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AND CONSUMER AFFAIRS

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HEARINGS OFFICE

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

In the Matter of)	CDR-2007-7
)	
ROBERT AND BONNIE WUND,)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioners,)	DECISION
)	
vs.)	
)	
BOARD OF DIRECTORS, THE FAIRWAY)	
VILLAS AT WAIKOLOA BEACH AOA,)	
CERTIFIED MANAGEMENT, INC.,)	
)	
Respondents.)	
)	

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

I. INTRODUCTION

On June 7, 2007, Robert and Bonnie Wund ("Petitioners"), filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("OAH"), and on June 12, 2007, Petitioners submitted to OAH the full amount of the required filing fees. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On July 23, 2007, Respondents Board of Directors, The Fairway Villas at Waikoloa Beach AOA and Certified Management, Inc. ("Respondents") filed a motion to dismiss Petitioners' claim. On July 27, 2007, Petitioners filed a response to the motion and on July 31, 2007, a reply memorandum was filed by Respondents.

On July 31, 2007, the motion came before the undersigned Hearings Officer. Respondents were represented by Terrance M. Revere, Esq. and Petitioners were represented by Robert Wund ("Petitioner Wund").

On August 2, 2007, the Hearings Officer issued an Order Granting in Part and Denying in Part Respondents' Motion to Dismiss Petitioners' Claim. Among other things, the order limited the hearing to the issue whether Respondents met their obligations in responding to Petitioners' complaint that certain owners might be using their units illegally¹. On the same date, Petitioners filed a motion for declaratory relief. The motion was denied by order dated August 8, 2007.

On August 9, 2007, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer. Petitioner Wund appeared *pro se* and on behalf of Petitioner Bonnie Wund. Respondents were represented by Terrance M. Revere, Esq.

At the close of the hearing, the Hearings Officer directed the parties to file written closing arguments. Accordingly, on August 27, 2007, Petitioners filed their closing brief and on September 7, 2007, Respondents filed their closing arguments. A reply brief was transmitted to the Hearings Officer by Petitioners on September 21, 2007.

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 of law and decision.

II. FINDINGS OF FACT

1. By letter dated March 10, 2006, Petitioner Wund complained to Certified Management, Inc. ("Certified Management") that several units in The Fairway Villas at Waikoloa Beach ("Project") had connecting doorways between them, that the doorways were prohibited by the Declaration and Bylaws ("Project Documents"), and that those "modifications" should be removed.

2. Petitioner Wund's March 10, 2006 letter was addressed at the May 16, 2006 regular meeting of the Board of Directors, The Fairway Villas at Waikoloa Beach

¹ The issue as to whether certain owners were renting their units in violation of the Project Documents, the Hawaii County Code and/or the Uniform Building Code was not within the scope of this hearing.

AOAO (“Board”). Petitioner Wund was in attendance at the meeting. The Board responded that the modifications Petitioner Wund was complaining of had been approved by the developer and installed prior to occupancy. The Board’s response was confirmed in writing to Petitioner Wund in a letter from Certified Management dated June 23, 2006.

3. By letter dated June 1, 2006, Petitioner Wund repeated his complaint regarding the connecting doorways and requested that those doorways be removed.

4. Prior to July 20, 2006, Petitioner Wund contacted West Hawaii Mediation Center (“WHMC”) and requested that his dispute with the Board regarding the connecting doorways be made the subject of mediation. By E-Mail dated July 20, 2006 to Milton Motooka, Esq., WHMC informed the Board’s counsel that it had been contacted by Petitioner Wund and that Petitioner Wund was interested in participating in mediation with the Board regarding the modifications.

5. Although the Board was willing to participate in a mediation of the dispute, the parties were apparently unable to agree to, among other things, a date for the mediation.

6. By letter dated August 11, 2006, Petitioner Wund complained to the Board through Certified Management of the connecting doorways, that transient rentals at the Project appeared to be in violation of the applicable laws, and requested that the Board obtain a professional opinion on the subject.

7. By letter dated February 23, 2007, Petitioner Wund provided the Board with “Formal Notice” of the Board’s noncompliance with the Project Documents and the applicable laws, and demanded immediate compliance. Petitioner Wund also demanded that the matter be made the subject of mediation.

8. On March 1, 2007, Laurie Sokach of Certified Management sent an E-Mail to Petitioner Wund which stated:

I received your faxed letter, attached here, and have forwarded it to the Board President for distribution to the board in its entirety. As soon as I have their response I will be forwarding it to you.

Please remember that according to the attorney for the association, owners that rent their units are not in violation of the governing documents as they are currently written.

And as you know from the last board meeting, the board is reviewing the past minimum days occupancy resolution that failed to obtain the necessary votes to be adopted by the association. They are discussing attempting another similar resolution, but would like to think that if more thought out could be actually accomplished.

* * * *

9. By E-Mail dated March 2, 2007 to Sokach, Petitioner Wund requested a copy of the attorney opinion letter regarding the legality of rental units in the Project. Sokach responded to Petitioner Wund on March 5, 2007 and explained that the attorney's letter was privileged information and that "I am not able to release it to you at this time."

10. By E-Mail dated March 9, 2007 to the Board, Petitioner Wund stated:

The attached file should be self explanatory.

From Laurie's email, it appears that many of the board may not be aware of my correspondence of February 23 requesting mediation or any of the subsequent communication.

I don't understand why CMI or the board would not want to share with me or any owner the association's attorney's opinion as she references in her last email to me.

11. On April 18, 2007, Petitioner Wund and AOA Fairway Villas participated in a mediation of the dispute. As a result of the mediation, the parties entered into an agreement as follows:

- a. Both parties agree to continue communications
- b. Mr. Wund will provide a letter outlining his concerns to Mr. Revere by April 20, 2007.
- c. Mr. Wund will refrain from filing any legal actions for thirty (30) days from this date.

12. By letter dated April 19, 2007, Petitioner Wund provided the Board with an outline of his concerns as agreed to in the mediation.

13. At its April 24, 2007 regular meeting, the Board discussed, at length, whether and how they could get proposed amendments regarding transient vacation rental/minimum rental period passed.

14. By E-Mail dated May 7, 2007, counsel for the Board provided Petitioner Wund with a detailed legal memorandum regarding the vacation rental use issue. The message also stated:

Regarding the use of loft space, we have been consulting with experts who are familiar with the building code. We will prepare a legal opinion to the Board on this issue.

Regarding the noise disturbances etc, are you willing to serve on a rules enforcement committee? As you note it is not possible for the resident manager to prevent every disturbance. The assistance of owners like you who live there would be valuable. I think more communication between the owners and guests regarding expectations would be helpful.

There are many issues you have brought up and as recognized at the mediation hearing and in your letter, these are complicated problems with competing interests. I hope that you will chose to continue working with us to address these issues rather than run the risk and expense of litigation, where the only certainty to both sides is expense and stress.

* * * *

15. Between May 8, 2007 and May 22, 2007, various E-Mails were exchanged between Petitioner Wund and the attorney for the Board regarding the issues raised by Petitioner Wund.

16. By letter dated May 22, 2007, counsel for the Board provided Petitioner Wund with a detailed response to the issues raised by Petitioner in his letter of April 19, 2007. The letter stated in part:

* * * *

I am pleased to report that I met with the Board to discuss your various concerns. I want you to know that the Board takes your concerns very seriously.

In your letter you called for immediate action on five numbered items. The Board responds as follows:

1. The Board is considering your suggestion for a “transient guest supervision” plan. However, they are inquiring if you have any concrete ideas as to exactly what you want, how this could be legally implemented and administered, how it would be administered, and the reason why residential owners would not be expected to contribute. For example, theoretically on any given day, a residential owner could cause problems at the pool, with quiet hours etc., and a guest could simply be sleeping. Additionally, since owners go in and out of rental pools, there may be significant administrative and cost allocation challenges. Your input on this would be appreciated.
2. The Board agrees with you that the appropriate notices should be posted on the project for quiet hours, parking, and Association rules. Certified Management will work with Woody to get this implemented.
3. I am in the process of reviewing the plans for lofts with the AOA’s consultant. If your understanding regarding the construction is verified, and lofts are being used as illegal sleeping rooms, the Board will be sending a letter to loft owners informing them of the issue and requiring that lofts not be rented or used as sleeping rooms. The Board is also contemplating sending a letter to all owners reminding them that especially if they rent their apartments, they as owners are responsible for compliance with all applicable building and safety codes and that the AOA expects non-compliant owners to defend and indemnify the AOA for all expenses incurred.
4. As you know, Woody has been and will continue to issue warnings and fines where warranted. Based on the mediation, I understand that you are satisfied with Woody’s performance.
5. The Board agrees with you that guests should be required to sign an acknowledgement of receipt of Association rules. Again, Certified will work with Woody on implementation.

You also had requests for voluntary action on the part of rental agencies. As indicated by your letter, these requests are more properly directed to the rental agencies and individual owners at issue than the AOA Board. We encourage you to discuss these issues with your surrounding neighbors and their rental agents.

On the issue of minimum stays, as you will recall the Board attempted to pass an amendment to the governing documents that would contain a minimum stay requirement. Unfortunately, it did not pass. The Board plans on raising this issue again at the next annual meeting. I encourage you to solicit your neighbors for support of an amendment. In the interim, the Board plans on writing owners to request, on a voluntary basis, that they agree to a minimal rental period until the issues can be addressed as an agenda item at the next annual meeting.

* * * *

17. On June 7, 2007, Petitioners filed the instant Request for Hearing.

18. On July 23, 2007, Respondents filed a motion to dismiss the request for hearing, alleging that the request was untimely, that Petitioners had failed to name indispensable parties or real parties-in-interest², and that because the interpretation of the Uniform Building Code and the Hawaii County Code was outside the scope of this proceeding, OAH was not the proper forum to hear this dispute.

19. On August 2, 2007, the Hearings Officer issued an Order Granting in Part and Denying in Part Respondents' Motion to Dismiss Petitioners' Claim. The Order provided in relevant part:

1. Respondents' motion to dismiss shall be granted as to Petitioners' (a) claim that the owners of certain apartment units are using their units illegally (for other than residential use) and (b) request that those owners be ordered to comply with the applicable laws regarding the proper use of the units. Because those claims directly involve the *owners' alleged use* of certain units, those

² The gravamen of Petitioners' complaint was that certain unit owners in the Project were renting their units out illegally. Respondents argued and the Hearings Officer agreed that such a claim can only be heard after those owners are given proper notice and the opportunity to be heard at the mediation and subsequent hearing.

owners must first be provided with proper notice of this dispute, the opportunity to mediate the dispute and, if necessary, the opportunity to participate in the hearing of this dispute;

2. Respondent's motion to dismiss shall be granted to the extent Petitioners seek a declaratory ruling as to what constitutes "residential use" of the subject apartment units; and

3. Petitioners will be allowed to pursue and the hearing shall be *limited* to addressing the issue whether *Respondents* have met their obligations in responding to Petitioners' complaint that certain owners may be using their units illegally, and to that extent, Respondents' motion is denied. Petitioners shall have the burden of proving that Respondents' actions in responding to their complaint have been deficient.

III. CONCLUSIONS OF LAW

The sole issue presented here is whether Respondents have met their obligations in responding to Petitioners' complaint that certain owners may be using their units illegally. Petitioners cite to the Business Judgment Rule for the proposition that the actions of a director are evaluated by "how an ordinarily careful or reasonable person would act in similar circumstances", and suggest that Respondents' responses to Petitioners' various concerns have fallen below this standard. Petitioners' argument, however, belies the evidence.

According to the evidence, the Board, for the most part, responded in a timely manner to Petitioners' complaints and addressed those concerns in writing and at various meetings. The Board also agreed to and did participate in a mediation that had been requested by Petitioners to address their complaints. Additionally, the Board requested and obtained a legal opinion advising that "owners that rent their units are not in violation of the governing documents as they are currently written". Furthermore, the Board, through its attorneys, provided Petitioners with a detailed, legal opinion regarding Petitioners' concern

that some units in the Project were being used as vacation rentals. The evidence also established that Respondents were generally responsive to Petitioners many E-Mails and ultimately provided Petitioners with a detailed, point-by-point response to their April 19, 2007 outline of concerns. There was even evidence that the Board had attempted to pass, albeit unsuccessfully, an amendment to the governing documents that would contain a minimum stay requirement, and that the Board was planning to raise the issue again at the next annual meeting, and that in the interim, the Board was planning to write to the owners to request that they voluntarily agree to a minimal rental period “until the issues can be addressed . . . at the next annual meeting.”

Based on all of these considerations, the Hearings Officer cannot conclude that Petitioners have proven by a preponderance of the evidence that Respondents have failed to meet their obligations in responding to Petitioners’ complaint that certain owners may be using their units illegally.

IV. DECISION

Based on the foregoing considerations, the Hearings Officer finds and concludes that Petitioners have not proven by a preponderance of the evidence that Respondents have failed to meet their obligations in responding to Petitioners’ complaint that certain owners may be using their units illegally. Accordingly, the Hearings Officer orders that this matter be and is hereby dismissed.

Dated at Honolulu, Hawaii: DEC 18 2007.

/s/ CRAIG H. UYEHARA

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