
A BILL FOR AN ACT

RELATING TO NONJUDICIAL FORECLOSURES.

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

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

14 These restrictions include:

15 (1) Prohibiting the use of nonjudicial foreclosure to
16 collect fines, penalties, legal fees, or late fees;



1 (2) Requiring associations to give an owner sixty days to
2 cure a default before proceeding with the nonjudicial
3 foreclosure and to accept reasonable payment plans of
4 up to twelve months; and

5 (3) Requiring associations to provide owners with contact
6 information for approved housing counselors and
7 approved budget and credit counselors.

8 The Intermediate Court of Appeals in Sakal v. Association
9 of Apartment Owners of Hawaiian Monarch, 143 Haw. 219, 426 P.3d
10 443 (2018), held that the legislature intended that associations
11 can only conduct nonjudicial foreclosures if they have specific
12 authority to conduct nonjudicial foreclosures in their
13 declaration or bylaws or in an agreement with the owner being
14 foreclosed upon.

15 The legislative history indicates this was not the intent
16 of the legislature in 2012, nor in legislatures that have made
17 subsequent amendments. Therefore, this Act confirms the
18 legislative intent that condominium and homeowner associations
19 should be able to use nonjudicial foreclosure to collect
20 delinquencies without having specific authority to conduct



1 nonjudicial foreclosures in an agreement with a delinquent owner
2 or in the association's declaration or bylaws.

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

5 "(a) All sums assessed by the association, but unpaid for
6 the share of the assessments chargeable to any unit, shall
7 constitute a lien on the unit. The priority of the
8 association's lien shall, except as otherwise provided by law,
9 be as provided in the association documents or, if no priority
10 is provided in the association documents, by the recordation
11 date of the liens; provided that any amendment to the
12 association documents that governs the priority of liens on the
13 unit shall not provide that an association lien shall have
14 priority over a mortgage lien that is recorded before the
15 amendment is recorded. A lien recorded by an association for
16 unpaid assessments shall expire six years from the date of
17 recordation unless proceedings to enforce the lien are
18 instituted prior to the expiration of the lien; provided that
19 the expiration of a recorded lien shall in no way affect the
20 association's automatic lien that arises pursuant to this
21 subsection or the association documents. Any proceedings to



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

10 The lien of the association may be foreclosed by action or
11 by nonjudicial or power of sale foreclosure procedures set forth
12 in chapter 667, by the managing agent or board, acting on behalf
13 of the association and in the name of the association; provided
14 that no association may exercise the nonjudicial or power of
15 sale remedies provided in chapter 667 to foreclose a lien
16 against any unit that arises solely from fines, penalties, legal
17 fees, or late fees, and the foreclosure of any such lien shall
18 be filed in court pursuant to part IA of chapter 667. All
19 associations shall be deemed to have a power of sale for the
20 purposes of enforcement of their claim of lien under part VI of
21 chapter 667. In any association foreclosure, the unit owner



1 shall be required to pay a reasonable rental for the unit, if so
2 provided in the association documents or the law, and the
3 plaintiff in the foreclosure shall be entitled to the
4 appointment of a receiver to collect the rental owed by the unit
5 owner or any tenant of the unit. If the association is the
6 plaintiff, it may request that its managing agent be appointed
7 as receiver to collect the rental from the tenant. The managing
8 agent or board, acting on behalf of the association and in the
9 name of the association, may bid on the unit at foreclosure sale
10 and acquire and hold, lease, mortgage, and convey the unit
11 thereafter as the board deems reasonable. Action to recover a
12 money judgment for unpaid assessments shall be maintainable
13 without foreclosing or waiving the lien securing the unpaid
14 assessments owed.

15 In the case of a voluntary conveyance, the grantee of a
16 unit shall be jointly and severally liable with the grantor for
17 all unpaid assessments against the latter for the grantor's
18 share of the common expenses up to the time of the grant or
19 conveyance, without prejudice to the grantee's right to recover
20 from the grantor the amounts paid by the grantee. Any such
21 grantor or grantee is entitled to a statement from the board,



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

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

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

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

18 and

19 (2) Except as provided in subsection (j), all sums unpaid
20 on any mortgage of record that was recorded prior to
21 the recordation of a notice of a lien by the



1 association, and costs and expenses including
2 attorneys' fees provided in such mortgages;
3 provided that a lien recorded by an association for unpaid
4 assessments shall expire six years from the date of recordation
5 unless proceedings to enforce the lien are instituted prior to
6 the expiration of the lien; provided further that the expiration
7 of a recorded lien shall in no way affect the association's
8 automatic lien that arises pursuant to this subsection or the
9 declaration or bylaws. Any proceedings to enforce an
10 association's lien for any assessment shall be instituted within
11 six years after the assessment became due; provided that if the
12 owner of a unit subject to a lien of the association files a
13 petition for relief under the United States Bankruptcy Code (11
14 U.S.C. §101 et seq.), the period of time for instituting
15 proceedings to enforce the association's lien shall be tolled
16 until thirty days after the automatic stay of proceedings under
17 section 362 of the United States Bankruptcy Code (11 U.S.C.
18 §362) is lifted.

19 The lien of the association may be foreclosed by action or
20 by nonjudicial or power of sale foreclosure procedures set forth
21 in chapter 667, by the managing agent or board, acting on behalf



1 of the association and in the name of the association; provided
2 that no association may exercise the nonjudicial or power of
3 sale remedies provided in chapter 667 to foreclose a lien
4 against any unit that arises solely from fines, penalties, legal
5 fees, or late fees, and the foreclosure of any such lien shall
6 be filed in court pursuant to part IA of chapter 667. All
7 associations shall be deemed to have a power of sale for the
8 purposes of enforcement of their claim of lien under part VI of
9 chapter 667.

10 In any such foreclosure, the unit owner shall be required
11 to pay a reasonable rental for the unit, if so provided in the
12 bylaws or the law, and the plaintiff in the foreclosure shall be
13 entitled to the appointment of a receiver to collect the rental
14 owed by the unit owner or any tenant of the unit. If the
15 association is the plaintiff, it may request that its managing
16 agent be appointed as receiver to collect the rent from the
17 tenant. The managing agent or board, acting on behalf of the
18 association and in the name of the association, unless
19 prohibited by the declaration, may bid on the unit at
20 foreclosure sale, and acquire and hold, lease, mortgage, and
21 convey the unit. Action to recover a money judgment for unpaid



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1 common expenses shall be maintainable without foreclosing or
2 waiving the lien securing the unpaid common expenses owed."

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

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

8 (1) The mortgage contains, authorizes, permits, or
9 provides for a power of sale, a power of sale
10 foreclosure, a power of sale remedy, or a nonjudicial
11 foreclosure [-]; or

12 (2) For the purposes of part VI, an association enforces
13 its claim of an association lien, regardless of
14 whether the association documents provide for a power
15 of sale, a power of sale foreclosure, a power of sale
16 remedy, or a nonjudicial foreclosure."

17 SECTION 5. Statutory material to be repealed is bracketed
18 and stricken. New statutory material is underscored.

19 SECTION 6. This Act shall take effect on July 1, 2019;
20 provided that the amendments made to section 514B-146(a), Hawaii
21 Revised Statutes, by section 3 of this Act shall not be repealed



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1 when that section is reenacted on June 30, 2020, pursuant to
2 section 6 of Act 195, Session Laws of Hawaii 2018.

3

INTRODUCED BY:

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JAN 17 2019



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Report Title:

Nonjudicial Foreclosure; Power of Sale; Condominium Associations; Planned Community Associations

Description:

Provides an explicit grant of power of sale to condominium associations and planned community associations for the purposes of enforcing association liens under the power of sale procedures in state foreclosure law.

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

