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2012 INTERIM LEGISLATIVE UPDATE

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HB 1875 CD 1 RELATING TO COLLECTIONS AND FORELCOSURES.

In 2011, act 48 (SLH 2011) made major changes to Hawaii's foreclosure laws. The main focus of act 48 was mortgage foreclosures and imposing greater liability on foreclosing mortgage companies. Nevertheless, it created a number of problems for condominiums and other homeowner associations. For example, act 48 created greater potential liability for condominium associations by forcing them to follow the mortgage nonjudicial foreclosure law. Act 48 also eliminated nonjudicial foreclosures for non-condominium homeowner associations altogether. Fortunately, HB 1875 corrects many of the problems act 48 created for associations (although not necessarily those that act 48 created for lenders).

Condominium Associations

HB 1875 eliminates the requirement that condominium associations follow the nonjudicial foreclosure law applicable to mortgage companies. Instead, HB 1875 establishes a completely new part of the foreclosure law that covers only foreclosures by associations, allowing associations to avoid the some of the liability that act 48 imposed on mortgage companies. Creating a separate association nonjudicial foreclosure part of the law also allows associations to proceed with collections more efficiently.

HB 1875 also has a one major downside for condominiums. Last year, act 48 doubled the original, six-month or \$3,600 (whichever was less) post-foreclosure lien previously found in the condominium law to 12 months or \$7,200 (whichever is less). Under that change condominium associations can collect up to 12 months of delinquent maintenance fees or \$7,200 in any foreclosure, even if the lender is not paid in full from the sales proceeds. The 12 month/\$7,200 lien was due to expire in 2014, anyway, but HB 1875 eliminates it two years early, in favor of a simple, six-month lien with NO

dollar cap. In other words, under the change proposed by HB 1875, condominium associations will be able to demand six months of maintenance fees, with no limit or cap.

HB 1875 does not eliminate the requirement of act 48 that all associations must accept “reasonable” payment plans from delinquent owners. Nevertheless, HB 1875 does provide a definition of “reasonable”, making it easier for associations to understand how to comply with that requirement. (Under HB 1875, a reasonable payment plan is essentially a payment plan that can be completed within 12 months.)

Non Condominium Associations

HB 1875 puts NON-condominium homeowner associations on a par with condominium associations by:

- Creating a lien that arises automatically, without the need to record a written document.
- Allowing them to recover six months of maintenance fees in any foreclosure even if the lender is not paid in full. (Thus, non-condominium associations can now enjoy the same benefit that condominiums have enjoyed since 2000.)
- Giving them the right to demand rent from tenants of delinquent owners.
- Giving them the right to terminate utilities and common services of delinquent owners.
- Giving them the right to conduct nonjudicial foreclosures again, under the new part of the foreclosure law for associations.
- Allowing them to begin billing foreclosing lenders and others within 30 to 60 days after the lender has completed its judicial or nonjudicial foreclosure auction, thereby preventing lenders from “sitting on” the deed for a foreclosed unit until they find a buyer and transfer the property.
- Giving them the right to insist that delinquent owners “pay first and dispute later”, rather than withholding delinquent assessments for real or imagined reasons.

These changes should benefit all non-condominium homeowner associations, especially those townhome projects that have substantial maintenance fees because they provide their members with essentially the same services as condominium associations.

ACT 018, (signed 4/12/2012; HB 1746 HD1) METERING OF UTILITIES IN CONDOMINIUMS.

The purpose of this act is to permit a condominium board of directors to authorize the installation of meters to measure utility use by individual units, as long as the condominium association bears the cost of installing the meters. This act is intended to help older condominium projects in Hawaii that often have only a single meter measuring utility consumption for all units in the project. In that way, those associations can ensure utility expenses are based on the individual units' actual use, rather than charged as a common expense.

The legislature found that wasteful or excessive utility use results in higher costs for the association when utility costs are paid for as a common expense. Moreover, the legislature determined that charging for utilities as a common expense created clear unfairness.

Act 18 eliminates the requirement found in prior laws that installation of separate meters was "subject to" any approval requirements and spending limits contained in the declaration or bylaws. Instead, act 18 allows boards to proceed despite any such spending limits or requirements. In other words, act 18 provides that owner approval is no longer required to install separate meters as long as the condominium association bears the cost of installing the meters.

HB 2078 HD2 SD2 CD1 RELATING TO TAXATION.

The stated purpose of this bill is to foster consumer protection in the State's transient accommodations market and ensure greater compliance with applicable state and county laws by operators of transient accommodations in the State. The bill does so by requiring the operator of a transient accommodation to designate a local contact residing on the same island where the transient accommodation is located. The bill also requires that all advertisements and solicitations on websites for transient accommodations display registration identification numbers.

Unfortunately, the bill also requires community, condominium, and other similar associations to provide relevant information to the department of taxation about all operators who may be leasing their property as a transient accommodation, to help ensure compliance with appropriate state and county tax laws. In the specific terms of the bill:

Any nongovernmental entity with covenants, bylaws, and administrative provisions which is formed pursuant to chapter 514A, 514B, or 421J, shall provide the department with all relevant information, maintained in its records, related to all operators who may be leasing their property as transient

accommodations by December 31 of each year, or within sixty calendar days of any change in the relevant information, operation, or ownership of the transient accommodation. Any person or entity who willfully fails to supply information required under this subsection shall be subject to the penalties under section 231-35; provided that a person or entity shall not be subject to any term of imprisonment or probation under section 231-35.

(Emphasis added.)

The use of the word “willfully” suggests mere inadvertence will not result in liability. Nevertheless, this bill creates potential liability for associations located in resort areas where short-term rentals are permitted.

HB 2328 HD1 SD1 CD1 RELATING TO TAXATION.

The bill amends the sunset provision of Act 166, Session Laws of Hawaii 2007, to encourage sales of leased fee interests under condominiums and co-ops. Specifically, the bill extends the State exemption from taxation of capital gains realized from the sale of leased fee interests in condominium and cooperative units from January 1, 2013 to January 1, 2018. The legislature decided that extending this exemption is necessary to encourage landowners to sell condominium and cooperative lessees the fee interests for their units and thereby promote the long-term stability of Hawaii’s condominium housing market.

ACT 085 (4/26/2012 SB2842 SD1 HD1) RELATING TO CIVIL ACTIONS FOR DISCRIMINATORY PRACTICES IN REAL PROPERTY TRANSACTIONS.

The purpose of this act is to make the law relating to the filing of civil actions in housing discrimination cases consistent with the federal laws under the Fair Housing Act. Existing Hawaii law allowed an aggrieved person to file a civil action after filing an administrative complaint with the Hawaii Civil Rights Commission and obtaining a right to sue. In contrast, federal law provides the aggrieved person an option to file a civil action without first filing an administrative complaint. This act amends Hawaii law to allow an aggrieved person to file a court action without the person first having to exhaust his administrative remedies.

ACT 089 (4/26/2012, SB2747 SD1 HD2) RELATING TO ELECTRIC VEHICLE PARKING.

The purpose of this measure is to assist Hawaii in addressing its energy needs and promote the increased use of electric vehicles by simplifying and clarifying current requirements for electric vehicle parking. The act, among other things, requires at least one parking space to be equipped with an electric vehicle charging system and

designated for the exclusive use of electric vehicles in places of public accommodation with at least 100 parking spaces. (Note that since the act applies to places of “public accommodation” i.e., commercial facilities -- most residential condominiums will be unaffected by it.). The act also allows the space for the electric vehicle to be located anywhere in the parking structure or lot but specifies that no parking space designated for electric vehicles shall displace or reduce accessible stalls required by the Americans with Disabilities Act Accessibility Guidelines.

SB 3002 SD2 HD1 CD1 RELATING TO REAL ESTATE BROKERS AND SALESPERSONS.

The original purpose of this measure was to establish that real estate brokers and salespersons could not be held liable for: (1) misrepresentations based upon a good faith reliance on certain information; and (2) failure to ascertain and disclose all material facts concerning a property if there was a good faith reliance on a prepared disclosure statement.

The legislature was concerned, however, that the proposed amendments were inconsistent with the national professional standards that govern real estate brokers and salespersons, which state that realtors must avoid misrepresentation without qualification. Therefore, to preserve the current standard of practice for Hawaii real estate licensees and protect a consumer’s ability to seek redress, the final bill: (i) deletes the two exemptions of the original bill; but (ii) clarifies that in evaluating a licensee’s conduct, the Real Estate Commission should consider whether a real estate licensee relied in good faith on information provided by other persons or third parties.