P.O. Box 976
Honolulu, Hawaii 96808

February 19, 2021

Chair Karl Rhoads
Vice Chair Jarrett Keohokalole
Committee on Judiciary
415 South Beretania Street
Honolulu, Hawaii 96813

Re: SB 191 SD1 SUPPORT

Dear Chair Rhoads, Vice-Chair Keohokalole and Committee Members:

SB 191 SD1 provides a mechanism to add "power of sale" language to a condominium association's governing documents. The Community Associations Institute ("CAI") supports SB 191 SD1.

SB 191 SD1 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 SD1 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 SD1 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 SD1 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 SD1, therefore, is well within the scope of legislative authority.

SB 191 SD1 effectively addresses stated judicial concerns about Act 282. CAI respectfully requests that the Committee pass SB 191 SD1 with one correction.

In section 2, the word "procedures" should be added before "and requirements" to read (in relevant part): "in compliance with procedures and requirements of Chapters 514B and 667 of the Hawaii Revised Statutes."

Very truly yours,

Philip Nerney

Philip Nerney

SB-191-SD-1
Submitted on: 2/20/2021 12:50:59 PM
Testimony for JDC on 2/24/2021 9:45:00 AM

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

Comments:

Our Board 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. 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.

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

Please pass SB191.

Mike Golojuch, Sr.

President, Palehua Townhouse Association

SB-191-SD-1
Submitted on: 2/20/2021 4:19:17 PM
Testimony for JDC on 2/24/2021 9:45:00 AM

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

Comments:

This Bill is essential. If an owner does not pay his maintenance fees. it burdens all the other owners. Support.

Senate

Committee on Judiciary
Wednesday, February 24, 2021 at 9:45 a.m.

To: Chair Karl Rhoads and Vice-Chair Jarrett Keohokalole

Re: SB191 SD1, relating to Condominiums

Aloha Chair Rhoads, Vice-Chair Keohokalole, and members of the Senate Committee on Judiciary,

I am Lila Mower and I **STRONGLY OPPOSE SB191 SD1.**

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

As for experience on other volunteer boards, I am the President of Kokua Council, one of Hawaii's oldest advocacy organizations which focuses on policies and practices which impact the well-being of seniors and other vulnerable people and I also serve on the Board of the over-20,000-member organization, Hawaii Alliance for Retired Americans.

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.

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

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: 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 those daunting 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.

The condo industry would have Legislators believe that there is savings of time and money in the non-judicial foreclosure process, but experience has demonstrated that that savings may be minimal or eliminated because the process may be more lengthy than perceived and because many foreclosed owners file legal action against their associations for having failed to exercise due process, including the simple but significant step of providing owners proper notification.

Please do not pass SB191 SD1 and instead act to protect the most valuable asset that most Hawaii residents own: their homes.

Mahalo.

(I share the following excerpt from the article "Not So Neighborly Associations Foreclosing on Homes," from www.npr.org:

"It's called nonjudicial foreclosure, and in practice it means a house can be sold on the courthouse steps with no judge or arbitrator involved. In Texas the process period is a mere 27 days -- the shortest of any state.

David Kahne, a Houston lawyer who advises homeowners, says that in Texas, the law is so weighted in favor of HOAs, he advises people that instead of hiring him, they should call their association and beg for mercy.

"I suggest you call the association and cry," he says.

If a homeowner misses a couple of association dues payments, the $250 or $500 they owe often becomes $3,000 after the association's lawyers add their legal fees, Kahne says.

It's not the HOA that has to pay the lawyer's bill but the delinquent homeowner. If the homeowner wishes to contest and loses, the owner is on the hook for legal fees that could run deep into the tens of thousands of dollars.

Kahne says that as the economy has gone under, HOA management companies and lawyers have been making millions off homeowners through this foreclosure process.")

SB-191-SD-1
Submitted on: 2/22/2021 9:35:53 AM
Testimony for JDC on 2/24/2021 9:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Nancy Manali-Leonardo	Individual	Oppose	No

Comments:

I strongly oppose SB 191 SD1.

I am a senior and would be homeless if a rogue board decided to proceed with a nonjudicial foreclosure. I have always paid all of my fees and dues, but you see that is *not* enough if a majority of the board can simply deny ownership for all sorts of bogus reasons via by voting anyone into homeless. No due process is just unfathomable. This bill leaves no hope for seniors on a budget to fight. It is unfair. Honolulu ranks high in homelessness-let's not make it higher. This bill was written by attorneys, I feel. It was not written by homeowners like me. It is very, very rare that an owner should be foreclosed on. This bill will make it a more common occurrence.

Thank you,

Nancy Manali-Leonardo (a condo owner)

808 542-1556

February 22, 2021

SB-191-SD-1
Submitted on: 2/22/2021 4:09:12 PM
Testimony for JDC on 2/24/2021 9:45:00 AM

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

Comments:

I strongly support. Foreclosure is the last resort for assocations unable to collect the debt owed by an owner. Judicial foreclosures are extremely costly and can remain pending for years, with the owner paying nothing during the time the case remains pending. All other owners end up paying that deficiency when many of them can barely afford to pay their own maintence fees. Consequently, it is imperative that associations be permitted to conduct nonjudicial foreclosures as the process is shorter and cost-effective. Associations are typically non-profit entities with a break even budget. Thus, when one owner fails to pay its maintenance and reserve fees, all other owners must cover the deficit in order to pay the association's bills. There is no extra money to fund forelcosure litigation which can cost tens of thousands of dollars per case depending upon the number of creditors named as parties in the case.

Thank you for the opportunity to testify.

SB-191-SD-1
Submitted on: 2/22/2021 7:02:52 PM
Testimony for JDC on 2/24/2021 9:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Jeff Sadino	Individual	Oppose	No

Comments:

While I originally supported this Bill and its companion Bill HB 641, I must now OPPOSE it since my previous suggestions for improvement were not incorporated.

Non-judicial foreclosures should be repealed due to their misuse by the law firms. For one example, a quick and incomplete search of public records shows that Porter McGuire Kiakona has used the NJF process on people for as little as $432. Supporters of NJF say that there are abundant protections in place for Owners. This example makes me question just how good those protections are or if the owner even understands them.

For a second example, the biggest reason the supporters give is that NJFs are necessary so that the financial burden is not shouldered by other owners. PMK did a NJF in my AOAO in 2017. Not until AFTER the NJF was complete was ANY discussion held about how to generate revenue from the newly acquired Unit. In fact, the Unit could not even be rented out or sold to an investor due to its very bad condition. Instead, the Unit has sat empty for three years, has not generated a single penny of revenue, and has not alleviated the financial burden to any of the other owners. PMK still collected their attorney fees. PMK should have had at least a shred of foresight that this was a possibility before charging us for their services, especially considering that PMK describes themselves as the “Pioneers” of the NJF.

Regarding this Bill, a previous testifier in support stated that the main protection of this Bill is that it has an “opt-out” clause for the owner. In fact, it does not. 514B-xx, (b)(3) states that “An owner may preserve a potential defense…” My MAIN suggestion is that this phrase should be replaced with the phrase “An owner may opt out…” or similarly “An owner shall preserve a complete defense…” If it is the intention of the legislatures and supporters to have an “opt-out” clause, then I see no reason why the clause should not be unmistakably clear??

I am not a lawyer. But I also do not think that being a lawyer should be a pre-requisite for home ownership. I am extremely concerned about multiple places of confusing language in this Bill (see previous testimony on 2/9/21 for HB 641). It strikes me as language that does its best to dance around multiple sticky issues without giving a

straightforward solution and instead of stating clearly and definitively what protections an owner can depend on. The owner deserves to have this very important law written in plain and simple language.

I would also suggest that the 14 day notice in 514B-xx(c) be extended to 60 days, (c)(2) require certified mail, (c)(3) regarding email be removed, and that a NJF can only be added to the Governing Documents by a vote of the Association (not the Board).

Thank you for the opportunity to testify,

Jeff Sadino

SB-191-SD-1
Submitted on: 2/22/2021 11:32:33 PM
Testimony for JDC on 2/24/2021 9:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara J. Service	Individual	Oppose	No

Comments:

As a senior and a log-time officer of an AOAO, I strongly encourage your opposition to SB191 which would give condo boards way too much power over owners (often elderly) who may end up losing their untts.

Mahalo!

Barbara J. Service MSW (ret.)

Senior Advocate

SB-191-SD-1
Submitted on: 2/23/2021 1:45:19 AM
Testimony for JDC on 2/24/2021 9:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
B.A. McClintock	Individual	Oppose	No

Comments:

Please oppose this bill. It obviously will hurt homeowners who are already at a disadvantage in condo associations.

SB-191-SD-1
Submitted on: 2/23/2021 7:35:42 AM
Testimony for JDC on 2/24/2021 9:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Harendra Panalal	Individual	Oppose	No

Comments:

Hon. Senators:

NJF have been abused in the past.

HRS514B should be followed in letter and in spirit.

We need more transparency in all condominium matters.

I have been on BOD of two large AOUO for many years.

Harendra Panalal, MSE, PE, RME

home 538-6202, cell 439-4295

SB-191-SD-1
Submitted on: 2/23/2021 8:00:19 AM
Testimony for JDC on 2/24/2021 9:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Lourdes Scheibert	Individual	Oppose	No

Comments:

The Real Estate Commission should have extensive education for the condominium owner and potential owners on classes for non-judicial-foreclosures by the board of directors before this measure becomes law. This measure should be deferred.

The courts found non-judicial-foreclosures by associations unlawful. There's a reason. Foreclosures should be left to the lender who loan the money to the owner. Should this measure pass what happens to the contract of a mortgage lender? Will it make qualifying for a loan difficult or will a lender write provisions in their contract to neutralize this measure? I'm not an expert on mortgage loans.

Education for volunteer board directors should be mandatory for good stewardship of self-governance to have an understanding of the governing documents, 514B and building & fire codes.

When this measure passes into law coupled with the uneducated director and the option of assigning a proxy to the board as a whole for the preference of the majority board directors will give a volunteer board unbridled power and exposes the owners to abuse and retaliation.

Lourdes Scheibert

Condominium owner and former condo director

LATE

SB-191-SD-1
Submitted on: 2/23/2021 12:58:28 PM
Testimony for JDC on 2/24/2021 9:45:00 AM

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

Comments:

No matter the terminology for nonjudicial foreclosure in this and other similar bills, NJFs are WRONG, and the condo industry, including its legal principals needs to stop trying to cloak this unjust procedure in a shroud of decency. Numerous legal judgments have already been rendered against it, so the attorneys and industry leaders should cease trying to deceive uninitiated condo owners who alone are targeted for this injustice!