SB-191
Submitted on: 1/30/2021 5:08:49 PM
Testimony for CPN on 2/3/2021 9:30:00 AM

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

Comments:

Our association supports SB191.

SB-191
Submitted on: 1/31/2021 4:43:38 PM
Testimony for CPN on 2/3/2021 9:30:00 AM

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

Comments:

The Bill is needed to allow Condominiums to economically enforce payments. Condominiums are non profits with break even budgets that when one owner does not pay, all the other owners have to cover the deficit.

SB-191
Submitted on: 2/1/2021 7:23:05 AM
Testimony for CPN on 2/3/2021 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower	Testifying for Hui `Oia`i`o, Condo Owners Coalition of Hawaii	Oppose	No

Comments:

STRONGLY OPPOSE. Non-judicial foreclosures occur without the benefit of a neutral third party to assure that due process and legal procedures are satisfied.

HAWAII LEGISLATIVE
ACTION COMMITTEE
community
ASSOCIATIONS INSTITUTE

P.O. Box 976
Honolulu, Hawaii 96808

February 1, 2021

Chair Rosalyn H. Baker
Vice Chair Stanley Chang
Committee on Commerce and Consumer Protection
415 South Beretania Street
Honolulu, Hawaii 96813

Re: SB 191 SUPPORT

Dear Chair Baker, Vice-Chair Chang and Committee Members:

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

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

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

Very truly yours,

Philip Nerney

Philip Nerney

SB-191
Submitted on: 1/31/2021 12:59:50 PM
Testimony for CPN on 2/3/2021 9:30:00 AM

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

Comments:

I am opposed to this measure because it is just another means for association management and condo industry leaders to conveniently bypass justice for condo owners whose properties are in jeopardy.

Senator Baker and Members of The Committee,

My name is John Morris and I am testifying in favor of SB191 because it helps clear up and confirm the right of homeowner associations to conduct nonjudicial foreclosures.

As section 1 of SB191 points out, decisions by the Hawaii Supreme Court and the Federal District Court for Hawaii have created confusion about the right of condominium associations to use the non-judicial foreclosure process.

Associations originally lobbied for the ability to conduct non judicial foreclosures because the non-judicial process benefits associations in their efforts to preserve their financial viability. Recent court decisions misinterpreted the Legislature's intent back then and have also questioned the Legislature's efforts to confirm its intent in act 282 (SLH 2019). SB191 tries to clarify those issues by clearly stating that condominiums may use the nonjudicial process if they follow certain basic steps.

If associations are forced to use the judicial, rather than NON-judicial foreclosures, the association will take 2 1/2 to three times as long and spend 2 1/2 to three times as much to complete the judicial foreclosure. That is why, more than two decades ago, the associations lobbied the legislature for the right to conduct non-judicial foreclosures.

Admittedly, even the non-judicial process is not necessarily highly effective in all cases, but it does pressure the owner to pay while reducing the time and expense of the association to apply that pressure. The nonjudicial process also allows the association to take over the unit and rent it out sooner, to try to reduce the association's losses

The main problem facing an association in any type of foreclosure is that the value of the unit being foreclosed on is often less than the amount of the mortgage on the unit. For example, most of the time when associations are trying to collect money from one of their members, the member owns a unit that is subject to a mortgage that has been recorded prior to the association's lien for delinquent assessments. If the lender's mortgage has been recorded prior to the association's lien and the association holds a foreclosure auction, the sale of the property will have to be subject to that mortgage.

All too often, the mortgage is worth more than the value of the unit. For example, the association might be foreclosing on a unit that is worth $400,000 but is subject to a mortgage of $500,000. If the association tries to sell the unit in its foreclosure, it will be offering a property to a buyer that will: (i) must be purchased subject to the mortgage and (ii) be worth $100,000 less than the mortgage. Moreover, if the buyer wants to keep the property, he or she will have to pay off the mortgage or the lender will foreclose on the buyer.

If the association can use the non-judicial process, the result will not necessarily be different, but it will take 1/2 to 1/3 the time and reduce the expenses by 1/2 to 1/3. That may allow associations to take over the unit and at least rent it out until the lender forecloses, thereby reducing the association's loss.

Moreover, in 2012, when the legislature passed the current nonjudicial foreclosure law for associations, the legislature included numerous protections for an owner. For example, after the

association starts the nonjudicial foreclosure, the association must wait 60 days before taking any further action, to allow the owner the opportunity to organise some kind of response. Moreover, the law also states that if an owner offers a payment plan that will not exceed 12 months, the association must accept that payment plan.

Thank you for this opportunity to testify.

John Morris

SB-191
Submitted on: 2/1/2021 8:37:12 AM
Testimony for CPN on 2/3/2021 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Dr. Jim Shon	Individual	Support	No

Comments:

Strongly support. There are vulnerable seniors and others who have lost their condo homes in the past due to nonjudicial evictions. If a condo is a vertical village, it makes sense to expect transparent, just, and fair democratic processes. Especially during this pandemic, just as laws are being enacted to suspect noncondo evictions, this measure ensures that our economic crisis will not create additional hardships.

SB-191
Submitted on: 2/1/2021 7:04:57 PM
Testimony for CPN on 2/3/2021 9:30:00 AM

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

Comments:

Highly support!

SB-191
Submitted on: 2/2/2021 9:04:22 AM
Testimony for CPN on 2/3/2021 9:30:00 AM

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

Comments:

Non-judicial foreclosures are a disaster and should be abolished completely.

I support the changes made on Page 8 of this Bill to 514B-146(a).

As a financial planner, I am reminded of a story of one of my clients. He lost his condo and he did not even understand why. He paid his maintenance fee every month and to the best of his understanding, he did everything he was supposed to do. He even hired a lawyer to defend himself. Imagine having your home taken away from you and two years later, you still can't understand why or how it happened. Associations and their lawyers often give conflicting (or no) information to Owners about what is happening to them.

My AOAO performed a non-judicial foreclosure on the advice of our lawyers, and even months later, my Board still had no idea what they did with the non-judicial, what it meant, or even how it would help the AOAO. The Unit has sat completely vacant for the past 3 years at no benefit to anybody.

My AOAO was created in 1972, before the non-judicial powers were appropriated. To assume that my Governing Documents intended to appropriate power of sale abilities clearly cannot be supported. At a minimum, a clear amendment to the Governing Documents and clear notification to the Owners needs to be required.

PMK, one of the largest condo law firms in the state and one of the most active in contributing to the legislative agenda, on their website they brag that they are "Pioneers of the non-judicial foreclosure, we were one of the first to streamline the foreclosure process, saving our clients time and money." A quick (and incomplete) search of public records show that PMK has stolen the homes of people for delinquent amounts of:

$432
$1,007
$3,902
$3,983
$3,988
$4,069
$5,573

$5,667
$6,236
$8,449
$8,594

With the messiness and abuse of Owners that is rampant in condo governance, for large law firms to brag about stealing peoples' homes for just a couple thousand dollars demonstrates how the non-judicial foreclosure process has been abused.

If the non-judicial foreclosure process is not completely repealed, then at a minimum as many protections as possible are needed for the Owners, and so I support this Bill that requires the explicit "power of sale" clause to exist in the Governing Documents.

Thank you for the opportunity to testify.

LATE

SB-191
Submitted on: 2/2/2021 9:47:59 AM
Testimony for CPN on 2/3/2021 9:30:00 AM

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

Comments:

I oppose, **the explicit grant of power of sale to associations is not required for the purposes of enforcing association liens under the association alternate power of sale foreclosure process.**

I believe the 'power of sale' should be reserved traditionally first to the Mortgage lending institution who lent the money to the owner to buy the unit.

Safeguards be put in place on mandatory education for the condominium volunteer directors to understand nonjudicial foreclosures. Directors should be aware of the major consequences of the absence of a court appointed supervised mortgage foreclosures.

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