

HB

76

A BILL FOR AN ACT

RELATING TO NONJUDICIAL FORECLOSURES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. In 1999, the legislature passed Act 236,
2 Session Laws of Hawaii 1999, authorizing condominium
3 associations to conduct nonjudicial foreclosures. In 2012,
4 through Act 182, Session Laws of Hawaii 2012, the legislature
5 enacted a new part of the foreclosure law—part VI of chapter
6 667, Hawaii Revised Statutes—creating a nonjudicial foreclosure
7 process specifically for condominium and planned community
8 associations. During that time, in reliance on the
9 legislature's actions, associations have conducted nonjudicial
10 foreclosures as part of their efforts to collect delinquencies
11 and sustain their financial operations. Associations have done
12 so subject to the restrictions on nonjudicial foreclosures and
13 other collection options imposed by the legislature.

14 These restrictions include:

15 (1) Prohibiting the use of nonjudicial foreclosure to
16 collect fines, penalties, legal fees, or late fees;



1 (2) Requiring associations to give an owner sixty days to
2 cure a default before proceeding with the nonjudicial
3 foreclosure and to accept reasonable payment plans of
4 up to twelve months; and

5 (3) Requiring associations to provide owners with contact
6 information for approved housing counselors and
7 approved budget and credit counselors.

8 The Intermediate Court of Appeals in Sakal v. Association
9 of Apartment Owners of Hawaiian Monarch, 143 Haw. 219, 426 P.3d
10 443 (2018), held that the legislature intended that associations
11 can only conduct nonjudicial foreclosures if they have specific
12 authority to conduct nonjudicial foreclosures in their
13 declaration or bylaws or in an agreement with the owner being
14 foreclosed upon.

15 The legislative history indicates this was not the intent
16 of the legislature in 2012, nor in legislatures that have made
17 subsequent amendments. Therefore, this Act confirms the
18 legislative intent that condominium and homeowner associations
19 should be able to use nonjudicial foreclosure to collect
20 delinquencies without having specific authority to conduct



1 nonjudicial foreclosures in an agreement with a delinquent owner
2 or in the association's declaration or bylaws.

3 SECTION 2. Section 421J-10.5, Hawaii Revised Statutes, is
4 amended by amending subsection (a) to read as follows:

5 "(a) All sums assessed by the association, but unpaid for
6 the share of the assessments chargeable to any unit, shall
7 constitute a lien on the unit. The priority of the
8 association's lien shall, except as otherwise provided by law,
9 be as provided in the association documents or, if no priority
10 is provided in the association documents, by the recordation
11 date of the liens; provided that any amendment to the
12 association documents that governs the priority of liens on the
13 unit shall not provide that an association lien shall have
14 priority over a mortgage lien that is recorded before the
15 amendment is recorded. A lien recorded by an association for
16 unpaid assessments shall expire six years from the date of
17 recordation unless proceedings to enforce the lien are
18 instituted prior to the expiration of the lien; provided that
19 the expiration of a recorded lien shall in no way affect the
20 association's automatic lien that arises pursuant to this
21 subsection or the association documents. Any proceedings to



1 enforce an association's lien for any assessment shall be
2 instituted within six years after the assessment became due;
3 provided that if the owner of a unit subject to a lien of the
4 association files a petition for relief under the United States
5 Bankruptcy Code (11 U.S.C. §101 et seq.), the period of time for
6 instituting proceedings to enforce the association's lien shall
7 be tolled until thirty days after the automatic stay of
8 proceedings under section 362 of the United States Bankruptcy
9 Code (11 U.S.C. §362) is lifted.

10 The lien of the association may be foreclosed by action or
11 by nonjudicial or power of sale foreclosure procedures set forth
12 in chapter 667, by the managing agent or board, acting on behalf
13 of the association and in the name of the association; provided
14 that no association may exercise the nonjudicial or power of
15 sale remedies provided in chapter 667 to foreclose a lien
16 against any unit that arises solely from fines, penalties, legal
17 fees, or late fees, and the foreclosure of any such lien shall
18 be filed in court pursuant to part IA of chapter 667. All
19 associations shall be deemed to have a power of sale for the
20 purposes of enforcement of their claim of lien under part VI of
21 chapter 667. In any association foreclosure, the unit owner



1 shall be required to pay a reasonable rental for the unit, if so
2 provided in the association documents or the law, and the
3 plaintiff in the foreclosure shall be entitled to the
4 appointment of a receiver to collect the rental owed by the unit
5 owner or any tenant of the unit. If the association is the
6 plaintiff, it may request that its managing agent be appointed
7 as receiver to collect the rental from the tenant. The managing
8 agent or board, acting on behalf of the association and in the
9 name of the association, may bid on the unit at foreclosure sale
10 and acquire and hold, lease, mortgage, and convey the unit
11 thereafter as the board deems reasonable. Action to recover a
12 money judgment for unpaid assessments shall be maintainable
13 without foreclosing or waiving the lien securing the unpaid
14 assessments owed.

15 In the case of a voluntary conveyance, the grantee of a
16 unit shall be jointly and severally liable with the grantor for
17 all unpaid assessments against the latter for the grantor's
18 share of the common expenses up to the time of the grant or
19 conveyance, without prejudice to the grantee's right to recover
20 from the grantor the amounts paid by the grantee. Any such
21 grantor or grantee is entitled to a statement from the board,



1 either directly or through its managing agent or resident
2 manager, setting forth the amount of the unpaid assessments
3 against the grantor. The grantee is not liable and the unit
4 conveyed is not subject to a lien for any unpaid assessments
5 against the grantor in excess of the amount set forth in the
6 statement, except as to the amount of subsequently dishonored
7 checks mentioned in the statement as having been received within
8 the thirty-day period immediately preceding the date of such
9 statement."

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

12 "(a) All sums assessed by the association but unpaid for
13 the share of the common expenses chargeable to any unit shall
14 constitute a lien on the unit with priority over all other
15 liens, except:

16 (1) Liens for real property taxes and assessments lawfully
17 imposed by governmental authority against the unit;
18 and

19 (2) Except as provided in subsection (j), all sums unpaid
20 on any mortgage of record that was recorded prior to
21 the recordation of a notice of a lien by the



1 association, and costs and expenses including
2 attorneys' fees provided in such mortgages;
3 provided that a lien recorded by an association for unpaid
4 assessments shall expire six years from the date of recordation
5 unless proceedings to enforce the lien are instituted prior to
6 the expiration of the lien; provided further that the expiration
7 of a recorded lien shall in no way affect the association's
8 automatic lien that arises pursuant to this subsection or the
9 declaration or bylaws. Any proceedings to enforce an
10 association's lien for any assessment shall be instituted within
11 six years after the assessment became due; provided that if the
12 owner of a unit subject to a lien of the association files a
13 petition for relief under the United States Bankruptcy Code (11
14 U.S.C. §101 et seq.), the period of time for instituting
15 proceedings to enforce the association's lien shall be tolled
16 until thirty days after the automatic stay of proceedings under
17 section 362 of the United States Bankruptcy Code (11 U.S.C.
18 §362) is lifted.

19 The lien of the association may be foreclosed by action or
20 by nonjudicial or power of sale foreclosure procedures set forth
21 in chapter 667, by the managing agent or board, acting on behalf



1 of the association and in the name of the association; provided
2 that no association may exercise the nonjudicial or power of
3 sale remedies provided in chapter 667 to foreclose a lien
4 against any unit that arises solely from fines, penalties, legal
5 fees, or late fees, and the foreclosure of any such lien shall
6 be filed in court pursuant to part IA of chapter 667. All
7 associations shall be deemed to have a power of sale for the
8 purposes of enforcement of their claim of lien under part VI of
9 chapter 667.

10 In any such foreclosure, the unit owner shall be required
11 to pay a reasonable rental for the unit, if so provided in the
12 bylaws or the law, and the plaintiff in the foreclosure shall be
13 entitled to the appointment of a receiver to collect the rental
14 owed by the unit owner or any tenant of the unit. If the
15 association is the plaintiff, it may request that its managing
16 agent be appointed as receiver to collect the rent from the
17 tenant. The managing agent or board, acting on behalf of the
18 association and in the name of the association, unless
19 prohibited by the declaration, may bid on the unit at
20 foreclosure sale, and acquire and hold, lease, mortgage, and
21 convey the unit. Action to recover a money judgment for unpaid



1 common expenses shall be maintainable without foreclosing or
2 waiving the lien securing the unpaid common expenses owed."

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

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

8 (1) The mortgage contains, authorizes, permits, or
9 provides for a power of sale, a power of sale
10 foreclosure, a power of sale remedy, or a nonjudicial
11 foreclosure ~~[-]~~; or

12 (2) For the purposes of part VI, an association enforces
13 its claim of an association lien, regardless of
14 whether the association documents provide for a power
15 of sale, a power of sale foreclosure, a power of sale
16 remedy, or a nonjudicial foreclosure."

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

19 SECTION 6. This Act shall take effect on July 1, 2019;
20 provided that the amendments made to section 514B-146(a), Hawaii
21 Revised Statutes, by section 3 of this Act shall not be repealed



H.B. NO. 76

1 when that section is reenacted on June 30, 2020, pursuant to
2 section 6 of Act 195, Session Laws of Hawaii 2018.
3

INTRODUCED BY:

T. Beale

Linda Ichimaru

JAN 17 2019



H.B. NO. 76

Report Title:

Nonjudicial Foreclosure; Power of Sale; Condominium
Associations; Planned Community Associations

Description:

Provides an explicit grant of power of sale to condominium
associations and planned community associations for the purposes
of enforcing association liens under the power of sale
procedures in state foreclosure law.

*The summary description of legislation appearing on this page is for informational purposes only and is
not legislation or evidence of legislative intent.*





**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

ON THE FOLLOWING MEASURE:

H.B. NO. 76, RELATING TO NONJUDICIAL FORECLOSURES.

BEFORE THE:

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

DATE: Tuesday, February 5, 2019

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): Clare E. Connors, Attorney General, or
Shari Wong, Deputy Attorney General

Chair Takumi and Members of the Committee:

The Department of the Attorney General provides the following comments.

The purpose of the bill is to confirm the legislative intent that condominium and homeowner associations should be able to use nonjudicial foreclosure to collect delinquencies without having specific authority to conduct nonjudicial foreclosures in an agreement with a delinquent owner or in the association's declaration or bylaws.

If the bill intends to create a new right for associations to use the nonjudicial foreclosure process, the bill's proposed wording on pages 4 and 8 is appropriate. This proposed wording appears to create a new right for associations to use the nonjudicial foreclosure process, but would not be applicable to matters currently pending.

On the other hand, if the bill intends to "clarify" or "confirm" an existing right of associations to use the nonjudicial foreclosure process, we recommend the deletion of the proposed amendments on page 4, lines 18-21, and on page 8, lines 6-9. Instead of the bill's proposed amendments, we recommend an amendment to page 4, lines 10-18, and to page 7, line 19, to page 8, line 6, to read as follows: "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 IA of chapter 667."

Thank you for the opportunity to provide comments.

HB-76

Submitted on: 1/31/2019 11:22:26 AM

Testimony for CPC on 2/5/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Richard Emery	Associa	Support	Yes

Comments:

Due to recent court decisions reflecting ambiguity on the legislature's intent as to nonjudicial foreclosures; this Bill is critical to prevent associations from potential legal exposure and judgments. We SUPPORT the Bill.



P.O. Box 976
Honolulu, Hawaii 96808

January 31, 2019

Representative Roy M. Takumi, Chair
Representative Linda Ichiyama, Vice Chair
Committee on Consumer Protection and Commerce
415 South Beretania Street
Honolulu, Hawaii 96813

Re: HB 76 Support

Dear Chair Takumi, Vice Chair Ichiyama and Committee Members:

This testimony is submitted on behalf of the Community Associations Institute ("CAI"). CAI supports HB 76.

This bill is needed because the Intermediate Court of Appeals has held that a power of sale must exist in a condominium association's by-laws or another enforceable agreement to avail itself of the nonjudicial power of sale foreclosure procedures set forth in Chapter 667 of the Hawaii Revised Statutes. See, Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 219, 426 P.3d 443 (App. 2018). That holding has the potential to harm consumers.

Potential liability that may flow from the ICA's holding will fall upon condominium owners who pay the bills of their respective associations. Condominium associations have reasonably regarded statutory authority as sufficient to use non-judicial foreclosure procedures, and HB 76 will protect consumers whose associations have relied upon that understanding. HB 76 will supply the clarity that the ICA perceives to be lacking in current law.

Community Associations Institute, by

Philip Nerney

For its Legislative Action Committee



Kokua Council is one of Hawaii's oldest Senior Advocacy Group. **Kokua Council** advocates, informs, and educates to improve laws, policies and practices impacting the well-being of seniors, their families and our community.

TESTIMONY RE: **HB76** on February 5, 2019 at 2 p.m.

HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

POSITION:

Kokua Council OPPOSES the basic intent of this bill which attempts to circumvent the administration of neutral justice by expediting the foreclosure of property without addressing a condo association's obligations to its members, many of whom are seniors.

While it is true that associations must collect common expense assessments (i.e., maintenance fees) to sustain their operations, too many associations have failed to maintain and protect its property by properly budgeting and saving for necessary upkeep and repairs, forcing current owners to be subjected to extraordinary increases in common assessment fees or lump sum special assessments, both of which are far more financially difficult on those with fixed incomes and with rare opportunity to raise more funds.

Some associations have failed to make repairs as they are obligated despite owners having paid through common assessments for those repairs, forcing those owners to pay doubly--for those repairs on their own just to have a livable home and also having to pay common assessment fees on fixed or limited incomes.

Those associations should not be given a blanket right to expedite foreclosure without giving those owners their right to justice.

Priorities for 2019

General Comments from our Community Partners:

- Senior advocates are not focused on only senior-specific concerns, but see the importance of broader community issues, such as open government, prison reform, education, condo governance, and climate change.
- Highest priorities are for adequate and increased funding for established programs.
- There is increasing concern of how programs are implemented at the state and counties, the transparency of state and county agencies and their budgets, appropriate and effective regulations, and treatment of vendors.
- There is also a growing recognition that the laws and practices of condo governance boards can have a major impact on the safety and quality of life of seniors living in those buildings.

Kokua Council's Top Five Priorities for 2019

1. Funding, structure, and implementation of the **Kupuna Caregivers Law**.
2. **More funds to serve more seniors** in other programs: Kupuna Care, ADRCs, etc.
3. **Less bureaucracy and timely payments** for vendors delivering Kupuna services.
4. **Condo legal and financial protections** for low income, vulnerable senior residents.
5. **Greater transparency and collaboration** in legislating, designing, and implementing policies, programs and practices impacting seniors & their families.

*To contact Kokua Council, send emails to Jim Shon, President:
jshon@hawaii.edu.*

HB-76

Submitted on: 2/1/2019 7:37:29 AM

Testimony for CPC on 2/5/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower	Hui `Oia`i`o, a coalition of condo owners	Oppose	No

Comments:

We oppose this measure for the following reasons:

While we recognize and agree that owners are obligated to pay common expense assessments to sustain the operations of their Associations, this power of sale provision—if enacted--enables an Association to expeditiously deprive a homeowner of his property should that homeowner default on common fees or assessments, ignoring that an Association's obligation to maintain that same property is not held to the same standard of enforcement.

Besides the obvious impact that a poorly maintained property has on the financial health of the Association and its owners via increased maintenance fees, special assessments, and lowered property value, there is a secondary problem: owners who complain of maintenance deficiencies are often targeted for their concerns rather than recognized for their diligence.

The targeting of owners, often exercised by using attorneys to intimidate owners and/or bury them under mounting legal fees, was the inspiration for what is commonly-called the "anti-retaliation law" that passed in 2017 as Act 190.

For a recent example of retaliatory practices, refer to the 14-minute mark of the ThinkTech video, "A \$1.9 Million Judgement Against a Maui Association," <https://thinktechhawaii.com/a-1-9-million-judgment-against-a-maui-Association-condo-insider/>, which is paraphrased here:

- The Whites [the owners] were fined for a violation of the Association's documents but the Association did not comply with their own By-Laws and did not give the Whites a hearing, fined them 850 times [at \$200 a day] for a total of \$170,000, and said to the Whites, "We'll take your maintenance fees and apply them to the fines." The Association then said, 'You're going to be delinquent on your maintenance fees and we're going to foreclose and if you want a hearing, you're going to have to pay \$30,000 first.'*

Because of retaliatory practices which include fraudulent charges of rules violations, protections against non-judicial foreclosures must remain in place. Owners should have the right to their "day in court" before Associations can foreclose upon them.

But in non-judicial foreclosures, it is possible that owners will have little warning when the power of sale is enforced and the property is sold.

Further, owners who seek enforcement of the Association's obligation to maintain the property must jump through legal hoops starting with mediation and usually culminating in costly and lengthy litigation, a process which contrasts unfairly against the expeditious non-judicial "remedy" enforced upon owners.

HB76 appears to be an attempt to override the legal precedence established by Sakal v AOA Hawaiian Monarch which was decided just last year. The Sakal case is an example of the inevitable abuse that occurs when an Association employs non-judicial foreclosures rather than to seek the neutral administration of justice.

HB-76

Submitted on: 1/31/2019 7:13:24 PM

Testimony for CPC on 2/5/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jane Sugimura	HI Council of Assoc. of Apt. Owners a	Support	No

Comments:



200 North Vineyard Boulevard, B140
Honolulu, HI 96817
Ph: 808-587-7886
Toll Free: 1-866-400-1116
www.hawaiiancommunity.net

February 4, 2019

House Committee on Consumer Protection & Commerce
Tuesday, February 5, 2019
Conference Room 329

HB76 – OPPOSE

Aloha Committee Chair, Vice-Chair, and Members:

I am submitting testimony in my capacity as Executive Director of Hawaiian Community Assets (HCA), Hawaii's largest HUD-approved housing counseling agency and member of the 2011 Mortgage Foreclosure Task Force that draft legislation to outlaw nonjudicial foreclosures in Hawaii, to **OPPOSE HB76**.

HB76 would undo the hard work of the Mortgage Foreclosure Task Force that brought together homeowner advocates, public agency representatives, and mortgage lenders to improve the mortgage foreclosure process in Hawaii. During our work as a task force, it was found that the nonjudicial foreclosure process did not provide adequate protections and access to services for our local homeowners, resulting in the loss of more than \$54 billion in home equity during the Great Recession.

Today, mortgage lenders must abide by a judicial foreclosure process – condominium associations and planned community associations should have to do the same.

HUD-approved housing counseling agencies stand-by ready as partners that condominium associations and planned community associations can contract to assess a household's financial situation and determine (1) if it is possible for the homeowner to keep the home and if so, (2) an affordable repayment plan that can save the associations from the costs of foreclosure and prohibit a local family from going through an unnecessary foreclosure. At the same time, housing counseling agencies are able to engage the family in a tough conversation about giving the home up and at the same time, prepare them for transitioning to a rental or homeless shelter so they do not end up houseless on the beach or the streets. **Please vote no on HB76.**

Mahalo for your time, leadership and consideration. Please contact me directly at 808.587.7653 or jeff@hawaiiancommunity.net should you have any questions or need additional information.

Sincerely

A handwritten signature in black ink that reads "Jeff Gilbreath".

Jeff Gilbreath
Executive Director

HB-76

Submitted on: 2/4/2019 11:51:22 AM

Testimony for CPC on 2/5/2019 2:00:00 PM

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

Comments:

RE: HB 76

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly support the passage of HB 76, which clarifies the right of planned community associations governed by Chapter 421J, Hawai'i Revised Statutes, and condominium associations governed by Chapter 514B, Hawai'i Revised Statutes, to use nonjudicial or power of sale foreclosures to collect unpaid common expense assessments in light of the Hawai'i Intermediate Court of Appeals' decision in *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawai'i 219, 426 P.3d 443 (App. 2018).

In the *Sakal* case, the ICA held that the provisions in the Condominium Property Act stating that "the lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures" does not empower associations to conduct nonjudicial or power of sale foreclosures unless nonjudicial or power of sale foreclosure provisions are contained in the association's project documents. The *Sakal* decision came as a great surprise to planned community and condominium associations who have relied, in good faith, upon the law which was adopted with the express intent of empowering both planned community associations and condominium associations to foreclose their liens by nonjudicial foreclosure.

HB 76 clarifies that since 1999, condominium associations have been empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws.

HB 76 further clarifies that as of the effective date of Act 182 (2012), planned community associations were empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws.

These clarifications are important as the issue of legislative intent will undoubtedly impact future court decisions regarding nonjudicial foreclosures by condominium and planned community associations;

1. HB 76 amends Chapter 667, Hawai'i Revised Statutes, to provide that for purposes of Part VI ("Association Alternate Power of Sale Foreclosure Process") the definition of "power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure used by an association to enforce its lien for unpaid common expenses, regardless of whether the association's documents provide for a power of sale, a power of sale foreclosure, or a nonjudicial foreclosure. This clarification expresses the intent of the Legislature that planned community and condominium associations may exercise the remedy of nonjudicial foreclosure regardless of whether they have a written power of sale provision in their project documents.

For these reasons, I strongly support HB 76.

Respectfully submitted,

Mark McKellar

Hon. Rep. Roy Takumi and Rep. Linda Ichiyama:

I **OPPOSE** the said **HB76**.

I have lived in Honolulu since 1970.

I am President of the following AOOU.

Mokuleia Surf (12 Units)

Hale-O-Kalani Towers (100 Units)

I am also a Director (former president) of Sunset Towers AOOU (80 Units)

I am owner of Unit 417 in Country Club Plaza, Salt Lake

NJF are liable to be abused by attorneys, parliamentarians, management companies, BOD, et al.

I have seen attorney's charges up to \$600 per hour for condo matters.

Owners are not shown all docs under the pretext "attorney-client privilege".

A few people believe that it is a travesty of justice for other fellow condo owners who are kept out of the loop, and still be held liable.

I request complete transparency in all AOOU matters.

Mahalo



Harendra Panalal, MSE, PE, RME

off 792-0455, home 538-6202

harenp2009@hotmail.com

HB-76

Submitted on: 1/30/2019 9:02:11 PM

Testimony for CPC on 2/5/2019 2:00:00 PM

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

Comments:

I am against this measure, as it has been associated with too many failures to extend due process rights to owners in default who stand to lose their properties too easily. These salient failures include improper foreclosure action notification to owners who are also not given sufficient time to respond to the action. **Owners should literally be given their day in court to present their cases adequately.**

Moreover, attorneys involved in the collection process should be required to justify their outrageous charges to debtors **IN COURT**, and not be able to escape justifying the charges that alone have been responsible for many properties lost in the collection process. When will legislators wake up to these outright thefts of victimized owners' properties?

Lourdes Scheibert
920 Ward Ave #6D
Honolulu, Hawaii 96814

January 31, 2019

Consumer Protection & Commerce
Representative Roy Takumi, Chair
Representative Linda Ichiyama, Vice Chair

Members: Representatives Henry Aquino, Della Au Bedatti, Rida Cabanilla Arakawa, Romy Cacholua, Sharon Har, Sam Satoru Kong, John Mizuno, Richard Onishi, Lauren Matsumoto

Oppose HB76: Provides an explicit grant of power of sale to condominium associations and panned community associations for the purposes of enforcing association liens under the power of sale procedures in state foreclosure law

I am a concerned condominium owner and oppose HB76. This amendment protects the Association's from legal responsibility to the owners who lost their homes to non judicial foreclosure. (Reference CivilBeat: An article by Ian Lind: Why Condo Associations Are Sweating After A Judge's Ruling) While this would be an advantage for the Associations to right a wrong thru legislation is it morally right to take a family's home without due process?

The attorneys for the Associations were forewarned in an article written by Milton Motooka, www.myhawaii.com, Legal Update, April 2011 newsletter. (attached for your reference) Lawsuit Challenges Legality of Association Non-Judicial Foreclosure. (Motooka's newsletter attached for your reference) In this newsletter, Motooka writes: Our firm experienced the loss of some long-standing clients because "Milton's office doesn't do non-judicials." In fact, our firm does pursue non-judicial fore-closures but only following what we strongly believe is the letter and the spirit of the law. This means there has to be effective notice and the owner must execute the conveyance document as required by statute. This is possible when a delinquent owner is willing to sign the conveyance document transfer-ring title to his unit in exchange for the Association not seeking a deficiency judgment against the owner.

It is my opinion, the attorneys and/or property managers who advised the Association Board of Directors should be equally held responsible based on the business judgment rule. Volunteer directors act on the advice of their property managers and their attorneys. Further, because HRS 514B does not require directors to be educated of their responsibilities,

many directors do not know if they are acting in violation of HRS 514B or of their own governing documents.

Thank-you,
Lourdes Scheibert
Condominium Owner

attach: Motooka newsletter

Legal Update

www.myrhawaii.com

April 2011

Motooka Yamamoto & Revere

Attorneys at Law

Overview Message—Milton Motooka

It's the end of the first quarter and nearing the end of "annual meeting season." It seems that annual meetings are becoming more contentious. This is undoubtedly related to the heightened stress level, which the long recession has caused. And it's no surprise that a hot topic continues to be delinquent homeowners and related collection issues, especially foreclosures.



Our firm experienced the loss of some long-standing clients because "Milton's office doesn't do non-judicials." In fact, our firm does pursue non-judicial foreclosures but only following what we strongly believe is the letter and the spirit of the law. This means there has to be effective notice and the owner must execute the conveyance document as required by statute. This is possible when a delinquent owner is willing to sign the conveyance document transferring title to his unit in exchange for the Association not seeking a deficiency judgment against the owner.

Last year we mailed a detailed review of non-judicial foreclosure issues and risks to all our clients. We've included this in this newsletter as well. It is long and involved but we believe it will help boards make a sound decision when considering a foreclosure. It should be noted that a second suit against an Association has recently been filed alleging the non-judicial foreclosure filed by the Association was illegal.

The controversy over Association non-judicial foreclosure may become a moot point, depending on the outcome of legislative bills currently being considered. We noted several bills in the legislature relating to foreclosures and while there were different proposals, we believe most give further support to our interpretation of the current laws. One bill seeks to give Associations the same non-judicial foreclosure rights as Lenders currently have. Obviously, this wouldn't be necessary if those rights existed now. Another bill that just passed the House proposes to do away with all non-judicial foreclosures and to require mediation for any foreclosure.

Other legislation that we're following out relates to the possibility of the loss of tax exemption for non profits – including Associations. That would mean Associations would need to pay the general excise tax on maintenance fees. Associations currently only need to pay the general excise tax on non-exempt items, like fines. Other proposed legislation, like the ban on leaf blowers may not seem important, but there are costs involved with any change in common practice.

Inside this issue:

Law Suit Challenges Legality of Association Non-Judicial Foreclosures

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On Line Resources for Homeowners and Board Members

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Lawsuit Challenges Legality of Association Non-Judicial Foreclosure

By Milton M. Motooka, Esq.

Hawaii Associations that have opted for non-judicial foreclosures (“NJF”) as a quick and inexpensive way to foreclose on delinquent owners may be facing challenges to that process. The trend toward NJF has recently been called into question by a Honolulu lawsuit alleging the illegality of a NJF by the Association-defendant under Part 1 of the NJF statute.

The lawsuit, in and of itself, highlights the litigation risks associated with an Association pursuing a NJF on questionable legal grounds. More importantly, the lawsuit calls into question whether Associations can reliably count on NJF – past, present and future - to deliver what Associations have been led to expect, namely foreclosures that are legally effective and binding.

Our firm has strict procedures relating to NJF because of the risks and our beliefs about what the letter of the law requires. Among the risks to consider are the potential of: 1) Court invalidation of the NJF sales; 2) Monetary liability for consequential damages and/or attorneys’ fees and costs; 3) Legal expenses incurred in defending such actions; 4) Potential exposure to liability not covered by insurance; and 5) Difficulty obtaining/affording liability insurance in the future.

Background

On November 3, 2010, a complaint was filed in the Circuit Court of the First Circuit, State of Hawaii, in Civil No. 10-1-2345-11, by Wells Fargo Bank against Daniel Omiya, the purchaser of a property at a Part 1 NJF sale, and an Association (the foreclosing party). The complaint alleged the Association failed to give proper notice of the nonjudicial foreclosure to Wells Fargo Bank, who at the time was the record legal owner, having previously foreclosed on the subject property pursuant to a defaulted mortgage.

Significantly, the complaint also alleged that the Association’s Part 1 NJF was legally defective, because Associations, unlike mortgagee-banks, have no statutory right to foreclose under Part 1 of the NJF statute. The bank argued that without a contractual power of sale – such as exists in bank mortgage agreements - Associations cannot legally foreclose under Part 1. Wells Fargo’s com-

plaint asked the court to invalidate the Association’s NJF sale, and restore Wells Fargo to its pre-NJF rights, including declaring Wells Fargo the rightful owner of the property. Wells Fargo also requested attorneys’ fees and expenses and other appropriate remedies, which presumably included money damages caused by the alleged statutory violation.

Following are significant excerpts from the bank’s complaint:

Defendant (name of Association) could have but chose not to foreclose the Property by judicial foreclosure but elected to proceed by power of sale under HRS Section 667-5 through 667-10. Defendant (name of Association)’s power of sale foreclosure of the Property was legally defective because there is no specific means to provide the required statutory notice and there are no power of sale rights granted to Defendant (name of Association) for it to have exercised. Defendant (name of Association) did not and could not satisfy the legal requirements of HRS Section 667-5 (a)(2) which provides:

“Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

There is no mortgage between Plaintiff and Defendant (name of Association). As a result Defendant (name of Association) cannot give the required notices to Plaintiff as required by the mortgage. Additionally, there is no underlying mortgage that authorizes Defendant (name of Association) to exercise any power of sale as required by HRS Section 667-5. Plaintiff never expressly granted any power of sale rights to Defendant (name of Association) under any mortgage or other voluntary instrument.”

Implications and Potential Consequences

Hawaii Revised Statutes (“HRS”) Chapter 667 governs

(Continued on page 3)



non-judicial foreclosures in Hawaii. The Chapter is divided into two parts. Part I provides a simple and fast NJF procedure. On its face, however, Part 1 is limited to mortgagees or others having a contractual power of sale. Associations are given a statutory right to pursue NJF only under Part 2 of the same statute. Part 2, however, requires far more from the foreclosing party in terms of required notice and other prerequisites. Because of the ease, speed, simplicity, and reduced cost of proceeding under Part 1, many Associations have eschewed Part 2 in favor of Part 1. We have always maintained that this is quite dangerous, as the Wells Fargo complaint demonstrates, because of the risk that Hawaii courts could ultimately rule that Association NJF brought under Part 1 are illegal and invalid, and therefore voidable. Such a ruling would give rise to the specter of not just wholesale reversals of Association NJF, but also open-ended exposure to claims for consequential money damages. In the Wells Fargo case, for example, if the court rules in favor of Wells Fargo, it might, in lieu of divesting the bona fide purchaser of title to the property, grant Wells Fargo money damages instead. Such a result would thrill Wells Fargo, which alleges facts supporting damages in excess of \$300,000.

The 1998 enactment of Part 2 of the NJF statute supports Wells Fargo's argument that Associations are not entitled to proceed under Part 1. Section 667-40 of Part 2 states:

Use of power of sale foreclosure in certain non-mortgage

situations. A power of sale foreclosure under this part may be used in certain **non-mortgage situations** where a law or a 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. These laws or written documents are limited to those involving time share plans, **condominium property regimes**, and agreements of sale. (emphasis added)

Prior to the above enactment, Associations had no recognized right to pursue NJF. The enactment of Part 2 was thus seen as the enabling "law" that provided condominium associations the right to pursue NJF, notwithstanding their lack of a mortgage agreement containing a contractual power of sale. That Associations were specifically identified as Part 2 beneficiaries reinforces the view that the Legislature did not, at the time of Part 2 enactment, consider Associations entitled to proceed under Part 1, which references only mortgage-based foreclosures. Part 2, however, is procedurally much more difficult and costly to comply with. This led many Associations to nevertheless proceed under Part 1, notwithstanding that it was Part 2 alone that conferred on Condominium Associations the right and ability to pursue NJF.

Some attorneys have sought to de-

Hawaii courts could rule that Association NJF brought under Part 1 are illegal and invalid, and therefore voidable.

fend Associations' right to foreclose under Part 1 by citing HRS Section 514B-146 which provides in part:

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 in like manner as a mortgage of real property.

As Wells Fargo points out in its complaint, however, the Association possesses no contractual power of sale, a key prerequisite under Part 1.

Recommendations

This firm's recommendation to Association clients is, and has been, to pursue NJF only via Part 2. We believe the risks and potentially adverse consequences of a wrongful NJF under Part 1 are far too great, notwithstanding the



apparent savings in time and cost under Part 1. Non-judicial foreclosures are increasingly being challenged in different parts of the mainland by an ever-growing cottage industry of plaintiffs' lawyers. We believe it only a matter of time before the phenomenon becomes prevalent in Hawaii as well. We urge caution, including carefully monitoring of developments in this fast-evolving area.

(Continued on page 4)

CAI On Line Resources for Homeowners, Board Members

CAI offers a variety of resources to help people who own, rent or are considering a home in a homeowners association, condominium or cooperative. The following can help you better understand the nature, benefits, and obligations of living in an association.

[Board Member Basics](#), a six-part online learning program that gives community association board members and other homeowner leaders the information and guidance they need to govern their communities effectively and responsibly.

[An Introduction to Community Association Living](#), a two-hour primer that introduces and explains the nature of community associations, including the roles and functions of boards, committees and community managers.

[Community Association Fundamentals](#), a summary of 10 core principles that address the basic function of associations, the obligations and expectations of homeowners and the underlying principles of the association model.

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On Line Resources— Government and Other Websites

The following links provide access to information and resources available from the U.S. government and other organizations. Just click on the link.

[Free housing-related publications \(PDFs\) from the Federal Citizen Information Center](#)

[Making home affordable](#)

[Home foreclosure resources](#)

[Fair housing laws](#)

[Fair lending practices](#)

[Home improvements](#)

[Do-it-yourself home repair and remodeling](#)

[Emergency preparedness—get a kit, make a plan, be informed](#)

[Disaster information](#)

[Tax information for homeowners](#)

[Buying and selling a home](#)

[Green ideas for homeowners and communities](#)

[Sierra Club--Reduce, Reuse, Recycle](#)

[Home Safety Council](#)

[National Crime Prevention Council--Home and Neighborhood](#)

(Continued from page 3)

We are also concerned of the potential liability exposure, not only of Associations, but their directors as well. We fear that cases such as the one brought by Wells Fargo, and others likely to follow, could be used by opposing attorneys to prove that Associations, as well as their directors, had “notice” of the legal infirmities of Part 1 NJF. The argument in cases subsequent to Wells Fargo is that, having received such notice, an Association’s continued pursuit of Part 1 NJF elevates the wrongdoing from mere negligence to “reckless or intentional disregard” for the rights of owners, a standard under Hawaii law sufficient to trigger punitive damages. Since Boards operate as fiduciaries with respect to

Interesting to note the following type of help wanted ad: “Hawaii Attorneys wanted—looking for aggressive teachable attorneys that will work with attorneys in different parts of the country using proprietary foreclosure defenses strategies defending homeowners . . . We have hundreds of cases that need representation.”

intentionally or recklessly pursuing illegal Part 1 NJF. Such punitive liability is frequently not covered under standard policies of liability insurance.

Also of concern is the possibility that Wells Fargo’s complaint will not long remain an isolated incident. If Hawaii follows in the footsteps of foreclosure-ridden states like Florida and California, en masse litigation challenging NJF on a wholesale basis may not be long in arriving.

their owner constituency, it’s not difficult to envision such arguments as effective in creating punitive damages liability against Board members seen as

HB-76

Submitted on: 1/31/2019 9:34:56 PM

Testimony for CPC on 2/5/2019 2:00:00 PM

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

Comments:

Oppose as this bill does not address the matter of Boards bullying association members and imposing frivolous fines to create debt. An Office of Condo Commissioner or Ombudsman should be created to provide adjudication. Mediation is not equal as the association is flush with cash vs one single owner.

HB-76

Submitted on: 2/1/2019 10:39:35 PM

Testimony for CPC on 2/5/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Steve Glanstein	Individual	Support	No

Comments:

I support HB 76. Condominium associations have relied upon non-judicial foreclosures for years. Without non-judicial foreclosures the extra costs will be imposed on the **non-defaulting owners**. A recent court ruling poses an unfair and onerous burden on our Hawaii condominium associations and their owners.

HB 76 clarifies that condominium associations are, and always have been, empowered to conduct nonjudicial or power of sale foreclosures. Please pass HB 76.

TESTIMONY IN FAVOR OF HB 76.

I strongly support HB 76. The recent decision of the Intermediate Court of Appeals (“ICA”) in Sakal v. Association of Apartment Owners of Hawaiian Monarch, 143 Hawai‘i 219, 426 P.3d 443 (2018) significantly changes Hawaii’s foreclosure law for associations. Essentially, the Sakal decision undermines the efforts of associations since 1999 to have an effective foreclosure remedy against delinquent owners.

In 1999, the legislature recognized that, after years of losses from delinquencies, nonjudicial foreclosure allowed associations to make the best of a bad situation. The courts were clogged, so lender judicial foreclosures were taking 12 to 18 months, sometimes longer (which, in turn, meant that it often took 18 months to 2 years before a paying owner took possession of the unit). Hawaii’s “first in time, first in right” foreclosure law also meant that if associations foreclosed judicially, they spent just as much time and money as a lender for a more questionable result.

More specifically, the “first in time . . .” principle meant that if the association foreclosed, it could do nothing to affect the lender’s first lien and would have to sell the property subject to the mortgage – i.e., the mortgage would remain as a lien on the property after the association’s foreclosure. Falling property values often put the association in the position of, for example, trying to auction a property worth \$400,000 that remained subject to a mortgage of \$500,000. Since the mortgage would remain on the property despite the association’s foreclosure, there were often very few buyers.

Despite these disadvantages, associations could sometimes foreclose, buy the property at the auction, and rent out the property while the lender conducted its own collection efforts. Since nonjudicial foreclosures typically were one third the cost and took one third the time of a judicial foreclosure, the right to conduct a nonjudicial foreclosures provided a significant benefit to an association. The nonjudicial process also allowed the association to put cost-effective pressure on a delinquent owner to pay, **which is the main purpose of the nonjudicial foreclosure process in the first place.**

The Hawaii legislature recognized that prolonging the collection process against delinquent owners severely impacted an association's financial viability. While many people often focus on the owner being foreclosed, they lose sight of the fact that if one owner is not paying, all of the other owners have to make up the difference so the association can continue to function. If many owners stop paying, the increase in maintenance fees to cover their delinquencies sometimes starts overwhelming the ability of the remaining owners to pay, leading to financial problems for the association.

Ultimately, nonjudicial foreclosure became one of the most effective remedies for associations. In recognition of that fact, in 2012, the legislature amended Hawaii's foreclosure law to establish a new nonjudicial foreclosure process – “part VI” – solely for condominiums and other types of homeowner associations. The decision in Sakal has now significantly undermined those legislative efforts.

A review of the legislative history outlined above and referenced in section 1 of HB 76 provides ample evidence that the court in Sakal misinterpreted the legislature's intent. Moreover, as section 1 of HB 76 recognizes, when the legislature enacted part VI in 2012 to provide a nonjudicial foreclosure remedy specifically for associations, the legislature did not ignore the difficulties faced by delinquent owners.

Instead, as part of the changes made in 2012, the legislature prohibited associations from nonjudicially foreclosing only to collect fines, penalties, legal fees, or late fees. The legislature also required the association to: 1) after commencing a nonjudicial foreclosure, give the owner sixty (60) days to cure the default before proceeding with the nonjudicial foreclosure; and 2) accept a “reasonable payment plan” – defined as a payment plan that will last up to twelve (12) months – from the owner. The notice of intent to begin the foreclosure must also include contact information for owners on approved housing counselors and approved budget and credit counselors.

In summary, as HB 76 recognizes, the legislature carefully and consciously gave associations the right to conduct nonjudicial foreclosures even if they did not have specific authority in the declaration and bylaws or a separate agreement with an owner. The legislature also balanced the right of associations to conduct nonjudicial foreclosures by imposing specific limitations to protect the rights of delinquent owners.

The legislature's intent should be recognized and reaffirmed. For those reasons, I strongly support HB 76.

John Morris

HB-76

Submitted on: 2/2/2019 6:07:05 PM

Testimony for CPC on 2/5/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Anne Anderson	Individual	Support	No

Comments:

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly support the passage of HB 76, which clarifies the right of planned community associations governed by Chapter 421J, Hawai'i Revised Statutes, and condominium associations governed by Chapter 514B, Hawai'i Revised Statutes, to use nonjudicial or power of sale foreclosures to collect unpaid common expense assessments in light of the Hawai'i Intermediate Court of Appeals' decision in Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 219, 426 P.3d 443 (App. 2018).

In the Sakal case, the ICA held that the provisions in the Condominium Property Act stating that "the lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures" does not empower associations to conduct nonjudicial or power of sale foreclosures unless nonjudicial or power of sale foreclosure provisions are contained in the association's project documents. The Sakal decision came as a great surprise to planned community and condominium associations who have relied, in good faith, upon the law which was adopted with the express intent of empowering both planned community associations and condominium associations to foreclose their liens by nonjudicial foreclosure.

HB 76 clarifies that since 1999, condominium associations have been empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws.

HB 76 further clarifies that as of the effective date of Act 182 (2012), planned community associations were empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws.

These clarifications are important as the issue of legislative intent will undoubtedly impact future court decisions regarding nonjudicial foreclosures by condominium and planned community associations;

HB 76 amends Chapter 667, Hawai'i Revised Statutes, to provide that for purposes of Part VI ("Association Alternate Power of Sale Foreclosure Process") the definition of "power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure used by an association to enforce its lien for unpaid common expenses, regardless of whether the association's documents provide for a power of sale, a power of sale foreclosure, or a nonjudicial foreclosure. This clarification expresses the intent of the Legislature that planned community and condominium associations may exercise the remedy of nonjudicial foreclosure regardless of whether they have a written power of sale provision in their project documents.

For these reasons, I strongly support HB 76.

Respectfully submitted,

M. Anne Anderson

HB-76

Submitted on: 2/3/2019 4:19:50 PM

Testimony for CPC on 2/5/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Laurie Hirohata	Individual	Oppose	No

Comments:

TESTIMONY IN OPPOSITION TO HB76

I am not an attorney. I am a social worker/community advocate who tried to assist a number of immigrant & elderly owners who were being exploited by a very unfair and unscrupulous system. I am sad to report that I know of at least 5-6 of these elderly owners who lost their homes unfairly to a NJF foreclosure and died not too long after losing their home.

(NOTE: in the Human Services/Mental Health profession, "broken heart syndrome," is a very real diagnosis).

All these folks wanted to do was to die in his/her own home that s/he had lived in for 20+ years. Unfortunately, they and countless others have died homeless because of unscrupulous and unfair business practices that ended with a NJF foreclosure.

Check the DCCA, RICO data on the thousands of complaints that have been filed over the years on this matter. The Better Business Bureau also has a lot of complaints on this matter in their database. Finally, check YELP, under the Business Section, and the specific Management Agent Co. and you will see thousands of complaints also listed there.

If the Legislature saw the necessity to enacted HRS,CH521, Landlord Tenant Code, to protect and provide due process rights (proper notification & court proceedings) to renters from being unlawfully evicted by landlords; why is the Legislature now proposing to remove the protection and due process rights of owners from unlawful lock-outs from their units (eviction) in HB76?

Most AOA's have 501-c-4 non-profit corporation's tax exempt status. Most AOA's are managed by for-profit Managing Agents & affiliate attorneys.

What is the "true" purpose of HB76? What added benefit will HB76 provide to the owners and general public vs. the for-profit Managing Agents & affiliate attorneys?

How will HB76 better protect the rights of the owners? Does HB76 "even the playing field" for owners or is the "true" intent to make it easier for certain "players" to reap more profits from the unsuspecting owners?

Most of the owners I have met, who lost their homes to a NJF foreclosure, were suddenly "locked out" and their unit foreclosed on. Many of these owners were elderly, or immigrants with poor English language skills, or military personnel who were deployed and could not fight back against the unfair and unscrupulous business practices.

The largest part of the escalating fee/fine in dispute for most of these cases were the attorney fees charged by the Managing Agents' affiliate attorney. The attorney fees imposed on the owner did not benefit the owner in any way because the attorney's client was/is the AOA Board, and yet the owner was forced to pay for all of the AOA's attorneys fees.

No entity currently provides oversight & management to ascertain whether the attorney fees are justifiable and within a reasonable rate. Some owners have calculated their attorney fees to be way above the 25% rate for legal fees established in the HRS for debts won in State Court. If the owner tried to contest the exorbitant rate, they incurred additional attorney fees (that had no benefit to the owner) from the AOA's attorney.

The argument that Act 195 was passed last Session to mandate that attorney fees be collected after all other AOA operating costs is not a valid argument because Act 195 will expire in 2020. The owners will once again be forced to absorb exorbitant attorney fees after 2020 unless Act 195 is extended indefinitely. No bill has been introduced this Session to address this short-coming in Act 195.

On another note, has HB76 been sent to the AG Office and the State Tax Office for review and a legal opinion?

AOA's are 501-c-4 non-profit corporations. There are IRS codes that 501-c-4 non-profit corporations have to maintain to continue their "non-profit" corporation status.

Does the State have the authority to impose "blanket" amendments to a 501-c-4 corporation's bylaws? If HB76 is enacted, what impact will it have on the AOA's non-profit corporation status?

What rights does a non-profit corporation have if it opposes the new amendment and wants to "waive" the inclusion of the new amendment to its bylaws?

Finally, I personally object to the fact that the State wants to intervene and amend a non-profit corporation's bylaws because it "opens the doors" to a whole new world of potential issues. For example, how much liability will the State be held accountable for if

the AOA is sued trying to enforce a statutory amendment implemented by the Legislature to the non-profit corporation's bylaws?

Thank you very much for your time and attention to this matter.

Respectfully Submitted By:

Laurie Hirohata, MSW, MEd

HB-76

Submitted on: 2/4/2019 8:49:26 AM

Testimony for CPC on 2/5/2019 2:00:00 PM

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

Comments:

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly SUPPORT the passage of HB 76, which clarifies the right of planned community associations governed by Chapter 421J, Hawaii Revised Statutes, and condominium associations governed by Chapter 514B, Hawaii Revised Statutes, to use nonjudicial or power of sale foreclosures to collect unpaid common expense assessments in light of the Hawaii Intermediate Court of Appeals' decision in *Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch*, 143 Hawai'i 219, 426 P.3d 443 (App. 2018).

In the *Sakal* case, the ICA held that the provisions in the Condominium Property Act stating that "the lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures" does not empower associations to conduct nonjudicial or power of sale foreclosures unless nonjudicial or power of sale foreclosure provisions are contained in the association's project documents. The *Sakal* decision came as a great surprise to planned community and condominium associations who have relied, in good faith, upon the law which was adopted with the express intent of empowering both planned community associations and condominium associations to foreclose their liens by nonjudicial foreclosure.

HB 76 clarifies that since 1999, condominium associations have been empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws.

HB 76 further clarifies that as of the effective date of Act 182 (2012), planned community associations were empowered to conduct nonjudicial or power of sale foreclosures as a matter of law, regardless of whether an express written power of sale provision is contained in the associations' declaration or bylaws.

These clarifications are important as the issue of legislative intent will undoubtedly impact future court decisions regarding nonjudicial foreclosures by condominium and planned community associations;

HB 76 amends Chapter 667, Hawai'i Revised Statutes, to provide that for purposes of Part VI ("Association Alternate Power of Sale Foreclosure Process") the definition of "power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure used by an association to enforce its lien for unpaid common expenses, regardless of whether the association's documents provide for a power of sale, a power of sale foreclosure, or a nonjudicial foreclosure. This clarification expresses the intent of the Legislature that planned community and condominium associations may exercise the remedy of nonjudicial foreclosure regardless of whether they have a written power of sale provision in their project documents.

For these reasons, I strongly support HB 76.

Respectfully submitted,

Paul A. Ireland Koftinow

Dear Representative Takumi, Chair, Representative Ichiyama, Vice Chair, and Members of the Committee:

I strongly support the passage of HB 76, which clarifies that previous legislatures intended to statutorily authorize community associations (under Chapter 421J, HRS) and condominium owners' associations (under Chapter 514B, HRS) the right to use nonjudicial or power of sale foreclosures to enforce their association lien for unpaid assessments regardless of whether the governing documents of the association or an agreement with the delinquent owner expressly permit the power of sale, nonjudicial foreclosure.

Hawaii's appellate courts have recently jeopardized countless nonjudicial foreclosures conducted by associations in reliance on prior legislation which empowered community associations and condominium associations to conduct power of sale foreclosures of assessment liens without requiring a separate, express power in the project documents or in an agreement with the owner(s). The clarification of HB 76 which affirms that homeowner associations are statutorily authorized to enforce assessment liens nonjudicially regardless of express separate private authority to do so should impact future court decisions regarding nonjudicial foreclosures by condominium and planned community associations

Further, HB 76 amends Chapter 667, Hawai'i Revised Statutes, to provide that the definition of "power of sale" or "power of sale foreclosure" includes the nonjudicial foreclosure of association assessment liens, as well as power of sale foreclosures of secured mortgages.

For these reasons, I support HB 76.

Respectfully submitted,

/s/ Pamela J. Schell

HB-76

Submitted on: 2/4/2019 5:12:37 PM

Testimony for CPC on 2/5/2019 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mary Martin	Individual	Support	No

Comments:

This bill is needed to clarify and enforce existing rights as passed by this legislature in 1999, codified as HRS 514A-82(b)(13).