HB-76-HD-1
Submitted on: 2/20/2019 2:36:05 PM
Testimony for JUD on 2/22/2019 2:05:00 PM

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

Comments:

HB-76-HD-1
Submitted on: 2/20/2019 9:33:24 PM
Testimony for JUD on 2/22/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower for Kokua Council	Kokua Council	Oppose	Yes

Comments:

HAWAII CHAPTER
community
ASSOCIATIONS INSTITUTE

P.O. Box 976
Honolulu, Hawaii 96808

February 20, 2019

Representative Chris Lee, Chair
Representative Joy A. San Buenaventura, Vice Chair
Committee on Judiciary
415 South Beretania Street
Honolulu, Hawaii 96813

Re: HB 76 HD1 Support

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

This testimony is submitted on behalf of the Community Associations Institute ("CAI"). CAI supports HB 76 HD1.

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) (https://www.courts.state.hi.us/wp-content/uploads/2018/07/CAAP-15-0000529.pdf). 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 HB 76 HD1 will protect consumers whose associations have relied upon that understanding. HB 76 HD1 will supply the clarity that the ICA perceives to be lacking in current law.

The Sakal decision provides that the ICA:

> will not infer that such significant powers have been granted over an entire class of property **in the absence of a clear legislative act** or, with respect to a particular association or property, by express authorization in a contract entered into by, or otherwise binding on, the affected parties.

(Bold added) HB 76 HD1 will address the perceived deficiency. Further to this point, the ICA wrote:

> Finally, Sakal correctly notes that other jurisdictions that have granted a power of sale statutorily have done so explicitly; and, Sakal argues that, had the Hawai'i Legislature intended to grant such powers, it would have specifically said as much.

Again, the issue is the ICA's interest in an *explicit* statement of legislative intent. The ICA did not suggest that the legislature lacked power to act.

Legislative action is ripe because the Hawaii Supreme Court denied *discretionary* review of the ICA's decision with respect to the power of sale issue. The substance of the order rejecting certiorari reads (in total) as follows:

> Petitioner/Defendant-Appellee Association of Apartment Owners of Hawaiian Monarch's Application for Writ of Certiorari, filed on November 30, 2018, is hereby rejected.

The Hawaii Supreme Court gave no reason for declining review and no reason can be inferred. Thus, the expressed basis upon which the power to use non-judicial foreclosure procedures to protect associations from owners who default upon their obligations to their co-owners, is simply that the legislature is obliged to provide clarity. HB 76 HD1 will do that.

Community Associations Institute,

Philip Nerney

For its Legislative Action Committee

HB-76-HD-1
Submitted on: 2/21/2019 10:13:37 AM
Testimony for JUD on 2/22/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower	Hui `Oia`i`o	Oppose	Yes

Comments:

HB-76-HD-1
Submitted on: 2/21/2019 10:50:07 AM
Testimony for JUD on 2/22/2019 2:05:00 PM

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

Comments:

Due to recent court rulings on the ambiguity of the legislature's intent on the use of power of sale by condominium associations, condominium associations face the threat of lawsuits that will be adverse to all the owners. This Bill is critical to correct the potential problem. WE SUPPORT.

HSBA
Hawaii State Bar Association

Collection Law Section

LATE

Reply to: **STEVEN GUTTMAN, CHAIR**
220 SOUTH KING STREET SUITE 1900
HONOLULU, HAWAII 96813
TELEPHONE: (808) 536-1900
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HOUSE COMMITTEE ON JUDICIARY
REGARDING HOUSE BILL 76, HOUSE DRAFT 1

Hearing Date: Friday, February 22, 2019
Time : 2:05 p.m.
Place : Conference Room 325

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

The Collection Section of the Hawaii State Bar Association strongly supports HB76 HD1. This testimony reflects the opinions of the Collection Section only and is not representative of the Hawaii State Bar Association.

Section 1 of the bill accurately reflects the history of association non-judicial foreclosures in Hawaii. It is necessary as a result of the ruling in Sakal v. Association of Apartments Owners of Hawaiian Monarch to have the Legislature clarify its original intention in 1999, when it authorized non-judicial foreclosure for all condominium associations in the State and in 2012, by adopting Part VI of Chapter 667 which created a specific process to be followed in association foreclosures. HD 76 HD 1 does not propose to retroactively apply a new law but rather to clarify that it was always the intention of the Legislature to allow all condominium associations, and later, other planned communities, to be able to foreclose through the non-judicial process, regardless whether their governing documents specifically provided for use of non-judicial foreclosure.

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

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

Part VI built in protections for homeowners facing non-judicial foreclosure, requiring foreclosing associations to provide time for the owners to either pay in full or arrange for a reasonable payment plan with the association. Notices are provided to all interested parties and the owners are kept informed of the progress through required notices.

The non-judicial foreclosure process is less expensive, mostly because commissioner's fees and costs are an expense of judicial foreclosure and therefore, is beneficial to homeowners who will lose their property because they are unable to afford the mortgage and assessments to be foreclosed through the less expensive process. The cost of either the judicial or non-judicial foreclosure in attorneys' fees and costs and commissioner's fees and costs are included in the amounts owed by the homeowners, and may be included in a deficiency judgment sought by the foreclosing mortgagee or association.

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

For the foregoing reasons, the Collection Section urges the Committee to pass HB 76 HD1.

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

Sincerely,

Steven Guttman

STEVEN GUTTMAN,
Chairman
Collection Law Section

cc: Pat Shimizu, Director
Hawaii State Bar Association

TESTIMONY IN FAVOR OF HB 76 HD1.

Chair Lee and Members of the Committee:

My name is John Morris and I urge you to pass HB 76 HD1. The bill confirms that the recent decision of the Intermediate Court of Appeals ("ICA") in Sakal v. Association of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 219, 426 P.3d 443 (2018) MISinterpreted the legislative intent in allowing associations to conduct nonjudicial foreclosures.

The ICA in Sakal incorrectly concludes that the legislature only intended to allow associations to conduct nonjudicial foreclosures if the associations' declaration or bylaws specifically permit the association to do so. In doing so, the Sakal decision undermines the efforts of the legislature since 1999 to give associations an effective foreclosure remedy against delinquent owners. Essentially, the ICA held that the right of an association to conduct nonjudicial foreclosures depended not on the intent of the legislature but on the actions of a long-ago developer's attorney, when he drafted the association's governing documents!

1. **This bill is not "retroactive legislation."** Instead, it merely seeks to re-affirm the legislative intent that was expressed in 1999, almost 20 years ago. At that time, the legislature recognized that, after years of losses from delinquencies, nonjudicial foreclosure helped associations make the best of a bad situation.

During the 1990's, the courts were clogged with judicial foreclosures, so lender judicial foreclosures were taking 12 to 18 months, sometimes longer (which, in turn, meant that it often took 18 months to 2 years before a new paying owner took possession of the apartment and actually began paying association maintenance fees). Hawaii's "first in time, first in right" foreclosure law also meant that if associations foreclosed judicially, they spent just as much time and money as a lender for a more questionable result.

More specifically, the "first in time . . ." principle meant that if the association foreclosed, it could do nothing to affect the lender's first mortgage lien and would have to sell the property subject to the mortgage – i.e., the mortgage would remain as a lien on the property after the association's foreclosure sale. Falling property values 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 sale, there were often very few buyers.

Despite these disadvantages, associations could sometimes foreclose, buy the property at the auction, and rent out the property while the lender conducted its own collection

efforts. Since nonjudicial foreclosures typically were one third the cost and took one third the time of a judicial foreclosure, the right to conduct a nonjudicial foreclosures provided a significant benefit to an association. The nonjudicial process also allowed 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.

2. **This bill balances the interests of the delinquent owner and the paying owners**. Some people characterize nonjudicial foreclosures as unfair to delinquent owners while forgetting the adverse impact of those delinquencies on the owners who are paying their maintenance fees. The Hawaii legislature recognized in 1999 that prolonging the collection process against delinquent owners severely impacted an association's financial viability and that of its members. While many people often focus on the owner being foreclosed, they lose sight of the fact that if one owner is not paying, all of the other owners have to make up the difference, so the association can continue to function. If too many owners stop paying, the increase in maintenance fees to cover their delinquencies can start overwhelming the ability of the remaining owners to pay, leading to financial problems for the association and those owners.

In recognition of the need to balance the interests of the delinquent owners with the non-delinquent owners, in 2012, the legislature amended Hawaii's foreclosure law to establish a new nonjudicial foreclosure process – "part VI" – solely for condominiums and other types of homeowner associations. In doing so, the legislature did not ignore the difficulties faced by delinquent owners.

Instead, as part of the changes made in 2012, the legislature:

- Prohibit associations from nonjudicially foreclosing only to collect fines, penalties, legal fees, or late fees.

- Require that, after starting a nonjudicial foreclosure, the association must give the owner sixty (60) days to cure the default before proceeding with the nonjudicial foreclosure. Under part VI, the notice of intent to begin the nonjudicial foreclosure must also include contact information for owners about approved housing counselors and approved budget and credit counselors

- Require associations to accept a "reasonable payment plan" – defined as a payment plan that can last up to twelve (12) months – from the owner.

In summary, HB 76 HD1 recognizes that, beginning in 1999, the legislature carefully and consciously gave associations the right to conduct nonjudicial foreclosures even if they did not have specific authority in the declaration and bylaws or a separate agreement with an owner. The legislature also balanced the right of associations to conduct nonjudicial foreclosures by imposing specific limitations to protect the rights of

delinquent owners.

The legislature's intent should be recognized and re-affirmed. For those reasons, I strongly support HB 76 HD1.

In addition, HB 76 SD1 is more comprehensive than its Senate counterpart, SB 551. First the wording of HB 76 HD1confirms for not just condominiums but other types of homeowner associations the right to conduct nonjudicial foreclosures. HB 76 HD1 also amends the definition of "power of sale foreclosure" (i.e., nonjudicial foreclosure) in section 667-1 -- the definition that was the source of the misinterpretation by the ICA in Sakal. Those additional provisions would make HB 76 HD1 a more comprehensive bill.

John Morris

HB-76-HD-1
Submitted on: 2/20/2019 9:32:05 PM
Testimony for JUD on 2/22/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower	Individual	Oppose	Yes

Comments:

I am opposed to this measure because the nonjudicial foreclosure process is patently unfair to condo owners on several levels.

The industry's claim that judicial foreclosure proceedings are too costly for associations to bear, is just another attempt to perpetuate their self governance model which would deny condo owners the right to due process through our courts that should guarantee Americans proper representation of their claims or defenses against management actions.

The industry's favored laissez-faire, or hands off by our court system, is an excuse to rush owners through foreclosure for purposes like obscuring the wrongful unlimited legal charges that alone have caused some owners to lose their properties. Through nonjudicial foreclosure, other iniquities like improper owner notification of foreclosure intent can also be effectively glossed over. Industry insiders know very well that without their filing foreclosures through the courts, owners themselves would have to initiate lawsuits to adequately fight the foreclosures - a prohibitively costly expense for many, if not most homeowners. Yet, when wrongful foreclosure actions escape scrutiny out of court proceedings, owners do not have an adequate means of defending their efforts to maintain home ownership.

Victimized owners include those who have consistently maintained good common element dues payment records, but who are faced with sudden drastic increases in their maintenance fees that cause them to be in default of these common element dues. In those circumstances, not the owners, but the individuals in management, including boards need to be held accountable for their poor planning, lack of farsightedness, and failure to properly maintain common element functions in a timely manner.

In addition to the above circumstances, the targeting of certain owners for retaliation and selective enforcement, including falsely accusing, and imposing fines on them for violations of codes, covenants and restrictions, is a major cause of owner debt and property loss. These should be criminal offenses, yet are usually hidden by management through the nonjudicial foreclosure process.

Please see through this injustice advocated by the condo industry, and protect condo owners, as the statutes should, by upholding the judicial foreclosure requirement.

Marcia Kimura

House Judiciary Committee Hearing
Friday, 2-22-19, 2:05 pm, RM 325

Chair Rep. Lee, V. Chair San Buenaventura & JUD Committee Members:

I am very opposed to the passage of HB76, HD1 because the Non-judicial Foreclosure (NJF) process has been misused against owners who do not have the means to fight back! I have been assisting elderly and immigrant owners for the past 6 years and have encountered a number of cases where the NJF process stemmed from a disputed fine or fee (which is supposedly illegal). The amount in disputed ballooned up to about $10,000, of which the biggest amount owed was for (unnecessary) legal fees. The owners were forced to pay for the AOAO's legal fees because it was added to the owner's maintenance fees and the legal fees DID NOT BENEFIT THE OWNER in anyway, because the attorney represented the AOAO Board and not the owner.

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

Many of the elderly victims have lived in their homes for over 20-30 years and foreclosed on because of disputed fees/fines; and not because of delinquent mortgage payments, etc.
In fact, most of them owned their property free-and-clear because they had paid up their mortgages years ago.
The issue I found when I helped to investigate the disputed fine/fee, were irregularities in the original fines & fees and very questionable and/or unethical business practices that could be construed as "illegal."

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

If you truly believe that HB76, HD1 will be used correctly and "legally" then I strongly implore that if you must pass HB76, HD1, then I recommend that you add language that will extend the life of ACT 195 permanently.

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

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

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

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

I, as a former state planner, who has assisted the LRB attorneys in researching bills in the past would like to know the LRB attorney's opinion on what is the potential legal liability and cost to the state taxpayers if HB76, HD1 or SB551, SD1 is enacted and further litigation is pursued?

Thank you,

Laurie Hirohata

Laurie Hirohata, MSW, MEd
Community Advocate

The Proposed Legislation May Improperly Affect Existing Claims

By Steven K.S. Chung, Of Counsel
IMANAKA ASATO | A LIMITED LIABILITY LAW COMPANY

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

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

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

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

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

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

The following are excerpts from an appellate brief discussing the use of Part I by condominium associations.

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

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

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

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

In 1998, financial institutions and condominium associations sought a nonjudicial foreclosure option and the legislature responded by enacting the "Alternate Power of Sale Foreclosure Process," codified at HRS §§ 667-21 through 667-42.[5] Because of concerns regarding the rights of homeowners, the legislature included substantial consumer protection

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[2] HRS § 514A-1.5 and § 514B-21.
[3] § 667-5 contains identical language.
[4] HRS §514A-90 (1998).
[5] H.B. 2506, H.D. 1, 19th Leg., Reg. Sess. (1998).

safeguards in Part II.[6] They included: (1) that the homeowner be given at least sixty days to cure any default (HRS §667-22(a)(6)); (2) actual service of the notice of default on the homeowner in the same manner as service of process (HRS §667-22(c); (3) at least sixty days advance notice before the public sale (HRS § 667-25); (4) at least two open houses of the mortgaged property (HRS § 667-26); (5) that the homeowner sign the conveyance document (HRS § 667-31(a) [1998]); and (6) a bar against deficiency judgments (HRS § 667-38). Pursuant to HRS § 667-40, the nonjudicial foreclosure process set out in Part II was specifically made available to condominium associations. It provided

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

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

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

This, of course, was intended to provide the "law or written document" that HRS § 667-40 required for a condominium associations to be authorized to use the nonjudicial foreclosure

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[6] *Id.*
[7] HRS § 514A-90 (1998).
[8] 1999 Act 236, §1.4.
[9] Hereafter, HRS § 514A-90 refers to HRS § 514A-90 (1999), which remained unchanged between 1999 and 2010.

process set forth in Part II. When Chapter 514B became the Condominium Property Act, it included HRS § 514B-146(a), which repeated verbatim the language of HRS § 514A-90.[10] None of these amendments, however, changed HRS § 667-5 in any way, and it continued to be available only when a "power of sale is contained in a mortgage."[11]

Because of the repeated abuse of HRS § 667-5, which was used to strip consumers of their homes, a moratorium was placed on its use in 2011, and it was repealed in 2012. Today, a condominium association may only foreclose by action under Part I, as amended, by using Part II to conduct a nonjudicial foreclosure, or by using an alternative nonjudicial process codified as HRS §§ 667-91 to 667-104 ("Part VI"), which was enacted in 2012 and contains many of the consumer safeguards that originated in Part II.[12] They include a requirement that notice of default be served on the homeowner in the same manner as service of process and that an opportunity to cure the default be provided.[13]

B. The legislative intent

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

Courts must construe a statute in a manner consistent with its purpose and with reference to other laws regarding the same issue, rejecting interpretations that are absurd, unjust or clearly inconsistent with the purposes and policies of the statute.[16] As discussed above, the

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[10] HRS §514B-146 (2004)
[11] HRS § 667-5 (1999)
[12] Part II was amended when Part VI was adopted.
[13] HRS § 667-92(e))
[14] *Franks v. Honolulu*, 74 Hawai'i 328, 335, 843 P.2d 668, 671 (1993)
[15] *Richardson v. City and County of Honolulu*, 76 Hawai'i 46, 55, 868 P.2d 1193, 1202 (1994); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 504 (1936); *accord State v. Kuuku*, 61 Hawai'i 79, 82, 595 P.2d 291, 294 (1979). .
[16] *Haole v. State*, 111 Hawai'i 144, 149, 140 P.3d 377, 382 (2006); *State v. McKnight*, 131 Hawai'i 379, 389, 319 P.3d 298, 308 (2013) (citation omitted).

legislature included substantial safeguards in Part II to protect consumers from abusive collection practices. The legislature believed that these safeguards were "needed to protect the interests of consumers."[17]

In 2011, when the legislature examined § 667-5, a moratorium was placed on its use and it was referred to as "one of the most draconian (nonjudicial foreclosure statutes) in the country" that "was originally designed to make it easy to take land away from Native Hawaiians."[18] In 2012, the legislature repealed HRS § 667-5 in order to "provide a single nonjudicial foreclosure process under Part II of [chapter 667]."[19] This history makes it clear that the legislature had a negative view of HRS § 667-5 and never intended to allow its use by condominium associations. Given the legislature's desire to protect homeowners, it is illogical to conclude that a year after enacting Part II the legislature gave condominium associations the ability to bypass the safeguards in Part II by using HRS § 667-5.

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

In *Galima v. AOAO Palm Court,* LEK-KSC, Civil No. 16-00023, 2017 U.S. Dist. LEXIS 47715, the U.S. District Court was called upon to decide the same issues involved in this appeal. After carefully analyzing the issues and legislative history of the statutes involved, the District Court ruled that condominium associations were not authorized to use § 667-5.

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

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

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

Predicting that the Hawai'i Supreme Court would find it clear from the language of the statutes at issue that condominium associations were only authorized to use Part II, the District Court said that a contrary conclusion "is an illogical, and almost absurd, interpretation of § 514B-146(a) (2010) because it would render Chapter 667, Part II meaningless in the context of condominium association liens."

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

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

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[20] *Hawaiian Oceanview Estates v. Yates* 58 Hawai'i 53, 58, 564 P.2d 436, 440 (1977).
[21] *In re W.H. Shipman, Ltd.*, 84 Hawai'i 360, 368, 934 P.2d 1, 9 (Haw. Ct. App. 1997).
[22] *Id.*
[23] *Jenkins v. Wise*, 58 Hawai'i 592, 597, 574 P.2d 1337, 1341 (1978).

Properties lost to illegal foreclosures, lawsuit says

By Leila Fujimori
September 26, 2016
PrevNext

A class-action lawsuit filed in federal court last month alleges that 72 Oahu homeowner associations and two law firms acting as their agents unlawfully foreclosed on 160 homes beginning in September 2010.

The complaint contends the associations and the law firms unlawfully used a swift, nonjudicial foreclosure process intended for use by mortgage lenders, not by homeowners associations, and only when specific language is contained in a mortgage.

Nonjudicial foreclosure is available only when a mortgage contains a “power of sale,” a clause that pre-authorizes the lender to sell the property at public auction, without going to court for authorization, if the borrower defaults.

A public sale is quick and would only require a legal notice published in a newspaper.

The 160 who lost their homes in the nonjudicial foreclosures may be able to recoup the full value, said Honolulu attorney Steven Chung, who represents plaintiffs Benita Brown, Craig and Kristine Connelly, and others.

Disabled Marine veteran Charles Hicks, 66, and his wife, Deneen, 51, first-time homeowners, lost their condo to their homeowners association two years ago, and are among the 60 homeowners that have been contacted by Chung about the lawsuit.

“We knew it was done illegally, and finally someone listened and understood and really cared and tried to do something for us. It was really like a godsend,” said Deneen Hicks. “Me and my husband cried because this thing has been a nightmare.”

Shortly after moving into their Makaha Valley Plantation condo in November 2008, a storm hit and the unit was inundated with water from external leaks. Later their ceiling collapsed after upstairs tenants left the water running before vacating the unit, the couple said.

They had been dealing with mounting repair and mold remediation bills when they fell behind by $2,500 on maintenance fees and said they asked the association whether they could work out a payment plan. Instead, they said, they received a letter from the association attorneys, and attorneys’ fees and costs were added to the $2,500 they owed.

“They would not work with us,” Deneen Hicks said. “They only sicced their attorneys on us to get our condo, and this is not fair.”

Plaintiffs’ attorney Chung, of the Imanaka Asato law firm, teamed up with two San Diego firms to represent plaintiffs and filed the class-action complaint Aug. 10 against the following Hawaii law firms and associations: Porter McGuire Kiakona & Chow; Ekimoto & Morris; the Association of

Apartment Owners of Terrazza/Cortbella/Las Brisas/Tiburon; and the Association of Apartment Owners of Ko Olina Kai Golf Estates and Villas.

Plaintiffs also say the associations were not getting the signatures of homeowners on conveyance documents in the nonjudicial foreclosures, as required under Hawaii law.

This resulted in what plaintiffs allege is the wrongful and unlawful sale of the condos, or in some cases the rental of the homes by the homeowners associations, sometimes for years.

Attorney John Morris of Ekimoto & Morris says the law has a “fatal flaw” in that there is no requirement to follow it. “We’ve had the power (to use the nonjudicial power of sale) for years because we were almost always behind the lender.”

However, none of the cases covered by this lawsuit involves foreclosure by lender.

Morris also says the requirement to get the homeowner’s signature is a flaw in the law. “You could spend thousands of dollars, and if a person … refused to sign, the whole thing was a waste of time,” he said.

Chung said, “Rather than a flaw, however, that is one of the safeguards the Legislature specifically enacted.” Chung added that attorneys for the associations used nonjudicial foreclosures to circumvent safeguards enacted by the Legislature.

Damages may exceed $80 million for the 160 homes identified, but most of the former homeowners have not yet been contacted.

Charles Hicks said the homeowners association should have investigated the leaks and taken care of the problem, as well as other problems, but instead foreclosed on the condo in 2014.

The couple moved to Georgia in 2014 and have been without a permanent home since.

“For this to happen, it was devastating,” Charles Hicks said. The lawsuit has “given me quite a bit of hope,” he said, adding, “To think that you go through that and there’s no hope. … My home is there and somebody’s collecting rent.

“I knew it was wrong, and to know that and you can’t do anything about it, it actually nearly drove me insane,” he said. “I worked all my life for that, never broken the law and to get treated like this.”

Porter McGuire and Ekimoto & Harris are two of a handful of Honolulu firms specializing in condominium law.

Kapono Kiakona, a partner with the Porter firm, contends there was never a requirement to obtain signatures in nonjudicial foreclosures.

After the Legislature amended the law (HRS Sec. 514A) in 1999, “it gave the right to the associations to use the nonjudicial foreclosure in a manner like a lender,” he said. “The associations went forward because people weren’t paying. Unlike lenders, the association can’t choose who moves into an association.

“The association has to protect itself,” Kiakona said.

HB-76-HD-1
Submitted on: 2/20/2019 3:32:21 PM
Testimony for JUD on 2/22/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
R Laree McGuire	Individual	Support	No

Comments:

HB-76-HD-1
Submitted on: 2/21/2019 10:52:32 AM
Testimony for JUD on 2/22/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mary Martin	Individual	Support	No

Comments:

This bill is necessary to correct the misinterpretation of the ICA in Sakal v. Hawaiian Monarch, wherein the ICA ignored legislation, and the intent thereof, which has been in existence since 1999.

HB-76-HD-1
Submitted on: 2/21/2019 6:56:08 PM
Testimony for JUD on 2/22/2019 2:05:00 PM

LATE

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

Comments:

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

I strongly support the passage of HB 76, HD1 which clarifies the right of planned community associations governed by Chapter 421J, Hawai`i Revised Statutes, and condominium associations governed by Chapter 514B, Hawai`i Revised Statutes, to use nonjudicial or power of sale foreclosures to collect unpaid common expense assessments in light of the Hawai`i Intermediate Court of Appeals' decision in Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawai`i 219, 426 P.3d 443 (App. 2018).

In the Sakal case, the 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 planned community and condominium associations who have for years relied, in good faith, upon the law which was adopted with the express intent of empowering both planned community associations and condominium associations to foreclose their liens by nonjudicial foreclosure.

HB 76, HD1 clarifies that since 1999, condominium associations 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.

HB 76, HD1 further clarifies that as of the effective date of Act 182 (2012), planned community associations were 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.

These clarifications are important as the issue of legislative intent will undoubtedly impact future court decisions regarding nonjudicial foreclosures by condominium and planned community associations;

HB 76, HD1 amends Chapter 667, Hawai`i Revised Statutes, to provide that for purposes of Part IV ("Association Alternate Power of Sale Foreclosure Process") the definition of "power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure used by an association enforce its lien for unpaid common expenses, regardless of whether the association's documents provide for a power of sale, a power of sale foreclosure, or a nonjudicial foreclosure. This clarification expresses the intent of the Legislature that planned community and condominium associations may exercise the remedy of nonjudicial foreclosure regardless of whether they have a written power of sale provision in their project documents.

For these reasons, I strongly support HB 76, HD1.

Respectfully submitted,

M. Anne Anderson

LATE

HB-76-HD-1
Submitted on: 2/22/2019 8:00:16 AM
Testimony for JUD on 2/22/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
M D Schochet	Individual	Oppose	No

Comments:

LATE

HB-76-HD-1
Submitted on: 2/22/2019 9:36:09 AM
Testimony for JUD on 2/22/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Julianne Puzon	Individual	Support	No

Comments:

To the Honorable Chair Chris Lee and Members of the House Judiciary Committee:

My name is Julianne Puzon and I strongly support HB76 HD1 and its intent. For the past nine years I have served as the treasurer of a condominium association in Wahiawa, but I am testifying here as an individual. After the financial meltdown in 2008, some of our owners stopped paying their maintenance fees. More recently, a few other owners also did so but for reasons unrelated to this crisis in the mortgage industry.

Given that we are a small association with only 88 units, this placed an undue burden on the remaining owners who regularly and faithfully have paid these fees every month. Many of them are long time owners also.

Our By-laws allow us to foreclose on liens but do not contain the speciifc language allowing nonjudicial foreclosure.and power of sale. It is unfortunate that we have had to pursue foreclosures but it has been necessary for the financial health of our association.

Passage of this bill will help to restore a substantial measure of fairness to the thousands of commmunity associations and tens of thousand of owners in Hawaii. Thank you for your consideration.