



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

In the Matter of

A. J. DI MAURO, and KEITH WILDE,

Petitioners,

vs.

BOARD OF DIRECTORS OF THE
WAIKOLOA VILLAS AOA,
MICHAEL BERNSTONE, and JESSE
MAUPIN,

Respondents.

CDR-2006-3

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION

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I. CHRONOLOGY OF THE CASE

On April 24, 2006, A. J. Di Mauro (“Petitioner”), and Keith Wilde filed a request for hearing in the above-captioned matter pursuant to Hawai`i Revised Statutes (“HRS”) §514A-121.5.¹ The matter was duly scheduled for hearing and pre-hearing conference, and the parties duly provided with notice.

The hearing was subsequently held in abeyance as the result of a combination of factors including the repeal and reinstatement of HRS §514A-121.5, as well as scheduling considerations.

The parties subsequently stipulated to submit the matter on written submissions, and the parties thereafter submitted their pleadings in support of their respective positions.

¹ Subsequent to the filing of the present matter, Mr. Wilde withdrew from the proceedings.

II. ISSUES PRESENTED

The issues to be decided in the present matter, as identified in Petitioners' request for hearing are as follows:

1. Whether the apportionment of common expenses of the Waikaloa Villas is based upon the total living area in each unit, including any loft level living areas;
2. Whether the living area of the "Type 2-A1" apartments of the Waikaloa Villas was improperly calculated in that the loft level living areas were not included; and
3. Whether the common interest percentages of all 104 units of the Waikaloa Villas need to be recomputed and the proportionate common expenses need to be recalculated based upon the revised common interest percentages.

III. FINDINGS OF FACT

1. The Waikoloa Villas I project is located in Waikoloa, Hawai'i, and was created by Declaration of Horizontal Property Regime: Waikoloa Villas I, dated May 4, 1979, which was subsequently recorded in the Bureau of Conveyances of the State of Hawai'i.

2. The Declaration of Horizontal Property Regime: Waikoloa Villa I, provides in relevant part:

2. Description and Division of Project. The buildings and improvements of said Regime (the "Project") are in accordance with the plans simultaneously herewith recorded in the Bureau of Conveyances of the State of Hawai'i as Condominium File Plan No. ___ as the same shall from time to time be lawfully amended (the "Condominium Map"), and the Project is divided into 69 condominium estates and is further described as set forth in Exhibit B attached hereto and by this reference made a part hereof; provided, should the descriptions and divisions set forth therein conflict with the depictions and divisions shown on the Condominium Map, the latter shall control; provided, further, that the Condominium Map is intended to show only the layout, location, apartment numbers and dimensions of the apartments, and is not intended and shall not be deemed to contain any other representation or warranty.

The perimeter or outer limits of each of the apartments into which the Project is so divided shall be established by the center line of all perimeter walls which are also party walls (whether or not load-bearing); the exterior undecorated face of the perimeter walls which are not party walls (whether or not load-bearing); the exterior

undecorated face of any glass windows, doors, panels or railings along the perimeter; and the inner decorated or finished surfaces of the perimeter floors and ceilings. The floor area of each apartment is calculated as a gross area based on the perimeter or outer limits, as thus established. However, what is included as the apartment within said perimeter or outer limits is determined as follows: Each of the apartments shall include the inner decorated or finished surfaces of the walls, floors and ceilings along the perimeter or outer limits of the apartment, but except for such inner decorated or finished surfaces, such perimeter walls, floors and ceilings are common elements; each of the apartments shall also include all other walls, partitions, floors, ceilings and other improvements within said perimeter or outer limits; any adjacent lanai shown on the Condominium Map; all built-in appliances and fixtures and all furnishings and appliances described herein; and all air space encompassed within said perimeter; excluding therefrom, however, all elements herein established as common elements.

3. Common Elements. The common elements will include all portions of the land and improvements, other than the apartments, including the apartment buildings, the land on which they are located, and all elements mentioned in the Horizontal Property Act which are actually constructed on the land herein described. The common elements shall include, but are not limited to:

(a) Said land in fee simple.

(b) All foundations, floor slabs, columns, girders, beams, supports, load-bearing walls, main walls, interior walls separating adjacent apartments in the same building (except the inner decorated surfaces of such walls), roofs of the building, stairs, stairways, fire escapes and entrances and exists of the apartment building.

(c) All yards, grounds, landscaping, refuse facilities, and switchrooms.

(d) All building walkways, building sidewalks, pathways, parking areas, parking stalls, driveways and roads within the Project.

(e) All ducts, electrical equipment, wiring and other central and appurtenant installations including power, light, water, sewer, gas and telephone, if installed; all pipes, plumbing, wires, conduits or other utility or service lines, which run through an apartment but which are utilized by or serve more than one apartment; and air conditioning and like utilities, if installed.

(f) All other portions of the land and improvements not specifically heretofore designated as apartments, but which are intended for common use and all other devices and installations existing for or rationally of common use or necessary to the existence, upkeep and safety of the Horizontal Property Regime.

(g) All recreational facilities, including a swimming pool with detached jacuzzi heated pool, a shuffle board court and a barbecue/picnic area.

(h) The administration building depicted on the Condominium Map which is intended as the Project office, excluding, however, that portion which is depicted on the Condominium Map and is described in this Declaration as the commercial apartment.

(i) A cabana, located beside the pool, and containing two bathrooms (containing a sink and toilet), a kitchen equipped with a refrigerator, range top, a double sink, and an open entertainment area.

4. Limited Common Elements. There are no limited common elements. Parking will be unassigned, and the parking stalls are part of the common elements.

5. Percentage of Undivided Interest. The undivided percentage interest in the common elements appurtenant to each apartment is described in Exhibit C attached hereto and by this reference made a part hereof, and each apartment shall have said percentage in all common profits and expenses of the Project, and for all other purposes including voting.

...

7. Alteration and Transfer of Interests. Except as otherwise expressly provided in this Declaration, the undivided percentage interest in the common elements, and the easements appurtenant to each apartment shall have a permanent character, shall not be altered without the consent of all of the apartment owners affected, expressed in an amendment to this Declaration duly recorded, shall not be separated from the apartment to which they appertain, and shall be deemed to be conveyed, leased or encumbered with such apartment even though such undivided percentage and easements are not expressly mentioned or described in the conveyance or other instrument. The common elements shall remain undivided, and no right shall exist to partition or divide any portion thereof except as provided in the Act and as otherwise expressly provided herein.

8. Purposes and Uses. The buildings and each of the apartments are intended for and shall be restricted to the following purposes and uses,' which restrictions are intended and shall be deemed to be cumulative:

...

(d) No apartment owner will, without the prior written consent of the Board (and any other persons required by the By-Laws or by law), make any structural alterations within his apartment or make any alterations in or addition to the exteriors of the building (including awnings, jalousies, screens or air conditioners) or to any other portion or portions of the common elements. The Board shall not unreasonably withhold or delay its consent, and shall have

the obligation to answer any written request by an apartment Owner for its consent within thirty (30) days after its receipt of such a request describing the proposed alteration in reasonable detail, and the Board's failure to do so shall constitute its consent to the proposed alteration. If the Board shall answer by withholding its consent, the Board shall at the same time state in reasonable detail its reasons for withholding its consent and the bases therefore.

...

12. Common and Utility Expenses.

(a) Apartment Owner's Obligation. The owner of each apartment shall be liable for and pay a share of common expenses, in proportion to his common interest in the common elements appurtenant to his apartment.

(b) Estimates Of, Assessments For, and Payment of Expenses. The Board shall estimate the annual common expenses in advance for each accounting year. As of the first day of each calendar month during the year, the Board shall assess to each apartment one-twelfth (1/12) of the total estimated common expenses for the year plus a reasonable sum for contingencies less any surplus from the prior year and any expected receipts for the current year, all as determined by the Board, in proportion of that apartment's percentage interest. If such estimates and determinations by the Board shall be inadequate for any reason, including without limitation nonpayment of any assessments, the Board may adjust proportionately the assessment at any time. The assessment shall be levied by mailing to the owner of each apartment at the address shown in the records of the Association, a written statement setting forth the amount of the assessment against the individual apartments. Notwithstanding the time such written notice is given or estimate is made, the assessment shall be due and payable for the period or periods as the Board shall determine for the purposes of establishing a lien therefore in accordance with the By-Laws. Payments on account of assessments for common expenses shall be made to the Board as agent for the owners, and the Board shall transmit said payments from such owner, in accordance with the By-Laws. The unexpended sums on account of assessments received by the Board at the end of any year shall be applied toward current costs and expenses in the following year, unless owners of fifty percent (50%) of the common elements vote to return such unexpended sums to themselves. The election, if any, shall be made at the next ensuing annual meeting of the Association.

(c) Utility Expenses. Except with respect to a utility service separately metered and/or billed directly to all apartments (both residential and commercial) by the government agency or public utility providing the service, the expenses of utility services shall be a common expense to be apportioned among all apartments, residential and commercial, not in accordance with their respective undivided percentage interests, but as permitted by Sections 514A-15(a) and 514A-15.5, Hawaii Revised Statutes, in accordance with the following

provisions: Upon completion of construction of the Project as evidenced by a Certificate of Substantial Completion issued by the architect of the Project, and thereafter from time to time during each calendar year but at least once in each calendar year, the Board shall estimate (a) the amount of each applicable utility service furnished to the apartments (residential as well as commercial) but excluding therefrom (i) the amount, if any, of such utility service for which there is a separate metering and/or direct billing to any apartment or apartments (but not all apartments), and (ii) excluding the amount of such service to the common elements (which the Board shall also estimate if necessary); and (b) the amount of each such service furnished to the commercial apartment. The Board shall then apportion the expenses of such services as follows: No expense for any utility service shall be assessed to any apartment that is separately metered and/or billed directly for that service. The commercial apartment (if not separately metered and/or billed directly for that service) shall bear that portion of the expenses for each such service in the ratio that said estimate (b) bears to said estimate (a). The remainder of each such expense shall be apportioned to each residential apartment (excluding apartments separately metered and/or billed directly, if any) in the ratio that such apartment's percentage interest bears to the total percentage interests of all such apartments. The expense for all utility services for the common elements shall be apportioned among all the apartments in accordance with their respective undivided percentage interest. In making its estimates, the Board may use check-meters and other devices and may seek advice from engineers, accountants or such other experts as it deems appropriate. The owner of the commercial apartment shall have the right at any time or times, at his expense, to obtain separate metering and/or direct billing for any utility service for his apartment.

13. Merger of Projects. The Declarant is considering the development of one or two additional condominium projects (herein called "Waikoloa Villas II" and "Waikoloa Villas III") on land adjacent to the Project, which land is described in Exhibit A-I attached hereto and by this reference made a part hereof. The present plan of incremental development for Waikoloa Villas II and Waikoloa Villas III is for fifty-six (56) additional residential apartments of the same type as the apartments in the Project. The mix and number of apartment types for each of Waikoloa Villas II and Waikoloa Villas III may be derived from Exhibit C-1 attached hereto and by this reference made a part hereof.

...

Without limiting the generality of the foregoing, the following consequences shall ensue from and after the effective date of each merger:

(a) The apartments in each of the merged increments shall have the right to use the common elements of said increments to the same extent and subject to the same limitations as

are imposed upon an apartment in each increment just as though the merged increments had been developed as one increment.

(b) Each apartment shall have appurtenant thereto an undivided percentage interest in the common elements of the merged increments in the same proportion that such apartment's gross area determined pursuant to paragraph 2 of this Declaration, excluding the gross area of any loft, bears to the total gross area, excluding the gross area of all lofts, of all of the apartments included in the merged increments, which percentage shall constitute such apartment's proportionate share in the profits and common expenses of the merged increments and such apartment's proportionate representation for all other purposes, including voting in the merged increments[.]

...

17. Amendment. Except as otherwise expressly provided herein or in the Horizontal Property Act, this Declaration may be amended by the vote of the apartment owners by at least seventy-five percent (75%) of the interest in the common elements, evidenced by an instrument in writing, signed and acknowledged by any two (2) officers of the Association, which amendment shall be effective upon filing in said Bureau of Conveyances; provided, however, no amendments of this Declaration or the By-Laws or any regulation or house rules whatsoever shall limit or affect the right or interest of (a) the owners of the commercial apartment without first securing his vote, and of (b) the Declarant without first securing the Declarant's prior written approval; provided, further, however, that at any time prior to the first filing in said Bureau of a conveyance of an apartment and its appurtenances to a party not a signatory hereto, the Declarant may amend this Declaration (including all exhibits) and the By-Laws in any manner, without the consent of any apartment purchaser. Notwithstanding the lease, sale or conveyance of any of the apartments, the Declarant may amend this Declaration (and when applicable, the Condominium Map) to file the "As-Built" verified statement required by Section 514A-12 of the Act (1) so long as such statement is merely a verified statement of a registered architect or professional engineer certifying that the final plan thereto filed fully and accurately depicts layout, location, apartment numbers, and the dimensions of the apartments as built, or (2) so long as the plans filed therewith involve only immaterial changes to the layout, location, or dimensions of the apartments as built or any change in any apartment number. In case of a modification or amendment to the By-Laws, this Declaration shall be amended to set forth such modification or amendment pursuant to such percentage vote as required by the By-Laws which rendered the modification or amendments thereof effective.

Respondents' Exhibit G.

3. Exhibit B to Declaration of Horizontal Property Regime: Waikoloa Villa I, provides in relevant part:

DESCRIPTION OF PROJECT

...

The Project contains sixty-nine (69) apartments (68 residential and 1 commercial). The residential apartments are located in five (5) low-rise residential apartment buildings, identified by the letters "A" through "E". Each building is three stories in height. There are no basements. Buildings A and E each contain sixteen (16) residential apartments; and Buildings B, C and D each contain twelve (12) residential apartments. The commercial apartment is located in a separate building which also contains the Project Office which is described in Paragraph 3 of the Declaration. Recreational amenities in the Project include a swimming pool, jacuzzi, shuffle board court, barbecue/picnic area and cabana.

...

The 68 residential apartments are divided into 3 basic types: Type 1 all having 1 bedroom, Type 2 all having 2 bedrooms, and Type 3 all having 3 bedrooms. There are a total of 4 three-bedroom units, 52 two-bedroom units and 12 one-bedroom units. Each unit type is further subdivided as follows:

...

(a) Type 3-A, a two-story unit containing 3 bedrooms, 3 bathrooms, a living/dining room, a kitchen, 2 lanais, and a foyer. The 3-A apartments contain 1820 square feet, more or less, including 2 lanais totaling 265 square feet. There will be 4 apartments of this type.

(b) Type 2-A, containing 2 bedrooms, 2 bathrooms, a living/dining room, a kitchen, a lanai and a foyer. The 2-A apartments contain 1381 square feet, more or less, including a lanai of 231 square feet. There will be 12 apartments of this type.

(c) Type 2-A1, containing 2 bedrooms, 2 bathrooms, a living/dining room, a kitchen, a lanai and a foyer. The 2-A1 apartments contain 1381 square feet, more or less, including a lanai of 231 square feet. These units are similar to 2-A units, but since they are located on the second floor, there is a storage space of 203 square feet, more or less, in the loft area above the bathrooms (which area is not included in the above-stated area of the apartment). There will be 12 apartments of this type.

(Note: An option may be made available to add to the loft a bath and dressing area and to extend the loft to about 399 square feet.)

(d) Type 2-B, containing 2 bedrooms, 2 bathrooms, a living/dining room, a kitchen, 2 lanais, and a foyer. The 2-B apartments contain 1425 square feet, more or less, including 2 lanais of 265 square feet. There will be 10 apartments of this type.

(e) Type 2-C, a two-story unit containing 2 bedrooms, 2 bathrooms, a living/dining room, a kitchen, a lanai, and a foyer. The 2-

C apartments contain 1397 square feet, more or less, including a lanai of 187 square feet. There will be 18 apartments of this type.

(f) Type 1-A, containing 1 bedroom, 1 bathroom, a living/dining room, a kitchen, a lanai, and a foyer. The 1-A apartments contain 1002 square feet, more or less, including a lanai of 187 square feet. There will be 12 apartments of this type.

...

Type 2-A1 apartments are numbered: A-202, A-203, A-204, A-205, C-202, C-203, D-202, D-203, E-202, E-203, E-204 and E-205.

Respondents' Exhibit G.

4. According to Exhibit C of the Declaration of Horizontal Property Regime: Waikoloa Villas I, ownership interests for each type of unit was as follows:

Type of Apt. Phase I	Gross Area (Ft. ²) (Each Apt.) Excluding Loft Area	Percentage of Undivided Interest in the Common Elements (Each Apt.)	No. of Apts.	Total Gross Area (Ft. ²) (Each Apt. Type) Excluding Loft Area	Percentage of Ownership in the Common Elements Per Type (Total)
1 Bedroom: 1-A	1002	1.0872	12	12,024	13.0464
2 Bedroom: 2-A, 2-A1	1381	1.4985	24	33,144	35.9640
2 Bedroom: 2-B	1425	1.5463	10	14,250	15.4630
2 Bedroom: 2-C	1397	1.5018	18	25,146	27.0324
3 Bedroom: 3-A	1820	1.9608	4	7,280	7.8432
Commercial Apartment	624	.6510	1	624	.6510

5. According to Exhibit C-1 of the Declaration of Horizontal Property Regime: Waikoloa Villas I, ownership interests for each type of unit upon merger of Waikoloa Villas I and II was as follows:

Type of Apt.	Gross Area (Ft. ²) (Each Apt.) Excluding Loft Area	Percentage of Undivided Interest in the Common Elements (Each Apt.)	No. of Apts.	Total Gross Area (Ft. ²) (Each Apt. Type) Excluding Loft Area	Percentage of Ownership in the Common Elements Per Type (Total)
1 Bedroom: 1-A	1002	.7157	20	20,040	14.3140
2 Bedroom: 2-A, 2-A1	1381	.9865	32	44,192	31.5680
2 Bedroom: 2-B	1425	1.0179	16	22,800	16.2864
2 Bedroom: 2-C	1397	.9886	30	41,910	29.6580
3 Bedroom: 3-A	1820	1.2908	6	10,920	7.7448
Commercial Apartment	624	.4288	1	624	.4288

6. The Waikaloa Villa II project was created by Declaration of Horizontal Property Regime: Waikoloa Villas II dated May 4, 1979, which was subsequently recorded in the Bureau of Conveyances of the State of Hawai'i.

7. According to Exhibit C of the Declaration of Horizontal Property Regime: Waikoloa Villas II, ownership interests for each type of unit was as follows:

Type of Apt. Phase II	Gross Area (Ft. ²) (Each Apt.) Excluding Loft Area	Percentage of Undivided Interest in the Common Elements (Each Apt.)	No. of Apts.	Total Gross Area (Ft. ²) (Each Apt. Type) Excluding Loft Area	Percentage of Ownership in the Common Elements Per Type (Total)
1 Bedroom: 1-A	1002	2.0946	8	8,016	16.7568
2 Bedroom: 2-A, 2-A1	1381	2.8869	8	11,048	23.0952
2 Bedroom: 2-B	1425	2.9789	6	8,550	17.8734
2 Bedroom: 2-C	1397	2.8933	12	16,764	34.7196
3 Bedroom: 3-A	1820	3.7775	2	3,640	7.5550

8. According to Exhibit C-1 of the Declaration of Horizontal Property Regime: Waikoloa Villas II, ownership interests for each type of unit upon merger of Waikoloa Villas I and II was as follows:

Type of Apt.	Gross Area (Ft. ²) (Each Apt.) Excluding Loft Area	Percentage of Undivided Interest in the Common Elements (Each Apt.)	No. of Apts.	Total Gross Area (Ft. ²) (Each Apt. Type) Excluding Loft Area	Percentage of Ownership in the Common Elements Per Type (Total)
1 Bedroom: 1-A	1002	.7157	20	20,040	14.3140
2 Bedroom: 2-A, 2-A1	1381	.9865	32	44,192	31.5680
2 Bedroom: 2-B	1425	1.0179	16	22,800	16.2864
2 Bedroom: 2-C	1397	.9886	30	41,910	29.6580
3 Bedroom: 3-A	1820	1.2908	6	10,920	7.7448
Commercial Apartment	624	.4288	1	624	.4288

9. The Declaration of Horizontal Property Regime: Waikoloa Villas II, as well as Exhibit B attached thereto, are substantially similar to the Declaration of Horizontal Property Regime: Waikoloa Villas I, and Exhibit B attached thereto, except as to the specific number of units and the property area of the Waikoloa Villas II project compared to the Waikoloa Villas I.

10. The floor plans for the Waikoloa Villas indicate that the basic loft area for the Type 2-A1 apartments, designated as “Unit 2-A1”, was approximately 183 square feet. The floor plans for the Waikoloa Villas also contained specifications for the construction of the optional loft area for the Type 2-A1 apartments. However, because the floor plans for the “Unit 2-A1 Optional Loft Level” do not appear to extend over the entire area of the loft above the main level bathrooms, the total area for the “Unit 2-A1 Optional Loft Level” appears to be approximately 250 square feet rather than 399 square feet.²

11. Article VI of the By-Laws of the Association of Apartment Owners of Waikoloa Villas I, state in relevant part:

² In Petitioner’s Brief in Support of Assessments of 2-A1 Loft Areas for AOAO Expenses or for Exclusion of 3-A & 3-C Loft Areas for AOAO Expenses, Petitioner DiMauro indicated that all 16 of the Unit 2A-1 apartments had the Optional Loft Level improvements installed and constructed by the developer as shown on the Waikoloa Villas floor plans.

ARTICLE VI
COMMON EXPENSES, TAXES AND ACCOUNTING

Section 1. Common Expenses; Reserve Funds.

(a) The Owner of each Apartment shall be liable for and pay a share of the common expenses in proportion to his interest in the common elements appurtenant to his Apartment. The common expenses shall include such amounts as the Board of Directors may deem appropriate to make up any deficiency in these expenses for any prior year. . .

Assessments of common expenses shall be payable in monthly installments on the first day of each month, commencing with respect to each Apartment on the first day of the first month following the issuance by the appropriate county agencies of a certificate of occupancy for such Apartment. The first monthly installment of common expenses shall be prorated for each Apartment from the date of issuance of such certificate of occupancy. The Declarant shall fix the rate of monthly installments of common expenses until such rate shall be predetermined by the Board of Directors.

Respondents' Exhibit G.

12. Respondents Michael Bernstone and Jesse Maupin, each are owners of Type 2-A1 apartments. They each purchased their units with the understanding that their common interest percentages were permanent and not subject to change without unanimous owner consent.

IV. CONCLUSIONS OF LAW

In the present case, pursuant to the provisions of HRS §514A-121.5(g), Petitioner has the burden of persuasion to prove that:

1. the apportionment of common expenses of the Waikaloa Villas is based upon the total living area in each unit, including any loft level living areas;
2. the living area of the "Type 2-A1" apartments of the Waikaloa Villas was improperly calculated in that the loft level living areas were not included; and
3. the common interest percentages of all 104 units of the Waikaloa Villas need to be recomputed and the proportionate common expenses need to be recalculated based upon the revised common interest percentages.

A. Computation and Apportionment of Common Expenses

Based upon the preponderance of the evidence presented by the parties, the Hearings Officer must conclude that the computation and apportionment of common expenses for the Waikoloa Villas I and II is based upon the percentage of undivided interest in the common elements.

As discussed below, however, the percentage of undivided interest in the common elements was initially determined by the developer and specifically excluded the loft areas of the Type 2-A1 units.

B. Computation of Ownership Interests

Paragraph 2 of the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, entitled “Description and Division of Project” state:

- The floor area of each apartment is calculated as a gross area based on the perimeter or outer limits;
- Each of the apartments shall include the inner decorated or finished surfaces of the walls, floors and ceilings along the perimeter or outer limits of the apartment, but except for such inner decorated or finished surfaces, such perimeter walls, floors and ceilings are common elements;
- each of the apartments shall also include all other walls, partitions, floors, ceilings and other improvements within said perimeter or outer limits; and
- all built-in appliances and fixtures and all furnishings and appliances described herein; and all air space encompassed within said perimeter.

Next, Paragraph 5 of the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, entitled “Percentage of Undivided Interest” state:

5. Percentage of Undivided Interest. The undivided percentage interest in the common elements appurtenant to each apartment is described in Exhibit C attached hereto and by this reference made a part hereof, and each apartment shall have said percentage in all common profits and expenses of the Project, and for all other purposes including voting.

Next, Paragraph 13 of the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, entitled “Merger of Projects” states in relevant part:

13. Merger of Projects.

...

(b) Each apartment shall have appurtenant thereto an undivided percentage interest in the common elements of the merged increments in the same proportion that such apartment's

gross area determined pursuant to paragraph 2 of this Declaration, **excluding the gross area of any loft**, bears to the total gross area, **excluding the gross area of all lofts**, of all of the apartments included in the merged increments, **which percentage shall constitute such apartment's proportionate share in the profits and common expenses of the merged increments and such apartment's proportionate representation for all other purposes**, including voting in the merged increments[.] Emphasis added.

Lastly, in Exhibits B, C, and C-1 to the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, only the Type 2-A1 units are specifically identified as containing “loft areas.” The only other document that was submitted by the parties that refers to “loft” or “loft level” is the floor plans for the various units. However, there was no evidence presented that these floor plans constituted a revision or amendment to the provisions of the Declarations of Horizontal Property Regime: Waikoloa Villas I and II.

Based upon the evidence presented by the parties, the Hearings Officer must conclude that the percentage of undivided interest was originally calculated by the developer to include only the finished living areas within each unit, as well as the other common elements delineated in the Declarations.

As such, the Hearings Officer must further find and conclude that as of the date of the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, the loft areas of the Type 2-A1 units were specifically excluded in the computation of the percentage of undivided interest in the common elements.

C. Recalculation and Apportionment of Common Expenses

Turning now to the process by which the recalculation of the percentage of undivided interest in the common elements, Paragraph 7 of the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, entitled “Alteration and Transfer of Interests” state:

7. **Alteration and Transfer of Interests.** Except as otherwise expressly provided in this Declaration, the undivided percentage interest in the common elements, and the easements appurtenant to each apartment shall have a permanent character, shall not be altered without the consent of all of the apartment owners affected, expressed in an amendment to this Declaration duly recorded, shall not be separated from the apartment to which they appertain, and shall be deemed to be conveyed, leased or encumbered with such apartment even though such undivided percentage and easements are not expressly mentioned or described in the conveyance or other instrument. The common elements shall remain undivided, and no right shall exist to partition or divide any

portion thereof except as provided in the Act and as otherwise expressly provided herein.

Additionally, the provisions of HRS §§514A-11(12) and 514A-13 state in relevant part:

§514A-11 Recordation and contents of declaration. The bureau of conveyances and the land court shall immediately set up the mechanics and method by which recordation of a master deed or lease and the declaration may be made. Provisions shall be made for the recordation of instruments affecting the individual apartments on subsequent resales, mortgages, and other encumbrances, as is done with all other real estate recordations; provided that land court certificates of title shall not be issued for apartments. The declaration to which section 514A-20 refers shall express the following particulars:

...

- (12) Description as to any additions, deletions, modifications, and reservations as to the property, including without limitation provisions concerning the merger or addition of later phases of the project. To the extent provided in the declaration, an amendment to the declaration that is made to implement those additions, deletions, modifications, reservations, or merger provisions shall require the vote or written consent of only the declarant or such percentage of apartment owners as is provided in the declaration[.]

...

§514A-13 Common elements. (a) Each apartment shall have appurtenant thereto a common interest as expressed in the declaration.

(b) The common interest appurtenant to each apartment as expressed in the declaration shall have a permanent character and **shall not be altered without the consent of all of the apartment owners affected, expressed in an amended declaration duly recorded.** except as provided in sections 514A-11(12) and 514A-13.4. An amendment which subdivides or consolidates apartments and reapportions the common interest appurtenant to the subdivided or consolidated apartment shall, to the extent provided in the declaration, require the vote or written consent of only the apartment owners of the subdivided or consolidated apartments, their mortgagees, and such other percentage of apartment owners as the declaration may provide. The common interest shall not be separated from the apartment to which it appertains and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned or described in the conveyance or other instrument.

(c) The common elements shall remain undivided and no right shall exist to partition or divide any part thereof, except as otherwise expressed in this chapter. Any provision to the contrary is void. Emphasis added.

Consequently, the Hearings Officer must conclude that the undivided percentage interest in the common elements as specified in Exhibits B, C, and C-1 to the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, can only be altered with the consent of all apartment owners affected. Because a recalculation of the undivided percentage interest in the common elements of Waikoloa Villas I and II would affect all of the apartment owners, the Hearings Officer finds and concludes that Paragraph 7 of the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, entitled “Alteration and Transfer of Interests” would require that all of the apartment owners agree to such changes.

Whether or not the percentage of undivided interest in the common elements will be recalculated is a matter for all of the apartment owners to decide in conjunction with the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, and the applicable provisions of HRS Chapter 514A, including HRS §514A-13 and 514A-11(12).

As a final matter, the Hearings Officer would note that: a) HRS §514A-121.5 does not provide authority for the Hearings Officer to usurp the process required by the Declarations of Horizontal Property Regime: Waikoloa Villas I and II in regards to recalculating ownership interests; b) there was no evidence presented by the parties in regards to the specific square footage of each of the Type 2-A1 units loft areas that were actually constructed; and c) only the rights of the parties to the unsuccessful mediation can be adjudicated in proceedings under HRS §514A-121.5, and clearly the nature of the issues raised by Petitioner are far more pervasive than just to the parties to the instant case.

V. DECISION

For the reasons stated above, the Hearings Officer finds and concludes that:

- 1) the computation and apportionment of common expenses for the Waikoloa Villas I and II project is based upon the percentage of undivided interest in the common elements;
- 2) the percentage of undivided interest was originally calculated by the developer to include only the finished living areas within each unit, as well as the other common elements delineated in the Declarations, and

that the loft areas of the Type 2-A1 units were specifically excluded in the computation of the percentage of undivided interest in the common elements; and

- 3) the recalculation of percentage of undivided interest in the common elements is a matter for all of the apartment owners to decide in conjunction with the Declarations of Horizontal Property Regime: Waikoloa Villas I and II, and the applicable provisions of HRS Chapter 514A.

IT IS HEREBY ORDERED THAT pursuant to HRS §514A-121.5 (i), that each party to the hearing bear the party's own costs, including attorney's fees.

DATED: Honolulu, Hawai'i, **April 30, 2009**.

/s/ RODNEY A. MAILE

RODNEY A. MAILE
Senior Hearing Officer
Department of Commerce
and Consumer Affairs