
A BILL FOR AN ACT

RELATING TO CONDOMINIUMS.

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

1 SECTION 1. The legislature finds that Act 282, Session Laws
2 of Hawaii 2019 (Act 282), was passed to express the legislative
3 intent that condominium associations have the authority to use a
4 nonjudicial foreclosure process to collect delinquencies
5 regardless of the presence or absence of power of sale language
6 in an association's governing documents. This was in response
7 to Sakal v. Association of Apartment Owners of Hawaiian
8 Monarch, 143 Haw. 219, 426 P.3d 443 (Ct. App. 2018), an
9 intermediate court of appeals case that held the legislature
10 intended that a condominium association must have specific
11 authority in its declaration, bylaws, or in an agreement with
12 the owner, to conduct a nonjudicial foreclosure.

13 The legislature further finds that recent decisions by the
14 Hawaii supreme court and federal district court of Hawaii have
15 created confusion about the right of condominiums to use the
16 nonjudicial foreclosure process. Specifically, the Hawaii
17 Supreme Court held in Malabe v. Ass'n of Apartment Owners of



1 Exec. Ctr., 147 Haw. 330, 465 P.3d 777 (2020), as corrected
2 (June 18, 2020), that in order for a condominium association to
3 utilize statutory nonjudicial power of sale foreclosure
4 procedures, a power of sale in its favor must have existed in
5 the association's bylaws or another enforceable agreement with
6 unit owners.

7 The legislature further finds that the Malabe court misread
8 the intent of the legislature in construing the legislative
9 intent of Act 282 in the narrow manner as described in its
10 holding. The legislature notes that the Malabe court also did
11 not address the Malabes' constitutional challenges to Act 282,
12 instead relying on a holding from the United States District
13 Court for the District of Hawaii that Act 282 is an
14 unconstitutional violation of the Contracts Clause of the United
15 States Constitution. This is despite the fact that Act 282
16 contains explicit language that nothing in that Act should be
17 applied so as to run afoul of any existing contracts, as well as
18 containing a severability clause. The legislature also finds
19 that Act 282 reflected the legislature's longstanding position
20 that condominium law enables an association to exercise a
21 nonjudicial foreclosure remedy. As the recent court decisions



1 have shown an unwillingness to honor longstanding legislative
2 intent, this Act is necessary to clear up and confirm the intent
3 of the legislature regarding the right of condominium
4 associations to conduct nonjudicial foreclosures -- namely, that
5 a specific grant of power of sale in an condominium
6 association's governing documents is not required for the
7 purposes of enforcement association liens through the
8 nonjudicial foreclosure process.

9 The purpose of this Act is to expressly reiterate and
10 declare that the intent of the legislature is that condominium
11 associations have existing authority to use a nonjudicial
12 foreclosure process to enforce association liens and to also set
13 out specific authority in the law to:

- 14 (1) Specify a procedure for condominium associations to
15 incorporate power of sale language into their
16 governing documents; and
- 17 (2) Specify that condominium associations may foreclose on
18 liens if power of sale language is contained within an
19 association's governing documents or within some other
20 agreement with the owner of the unit subject to
21 foreclosure.



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

4 "§514B- _____ Incorporation of power of sale language into
5 governing instruments; procedure; effect. (a) Notwithstanding
6 any other provision of this chapter, statute, or governing
7 document, an association may vote to adopt power of sale
8 language into the declaration or bylaws of the association
9 pursuant to this section.

10 (b) Power of sale language in substantially the following
11 form may be adopted by the board, after giving notice and an
12 opportunity to be heard to the unit owners:

13 "The governing documents of the association shall be deemed
14 to include a power of sale, sufficient in form and
15 substance to enable the foreclosure of the lien of the
16 association. Exercise of the power of sale shall be in
17 compliance with and pursuant to the requirements of
18 chapters 514B and 667 of the Hawaii Revised Statutes."

19 (c) Not less than fourteen days in advance of a board
20 meeting at which adoption of power of sale language will be
21 considered, notice to the owners shall be:



- 1 (1) Hand-delivered;
- 2 (2) Sent prepaid by United States mail to the mailing
- 3 address of each unit or to any other mailing address
- 4 designated in writing by the unit owner; or
- 5 (3) At the option of the unit owner, expressed in writing,
- 6 by electronic mail to the electronic mailing address
- 7 designated in writing by the unit owner.
- 8 (d) The notice under this section shall include the text
- 9 of the proposed power of sale language and inform the owners of
- 10 the opportunity to be heard on the proposal. The notice shall
- 11 also include the following language:
- 12 "An owner may preserve a potential defense that the
- 13 exercise of a power of sale included in the declaration or
- 14 bylaws of the association by board action constitutes an
- 15 impairment of contract, by:
- 16 (1) Delivering a written objection to the association by
- 17 certified or registered mail, return receipt
- 18 requested, within sixty days after a meeting at which
- 19 the board adopts a proposal to include this language;
- 20 and



1 (2) Producing, to the association, a return receipt
2 demonstrating delivery within thirty days after
3 service of a notice of default and intention to
4 foreclose upon the owner."

5 The notice shall include an address where the written
6 objection may be delivered.

7 (e) The board may vote to adopt the proposed power of sale
8 language into the declaration or bylaws of the association at
9 any board meeting for which notice has been given in compliance
10 with this section; provided that owners shall first be given an
11 opportunity to be heard.

12 (f) If the board adopts the proposed power of sale
13 language into the declaration or bylaws of the association, then
14 the power of sale language, designated as an amendment to the
15 association's declaration or bylaws, may be recorded.

16 (g) Power of sale language recorded pursuant to subsection
17 (f) shall be deemed to be effective upon recording.

18 (h) The procedures in this section shall be the exclusive
19 procedures for the incorporation of power of sale language into
20 the declaration or bylaws of an association after _____,
21 2021; provided that the power of sale language incorporated into



1 the declaration or bylaws of an association, or other agreement
2 with an owner, in accordance with law prior to that date shall
3 remain valid."

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

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

10 (1) Liens for real property taxes and assessments lawfully
11 imposed by governmental authority against the unit;
12 and

13 (2) Except as provided in subsection (j), all sums unpaid
14 on any mortgage of record that was recorded prior to
15 the recordation of a notice of a lien by the
16 association, and costs and expenses including
17 attorneys' fees provided in such mortgages;

18 provided that a lien recorded by an association for unpaid
19 assessments shall expire six years from the date of recordation
20 unless proceedings to enforce the lien are instituted prior to
21 the expiration of the lien; provided further that the expiration



1 of a recorded lien shall in no way affect the association's
2 automatic lien that arises pursuant to this subsection or the
3 declaration or bylaws. Any proceedings to enforce an
4 association's lien for any assessment shall be instituted within
5 six years after the assessment became due; provided that if the
6 owner of a unit subject to a lien of the association files a
7 petition for relief under the United States Bankruptcy Code
8 (11 U.S.C. §101 et seq.), the period of time for instituting
9 proceedings to enforce the association's lien shall be tolled
10 until thirty days after the automatic stay of proceedings under
11 section 362 of the United States Bankruptcy Code (11
12 U.S.C. §362) is lifted.

13 The lien of the association may be foreclosed by action or
14 by nonjudicial or power of sale foreclosure~~[, regardless of the~~
15 ~~presence or absence of]~~ if power of sale language ~~[in]~~ is
16 contained within an association's governing documents~~[,]~~ or
17 within another agreement with the owner of the unit subject to
18 foreclosure, by the managing agent or board, acting on behalf of
19 the association and in the name of the association; provided that
20 no association may exercise the nonjudicial or power of sale
21 remedies provided in chapter 667 to foreclose a lien against any



1 unit that arises solely from fines, penalties, legal fees, or
2 late fees, and the foreclosure of any such lien shall be filed
3 in court pursuant to part IA of chapter 667.

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

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



1 ""Power of sale" or "power of sale foreclosure" means a
2 nonjudicial foreclosure when:

3 (1) The mortgage contains, authorizes, permits, or
4 provides for a power of sale, a power of sale
5 foreclosure, a power of sale remedy, or a nonjudicial
6 foreclosure; or

7 (2) For the purposes of part VI, an association enforces
8 its claim of an association lien[~~, regardless of~~
9 ~~whether the association documents provide for~~
10 pursuant to a power of sale[~~, a power of sale~~
11 ~~foreclosure, a power of sale remedy, or a nonjudicial~~
12 ~~foreclosure.] provision that is authorized by statute,
13 contained in the association documents, or contained
14 in another enforceable agreement with the unit owner."~~

15 SECTION 5. This Act shall not be applied so as to impair
16 any contract existing as of its effective date in a manner
17 violative of either the Hawaii State Constitution or Article I,
18 section 10, of the United States Constitution.

19 SECTION 6. If any provision of this Act, or the
20 application thereof to any person or circumstance, is held
21 invalid, the invalidity does not affect other provisions or



1 applications of the Act that can be given effect without the
2 invalid provision or application, and to this end the provisions
3 of this Act are severable.

4 SECTION 7. Statutory material to be repealed is bracketed
5 and stricken. New statutory material is underscored.

6 SECTION 8. This Act shall take effect on January 1, 2050.



Report Title:

Condominium Associations; Nonjudicial Foreclosure; Power of Sale

Description:

Specifies a procedure for condominium associations to incorporate power of sale language into their governing documents. Clarifies that liens may be foreclosed upon if the power of sale language is contained within an association's governing documents or within some other agreement with the owner of the unit subject to foreclosure. Effective 1/1/2050.
(HD1)

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