

JAN 22 2021

A BILL FOR AN ACT

RELATING TO CONDOMINIUMS.

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

1 SECTION 1. The legislature passed Act 282 in 2019 to
2 confirm its intent that condominium associations should be able
3 to use nonjudicial foreclosure to collect delinquencies
4 regardless of the presence or absence of power of sale language
5 in an association's governing documents in response to Sakal v.
6 Association of Apartment Owners of Hawaiian Monarch, 143 Haw.
7 219, 426 P.3d 443 (App. 2018). The Sakal court held that a
8 condominium must have specific authority in its declaration,
9 bylaws, or in an agreement with the owner, to conduct a
10 nonjudicial foreclosure. Specifically, Section 1 of Act 282
11 states that the "legislative history indicates this was not the
12 intent of the legislature in 1999, nor in subsequent
13 amendments."

14 The Supreme Court of Hawai'i decided Malabe v. Ass'n of
15 Apartment Owners of Exec. Ctr. by & through Bd. of Directors,
16 147 Haw. 330, 465 P.3d 777 (2020), as corrected (June 18, 2020),
17 after the effective date of Act 282. In this case, the court



1 stated that: "We hold the ICA did not err in reinstating Count
2 I, the Malabes' wrongful foreclosure claim, based on its ruling
3 in Sakal, which correctly held that in order for an association
4 to utilize the nonjudicial power of sale foreclosure procedures
5 set forth in Hawai'i Revised Statutes ("HRS") Chapter 667, a
6 power of sale in its favor must have existed in association
7 bylaws or in another enforceable agreement with unit owners.
8 143 Hawai'i at 220-21, 426 P.3d 444-45." Id. at 333, 465 P.3d
9 at 780.

10 Notably, the Malabe court did not regard Act 282 and its
11 legislative intent as affecting its holding because the Malabes'
12 based their claims on section 667-5, Hawaii Revised Statutes,
13 which was repealed in 2012. The Malabe court misread the intent
14 of the legislature in construing the legislative intent of Act
15 282 in the narrow manner as described in its holding. The
16 Malabe court did not address the Malabes' constitutional
17 challenges to Act 282 on constitutional grounds, instead relying
18 on the holding from the United States District Court for the
19 District of Hawai'i that Act 282 is unconstitutional because it
20 violates Plaintiffs' rights under the Contracts Clause of the
21 United States Constitution. Id. at 334, 465 P.3d at 781 (citing



1 Galima v. Ass'n of Apartment Owners of Palm Court by & through
2 Bd. of Directors, 453 F. Supp. 3d 1334, 1356 (D. Haw. 2020)).

3 However, Section 6 of Act 282 finds that: "This Act shall
4 not be applied so as to impair any contract existing as of the
5 effective date of this Act in a manner violative of either the
6 Hawaii State Constitution or Article I, section 10, of the
7 United States Constitution." Moreover, Section 7 of Act 282
8 provides that the provisions of the act are severable.

9 Nevertheless, the Malabe and Galima courts have continued to
10 cast doubt upon the legislature's intent in passing Act 282.
11 Therefore, the legislature finds it necessary to clarify that
12 the explicit grant of power of sale to associations is not
13 required for the purposes of enforcing association liens through
14 the nonjudicial foreclosure process.

15 SECTION 2. Chapter 514B, Hawaii Revised Statutes, is
16 amended by adding a new section to be appropriately designated
17 and to read as follows:

18 "§514B- Incorporation of power of sale language into
19 governing instruments; procedure; effect. (a) Notwithstanding
20 any other provision of this chapter or of any other statute or
21 instrument, an association may incorporate power of sale



1 language into declaration or bylaws of the association, in
2 accordance with the terms of this section.

3 (b) Power of sale language, in the following form, may be
4 adopted by the board, after giving notice and an opportunity to
5 be heard to the unit owners:

6 "The governing documents of the association shall be deemed
7 to include a power of sale, sufficient in form and
8 substance to enable the foreclosure of the lien of the
9 association. Exercise of the power of sale shall be in
10 compliance with and requirements of Chapters 514B and 667
11 of the Hawaii Revised Statutes."

12 (c) The notice to owners shall, not less than fourteen
13 days in advance of a board meeting at which adoption of power of
14 sale language will be considered, be:

15 (1) Hand-delivered;

16 (2) Sent prepaid by United States mail to the mailing
17 address of each unit or to any other mailing address
18 designated in writing by the unit owner; or

19 (3) At the option of the unit owner, expressed in writing,
20 by electronic mail to the electronic mailing address
21 designated in writing by the unit owner.



1 Notice shall include the text of the proposed power of sale
2 language and inform the owners of the opportunity to be heard on
3 the proposal. Notice shall also include the following language:

4 "An owner may preserve a potential defense that the
5 exercise of a power of sale included in the declaration or
6 bylaws of the association by board action constitutes an
7 impairment of contract, by:

8 (1) Delivering a written objection to the association by
9 certified or registered mail, return receipt
10 requested, within sixty days after a meeting at which
11 the board adopts a proposal to include such language;
12 and

13 (2) Producing, to the association, a return receipt
14 demonstrating such delivery within thirty days after
15 service of a notice of default and intention to
16 foreclose upon that owner."

17 The notice shall include an address where the written
18 objection may be delivered.

19 (d) The board may adopt the proposal to incorporate the
20 power of sale language into the declaration or bylaws of the
21 association at any board meeting for which notice of the



1 proposal is given in compliance with this section; provided that
2 owners are first given an opportunity to be heard on the
3 proposal.

4 (e) If the board adopts the proposal to incorporate power
5 of sale language into the declaration or bylaws of the
6 association, then the power of sale language, designated as an
7 amendment to the association's declaration or bylaws, may be
8 recorded.

9 (f) Power of sale language so recorded shall be deemed to
10 be effective upon recording.

11 (g) The procedures provided for in this section shall be
12 the exclusive procedures for the incorporation of power of sale
13 language into the declaration or bylaws of an association
14 after _____, 2021; provided that the power of sale language
15 incorporated into the declaration or bylaws of an association,
16 or some other agreement with an owner, in accordance with law
17 prior to that date shall remain valid."

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

20 "(a) All sums assessed by the association but unpaid for
21 the share of the common expenses chargeable to any unit shall



1 constitute a lien on the unit with priority over all other
2 liens, except:

3 (1) Liens for real property taxes and assessments lawfully
4 imposed by governmental authority against the unit;
5 and

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

11 provided that a lien recorded by an association for unpaid
12 assessments shall expire six years from the date of recordation
13 unless proceedings to enforce the lien are instituted prior to
14 the expiration of the lien; provided further that the expiration
15 of a recorded lien shall in no way affect the association's
16 automatic lien that arises pursuant to this subsection or the
17 declaration or bylaws. Any proceedings to enforce an
18 association's lien for any assessment shall be instituted within
19 six years after the assessment became due; provided that if the
20 owner of a unit subject to a lien of the association files a
21 petition for relief under the United States Bankruptcy Code (11



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

6 The lien of the association may be foreclosed by action or
7 by nonjudicial or power of sale foreclosure[7] if ~~[regardless of~~
8 ~~the presence or absence of]~~ power of sale language ~~[in]~~ is
9 contained within an association's governing documents[7] or
10 within some other agreement with the owner of the unit subject
11 to foreclosure, by the managing agent or board, acting on behalf
12 of the association and in the name of the association; provided
13 that no association may exercise the nonjudicial or power of
14 sale remedies provided in chapter 667 to foreclose a lien
15 against any unit that arises solely from fines, penalties, legal
16 fees, or late fees, and the foreclosure of any such lien shall
17 be filed in court pursuant to part IA of chapter 667.

18 In any such foreclosure, the unit owner shall be required
19 to pay a reasonable rental for the unit, if so provided in the
20 bylaws or the law, and the plaintiff in the foreclosure shall be
21 entitled to the appointment of a receiver to collect the rental



1 owed by the unit owner or any tenant of the unit. If the
2 association is the plaintiff, it may request that its managing
3 agent be appointed as receiver to collect the rent from the
4 tenant. The managing agent or board, acting on behalf of the
5 association and in the name of the association, unless
6 prohibited by the declaration, may bid on the unit at
7 foreclosure sale, and acquire and hold, lease, mortgage, and
8 convey the unit. Action to recover a money judgment for unpaid
9 common expenses shall be maintainable without foreclosing or
10 waiving the lien securing the unpaid common expenses owed."

11 SECTION 4. This Act shall not be applied so as to impair
12 any contract existing as of its effective date in a manner
13 violative of either the Hawaii State Constitution or Article I,
14 section 10, of the United States Constitution.

15 SECTION 5. If any provision of this Act, or the
16 application thereof to any person or circumstance, is held
17 invalid, the invalidity does not affect other provisions or
18 applications of the Act that can be given effect without the
19 invalid provision or application, and to this end the provisions
20 of this Act are severable.



1 SECTION 6. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.

3 SECTION 7. This Act shall take effect upon its approval.

4

INTRODUCED BY: Kel Rhoads



S.B. NO. 191

Report Title:

Condominium Associations; Nonjudicial Foreclosure; Power of Sale

Description:

Provides a process for associations to incorporate power of sale language into governing documents. Clarifies that the explicit grant of power of sale to associations is not required for the purposes of enforcing association liens under the association alternate power of sale foreclosure process.

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

