SB-191-SD-2
Submitted on: 3/16/2021 1:34:52 PM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Richard Emery	Associa	Support	No

Comments:

This Bill helps protect the financial stability of associations. Strongly support.

P.O. Box 976
Honolulu, Hawaii 96808

March 16, 2021

Chair Aaron Ling Johanson
Vice Chair Lisa Kitagawa
Committee on Consumer Protection & Commerce
415 South Beretania Street
Honolulu, Hawaii 96813

Re: SB 191 SD2 SUPPORT

Dear Chair Johanson, Vice-Chair Kitagawa and Committee Members:

SB 191 SD2 provides a mechanism to add "power of sale" language to a condominium association's governing documents. The Community Associations Institute ("CAI") supports SB 191 SD2.

SB 191 SD2 is necessary because courts have cast doubt on previous legislative action. Act 282, passed in 2019, expressed the legislative intent that condominium associations have authority to use a nonjudicial foreclosure process when owners default upon their financial obligations to their fellow owners.

Courts have nonetheless insisted that "power of sale" language must be contained within the governing documents of a condominium association before a nonjudicial foreclosure process can be used. Courts, therefore, will not honor longstanding legislative intent without additional legislation.

Use of the nonjudicial foreclosure remedy is subject to robust due process and consumer protection provisions that have been in place since at least 2012. Without limitation, a defaulting owner is entitled to mediation under §§ 514B-146 and 514B-146.5, is entitled to a reasonable payment plan under §667-92 and is entitled to mediation under §667-94. Moreover, the nonjudicial or power of sale remedy is unavailable to foreclose a lien against any unit that arises solely from fines, penalties, legal fees, or late fees.

SB 191 SD2 strictly prescribes how a condominium association may incorporate "power of sale" language into its governing documents. Further, it provides owners with an "opt-out" mechanism to address potential impairment of contract concerns.[1]

A board contemplating incorporation of "power of sale" language into an association's governing documents must give notice that is comparable to notice required for a meeting of the whole association. *Compare*, HRS §514B-121(d). The SB 191 SD2 notice must, without limitation, specifically advise owners of the simple steps necessary to avoid being subject to exercise of the nonjudicial foreclosure remedy.

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[1] Contract Clause concerns were raised in Galima v. Association of Apartment Owners of Palm Court, 453 F.Supp. 3d 1334, 1356 (D. Haw. 2020). The Galima court relied upon Sveen v. Melin, 138 S. Ct. 1815, 1821–22 (2018) for the Contracts Clause test that it applied:

> The threshold issue is whether the state law has "operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co.,* 438 U.S., at 244, 98 S.Ct. 2716. In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights. See *id.,* at 246, 98 S.Ct. 2716 ; *El Paso,* 379 U.S., at 514–515, 85 S.Ct. 577 ; *Texaco, Inc. v. Short,* 454 U.S. 516, 531, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982). If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose."

Id. As to that test, the legislature should find that the contractual relationship relevant to condominium ownership is underpinned by the statutory scheme that *enables* the condominium form of ownership. The legislature's power to amend the condominium statute is part of the contractual *bargain*. It is also true that the Supreme Court of Hawaii has broadly recognized that an association may alter its governing documents. See, Lee v. Puamana Community Association, 128 P.3d 874, 883-884 (Haw. 2006). Thus, a party's expectations must, to be *reasonable*, take the possibility of change into account.

Assuming that a substantial impairment of a relevant contractual relationship is *perceived*, though, the legislature should find that providing a statutory nonjudicial or power of sale remedy to associations serves the significant and legitimate public purpose of facilitating the operation of the condominium property by, without limitation, protecting the financial viability of associations. The legislature should find here, as it did in Act 282, that it is crucial for condominium associations to be able to secure timely payment of common expenses to provide services to all residents of a condominium community. Further, the legislature should find that providing a statutory nonjudicial or power of sale remedy to associations is both appropriate and reasonable. Doing so would be consistent with longstanding legislative intent and statutory language.

Thus, assuming that an existing condominium owner could reasonably advance a good faith argument to the effect that a condominium purchase was in *reliance* upon a requirement that an association must foreclose judicially, in the absence of power of sale language in the governing documents of the association, that owner can easily preserve an impairment of contract defense.[2]

As noted in Act 282, condominiums are creatures of statute.[3] Enabling the condominium form of ownership has been treated as a *rightful* exercise of legislative power since State Savings & Loan Association v. Kauaian Development Company, 50 Haw. 540, 445 P.2d 109 (1968), which was "the first case to reach this court involving a condominium." 50 Haw. at 541. This is important because the legislative power "shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States." Haw. Const. art. III, § 1. The Supreme Court of Hawaii noted, in State Savings, that:

> The legislative enactment with which we are dealing in this case has profound social and economic overtones, not only in Hawaii but also in every densely populated area of the United States. Our construction of such legislation must be imaginative and progressive rather than restrictive.

Id.

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[2] SB 191 SD2 provides that:
"An owner may preserve a potential defense that exercise of a power of sale included in the declaration or bylaws of the association by board action constitutes an impairment of contract, by:

> (1) delivering a written objection to the association, by certified or registered mail, return receipt requested, within sixty days after a meeting at which the board adopts a proposal to include such language; and
> (2) producing, to the association, a return receipt demonstrating such delivery within thirty days after service of a notice of default and intention to foreclose upon that owner."

This requirement appropriately places a minimal burden on the person seeking exemption from a generally applicable rule.

[3] The Supreme Court of Hawaii has repeatedly recognized this to be so. It first did so in State Savings & Loan Association v. Kauaian Development Company, 50 Haw. 540, 546, 445 P.2d 109, 115 (1968) ("The condominium, or horizontal property regime, is a recently-born creature of statute."). It has done so at least twice since then. See, Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 348, 367 n.30 (Haw. 2002) ("'The condominium, or horizontal property regime, [was] a ...creature of statute' that was given its initial formal recognition in Hawai`i in 1961."); and Lee v. Puamana Community Association, 128 P.3d 874, 888 (Haw. 2006) ("condominium property regimes are creatures of statute").

The legislature can, therefore, specify how governing documents are amended. For example, the proviso: "Except as otherwise specifically provided in this chapter," HRS §514B-32(a)(11), qualifies the mechanism for amending a declaration of condominium property regime.

Chapter 514B authorizes condominium boards to "amend the declaration or bylaws as may be required in order to conform with the provisions of this chapter", HRS §514B-109(b), and Act 282 reflects the legislature's longstanding position that condominium law enables an association to exercise a nonjudicial foreclosure remedy. SB 191 SD2, therefore, is well within the scope of legislative authority.

SB 191 SD2 effectively addresses stated judicial concerns about Act 282. CAI respectfully requests that the Committee pass SB 191 SD2.

Very truly yours,

Philip Nerney

Philip Nerney

SB-191-SD-2
Submitted on: 3/16/2021 6:16:23 PM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mike Golojuch, Sr.	Palehua Townhouse Association	Support	No

Comments:

Our Board strongly supports SB191 to allow associations the ability to include the "power of sale" language in its governing documents. This allows one more avenue for the association to collect on a delinquent unit within the association. If it really becomes necessary to use non-judicial foreclosure, this measure reduces the cost and time that an association needs to remedy the situation.

Associations know that they must try other means first, such as mediation or a payment plan before even considering non-judicial forclosure. Please pass SB191.

Mike Golojuch, Sr. President, Palehua Townhouse Association

SB-191-SD-2
Submitted on: 3/17/2021 8:39:34 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Kevin Agena	Hawaiian Properties, Ltd.	Support	No

Comments:

We support SB191.

SB-191-SD-2
Submitted on: 3/17/2021 9:57:41 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

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

Comments:

Dear Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

I oppose S.B. 191 S.D.2.

While the intent of the bill is good, it will cause more harm than good.

Section 1 misstates the Hawaii Supreme Court's decision in Malabe. The Supreme Court did not rely "on the holding from another case that Act 282 is unconstitutional." The Supreme Court expressly stated that it was not ruling on the issue at all.

Section 1 states, in part, that the legislature "finds it necessary to clarify the legislative intent that the explicit grant of power of sale to associations is not required for purposes of enforcing association liens through the nonjudicial foreclosure process" but then goes on to require that an explicit grant of power of sale be included in an association's documents. It strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 and clarified that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents[.]" The language added in 2 is completely at odds with the intent stated in Section 1 and undermines Act 282 (2019).

This bill creates a process for condominium association boards of directors to "incorporate" a power of sale provision into an association's declaration or bylaws after giving owners fourteen days' written notice and an opportunity to be heard (but not vote). The bill provides that the association's board of directors will be required to inform owners of their right to raise the defense of impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board

adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the “exclusive procedures” that condominium associations may follow will prevent associations from allowing their owners to vote on a declaration or bylaw amendment incorporating a power of sale provision into their governing instruments. There is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. Tying the hands of associations in this manner does not protect associations, but harms them.

The change to HRS Section 514B-146 not only undermines Act 282 (2019), but it does not refer to the new power of sale language found in Section 2. No change is made to HRS Chapter 667 which may create issues.

These are only some of the issues with the bill. While S.B. 191 H.D.2 is well intended, it will not achieve its intended purpose and will likely result in more litigation. For the foregoing reasons, I respectfully ask and urge the committee to defer any action on the bill.

Sincerely,

Mark McKellar

House of Representatives

Committee on Consumer Protection and Commerce
Thursday, March 18, 2021 at 2:00 p.m.

To: Chair Aaron Ling Johanson and Vice-Chair Lisa Kitagawa

Re: SB191 SD2, relating to Condominiums

Aloha Chair Johanson, Vice-Chair Kitagawa, and members of the House Committee on Consumer Protection and Commerce,

I am Lila Mower and I **STRONGLY OPPOSE SB191 SD1.**

I share the following excerpt from the NPR's article, *Not So Neighborly Associations Foreclosing on Homes*:

> *"It's called nonjudicial foreclosure, and in practice it means a house can be sold on the courthouse steps with no judge or arbitrator involved. In Texas the process period is a mere 27 days -- the shortest of any state.*
>
> *David Kahne, a Houston lawyer who advises homeowners, says that in Texas, the law is so weighted in favor of HOAs, he advises people that instead of hiring him, they should call their association and beg for mercy. "I suggest you call the association and cry," he says.*
>
> *If a homeowner misses a couple of association dues payments, the $250 or $500 they owe often becomes $3,000 after the association's lawyers add their legal fees, Kahne says.*
>
> *It's not the HOA that has to pay the lawyer's bill but the delinquent homeowner. If the homeowner wishes to contest and loses, the owner is on the hook for legal fees that could run deep into the tens of thousands of dollars.*
>
> *Kahne says that as the economy has gone under, HOA management companies and lawyers have been making millions off homeowners through this foreclosure process."*

Since 2014, I led a coalition of more than 300 condo owners from over 150 condo associations. Additionally, I serve as a Director of a condominium association board and previously served as President of two other condo associations, all on Oahu.

As for experience on other volunteer boards, I am the President of Kokua Council, one of Hawaii's oldest advocacy organizations which focuses on policies and practices which impact the well-being of seniors and other vulnerable people and I also serve on the Board of the over-20,000-member organization, Hawaii Alliance for Retired Americans.

Prior to its repeal, HRS667-5 allowed a mortgagee (lender) holding a mortgage containing a power of sale to sell a borrower's home in as little as 36 days after declaring default. In 2011, the legislature placed a moratorium on the use of HRS667-5, referring to it as "one of the most draconian (nonjudicial foreclosure statutes) in the country" which was enacted in 1874 and "originally designed to make it easy to take land away from Native Hawaiians."

In 2011, Representative Herkes said that "in the last 10 to 15 years [that statute] had been the mechanism to non-judicially foreclose on homeowners, often without their knowledge and without providing them a fair opportunity to save their homes. In Act 48, we just put a stop to it. Now we've gotten rid of it." HRS667-5 was repealed in 2012, having never been intended to allow its usage by condominium associations.

The online Merriam-Webster dictionary defines "judicial" as "the administration of justice," from which one can interpret that "non-judicial" may lack that "justice" as the non-judicial foreclosure process allows foreclosures without the oversight of a neutral third party.

A board serves as its association's government with no "checks and balances" against its centralized power. The proposed measure intends to equip these boards with the ability to adopt non-judicial foreclosures to collect the payment of assessments while leaving owners still liable for their mortgages.

This dangerous empowerment of condominium boards should be juxtaposed against reports from the insurance industry that nationally, Hawaii has the most Directors and Officers Insurance (D&O) claims and among the highest insurance settlements despite having only a small fraction of homeowners' associations of states like Florida, California, New York, and Illinois.

This proposed measure should also be viewed against these statistics provided by the condo industry itself: Roughly one-third of Hawaii's population lives in association-governed communities. A national trade and special interest organization, Community Associations Institute, reported in their most recent national survey, that 30% of association residents do not rate their association as "positive."

If that ratio is applied to Hawaii, then roughly one-ninth of Hawaii's population, or over 140,000 Hawaii residents, may rate their associations as not "positive."

Legislators should not add to those dire statistics by passing extremely punitive measures especially in this difficult time when many of Hawaii's residents are suffering the economic consequences of the pandemic.

The proposed measure also circumvents the necessary super-majority of owners' consent to amend their association's Declaration or Bylaws to add the power of sale language by adding this dangerous amendment:

> The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure ~~[; regardless of the presence or absence of~~]] if power of sale language [~~in~~] is contained within an association's governing documents[~~,~~] or any other agreement between the association and the owner of the unit that is the subject of the foreclosure, 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.

Please do not pass SB191 SD1 and instead act to protect the most valuable asset that most Hawaii residents own: their homes.

Mahalo.

SB-191-SD-2
Submitted on: 3/17/2021 11:41:52 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jane Sugimura	Hawaii Council for Assoc. of Apt. Owners	Oppose	No

Comments:

With due respect to CAI, HCCA asks that this bill be deferred for the reasons in M. Anne Anderson's testimony to allow stake holders to work to revise the language in the bill to address the concerns raised in Ms. Anderson's testimony. Non-judicial foreclosures have been a contentious issue in the commdominium community and we need to ensure that any new legislation on this subject does not limit its effectiveness. .

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

TESTIMONY OF

LARRY S VERAY

TO THE COMMITTEE ON CONSUMER PROTECTION & COMMERCE RELATING TO CONDOMINIUMS

IN STRONG OPPOSITION OF SB191 SD2 WHICH PROVIDES A PROCESS FOR ASSOCIATIONS TO INCORPORATE POWER OF SALE LANGUAGE INTO GOVERNING DOCUMENTS AND CLARIFIES THE LEGISLATIVE INTENT THT THE EXPLICIT GRANT OF POWER OF SALE TO ASSOCIATIONS IS NOT REQUIRED FOR THE PURPOSE OF ENFORCING ASSOCIATION LIENS UNDER THE ASSOCIATION ALTERNATE POWER OF SALE FORCLOSURE PROCESS.

March 17, 2021

Aloha, Chair Aaron Johanson, Vice Chair Lisa Kitagawa and members. Thank you for allowing me the opportunity to provide testimony in strong **OPPOSITION** to SB191 SD2. Although I am Chair for the Pearl City Neighborhood Board No. 21, I am submitting this testimony as an individual; however, I am also Vice Chair of Waiau Gardens Kai-B Association Board of Directors and the Board has authorized me to represent all the homeowners of our Association located in Pearl City. While the intent of this bill is good, it will cause more harm than good.

We bring to your attention that SB191 SD2 will remove language from HRS Chapter 514B which allows condominium associations to foreclose "regardless of the presence or absence of power of sale language in an association's governing documents." The deletion of this language is problematic. This language was added in 2019 (by Act 282) and was intended to clarify the legislature's intent that condominium associations should be able to foreclose nonjudicially or by power of sale, even if their project documents do not contain a power of sale clause. This bill undermines the progress made by Act 282 and will now require a power of sale clause in an association's declaration or bylaws. There are a number of other problems with the bill, as stated in our sample testimony.

This bill creates a process for condominium association boards of directors to "incorporate" a power of sale provision into an association's declaration or bylaws after giving owners fourteen days' written notice and an opportunity to be heard (but not vote). The bill provides that the association's board of directors will be required to inform owners of their right to raise the defense of impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "exclusive procedures" that condominium associations may follow will prevent associations from allowing their owners to vote on a declaration or bylaw amendment incorporating a power of sale provision into their governing instruments. There is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be

defective. Tying the hands of associations in this manner does not protect associations, but harms them.

I most strongly urge you to not pass this bill because it will not achieve its intended purpose and will likely result in more litigation. For the foregoing reasons, I respectfully ask and urge the committee to defer any action on the bill.

Very respectfully,

Larry S. Veray

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

Dear Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

I oppose S.B. 191 S.D.2.

While the intent of the bill is good, it will cause more harm than good.

Section 1 misstates the Hawaii Supreme Court's decision in Malabe. The Supreme Court did not rely "on the holding from another case that Act 282 is unconstitutional." The Supreme Court expressly stated that it was not ruling on the issue at all.

Section 1 states, in part, that the legislature "finds it necessary to clarify the legislative intent that the explicit grant of power of sale to associations is not required for purposes of enforcing association liens through the nonjudicial foreclosure process" but then goes on to require that an explicit grant of power of sale be included in an association's documents. It strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 and clarified that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents[.]" The language added in Section 2 is completely at odds with the intent stated in Section 1 and undermines Act 282 (2019).

This bill creates a process for condominium association boards of directors to "incorporate" a power of sale provision into an association's declaration or bylaws after giving owners fourteen days' written notice and an opportunity to be heard (but not vote). The bill provides that the association's board of directors will be required to inform owners of their right to raise the defense of impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "exclusive procedures" that condominium associations may follow will prevent associations from allowing their owners to vote on a declaration or bylaw amendment incorporating a power of sale provision into their governing instruments. There is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. Tying the hands of associations in this manner does not protect associations, but harms them.

The change to HRS Section 514B-146 not only undermines Act 282 (2019), but it does not refer to the new power of sale language found in Section 2. No change is made to HRS Chapter 667 which may create issues.

These are only some of the issues with the bill. While S.B. 191 H.D.2 is well intended, it will not achieve its intended purpose and will likely result in more litigation. For the foregoing reasons, I respectfully ask and urge the committee to defer any action on the bill.

Sincerely,

Phyllis Lam

Board Member, Windward Cove

1020 Aoloa Place.

Kailua, HI 96734

SB-191-SD-2
Submitted on: 3/16/2021 6:05:11 PM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dawn Smith	Individual	Oppose	No

Comments:

There should not be a less protections re foreclosures to condo owners than single family home -owners. This affects 25-35% of the residencial owners of the state. It is a disgrace that someone keeps trying to diminish the rights of condo owners. Even rental tenants have more protections. Please allow the foreclosure procedures that are in place currently to continue to apply to ALL home-owners.

SB-191-SD-2
Submitted on: 3/16/2021 7:09:57 PM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Tim Apicella	Individual	Support	No

Comments:

March 16, 2021

Chair Aaron Ling Johanson

Vice-Chair Lisa Kitagawa

Committee on Consumer Protection & Commerce

RE: SB191 SD2 Support

Dear Chair Johanson, Vice-Chair Kitagawa, and Committee Members:

I am request your support for SB191 SD2 for the simple reason that allowing an association's board to ammend "power of sale" verbiage into an association's governing documents is an important element to make clear the nonjudicial process and address judicial concerns.

I understand and agree with the vital importance of ensuring consumer protections for those individuals facing nonjudicial forclosure. It is my undertanding that multipe consumer protections and important elements of due process has been written into 514B since 2012.

I respectfully request that the Committee pass SB191 SD2. Thank you for the opportunity to testify.

Sincerely,

Tim Apicella

Condominium Unit Owner

SB-191-SD-2
Submitted on: 3/16/2021 10:15:12 PM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Mark R. Hagadone, Ph.D., FACFE	Individual	Support	No

Comments:

Dear Chair Johanson, Vice-Chair Kitagawa and Committee Members:

Thank you for the excellent work you are accomplishing under less than ideal circumstances.

SB 191 provides a vehicle for the addition of the "power of sale" language to a condominium association's governing documents. The Community Associations Institute supports this Bill.

This Bill is vitally necessary because of past doubt that courts have cast on previous, (specifically Act 282) legislation. This doubt relates to the fact that legislative intent alone is not enough. Courts have insisted that "power of sale" language be physically present in a condominium association's governing documents.

SB 191 SD2, is within the scope of legislative authority governed by Chapter 514B which authorizes condominium boards to "amend the declaration or bylaws as may be required in order to conform with the provisions of this chapter". It will efficiently address these judicial concerns regarding legislative intent and because of this I respectively ask that the Committee pass SB 191 SD2.

Very truly yours,

Mark R. Hagadone

SB-191-SD-2
Submitted on: 3/17/2021 9:13:08 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

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

Comments:

Dear Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

I oppose S.B. 191 S.D.2.

While the intent of the bill is good, it will cause more harm than good.

Section 1 misstates the Hawaii Supreme Court's decision in Malabe. The Supreme Court did not rely "on the holding from another case that Act 282 is unconstitutional." The Supreme Court expressly stated that it was not ruling on the issue at all.

Section 1 states, in part, that the legislature "finds it necessary to clarify the legislative intent that the explicit grant of power of sale to associations is not required for purposes of enforcing association liens through the nonjudicial foreclosure process" but then goes on to require that an explicit grant of power of sale be included in an association's documents. It strikes out the language found in HRS 514B-146(a) which was added by Act 282 and clarified that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents[.]" The language added in 2 is completely at odds with the intent stated in Section 1 and undermines Act 282 (2019).

This bill creates a process for condominium association boards of directors to "incorporate" a power of sale provision into an association's declaration or bylaws after giving owners fourteen days' written notice and an opportunity to be heard (but not vote). The bill provides that the association's board of directors will be required to inform owners of their right to raise the defense of impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "exclusive procedures" that condominium associations may follow will prevent associations from allowing their owners to vote on a declaration or bylaw amendment incorporating a power of sale

provision into their governing instruments. re is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. Tying the hands of associations in this manner does not protect associations, but harms them.

The change to HRS Section 514B-146 not only undermines Act 282 (2019), but it does not refer to the new power of sale language found in Section 2. No change is made to HRS Chapter 667 which may create issues.

These are only some of the issues with the bill. While S.B. 191 H.D.2 is well intended, it will not achieve its intended purpose and will likely result in more litigation. For the foregoing reasons, I respectfully ask and urge the committee to defer any action on the bill.

Sincerely,

M. Anne Anderson

SB-191-SD-2
Submitted on: 3/17/2021 9:28:43 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
lynne matusow	Individual	Oppose	No

Comments:

This bill undermines the progress made by Act 282 in 2019 and will now require a power of sale clause in an association's declaration or bylaws.

Section 1 misstates the Hawaii Supreme Court's decision in Malabe. The Supreme Court did not rely "on the holding from another case that Act 282 is unconstitutional." The Supreme Court expressly stated that it was not ruling on the issue at all.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the "exclusive procedures" that condominium associations may follow will prevent associations from allowing their owners to vote on a declaration or bylaw amendment incorporating a power of sale provision into their governing instruments. Bylaws amendments require 67% apporval of the owners. The bill will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. Tying the hands of associations in this manner does not protect associations, but harms them.

I ask you to defer this bill.

SB-191-SD-2
Submitted on: 3/17/2021 9:50:55 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

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

Comments:

To: COMMITTEE ON CONSUMER PROTECTION & COMMERCE

Rep. Aaron Ling Johanson, Chair Rep. Lisa Kitagawa, Vice Chair

Rep. Henry J.C. Aquino Rep. Sharon E. Har Rep. Mark J. Hashem Rep. Sam Satoru Kong Rep. John M. Mizuno

Rep. Dee Morikawa
Rep. Richard H.K. Onishi Rep. David A. Tarnas Rep. Lauren Matsumoto

Testimony in ***opposing*** SB191 SD2

1. As cited in the formal Bill language, in 2 Court cases, Sakal vs AOAO Hawaiian Monarch & Malabee vs AOAO Executive Center, for lack of a 'Power of Sale' provision in By-Laws, exercise of 'Non Judicial Foreclosure' was illegal.

2. It is Hawaii state government position that the nearly 1,700 Home Owners Associations are 'self-governing'. This bill seeks to impose on owners, without their approval, state conferred authority on AOAO collections attorneys to seize their properties without going to Court, which violates the essence of 'self-government. Basically, it is disrespectful of those Court decisions.

3. My experience is that whenever collection attorneys get involved, 'debt' to the Home Owners Association quickly triples. Basically, the lawyers don't wish to appear in a Courtroom and work for their money, much easier to have their office clerks press a button on a computer to print ready made forms and letters to send out to condo owners demanding payments. These cases should be in Small Claims Court. By the time debt exceeds the parameters of a Small Claim, this means the management company is NOT doing its job.

4. As a metric, 30+% of Hawaii residents are in condos, yet, 60% of them are estimated to be owned by 'Investors' who do not live on site. As they don't reside there, usually, they cannot 'vote' in HOA elections, and, the state does nothing to assure their right to

vote. This is due to non-leadership. Yet, this bill, SB191 SD2, if passed into 'law', would permit an HOA thru its attorneys to seize property without judicial process, a denial of basic rights.

5. The solution to HOA debt collection is super simple. Each HOA should put in its By-Laws language to buyers of condos agree to 'garnishment' of wages or bank accounts for common area expenses of which owner(s) may be in arrears. This should not include spurious fines or 'legal fees', as those should be pursued in Small Claims Court.

6. Please reject this confiscatory bill as it intrudes upon HOA self-government which the state loves to cite when refusing to accord full voting rights to individual owners.

Respectfully, ***Dale Arthur Head*** (808) 696-4589 helpmakahasurfside@gmail.com (submitted Wed 03-17-2021)

SB191 SD2

Measure Title:	RELATING TO CONDOMINIUMS.
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)
Companion:	HB641
Package:	None
Current Referral:	CPC, JHA
Introducer(s):	RHOADS, BAKER

SB-191-SD-2
Submitted on: 3/17/2021 10:11:36 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dale Arthur Head	Individual	Support	No

Comments:

I testify in Support of this bill.

But, have to wonder why this Committee gutted the orignial version, which had been supported by this commette 2 years ago (2019) when it was HB347.

Dale Arthur Head (696-4589) helpmakahasurfide@gmail.com

SB-191-SD-2
Submitted on: 3/17/2021 11:33:19 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
mary freeman	Individual	Oppose	No

Comments:

Dear Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

I oppose S.B. 191 S.D.2.

While the intent of the bill is good, it will cause more harm than good.

Section 1 misstates the Hawaii Supreme Court's decision in Malabe. The Supreme Court did not rely "on the holding from another case that Act 282 is unconstitutional." The Supreme Court expressly stated that it was not ruling on the issue at all.

Section 1 states, in part, that the legislature "finds it necessary to clarify the legislative intent that the explicit grant of power of sale to associations is not required for purposes of enforcing association liens through the nonjudicial foreclosure process" but then goes on to require that an explicit grant of power of sale be included in an association's documents. It strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 and clarified that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents[.]" The language added in Section 2 is completely at odds with the intent stated in Section 1 and undermines Act 282 (2019).

This bill creates a process for condominium association boards of directors to "incorporate" a power of sale provision into an association's declaration or bylaws after giving owners fourteen days' written notice and an opportunity to be heard (but not vote). The bill provides that the association's board of directors will be required to

inform owners of their right to raise the defense of impairment of contract, while also imposing upon owners a deadline for raising the defense. The new provision which requires owners to deliver written objections within 60 days after a meeting at which the board adopts a proposal to include such language in the declaration or bylaws as a means of preserving constitutional rights will likely be challenged.

The language that states that the procedures for the incorporation of power of sale language into the declaration or bylaws shall be the “exclusive procedures” that condominium associations may follow will prevent associations from allowing their owners to vote on a declaration or bylaw amendment incorporating a power of sale provision into their governing instruments. There is no good reason to deprive owners of this right. It will also prevent associations from acting if the Hawaii courts find the power of sale clause created by the bill or the procedures established for incorporating such language into the declaration or bylaws to be defective. Tying the hands of associations in this manner does not protect associations, instead it harms them.

The change to HRS Section 514B-146 not only undermines Act 282 (2019), but it does not refer to the new power of sale language found in Section 2. No change is made to HRS Chapter 667 which may create issues.

These are only some of the issues with the bill. While S.B. 191 H.D.2 is well intended, it will not achieve its intended purpose and will likely result in more litigation. For the foregoing reasons, I respectfully ask and urge the committee to defer any action on the bill.

Sincerely,

Mary S. Freeman

Ewa Beach

SB-191-SD-2
Submitted on: 3/17/2021 1:21:11 PM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
R Laree McGuire	Individual	Support	No

Comments:

I strongly support. Foreclosure is the last resort for associations unable to collect the debt owed by an owner. Judicial foreclosures are extremely costly and can remain pending for years, with the owner paying nothing during the time the case remains pending. All other owners end up paying that deficiency when many of them can barely afford to pay their own miantenance fees. Consequently, it is imperative that associations be permitted to conduct nonjudicial foreclosures as the process is shorter and cost-effective and the respective statutes currently contain many consumer protection measures. Associations are typically nonprofit entities with a break-even budget. Thus, when one owner fails to pay its maintenance and reserve fees, all other owners must cover the deficit in order to pay the association's bills. There is no extra money to fund foreclosure litigation which can cost tens of thousands of dollars per case depending upon the number of creditors named as parties in the case.

Thank you for the opportunity to testify.

SB-191-SD-2
Submitted on: 3/17/2021 1:28:09 PM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Pamela J. Schell	Individual	Oppose	No

Comments:

S.B. 191S.D.2 requires that an explicit grant of power of sale be included in an association's documents. It strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 and clarified that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents[.]" The bill undermines Act 282 (2019) -- Pamela J. Schell

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

SB-191-SD-2
Submitted on: 3/17/2021 7:38:57 PM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jeff Sadino	Individual	Comments	No

Comments:

As a condo owner who has suffered indefensibly at the hands of Hawai'iana and Porter McGuire Kiakona for almost four years, three lawsuits that never even went to trial, and over $100,000 in accrued attorney expenses, I believe that non-judicial foreclosures should be eliminated. They are not used as a way to minimize expenses to the AOAO, they are used as a way to force an unwelcome owner to leave who has every right to be there. Without their full repeal, this Bill is at least a step in the right direction.

A non-judicial foreclosure should be used by the AOAO only as the last resort because of the immeasurable harm that it causes to the Owner presently and for many years to come. It seems that AOAOs use the NJF much too quickly and the irreparable harm that is causes to an owner seems to be overlooked. Instead of being utilized as a last resort, PMK, one of the largest condo law firms in the state, brags on their website that as "Pioneers of the non-judicial foreclosure, we were one of the first to streamline the foreclosure process." Never in a million years would I myself be bragging about something like this. More emphasis should be focused on resolving disputes and collecting delinquencies instead of being so eager to separate a family from their home.

Proponents of the NJF often say that it is necessary to recover expenses owed to the AOAO so that other owners are not saddled with the burden. This is a very good talking point, but it is not what happens in practice. PMK did a NJF in my AOAO in 2017. Not until 2018 did PMK discuss with my board how to generate money from their new unit. In truth, the unit was in a state of disrepair and unrentable. PMK should have known this before recommending the NJF. The unit has sat empty for 3 years and has not generated a single penny of income to the AOAO, but PMK still collected their attorney fees for it.

A quick search of public records shows that PMK has foreclosed on owners for as little as $432. Pioneers of non-judicial foreclosures alright! Imagine losing your home to your AOAO because of a $432 delinquency.

As a Financial Advisor, I have a client who lost his condo several years ago to a NJF and he still does not understand what happened to him, how they were able to do it, or what he should have done differently.

In the recognition of the serious and irreversible harm that NJFs cause to the Owner as well as how they have been abused by the largest managing agents and law firms, I would ask for the following changes be made:

Page 4:

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

Comments: In many AOAOs, participation at Board Meetings is low / non-existent. NJF is a tremendous power that the legislature is giving to the Board. By restricting its passage to Association meetings, it is likely that more owners will participate in this very important decision that is literally life-changing when it gets used.

(c) The notice to owners shall, not less than **SIXTY** days in advance of a board meeting at which adoption of power of sale language will be considered, be:

(1) Hand-delivered;

(2) Sent **BY CERTIFIED OR REGISTERED MAIL, RETURN RECEIPT REQUESTED**, to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. **ANY MAIL THAT CANNOT BE DELIVERED SHALL BE DEEMED A VOTE AGAINST INCORPORATING A NJF**; or

Comments: Again, a NJF is a tremendous power with the most serious and permanent of consequences. NJFs have been debated in public for the past 5 years. It is not at all realistic to expect an Owner to educate themselves on the pros and cons of a NJF in 14 days or less.

The postal service loses mail. Due to the irreversibility of a NJF, all owners should be guaranteed to be informed of the upcoming vote choice and so a certified letter is more appropriate than just a regular letter.

Subsection (3) should be removed. It is too easy to miss emails and a NJF is much too important.

Page 5:

Line 4: “An owner may **OPT OUT OF** the exercise of power of sale…”

Comments: While I’m not a lawyer, the phrase “may preserve a potential defense” seems to have a lot of uncertainty to it. “Opt out” would provide a definitiveness that is

needed to protect the owner from the attorneys moving the goalposts later. Indeed, multiple testimonies in support of this Bill and its companion Bill, multiple testifiers in support paraphrased this as an “opt out” provision that protected owners when in reality it does not provide any actual protection to the owner.

1. Delivering a written objection to the association by certified or registered mail, return receipt requested, within sixty days after a meeting at which the board adopts a proposal to include such language **AND THE MINUTES OF SUCH MEETING ARE APPROVED**; and

Comments: my Board votes on all motions in the Executive Session (even though they are not supposed to, but there is no one with the power to challenge them on this) and they do not meet again for at least another 60 days to approve the previous minutes. It can take my AOAO up to 90 days to provide finalized minutes.

1. Producing, to the association, a return receipt demonstrating such delivery within thirty days after service of a notice of default and intention to foreclose upon that owner.”

Comments: While I like this language, the Bill as it is written currently only requires this to be included when the NJF change is first proposed. Language that notifies the owner of their rights should also be included with the actual service of a notice of default.

I also think that it needs to be clarified how this “opt out” defense would be transferred to a new owner if the existing owner ever sells the unit. Does the “opt out” cease to exist or does it remain attached to the unit and how would the new owner know?

Also, I can easily envision the Board retaliating in other ways against an owner who chooses to “opt out” of a NJF. I think a paragraph needs to be added that makes it explicitly clear that retaliation against an owner for opting out of a NJF should be viewed in a manner that is most favorable to an owner.

Page 6:

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

Comments: While I like this language, it is no secret that there are a large number of NJF lawsuits currently in the Courts. This paragraph should be clarified that the power of sale language is not retroactive.

Page 8:

Lines 6-11: The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure if 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~~**, ~~by~~ by the managing agent or board, acting on behalf of the association and in the name of the association~~;~~

Comments: The NJF causes serious and irreparable harm to the owner. There should be no ambiguity as to when a NJF is or is not allowed and this should be clearly memorialized in the governing documents for everybody to see in plain sight. As above, a random document could easily get lost when the existing owner sells the unit to a new owner.

LATE *Testimony submitted late may not be considered by the Committee for decision making purposes.

SB-191-SD-2
Submitted on: 3/18/2021 11:45:53 AM
Testimony for CPC on 3/18/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Philip Blackman	Individual	Comments	No

Comments:

Dear Chair Johanson, Vice Chair Kitagawa, and Members of the Committee:

I comment on S.B. 191 S.D.2.

While the intent of the bill is good, it will cause more harm than good if not addressing concerns included below, in particular the likely hood the procedure of 60 day notification my yet be open to constitutional grounds objections. Modifying Act 282 may be a stronger starting point to give needed power to Board of Directors for leverage to recover unpaid maintenance fees, Time is of the essence in collections where claims by other parties and deadlines may decrease chances of boards ever recovering unpaid maintenance fees ! MAHALO

Section 1 misstates the Hawaii Supreme Court's decision in Malabe. The Supreme Court did not rely "on the holding from another case that Act 282 is unconstitutional." The Supreme Court expressly stated that it was not ruling on the issue at all.

Section 1 states, in part, that the legislature "finds it necessary to clarify the legislative intent that the explicit grant of power of sale to associations is not required for purposes of enforcing association liens through the nonjudicial foreclosure process" but then goes on to require that an explicit grant of power of sale be included in an association's documents. It strikes out the language found in HRS Section 514B-146(a) which was added by Act 282 and clarified that the "lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or

absence of power of sale language in an association's governing documents[.]" The language added in Section 2 is completely at odds with the intent stated in Section 1 and undermines Act 282 (2019).

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These are only some of the issues with the bill. While S.B. 191 H.D.2 is well intended, it will not achieve its intended purpose and will likely result in more litigation. For the foregoing reasons, I respectfully ask and urge the committee to defer any action on the bill without modification first.

Sincerely, Philip Blackman