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# A BILL FOR AN ACT

RELATING TO CONDOMINIUMS.

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

1           SECTION 1. The legislature passed Act 282, Session Laws of  
2 Hawaii 2019 (Act 282), to confirm its intent that condominium  
3 associations should be able to use nonjudicial foreclosure to  
4 collect delinquencies regardless of the presence or absence of  
5 power of sale language in an association's governing documents  
6 in response to Sakal v. Association of Apartment Owners of  
7 Hawaiian Monarch, 143 Haw. 219, 426 P.3d 443 (App. 2018). The  
8 Sakal court held that a condominium must have specific authority  
9 in its declaration, bylaws, or in an agreement with the owner,  
10 to conduct a nonjudicial foreclosure. Specifically, section 1  
11 of Act 282 stated that the legislative history indicated this  
12 was not the intent of the legislature in 1999, nor of subsequent  
13 amendments.

14           The Supreme Court of Hawai'i decided Malabe v. Ass'n of  
15 Apartment Owners of Exec. Ctr. by & through Bd. of Directors,  
16 147 Haw. 330, 465 P.3d 777 (2020, as corrected June 18, 2020),  
17 after the effective date of Act 282. In Malabe, the court



1 stated that: "We hold the ICA did not err in reinstating Count  
2 I, the Malabes' wrongful foreclosure claim, based on its ruling  
3 in Sakal, which correctly held that in order for an association  
4 to utilize the nonjudicial power of sale foreclosure procedures  
5 set forth in Hawaii Revised Statutes chapter 667, a power of  
6 sale in its favor must have existed in association bylaws or in  
7 another enforceable agreement with unit owners." Id. at 333,  
8 465 P.3d at 780 (citation omitted).

9 Notably, the Malabe court did not regard the legislative  
10 intent of Act 282 and its legislative intent as affecting its  
11 holding because the Malabes' based their claims on section  
12 667-5, Hawaii Revised Statutes, which was repealed in 2012. The  
13 Malabe court misread the intent of the legislature in construing  
14 Act 282 in the narrow manner as described in its holding. The  
15 Malabe court did not address the Malabes' challenges to Act 282  
16 on constitutional grounds, and relied instead on the holding  
17 from another case that Act 282 is unconstitutional because it  
18 violates plaintiffs' rights under the Contracts Clause of the  
19 United States Constitution. Id. at 334, 465 P.3d at 781 (citing  
20 Galima v. Ass'n of Apartment Owners of Palm Court by & through  
21 Bd. of Directors, 453 F. Supp. 3d 1334, 1356 (D. Haw. 2020)).



1           However, Section 6 of Act 282 provides that: "This Act  
2 shall not be applied so as to impair any contract existing as of  
3 the effective date of this Act in a manner violative of either  
4 the Hawaii State Constitution or Article I, section 10, of the  
5 United States Constitution." Moreover, Section 7 of Act 282  
6 provides that the provisions of the act are severable.  
7 Nevertheless, the Malabe and Galima courts have continued to  
8 cast doubt upon the legislature's intent in passing Act 282.  
9 Therefore, the legislature finds it necessary to clarify the  
10 legislative intent that the explicit grant of power of sale to  
11 associations is not required for the purposes of enforcing  
12 association liens through the nonjudicial foreclosure process in  
13 any part of chapter 667, Hawaii Revised Statutes.

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

17           "§514B-       Incorporation of power of sale language into  
18 governing instruments; procedure; effect. (a) Notwithstanding  
19 any other provision of this chapter or of any other statute or  
20 instrument, an association may incorporate power of sale



1 language into declaration or bylaws of the association, in  
2 accordance with the terms of this section.

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

6 "The governing documents of the association shall be deemed  
7 to include a power of sale, sufficient in form and  
8 substance to enable the foreclosure of the lien of the  
9 association. Exercise of the power of sale shall be in  
10 compliance with any requirements of Chapters 514B and 667  
11 of the Hawaii Revised Statutes."

12 (c) The notice to owners shall, no less than fourteen days  
13 in advance of a board meeting at which adoption of power of sale  
14 language will be considered, be:

15 (1) Hand-delivered;

16 (2) Sent prepaid by United States mail to the mailing  
17 address of each unit or to any other mailing address  
18 designated in writing by the unit owner; or

19 (3) At the option of the unit owner, expressed in writing,  
20 by electronic mail to the electronic mailing address  
21 designated in writing by the unit owner.



1 Notice shall include the text of the proposed power of sale  
2 language and inform the owners of the opportunity to be heard on  
3 the proposal. Notice shall also include the following language:

4 "An owner may preserve a potential defense that the  
5 exercise of a power of sale included in the declaration or  
6 bylaws of the association by board action constitutes an  
7 impairment of contract, by:

8 (1) Delivering a written objection to the association by  
9 certified or registered mail, return receipt  
10 requested, within sixty days after a meeting at which  
11 the board adopts a proposal to include such language;  
12 and

13 (2) Producing, to the association, a return receipt  
14 demonstrating such delivery within thirty days after  
15 service of a notice of default and intention to  
16 foreclose upon that owner."

17 The notice shall include an address where the written  
18 objection may be delivered.

19 (d) The board may adopt the proposal to incorporate the  
20 power of sale language into the declaration or bylaws of the  
21 association at any board meeting for which notice of the



1 proposal is given in compliance with this section; provided that  
2 owners are first given an opportunity to be heard on the  
3 proposal.

4 (e) If the board adopts the proposal to incorporate power  
5 of sale language into the declaration or bylaws of the  
6 association, then the power of sale language, designated as an  
7 amendment to the association's declaration or bylaws, may be  
8 recorded.

9 (f) Power of sale language so recorded shall be deemed to  
10 be effective upon recording.

11 (g) The procedures provided for in this section shall be  
12 the exclusive procedures for the incorporation of power of sale  
13 language into the declaration or bylaws of an association after  
14 \_\_\_\_\_ , 2021; provided that the power of sale language  
15 incorporated into the declaration or bylaws of an association,  
16 or any other agreement with an owner, in accordance with law  
17 prior to that date shall remain valid."

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

20 "(a) All sums assessed by the association but unpaid for  
21 the share of the common expenses chargeable to any unit shall



1 constitute a lien on the unit with priority over all other  
2 liens, except:

3 (1) Liens for real property taxes and assessments lawfully  
4 imposed by governmental authority against the unit;  
5 and

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

11 provided that a lien recorded by an association for unpaid  
12 assessments shall expire six years from the date of recordation  
13 unless proceedings to enforce the lien are instituted prior to  
14 the expiration of the lien; provided further that the expiration  
15 of a recorded lien shall in no way affect the association's  
16 automatic lien that arises pursuant to this subsection or the  
17 declaration or bylaws. Any proceedings to enforce an  
18 association's lien for any assessment shall be instituted within  
19 six years after the assessment became due; provided that if the  
20 owner of a unit subject to a lien of the association files a  
21 petition for relief under the United States Bankruptcy Code



1 (11 U.S.C. §101 et seq.), the period of time for instituting  
2 proceedings to enforce the association's lien shall be tolled  
3 until thirty days after the automatic stay of proceedings under  
4 section 362 of the United States Bankruptcy Code (11 U.S.C.  
5 §362) is lifted.

6 The lien of the association may be foreclosed by action or  
7 by nonjudicial or power of sale foreclosure [~~7, regardless of the~~  
8 ~~presence or absence of~~] if power of sale language [~~in~~] is  
9 contained within an association's governing documents [~~7~~] or any  
10 other agreement between the association and the owner of the  
11 unit that is the subject of the foreclosure, by the managing  
12 agent or board, acting on behalf of the association and in the  
13 name of the association; provided that no association may  
14 exercise the nonjudicial or power of sale remedies provided in  
15 chapter 667 to foreclose a lien against any unit that arises  
16 solely from fines, penalties, legal fees, or late fees, and the  
17 foreclosure of any such lien shall be filed in court pursuant to  
18 part IA of chapter 667.

19 In any such foreclosure, the unit owner shall be required  
20 to pay a reasonable rental for the unit, if so provided in the  
21 bylaws or the law, and the plaintiff in the foreclosure shall be



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

12 SECTION 4. This Act shall not be applied so as to impair  
13 any contract existing as of its effective date in a manner  
14 violative of either the Hawaii State Constitution or Article I,  
15 section 10, of the United States Constitution.

16 SECTION 5. If any provision of this Act, or the  
17 application thereof to any person or circumstance, is held  
18 invalid, the invalidity does not affect other provisions or  
19 applications of the Act that can be given effect without the  
20 invalid provision or application, and to this end the provisions  
21 of this Act are severable.



1           SECTION 6. Statutory material to be repealed is bracketed  
2 and stricken. New statutory material is underscored.

3           SECTION 7. This Act shall take effect upon its approval.



**Report Title:**

Condominium Associations; Nonjudicial Foreclosure; Power of Sale

**Description:**

Provides a process for associations to incorporate power of sale language into governing documents. Clarifies the legislative intent that the explicit grant of power of sale to associations is not required for the purposes of enforcing association liens under the association alternate power of sale foreclosure process. (SD2)

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

