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

In the Matter of)	CDR-2008-2
)	
DONALD NEWTON,)	HEARINGS OFFICER'S
)	FINDINGS OF FACT,
Petitioner,)	CONCLUSIONS OF LAW,
)	AND DECISION
vs.)	
)	
HALE KAI CONDOMINIUM,)	
BOARD OF DIRECTORS,)	
)	
Respondent.)	
)	

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

I. INTRODUCTION

On March 27, 2008, Donald Newton ("Petitioner"), filed a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

On May 22, 2008, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer. Petitioner was present and appeared *pro se* and Respondent Hale Kai Condominium, Board of Directors, was represented by its attorney, Valentina Stewart Watson, Esq.

At the conclusion of the hearing, the Hearings Officer directed the parties to file written proposed findings of fact and conclusions of law. Accordingly, on June 12 and 13, 2008, respectively, Petitioner and Respondent filed his/its proposed findings and conclusions.

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. The parties' proposed findings and conclusions were adopted to the extent that they were consistent with the established factual evidence and applicable legal authority, and were rejected or modified to the extent that they were inconsistent with established factual evidence and applicable legal authority, or were otherwise irrelevant.

II. FINDINGS OF FACT

1. Petitioner resides in and is the owner of an apartment unit in the Hale Kai Condominium in Maui ("Project").

2. On or about October 30, 2006, the sun shades for three units in the Project, Units 103, 105 and 109, did not look like the rest of the sun shades at the Project.

3. The three sun shades were identical as they had been recommended by the then-resident manager of the Project.

4. At its October 30, 2006 Board of Directors' meeting, Respondent discussed what they believed to be the existing policy on sun shades. At the time, Respondent was unaware of any written policy regarding the sun shades .

5. At the meeting, Respondent decided that the sun shades of the three units should be replaced with the matching sun shades when they wore out.

6. In or about 1983, a seawall was built for the Project adjacent to the swimming pool. The seawall ran along the area fronting the swimming pool for approximately 50 to 60 feet and was level with the existing grade.

7. In 2004, Respondent voted to retain a contractor to regROUT the existing seawall where rocks were falling out. The contractor also raised the height of the seawall approximately 12 inches in order to prevent the ocean from entering the swimming pool. As a result of the increased height of the wall, the view of the ocean from the swimming pool area is partially obstructed.

8. Respondent did not seek nor obtain the approval of the apartment owners prior to retaining the contractor and commencing construction of the wall.

III. CONCLUSIONS OF LAW

Article V, Section 3(g) of the Bylaws of the Association of Apartment Owners of Hale Kai, as amended June 15, 1996 ("Bylaws"), states:

(g) No apartment owner shall decorate or landscape any entrance, hallway, planting area or lanai appurtenant to his apartment except in accordance with standards therefore established by the Board of Directors or specific plans approved in writing by the Board.

It was unclear from the evidence what, if any, standard applied to the sun shades at the Project. Moreover, and in any event, Respondent voted to have the three sun shades replaced with sun shades that matched the sun shades installed in the other units of the Project when those sun shades wore out. Under these circumstances, the Hearings Officer concludes that Respondent acted reasonably and that Petitioner did not prove any violation of the Bylaws.

The Declaration of Horizontal Property Regime of Hale Kai dated October 15, 1965 provides in part:

F. Administration of Project. Administration of the project shall be vested in its Association of Apartment Owners, herein called the "Association", consisting of all apartment owners of the project in accordance with the by-laws of the Association attached hereto as Exhibit A and made a part hereof. Operation of the project and maintenance, repair, replacement and restoration of the common elements, and any additions and alterations thereto, shall be in accordance with the provisions of said Horizontal Property Act, this Declaration and the by-laws, and specifically but without limitation the Association shall:

* * * *

6. Not erect or place on the project any building or structure including fences and walls, nor make additions or structural alternations to or exterior changes of any common elements of the project, nor place or maintain thereon any signs, posters or bills whatsoever, except in accordance with plans and specifications including detailed plot plan, first approved in writing by a majority of apartment owners (or such larger percentage as required by law or this Declaration) including all owners of apartments thereby directly affected, and complete any such improvements diligently after the commencement thereof.

Clearly, a majority approval of apartment owners was required for the erection of a wall. Respondent contends that the work on the wall in 2004 did not involve the construction of a wall but rather, repairs to the existing seawall. While the contractor did perform repair work on the

seawall by regrouting loose rocks, it also erected a 12-inch wall on top of the existing wall. Thus, while a majority approval of apartment owners was not required for the repair of the wall, it was required prior to the construction of the "new" wall.

IV. ORDER

Based on the foregoing considerations, the Hearings Officer finds and concludes as follows:

1. Petitioner has failed to prove by a preponderance of the evidence that Respondent has violated the Bylaws in connection with the sun shades in units 103, 105 and 109;
2. Petitioner has proven by a preponderance of the evidence that prior approval from a majority of the apartment owners of the Project was required for the portion of the work performed in 2004 which resulted in the erection of a 12-inch wall on top of the existing seawall; and
3. That Respondent, the only party represented by counsel, bear its own attorney's fees and costs incurred in this matter.

Dated at Honolulu, Hawaii: _____ AUG 29 2008 _____.

/s/ CRAIG H. UYEHARA

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