HAWAII LEGISLATIVE
ACTION COMMITTEE
community
ASSOCIATIONS INSTITUTE

P.O. Box 976
Honolulu, Hawaii 96808

February 8, 2021

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

Re: HB 641 SUPPORT

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

HB 641 provides a mechanism to add "power of sale" language to a condominium association's governing documents. The Community Associations Institute ("CAI") supports HB 641.

HB 641 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.

HB 641 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 HB 641 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] HB 641 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. HB 641, therefore, is well within the scope of legislative authority.

HB 641 effectively addresses stated judicial concerns about Act 282. CAI respectfully requests that the Committee pass HB 641.

Very truly yours,

Philip Nerney

Philip Nerney

HB-641
Submitted on: 2/8/2021 3:56:02 PM
Testimony for CPC on 2/10/2021 2:00:00 PM

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

Comments:

Condos are break even organizations, they collect just enough money to pay their bills. When one owner does not pay, the deficit has to be covered by all the other owners who may be seniors, disabled, or unemployed. This Bill helps protect the financial stability of all.

HB-641
Submitted on: 2/8/2021 9:36:30 PM
Testimony for CPC on 2/10/2021 2:00:00 PM

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

Comments:

HCCA supports the intent and purpose of this bill and asks that your committe pass this out. Non-judicial foreclosures are a less costly, efficient way for condominium associations to recover delinquent maintenanc fees and condominium associations need to be able to incorporate a power of sale provision into teir governing documents so that they can conduct non-judicial foreclosures.

HB-641
Submitted on: 2/9/2021 11:46:48 AM
Testimony for CPC on 2/10/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lila Mower	Hui `Oia`i`o, Condo Owners Coalition of Hawaii	Oppose	No

Comments:

STRONGLY OPPOSE

HB-641
Submitted on: 2/9/2021 1:15:44 PM
Testimony for CPC on 2/10/2021 2:00:00 PM

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

Comments:

I SUPPORT the general language of this Bill, albeit with numerous changes for clarity and owner protections.

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 to leave who has every right to be there. Without their full repeal, this Bill is at least a step in the right direction.

If I understand this Bill right, the introduction seems to say that a power of sale clause does not need to be explicit in the Governing Documents, whereas the actual changes to the HRS (specifically on Page 8, Line 7) seems to say that a power of sale clause does need to be explicit in the Governing Documents.

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.

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 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:

"The governing documents of the association *shall be deemed to include* a power of sale, sufficient…"

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.

Also, "shall be deemed to include" could be read such that NJFs are allowed even if they are not explicitly included in the Governing Documents. As a Financial Advisor, I can say that NJFs are not a common phrase in most peoples' financial literacy and even when they are, they are still poorly understood. Because of this, the ability to do a NJF should be explicitly clear in the Governing Documents. In fact, 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.

(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 of consequences. There is no reason whatsoever that its decision making should be rushed. 60 days would allow people more time to educate themselves about the pros and cons of a NJF.

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, during the Senate Hearing on companion bill SB191, one testifier 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.

Thank you for the opportunity to testify,

Jeff Sadino

HB-641
Submitted on: 2/9/2021 1:22:24 PM
Testimony for CPC on 2/10/2021 2:00:00 PM

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

Comments:

Strongly support, especially in the light of the Hawaii Supreme Court's recent *Malabe* decision that effectively ignored Act 282 (2019), to the detriment of Condomiminium Associations.

Mahalo for your consideration.

HB-641
Submitted on: 2/9/2021 1:42:25 PM
Testimony for CPC on 2/10/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Harendra Panalal	Individual	Oppose	No

Comments:

Hi Hon. Representatives:

I OPPOSE HB641.

My family has been living in Honolulu for the past 50 years. I have been on BOD of two large condominium for many years.

Due to Covid-19, many owners are facing financial hardships.

BOD, management companies, attorneys, et al. may try to work out fair and amicable solutions with delinquent owners.

Mahalo

Harendra Panalal, MSE, PE, RME

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harenp2009@hotmail.com; ushapanalal24@gmail.com

HB-641
Submitted on: 2/10/2021 7:59:09 AM
Testimony for CPC on 2/10/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lourdes Scheibert	Individual	Oppose	No

Comments:

I stongly oppose for several reasons. Education in self governing for the condominium directors are not mandatory. Decisions by most directors are based on expert opinion that got the condominium industry in deep trouble in non-judicial foreclosures. See Ian Lind: Wrongful Foreclosure Claims Rock the Condo World, Civil Beat, August 31, 2016

Judicial forecloses should be left to the mortgage companies who lent the money to the owner to buy the unit. Court appointed supervised judical foreclosures exists for over a 100 years for a reason.