



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of)	CDR 2007-15
)	
ROBERT OLAGUE, JR.,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW AND
Petitioner,)	DECISION
)	
vs.)	
)	
BOARD OF DIRECTORS AND HOME)	
OWNERS ASSOCIATION VILLAGES OF)	
WAIPIO,)	
Respondent.)	
)	

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

I. INTRODUCTION

On November 28, 2007, Robert Olague, Jr. ("Petitioner") filed a request for administrative hearing to resolve a condominium management dispute pursuant to Hawaii Revised Statutes ("HRS") Chapter 514B. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On February 5, 2008, the hearing was convened by the undersigned Hearings Officer. Petitioner appeared *pro se*, and the Association of Apartment Owners of The Villages at Waipio, Phase I ("Respondent") was represented by John A. Morris, Esq.

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

1. Petitioner lives in a downstairs townhouse unit at the Villages of Waipio. Petitioner has a yard (a limited common element) and the six foot fence that separates his yard from a bike path that runs parallel and adjacent to Petitioner's property is a common element except that the interior surface of the fence is a limited common element.

2. Members of Respondent as well as members of the Gentry at Waipio Community Association have full and complete access to the bike path.

3. Section 6.03 of the Declaration of Horizontal Property Regime: The Villages of Waipio states:

The Association of Apartment Owners (the "Association") shall have the right, to be exercised by its Board of Directors (the "Board") or the agent engaged by the Association to manage the Condominium (the "Managing Agent"), to enter each apartment and the limited common elements from time to time during reasonable hours upon prior written notice as may be necessary for access to any common elements located in such apartment, and for the operation (including but not limited to improvement, repair, maintenance and repair of the condominium and at any time for making emergency repairs therein necessary to prevent damage to any apartment or common or limited common element.

4. Section 4.09 of the By-Laws of the Association of Apartment Owners of The Villages at Waipio Phase I states:

Each owner and occupant hereby grants a right of access to his or her apartment to the Manager and/or Managing Agent and/or any other person authorized by the Board, the resident manager or the Managing Agent, for the purpose of making inspections or for the purpose of correcting any condition originating in his or her apartment and threatening another apartment or a common element, or for the purpose of performing installations, alterations or repairs to the mechanical or electrical services or other common elements in his or her apartment or elsewhere in the building; provided that requests for entry are made in writing in advance and that any such entry is at a time reasonably convenient to the Owner or occupant. In case of an emergency, such right of entry shall be deemed granted, to be effective immediately whether the Owner or occupant is present at the time or not.

5. In December 2006, Petitioner and Respondent attempted to mediate the issues Petitioner is raising in this matter. The mediation was unsuccessful.

6. At a meeting of the Board of Directors of the Association of Apartment Owners at the Villages at Waipio on February 22, 2007, the Board adopted Policy Guidelines Regarding Access to Apartments and Limited Common Elements (“Policy Guidelines”), a copy of which is attached hereto and incorporated herein by reference as Appendix “A”.

7. The Policy Guidelines were adopted in response to concerns from owners about their privacy when providing access to units and limited common elements in non-emergency situations to the Board or the Managing Agent. Number 5 of the Policy Guidelines provides: “The Association shall not have to obtain an Owner’s permission to observe items on an Owner’s limited common element yard areas that are visible from the common elements or another Owner’s unit.”

8. Petitioner’s backyard is not visible from the paved bike path. However, Petitioner’s backyard is visible from an area between the paved bike path and the six foot fence that is eighteen inches to two feet higher and is covered with wedelia. As you get closer to the fence, you can see Petitioner’s back yard through the slats of the fence if you look at the fence at an angle.

III. CONCLUSIONS OF LAW

The issue to be resolved is whether, with the exception of emergencies, Respondent violates the bylaws and Policy Guidelines by looking over Petitioner’s fence from the Waipio community bike path.¹

Respondent’s declaration and bylaws grants Respondent access to Petitioner’s unit and the limited common elements upon prior written notice. The Policy Guidelines allow Respondent to observe items on Petitioner’s limited common element yard which are visible from the common elements without obtaining Petitioner’s permission.

The evidence presented showed that Petitioner’s backyard is not visible from the paved bike path. Accordingly, if Respondent was limited to viewing Petitioner’s limited common element yard from the paved bike path, the Policy Guidelines require that Respondent obtain Petitioner’s permission to observe Petitioner’s limited common area yard. However, the evidence presented also showed that Respondent can see into Petitioner’s back

¹ The Policy Guidelines also allow observation from another owner’s unit, but this will not be discussed as it was not an issue raised by Petitioner.

yard from areas between the fence and the paved bike path, which is also a common element. Accordingly, Respondent would not need permission to observe Petitioner's limited common element yard from that vantage point. Respondent appears to be sensitive to Petitioner's concerns and ideally, future implementation of the Policy Guidelines will be in a way that is least intrusive to Petitioner and other owners.

IV. DECISION

Based on the foregoing, the Hearings Officer finds that Petitioner's backyard is not visible from the paved bike path but is visible from other areas between the fence and the paved bike path, and accordingly, Respondent does not violate the bylaws and policy guidelines by looking over the fence. The Hearings Officer orders the parties to bear their own costs, including attorney's fees.

DATED: Honolulu, Hawaii, MAY - 1 2008.

/s/ SHERYL LEE A. NAGATA

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

ASSOCIATION OF APARTMENT OWNERS OF THE VILLAGES AT WAIPIO

**Adoption of Policy Guidelines
Regarding Access to Apartments and Limited Common Elements**

WHEREAS, the Board of Directors (the "Board") of the Association of Apartment Owners of The Villages at Waipio (the "Association") is authorized by Section 4.07 of the By-Laws to adopt administrative rules and regulations for the Project;

WHEREAS, the Board of Directors of the Association of Apartment Owners of The Villages at Waipio is empowered to oversee the administration and operation of the condominium in accordance with the terms and provisions of its Declaration, By-Laws and the Condominium Property Act;

WHEREAS, pursuant to Section 514B-137, Hawai'i Revised Statutes, and Section 4.09 of the By-Laws, each Unit Owner must provide access to his or her Unit and the limited common elements appurtenant to the Unit to agents of the Association or other unit owners;

WHEREAS, pursuant to Section 514B-137, Hawai'i Revised Statutes, and Section 4.09 of the By-Laws, the Association must give advance notice of its request for access and enter an Owner's Unit or limited common elements only during reasonable hours, unless there is an emergency;

WHEREAS, certain Owners voiced concerns about their privacy;

WHEREAS, in response to these concerns, there is a need to establish a policy concerning access to the units and limited common elements in non-emergency situations.

NOW, THEREFORE, BE IT RESOLVED, that the following policy guidelines are adopted:

1. In the absence of an emergency, if the Board or the Managing Agent determines that entry into a Unit or limited common elements is necessary, the Managing Agent if at all possible will give written notice to the Unit Owner at least 48 hours in advance of the scheduled entry. Such notice shall specify the date and time when access is requested.

2. Access shall be limited to the hours between 7:00 a.m. and 9:00 p.m. on weekdays.

3. If an Owner refuses to allow the Association access: (i) after the Board has requested access and given the notice required under this resolution; or (ii) in an emergency situation, the Owner shall be considered to be in violation of the Declaration, By-Laws, and Rules and Regulations of the Project.

4. If an Owner refuses to allow the Association access after the Board has requested access and given the notice required under this resolution, Association representatives may enter the Owner's unit or limited common elements without further notice to the Owner.

5. The Association shall not have to obtain an Owner's permission to observe items on an Owner's limited common element yard areas that are visible from the common elements or another Owner's unit.

I, Robert Castro, Secretary of the Board of Directors of the Association of Apartment Owners of The Villages at Waipio, do hereby certify that the foregoing is a true copy of the resolution duly adopted at a meeting of the Board of Directors, duly held on February 22, 2007 and duly entered in the book of minutes of the Association, and that this resolution is in full force and effect.



Secretary, ASSOCIATION OF APARTMENT
OWNERS OF THE VILLAGES AT WAIPIO