OFFICE OF ADMINISTRATIVE HEARINGS
CONDOMINIUM MANAGEMENT DISPUTE RESOLUTION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of	)	CDR-1011-04
	)	
DAWN SMITH,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION
vs.	)	
	)	
AOAO NAURU TOWER,	)	
	)	
Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On April 29, 2011, Dawn Smith ("Petitioner"), filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("OAH") against Chuck Heitzman, Setsuko Hayakawa and the Association of Apartment Owners of the Nauru Tower ("Respondents"). The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On May 20, 2011, Respondents filed a motion to dismiss Petitioner's request for hearing. On May 23, 2011, Petitioner filed a motion for an order to show cause why Respondents should not be held in contempt for violating the Hearings Officer's order in Case No. CDR 1011-2 and for a stay of assessments. Petitioner also requested leave to amend Section IV of her request for hearing.

On May 31, 2011, Petitioner filed an amended request for hearing.

On June 8, 2011, the Hearings Officer entered an order denying Petitioner's motion for order to show cause and Respondents' motion to dismiss. Petitioner's request for leave to amend her request for hearing was granted. Based on a review of Petitioner's hearing request, the order also clarified the issues for hearing as follows:

> a. whether the reserve maintained by the Board of Directors is properly funded pursuant to HRS §514B-148;
>
> b. whether the Board of Directors improperly exceeded its 2010/2011 operating budget in violation of HRS §514B-148(e);
>
> c. whether Respondents have complied with the requirements of HRS §514A-83.5 in regard to Petitioner's request to inspect the association's documents; and
>
> d. whether Petitioner violated the house rules identified in Respondents' response to notice of hearing.

On July 1, 2011 and July 20, 2011, Petitioner filed a motion for temporary restraining order, preliminary injunction and for stay of assessments pending final adjudication on merits, and a motion to compel document request. On August 9, 2011, the Hearings Officer denied Petitioner's motion for temporary restraining order, preliminary injunction and for stay of assessments pending final adjudication on merits, and granted in part and denied in part Petitioner's motion to compel document request.

On July 6, 2011 and July 11, 2011, the Hearings Officer directed the parties to address his continuing jurisdiction over this case. By order dated July 21, 2011, the Hearings Officer concluded that he had jurisdiction over this matter[1].

On August 18, 2011, Respondents filed a motion to dismiss Chuck Heitzman and Setsuko Hayakawa as respondents in this matter as well as a motion to compel document request. By orders dated August 23, 2011, the motion to dismiss the individually-named respondents was granted, and the motion to compel document request was granted in part and denied in part.

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[1] The Hearings Officer's order regarding the jurisdiction issue was appealed to the First Circuit Court. The appeal was subsequently denied.

On August 25, 2011, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer. The hearing reconvened on August 26, 2011 and September 9, 2011, and was concluded on September 12, 2011. Petitioner was present and was represented by her attorneys, Sidney K. Ayabe, Esq. and Christopher Shea Goodwin, Esq., and Respondent Association of Apartment Owners of Nauru Tower ("Respondent AOAO"), was represented by its attorneys, Mark J. Bennett, Esq., Stephanie E.W. Thompson, Esq. and Paul B. K. Wong, Esq.

Following the conclusion of the hearing, the Hearings Officer directed the parties to submit their closing arguments in writing. Accordingly, on October 7, 2011, Petitioner filed her closing arguments and on October 28, 2011, Respondent AOAO filed its post-hearing brief. Petitioner filed a rebuttal closing brief and an amended rebuttal closing brief on November 4, 2011. In her rebuttal briefs, Petitioner withdrew her request for a finding that Respondent AOAO had improperly exceeded its 2010/2011 operating budget in violation of HRS §514B-148(e).

Having reviewed and considered the evidence and arguments presented at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions, and decision.

II. FINDINGS OF FACT

1. The Nauru Tower condominium project ("Project") is located at 1330 Ala Moana Boulevard in Honolulu, Hawaii.

2. The Project's Declaration of Condominium Property Regime and By-Laws were recorded on or about November 28, 1989.

3. Administration of the Project is vested in Respondent AOAO. Respondent AOAO is comprised of all commercial and residential apartment owners of the Project.

4. The Project is managed and operated by its Board of Directors ("Board"). Chuck Heitzman is the current President of the Board.

5. Hawaiiana Management Co., Ltd. ("Hawaiiana Management") is Respondent AOAO's current managing agent.

6. Petitioner owns one residential and two commercial apartment units as well as 6 parking stalls in the Project.

7. Petitioner resides in her residential apartment unit at the Project and works out of one of her commercial apartment units located in the main lobby of the Project. Petitioner's other commercial apartment, located in the Project's mezzanine level, is leased out to an attorney.

8. Respondent AOAO uses the "Cash Flow" method for calculating reserves.

9. Respondent AOAO's Cash Flow plan for 2011 started with a $500,000.00 balance, anticipated the collection of $3,888,085.00 in maintenance fees, budgeted operational expenses of $3,505,193.00, capital expenses of $276,001.00, and a carry-over balance of $511,801.00 for 2012. As of July 31, 2011, Respondent AOAO had spent $284,350.06 in capital improvements while maintaining $292,351.08 in deposited accounts. Based on these figures, a special assessment at the end of 2011 may or will be necessary if Respondent AOAO does not have sufficient reserve funds to complete all of the capital reserve projects scheduled in its 2011 reserve budget.

10. In 2008, the tennis courts at the Project were at or near the end of its useful life and were scheduled to be resurfaced. The Board, however, decided to delay the resurfacing project to 2010 and, subsequently, to 2011.

11. The Board's decisions to delay the resurfacing of the tennis courts from 2008 to 2010 and then to 2011 were not based on any verbal or written recommendation from an expert or professional.

12. The tennis courts have yet to be resurfaced.

13. The cost to replace all of the parking garage exhaust fans at the Project total more than $10,000.00. The fans will reach their anticipated useful life in 2012. The fans are not listed in Respondent AOAO's 2011 reserve study and have not been listed as a reserve item for the past 4 or 5 years.

14. Tom Pressler, a licensed mechanical engineer who is familiar with the mechanical components in the Project, testified that the parking garage exhaust fans will

not need to be replaced in their entirety because regular maintenance would include replacing the individual fan components.

15. Respondent AOAO, thru its Board, accepted a proposal by Clear Blue Energy Corp. to install 35 carbon monoxide sensors at the Project at an actual cost of $103,515.00. The carbon monoxide sensors were installed at the Project in or about May and June 2011.

16. The carbon monoxide sensors are included in the 2011 reserve study as "Garage Fans – Carb. Monox."

17. In 2008 and, again in 2009, Respondent AOAO budgeted $75,000.00 to replace the Project's front door. However, the front door was not replaced in 2008 or 2009. In 2009, this item was removed completely from the Project's 2010 reserve list even though the replacement value of the door exceeded $10,000.00.

18. In or about November 2010, the front door fell off its hinges due to high winds. As a result, the Board arranged to have a security guard posted at the door area for safety reasons.

19. The replacement of the Project's front door was returned to the Project's 2011 reserve list. The current replacement cost for the front door has increased to approximately $150,000.00.

20. Kenneth Cole, an account executive with Hawaiiana Management, testified that deferral of a capital replacement item identified on the reserve study should be done only on the advice of an expert in order to avoid a violation of the reserve requirement law. According to Cole, "there needs to be an explanation why it was moved down the road."

21. The Board has not performed a complete reserve study since at least 2007. The Board has instead consulted with independent third-party experts regarding specific items or components. According to Cole, the reserve studies are modified annually after checking with contractors, prices are updated, and the life of components are adjusted.

22. Since 2007, Cole has recommended that the Board undertake a comprehensive reserve study. To date, his recommendation has not been accepted by the Board.

23. Cole testified that it's a "rare occurrence" when condominium associations use its capital reserve funds to pay for operating expenses.

24. On June 7, 2010, Petitioner emailed Cole and requested the Nauru Tower lobby landscaping contract and "a copy of any invoices from or to the Landscape contractor on that job though the present." The request was the result of a gnat and subsequent pesticide spraying problem that Petitioner and others were experiencing in the lobby area of the Project. On the same date, Cole responded that we "are working on putting this material together for you. It will probably be tomorrow morning before we have everything together."

25. On June 10, 2010, following several reminders, Cole transmitted a copy of the lobby landscape contract and invoice to Petitioner.

26. On or about July 26, 2010, Petitioner left a message for Cole, requesting that she be allowed to inspect the Project's records maintained at Hawaiiana Management including the insurance policies, building and grounds reports from 2008 to present, and all contracts, bids and invoices regarding the lobby garden. On the same date, Cole responded to Petitioner via email that, "[t]omorrow at 2:00 p.m. will be fine. . . . Regarding the Building and Grounds reports; these are verbal reports that are given by Chuck, we do not have a hard copy. We do have copies of Don Higgins reports.

27. Petitioner emailed Cole on July 26, 2010 and said:

> The minutes say that Building and Grounds reports are in the Manager's office and with Hawaiiana and available upon request.
>
> I will take the Don Higgins reports - but please check why there are no Building and Grounds reports in the minutes or in the office.

* * * *

28. In a follow-up email dated July 27, 2010 to Cole, Petitioner said:

> Regarding your yesterday e-mail that there are no separate Building and Grounds Reports - I am forwarding a list of the dates that the minutes showed there should be a written report on file. These reports may possibly be included in the Manager's report - you can let me know.

On the following Meeting dates was noted "report was separately provided and is on file in the offices of the Resident Manager and Hawaiiana Management" Co. Ltd.
April 5, 2008
May 20, 2008
Oct 21, 2008
Nov 18, 2008
Jan 21, 2009
April 16, 2009

Some of the other minutes do report that the Building and Grounds report is included in the Manager's Report.

* * * *

29. In his testimony, Board president Chuck Heitzman testified in part:

Q. And do you generate a working list either prior to or as a result of that meeting—those meetings?

A. Yes, we do.

Q. And is this the working list that was generated for July 29, 2011?

A. Yes.

Q. And it says working list at the top, but then you see under the handwriting it says report date. Would this be the building and grounds committee report?

A. This would not be the buildings and grounds report. This would be a scheduled meeting that we have to deal with the buildings and grounds issues.

Q. Would this be a document regularly maintained by either yourself or Hawaiiana Management?

A. It - as of this date it would be Hawaiiana Management.

Q. What was it before July of 2009?

A. I kept it.

Q. Have you turned over to your attorneys the buildings and grounds reports for the period prior to July of 2009 in your possession?

A. July of 2009?

Q. Yes, before July of 2009.

A. I have.

Q. You have turned them over?

A. Whatever I had, I turned over.

Q. And for building and grounds reports after July of 2009, they would be in the possession of Mr. Cole at Hawaiiana; is that correct?

A. That's correct.

* * * *

A. Oh, absolutely, sure. I gave pretty lengthy reports on any of the projects that the committee got into.

Q. In your experience as a member of the board of directors since 2007, are these reports by the building and grounds committee always written?

A. Yes, they are.

Q. They're always written?

A. Well, we come - I came up with a format, the committee did, and - to lay out the projects that we're looking on, and on a regular basis the board would be getting copies of that.

Q. These are your own records?

A. They're my own records, but, you know, at the board meeting anybody can take one if they want it, you know, including Kevin Cole.

* * * *

30. By letter dated October 6, 2010 to Petitioner, Respondent's attorney alleged that Petitioner was in violation of several provisions of the Project's House Rules, and demanded that Petitioner cease and desist from the following six alleged violations:

> a. Posting, hanging and/or displaying flyers, papers, signs or other material on Petitioner's doors or walls, or anywhere on or in her unit where it is visible from walkways and/or common areas.
>
> b. Conducting and/or soliciting of business of any kind outside of Petitioner's commercial apartments, for any purpose.
>
> c. Leaving her apartment entry doors open.
>
> d. Obstructing the use of roadways and walkways.
>
> e. Parking and using unlicensed or unregistered vehicles as storage.
>
> f. Modifying apartment entry door without prior approval of the Board.

31. The October 6, 2010 letter from Respondent's attorney to Petitioner demanded that Petitioner:

> a. immediately remove any and all signs, papers, postings, and/or flyers from her commercial and/or residential apartments that can be seen from the walkways and common elements, unless and until she obtained prior written permission from the Board.
>
> b. immediately cease and desist from conducting business outside of her commercial apartments.
>
> c. immediately cease and desist from harassing and/or soliciting other owners, occupants and staff.
>
> d. immediately cease and desist from leaving any apartment door open, unless for entry or exit purposes.

e. immediately cease and desist from obstructing, inhibiting and/or blocking the passage of owners in the walkways, roadways and common areas.

f. within one week, remove the vehicle parked in stall number B-192 from the premises of the property, or alternatively, submit a valid registration, proof of insurance and safety inspection for the vehicle along with your affidavit to the Board that the vehicle is not being used for storage purposes.

g. within 45 days, remove and replace the entry door on commercial apartment no. 301 to its original status, or to one that is in harmony with the general aesthetics and appearance of the common elements and building.

32. Prior to October 2010, no other residential or commercial apartment owner at the Project had been cited and assessed attorney's fees and costs by Respondent AOAO for the House Rule violations alleged against Petitioner.

33. The Project's House Rules provide in pertinent part:

C. USE OF COMMON AND LIMITED COMMON ELEMENTS

1. Use of Roadways and Recreation Areas

The roadways and recreation areas of the project are administered by the Association and are for use by the apartment owners and their tenants and guests. The walkways, passages, and roadways must not be obstructed or used for any purposes other than ingress and egress.

2. Parking Automobiles and Other Vehicles

Parking in unmarked areas is prohibited. Assigned parking stalls may be used to park any type of trailer or sea craft, providing such trailer or sea craft does not protrude from the stall. All other vehicles, including bicycles and motorcycles, when not being used, must be kept in the area or areas designated for such purpose or within the confines of an assigned parking stall. Except for bicycles, no other wheeled toys or vehicles shall be permitted in the garage

structure. Stall may not be used to store or maintain any furniture, packing crates, beach items, scuba gear and similar items except for surfboards.

* * * *

b. No vehicles, including bicycles, are to be ridden on walkways, planted areas or in the park area. Unlicensed motorized vehicles are not permitted to be operated in the project.

* * * *

6. Fire Stairwell Exit Doors and Apartment Entry Doors

Fire Stairwell exit doors and apartment entry doors must be kept closed at all times except during entrance or exit. This is a Fire Code requirement.

D. NOISE AND NUISANCES

1. Noise and Nuisances Prohibited

No nuisance shall be allowed in the project, nor shall any use or practice be allowed which is improper or offensive in the reasonable opinion of the Board, or which is in violation of the Bylaws or these House Rules, or which unreasonably interferes with or is an unreasonable annoyance to the peaceful possession or use of the project by other apartment owners or occupants.

* * * *

3. Soliciting Prohibited

No soliciting, whether commercial or religious is allowed in the project. Report all solicitations to the Board or Managing Agent (through the Resident Manager).

F. AESTHETIC CONSIDERATIONS

* * * *

3. No Objects to be Hung from windows or Railings

No clothes, bedding, carpeting or anything else shall be hung on or from windows or lanais for any purpose. Nor

shall clothing or laundry be hung in walkways or windows in such a manner as to be visible from roadways, walkways and common areas.

G. BUILDING REPAIRS, MAINTENANCE AND MODIFICATIONS

* * * *

2. Modifications and Alterations

All modifications and alterations must receive prior written permission of the Board.

* * * *

a. Signs: Except as permitted by the Board, owners and tenants shall not place any signs in or on buildings or in or upon any of the common elements.

* * * *

e. Board May Require Removal of Unauthorized Work. The Board may inspect any work and may order the removal of any work which has not been approved or which may adversely affect the common elements or the exterior appearance of the project.

34. Between March 2010 and March 2011, Petitioner routinely posted flyers in the glass window of her lobby commercial apartment unit. The glass window is visible from the lobby.

35. Most, if not all, of the flyers Petitioner posted on her commercial unit window related to matters concerning Respondent AOAO.

36. Both residential and commercial apartment unit owners/tenants in the Project, including, but not limited to Petitioner, have, from time to time, held business-related meetings in the lobby of the Project. On occasion, clients/customers of businesses occupying the commercial apartment units, including, but not limited to Petitioner's business, have waited in the lobby area of the Project.

37. Aside from Petitioner and her tenant in Petitioner's lobby level apartment unit, no other owner or tenant has been cited or assessed attorney's fees and

costs by Respondent AOAO for conducting business in the lobby or allowing their clients/customers to wait in the lobby area.

38. Commercial apartment unit owners/tenants in the Project, including, but not limited to Petitioner, have left their office door open from time to time during business hours.

39. Aside from Petitioner and her tenant in Petitioner's lobby level apartment unit, no other owner or tenant has been cited by either Respondent AOAO or the Fire Department for leaving their office door open during business hours.

40. There was no evidence that Petitioner's leaving her office door open during business hours constituted a violation of the applicable fire code.

41. One of Petitioner's parking stalls at the Project is occupied by a van owned by Petitioner. The van is unregistered and is used to store some of Petitioner's personal property.

42. The evidence established that Respondent AOAO has allowed at least one other unregistered vehicle, a race car, to be stored in the Project's parking garage. Board President Heitzman testified:

> Q. And, Mr. Heitzman, if [the race car] can't be operated on the streets, is it being stored in your parking garage?
>
> A. I guess in that case, yes.
>
> Q. Mr. Heitzman, what's the difference in the storage of that race car in your parking garage and Ms. Smith's van being used for storage? What is the difference?
>
> A. Yeah, I guess, you know, moving it around, you know, and operating it in the garage when it's unlicensed, that's not legal or not permissible. And so this one moves around by having a trailer pick it up, I guess, and get it out of there. But that's - that's a close one.

* * * *

43. Aside from Petitioner, no other owner has been assessed attorney's fees and costs by Respondent AOAO for alleged parking garage violations. Only after the

commencement of the instant action by Petitioner did Respondent AOAO move to enforce its House Rules regarding the parking garage against other owners.

44. In 2005, Petitioner arranged to have renovation work performed on her commercial apartment unit located in the mezzanine level of the Project. The renovation work included the replacement of the original, glass door which matched the doors of the other commercial apartment units, with a white wooden door. To date, Petitioner has never obtained written approval from Respondent AOAO for the new door.

45. As a result of the 6 alleged House Rule violations as set forth in Respondent AOAO's attorney's October 6, 2010 letter, Petitioner has been assessed attorneys' fees and costs in excess of $46,000.00.

III. CONCLUSIONS OF LAW

RESERVE FUND

HRS §514B-148 provides in its entirety:

> **§514B-148 Association fiscal matters; budgets and reserves.** (a) The budget required under section 514B-144(a) shall include at least the following:
> (1) The estimated revenues and operating expenses of the association;
> (2) Information as to whether the budget has been prepared on a cash or accrual basis;
> (3) The total replacement reserves of the association as of the date of the budget;
> (4) The estimated replacement reserves the association will require to maintain the property based on a reserve study performed by the association;
> (5) A general explanation of how the estimated replacement reserves are computed;
> (6) The amount the association must collect for the fiscal year to fund the estimated replacement reserves; and
> (7) Information as to whether the amount the association must collect for the fiscal year to fund the estimated replacement reserves was calculated using a per cent funded or cash flow plan. The method or plan shall not circumvent the estimated replacement reserves amount determined by the reserve study pursuant to paragraph (4).
> (b) The association shall assess the unit owners to

either fund a minimum of fifty per cent of the estimated replacement reserves or fund one hundred per cent of the estimated replacement reserves when using a cash flow plan; provided that a new association need not collect estimated replacement reserves until the fiscal year which begins after the association's first annual meeting. For each fiscal year, the association shall collect the amount assessed to fund the estimated replacement for that fiscal year reserves, as determined by the association's plan.
(c) The association shall compute the estimated replacement reserves by a formula that is based on the estimated life and the estimated capital expenditure or major maintenance required for each part of the property. The estimated replacement reserves shall include:
(1) Adjustments for revenues which will be received and expenditures which will be made before the beginning of the fiscal year to which the budget relates; and
(2) Separate, designated reserves for each part of the property for which capital expenditures or major maintenance will exceed $10,000. Parts of the property for which capital expenditures or major maintenance will not exceed $10,000 may be aggregated in a single designated reserve.
(d) No association or unit owner, director, officer, managing agent, or employee of an association who makes a good faith effort to calculate the estimated replacement reserves for an association shall be liable if the estimate subsequently proves incorrect.
(e) Except in emergency situations or with the approval of a majority of the unit owners, a board may not exceed its total adopted annual operating budget by more than twenty per cent during the fiscal year to which the budget relates. Before imposing or collecting an assessment under this subsection that has not been approved by a majority of the unit owners, the board shall adopt a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution shall be distributed to the members with the notice of assessment.
(f) The requirements of this section shall override any requirements in an association's declaration, bylaws, or any

other association documents relating to preparation of budgets, calculation of reserve requirements, assessment and funding of reserves, and expenditures from reserves with the exception of:
(1) Any requirements in an association's declaration, bylaws, or any other association documents which require the association to collect more than fifty per cent of reserve requirements; or
(2) Any provisions relating to upgrading the common elements, such as additions, improvements, and alterations to the common elements.
(g) Subject to the procedures of section 514B-157 and any rules adopted by the commission, any unit owner whose association board fails to comply with this section may enforce compliance by the board. In any proceeding to enforce compliance, a board that has not prepared an annual operating budget and reserve study shall have the burden of proving it has complied with this section.
(h) As used in this section:
"Capital expenditure" means an expense that results from the purchase or replacement of an asset whose life is greater than one year, or the addition of an asset that extends the life of an existing asset for a period greater than one year.
"Cash flow plan" means a minimum twenty-year projection of an association's future income and expense requirements to fund fully its replacement reserves requirements each year during that twenty-year period, except in an emergency; provided that it does not include a projection of special assessments or loans during that twenty-year period, except in an emergency.
"Emergency situation" means any extraordinary expenses:
(1) Required by an order of a court;
(2) Necessary to repair or maintain any part of the property for which the association is responsible where a threat to personal safety on the property is discovered;
(3) Necessary to repair any part of the property for which the association is responsible that could not have been reasonably foreseen by the board in preparing and distributing the annual operating budget;
(4) Necessary to respond to any legal or administrative proceeding brought against the association that could not have been reasonably foreseen by the board in

> preparing and distributing the annual operating budget; or
> (5) Necessary for the association to obtain adequate insurance for the property which the association must insure.
> "Major maintenance" means an expenditure for maintenance or repair that will result in extending the life of an asset for a period greater than one year.
> "Replacement reserves" means funds for the upkeep, repair, or replacement of those parts of the property, including but not limited to roofs, walls, decks, paving, and equipment, that the association is obligated to maintain.

HRS §514B-148(c)(2) expressly requires that Respondent AOAO's estimated replacement reserves include "[s]eparate, designated reserves for each part of the property for which capital expenditures or major maintenance will exceed $10,000. The requirement was obviously designed to ensure that associations set aside sufficient funds to cover the costs of anticipated major replacement and repair items and thereby minimize or avoid the need for large special assessments.

The evidence established that the Project's front door constituted a capital expenditure or major maintenance item and, as such, was required to be included in Respondent AOAO's reserve study. According to the evidence, however, the Board inexplicably omitted the front door from its 2010 reserve study even though it was included in its 2008, 2009 and 2011 studies. The omission of that item from its 2010 reserve study presumably had the effect of reducing Respondent AOAO's estimated replacement reserves. The Board's failure to include that item in its reserve studies was inconsistent with HRS §514B-148.

With respect to the parking garage exhaust fans, the evidence was insufficient to establish that the fans will need to be replaced in their entirety and should be listed as a reserve item. According to the evidence, the fans will not need to be replaced as regular maintenance would involve the replacement of the individual components of each fan. The evidence was also inconclusive as to the relationship, if any, between the recently-installed carbon monoxide sensors, which were listed in the study as "Garage Fans – Carb. Monox.", and the parking garage exhaust fans.

Petitioner contends that the 2011 reserve fund was inadequately funded and that, as a result, there were insufficient funds to cover the all of the capital expenditures scheduled for 2011 including the front door replacement. The Board, for the most part, acknowledges that a special assessment will be necessary, in part, to cover a shortfall in its reserve budget but, submits that the shortfall was largely unforeseen. Although Petitioner alleges that the Board had budgeted for the replacement of the front door as early as 2008 and deliberately removed the item from its 2010 reserve study, the Board, nevertheless, could not have anticipated the door falling down in November of 2010 and the need to temporarily post a security guard at the door for safety purposes. HRS §514B-148 only requires a good faith effort to calculate the estimated replacement reserves[2]. On this record, the Hearings Officer cannot conclude that the reserve maintained by the Board was in violation of HRS §514B-148.

According to Petitioner, Respondent AOAO's failure to conduct a comprehensive, independent reserve study violates HRS §514B-148. HRS §514B-148, however, stops short of requiring such a study. Moreover, the evidence was sufficient to establish that Respondent AOAO's reserve studies were modified annually after the Board had checked with contractors, prices are updated, and the life of components were adjusted. Petitioner also argues that the Board's deferral of the tennis court resurfacing project for over three years is a violation of the business judgment rule. While the Board's decision to repeatedly defer the resurfacing of the courts without any apparent justification and notwithstanding the fact that the tennis courts had reached the end of its useful life is questionable, the issue as to whether the decision was contrary to the business judgment rule or, for that matter a breach of the Board's fiduciary duty to its members, is beyond the scope of this proceeding.

REQUEST FOR DOCUMENTS

Next, Petitioner complains that the Board has improperly denied her access to various association documents in violation of HRS §514A-83.5. According to

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[2] Nevertheless, the Hearings Officer wonders whether or to what extent the shortfall was due to Respondent AOAO's failure to include the front door in its 2010 reserve study. It was impossible to make that determination from the evidence presented. In that regard, although Respondent AOAO's most recent audit may have been helpful in determining whether the reserve fund was adequate and in compliance with the applicable laws, it was not presented for the Hearings Officer's consideration. An audit would be the appropriate tool to determine whether or to what extent Respondent AOAO's operating and/or reserve budgets have been improperly exceeded.

the record, on June 7, 2010, Petitioner emailed Cole and requested the Nauru Tower lobby landscaping contract and "a copy of any invoices from or to the Landscape contractor on that job though the present." On the same date, Cole responded that we "are working on putting this material together for you. It will probably be tomorrow morning before we have everything together." On June 10, 2010, following several reminders from Petitioner, Cole finally transmitted a copy of the lobby landscape contract and invoice to Petitioner.

On or about July 26, 2010, Petitioner left a message with Cole requesting that she be allowed to inspect the association records maintained at Hawaiiana Management, including the insurance policies, building and grounds reports from 2008 to present, and all contracts, bids and invoices regarding the lobby garden. On the same date, Cole responded to Petitioner via email that, "[t]omorrow at 2:00 p.m. will be fine. . . . Regarding the Building and Grounds reports; these are verbal reports that are given by Chuck, we do not have a hard copy. We do have copies of Don Higgins reports. Petitioner emailed Cole on July 26, 2010 and pointed out that the minutes confirmed that Building and Grounds reports were in the Manager's office and with Hawaiiana Management and would be available upon request. Furthermore, in his testimony, Board president Chuck Heitzman acknowledged that the reports were maintained by Hawaiiana Management after July 2009 and by himself before then. Notwithstanding that, those reports have not been made available to Petitioner. HRS §514A-83.5(e) authorizes owners to file a request to examine association documents and requires the Board to give written authorization or refusal. The Board's failure to allow Petitioner access to the reports was inconsistent with this provision.

HOUSE RULE VIOLATIONS

1. Posting, hanging and/or displaying flyers, papers, signs or other material on Petitioner's doors or walls, or anywhere on or in her unit where it is visible from walkways and/or common areas in violation of House Rules F.3 and G.2.a.

House Rule F.3. prohibits the hanging of any objects from apartment windows: "No clothes, bedding, carpeting or *anything else shall be hung on or from*

windows or lanais for any purpose." The evidence established that between March 2010 and March 2011, Petitioner routinely and repeatedly posted flyers on the glass window of her lobby level commercial apartment unit. The evidence also established that the glass window is visible from the lobby area. On this record, the Hearings Officer concludes that Petitioner's actions constituted a violation of House Rule F.3.

Petitioner nevertheless contends that the subject of the flyers involved association matters and were therefore protected speech under HRS §514B-105(b) and HRS 514B-123(j). The applicability of HRS §514B-105(b) however, is expressly limited to "units that may be used for residential purposes only" while HRS §514B-123(j) addresses the solicitation or distribution of certain materials "on common elements". As such, neither provision is applicable here[3]. Similarly, the Hearings Officer also concludes that House Rule G.2.a. is inapplicable. That rule provides that except as permitted by the Board, owners shall not place any signs in or on *buildings* or in or upon any of the *common elements.* The rule does not address signs posted on the glass window of Petitioner's lobby level apartment.

2. Conducting and/or soliciting of business of any kind outside of Petitioner's commercial apartments, for any purpose in violation House Rules D.1. and D.3.

House Rule D.1. prohibits any practice which is improper or offensive in the reasonable opinion of the Board, or which is in violation of the Bylaws or these House Rules, or which unreasonably interferes with or is an unreasonable annoyance to the peaceful possession or use of the project by other apartment owners or occupants. House Rule D.3. prohibits any soliciting in the project. The evidence was insufficient to prove that the conducting of business-related meetings by Petitioner or any of the other owners or tenants could reasonably be construed as improper or offensive, or was in violation of the Bylaws or these House Rules, or unreasonably interfered with or was an unreasonable annoyance to the peaceful possession or use of the project by other

[3] There was no indication in the record that Petitioner's glass wall constituted a common area.

apartment owners[4]. Similarly, the evidence did not prove that Petitioner was *soliciting* in the project.

3. Leaving apartment entry doors open in violation of House Rule C.6.

House Rule C.6. requires that, "Fire Stairwell exit doors and apartment entry doors must be kept closed at all times except during entrance or exit. *This is a Fire Code requirement.*" (*emphasis added*). Construing the rule in its entirety and giving effect to all of its parts, the Hearings Officer concludes that Petitioner violated House Rule C.6. only if her action was contrary to the applicable Fire Code. Otherwise, the rule would be arbitrary[5]. Although she acknowledged leaving her door open from time to time, Petitioner points out that there was no evidence that that constituted a Fire Code violation. The Hearings Officer agrees and concludes that Petitioner was not in violation of House Rule C.6.

4. Obstructing the use of roadways and walkways in violation of House Rule C.1.

The evidence was insufficient to prove a violation of this rule.

5. Parking and using unlicensed or unregistered vehicles as storage in violation of House Rules C.2. and C.2.b..

House Rule C.2., among other things, prohibits the use of parking stalls to store or maintain any furniture, packing crates, beach items, scuba gear and similar items except for surfboards. The rule does not regulate the contents of vehicles and for that reason, is inapplicable here. This conclusion is buttressed by the fact that the Board began to enforce this rule and assess attorney's fees and costs against other owners who were storing their vehicles in the parking garage only after the initiation of the instant proceeding.

House Rule C.2.b. mandates that only licensed motorized vehicles may be operated on the property. Although Respondent AOAO argues that Petitioner acknowledged that her van was unregistered and that she nevertheless started the van on

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[4] If anything, it appeared from the evidence that such business-related meetings were a common and acceptable practice in the Project's lobby area.

[5] At the very least, the rule is ambiguous and as such, must be construed against Respondent AOAO.

one occasion and turned it off after repositioning the vehicle in the stall, the Hearings Officer considers this to be *de minimus* and not the type of conduct that the rule reasonably seeks to regulate.

6. Modifying apartment entry door without prior approval of the Board in violation of House Rule G.2. and G.2.e.

House Rule G.2 provides that all modifications and alterations must receive prior written permission of the Board and House Rule G.2.e. authorizes the Board to inspect and order the removal of any work which has not been approved or which may adversely affect the common elements or the exterior appearance of the project.

According to Petitioner, she received verbal approval from the then resident manager to replace the exterior door of her mezzanine level apartment and that the Board was aware of the new door but never objected until recently. Nevertheless, Petitioner is charged with knowledge of the rule and, like all other owners, was obligated to obtain *written* approval from the Board for the alteration. Thus, even if she was provided with verbal approval from the resident manager, Respondent was still obligated to comply with the rule and obtain the Board's written approval. Having failed to do so, Petitioner cannot shift the burden to the Board to object to the door.

IV. DECISION

Based on the foregoing considerations, the Hearings Officer orders as follows:

1. Pursuant to HRS §514B-148, the Board shall schedule the front door in Respondent AOAO's reserve studies; and

2. The Board shall provide immediate access to Petitioner to inspect its building and grounds reports and all related documents from 2008 to the present.

3. With respect to the House Rule violations alleged against Petitioner, the Hearings Officer finds and concludes that the evidence was sufficient to prove a violation of House Rules F.3. and G.2 and, therefore, those violations are affirmed. As to the remaining House Rule violations alleged in Respondent AOAO's October 6, 2010 letter, the evidence was insufficient to prove those violations and, accordingly, those violations are dismissed.

Both parties have requested an award of attorneys' fees and costs. HRS §514B-161(k) directs that "[e]ach party to the hearing shall bear the party's own costs, including attorney's fees, unless otherwise ordered by the hearings officer." The foregoing subsection expresses a preference that the parties bear their own attorneys' fees and costs incurred in pursuing an administrative hearing unless the circumstances of a case justify a different result. Throughout this proceeding, it was apparent to the Hearings Officer that a disagreement between the parties, fueled by bad feelings, mushroomed into a full-blown skirmish in which both sides suffered and may continue to suffer heavy economic losses. Based on the totality of the circumstances presented here, including the findings and conclusions set forth herein, the Hearings Officer sees no basis to depart from the general rule expressed in HRS §514B-161(k) requiring each party to bear its/her own expenses incurred in pursuing/contesting this matter. Accordingly, the Hearings Officer denies the parties' requests for an award of attorneys' fees and costs and, instead, orders each party to bear her/its own expenses incurred in pursuing this hearing. With respect to any fees and costs previously assessed against and paid by Petitioner for the alleged House Rule violations, Respondent AOAO may retain a reasonable amount to cover its legal expenses incurred in enforcing House Rules F.3. and G.2 only. The balance shall be returned to Petitioner within 30 days from the issuance of this decision.

Dated at Honolulu, Hawaii: MAR - 3 2012

CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs