

ACT 282

S.B. NO. 551

A Bill for an Act Relating to Condominiums.

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

SECTION 1. The legislature finds that “Hawaii was the first state to enact statutory provisions enabling the creation of condominiums.” State Savings & Loan Association v. Kauaian Development Company, 50 Haw. 540, 546, 445 P.2d 109, 115 n.8 (1968). Brought into being by the legislature through Act 180, Session Laws of Hawaii 1961, condominiums are “creature[s] of statute,” State Savings & Loan Association, 50 Haw. at 546, 445 P.2d at 115, which are governed by *statutes*, as well as their governing documents.

The legislature finds that condominiums provide a valuable housing resource in Hawaii, especially with limited space available for new development. The structure of condominium ownership requires each owner to share in the total cost of maintaining common areas such as building exteriors, landscaping, pool, and recreation rooms, in addition to paying insurance premiums. All owners pay for such maintenance through fees or dues. The legislature further finds that it is crucial that condominium associations be able to secure timely payment of dues to provide services to all residents of a condominium community.

In 1999, the legislature noted “that more frequently associations of apartment owners are having to increase maintenance fee assessments due to increasing delinquencies and related enforcement expenses. This places an unfair burden on those non-delinquent apartment owners who must bear an unfair share of common expenses” Moreover, lengthy delays in the judicial foreclosure process exacerbated the financial burden on association owners. The legislature determined that associations needed a more efficient alternative, such as power of sale foreclosures, to provide a remedy for recurring delinquencies.

Additionally, the legislature finds that condominium associations, since 1999, have been authorized to conduct nonjudicial foreclosures regardless of the presence or the absence of power of sale language in an association’s governing documents. Beginning in 1998 with the passage of Act 122, Session Laws of Hawaii 1998, and codified in section 667-40, Hawaii Revised Statutes, condominium associations were authorized to conduct nonjudicial foreclosures if a “law or written document contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.” However, in 1999, the legislature passed Act 236, Session Laws of Hawaii 1999, “[c]larify[ing] that associations of apartment owners may enforce liens for unpaid common expenses by non-judicial power of sale foreclosure procedures, as an alternative to legal action” by:

- (1) Specifying that condominium associations may foreclose liens by nonjudicial or power of sale foreclosure within the statute governing the priority of a condominium association lien (section 514A-90, Hawaii Revised Statutes (repealed January 1, 2019)); and
- (2) Incorporating into the bylaws of all condominium associations a provision authorizing condominium associations to enforce liens by nonjudicial or power of sale foreclosure pursuant to chapter 667, Hawaii Revised Statutes (section 514A-82, Hawaii Revised Statutes (repealed January 1, 2019)).

Thus, Act 236, Session Laws of Hawaii 1999, provided a statutory grant of power and an incorporation into written documents authorizing condominium associations to utilize nonjudicial foreclosure under sections 667-5 (repealed June 28, 2012) and 667-40, Hawaii Revised Statutes, to enforce their liens.

The legislature also finds that this intent was not abrogated by the recodification of chapter 514A, Hawaii Revised Statutes. First, through Act 164, Session Laws of Hawaii 2004, the language of section 514A-90, Hawaii Revised Statutes, was incorporated with limited amendments while retaining the authorization that condominium associations may foreclose liens by nonjudicial or power of sale foreclosure. Second, while the new statute governing bylaws no longer contained a provision authorizing condominium associations to enforce liens by nonjudicial or power of sale foreclosure, it was not removed out of an intention to revoke this authority from condominium associations but rather out of a desire to enhance the clarity of the condominium law. As stated in the *Final Report to the Legislature: Recodification of Chapter 514A, Hawaii Revised Statutes (Condominium Property Regimes)*, the “statutory requirements for condominium governing documents should be minimized while incorporating certain provisions . . . in more appropriate statutory sections.”

Further, the legislature finds that the intent was not abrogated by the creation of the nonjudicial foreclosure process specifically for condominium associations, codified as part VI of chapter 667, Hawaii Revised Statutes, through Act 182, Session Laws of Hawaii 2012. This is evidenced by the lack of a provision constricting its application similar to the language in section 667-40, Hawaii Revised Statutes.

Since the enactment of part VI of chapter 667, Hawaii Revised Statutes, associations have conducted nonjudicial foreclosures as part of their efforts to collect delinquencies and sustain their financial operations. Associations have done so subject to the restrictions on nonjudicial foreclosures and other collection options imposed by the legislature, which include:

- (1) Prohibiting the use of nonjudicial foreclosure to collect fines, penalties, legal fees, or late fees;
- (2) Requiring associations to give an owner sixty days to cure a default before proceeding with the nonjudicial foreclosure and to accept reasonable payment plans of up to twelve months; and
- (3) Requiring associations to provide owners with contact information for approved housing counselors and approved budget and credit counselors.

However, the intermediate court of appeals in *Sakal v. Association of Apartment Owners of Hawaiian Monarch*, 143 Haw. 219, 426 P.3d 443 (2018), held that the legislature intended that associations can only conduct nonjudicial foreclosures if they have specific authority to conduct nonjudicial foreclosures in their declaration or bylaws or in an agreement with the owner being foreclosed upon.

The legislative history indicates this was not the intent of the legislature in 1999, nor in legislatures that have made subsequent amendments. Therefore, this Act confirms the legislative intent that condominium associations should be able to use nonjudicial foreclosure to collect delinquencies regardless of the presence or absence of power of sale language in an association’s governing documents.

This Act also provides an additional consumer protection by requiring the foreclosing association to offer mediation with any notice of default and intention to foreclose and the procedures when mediation is chosen by the consumer.

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

“§514B- Association fiscal matters; supplemental nonjudicial foreclosure notices; restrictions on power of sale. (a) Any notice of default and intention to foreclose given by an association under section 667-92(a) shall, in addition to the requirements of that section, also include a statement that the

unit owner may request mediation by delivering a written request for mediation to the association by certified mail, return receipt requested, or hand delivery within thirty days after service of a notice of default and intention to foreclose on the unit owner.

If the association does not receive a request for mediation within the thirty-day period, the association may proceed with nonjudicial or power of sale foreclosure, subject to all applicable provisions of this chapter and chapter 667. If the association receives a request for mediation, as set forth in this subsection, from a unit owner within thirty days after service of a notice of default and intention to foreclose upon the unit owner, the association shall agree to mediate and shall be prohibited from proceeding with nonjudicial or power of sale foreclosure until the association has participated in the mediation or the time period for completion of the mediation has elapsed. The mediation shall be completed within sixty days of the date upon which the unit owner delivers a request for mediation upon the association; provided that if the mediation is not commenced or completed within sixty days or the parties are unable to resolve the dispute by mediation, the association may proceed with nonjudicial or power of sale foreclosure, subject to all applicable provisions of this chapter and chapter 667.

(b) In addition to the wording required by section 667-92(b), any notice of default and intention to foreclose given by an association under section 667-92(a) shall also contain wording substantially similar to the following in all capital letters and printed in not less than fourteen-point font:

“THIS NOTICE PERTAINS TO AMOUNTS DUE AND OWING TO THE ASSOCIATION FOR WHICH THE ASSOCIATION HAS A STATUTORY OR RECORDED LIEN. THIS NOTICE DOES NOT PERTAIN TO OBLIGATIONS OWED BY YOU TO OTHER CREDITORS, INCLUDING ANY OUTSTANDING MORTGAGE DEBT. YOU SHOULD CONSULT YOUR OTHER CREDITORS, INCLUDING YOUR MORTGAGEES, IF ANY, AS TO THE EFFECT THE FORECLOSURE OF THE ASSOCIATION’S LIEN WILL HAVE ON YOUR OTHER OUTSTANDING DEBTS.”

(c) The association’s power of sale provided in section 514B-146(a) may not be exercised against:

- (1) Any lien 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;
- (2) Any unit owned by a person who is on military deployment outside of the State of Hawaii as a result of active duty military status with any branch of the United States military. The foreclosure of any such lien shall be filed in court pursuant to part IA of chapter 667, this subsection shall not apply if the lien of the association has been outstanding for a period of one year or longer; or
- (3) Any unit while the nonjudicial or power of sale foreclosure has been stayed pursuant to section 667-92(c).”

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

“(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 (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~~], regardless of the presence or absence of power of sale language in an association's governing documents, 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."

SECTION 4. Section 667-1, Hawaii Revised Statutes, is amended by amending the definition of "power of sale" to read as follows:

"Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure when [the]:

- (1) The mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure[-]; or
- (2) For the purposes of part VI, an association enforces its claim of an association lien, regardless of whether the association documents provide for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure."

SECTION 5. Sections 3 and 4 of this Act shall be applied retroactively to any case, action, proceeding, or claim arising out of a nonjudicial foreclosure under section 667-5 (repealed June 28, 2012), Hawaii Revised Statutes, and parts II and VI of chapter 667, Hawaii Revised Statutes, that arose before the effective

date of this Act and in which a final non-appealable judgment has not yet been entered.

SECTION 6. This Act shall not be applied so as to impair any contract existing as of the effective date of this Act in a manner violative of either the Hawaii State Constitution or Article I, section 10, of the United States Constitution.

SECTION 7. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 9. This Act shall take effect upon its approval; provided that the amendments made to section 514B-146(a), Hawaii Revised Statutes, by section 3 of this Act shall not be repealed when that section is reenacted on June 30, 2020, pursuant to section 6 of Act 195, Session Laws of Hawaii 2018.

(Became law on July 9, 2019, without the governor's signature, pursuant to Art. III, §16, State Constitution.)

Note

1. Edited pursuant to HRS §23G-16.5.