS 667, opening the door to reversals of non-judicial foreclosures. Indeed, at least 3 cases, decided subsequent to Sakal, have applied the ICA's analysis as of writing this testimony. Failing to make this bill retroactive is likely to result in untold numbers of lawsuits for wrongful foreclosure, due to the presumption that the Sakal decision applies retroactively unless there is substantial prejudice. This legislative body can avoid that prejudice by affecting the bill, with retroactive force.

**SB-551**

Submitted on: 1/29/2019 7:55:55 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Lysa Tracy	Individual	Support	No

Comments:

**SB-551**

Submitted on: 1/29/2019 8:42:41 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Harendra Panalal	Individual	Oppose	No

Comments:

Hon. Sen. Baker and Sen. Chang:

I **OPPOSE** the said SB551.

I have lived in Honolulu since 1970.

I am President of the following AOOU.

Mokuleia Surf (12 Units)

Hale-O-Kalani Towers (100 Units)

I am also a Director of Sunset Towers AOOU (80 Units)

I am owner of Unit 417 in Country Club Plaza, Salt Lake

NJF are liable to be abused by attorneys, management companies, BOD, et al.

Owners are not shown all docs under the pretext "attorney-client privilege".

I request complete transparency in all AOOU matters.

Mahalo

Harendra Panalal, MSE, PE, RME

off 792-0455, home 538-6202

harenp2009@hotmail.com

**SB-551**

Submitted on: 1/29/2019 8:53:56 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mary Moorhead	Individual	Support	No

Comments:

# WILIWILI VISTA

HONOLULU, HAWAII 96826

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

I am writing to support the bill you introduced to confirm that, long ago, the legislature intended to give condominiums and other homeowner associations the right to conduct nonjudicial foreclosures against delinquent owners, regardless of whether the associations have specific authority to do so in their governing documents or some kind of an agreement with the owners. From what we have read, the legislature intended all along to give associations the right to conduct nonjudicial foreclosures so associations could pursue delinquent owners as efficiently as possible. There was no intention to make that right dependent on whether the association's declaration or bylaw specifically permitted nonjudicial foreclosures.

We think it is important that the law on this issue be consistent for everyone. A recent decision of the Intermediate Court of Appeals results in some associations being able to conduct nonjudicial foreclosures while some others cannot. Under the court decision, the only difference is whether their documents specifically mention nonjudicial or power of sale foreclosure. If they do, the associations can proceed with nonjudicial foreclosures, if they don't, the associations cannot.

Very few if any associations have amended their governing documents to allow nonjudicial foreclosures because until that recent court decision, no one knew they had to. Instead, associations looked at the clear wording of the law allowing them to conduct nonjudicial foreclosures and assumed they had that right.

Now, however, under the court decision, the association's right of nonjudicial foreclosure is based on whether some long-ago attorney thought to include in an association's bylaws the words "nonjudicial" or "power of sale" foreclosure. Instead of relying on that principle, the bills you have introduced to correct this problem should be passed to put this issue back where it belongs, in the control of the legislature.

Therefore, we support bill 551

BOARD OF DIRECTORS OF WILIWILI VISTA



Phillip Kwok  
Secretary



# **CORONET**

HONOLULU, HAWAII 96814

January 23, 2019

Senator Rosalyn H. Baker  
Chair, Committee on Commerce  
Hawaii State Capitol, Room 230  
Honolulu, HI 96813

Dear Senator Baker,

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Therefore, we support bill 551

BOARD OF DIRECTORS OF CORONET



Dennis Dolim  
President

**SB-551**

Submitted on: 1/29/2019 12:08:38 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Nancy Manali-Leonardo	Individual	Oppose	No

Comments:

I am opposed to SB 551.

I do not represent any person but myself, a citizen and resident of Honolulu for nearly 40 years.

**SB-551**

Submitted on: 1/29/2019 12:46:30 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
DONALD C CHAIKIN, Esquire	Individual	Support	No

Comments:

On behalf of myself, this firm and the many Condo Associations and Homeowner Associations that we represent, we support the intent of SB551 along with HB76. Associations need the ability to conduct Non-Judicial Foreclosures as a way of collecting delinquent maintenance fees. Maintenance fees are necessary for the basic operations of all Associations. We would suggest that this bill be amended to ALSO INCLUDE changes to HRS 421J-10.5 so that Homeowner Associations are not left with the same confusion by the ICA. Thank you.

**SB-551**

Submitted on: 1/29/2019 12:00:13 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

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

Comments:

This matter has pretty much already been settled by a class action federal lawsuit. Associations should use the Civil Court system. Too much abuse in 'Condo Land'. Frivolous fines, absurd attorney fees, bullying. Do it 'by the number'. Go to regular Court.

**SB-551**

Submitted on: 1/29/2019 2:26:18 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Laurie Hirohata	Individual	Oppose	No

Comments:

**TESTIMONY IN OPPOSITION TO SB551**

If the Legislature saw the necessity to enacted HRS,CH521, Landlord Tenant Code, to protect and provide due process rights (proper notification & court proceedings) to renters from being unlawfully evicted by landlords; why is the Legislature now proposing to remove the protection and due process rights of owners from unlawful eviction in the proposed SB551?

Most AOA's have 501-c-4 non-profit corporation's tax exempt status. Most AOA's are managed by for-profit Managing Agents & affiliate attorneys.

What is the "true" purpose of SB551? What added benefit will SB551 provide to the owners and general public vs. the for-profit Managing Agents & affiliate attorneys?

How will SB551 better protect the rights of the owners? Does SB551 "even the playing field" for owners or is the "true" intent to make it easier for certain "players" to reap more profits from the unsuspecting owners?

On another note, has SB551 been sent to the AG Office and the State Tax Office for review and a legal opinion?

AOA's are 501-c-4 non-profit corporations. There are IRS codes that 501-c-4 non-profit corporations have to maintain to continue their "non-profit" corporation status.

Does the State have the authority to impose "blanket" amendments to a 501-c-4 corporation's bylaws? If SB551 is enacted, what impact will it have on the AOA's non-profit corporation status?

What rights does a non-profit corporation have if it opposes the new amendment and wants to "waive" the inclusion of the new amendment to its bylaws?

Finally, I personally object to the fact that the State wants to intervene and amend a non-profit corporation's bylaws because it "opens the doors" to a whole new world of potential issues. For example, how much liability will the State be held accountable for if

the AOA is sued trying to enforce a statutory amendment implemented by the Legislature to the non profit corporation's bylaws?

Thank you very much for your time and attention to this matter.

Respectfully Submitted By:

Laurie Hirohata, MSW, MEd

**SB-551**

Submitted on: 1/29/2019 3:30:35 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Penelope Burniske	Individual	Oppose	No

Comments:

ABSOLUTELY NOT!!!

**SB-551**

Submitted on: 1/29/2019 3:47:47 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Stuart Mumm	Individual	Support	No

Comments:

It is important to retain the option of non judicial foreclosure for associations such as ours.

Please pass SB551

Stuart Mumm, President Honua Kai Condominium Association



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

January 29, 2019

Senator Rosalyn Baker, Chair  
Stanley Chang, Vice Chair  
Committee on Commerce, Consumer Protection, and Health  
Committee Members Jarrett Keohokalole, Clarence Nishihara, Russell Ruderman, Laura Thielen, Kurt Fevella

I am a concerned condominium owner and oppose SB551. This amendment protects the Association's from legal responsibility to the owners who lost their homes to non judicial foreclosure. (Reference CivilBeat: An article by Ian Lind: Why Condo Associations Are Sweating After A Judge's Ruling) While this would be an advantage for the Associations to right a wrong thru legislation is it morally right to take a family's home without due process?

The attorneys for the Associations were forewarned in an article written by Milton Motooka, [www.myhawaii.com](http://www.myhawaii.com), Legal Update, April 2011 newsletter. Lawsuit Challenges Legality of Association Non-Judicial Foreclosure. (Motooka's newsletter attached for your reference) In this newsletter, Motooka writes: Our firm experienced the loss of some long-standing clients because "Milton's office doesn't do non-judicial." In fact, our firm does pursue non-judicial fore-closures but only following what we strongly believe is the letter and the spirit of the law. This means there has to be effective notice and the owner must execute the conveyance document as required by statute. This is possible when a delinquent owner is willing to sign the conveyance document transfer-ring title to his unit in exchange for the Association not seeking a deficiency judgment against the owner.

It is my opinion, the attorneys and/or property managers who advised the Association Board of Directors should be equally held responsible based on the business judgment rule. Volunteer directors act on the advice of their property managers and their attorneys. Further, because HRS 514B does not require directors to be educated of their responsibilities, many directors do not know if they are acting in violation of HRS 514B or of their own governing documents.

Thank-you,  
Lourdes Scheibert  
Condominium Owner

# Legal Update

Motooka Yamamoto & Revere

Attorneys at Law

## Overview Message—Milton Motooka



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

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

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

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

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

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Law Suit Challenges Legality of Association Non-Judicial Foreclosures

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On Line Resources for Homeowners and Board Members

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# Lawsuit Challenges Legality of Association Non-Judicial Foreclosure

By Milton M. Motooka, Esq.

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

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

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

## **Background**

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

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



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

Following are significant excerpts from the bank’s complaint:

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

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

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

## **Implications and Potential Consequences**

Hawaii Revised Statutes (“HRS”) Chapter 667 governs

*(Continued on page 3)*

(Continued from page 2)

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

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

Use of power of sale foreclosure in certain non-mortgage

situations. A power of sale foreclosure under this part may be used in certain **non-mortgage situations** where a law or a written document contains, authorizes, permits or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure. These laws or written documents are limited to those involving time share plans, **condominium property regimes**, and agreements of sale. (emphasis added)

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

Some attorneys have sought to de-

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

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

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association in like manner as a mortgage of real property.

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

**Recommendations**

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



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

(Continued on page 4)

## CAI On Line Resources for Homeowners, Board Members

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

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

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

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

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*(Continued from page 3)*

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

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

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

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

## On Line Resources— Government and Other Websites

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

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

[Making home affordable](#)

[Home foreclosure resources](#)

[Fair housing laws](#)

[Fair lending practices](#)

[Home improvements](#)

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

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

[Disaster information](#)

[Tax information for homeowners](#)

[Buying and selling a home](#)

[Green ideas for homeowners and communities](#)

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

[Home Safety Council](#)

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

**SB-551**

Submitted on: 1/29/2019 6:36:03 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Robert Alcorn	Individual	Support	No

Comments:

I am very much in support of SB551. The recent Intermediate Court of Appeals decision of Sakal v. AOA Hawaiian Monarch is tragically unfair to most condominium associations and planned community associations in the State of Hawaii. These associations are all being put at real risk of liability for non-judicial foreclosures conducted in compliance with Hawaii Revised Statutes 667-91 through 104. The associations did not have any inclination that they would not be allowed to follow a procedure specifically designed for use by the associations.

This decision has many consequences that the Intermediate Court of Appeals has not thought through, and which the legislature likely never intended. If associations are not allowed for foreclose non-judicially, there will be a very large increase in the number of judicial foreclosure proceedings filed in the Circuit Court, thereby unnecessarily clogging the courts' dockets. In addition, these judicial proceedings will be much slower for associations, who will now be forced to compete with lenders to complete their judicial foreclosures faster in order to collect their delinquency before the lenders can complete a foreclosure and wipe out the association's lien, as lenders almost universally have lien priority superior to that of an association. Judicial foreclosures are also much more expensive for associations (meaning that the paying owners meeting all of their responsibilities will most likely have to pay the legal fees to foreclose on the owners who are not paying) to complete these judicial foreclosures, which can often run up to four times more expensive than non-judicial foreclosure proceedings.

Another unintended consequence of the Sakal v. AOA Hawaiian Monarch decision is that if associations are no longer allowed to use non-judicial foreclosure proceedings, they will no longer be able to use the provision of HRS 667-92(f)(3). This provision is a very important tool in collecting association delinquencies and most often reaches a result that is far better for not only the associations, but for the delinquent owners as well. When an association is able to utilize HRS 667-92(f)(3), it may take possession and lease an abandoned unit, and apply all rents received to the delinquent owner's delinquency as if paid by the owner directly. By utilizing this procedure, (1) delinquent owners are not foreclosed upon, as they remain the legal owner of the unit throughout the association's possession of the unit, (2) properties do not sit vacant and instead remain productive, which also has a positive impact on the community and it's property values, and (3) often, when the lender does eventually complete its foreclosure, the association has been able to collect enough rent to not only recover its entire



delinquency, but it also may have collected enough money so that the delinquent owner's other creditors or the delinquent owner themselves may be entitled to collect some of that additional rent. Without being able to file a Notice of Default and Intention to Foreclose, which is a purely non-judicial procedure, the associations are not able to use this valuable tool.

The Sakal decision is far reaching and potentially disastrous to many, if not most, condominium associations and planned community associations in the State of Hawaii, who will likely be faced with numerous legal challenges to foreclosures that were otherwise conducted in strict compliance with procedures specifically authorized by the legislature. These associations had no indication that any non-judicial foreclosure proceeding could possibly be reversed years later even though they relied upon a procedure specifically provided for associations.

Please pass SB551 and make it clear that the legislature always intended that this non-judicial foreclosure procedure be available all associations, not just to associations who use the magic "power of sale" language in their governing documents.

**SB-551**

Submitted on: 1/29/2019 5:19:55 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
A Denys	Individual	Support	No

Comments:

I support SB551 as written. Mahalo.

warmest aloha

AI Denys



**SB-551**

Submitted on: 1/29/2019 5:16:58 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Paul A. Ireland Koftinow	Individual	Support	No

Comments:

Dear Senator Baker, Chair, Senator Chang, Vice Chair, and Members of the Committee:

I strongly support the passage of S.B. 551. In *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawai'i 219, 426 P.3d 443 (App. 2018), the Hawai'i Intermediate Court of Appeals ("ICA") 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. The Sakal decision came as a great surprise to condominium associations who have for years relied, in good faith, upon the law and its intended meaning.

S.B. 551 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws. This clarification is important as the issue of legislative intent will undoubtedly impact future court decisions.

For this reason and the reasons stated herein, I strongly support S.B. 551.

Respectfully submitted,

Paul A. Ireland Koftinow

**SB-551**

Submitted on: 1/29/2019 5:04:48 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Linda Lee Kolstad	Individual	Support	No

Comments:

RE: S.B. 551

Dear Senator Baker, Chair, Senator Stanley Chang, Vice Chair, and Members of the Committee:

I strongly support the passage of S.B. 551. In *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawai'i 219, 426 P.3d 443 (App. 2018), the Hawai'i Intermediate Court of Appeals ("ICA") 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. The *Sakal* decision came as a great surprise to condominium associations who have for years relied, in good faith, upon the law and its intended meaning.

1. 551 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws. This clarification is important as the issue of legislative intent will undoubtedly impact future court decisions.

For this reason and the reasons stated herein, I strongly support S.B. 551.

Respectfully submitted,

Linda Lee Kolstad

**SB-551**

Submitted on: 1/29/2019 5:03:23 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Steve Glanstein	Individual	Support	No

Comments:

I support S.B. 551. Condominium associations have relied upon non-judicial foreclosures for years. Without non-judicial foreclosures the extra costs will be imposed on the **non-defaulting owners**. A recent court ruling poses an unfair and onerous burden on our Hawaii condominium associations and their owners.

S.B. 551 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures. Please pass S.B. 551.

**SB-551**

Submitted on: 1/29/2019 4:52:14 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Beverly FeBenito	Individual	Support	No

Comments:

RE: S.B. 551

Dear Senator Baker, Chair, Senator Stanley Chang, Vice Chair, and Members of the Committee:

I strongly support the passage of S.B. 551. In *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawai'i 219, 426 P.3d 443 (App. 2018), the Hawai'i Intermediate Court of Appeals ("ICA") 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. The *Sakal* decision came as a great surprise to condominium associations who have for years relied, in good faith, upon the law and its intended meaning.

1. 551 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws. This clarification is important as the issue of legislative intent will undoubtedly impact future court decisions.

For this reason and the reasons stated herein, I strongly support S.B. 551.

Respectfully submitted,

Beverly FeBenito

**SB-551**

Submitted on: 1/29/2019 4:17:02 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Anne Anderson	Individual	Support	No

Comments:

Dear Senator Baker, Chair, Senator Stanley Chang, Vice Chair, and Members of the Committee:

I am an attorney with Anderson Lahne & Fujisaki LLP A Limited Liability Law Partnership. My law firm represents a number of condominium associations.

I strongly support the passage of S.B. 551. In *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawai'i 219, 426 P.3d 443 (App. 2018), the Hawai'i Intermediate Court of Appeals ("ICA") 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. The *Sakal* decision came as a great surprise to condominium associations who have for years relied, in good faith, upon the law and its intended meaning.

S.B. 551 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws. This clarification is important as the issue of legislative intent will undoubtedly impact future court decisions.

For this reason and the reasons stated herein, I strongly support S.B. 551.

Respectfully submitted,

M. Anne Anderson

**SB-551**

Submitted on: 1/30/2019 9:25:29 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
M D Schochet	Individual	Oppose	No

Comments:



**LATE**

RE: S.B. 551

Dear Senator Baker, Chair, Senator Stanley Chang, Vice Chair, and Members of the Committee:

I strongly support the passage of S.B. 551.

The Intermediate Court of Appeals (“ICA”) interpreted Condominium Property Law to impose an unreasonable requirement into condominium associations’ ability to enforce their statutory liens. In Sakal v. Ass’n of Apartment Owners of Hawaiian Monarch, 143 Hawai’i 219, 426 P.3d 443 (App. 2018), the ICA held that Chapter 514, HRS does not empower associations to conduct nonjudicial or power of sale foreclosures unless the authority is expressly included in the association’s project documents. The Sakal decision casts a shadow over nonjudicial foreclosure sales which were properly conducted under Part VI, Chapter 667, Hawaii Revised Statutes, and burdens associations to amend project documents to include a power that has been statutorily permitted for years.

S.B. 551 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures, whether or not the governing documents include an express provision declaring the remedy given by the statute

For this reason and the reasons stated herein, I strongly support S.B. 551.

Respectfully submitted,

**SB-551**

Submitted on: 1/30/2019 1:21:23 PM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Kate Paine	Individual	Oppose	No

Comments:

SB551 Legislators' job is to protect citizens who have little voice in their home maintenance business due to "self-governance" overuse by an industry that includes lobbyists from management companies. Legislators are obligated to do what's right for the constituents' health and welfare. As lawyers most you are, is there not a conflict of interest if you do not hold legal firms liable for paid for "expert advice" to condo boards on foreclosures? Fully 85% of HOAs are not financially sound nor funded for large maintenance needs. To know this and vote in favor of this bill is another coffin nail in housing health. 1/30/19 1:20pm

**SB-551**

Submitted on: 1/31/2019 8:56:35 AM

Testimony for CPH on 1/31/2019 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mary Freeman	Individual	Support	No

Comments:

Dear Senator Baker, Chair, Senator Stanley Chang, Vice Chair, and Members of the Committee:

I strongly support the passage of S.B. 551. In *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawai'i 219, 426 P.3d 443 (App. 2018), the Hawai'i Intermediate Court of Appeals ("ICA") 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. Condominium associations have for years relied, in good faith, upon the law and its intended meaning, thus the Sakai decision was not expected nor understood.

S.B. 551 clarifies the right of condominium associations to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws. This clarification is important as the issue of legislative intent will undoubtedly impact future court decisions.

For this reason and the reasons stated herein, I strongly support S.B. 551.

Respectfully submitted,

Mary S. Freeman

R. Laree McGuire  
841 Bishop Street, Suite 1500  
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January 31, 2019

VIA WEB TRANSMITTAL

Hearing Date: Friday, January 31, 2019

Time: 9:30 a.m.

Place: Conference Room 229

Committee on Consumer Protection & Commerce  
Senate, the 30<sup>th</sup> Legislature  
Regular Session of 2019

Re: Community Associations Institute's **Testimony supporting SB 551**

Dear Chair Baker, Vice Chair Chang 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 support of SB 551. While many persons and representatives have submitted testimony in favor of this Bill, I am submitting this testimony for the specific purpose of respectfully requesting 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 a recent decision issued by the Hawaii Intermediate Court of Appeals (“ICA”), the ICA opined 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). Ultimately, 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 prospectively and not retrospectively. 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,

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to the detriment and damage of the condominium and homeowner association community.

Based on the foregoing, I respectfully submit that HB 551 should move forward, should pass, and should be amended to reflect retrospective application. Thank you for your time and consideration.

Sincerely yours,



R Laree McGuire