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

In the Matter of	CDR-1011-5
BARBARA GUEST, Petitioner.	HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
vs.	
BOARD OF DIRECTORS, KAREN MICHAUD, KANOELANI APARTMENTS	Senior Hearings Officer: David H. Karlen

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

I. INTRODUCTION

On May 25, 2011, Petitioner Barbara Guest filed her Request for Hearing under Hawaii Revised Statutes ("HRS") §514A-121.5. The caption of the Request identified "Board of Director Karen Michaud, Kanoelani Apartments" as the Respondent.

Throughout these proceedings, the Kanoelani Homeowners Association Board of Directors ("Kanoelani Board") has been considered to be the "real party in interest" insofar as identification of the Respondent has been concerned. Ms. Karen Michaud is the President of the Kanoelani Homeowners Association and has represented the Kanoelani Board throughout these proceedings.

A Notice of Hearing and Pre-Hearing Conference was issued on June 3, 2011. The Pre-Hearing conference was set for June 23, 2011, and the hearing was set for July 12, 2011. As the Petitioner and Respondent are both located on Maui, the Pre-Hearing conference and subsequent hearing sessions were conducted by telephone.

A Pre-Hearing conference was held on June 23, 2011. The hearing originally scheduled for July 12, 2011 was re-scheduled at that time to July 7, 2011. As a result of a telephone conference with the parties on July 7, 2011, the hearing was thereafter re-scheduled to July 21, 2011.

The hearing commenced on July 21, 2011 but was not concluded on that date. The hearing re-commenced on August 31, 2011 and concluded on that date. As discussed at the conclusion of the hearing on that date, additional documentary evidence regarding Respondent's Exhibit 7 was supposed to be submitted after the conclusion of the hearing.. This additional documentary evidence was supplied by Ms. Guest by means of an e-mail dated October 25, 2011, and also by Ms. Michaud by means of an e-mail dated November 1, 2011.

Petitioner Barbara Guest submitted the following exhibits at the hearing, all of which were admitted into evidence unless otherwise noted below:

1 - Condominium By-Laws

2 - Condominium Declaration of Horizontal Property Regime

3 - Condominium House rules

4 - Excerpt from an Internet website called the Hawaii State Condominium Guide (this is a private publication not sponsored by the State of Hawaii), including a diagram of the location of the fence in contention in this proceeding

5 - 2009 Condominium Association Biennial Registration Application for Kanoelani Apartments signed by Barbara Guest on April 22, 2009

6 - Hawaii Condominium bulletin, June 2001

7 - Excerpts from HRS Chapter 514A

8 - Real Estate Commission, Department of Commerce and Consumer Affairs, State of Hawaii, publication entitled Condominium Property Regimes: Owner Rights and Responsibilities

9 - Valley Isle Management, Inc., letter to Barbara and Michael Guest, May 24, 2010

10 - Memo by Barbara Guest dated May 26, 2010; Not admitted

11 - Valley Isle Management, Inc., letter to Mr. and Ms. Michael Guest, February 18, 2011

12 - Valley Isle Management, Inc., letter to Barbara and Michael Guest, March 13, 2011

13 - E-mails dated March 16 – March 22, 2011 (3 pages)

14 - Request to Bureau of Conveyances, March 18, 2011

15 - E-mails dated March 15, 2011

16 - Two pictures of Ms. Guest's dog

17 - E-mail dated December 15, 2010

18 - E-mails dated January 9, 2010, January 12, 2010, and April 16, 2011

19 - Memo by Barbara Guest dated April 20, 2011

20 - Two handwritten incident reports written by Barbara Guest

21 - Memo by Barbara Guest dated April 22, 2011

22 - Valley Isle Management, Inc., letter to Barbara Guest, April 22, 2011.

23 - Valley Isle Management, Inc., letter to "Kanoelani HOA Owner/Resident," dated April 25, 2011

24 - Diagram of Unit A

25 - E-mails of January 9, January 12, and July 20, 2010, and May 20 and May 21, 2011.

26 - Excerpts from HRS Chapter 514A

27 - Summary of Hawaii Supreme Court case of Penney v. Association of Apartment Owners of Hale Kaanapali

28 - Photographs

Respondent Kanoelani Board submitted the following exhibits at the hearing, all of which were admitted into evidence except where noted below:

Respondent's ("R") 1 - Request for Hearing

R 2 - Minutes of the Board of Directors Meeting, November 11, 1998

R 3 - Photograph of Barbara Guest's dog

R 4 - Photograph of privacy fences (Taken prior to the date Ms. Michaud purchased her unit)

R 5 - Photograph of fence with yellow kayak propped up on it (taken after Request for Hearing was made)

R 6 - Closer picture of fence with hinges (Taken after R 5)

R 7 - E-mail from Hawaii State Department of Health, October 26, 2010

(After review of the complete copy sent in after conclusion of the evidentiary hearing, the Hearings Officer concludes that no further argument concerning this document is necessary)

R 8 - Package of materials from Duane Wrobel of Valley Isle Management, Inc., with cover letter dated June 20, 2011

One page police report and handwritten document excluded

One page excerpt from rules with fax banner of "P. 08" excluded

Three full paragraphs on the second page of letter of June 20, 2011 excluded

R 9 - Picture of lanai (Taken some time in June of 2011)

R 10 - Letter to Barbara Guest dated April 19, 2011

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

II. FINDINGS OF FACT

1. The condominium at issue is known as the "Kanoelani Apartments" and is located in Kihei, County of Maui, State of Hawaii.

2. The official title of the condominium's homeowners' association is the Association of Unit Owners of Kanoelani Apartments ("Homeowners Association"). The affairs of the Association are governed by a three (3) person Board of Directors.

3. There are six (6) apartment units in the condominium.

4. Barbara Guest has been an owner of Unit C of the condominium since 1991 and resides there on a full-time basis.

5. Karen Michaud has been an owner of Unit A since 2004. She resided there for approximately six months. She then moved to another location on Maui but continues to own Unit A and rents it to tenants.

6. Both Ms. Guest's unit and Ms. Michaud's unit are on the ground floor of the two story condominium building.

7. On April 20, 2011, Barbara Guest sent an e-mail to Mediation Services of Maui requesting mediation on two disputes: pet policy and changing use of common elements.

8. On May 20, 2011, Mediation Services of Maui closed their case and issued a report dated May 23, 2011 that Respondent chose not to mediate.

9. On May 25, 2011, Ms. Guest filed her Request for Hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii. The Request identified two separate disputes: pet policy and construction of a fence on common elements in the back yard to delineate a lanai area for a unit that does not have a lanai area. The unit in question in the second issue is Unit A owned by Ms. Michaud.

10. The condominium's By-Laws (Petitioner's Exhibit 1) were recorded in 1977 as Exhibit "B" to the Declaration of Horizontal Property Regime for the Kanoelani Apartments. The Declaration, absent Exhibit "B," is Petitioner's Exhibit 2.

11. Neither the By-Laws nor the Declaration say anything about allowing, prohibiting, or regulating pets in the condominium units or on the condominium premises.

12. The House Rules adopted by the Board in 1998 (Petitioner's Exhibit 3) contains the following terms under the heading of "PETS":

> No pets, birds or excessively large or heavy aquariums. No pets are allowed inside units or anywhere on property. No pet sitting or temporary care of pets allowed.

13. There was no evidence that Barbara Guest and other members of the Board at the time this was enacted were aware of any statutes concerning requirements about pets provisions in the bylaws.

14. The Board later received an opinion from a condominium specialist with the State of Hawaii that the House Rules concerning pet ownership needed a basis in the Bylaws.

15. The House Rule in this regard was not enforced for many years. However, Ms. Michaud did personally inform one person that they could not have a dog and the dog was removed.

16. In 1989, the Legislature enacted HRS §§514A-82.5 and 514A-82.6, both of which concern pets in condominiums. These statutes were repealed in 2004 and then essentially reenacted in 2007.

17. In 2004, the Legislature enacted HRS §514B-156, which concerns pets in condominiums.

18. The Real Estate Commission of the Department of Commerce and Consumer Affairs of the State of Hawaii has published a booklet (Petitioner's Exhibit 8) entitled "Condominium Property Regimes: Owner Rights and Responsibilities). This booklet is current as of July 15, 2009. The booklet asserts at page 50 that under HRS §514B-156(a), "if the bylaws permit pets or do not specifically prohibit pets, you may keep pets." However, the booklet cautions on page 2 that "the information in this publication does not constitute an official or binding interpretation, opinion or decision of the Hawaii Real Estate Commission or the Department of Commerce and Consumer Affairs, State of Hawaii."

19. At the time of the hearings in this matter, Barbara Guest had owned and kept a dog in her condominium unit for approximately 2 and one-half years.

20. On May 24, 2010, the managing agent for the Homeowners Association wrote a letter to Ms. Guest informing her of a House Rule violation due to keeping a dog in her residence when pets are specifically forbidden by the House Rules. The letter referred to this as a second complaint against Ms. Guest but was only the first notice of violation to be issued. Petitioner's Exhibit 9.

21. Ms. Guest received this letter on the evening of May 25, 2010.

22. This was the first time Ms. Guest had received notice that keeping her dog was in violation of the House Rules. She tried to get copies of any complaints filed with the managing agent, but the managing agent never provided her with any such copies.

23. Ms. Guest did not remove the dog from her unit. Neither the Homeowners Association nor the managing agent took any action against Ms. Guest as a result of the May 24, 2010 notice.

24. On February 18, 2011, the managing agent sent Ms. Guest a letter informing her that she was violating the House Rules against pets. This was termed a "First Offense." Petitioner's Exhibit 11.

25. On March 13, 2011, the managing agent sent Ms. Guest another letter about violating the House Rules against pets. This was termed a "Second Offense." Petitioner's Exhibit 12 Attached to this letter is one page with a fax banner of "P.08" at the top. The origin or context of this document was never established.

26. Neither the Homeowners Association nor the managing agent took any action against Ms. Guest as a result of the February 18 and March 13, 2011 notices.

27. The lanai associated with Ms. Michaud's Unit A was enclosed in the late 1980's before Ms. Michaud purchased her unit. From Petitioner's Exhibit 24, it appears that this lanai is on the opposite side of the building from the yard.

28. Ms. Guest refers to this enclosure as "illegal," but that is not an issue in this proceeding. It must also be noted that there was no evidence that the Kanoelani Board or any individual owner has ever taken any appropriate action to correct any "illegal" enclosure.

29. In 1993, the owner of Unit A at the time took out a window and installed a sliding glass door to afford an additional entrance and exit for the unit. It is the Hearings Officer's understanding that this sliding glass door opens on to the yard. Again, whether or not that action was "illegal" is not an issue in this proceeding. Again, it must also be noted that there was no evidence that the Kanoelani Board or any individual owner has ever taken any appropriate action to correct any "illegal" sliding glass door.

30. When Karen Michaud purchased Unit A in 2004, she installed a removable ramp to provide better access to the yard from her unit, as Ms. Michaud is confined to a wheelchair. This ramp was authorized by the Kanoelani Board and/or the President of the homeowners association at the time. The ramp was removed when Ms. Michaud moved to another residence. A brick and graveled area immediately adjacent to the sliding glass door in Unit A, which appears to be placed on the back yard common element, still remain. Petitioner's Exhibit 28, page 1.

31. There is at present a fence extending out from Unit A. It extends into the yard, a common element, from the right side of Unit A (looking at Unit A from the yard)

where Unit A borders Unit B. Its location is depicted on the second page of Petitioner's Exhibit 4 and on Petitioner's Exhibit 24.

32. A fence was first constructed there by the same owner who installed the sliding glass door in Unit A.

33. A fence was in that location when Ms. Michaud purchased her unit. Respondent's Exhibit R-4 is a picture taken prior to that purchase and shows a fence in the same location as the present fence.

34. At one point in the proceeding, Ms. Michaud said Ms. Guest's husband removed the fence extending from Unit A approximately four years ago. In her e-mail of May 20, 2011, Ms. Michaud says that the fence fell down. Petitioner's Exhibit 25. In any event, Ms. Guest testified without contradiction at the hearing on July 21, 2011, that the fence had not been there for approximately four years

35. In April of 2011, Ms. Michaud's tenant in Unit A asked if a fence could be erected. This tenant had begun storing large personal items in the back yard, thereby generating complaints recognized by Ms. Michaud as legitimate, and Ms. Michaud told him to remove his things from the back yard.

36. The tenant in Unit A constructed the fence in question on or about April 15, 2011.

37. Ms. Guest objected to this construction and promptly filed a written complaint about it with the managing agent. This complaint is dated April 17, 2011 and is part of Petitioner's Exhibit 20.

38. Ms. Michaud states in the aforementioned e-mail of May 20, 2011 that this fence "went up with barbara's [sic] blessing," but that was not the case.

39. Following Ms. Guest's complaint to the managing agent about the fence, there was quite a bit of "tit-for-tat," as Ms. Michaud put it in her e-mail of May 20, 2011, about storing property on the common elements. See, also Ms. Guest's e-mail of May 20, 2011, part of Petitioner's Exhibit 25, as well as Petitioner's Exhibits 22 and 23 and Respondent's Exhibit 9.

40. The perspectives of the photo of the earlier fence in Respondent's Exhibit 4 and the photo of the current fence in Petitioner's Exhibit 28 and Respondent's Exhibits 5 and 6 are not the same. However, the old fence appears to be roughly the same height as the fences extending from Units B and C, and the count of the latticework openings in the old fence, albeit difficult, appears to be same, in terms of height, as the count of those openings in the new fence. The new fence does not look as nice as the old fence.

41. The parties disagree significantly about how far the new fence extends into the yard as compared to the old fence. It is clear, however, that the new fence extends several feet into the yard. Furthermore, it extends into the yard much more than the fences from Unit B and Unit C. In addition, Units B and C have lanais facing the yard, and their fences are on, or mostly on, their lanai areas which are part of those units and not common elements. Unit A, on the other hand, has no lanai area facing the yard, has no expectation of privacy connected to its sliding glass door, and has no expectation or right to any privacy fence located totally in the common area.

42. Ms. Michaud was President of the Homeowners Association when the fence was constructed in 2011 by her tenant.

III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

HRS §514A-121.5(a) provides for mediation of a dispute between a condominium apartment owner and the board of directors of a condominium homeowners association involving the interpretation or enforcement of the condominium's declaration, bylaws, house rules or other matters involving several sections of HRS Chapter 514A that are enumerated in HRS §514A-121.5(a).

The two disputes raised by Barbara Guest in her request for mediation are among the types of disputes for which mediation is provided in HRS §514A-121.5(a).

HRS §514A-121.5(c) provides that if a dispute is not resolved by mediation, including for the reason that the board of directors refuses to participate in the mediation, any party to the proposed or terminated mediation may file a request for a hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs. Pursuant to subsection 1 of this statute, the apartment owner must be a member of an association duly registered pursuant to HRS section 514A-95.1. Pursuant to subsection 2 of this statute, the request for hearing shall be filed within thirty days from the termination date of the mediation as specified in writing by the mediation service.

Barbara Guest is an apartment owner who is a member of an association duly registered pursuant to HRS section 514A-95.1.

The request for hearing in this matter was filed within thirty days from the termination date of the mediation as specified in writing by Mediation Services of Maui.

The Office of Administrative Hearings, Department of Consumer Affairs, has jurisdiction over this matter pursuant to HRS §514A-121.5(c).

HRS §514A-82.5 was enacted in 2007. It provides as follows:

Pets in apartments. (a) Whenever the bylaws do not forbid apartment owners from keeping animals as pets in their apartments, the bylaws shall not forbid the tenants of the apartment owners from keeping pets in the apartments rented or leased from the owners; provided that:

(1) The apartment owner agrees in writing to allow the apartment owner's tenant to keep a pet in the apartment;
(2) The tenants may keep only those types of pets which may be kept by apartment owners;
(3) The bylaws may allow each owner or tenant to keep only one pet in the apartment;
(4) The animals shall not include those described as pests under section 150A-2, or animals prohibited from importation under section 141-2, 150A-5, or 150A-6;
(5) The bylaws may include reasonable restrictions or prohibitions against excessive noise or other problems caused by pets on the property; and
(6) The bylaws may reasonably restrict or prohibit the running of pets at large in the common areas of the property.

(b) Any amendments to the bylaws pertaining to pet restrictions or prohibitions which exempt circumstances existing prior to the adoption of the amendments shall apply equally to apartment owners and tenants.

Subsection (a) of this statute has no applicability to this matter because it only provides protection to tenants when the bylaws do not forbid owners from keeping animals as pets in their apartments. Barbara Guest is an owner and not a tenant.

Subsection (b) of this statute has no applicability to this matter because it only applies to amendments to bylaws, and no such amendment is involved in this matter.

HRS §514A-82.6 was enacted in 2007. It provides as follows:

Pets, replacement of subsequent to prohibition. (a) Any apartment owner who keeps a pet in the owner's apartment pursuant to a provision in the bylaws which allows owners to keep pets or in the absence of any provision in the bylaws to the contrary may, upon the death of the animal, replace the animal with another and continue to do so for as long as the owner continues to reside in the owner's apartment or another apartment subject to the same bylaws.

(b) Any apartment owner who is keeping a pet pursuant to subsection (a) as of the effective date of an amendment to the bylaws which prohibits owners from keeping pets in

their apartments shall not be subject to the prohibition but shall be entitled to keep the pet and acquire new pets as provided in subsection (a).

HRS §514A-82.6 was originally enacted in 1989. The original enactment was repealed in 2004. The current enactment in 2007 has language identical to the 1989 version of the statute.

Barbara Guest is also relying on HRS §514B-156(a) as cited on page 50 of her Exhibit 8

HRS Chapter 514B applies to condominiums created after July 1, 2006. However, pursuant to HRS §514B-22, certain sections of this new law apply to previously created condominiums as follows:

Applicability to pre-existing condominiums. Sections 514B-4, 514B-5, 514B-35, 514B-41(c), 514B-46, 514B-72, and part VI, and section 514B-3 to the extent definitions are necessary in construing any of those provisions, and all amendments thereto, apply to all condominiums created in this State before July 1, 2006; provided that those sections:

(1) Shall apply only with respect to events and circumstances occurring on or after July 1, 2006; and

(2) Shall not invalidate existing provisions of the declaration, bylaws, condominium map, or other constituent documents of those condominiums if to do so would invalidate the reserved rights of a developer or be an unreasonable impairment of contract.

For purposes of interpreting this chapter, the terms "condominium property regime" and "horizontal property regime" shall be deemed to correspond to the term "condominium"; the term "apartment" shall be deemed to correspond to the term "unit"; the term "apartment owner" shall be deemed to correspond to the term "unit owner"; and the term "association of apartment owners" shall be deemed to correspond to the term "association".

HRS §514B-156(a) is part of Part VI of HRS Chapter 514B and provides as follows:

Pets. (a) Any unit owner who keeps a pet in the owner's unit pursuant to a provision in the bylaws which allows owners to keep pets or in the absence of any provision in the bylaws to the contrary, upon the death of the animal, may replace the animal with another and continue to do so for as long as the owner continues to reside in the owner's unit or another unit subject to the same bylaws.

Subsection (a) of this statute is essentially identical to subsection (a) of HRS §514A-82.6.

The By-laws of the Kanoelani Apartments do not prohibit pets. The Respondent has argued that Section 5 of the By-laws provides authority for the House Rules in question here, but that is only a general enabling section and does not say anything, one way or the other, about pets.

Under the terms of HRS §514B-22, it would be appropriate to apply HRS §514B-156 to the Kanoelani Apartments condominium because doing so would not violate any terms of the condominium's declarations or bylaws. The House Rules are not "constituent documents" of the condominium within the meaning of HRS §514B-22.

Both HRS §514A-82.6 and HRS §514B-156 should be interpreted as allowing pets in an owner's condominium unit or apartment as long as pets are not specifically prohibited by the condominium's bylaws.

A prohibition of pets in the owner's condominium unit or apartment that is contained only in the condominium's House Rules is not legally effective and cannot, in this case, be enforced against Barbara Guest.

It should be noted that the statutes in question do not prohibit regulations in the House Rules regarding pets causing problems or pets in common areas. See, for example, page 50 of Petitioner's Exhibit 8 which states in relevant part that under HRS Chapter 514B the "house rules may include reasonable restrictions or prohibitions against excessive noise and other problems caused by pets, such as running at large in the common areas of the project."

There was evidence in this hearing of complaints about Barbara Guest's dog fouling the condominium's yard area, which is a common element, and going into the condominium's pool, which is also a common element.

The House Rules of the Kanoelani Apartments condominium prohibit pets "inside units" and to that extent are unenforceable pursuant to the statutory provisions cited and discussed above. "Units" means the freehold estates described in the condominium's Declaration, which includes the unit's lanai.

The House Rules of the Kanoelani Apartments condominium also flatly prohibit pets "anywhere on the property" in addition to "inside units." This additional restriction refers to, among other areas, the yard area and the pool.

The reasonableness of the House Rules regarding prohibition of pets on the property other than inside an owner's unit, and the reasonableness of how the rules have been enforced or not enforced in specific past situations with respect to areas of the property other than an owner's unit, was not the subject of this proceeding. Accordingly, the undersigned Hearings Officer makes no decision or order regarding the enforceability of the House Rules, in general or in particular, for areas other than inside an owner's unit.

The fence in question is not a structural addition to the building or a common element. However, it is, in effect, a material alteration to the common elements because it is intended to, and does, exclude all unit owners except the owner of Unit A from the use and enjoyment of a significant portion of the common elements. It amounts to a change of use in a portion of the common elements.

Construction of the fence required a decision of the Kanoelani Board approved the owners of seventy-five percent of the common interests. HRS §514A-13(d).

Approval could not be granted by Ms. Michaud as President of the homeowners association because of her conflict of interest since the fence benefited only her unit and because of this statutory requirement.

Ms. Michaud's unit did not obtain any vested right to have the new fence in place merely because a fence was previously there when she purchased her unit. Further, a fence was not integral to the use of her unit because there was no fence present for a four year period during which Ms. Michaud was renting out the unit. The fence was built only at the request of one particular tenant who appears to have a lot of large items to store, but this is not a justification for the construction of the fence.

It may be the case that the privacy fences for Units B and C extend into the common areas (particularly the one for Unit B). Any incorrect placement of these fences does not justify the significantly greater intrusion and interference with the common areas by the fence constructed to benefit Unit A. In addition, this decision does not in any way constitute a ruling on whether or not the fences for Units B and C should be modified to remove those portions extending into the common areas. That is not an issue in these proceedings.

IV. DECISION

As a general observation, this small condominium project appears to have large problems in terms of owners (and tenants) getting along with each other, clear and consistent enforcement of House Rules, maintenance issues, and possible deficiencies in the managing agent's performance, especially when dealing with controversies between owners and/or tenants. This is very unfortunate, but the present proceedings were not the arena for resolution of numerous and day-to-day frictions and operations issues.

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

1. By a preponderance of the evidence, Petitioner Barbara Guest has established that the House Rules are legally invalid and cannot be enforced insofar as they state a prohibition against pets in the units.

2. By a preponderance of the evidence, Petitioner Barbara Guest has established that the fence placed on a portion of the common elements, namely the yard, on or about April 15, 2011, was not properly authorized and should be removed.

3. Pursuant to the provisions of HRS §514A-121.5(i), the Hearings Officer orders each party to bear their own costs in this proceeding. There are no other issues remaining for hearing.

4. This is a final decision. Any party to this proceeding that is aggrieved by it may apply for judicial review of the decision pursuant to HRS §91-14 and HRS §514A-121.5(j).

DATED: Honolulu, Hawaii, NOV 07 2011.

DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce
and Consumer Affairs