



2008 NOV 10 A 11: 03

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

In the Matter of)	CDR 2007-12
)	
YUAN Y. SHAW,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION
)	
vs.)	
)	
AOAO HARBOR SQUARE,)	
)	
Respondent.)	
_____)

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

I. INTRODUCTION

On October 26, 2007, Yuan Y. Shaw ("Petitioner") filed a request for administrative hearing to resolve a condominium management dispute pursuant to Hawaii Revised Statutes ("HRS") Chapter 514A. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On December 17, 2007, the parties filed a stipulation to continue the hearing from December 18, 2008 to April 8, 2008. On April 8, 2008, the parties filed a stipulation to continue the hearing from April 8, 2008 to July 15, 2008.

On July 9, 2008, Respondent, by and through its attorney Lissa H. Andrews, Esq. filed a Motion for In Camera Review of Documents Relating to Unit Owners, a Motion to Dismiss Petitioner's Request for Hearing, a Motion to Quash and/or for Protective Order as to Subpoenas Issued to David Thompson, P. Pasha Baker and Tom Smyth, and a Motion for Summary Judgment Regarding Enforcement of Covenants. On July 14, 2008, Petitioner

filed memoranda in opposition to Respondent's motion for summary judgment and the Motion to Quash.

On July 10, 2008, Petitioner, by and through her attorney Stephen M. Shaw, Esq. filed a Motion to Preclude Evidence Subject to Disclosure From Being Introduced at the Hearing. On July 11, 2008, Respondent filed a memorandum in opposition to Petitioner's motion.

On July 14, 2008, Petitioner filed an Amended Request for Hearing.

On July 15, 2008, the hearing was convened by the undersigned Hearings Officer. Petitioner was present and was represented by Mr. Shaw. Respondent was represented by Ms. Andrews. After hearing arguments on the motions filed, the Hearings Officer denied Respondent's Motion to Dismiss, Motion to Quash, and Motion for Summary Judgment. Respondent's Motion for In Camera Review was withdrawn by Respondent. Petitioner's Motion to Preclude Evidence was denied. The hearing proceeded with Petitioner presenting her case-in-chief. After Petitioner rested her case, the parties agreed to continue the hearing to August 7, 2008.

On July 31, 2008, Respondent filed a Motion to Dismiss. On August 6, 2008, Petitioner filed a memorandum in opposition to Respondent's Motion. On August 7, 2008, Petitioner filed supplemental authorities in support of her memorandum in opposition to Respondent's motion.

On August 7, 2008, the hearing was reconvened by the undersigned Hearings Officer. Petitioner was present and was represented by Mr. Shaw. Respondent was represented by Ms. Andrews. After hearing arguments on Respondent's Motion, the Hearings Officer orally granted the motion and directed Respondent to prepare proposed findings of fact and conclusions of law for review.

On August 21, 2008, Respondent filed proposed findings of fact and conclusions of law. On September 2, 2008, Petitioner filed objections to Respondent's proposed findings of fact and conclusions of law and also filed her own proposed findings of fact and conclusions of law.

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

II. FINDINGS OF FACT

As a preliminary matter, the proposed findings of fact and conclusions of law filed by the parties have been considered. To the extent that the proposed findings and conclusions submitted are in accordance with the findings and conclusions stated herein, they have been accepted, and to the extent they are inconsistent, they have been rejected. Certain proposed findings and conclusions have been omitted as the Hearings Officer determined them to be not relevant or necessary to a proper determination of the material issues presented.

1. Petitioner owns Apartments 17C and 1205 of the Harbor Square condominium with her husband Stephen M. Shaw.

2. Paragraph G.1 of the Harbor Square Declaration (“Declaration”) provides:

The residential apartments shall be occupied and used for residential purposes only, and for no other purpose whatsoever, except that a full-time residential occupant may use a portion of the apartment so occupied for his own secondary general office purposes to the extent that such use does not impair the residential use and enjoyment of that portion of the building by others. The apartments shall not be used primarily for office purposes...

3. On September 13, 2007, Respondent received a complaint from a resident that Apartment 17C was being used primarily as an office, and only secondarily, if at all, as a residence.

4. Respondent reviewed the real property tax records of the City and County of Honolulu and determined that Petitioner was not claiming an owner-occupant exemption for Apartment 17C, but was claiming the owner-occupant tax exemption for Apartment 1205.

5. On October 4, 2007, Respondent demanded that Petitioner immediately cease and desist from using Apartment 17C “primarily for office purposes.”

6. In a letter dated October 11, 2007, Mr. Shaw responded that Apartment 17C was not being used primarily for office purposes and that he did not intend to use Apartment 17C in that manner in the future. Mr. Shaw further stated that several other owners (Directors Thompson, Baker and Blum) and owner David Farmer were using their units primarily for business purposes.

7. Pursuant to Mr. Shaw's complaint, Respondent sent demand letters to Directors Thompson, Baker and Blum and owner Mr. Farmer, demanding that they cease and desist from using their units primarily for a business purpose.

8. David Thompson testified that, although he used one of his two Harbor Square units primarily for business purposes, he ceased such use after he was notified by Respondent in October 2007 that such use was in violation of the Declaration. Mr. Thompson denied mentioning that he was operating a business out of his unit to members of Harbor Square's board, did not remember sending emails to other board members in his capacity as the owner of his title insurance company, and denied that board members visited his unit. Mr. Thompson denied handing out business cards to board members and did not do title work for any board member. Mr. Thompson sold his title company after receiving the notice from Respondent and is in the process of selling his units at Harbor Square.

9. P. Pasha Baker and Tom Smythe are not using their Harbor Square units primarily for business purposes.

10. Messrs. Thompson and Smythe and Ms. Baker stated that they did not know whether other unit owners such as John White, David Farmer and James Vrechek were using their units primarily for business purposes.

III. CONCLUSIONS OF LAW

The issue to be resolved is whether paragraph G.1 of the Declaration had been waived or was ambiguous.

The evidence presented did not support Petitioner's claim that Respondent's Board of Directors knew of violations of paragraph G.1 of the Declaration and failed to enforce the restriction in paragraph G.1. Accordingly, the Hearings Office concludes that Petitioner failed to establish that Respondent waived the right to enforce paragraph G.1 of the Declaration.

The evidence presented also did not support Petitioner's claim that paragraph G.1 of the Declaration was ambiguous. In fact, it appears that Petitioner agrees with Respondent's interpretation of paragraph G.1, that "the owner of a unit at Harbor Square may only use his/her unit primarily as a residence. Any office use must be secondary to full-time

residential use of the apartment and must not interfere with the residential use and enjoyment of that portion of the building by others.”

IV. DECISION

Based on the foregoing, the Hearings Officer finds that Petitioner failed to prove by a preponderance of the evidence that paragraph G.1 of the Declaration was ambiguous or that it’s enforcement had been waived by Respondent, and accordingly, grants Respondent’s Motion to Dismiss and orders that the Request for Hearing and the Amended Request for Hearing be and hereby is dismissed. The Hearings Officer also orders the parties to bear their own costs, including attorney’s fees.

DATED: Honolulu, Hawaii, NOV 10 2008.

/s/ SHERYL LEE A. NAGATA

SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs