



# Hawaii Condominium Bulletin

## Act 182 (SLH 2012): Analysis of new Nonjudicial Foreclosure Law provisions and Additional Collections Options for Condominium and Planned Community Associations

By Gordon M. Arakaki, Esq.

(This article is reprinted with permission from Community Associations Institute Hawaii and was included in the CAI Hawaii December 2012 online newsletter.)

Act 182 [Session Laws of Hawaii (“SLH”), 2012]/HB 1875, HD2, SD2, CD1 was signed into law by the Governor on June 28, 2012. The bill, which implements the 2011 recommendations of the Mortgage Foreclosure Task Force along with other best practices, corrects many of the problems created for condominium and planned community associations (collectively “homeowner associations”) by Act 48 (SLH 2011).

The new power of sale (aka “nonjudicial”) foreclosure law and additional collections options for homeowner associations provided by Act 182 (SLH 2012) are described below.

### I. New Nonjudicial Foreclosure Process for Homeowner Associations

One of the biggest differences between the old nonjudicial foreclosure process and the new process is that nonjudicial foreclosure processes for condominium associations and planned community associations are distinguished from mortgage foreclosures and grouped together in a new part titled “Association Alternative Power of Sale Foreclosure Process” that has been added to Hawaii Revised Statutes (“HRS”) Chapter 667 (“Foreclosures”). Creating a separate nonjudicial foreclosure process for homeowner associations allows associations to avoid some of the liability that Act 48 (SLH 2011) imposed on mortgage companies and also allows associations to proceed with collections more efficiently.

In a nutshell, Act 182’s new nonjudicial foreclosure process for homeowner associations: (i) allows associations to foreclose within approximately six months; (ii) continues Act 48’s requirement that associations accept reasonable payment plans (essentially plans that can be completed within 12 months); and (iii) provides options for associations when delinquent owners cannot be served (e.g., taking control of an unoccupied unit and renting it out).

The basic timeline for the new process when an association decides to file for foreclosure on a delinquent assessment lien (with no complications or postponements) is as follows:

Days (after NDIF service)	Action/Procedural Step
0	Association prepares and records a Notice of Default and Intention to Foreclose (“NDIF”)
0 - 60 days	Association must serve NDIF on Delinquent Owner and other interested parties
0 - 30 days	Delinquent Owner has 30 days after service of NDIF to submit payment plan to Association
0 - 60 days	Alternatively, Delinquent Owner has 60 days after service of NDIF to <u>cure</u> default
61+ days	<i>If</i> , within 60 days, Association is <u>unable to serve</u> Delinquent Owner or other interested party, Association has <u>three statutory options</u> :

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# Letter from the Chair



Here we are....one quarter through the New Year. It's amazing how fast time flies. Before you know it you will be Christmas shopping again.

In this current issue of the Hawaii Condominium Bulletin we highlight some of the legislative activity for 2013 and bills that may have an effect on condominium associations. We are early in this Legislative Session so the Bills highlighted in this issue can still change. You can track many of the bills discussed in this issue of the Bulletin through [www.capitol.hawaii.gov](http://www.capitol.hawaii.gov).

Another Bill to keep an eye on that is supported by the industry is SB 1360 and similar HB 334, which will make the exemption of General Excise Tax on maintenance fee payments permanent. The exemption of GET on maintenance fee payments was passed in 2007 under Act 239, however there was a Sunset Date included in Act 239 which will "sunset" on 12/31/14. The bill(s) will also clarify that the aggregate amount of the tax exempted shall not exceed \$40,000. You can also make a difference on this bill or any other current bills in the legislature by submitting your own testimony. You can submit testimony at <http://www.capitol.hawaii.gov/submittestimony.aspx>.

An excellent article in this issue is "**Act 182 (SLH 2012): Analysis of new Non-judicial Foreclosure Law provisions and Additional Collections Options for Condominium and Planned Community Associations**" By Gordon M. Arakaki, Esq. This article clarifies the actions that a Condominium Association can take in their own attempts at a non-judicial foreclosure. Gordon was an instrumental part of the Condominium Recodification several years ago, and you will find his comments useful.

I attended the CAI Hawaii seminar in Honolulu at the Japanese Cultural Center, "Free Legal Advice" on February 21. It was an instructive event, providing practical information for condominium association board members and condominium managing agents in areas that are important to the functioning of an association on topics such as employment law, criminal activity on association property and entering into construction contracts. CAI Hawaii has scheduled other such educational events through out 2013; go on-line to the CAI Hawaii website for a list and date of educational events for the rest of this year.

Aloha.  
Scott A. Sherley  
Chair, Condominium Review Committee

# Act 182 (SLH 2012): Analysis of new Nonjudicial Foreclosure Law provisions and Additional Collections Options for Condominium and Planned Community Associations (cont. page 1)

Days (after NDIF service) Action/Procedural Step (continued)

- (1) File special proceeding circuit court for permission to serve by publication and posting;
- (2) Proceed with nonjudicial foreclosure but give up right to deficiency judgment, with owner having a one-year right of redemption; or
- (3) If unit is *unoccupied*, take control of unit and rent it out. [Note: Since the association will not have an ownership interest in the unit (i.e., no title), this option should be discussed with the association's insurance agent.]

61 - 120+ days	If default is not cured (within 60 days of service of NDIF) and parties have not agreed on payment plan, Association may foreclose on Association's lien and sell unit at a <i>public sale</i> , which can take place on the later of 60 days after Public Notice of public sale is distributed or 14 days after Public Notice advertisement publication date (i.e., 3 weeks of publication + 14 days = 35 days)
61 - 120+ days	Association prepares Public Notice of the public sale and has copies of Public Notice mailed or delivered to Delinquent Owner and other interested parties; Association also has Public Notice of the public sale: <ol style="list-style-type: none"><li>(1) Printed in a newspaper of general circulation; or</li><li>(2) Published on a State website at the discretion of the agency that maintains the website</li></ol>
120+ days	Public sale held (note that Delinquent Owner has until 3 business days before public sale to cure default); any person (including the Association ) is authorized to bid on Delinquent Owner's unit; highest bidder meeting terms and conditions of public sale is the successful bidder
120+ days	After purchaser completes purchase, the unit is conveyed to the purchaser by a Conveyance Document executed by Association and sales proceeds are distributed pursuant to statute; [Note that lien creditors prior to Association are not forced to their right of recovery, but Association and any prior lien creditor may agree in writing that sales proceeds will be distributed by Association to prior lien creditor towards payment of moneys owed to prior lien creditor before any moneys are paid to the association; otherwise, sales proceeds go to Association and others]
120+ to between 130 and 165 days	Affidavit after public sale and Conveyance Document must be recorded within 10 to 45 days after public sale held

Finally, Act 182 (SLH 2012) makes the following changes to Hawaii's foreclosure laws as they apply to homeowner associations:

- The statutory "regular periodic assessment" (aka "maintenance fees") priority lien, previously available only to condominium associations and now available to both condominium and planned community associations, has been changed to: (i) reduce the relevant assessment period of twelve months back to six months immediately preceding the foreclosure; and (ii) eliminate the cap on the priority lien amount. The twelve month assessment period was always intended to be temporary – pursuant to Act 48 (SLH 2011), it was due to revert to six months in 2014 – and eliminating the cap on the priority lien amount (twelve months/six months or \$7,200.00/ \$3,600.00, whichever was less) is a long overdue beneficial change for homeowner associations. Hawaii's priority lien statutes are now more in line with the "super priority" lien for assessments provided for in the Uniform Common Interest Ownership Act.
- Recorded liens (as opposed to automatic liens arising pursuant to statute or project documents) expire six years from date of recordation unless proceedings to enforce the lien are instituted before the lien expires.
- In most cases, associations may not initiate or continue nonjudicial foreclosures when a lender is in the process of foreclosing on a senior lien.

## II. New Statutory Collections Options for Planned Community Associations

Act 182 (SLH 2012) adds two new sections to HRS Chapter 421J, providing additional collections options for planned community associations that are similar to those found for condominium associations in HRS Chapter 514B.

Planned community associations now have the following statutory rights that are already provided for condominium associations by statute:

- Right to demand rent from tenants of delinquent owners;
- Right to terminate access to common areas and common services (including, but not limited to utilities) of delinquent owners;
- Automatic liens for delinquent assessments that arise without the need to record a written document (as discussed above);
- Right to recover six months of "regular periodic assessments" (aka "maintenance fees") from subsequent non-mortgagee purchaser even if mortgagee (i.e., lender) is not paid in full;
- Right to conduct nonjudicial foreclosures (as now provided for under the new nonjudicial foreclosure process for both condominium and planned community associations);

## Act 182 (SLH 2012): Analysis of new Nonjudicial Foreclosure Law provisions and Additional Collections Options for Condominium and Planned Community Associations (cont. page 3)

- Right to begin billing foreclosing lenders for maintenance fees within 30 to 60 days after the lender has completed its judicial or nonjudicial foreclosure public sale (which prevents lenders from avoiding their duty to pay their unit's share of maintenance fees by sitting on the deed for a foreclosed unit until they find a purchaser and transfer the property); and
- Right to insist that delinquent owners "pay first and dispute later" (i.e., prohibiting delinquent owners from withholding payment of their delinquent assessments for any reason).

### III. Conclusion

Act 182 (SLH 2012) corrects many (if not most) of the problems that Act 48 (SLH 2011) created for homeowner associations. Everyone should appreciate the hard work and sincere efforts of the Legislature and Mortgage Foreclosure Task Force to address the legitimate, but sometimes competing, interests of the multitude of stakeholders affected by Hawaii's nonjudicial (aka "power of sale") foreclosure law. Certainly as it applies to homeowner associations and the people who live in such associations, Hawaii's new nonjudicial foreclosure law appears to be a big improvement over the prior law.

About the author: Gordon Arakaki, Esq. is with Clay Chapman Iwamura Pulice & Nervell. He is a former Chief of Staff/Committee clerk for the Senate Committee on Ways and Means and Staff Attorney/Committee Clerk for the Senate Committee on Education and Technology and Senate Committee on Commerce, Consumer Protection, and Information Technology. Gordon also serves on CAI Hawaii's Board of Directors. This article was previously published in the Hawaii State Bar Association Journal.

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<sup>1</sup> Act 182 (SLH 2012) also attempts to address problems created for lenders by Act 48 (SLH 2011). This analysis, however, deals strictly with the provisions of Act 182 (SLH 2012) that affect homeowner associations.

<sup>2</sup> Condominium associations are governed by Chapter 514B of the Hawaii Revised Statutes ("HRS"), and in some instances, to a limited extent, HRS Chapter 514A.

<sup>3</sup> Planned community associations are governed by HRS Chapter 421J.

## AOUO Biennial Registration

The current AOUO biennial registration period ends on June 30, 2013. HRS § 514B-103, requires all condominium associations of more than five units to register with the Real Estate Commission ("Commission"). The upcoming biennial registration period will run from July 1, 2013, through June 30, 2015.

In keeping with the Commission's paperless initiative, no registration packets are being printed; the AOUO registration is being conducted exclusively on-line. Registration information may be accessed at: [aouo.ehawaii.gov](http://aouo.ehawaii.gov)

If your condominium association is managed by a condominium managing agent, a registration notice will be mailed to the company. If your condominium association is self-managed, a registration notice will be mailed to the person designated as the contact officer in the most recent registration information on file with the Commission.

This year's registration reflects the amendment to HAR Chapter 53 condominium fees, effective December 31, 2012, that increased the condominium education trust fund fee ("CETF"), per unit, from \$2 annually, to \$3.50, and the biennial fee from \$4 to \$7. This is the first increase in per unit CETF registration fees in twenty years.

The information collected on the registration is made available to the members of the Legislature and general public upon specific request. It is also available for public viewing at the Commission's website. Prospective purchasers and real estate licensees use the association registration information when considering condominium purchases; financial institutions utilize this information to check on the registration and financial status of a condominium association for refinancing or mortgage purposes.

Condominium unit owners should be aware that condominium associations which fail to register lack standing to maintain an action or proceeding in the courts of the State of Hawaii. Unregistered associations are also precluded from filing an action to collect or foreclose on a lien for the collection of common or other expenses.

In order to process all registrations in a timely manner, the deadline for registration is May 31, 2013. Any questions regarding the registration process may be directed to Commission staff at (808) 586-2643.

# Ask the Condominium Specialist

**Q:** There are eight people living in a two-bedroom condominium unit located near my unit. The residents of this unit cause quite a bit of noise and commotion, disturbing those of us near them. I believe it is illegal to have so many people in the unit. I have spoken to my resident manager about this and was told that it would be a violation of “discrimination laws” to limit the number of persons in the unit. Is this correct?

**A:** The condominium law does not address issues of zoning or the number of persons who may legally reside in a residential unit. These issues are among many that lay within the jurisdiction of the City and County of Honolulu. You may call the Building Division of the City at 768-8122 to inquire about the legality of the number of persons living in a residential unit.

If you live on a neighbor island, call your respective county office for questions concerning occupancy restrictions within the county housing code. All things considered, it would be wise to discuss this issue with the condominium association’s attorney.

Among the factors that the City considers when determining legality include the zoning designation for a particular area and whether all persons living in a unit constitute a “family”. In addition to occupancy restrictions governed by the county, there are state laws and federal regulations governing discrimination in real property transactions. The Hawaii Civil Rights Commission is another agency that may be contacted at (808) 586-8636 for questions on housing occupancy restrictions. For questions regarding discrimination against family status, the Federal Fair Housing Act and the Federal Department of Housing and Urban Development may be reached at (808) 522-8182.

**Q:** I have received several notices of “landscaping violations” from my condominium managing agent. The notices are vague and do not provide a specific reference to my alleged violation. I am inclined to challenge the allegations. Must I pay the fines which I believe have been imposed unfairly?

**A:** Yes! HRS Chapter 514B has a “pay first, challenge later” provision in HRS §514B-146 (c), which provides in relevant part that “[n]o unit owner shall withhold any assessment claimed by the association”. It goes on to state that a disputing unit owner may request a written statement that specifies: 1) the common expenses included in the assessment along with the due date of each amount claimed; 2) the amount of any penalty, late fee, lien filing fee and any other charge included in the assessment; 3) any attorney’s fees included in the assessment; 4) that under Hawaii law, a unit owner may not withhold assessments, for any reason; 5) the right of a unit owner to demand mediation or arbitration to resolve the assessment dispute, provided the unit owner pays the assessment in full and stays current with all assessments; and 6) that payment of the assessment in full does not prevent the owner from challenging the assessment or from receiving a refund of all amounts not owed.

While you believe your position is strong with regard to this dispute, the law is clear that you must pay first before any dispute resolution means are available to you.

The information provided herein is informal and for informational purposes only. Consult with an attorney familiar with the Hawaii condominium law for specific legal advice.

# 2013 Legislative Report

Here are some bills being considered by the Hawaii Legislature this year that the Real Estate Branch is following. If passed, these would have a direct effect on condominium living and law in Hawaii. The legislature adjourns on May 2, 2013.

HB 21 – Repeals the prioritization of liens for unpaid mortgages over subsequently recorded liens for unpaid condominium association fees. Clarifies the obligation of the acquirer of a foreclosed unit under the lien for unpaid association fees.

HB 24 and its companion bill, SB 505 – Specifies that a percentage of fees paid into the condominium education trust fund shall be used to support mediation of condominium related disputes.

HB 25 and its companion bill, SB 508 – Allows a condominium association, as a junior lienholder, to commence or continue a nonjudicial foreclosure action on a property subject to a judicial foreclosure until a foreclosure commissioner is appointed by the circuit court.

HB 997 – Establishes the condominium dispute resolution program for condominiums. Permits a party to proposed or terminated mediation to file a request for a hearing with the Office of Administrative Hearings of the Department of Commerce and Consumer Affairs.

SB 296 – Requires proxy holders to vote strictly in accordance with owner's directives. Permits owners to indicate choices for voting in meeting for which proxy is given. Requires notice of matters to be voted on, or persons to be voted for, and place for specifying how proxy is to be voted.

SB 1368 and its companion, HB 1414 – Permits the real estate commission to ensure compliance by enforcing any rule, order, decision, demand, or requirement of the commission issued pursuant to Hawaii Revised Statutes, Chapter 514B.

## Almost Free Legal Advice CAI Hawaii Seminar

On February 21, 2013, CAI Hawaii conducted an educational seminar at the Japanese Cultural Center, entitled "Almost Free Legal Advice".

Attorneys from different fields of law relevant to community associations were available to answer questions from the attendees of the lunchtime audience. William D. Hoshijo, Lance S. Fujisaki, Steve Guttman, Keith M. Kaneshiro and John Knorek discussed and responded to questions in the areas of civil rights and reasonable accommodations, construction contracts, bankruptcy and community associations, drug dealers and prostitutes on association property and labor and employment issues, respectively. Milton Motooka moderated the discussion.

Contact CAI Hawaii for a calendar of its events for 2013, starting with the March 14, 2013, "Aging Buildings" expo at the Neal Blaisdell Center. The seminars are partly funded by funds from the Condominium Education Trust Fund of the Real Estate Commission.

# Mediation Case Summaries

From December 2012 through February 2013, the following condominium mediations were conducted pursuant to Hawaii Revised Statutes § 514B-161, and subsidized in part by the Real Estate Commission. Additional condominium mediations may have been conducted through the District Court process by the providers listed below and Mediation Services of Maui, West Hawaii Mediation Center and Kuikahi Mediation Center.

On the island of Kauaʻi, Kauaʻi Economic Opportunity (“KEO”) conducted a mediation presentation as part of the “Kids First Program” offered by the District Court. Children and their families were provided information on the mediation process regarding condominium and real property disputes.

Additionally, in conjunction with the Kauaʻi Police Department, KEO staff are currently developing an alternative dispute resolution program. As part of this program development, KEO conducted a presentation to the police department on condominium dispute resolution through the mediation process.

Congratulations to KEO on its consistent outreach to the Kauaʻi community!

## Kauaʻi Economic Opportunity

PARTIES	ISSUE	DISPOSITION
Owner vs. Board	Interpretation of bylaws regarding board use of proxy votes.	Mediation occurred; no agreement reached.

## Mediation Center of the Pacific

Owner vs. Board	Responsibility for repair of water leak; access to project documents.	Mediated to agreement.
Owner vs. Board	Board approval of improvements to unit made by unit owner.	Mediated; no agreement.
Board vs. Owner	Board approval of alterations to property.	Parties declined mediation.
Owner vs. Board	Dispute over maintenance fees; board approval for installation of bathroom fan.	Mediated to agreement.
Owner vs. Board	Alleged selective enforcement by board of house rules.	Mediated; no agreement.

# 2013 Real Estate Commission Meeting Schedule

**Laws & Rules Review Committee – 9:00 a.m.**

**Condominium Review Committee – Upon adjournment of  
the Laws & Rules Review Committee Meeting**

**Education Review Committee – Upon adjournment of the  
Condominium Review Committee Meeting**

**Real Estate Commission – 9:00 a.m.**

Wednesday, April 10, 2013  
Wednesday, May 8, 2013  
Wednesday, June 12, 2013  
Wednesday, July 10, 2013  
Wednesday, August 7, 2013  
Wednesday, September 11, 2013  
Wednesday, October 9, 2013  
Wednesday, November 13, 2013  
Wednesday, December 11, 2013

Friday, March 22, 2013  
Friday, April 26, 2013  
Friday, May 24, 2013  
Friday, June 28, 2013  
Friday, July 26, 2013  
Friday, August 23, 2013  
Friday, September 27, 2013  
Friday, October 25, 2013  
Wednesday, November 27, 2013  
Friday, December 20, 2013

All meetings will be held in the Queen Liliuokalani Conference Room of the King Kalakaua Building, 335 Merchant Street, First Floor.

Meeting dates, locations and times are subject to change without notice. Please visit the Commission's website at [www.hawaii.gov/hirec](http://www.hawaii.gov/hirec) or call the Real Estate Commission Office at (808) 586-2643 to confirm the dates, times and locations of the meetings. This material can be made available to individuals with special needs. Please contact the Executive Officer at (808) 586-2643 to submit your request.

Real Estate Branch and Real Estate Commission's web page at: <http://www.hawaii.gov/hirec>  
Address: 335 Merchant Street, Rm. 333; Honolulu, HI 96813; Phone: (808) 586-2643

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