

ACT 195

H.B. NO. 1873

A Bill for an Act Relating to Condominiums.

Be It Enacted by the Legislature of the State of Hawaii:

PART I

SECTION 1. The legislature finds that it is important to have clear and effective rules related to association foreclosures on condominiums, including which actions successfully cure a default. The legislature further finds that a condominium owner and an association agreeing to a payment plan is not sufficient to cure a default. Rather, agreeing to a payment plan and paying the delinquency in full is required for a unit owner to cure a nonjudicial foreclosure on a condominium.

The legislature further finds that existing law requires condominium owners to pay all assessments claimed by an association first, prior to initiating a dispute over assessments. The legislature additionally finds that preserving this pay first, dispute later provision as it applies to common expense assessments is important. However, encouraging the use of mediation for all other penalties or fines, late fees, lien filing fees, or other charges in an assessment will be beneficial to condominium owners and associations.

Accordingly, the purpose of this Act is to:

- (1) Clarify that an association does not have to rescind the notice of default and intention to foreclose or restart the foreclosure by filing a new notice of default and intent to foreclose if a unit owner defaults on a payment plan to cure a nonjudicial foreclosure agreed to by the parties;
- (2) Specify that if a unit owner and an association have agreed on a payment plan to prevent a nonjudicial foreclosure from proceeding, any association fines imposed while the payment plan is in effect shall not be deemed a default under the payment plan;
- (3) Clarify the obligations of a unit owner and an association while a unit owner is not otherwise in default under a payment plan;
- (4) Clarify that the pay first, dispute later provisions in Hawaii's condominium law apply only to common expense assessments claimed by an association;
- (5) Specify that a unit owner who disputes the amount of an assessment may request a written statement about the assessment from the association, including that a unit owner may demand mediation prior to paying contested charges, other than common expense assessments; and
- (6) Specify requirements for mediation on contested charges, except for common expense assessments.

PART II

SECTION 2. Section 667-94, Hawaii Revised Statutes, is amended to read as follows:

~~“[H]§667-94[H] Cure of default. (a) If the default is cured as required by the notice of default and intention to foreclose[, or if the parties have agreed on a payment plan], the association shall rescind the notice of default and intention to foreclose. If, pursuant to section 667-92(c), the parties agree on a payment~~

plan to cure the default, the notice of default and intention to foreclose shall be put on hold until the payment plan is completed. Within fourteen days of the date of the cure or an agreement on a payment plan, the association shall so notify any person who was served with the notice of default and intention to foreclose. If the default is cured, or the payment plan is completed according to its terms, and the notice of default and intention to foreclose was recorded, a release of the notice of default and intention to foreclose shall be recorded.

(b) If the default is not cured as required by the notice of default and intention to foreclose, [or] the parties have not agreed on a payment plan, or the parties have agreed on a payment plan but a default occurs under the payment plan, the association, without filing a court action and without going to court, may foreclose the association's lien under power of sale to sell the unit at a public sale.

(c) If the parties have agreed on a payment plan to prevent a foreclosure from proceeding, any unpaid fines the association imposes on the unit owner while the payment plan is in effect shall not be deemed a default under the payment plan. As long as the unit owner is not otherwise in default under the payment plan, the:

- (1) Association shall notify the unit owner in writing of the right to mediation;
- (2) Fines and any attorneys' fees incurred with respect to such fines shall not be deducted from the unit owner's payments pursuant to the payment plan; and
- (3) Parties shall attempt to resolve a dispute over fines and attorneys' fees, if any, through mediation, within thirty days of the association's written notice.

If the unit owner refuses to participate in mediation or defaults under the payment plan, or the parties are unable to resolve the dispute through mediation, the association may then commence foreclosure proceedings."

PART III

SECTION 3. Section 514B-105, Hawaii Revised Statutes, is amended by amending subsection (c) to read as follows:

"(c) No association shall deduct and apply portions of common expense payments received from a unit owner to unpaid late fees, legal fees, fines, and interest (other than amounts remitted by a unit in payment of late fees, legal fees, fines, and interest) ~~[unless the board adopts and distributes to all owners a policy stating that:~~

- (1) ~~Failure to pay late fees, legal fees, fines, and interest may result in the deduction of such late fees, legal fees, fines, and interest from future common expense payments, so long as a delinquency continues to exist; and~~
- (2) ~~Late fees may be imposed against any future common expense payment that is less than the full amount owed due to the deduction of unpaid late fees, legal fees, fines, and interest from the payment]."~~

SECTION 4. Section 514B-146, Hawaii Revised Statutes, is amended to read as follows:

"§514B-146 Association fiscal matters; lien for assessments. (a) All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit with priority over all other liens, except:

- (1) Liens for real property taxes and assessments lawfully imposed by governmental authority against the unit; and
- (2) Except as provided in subsection [(g);] (j), all sums unpaid on any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association, and costs and expenses including attorneys' fees provided in such mortgages;

provided that a lien recorded by an association for unpaid assessments shall expire six years from the date of recordation unless proceedings to enforce the lien are instituted prior to the expiration of the lien; provided further that the expiration of a recorded lien shall in no way affect the association's automatic lien that arises pursuant to this subsection or the declaration or bylaws. Any proceedings to enforce an association's lien for any assessment shall be instituted within six years after the assessment became due; provided that if the owner of a unit subject to a lien of the association files a petition for relief under the United States Bankruptcy Code (11 U.S.C. §101 et seq.), the period of time for instituting proceedings to enforce the association's lien shall be tolled until thirty days after the automatic stay of proceedings under section 362 of the United States Bankruptcy Code (11 U.S.C. §362) is lifted.

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, 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.

In any such foreclosure, the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws or the law, and the plaintiff in the foreclosure shall be entitled to the appointment of a receiver to collect the rental owed by the unit owner or any tenant of the unit. If the association is the plaintiff, it may request that its managing agent be appointed as receiver to collect the rent from the tenant. The managing agent or board, acting on behalf of the association and in the name of the association, unless prohibited by the declaration, may bid on the unit at foreclosure sale, and acquire and hold, lease, mortgage, and convey the unit. Action to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the unpaid common expenses owed.

(b) Except as provided in subsection [(g);] (j), when the mortgagee of a mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the mortgage, the acquirer of title and the acquirer's successors and assigns shall not be liable for the share of the common expenses or assessments by the association chargeable to the unit that became due prior to the acquisition of title to the unit by the acquirer. The unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners, including the acquirer and the acquirer's successors and assigns. The mortgagee of record or other purchaser of the unit shall be deemed to acquire title and shall be required to pay the unit's share of common expenses and assessments beginning:

- (1) Thirty-six days after the order confirming the sale to the purchaser has been filed with the court;
- (2) Sixty days after the hearing at which the court grants the motion to confirm the sale to the purchaser;
- (3) Thirty days after the public sale in a nonjudicial power of sale foreclosure conducted pursuant to chapter 667; or
- (4) Upon the recording of the instrument of conveyance;

whichever occurs first; provided that the mortgagee of record or other purchaser of the unit shall not be deemed to acquire title under paragraph (1), (2), or (3), if transfer of title is delayed past the thirty-six days specified in paragraph (1), the sixty days specified in paragraph (2), or the thirty days specified in paragraph (3), when a person who appears at the hearing on the motion or a party to the foreclosure action requests reconsideration of the motion or order to confirm sale, objects to the form of the proposed order to confirm sale, appeals the decision of the court to grant the motion to confirm sale, or the debtor or mortgagor declares bankruptcy or is involuntarily placed into bankruptcy. In any such case, the mortgagee of record or other purchaser of the unit shall be deemed to acquire title upon recordation of the instrument of conveyance.

(c) ~~[No unit owner shall withhold any assessment claimed by the association.]~~ A unit owner who receives a demand for payment from an association and disputes the amount of an assessment may request a written statement clearly indicating:

- (1) The amount of common expenses included in the assessment, including the due date of each amount claimed;
- (2) The amount of any penalty~~;~~ or fine, late fee, lien filing fee, and any other charge included in the assessment; that is not imposed on all unit owners as a common expense; and
- (3) The amount of attorneys' fees and costs, if any, included in the assessment~~;~~.

(d) A unit owner who disputes the information in the written statement received from the association pursuant to subsection (c) may request a subsequent written statement that additionally informs the unit owner that:

- ~~[(4) That under]~~ (1) Under Hawaii law, a unit owner has no right to withhold common expense assessments for any reason;
- ~~[(5) That a]~~ (2) A unit owner has a right to demand mediation or arbitration to resolve disputes about the amount or validity of an association's common expense assessment~~;~~; provided that the unit owner immediately pays the common expense assessment in full and keeps common expense assessments current; ~~and~~
- ~~[(6) That payment]~~ (3) Payment in full of the common expense assessment ~~[does]~~ shall not prevent the owner from contesting the common expense assessment or receiving a refund of amounts not owed~~[-]; and~~
- (4) If the unit owner contests any penalty or fine, late fee, lien filing fee, or other charges included in the assessment, except common expense assessments, the unit owner may demand mediation as provided in subsection (g) prior to paying those charges.

(e) No unit owner shall withhold any common expense assessment claimed by the association. Nothing in this section shall limit the rights of an owner to the protection of all fair debt collection procedures mandated under federal and state law.

~~[(d)]~~ (f) A unit owner who pays an association the full amount of the common expenses claimed by the association may file in small claims court or require the association to mediate to resolve any disputes concerning the amount or validity of the association's common expense claim. If the unit owner and the association are unable to resolve the dispute through mediation, either party may file for arbitration under section 514B-162; provided that a unit owner may only file for arbitration if all amounts claimed by the association as common expenses are paid in full on or before the date of filing. If the unit owner fails to keep all association common expense assessments current during the arbitration, the association may ask the arbitrator to temporarily suspend the arbitration proceed-

ings. If the unit owner pays all association common expense assessments within thirty days of the date of suspension, the unit owner may ask the arbitrator to recommence the arbitration proceedings. If the unit owner fails to pay all association common expense assessments by the end of the thirty-day period, the association may ask the arbitrator to dismiss the arbitration proceedings. The unit owner shall be entitled to a refund of any amounts paid as common expenses to the association [~~which~~] that are not owed.

(g) A unit owner who contests the amount of any attorneys' fees and costs, penalties or fines, late fees, lien filing fees, or any other charges, except common expense assessments, may make a demand in writing for mediation on the validity of those charges. The unit owner has thirty days from the date of the written statement requested pursuant to subsection (d) to file demand for mediation on the disputed charges, other than common expense assessments. If the unit owner fails to file for mediation within thirty days of the date of the written statement requested pursuant to subsection (d), the association may proceed with collection of the charges. If the unit owner makes a request for mediation within thirty days, the association shall be prohibited from attempting to collect any of the disputed charges until the association has participated in the mediation. The mediation shall be completed within sixty days of the unit owner's request for mediation; provided that if the mediation is not completed within sixty days or the parties are unable to resolve the dispute by mediation, the association may proceed with collection of all amounts due from the unit owner for attorneys' fees and costs, penalties or fines, late fees, lien filing fees, or any other charge that is not imposed on all unit owners as a common expense.

[(e)] (h) In conjunction with or as an alternative to foreclosure proceedings under subsection (a), where a unit is owner-occupied, the association may authorize its managing agent or board to, after sixty days' written notice to the unit owner and to the unit's first mortgagee of the nonpayment of the unit's share of the common expenses, terminate the delinquent unit's access to the common elements and cease supplying a delinquent unit with any and all services normally supplied or paid for by the association. Any terminated services and privileges shall be restored upon payment of all delinquent assessments but need not be restored until payment in full is received.

[(f)] (i) Before the board or managing agent may take the actions permitted under subsection [(e)] (h), the board shall adopt a written policy providing for such actions and have the policy approved by a majority vote of the unit owners at an annual or special meeting of the association or by the written consent of a majority of the unit owners.

[(g)] (j) Subject to this subsection, and subsections [(h)] (k) and [(i)] (l), the board may specially assess the amount of the unpaid regular monthly common assessments for common expenses against a mortgagee or other purchaser who, in a judicial or nonjudicial power of sale foreclosure, purchases a delinquent unit; provided that the mortgagee or other purchaser may require the association to provide at no charge a notice of the association's intent to claim lien against the delinquent unit for the amount of the special assessment, prior to the subsequent purchaser's acquisition of title to the delinquent unit. The notice shall state the amount of the special assessment, how that amount was calculated, and the legal description of the unit.

[(h)] (k) The amount of the special assessment assessed under subsection [(g)] (j) shall not exceed the total amount of unpaid regular monthly common assessments that were assessed during the six months immediately preceding the completion of the judicial or nonjudicial power of sale foreclosure.

[(i)] (l) For purposes of subsections [(g)] (j) and [(h)] (k), the following definitions shall apply, unless the context requires otherwise:

“Completion” means:

- (1) In a nonjudicial power of sale foreclosure, when the affidavit after public sale is recorded pursuant to section 667-33; and
- (2) In a judicial foreclosure, when a purchaser is deemed to acquire title pursuant to subsection (b).

“Regular monthly common assessments” does not include:

- (1) Any other special assessment, except for a special assessment imposed on all units as part of a budget adopted pursuant to section 514B-148;
- (2) Late charges, fines, or penalties;
- (3) Interest assessed by the association;
- (4) Any lien arising out of the assessment; or
- (5) Any fees or costs related to the collection or enforcement of the assessment, including attorneys’ fees and court costs.

~~(j)~~ (m) The cost of a release of any lien filed pursuant to this section shall be paid by the party requesting the release.

~~(k)~~ (n) After any judicial or nonjudicial foreclosure proceeding in which the association acquires title to the unit, any excess rental income received by the association from the unit shall be paid to existing lien holders based on the priority of lien, and not on a pro rata basis, and shall be applied to the benefit of the unit owner. For purposes of this subsection, excess rental income shall be any net income received by the association after a court has issued a final judgment determining the priority of a senior mortgagee and after paying, crediting, or reimbursing the association or a third party for:

- (1) The lien for delinquent assessments pursuant to subsections (a) and (b);
- (2) Any maintenance fee delinquency against the unit;
- (3) Attorney’s fees and other collection costs related to the association’s foreclosure of the unit; or
- (4) Any costs incurred by the association for the rental, repair, maintenance, or rehabilitation of the unit while the association is in possession of the unit including monthly association maintenance fees, management fees, real estate commissions, cleaning and repair expenses for the unit, and general excise taxes paid on rental income;

provided that the lien for delinquent assessments under paragraph (1) shall be paid, credited, or reimbursed first.”

PART IV

SECTION 5. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 6. This Act shall take effect on July 1, 2018, and shall be repealed on June 30, 2020; provided that sections 514B-105, 514B-146, and 667-94, Hawaii Revised Statutes, shall be reenacted in the form in which they read on the day before the effective date of this Act.

(Approved July 10, 2018.)