SB-191-HD-1
Submitted on: 3/25/2021 3:19:08 PM
Testimony for JHA on 3/30/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Richard Emery	Associa	Support	No

Comments:

Strongly support with the amendments offered by CAI.

SB-191-HD-1
Submitted on: 3/25/2021 4:49:29 PM
Testimony for JHA on 3/30/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mike Golojuch, Sr.	Palehua Townhouse Association	Support	No

Comments:

Our Board strongly supports SB191 to allow associations the ability to include the "power of sale" language in its governing documents. This allows one more avenue for the association to collect on a delinquent unit within the association.

Associations know that they must try other means first, such as mediation or a payment plan before even considering non-judicial forclosure.

If it really becomes necessary to use non-judicial foreclosure, this measure reduces the cost and time that an association needs to remedy the situation. Please pass SB191.

Mike Golojuch, Sr. President, Palehua Townhouse Association

P.O. Box 976
Honolulu, Hawaii 96808

March 25, 2021

Chair Mark M. Nakashima
Vice Chair Scot Z. Matayoshi
Committee on Judiciary & Hawaiian Affairs
415 South Beretania Street
Honolulu, Hawaii 96813

Re: SB 191 SD2 HD1 SUPPORT

Dear Chair Nakashima, Vice-Chair Matayoshi and Committee Members:

SB 191 SD2 HD1 provides a mechanism to add "power of sale" language to a condominium association's governing documents. The Community Associations Institute ("CAI") supports SB 191 SD2 HD1.

SB 191 SD2 HD1 is necessary because courts have cast doubt on previous legislative action. Act 282, passed in 2019, expressed the legislative intent that condominium associations have authority to use a nonjudicial foreclosure process when owners default upon their financial obligations to their fellow owners.

Courts have nonetheless insisted that "power of sale" language must be contained within the governing documents of a condominium association before a nonjudicial foreclosure process can be used. Courts, therefore, will not honor longstanding legislative intent without additional legislation.

Use of the nonjudicial foreclosure remedy is subject to robust due process and consumer protection provisions that have been in place since at least 2012. Without limitation, a defaulting owner is entitled to mediation under §§ 514B-146 and 514B-146.5, is entitled to a reasonable payment plan under §667-92 and is entitled to mediation under §667-94. Moreover, the nonjudicial or power of sale remedy is unavailable to foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees.

SB 191 SD2 HD1 strictly prescribes how a condominium association may incorporate "power of sale" language into its governing documents. Further, it provides owners with an "opt-out" mechanism to address potential impairment of contract concerns.[1]

A board contemplating incorporation of "power of sale" language into an association's governing documents must give notice that is comparable to notice required for a meeting of the whole association. *Compare*, HRS §514B-121(d). The SB 191 SD2 HD1 notice must, without limitation, specifically advise owners of the simple steps necessary to avoid being subject to exercise of the nonjudicial foreclosure remedy.

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[1] Contract Clause concerns were raised in Galima v. Association of Apartment Owners of Palm Court, 453 F.Supp. 3d 1334, 1356 (D. Haw. 2020). The Galima court relied upon Sveen v. Melin, 138 S. Ct. 1815, 1821–22 (2018) for the Contracts Clause test that it applied:

> The threshold issue is whether the state law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.,* 438 U.S., at 244, 98 S.Ct. 2716. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. See *id.,* at 246, 98 S.Ct. 2716 ; *El Paso,* 379 U.S., at 514–515, 85 S.Ct. 577 ; *Texaco, Inc. v. Short,* 454 U.S. 516, 531, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose."

Id. As to that test, the legislature should find that the contractual relationship relevant to condominium ownership is underpinned by the statutory scheme that *enables* the condominium form of ownership. The legislature's power to amend the condominium statute is part of the contractual *bargain*. It is also true that the Supreme Court of Hawaii has broadly recognized that an association may alter its governing documents. See, Lee v. Puamana Community Association, 128 P.3d 874, 883-884 (Haw. 2006). Thus, a party's expectations must, to be *reasonable*, take the possibility of change into account.

Assuming that a substantial impairment of a relevant contractual relationship is *perceived*, though, the legislature should find that providing a statutory nonjudicial or power of sale remedy to associations serves the significant and legitimate public purpose of facilitating the operation of the condominium property by, without limitation, protecting the financial viability of associations. The legislature should find here, as it did in Act 282, that it is crucial for condominium associations to be able to secure timely payment of common expenses to provide services to all residents of a condominium community. Further, the legislature should find that providing a statutory nonjudicial or power of sale remedy to associations is both appropriate and reasonable. Doing so would be consistent with longstanding legislative intent and statutory language.

Thus, assuming that an existing condominium owner could reasonably advance a good faith argument to the effect that a condominium purchase was in *reliance* upon a requirement that an association must foreclose judicially, in the absence of power of sale language in the governing documents of the association, that owner can easily preserve an impairment of contract defense.[2]

As noted in Act 282, condominiums are creatures of statute.[3] Enabling the condominium form of ownership has been treated as a *rightful* exercise of legislative power since State Savings & Loan Association v. Kauaian Development Company, 50 Haw. 540, 445 P.2d 109 (1968), which was "the first case to reach this court involving a condominium." 50 Haw. at 541. This is important because the legislative power "shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." Haw. Const. art. III, § 1. The Supreme Court of Hawaii noted, in State Savings, that:

> The legislative enactment with which we are dealing in this case has profound social and economic overtones, not only in Hawaii but also in every densely populated area of the United States. Our construction of such legislation must be imaginative and progressive rather than restrictive.

Id.

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[2] SB 191 SD2 HD1 provides that:

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

> (1) delivering a written objection to the association, by certified or registered mail, return receipt requested, within sixty days after a meeting at which the board adopts a proposal to include such language; and
>
> (2) producing, to the association, a return receipt demonstrating such delivery within thirty days after service of a notice of default and intention to foreclose upon that owner."

This requirement appropriately places a minimal burden on the person seeking exemption from a generally applicable rule.

[3] The Supreme Court of Hawaii has repeatedly recognized this to be so. It first did so in State Savings & Loan Association v. Kauaian Development Company, 50 Haw. 540, 546, 445 P.2d 109, 115 (1968) ("The condominium, or horizontal property regime, is a recently-born creature of statute."). It has done so at least twice since then. See, Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 348, 367 n.30 (Haw. 2002) ("'The condominium, or horizontal property regime, [was] a ...creature of statute' that was given its initial formal recognition in Hawai`i in 1961."); and Lee v. Puamana Community Association, 128 P.3d 874, 888 (Haw. 2006) ("condominium property regimes are creatures of statute").

The legislature can, therefore, specify how governing documents are amended. For example, the proviso: "Except as otherwise specifically provided in this chapter," HRS §514B-32(a)(11), qualifies the mechanism for amending a declaration of condominium property regime.

Chapter 514B authorizes condominium boards to "amend the declaration or bylaws as may be required in order to conform with the provisions of this chapter", HRS §514B-109(b), and Act 282 reflects the legislature's longstanding position that condominium law enables an association to exercise a nonjudicial foreclosure remedy. SB 191 SD2 HD1, therefore, is well within the scope of legislative authority.

SB 191 SD2 HD1 effectively addresses stated judicial concerns about Act 282. CAI respectfully requests that the Committee pass SB 191 SD2 HD1.

Very truly yours,

Philip Nerney

Philip Nerney

SB-191-HD-1
Submitted on: 3/28/2021 9:01:52 AM
Testimony for JHA on 3/30/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mark McKellar	Law Offices of Mark K. McKellar, LLLC	Oppose	No

Comments:

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

I oppose S.B. 191 S.D.2, H.D.1 because it undermines the purpose and intent of Act 282 (2019) and will end up hurting, rather than helping, associations.

Section 1 states, in part, that "this Act is necessary to clear up and confirm the intent of the legislature regarding the right of condominium associations to conduct nonjudicial foreclosures –- namely, that a ***specific grant of power of sale*** in an [sic] condominium association's governing documents ***is not required*** for the purposes of enforcement [of] association liens through the nonjudicial foreclosure process." It further states that the "purpose of this Act is to expressly ***reiterate and declare*** that the intent of the legislature is that condominium associations have ***existing authority*** to use a nonjudicial foreclosure process …" However, it ***then goes on to do just the opposite.***

Section 3 of the bill strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 to expressly clarify that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, ***regardless of the presence or absence of*** power of sale language in an association's governing documents[.]" It replaces it with language that requires that a condominium association have power of sale language in its declaration or bylaws before it may utilize nonjudicial foreclosure procedures. Section 4 makes a similar change to HRS Section 667-1.

It is contradictory to state in Section 1 that the Act is necessary to clear up and confirm the intent of the legislature that a specific grant of power of sale in a condominium association's governing documents is not required in order for a condominium to enforce its lien through the nonjudicial foreclosure process and then to state in Sections 3 and 4 that condominiums may only enforce their liens if they have a power of sale provision in this governing documents. This contradiction will likely be used against associations.

Not only is the bill contradictory and harmful, but there is no urgent need for the bill. It is premature to consider a bill of this nature. It appears that it is based on an incorrect

reading of the Hawai‘i Supreme Court’s decision in Malabe referred to in Section 1. Section 1 states, in part, that the Hawai‘i Supreme Court in Malabe held that in order for a condominium association to utilize statutory nonjudicial power of sale of foreclosure procedures, a power of sale in its favor must have existed in the association’s bylaws or another enforceable agreement with the unit owner. While this is true, it is critical to note that the Hawaii Supreme Court’s decision in Malabe was limited to nonjudicial foreclosures under HRS Chapter 667 Part I, which was repealed in 2012. The Hawai‘i Supreme Court has not yet addressed nonjudicial foreclosures under HRS Chapter 667, Part VI, which many associations have relied upon.

It is entirely possible that, when faced with the issue, the Hawai‘i Supreme Court will find that nonjudicial foreclosures are allowed under HRS Chapter 667, Part VI. Chief Justice Recktenwald and Justice Nakayama made it abundantly clear in the dissenting opinion to Malabe that they believe that nonjudicial foreclosures are allowed under Part VI regardless of the presence or absence of a power of sale language in an association’s declaration or bylaws. The other three justices declined to rule on the issue because it was not ripe for determination and one of those justices has since retired and been replaced with a new justice. The legislature should wait until the Hawai‘i Supreme Court rules on Part VI nonjudicial foreclosures before making changes to HRS Section 514B-146 and HRS Section 667-1 (as HRS Section 667-1 pertains to Part VI nonjudicial foreclosures) because it may turn out that no changes are needed.

Section 4, which amends HRS Section 667-1 is also problematic for other reasons. Whether intentional or not, the amendment to HRS Section 667-1 will have the effect of stripping ***planned community associations*** of their right to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in an association’s governing documents, because they too are covered by Part VI of HRS Chapter 667. Planned community associations are certain to have strong objections to the legislature modifying this bill which ***purportedly only applies to condominium associations*** in such a manner as to strip them of their power to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in their governing documents. This is not a clarification of an existing law; it is a fundamental change in the law.

Section 2 of the bill states that “an association” may vote to adopt power of sale language into the declaration or bylaws and then establishes a procedure for the “board” (not the members) to adopt such language as an amendment to the declaration or bylaws. Section 2 provides that prior to adopting such an amendment, the board shall give owners fourteen days’ written notice and an opportunity to be heard (but not vote). Permitting boards to adopt declaration or bylaw amendments without a vote of the owners is highly unusual.

The bill provides that the association’s board of directors will be required to inform owners of their right to preserve a potential defense that the exercise of a power of sale included in the declaration or bylaws constitutes an impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which

requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged, leading to even more litigation against associations.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "***exclusive procedures***" that condominium associations may follow ***will prevent associations from allowing their owners to vote on a declaration or bylaw amendment*** incorporating a power of sale provision into their governing instruments. re is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. ***Tying the hands of associations in this manner does not protect associations, but harms them.***

These are only some of the issues with the bill. While S.B. 191 S.D.2, H.D.1 has been proposed with the intent of helping associations, it will do just the opposite. It will harm associations and lead to more litigation.

I respectfully urge the committee to defer any action on the bill. ***There is no urgent need for a bill on this topic. Rushed actions often lead to harmful consequences and that is exactly what will happen if this bill is adopted.***

Thank you for the opportunity to submit testimony on this bill.

Sincerely,

Mark McKellar

SB-191-HD-1
Submitted on: 3/28/2021 4:41:06 PM
Testimony for JHA on 3/30/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dante Carpenter	Vice-Pres. Country Club Village Codominium	Oppose	No

Comments:

Chair Nakashima, Vice-Chair Matayoshi & Committee Members:

In the interests of the Elected Board of Directors for the CCV2 Condominium, comprising 469 units and its Owners, I speak in opposition to SB 191, SD2, HD1 because it undermines the purpose and intent of ACT 282 (2019) and will end up hurting, rather than helping, associations!

Section 3 strikes out the language found in HRS Section 514B-146(a) which was added by ACT 282 to epressly clarify that the "lien of the ssociation may be foreclosed by action or by non-judicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents.

The bill is both contradictory and harmful, additionally there is no urgent need for this bill! It appears there is a misinterpretation of certain elements including an incorrect reaing of the Hawaii Supreme Court's decision in *Malabe*, referred to in Section 1.

Section 4, which amends HRS Section 667-1 is also problematic for other resons. Whether intentional or not, the amendment for HRS Section 667-1 will have the effect of stripping *Planned Community Associations* of their right to conduct non-judicial foreclosures, becaused they also are covered by Part VI of HRS Chapter 667.

In sum, tying the hands of the associations, with the bill's language, while ostesibly well intended, does not protect associations, but, in fact, harms them!

I urge the Committee to defer any action on this bill!

Respectfully submitted,

Dante Carpenter

Vice President Country Club Village Condo; 469 Units in Moanalua, Salt Lake Area

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

I oppose S.B. 191 S.D.2, H.D.1 because it undermines the purpose and intent of Act 282 (2019) and will end up severely hurting, rather than helping, associations.

Section 1 states, in part, that "this Act is necessary to clear up and confirm the intent of the legislature regarding the right of condominium associations to conduct nonjudicial foreclosures – - namely, that a ***specific grant of power of sale*** in an [sic] condominium association's governing documents ***is not required*** for the purposes of enforcement [of] association liens through the nonjudicial foreclosure process." It further states that the "purpose of this Act is to expressly ***reiterate and declare*** that the intent of the legislature is that condominium associations have ***existing authority*** to use a nonjudicial foreclosure process …" However, it ***then goes on to do just the opposite.***

Section 3 of the bill strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 to expressly clarify that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, ***regardless of the presence or absence of*** power of sale language in an association's governing documents[.]" It replaces it with language that requires that a condominium association have power of sale language in its declaration or bylaws before it may utilize nonjudicial foreclosure procedures. Section 4 makes a similar change to HRS Section 667-1.

It is contradictory to state in Section 1 that the Act is necessary to clear up and confirm the intent of the legislature that a specific grant of power of sale in a condominium association's governing documents is not required in order for a condominium to enforce its lien through the nonjudicial foreclosure process and then to state in Sections 3 and 4 that condominiums may only enforce their liens if they have a power of sale provision in this governing documents. This contradiction will likely be used against associations.

Not only is the bill contradictory and harmful, but there is no urgent need for the bill. It is premature to consider a bill of this nature. It appears that it is based on an incorrect reading of the Hawai'i Supreme Court's decision in Malabe referred to in Section 1. Section 1 states, in part, that the Hawai'i Supreme Court in Malabe held that in order for a condominium association to utilize statutory nonjudicial power of sale of foreclosure procedures, a power of sale in its favor must have existed in the association's bylaws or another enforceable agreement with the unit owns. While this is true, it is critical to note that the Hawaii Supreme Court's decision in Malabe was limited to nonjudicial foreclosures under HRS Chapter 667 Part I, which was repealed in 2012. The Hawai'i Supreme Court has not yet addressed nonjudicial foreclosures under HRS Chapter 667, Part VI, which many associations have relied upon.

It is entirely possible that, when faced with the issue, the Hawai'i Supreme Court will find that nonjudicial foreclosures are allowed under HRS Chapter 667, Part VI. Chief Justice Recktenwald and Justice Nakayama made it abundantly clear in the dissenting opinion to Malabe that they believe that nonjudicial foreclosures are allowed under Part VI regardless of the presence or absence of a power of sale language in an association's declaration or bylaws. The other three justices declined to rule on the issue because it was not ripe for determination and one of those justices has since retired and been replaced with a new justice. The legislature should

wait until the Hawai‘i Supreme Court rules on Part VI nonjudicial foreclosures before making changes to HRS Section 514B-146 and HRS Section 667-1 (as HRS Section 667-1 pertains to Part VI nonjudicial foreclosures) because it may turn out that no changes are needed.

Section 4, which amends HRS Section 667-1 is also problematic for other reasons. Whether intentional or not, the amendment to HRS Section 667-1 will have the effect of stripping ***planned community associations*** of their right to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in an association's governing documents, because they too are covered by Part VI of HRS Chapter 667. Planned community associations are certain to have strong objections to the legislature modifying this bill which ***purportedly only applies to condominium associations*** in such a manner as to strip them of their power to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in their governing documents. ***This is not a clarification of an existing law; it is a fundamental change in the law.***

Section 2 of the bill states that "an association" may vote to adopt power of sale language into the declaration or bylaws and then establishes a procedure for the "board" (not the members) to adopt such language as an amendment to the declaration or bylaws. Section 2 provides that prior to adopting such an amendment, the board shall give owners fourteen days' written notice and an opportunity to be heard (but not vote). Permitting boards to adopt declaration or bylaw amendments without a vote of the owners is prohibited by existing governing documents.

The bill provides that the association's board of directors will be required to inform owners of their right to preserve a potential defense that the exercise of a power of sale included in the declaration or bylaws constitutes an impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged, leading to even more litigation against associations.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "***exclusive procedures***" that condominium associations may follow ***will prevent associations from allowing their owners to vote on a declaration or bylaw amendment*** incorporating a power of sale provision into their governing instruments. There is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. ***Tying the hands of associations in this manner does not protect associations, but harms them.***

These are only some of the issues with the bill. While S.B. 191 S.D.2, H.D.1 has been proposed with the intent of helping associations, it will do just the opposite. It will harm associations and lead to more litigation.

I respectfully urge the committee to defer any action on the bill. ***There is no urgent need for a bill on this topic. Rushed actions often lead to harmful consequences and that is exactly what will happen if this bill is adopted.***

Thank you for the opportunity to submit testimony on this bill.

Sincerely,
Grant Oka

President, Kipuka at Hoakalei AOUO

House of Representatives

Committee on Judiciary and Hawaiian Affairs
Tuesday, March 30, 2021 at 2:00 p.m.

To: Chair Mark Nakashima and Vice-Chair Scot Matayoshi

Re: SB191 HD1, relating to Condominiums

Aloha Chair Nakashima, Vice-Chair Matayoshi, and members of the House Committee on Judiciary and Hawaiian Affairs,

I am Lila Mower and I **STRONGLY OPPOSE SB191 HD1.**

By adding the dangerous phrase highlighted below, the proposed measure allows the circumvention of the necessary consent by a super-majority of owners to amend their association's Declaration or Bylaws to add the power of sale language:

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

Even the Legislature's website summarizes that phrase within the proposed amendment as:

> Specifies a procedure for condominium associations to incorporate power of sale language into their governing documents. Clarifies that liens may be foreclosed upon if the power of sale language is contained within an association's governing documents or within some other agreement with the owner of the unit subject to foreclosure. Effective 1/1/2050. (HD1)

That "any other agreement" or "some other agreement" is undefined and unlimited, lacking any protection for condo owners.

I serve as a Director of a condominium association board and previously served as President of two other condo associations, all on Oahu. Since 2014, I led a coalition of more than 300 condo owners from over 150 condo associations. I am acutely aware of the power of association boards.

A board serves as its association's government with no "checks and balances" against its centralized power. The proposed measure intends to equip these boards with the ability to adopt non-judicial foreclosures to collect the payment of assessments while leaving owners still liable for their mortgages.

This dangerous empowerment of condominium boards should be juxtaposed against reports from the insurance industry that **nationally, Hawaii has the most Directors and Officers Insurance (D&O) claims**

and among the highest insurance settlements despite having only a small fraction of homeowners' associations of states like Florida, California, New York, and Illinois.

This proposed measure should also be viewed against these statistics provided by the condo industry itself: Roughly one-third of Hawaii's population lives in association-governed communities. A national trade and special interest organization, Community Associations Institute, reported in their most recent national survey, that 30% of association residents do not rate their association as "positive."

If that ratio is applied to Hawaii, then roughly one-ninth of Hawaii's population, or over 140,000 Hawaii residents, may rate their associations as **not** "positive."

Legislators should not add to these dire statistics by passing extremely punitive measures especially in this difficult time when many of Hawaii's residents are suffering the economic consequences of the pandemic.

Further, prior to its repeal, HRS667-5 allowed a mortgagee (lender) holding a mortgage containing a power of sale to sell a borrower's home in as little as 36 days after declaring default. In 2011, the legislature placed a moratorium on the use of HRS667-5, referring to it as "one of the most draconian (nonjudicial foreclosure statutes) in the country" which was **enacted in 1874 and "originally designed to make it easy to take land away from Native Hawaiians."**

In 2011, Representative Herkes said that "in the last 10 to 15 years [that statute] 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." HRS667-5 was repealed in 2012, having never been intended to allow its usage by condominium associations.

Finally, the online Merriam-Webster dictionary defines "judicial" as "the administration of justice," from which one can interpret that "non-judicial" may lack that "justice" because the non-judicial foreclosure process allows foreclosures without the oversight of a neutral third party.

The members of this Committee should take special interest in acts which blatantly lack protections against injustice and have great potential to harm as SD191 HD1 proposes and which also proposes to reverse the actions of legislators in 2012 when they repealed HRS667-5.

Please do not pass SB191 HD1 and instead act to protect the most valuable asset that most Hawaii residents own: their homes.

Mahalo.

SB-191-HD-1
Submitted on: 3/25/2021 5:23:41 PM
Testimony for JHA on 3/30/2021 2:00:00 PM

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

Comments:

I strongly support, but recognize that a number of stakeholders oppose. Instead of deferring the Bill, I ask that the Bill be amended to address the concerns of all parties.

Respectfully submitted.

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

I oppose S.B. 191 S.D.2, H.D.1 because it undermines the purpose and intent of Act 282 (2019) and will end up hurting, rather than helping, associations.

Section 1 states, in part, that "this Act is necessary to clear up and confirm the intent of the legislature regarding the right of condominium associations to conduct nonjudicial foreclosures -- namely, that a ***specific grant of power of sale*** in an [sic] condominium association's governing documents ***is not required*** for the purposes of enforcement [of] association liens through the nonjudicial foreclosure process." It further states that the "purpose of this Act is to expressly ***reiterate and declare*** that the intent of the legislature is that condominium associations have ***existing authority*** to use a nonjudicial foreclosure process ..." However, it ***then goes on to do just the opposite.***

Section 3 of the bill strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 to expressly clarify that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, ***regardless of the presence or absence of*** power of sale language in an association's governing documents[.]" It replaces it with language that requires that a condominium association have power of sale language in its declaration or bylaws before it may utilize nonjudicial foreclosure procedures. Section 4 makes a similar change to HRS Section 667-1.

It is contradictory to state in Section 1 that the Act is necessary to clear up and confirm the intent of the legislature that a specific grant of power of sale in a condominium association's governing documents is not required in order for a condominium to enforce its lien through the nonjudicial foreclosure process and then to state in Sections 3 and 4 that condominiums may only enforce their liens if they have a power of sale provision in this governing documents. This contradiction will likely be used against associations.

Not only is the bill contradictory and harmful, but there is no urgent need for the bill. It is premature to consider a bill of this nature. It appears that it is based on an incorrect reading of the Hawai'i Supreme Court's decision in Malabe referred to in Section 1. Section 1 states, in part, that the Hawai'i Supreme Court in Malabe held that in order for a condominium association to utilize statutory nonjudicial power of sale of foreclosure procedures, a power of sale in its favor must have existed in the association's bylaws or another enforceable agreement with the unit owns. While this is true, it is critical to note that the Hawaii Supreme Court's decision in Malabe was limited to nonjudicial foreclosures under HRS Chapter 667 Part I, which was repealed in 2012. The Hawai'i Supreme Court has not yet addressed nonjudicial foreclosures under HRS Chapter 667, Part VI, which many associations have relied upon.

It is entirely possible that, when faced with the issue, the Hawai'i Supreme Court will find that nonjudicial foreclosures are allowed under HRS Chapter 667, Part VI. Chief Justice Recktenwald and Justice Nakayama made it abundantly clear in the dissenting opinion to Malabe that they believe that nonjudicial foreclosures are allowed under Part VI regardless of the presence or absence of a power of sale language in an association's declaration or bylaws. The other three justices declined to rule on the issue because it was not ripe for determination and one of those

justices has since retired and been replaced with a new justice. The legislature should wait until the Hawai'i Supreme Court rules on Part VI nonjudicial foreclosures before making changes to HRS Section 514B-146 and HRS Section 667-1 (as HRS Section 667-1 pertains to Part VI nonjudicial foreclosures) because it may turn out that no changes are needed.

Section 4, which amends HRS Section 667-1 is also problematic for other reasons. Whether intentional or not, the amendment to HRS Section 667-1 will have the effect of stripping ***planned community associations*** of their right to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in an association's governing documents, because they too are covered by Part VI of HRS Chapter 667. Planned community associations are certain to have strong objections to the legislature modifying this bill which ***purportedly only applies to condominium associations*** in such a manner as to strip them of their power to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in their governing documents. This is not a clarification of an existing law; it is a fundamental change in the law.

Section 2 of the bill states that "an association" may vote to adopt power of sale language into the declaration or bylaws and then establishes a procedure for the "board" (not the members) to adopt such language as an amendment to the declaration or bylaws. Section 2 provides that prior to adopting such an amendment, the board shall give owners fourteen days' written notice and an opportunity to be heard (but not vote). Permitting boards to adopt declaration or bylaw amendments without a vote of the owners is highly unusual.

The bill provides that the association's board of directors will be required to inform owners of their right to preserve a potential defense that the exercise of a power of sale included in the declaration or bylaws constitutes an impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged, leading to even more litigation against associations.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "***exclusive procedures***" that condominium associations may follow ***will prevent associations from allowing their owners to vote on a declaration or bylaw amendment*** incorporating a power of sale provision into their governing instruments. There is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. ***Tying the hands of associations in this manner does not protect associations, but harms them.***

These are only some of the issues with the bill. While S.B. 191 S.D.2, H.D.1 has been proposed with the intent of helping associations, it will do just the opposite. It will harm associations and lead to more litigation.

I respectfully urge the committee to defer any action on the bill. ***There is no urgent need for a bill on this topic. Rushed actions often lead to harmful consequences and that is exactly what will happen if this bill is adopted.***

Thank you for the opportunity to submit testimony on this bill.

Sincerely,

M. Anne Anderson

SB-191-HD-1
Submitted on: 3/27/2021 5:29:01 PM
Testimony for JHA on 3/30/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Paul A. Ireland Koftinow	Individual	Oppose	No

Comments:

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

I am an owner and resident of a condomium unit in Hawaii and I am an attorney who practices condominium law. I ***oppose*** S.B. 191 S.D.2, H.D.1 because it undermines the purpose and intent of Act 282 (2019) and will end up hurting, rather than helping, associations.

Section 1 states, in part, that "this Act is necessary to clear up and confirm the intent of the legislature regarding the right of condominium associations to conduct nonjudicial foreclosures –- namely, that a ***specific grant of power of sale*** in an [sic] condominium association's governing documents ***is not required*** for the purposes of enforcement [of] association liens through the nonjudicial foreclosure process." It further states that the "purpose of this Act is to expressly reiterate and declare that the intent of the legislature is that condominium associations have existing authority to use a nonjudicial foreclosure process …" However, it ***then goes on to do just the opposite.***

Section 3 of the bill strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 to expressly clarify that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, ***regardless of the presence or absence of*** power of sale language in an association's governing documents[.]" It replaces it with language that requires that a condominium association have power of sale language in its declaration or bylaws before it may utilize nonjudicial foreclosure procedures. Section 4 makes a similar change to HRS Section 667-1.

It is contradictory to state in Section 1 that the Act is necessary to clear up and confirm the intent of the legislature that a specific grant of power of sale in a condominium association's governing documents is not required in order for a condominium to enforce its lien through the nonjudicial foreclosure process and then to state in Sections 3 and 4 that condominiums may only enforce their liens if they have a power of sale provision in this governing documents. This contradiction will likely be used against associations.

Not only is the bill contradictory and harmful, but there is no urgent need for the bill. It is premature to consider a bill of this nature. It appears that it is based on an incorrect reading of the Hawai'i Supreme Court's decision in *Malabe* referred to in Section 1. Section 1 states, in part, that the Hawai'i Supreme Court in *Malabe* held that in order for a condominium association to utilize statutory nonjudicial power of sale of foreclosure procedures, a power of sale in its favor must have existed in the association's bylaws or another enforceable agreement with the unit owns. While this is true, it is critical to note that the Hawaii Supreme Court's decision in *Malabe* was limited to nonjudicial foreclosures under HRS Chapter 667 Part I, which was repealed in 2012. The Hawai'i Supreme Court has not yet addressed nonjudicial foreclosures under HRS Chapter 667, Part VI, which many associations have relied upon.

It is entirely possible that, when faced with the issue, the Hawai'i Supreme Court will find that nonjudicial foreclosures are allowed under HRS Chapter 667, Part VI. Chief Justice Recktenwald and Justice Nakayama made it abundantly clear in the dissenting opinion to *Malabe* that they believe that nonjudicial foreclosures are allowed under Part VI regardless of the presence or absence of a power of sale language in an association's declaration or bylaws. The other three justices declined to rule on the issue because it was not ripe for determination and one of those justices has since retired and been replaced with a new justice. The legislature should wait until the Hawai'i Supreme Court rules on Part VI nonjudicial foreclosures before making changes to HRS Section 514B-146 and HRS Section 667-1 (as HRS Section 667-1 pertains to Part VI nonjudicial foreclosures) because it may turn out that no changes are needed.

Section 4, which amends HRS Section 667-1 is also problematic for other reasons. Whether intentional or not, the amendment to HRS Section 667-1 will have the effect of ***stripping planned community associations*** of their right to conduct nonjudicial foreclosures ***regardless of the presence or absence of power of sale language*** in an association's governing documents, because they too are covered by Part VI of HRS Chapter 667. Planned community associations are certain to have strong objections to the legislature modifying this bill which ***purportedly only applies to condominium associations*** in such a manner as to strip them of their power to conduct nonjudicial foreclosures ***regardless of the presence or absence of power of sale language*** in their governing documents. This is not a clarification of an existing law; it is a fundamental change in the law.

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The bill provides that the association's board of directors will be required to inform owners of their right to preserve a potential defense that the exercise of a power of sale

included in the declaration or bylaws constitutes an impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged, leading to even more litigation against associations.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "***exclusive procedures***" that condominium associations may follow ***will prevent associations from allowing their owners to vote on a declaration or bylaw amendment*** incorporating a power of sale provision into their governing instruments. There is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. ***Tying the hands of associations in this manner does not protect associations, but harms them.***

These are only some of the issues with the bill. While S.B. 191 S.D.2, H.D.1 has been proposed with the intent of helping associations, it will do just the opposite. It will harm associations and lead to more litigation.

I respectfully urge the committee to defer any action on the bill. ***There is no urgent need for a bill on this topic. Rushed actions often lead to harmful consequences and that is exactly what will happen if this bill is adopted.***

Thank you for the opportunity to submit testimony on this bill.

Sincerely,

Paul A. Ireland Koftinow

March 28, 2021

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

I oppose S.B. 191 S.D.2, H.D.1 because it undermines the purpose and intent of Act 282 (2019) and will end up hurting, rather than helping, associations.

Section 1 states, in part, that "this Act is necessary to clear up and confirm the intent of the legislature regarding the right of condominium associations to conduct nonjudicial foreclosures – - namely, that a ***specific grant of power of sale*** in an [sic] condominium association's governing documents ***is not required*** for the purposes of enforcement [of] association liens through the nonjudicial foreclosure process." It further states that the "purpose of this Act is to expressly ***reiterate and declare*** that the intent of the legislature is that condominium associations have ***existing authority*** to use a nonjudicial foreclosure process …" However, it ***then goes on to do just the opposite.***

Section 3 of the bill strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 to expressly clarify that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, ***regardless of the presence or absence of*** power of sale language in an association's governing documents[.]" It replaces it with language that requires that a condominium association have power of sale language in its declaration or bylaws before it may utilize nonjudicial foreclosure procedures. Section 4 makes a similar change to HRS Section 667-1.

It is contradictory to state in Section 1 that the Act is necessary to clear up and confirm the intent of the legislature that a specific grant of power of sale in a condominium association's governing documents is not required in order for a condominium to enforce its lien through the nonjudicial foreclosure process and then to state in Sections 3 and 4 that condominiums may only enforce their liens if they have a power of sale provision in this governing documents. This contradiction will likely be used against associations.

Not only is the bill contradictory and harmful, but there is no urgent need for the bill. It is premature to consider a bill of this nature. It appears that it is based on an incorrect reading of the Hawai'i Supreme Court's decision in Malabe referred to in Section 1. Section 1 states, in part, that the Hawai'i Supreme Court in Malabe held that in order for a condominium association to utilize statutory nonjudicial power of sale of foreclosure procedures, a power of sale in its favor must have existed in the association's bylaws or another enforceable agreement with the unit owns. While this is true, it is critical to note that the Hawaii Supreme Court's decision in Malabe was limited to nonjudicial foreclosures under HRS Chapter 667 Part I, which was repealed in 2012. The Hawai'i Supreme Court has not yet addressed nonjudicial foreclosures under HRS Chapter 667, Part VI, which many associations have relied upon.

It is entirely possible that, when faced with the issue, the Hawai'i Supreme Court will find that nonjudicial foreclosures are allowed under HRS Chapter 667, Part VI. Chief Justice Recktenwald and Justice Nakayama made it abundantly clear in the dissenting opinion to Malabe that they believe that nonjudicial foreclosures are allowed under Part VI regardless of the presence or absence of a power of sale language in an association's declaration or bylaws. The other three justices declined to rule on the issue because it was not ripe for determination and one of those

justices has since retired and been replaced with a new justice. The legislature should wait until the Hawai‘i Supreme Court rules on Part VI nonjudicial foreclosures before making changes to HRS Section 514B-146 and HRS Section 667-1 (as HRS Section 667-1 pertains to Part VI nonjudicial foreclosures) because it may turn out that no changes are needed.

Section 4, which amends HRS Section 667-1 is also problematic for other reasons. Whether intentional or not, the amendment to HRS Section 667-1 will have the effect of stripping ***planned community associations*** of their right to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in an association's governing documents, because they too are covered by Part VI of HRS Chapter 667. Planned community associations are certain to have strong objections to the legislature modifying this bill which ***purportedly only applies to condominium associations*** in such a manner as to strip them of their power to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in their governing documents. This is not a clarification of an existing law; it is a fundamental change in the law.

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These are only some of the issues with the bill. While S.B. 191 S.D.2, H.D.1 has been proposed with the intent of helping associations, it will do just the opposite. It will harm associations and lead to more litigation.

I respectfully urge the committee to defer any action on the bill. ***There is no urgent need for a bill on this topic. Rushed actions often lead to harmful consequences and that is exactly what will happen if this bill is adopted.***

Thank you for the opportunity to submit testimony on this bill.

Sincerely,

/s/ *Lance S. Fujisaki*

Lance S. Fujisaki

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

I oppose S.B. 191 S.D.2, H.D.1 because it undermines the purpose and intent of Act 282 (2019) and will end up severely hurting, rather than helping, associations.

Section 1 states, in part, that "this Act is necessary to clear up and confirm the intent of the legislature regarding the right of condominium associations to conduct nonjudicial foreclosures – - namely, that a ***specific grant of power of sale*** in an [sic] condominium association's governing documents ***is not required*** for the purposes of enforcement [of] association liens through the nonjudicial foreclosure process." It further states that the "purpose of this Act is to expressly ***reiterate and declare*** that the intent of the legislature is that condominium associations have ***existing authority*** to use a nonjudicial foreclosure process …" However, it ***then goes on to do just the opposite.***

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It is contradictory to state in Section 1 that the Act is necessary to clear up and confirm the intent of the legislature that a specific grant of power of sale in a condominium association's governing documents is not required in order for a condominium to enforce its lien through the nonjudicial foreclosure process and then to state in Sections 3 and 4 that condominiums may only enforce their liens if they have a power of sale provision in this governing documents. This contradiction will likely be used against associations.

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It is entirely possible that, when faced with the issue, the Hawai'i Supreme Court will find that nonjudicial foreclosures are allowed under HRS Chapter 667, Part VI. Chief Justice Recktenwald and Justice Nakayama made it abundantly clear in the dissenting opinion to Malabe that they believe that nonjudicial foreclosures are allowed under Part VI regardless of the presence or absence of a power of sale language in an association's declaration or bylaws. The other three justices declined to rule on the issue because it was not ripe for determination and one of those justices has since retired and been replaced with a new justice. The legislature should

wait until the Hawai‘i Supreme Court rules on Part VI nonjudicial foreclosures before making changes to HRS Section 514B-146 and HRS Section 667-1 (as HRS Section 667-1 pertains to Part VI nonjudicial foreclosures) because it may turn out that no changes are needed.

Section 4, which amends HRS Section 667-1 is also problematic for other reasons. Whether intentional or not, the amendment to HRS Section 667-1 will have the effect of stripping ***planned community associations*** of their right to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in an association's governing documents, because they too are covered by Part VI of HRS Chapter 667. Planned community associations are certain to have strong objections to the legislature modifying this bill which ***purportedly only applies to condominium associations*** in such a manner as to strip them of their power to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in their governing documents. ***This is not a clarification of an existing law; it is a fundamental change in the law.***

Section 2 of the bill states that "an association" may vote to adopt power of sale language into the declaration or bylaws and then establishes a procedure for the "board" (not the members) to adopt such language as an amendment to the declaration or bylaws. Section 2 provides that prior to adopting such an amendment, the board shall give owners fourteen days' written notice and an opportunity to be heard (but not vote). Permitting boards to adopt declaration or bylaw amendments without a vote of the owners is prohibited by existing governing documents.

The bill provides that the association's board of directors will be required to inform owners of their right to preserve a potential defense that the exercise of a power of sale included in the declaration or bylaws constitutes an impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged, leading to even more litigation against associations.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "***exclusive procedures***" that condominium associations may follow ***will prevent associations from allowing their owners to vote on a declaration or bylaw amendment*** incorporating a power of sale provision into their governing instruments. There is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. ***Tying the hands of associations in this manner does not protect associations, but harms them.***

These are only some of the issues with the bill. While S.B. 191 S.D.2, H.D.1 has been proposed with the intent of helping associations, it will do just the opposite. It will harm associations and lead to more litigation.

I respectfully urge the committee to defer any action on the bill. ***There is no urgent need for a bill on this topic. Rushed actions often lead to harmful consequences and that is exactly what will happen if this bill is adopted.***

Thank you for the opportunity to submit testimony on this bill.

Sincerely,
Marilyn Joyce Oka

SB-191-HD-1
Submitted on: 3/28/2021 7:32:58 PM
Testimony for JHA on 3/30/2021 2:00:00 PM

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

Comments:

Dear Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

I oppose S.B. 191 S.D.2, H.D.1 because it undermines the purpose and intent of Act 282 (2019) and will end up hurting, rather than helping, associations.

Section 1 states, in part, that "this Act is necessary to clear up and confirm the intent of the legislature regarding the right of condominium associations to conduct nonjudicial foreclosures –- namely, that a ***specific grant of power of sale*** in an [sic] condominium association's governing documents ***is not required*** for the purposes of enforcement [of] association liens through the nonjudicial foreclosure process." It further states that the "purpose of this Act is to expressly ***reiterate and declare*** that the intent of the legislature is that condominium associations have ***existing authority*** to use a nonjudicial foreclosure process …" However, it ***then goes on to do just the opposite.***

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It is contradictory to state in Section 1 that the Act is necessary to clear up and confirm the intent of the legislature that a specific grant of power of sale in a condominium association's governing documents is not required in order for a condominium to enforce its lien through the nonjudicial foreclosure process and then to state in Sections 3 and 4 that condominiums may only enforce their liens if they have a power of sale provision in this governing documents. This contradiction will likely be used against associations.

Not only is the bill contradictory and harmful, but there is no urgent need for the bill. It is premature to consider a bill of this nature. It appears that it is based on an incorrect reading of the Hawai‘i Supreme Court’s decision in Malabe referred to in Section 1. Section 1 states, in part, that the Hawai‘i Supreme Court in Malabe held that in order for a condominium association to utilize statutory nonjudicial power of sale of foreclosure procedures, a power of sale in its favor must have existed in the association’s bylaws or another enforceable agreement with the unit owns. While this is true, it is critical to note that the Hawaii Supreme Court’s decision in Malabe was limited to nonjudicial foreclosures under HRS Chapter 667 Part I, which was repealed in 2012. The Hawai‘i Supreme Court has not yet addressed nonjudicial foreclosures under HRS Chapter 667, Part VI, which many associations have relied upon.

It is entirely possible that, when faced with the issue, the Hawai‘i Supreme Court will find that nonjudicial foreclosures are allowed under HRS Chapter 667, Part VI. Chief Justice Recktenwald and Justice Nakayama made it abundantly clear in the dissenting opinion to Malabe that they believe that nonjudicial foreclosures are allowed under Part VI regardless of the presence or absence of a power of sale language in an association’s declaration or bylaws. The other three justices declined to rule on the issue because it was not ripe for determination and one of those justices has since retired and been replaced with a new justice. The legislature should wait until the Hawai‘i Supreme Court rules on Part VI nonjudicial foreclosures before making changes to HRS Section 514B-146 and HRS Section 667-1 (as HRS Section 667-1 pertains to Part VI nonjudicial foreclosures) because it may turn out that no changes are needed.

Section 4, which amends HRS Section 667-1 is also problematic for other reasons. Whether intentional or not, the amendment to HRS Section 667-1 will have the effect of stripping ***planned community associations*** of their right to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in an association’s governing documents, because they too are covered by Part VI of HRS Chapter 667. Planned community associations are certain to have strong objections to the legislature modifying this bill which ***purportedly only applies to condominium associations*** in such a manner as to strip them of their power to conduct nonjudicial foreclosures regardless of the presence or absence of power of sale language in their governing documents. This is not a clarification of an existing law; it is a fundamental change in the law.

Section 2 of the bill states that “an association” may vote to adopt power of sale language into the declaration or bylaws and then establishes a procedure for the

"board" (not the members) to adopt such language as an amendment to the declaration or bylaws. Section 2 provides that prior to adopting such an amendment, the board shall give owners fourteen days' written notice and an opportunity to be heard (but not vote). Permitting boards to adopt declaration or bylaw amendments without a vote of the owners is highly unusual.

The bill provides that the association's board of directors will be required to inform owners of their right to preserve a potential defense that the exercise of a power of sale included in the declaration or bylaws constitutes an impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged, leading to even more litigation against associations.

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These are only some of the issues with the bill. While S.B. 191 S.D.2, H.D.1 has been proposed with the intent of helping associations, it will do just the opposite. It will harm associations and lead to more litigation.

I urge the committee to defer any action on the bill. ***There is no urgent need for a bill on this topic. Rushed actions often lead to harmful consequences and that is exactly what will happen if this bill is adopted.***

Thank you for the opportunity to submit testimony on this bill.

Sincerely,

Mary Freeman

Ewa Beach

SB-191-HD-1
Submitted on: 3/29/2021 9:01:06 AM
Testimony for JHA on 3/30/2021 2:00:00 PM

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

Comments:

This bill is flawed and should be deferred.

Below is a partial list of why I oppose the bill:

1. It will lead to more lawsuits.

2. it undermines the purpose and intent of Act 282 (2019) and will end up hurting, rather than helping, associations.

3. It is contradictory to state in Section 1 that the Act is necessary to clear up and confirm the intent of the legislature that a specific grant of power of sale in a condominium association's governing documents is not required in order for a condominium to enforce its lien through the nonjudicial foreclosure process and then to state in Sections 3 and 4 that condominiums may only enforce their liens if they have a power of sale provision in this governing documents. This contradiction will likely be used against associations.

4. There is no urgent need for the bill. It is premature to consider a bill of this nature. It appears that it is based on an incorrect reading of the Hawai'i Supreme Court's decision in Malabe referred to in Section 1. When faced with the issue, the Hawai'i Supreme Court could well find that nonjudicial foreclosures are allowed under HRS Chapter 667, Part VI.

5. Section 2 of the bill states that "an association" may vote to adopt power of sale language into the declaration or bylaws and then establishes a procedure for the "board" (not the members) to adopt such language as an amendment to the declaration or bylaws. Bylaw amendments require owner votes, not board votes, and they require a supermajority of the owners to approve the amendment,

I oppose S.B.191 S.D.2, H.D.1 and respectfully suggest that the Committee defer action on this bill to allow more discussion and address problems that the specifics in the bill could create.

The 2019 legislature, in Act 282, addressed the courts' holdings in the recent wrongful foreclosure cases. Although ample evidence existed that the legislature has long intended that common ownership associations may use nonjudicial foreclosure to enforce their statutory, automatic liens for unpaid assessments, the appellate courts strained to achieve the justices' desired finding that the evidence merely permitted the associations to use the nonjudicial foreclosure procedures, but only if the associations otherwise had express power of sale authority in their governing documents. Therefore, the 2019 legislature worked, with extensive input from attorneys specializing in condominium law, Boards of Directors of associations, and owners in common ownership associations, to expressly proclaim that express power of sale provisions in the project documents were not, and had not been, previously required.

Adopting S.B.191 S.D.2, H.D.1 undermines the 2019 legislation as it implies that the legislature did not really mean its expressly stated intention that previous law did and was intended to unequivically allow associations to foreclose liens using the nonjudicial foreclosure remedy. The proposed legislation sheds doubt on the clear pronouncement of the 2019 legislature.

Further, S.B.191 S.D.2, H.D.1 professes that a Board- conceived amendment to the governing documents, without a vote of the owners, is the exclusive mode (after 2021) allowed to authorize the associations to foreclose nonjudicially although it states that power of sale provisions under prior law will remain valid. This can create unnecessary confusion and directly contradicts the legislature's prior position as it indicates that the legislators themselves doubt that associations may nonjudicially foreclose assessment liens without the express grant of the authority in the Declaration and/or Bylaws. The proposed bill also disadvantages associations by providing owners with an impairment of contract defense to the nonjudicial foreclsoure – one which is defective in that owners must give written notice of their objection to the proposed amendment within sixty days of the Board's decision to amend the documents to include the power of sale provision and then show proof of delivery of the objection within 30 days of receipt of a notice of default and intention to foreclose. This promotes more, not less, litigation for associations and their owner members.

Finally, this is a bill related to condominiums; however, the proposed amendment to Section 667-1, HRS will negatively impact community associations which then may not have the right to conduct nonjudicial foreclosures whether or not they have the express authority to do so in their governing documents.

The Committee should defer passage of this bill to further consider its potential impact and effects. The 2019 legislature worked hard extremely hard to supply protection to homeowners associations. This legislature should not undermine or even decimate that protection.

March 29, 2021

Respectfully submitted –

SB 191, HD1, RELATING TO CONDOMINIUMS. Condominium Associations; Nonjudicial Foreclosure; Power of Sale

Chair Nakashima, Vice-Chair Matayoshi, and Members of the Committee,

My name is Jeff Sadino and I am offering COMMENTS.

In the recognition of the serious and irreversible harm that NJFs cause to the Owner as well as how they have been abused by the industry-leading Managing Agents and law firms, I would ask for the following changes to be made:

SECTION 2, (a):

"Power of sale language in substantially the following form may be adopted by the ~~board~~ **ASSOCIATION**…"

Comments: This sentence is in direct contradiction to 514B-108(e) which states the bylaws can only be amended by a super-majority of the Association.[1]

SECTION 2, (c)(1-3):

(c) Not less than ~~fourteen~~ **SIXTY** days in advance of a board meeting at which adoption of power of sale language will be considered, notice to the owners shall be:

~~(1) Hand-delivered;~~
(2) Sent prepaid by United States mail…
~~(3) …by electronic mail…"~~

Comments: NJFs are an extremely contentious and complicated issue. To expect an Owner who is not educated in these things to fully educate themselves on the pros and cons in as little as 14 days is incredibly disingenuous on the part of the supporters of NJFs.

As a Financial Advisor, I have a client who lost his condo to a NJF and he still does not even understand what happened to him, how they were able to do it, or what he should have done differently. Obviously NJFs are complicated and 14 days is obviously not enough time for an Owner to make an educated decision.

[1] §514B-108 (e): "The bylaws may be amended at any time by the vote or written consent of at least sixty-seven per cent of all unit owners…"

Regarding how the notice is delivered to Owners, again, this is in direct contradiction to 514B-110(c)[2]. Any changes to the bylaws must be mailed to the Owners. Hand delivery or email is incredibly ripe for abuse and corruption by the Boards, Managing Agents, and law firms.

SECTION 2, (d):

"An owner may preserve a potential defense…" should be changed to "An owner may **OPT OUT**…"

Comments: While I'm not a lawyer, the phrase "may preserve a potential defense" seems to have a lot of uncertainty to it and will certainly be challenged in court by those law firms that use NJFs. "Opt out" would provide a predictability that even the supporters of NJFs say they want. Multiple testifiers in support paraphrased this as an "opt out" provision that protected owners when in reality it does not read that way to an average person like myself.

SECTION 2, (d)(1):

"Delivering a written objection to the association by certified or registered mail, return receipt requested, within sixty days after ~~a meeting at which the board adopts a proposal to include this language~~ **THE MINUTES OF A MEETING AT WHICH THE BOARD ADOPTS A PROPOSAL TO INCLUDE THIS LANGUAGE ARE APPROVED**…"

Comments: My Board votes on all motions in the Executive Session and they do not meet again for at least another 60 days to approve the previous minutes. As such, an Owner literally has no way to know within 60 days whether or not the amendment passed or failed. This line would actually be better written to refer to the annual Association meeting instead of Board Meetings.

Also, I can easily envision the Board retaliating in other ways against an owner who chooses to "opt out" of a NJF. I think a paragraph needs to be added that makes it explicitly clear that retaliation against an owner for opting out of a NJF should be viewed in a manner that is most favorable to an owner. A supporting reference to 514B-9[3] should also be included to discourage the abuse of NJFs that we have seen in the past.

[2] §HRS 514B-110(c): "Within thirty days of a decision by the board or receipt of a petition to initiate a bylaw amendment, the board shall mail a ballot with the proposed bylaw amendment to all of the unit owners of record…"

[3] §514B-9: Obligation of good faith. Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

As a condo owner who has suffered indefensibly at the hands of Hawai'iana and Porter McGuire Kiakona for almost four years, three lawsuits filed with zero of their demands granted, and well over $100,000 in accrued legal fees, I believe that non-judicial foreclosures should be eliminated completely.

Proponents of the NJF often say that they are necessary to recover expenses owed to the AOAO so that other owners do not have to carry the financial burden. This is a very good (and the only) talking point, but it is not what happens in practice. PMK did a NJF in my AOAO in 2017. After the NJF completed and PMK collected their attorney fees, we found out that the unit was in a state of disrepair and unrentable. The unit has sat empty for 3 years and has not generated a single penny of income. Instead of alleviating the financial burden on other others, the increased attorney fees actually made the financial burden worse.

A quick search of public records shows that PMK has foreclosed on owners for as little as $432. Was a NJF really the best tool to use to alleviate this burden of $432 on the other owners? Is this really how the Legislature intended for the NJF to be used??

Thank you for the opportunity to testify,
Jeff Sadino

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

SB-191-HD-1
Submitted on: 3/30/2021 7:16:31 AM
Testimony for JHA on 3/30/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
John D. Smith	Individual	Support	No

Comments:

I support this bill and pass it through.

SB-191-HD-1
Submitted on: 3/30/2021 9:57:55 AM
Testimony for JHA on 3/30/2021 2:00:00 PM

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

Comments:

The problem with those supporting this measure is that they don't believe that THEY can ever find themselves in the situation where they are condo owners who could, for any unforeseen reason, be facing foreclosure at the hands of greedy attorneys and uninitiated condo board members who have no intention of protecting the rights of owners to justice through third party court proceedings. But those unforeseen circumstances include old age and the need to live in and own more easily maintained homes like condominiums, sudden unpredicted income loss and/or serious illness. Any or all of these conditions can and often does lead to inability to keep up with maintenance dues payments.

As a result of this dire predicament, and if SB191 is passed into law as it is now worded, those condo owners will surely face foreclosure under highly unreasonable and unjust terms that will be permanently and swiftly mandated. Thousands of condo owners have already unfairly lost their homes because of nonjudicial foreclosures already and illegally in place, and which our courts have ruled against.

Think about it, attorneys: You yourselves may be living "high off the hog" right now, in your fleeting youth, wealth and sense of power. But one day, you may find yourself in the unforeseen circumstances described above. If or when you do, you'll think back on kinder, more just legislation you did not, but could have supported.

SB-191-HD-1
Submitted on: 3/30/2021 9:58:38 AM
Testimony for JHA on 3/30/2021 2:00:00 PM

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

Comments:

TO: COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Rep. Mark M. Nakashima, Chair Rep. Scot Z. Matayoshi, Vice Chair

Rep. Linda Ichiyama Rep. Dale T. Kobayashi Rep. Matthew S. LoPresti

Rep. Nicole E. Lowen Rep. Angus L.K. McKelvey Rep. Nadine K. Nakamura

Rep. Roy M. Takumi Rep. Chris Todd Rep. James Kunane Tokioka Rep. Gene Ward

Testimony ***opposing SB191 SD2 HD1***

Aloha esteemed Legislators

1. As cited in the formal Bill language, in 2 Court cases, Sakal vs AOAO Hawaiian Monarch & Malabee vs AOAO Executive Center, for lack of a 'Power of Sale' provision in By-Laws, exercise of 'Non Judicial Foreclosure' was illegal.

2. It is Hawaii state government position that the nearly 1,700 Home Owners Associations are 'self-governing'. This bill seeks / encourages owners to sign onto state conferred authority for AOAO collections attorneys to seize their properties without going to Court, which violates the true essence of 'self-government'. The matter is properly up to each individual Home Owners Association (HOA) to deal with. Basically, it is disrespectful of those Court decisions. And, it shows disregard for Consumer Protection as there are no provisions to block Boards of Directors from imposing unethical fines to create 'debt' on owners which then can be 'gamed' as a means to seize their property.

3. My experience is that whenever collection attorneys get involved, 'debt' to the Home Owners Association quickly triples. Basically, the lawyers don't wish to appear in a Courtroom and work for their money, much easier to have their office clerks press a button on a computer to print ready made forms and letters to send out to condo owners

demanding payments. These cases should be in Small Claims Court. By the time debt exceeds the parameters of a Small Claim, this means the management company is NOT doing its job.

4. As a metric, 30+% of Hawaii residents are in condos, yet, 60% of them are estimated to be owned by 'Investors' who do not live on site. As they don't reside there, usually, they cannot 'vote' in HOA elections, and, the state does nothing to assure their right to vote. This is due to non-leadership. Yet, this bill, SB191 SD2, if passed into 'law', would permit an HOA thru its attorneys to seize property without judicial process, a denial of basic rights.

5. The solution to HOA debt collection is super simple. Each HOA should put in its By-Laws language to buyers of condos agree to '***garnishment'*** of wages or bank accounts for common area expenses of which owner(s) may be in arrears. This should not include spurious fines or 'legal fees', as those should be pursued in Small Claims Court.

6. Please ***reject*** this confiscatory bill as it intrudes upon HOA self-government which the state loves to cite when refusing to accord full voting rights to individual owners. Consider, as the state, its Legislature, does not support the 'right to vote' for condo owners who cannot attend Annual Meetings in person, yet, shamelessly panders to the huge (Mis)management 'industry'. Profits over ethics are the 'norm'. Bad Karma, not Pono. Try, for a change, tipping the 'Scale of Justice' in favor of Consumer Protection.

Respectfully, ***Dale Arthur Head*** (808) 696-4589 koolmakaha@gmail.com (submitted Wed 03-30-2021)

SB191 SD2 HD1