

KALELE KURRENTS

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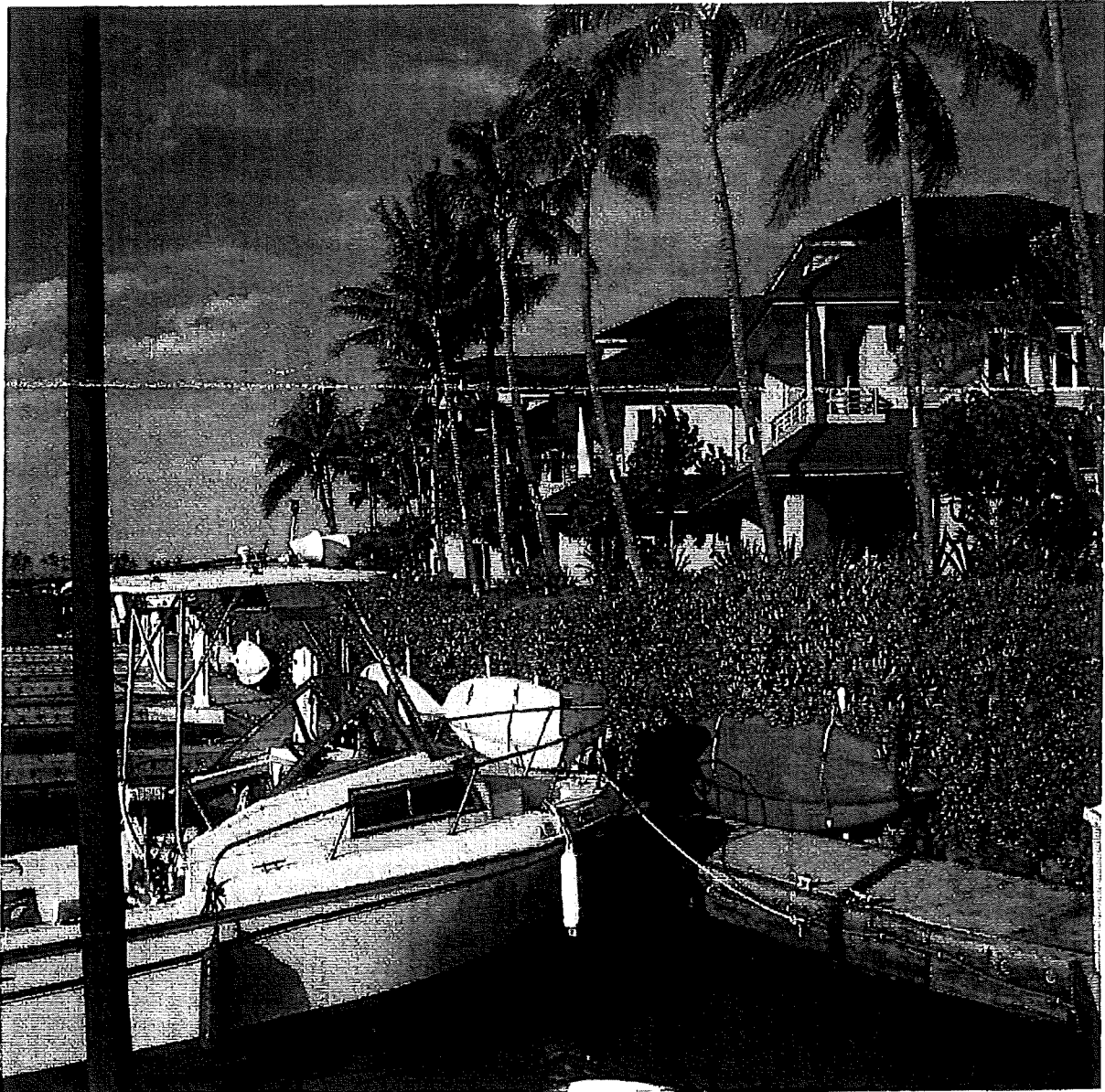


EXHIBIT
1

59
YOSHIKAWAU00155

IMPORTANT NUMBERS

Management Office:

395-0431 ph
395-0431 fax

Resident Manager

395-0431 ph
225-0401 Cell

Security Phone:

232-4821 ph

Email: kalelekai002@hawaii.rr.com

Also annerusso@hawaii.rr.com

Fire: 911

Police: 911

Ambulance: 911

Kalele Kal Condominium Vacation Check List

- Notify KK management office of the dates you'll be away.
- Make sure your emergency telephone numbers are on file with building management.
- Leave a key with a friend or in a lockbox if not stored in the Manager's Office.
- Stop newspaper delivery.
- Fill out a "Hold Mail" card for the U.S. Post Office. *(The security guard can provide one for you.)*
- Replace your smoke detector battery. *(The neighbors complain if your low battery signal continuously beeps.)*
- Turn off air conditioning. *(If algae grows in the drain line, the drip pan will overflow onto your ceiling.)*
- Turn off water valves for your toilets and your clothes washing machine.
- Close windows and draperies.
- Turn off reoccurring (preset) alarms on alarm clocks or clock radios.
- Unplug small appliances (i.e. toaster, coffee maker, hair-dryer, battery chargers, etc.)
- Turn off your computer. *(No hacker has ever broken into a computer that is turned off.)*
- Water your plants.
- Turn off all lights.
- Lock your deadbolt lock.
- During hurricane season: *Remove everything from your lawn. (The hurricane season officially begins June 1 and continues through November 30.)*

Upcoming Events:

April 12 6:30pm Board of Directors
Meeting in the Cabana

April 18 Moni Marc Pest control
spraying

Door Lock Maintenance

Recently a few owners have had problems with their front door locks malfunctioning.

We do live in a gated community with security. However it never hurts to make sure your door is always secured and your locks work properly. We have noticed some owners using the deadbolt to hold the door open to prevent the door from closing. This only wears down the mechanism, and may cause your lock to malfunction.

All locks to the front doors and mailboxes are the responsibility of the owner. If you believe your lock is malfunctioning, or you would like to have it checked, please contact a lock smith. You may also contact the office for recommendations.

Neighboring courtesies

Lately, we have been having some pet House Rules violated. We also found urine on numerous occasions outside the 1st floor garage exit on the walls and floors. This is not neighborly and we ask anyone who sees anything to report to the management office immediately.

We have also noticed an increased amount of fecal matter left behind. Please be neighborly and pick up after your pets. House Rules are in place to make for a comfortable living environment for everyone.

If you notice House Rules are being violated, please report them immediately to Security or the Management Office.

We will keep names of persons giving information confidential.

Reserved Elevators

We frequently have move ins, move outs, and deliveries. We pad the elevators and set them on independent to make things easier for the persons using the elevators. We ask you to not use these elevators unless they are reserved for you. It makes it difficult when someone has to go to others floors and chase the elevators down to move their belongings. Also as a reminder, please make sure to reserve deliveries and moves at least 24 hours in advance at the management office.

Caring for Kalele Kai

We are moving along quickly with our hallway painting project. Our team is working diligently to beautify our hallways.

To help keep the beauty, please make sure that you take care of our walls. When walking your dog, please make sure the leash does not run along on the walls, make sure you are careful when bringing items into the building and do not hit the walls. If you are moving in or out, please watch your movers and instruct them to be very careful.

Building one has been completed now for three weeks and it is already showing some abuse. When this project is complete, and our carpets are installed, we want the appearance to last a very long time.

We have been noticing mud through the hallways, and spills from one end of a hall to the trash room. Lets all be neighborly. Make sure your trash bags are not leaking and your and your pet's feet are clean before entering the buildings.

When our housekeepers or maintenance staff have to spend time repairing walls or extra cleaning, it takes away from other areas needing attention.

Board of Directors

A big welcome to Kimiko Hayashi and Paul Jordan who were just elected to serve three year terms on the board of directors.

We also welcome back re-elected board members Colin Kurata, Fred Rodrigues, Ray Tanaka and Jim Propotnick. Fred has a three year term, Jim a two year term with Ray and Colin having one year terms.

The new and re-elected directors join Sharon Peterson, Zig Palagyi and Richard Rosic as your board for this year.

The board elected the following members to serve as officers: Richard Rosic, President – Jim Propotnick, Vice President – Colin Kurata, Secretary – Paul Jordan, Treasurer.

We extend our thanks to everyone who attended the annual meeting as we had a large turnout.

The next monthly meeting is Tuesday, April 12th at 6:30pm, in the cabana.

Project updates

1. The landscape renovation for the entryway of Building 1 will commence once the weather clears.
2. We will be placing tile in front of the elevator in Building 3 shortly.
3. Rainy weather has uncovered numerous water leaks and related problems; please bear with us as we get these problems fixed.

Information on the boat docks

- When Kalele Kai first sold the condominium units to the general public, all but two of the 60 boat docks were retained by the developer.
- Two of the boat docks (#7 and #8) are common elements and can be used by association owners and their tenants with advance notice to the management office on site.
- The remaining 58 boat docks have been purchased by the owners of Kalele Kai from the developer.
- Only owners of Kalele Kai are allowed to own the boat docks as limited common elements.
- Users of the Hawaii Kai Marina must comply with Marina Rules and vessels must be registered at the Marina Office.
- The Kalele Kai boat docks are 23 feet long.
- If an owner has a boat that is too long to fit into a single slip, the piers can be moved to accommodate a larger boat parallel to the shore.
- Currently there are 17 boat docks available to owners of Kalele Kai to purchase. Some docks are for single slips and some groups of docks can accommodate larger vessels.
- For further information please feel free to contact the Management Office, located next to the pool in person or by calling Eric or Anne at 395-0431.

Energy & water usage

This is the monthly reminder to let us know of any area on the property where you feel we can save energy by turning off unnecessary lights.

Even with all the recent rain, water is still a costly item for the association. Please be conservative when washing cars and boats.

Useful information

1. Wrapping your hot water heater and copper pipes with insulation will not only save energy but it will help reduce the humidity in your utility room. It is also advisable to remove any dirt or rust prior to insulating. Insulation can be found at City Mill or Home Depot.
2. Townhouse owners should check their A/C equipment room for leakage or other problems on a regular basis.
3. Owners of apartments on the 6th floor might wish to consider adding an air vent to their ceilings. This allows air to flow to the upper crawl, helping keep the temperature differential equal. Please check with the office for the latest information and vent recommendation.
4. Remember to spray a light coating of Corrosion Guard over metal valve handles in your utility rooms.

Further clarification to a question asked at the annual meeting

During the owners forum portion of the annual meeting a question was raised asking "why the AOA was paying an interest rate of 7 percent on the Resident Managers apartment".

The AOA falls under a commercial loan rate category – this particular loan was negotiated directly with the President of Territorial Savings and we obtained the best loan available at the time.

Mosquito Caution

With all this rain we have been receiving, the islands are expecting an increase in mosquito populations. Here at Kalele Kai we will be removing any standing water and doing everything we can to minimize the mosquito's. However, this would be a good time to patch any holes in your screens as a cautionary measure.

Brief update on the Hale Alii Project

A few owners of Kalele Kai recently attended a Neighborhood Board meeting in hopes of getting a better understanding of what is taking place with the proposed condo project across the street on Hawaii Kai Drive.

It turns out that this project of some 300 new condominiums has been approved for several years and the current discussion revolves around how the project will be divided to accommodate the 69 affordable units prescribed in the original plans.

It was concluded that due to the complexity of the project that further discussion would be deferred to a later meeting and a committee would be formed to review the issues.

As this project will have direct impact on Kalele Kai, we will follow what takes place and let you know of the next planned meeting.



Keone Thomas

Please welcome Keone to Kalele Kai. Keone comes to Kalele Kai to complete our landscaping department. He was born and raised here in Oahu and graduated from Radford High School. He is very active and enjoys fishing with his friends, training as a boxer in his garage and working out. We are very proud to have Keone Thomas with us at Kalele Kai and we look forward to the many things, he and his team will do for us.

**Kalele Kai AOA
One Keahole Place
Honolulu, HI 96825**

**Resident
One Keahole Place
Honolulu, HI 96825**

Keith W. Hunter, Arbitrator
Dispute Prevention & Resolution, Inc.
1003 Bishop Street, Suite 1155
Honolulu, Hawaii 96813

IN THE TRIBUNALS OF
DISPUTE PREVENTION & RESOLUTION
STATE OF HAWAII

IN THE MATTER OF:) DPR ARB. NO.: 13-0496-A
)
)
Hitoshi Yoshikawa) ARBITRATOR'S PARTIAL
) FINAL AWARD
Claimant,)
)
vs.) Hearing: August 25-26,
) September 6, September 18
ASSOCIATION OF APARTMENT) and October 3, 2014
OWNERS OF KALELE KAI,)
)
Respondent.)
)
)
)
)
)

I. INTRODUCTION

The issues before the Arbitrator in this proceeding involve a dispute as to whether Hitoshi Yoshikawa's ("Yoshikawa") new boat, the Rola, violates



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the Association of Owners of Kalele Kai's ("Association") Declaration, which restricts boat lengths to twenty-three (23) feet within the Kalele Kai Marina.

Yoshikawa requests that the Arbitrator:

1. Allow the Rola to remain moored at Kalele Kai;
2. Find that the Declaration's 23-foot limit does not apply to the Rola or Yoshikawa's side-tie moorings;
3. Allow that Yoshikawa or any future owner of the Yoshikawa's property to have the right to moor any boat that fits within the 69' side-tie mooring;
4. Award special damages in the amount of \$12,741.09, which is the total Yoshikawa paid under protest to the Association for dock repair and maintenance assessments, along with 10% prejudgment interest.
5. Award general damages in the amount of \$250,000 for the extreme aggravation this situation has caused, along with \$250,000 in punitive damages.

The Association asks the Arbitrator to dismiss all claims with prejudice and issue a mandatory injunction ordering Yoshikawa to remove the Rola from the Kalele Kai Marina by a date certain and henceforth comply strictly with the Declaration.

The undersigned Arbitrator, having conducted arbitration hearings on August 25-26, September 6, September 18 and October 3, 2014, wherein the parties were afforded a full and complete opportunity to present evidence and examine witnesses under oath, and having carefully considered the pre-hearing and post-hearing briefs, the numerous exhibits submitted by the parties, and having considered the totality of credible evidence, testimony,

and arguments in light of the claims by each of the parties, and being duly sworn, hereby FINDS, CONCLUDES AND AWARDS, AS FOLLOWS:

II. FACTUAL SUMMARY

Boat-Mooring Restrictions

The Kalele Kai condominium project and marina were built in the 1990s.¹ The Kalele Kai Marina was originally constructed with numerous 23' perpendicular moorings and one 69' side-tie mooring.²

The Kalele Kai Declaration ("Declaration") was recorded on June 1, 1992.³ The Declaration restricts the lengths of boats moored in the marina to 23 feet.⁴

The Marina Association does not limit the size of the boats that use its waters.⁵ The Marina Association does regulate the mooring of vessels according to mooring zones that restrict the length that boats can extend from the dock.⁶ The Mooring Restrictions Legend states that "[t]he mooring zone is measured from the marina wall to the outboard side of the vessel

¹ See February 2, 1993, Full Size Condo Map, Yoshikawa Exhibit 13.

² See *Id.*; See also, Photo of Hawaii Kai Marina, Yoshikawa Exhibit 157.

³ See June 1, 1993, Declaration of Condominium Property, Yoshikawa Exhibit 15.

⁴ See *Id.* at KK002093.

⁵ *Id.* at 5.

⁶ *Id.* at 6.

moored at the dock.”⁷ This mooring limitation permits boats to extend perpendicular from the dock for 30 feet, the same distance of the Kalele Kai easement within the surrounding Hawaii Kai Marina.⁸

In February 2008, Richard Rosic (“Rosic”), a homeowner and boat-mooring owner in Kalele Kai since 2001, listed his town house for sale. Rosic’s property included a 69-foot boat mooring, which had housed his boat, the Ariel, since 2002. The Ariel is in excess of 38 feet and exceeds the Declaration’s 23-foot restriction.

A dispute ensued between Rosic and the Association wherein the Association claimed it did not have authority under its governing documents to approve Rosic’s disposal, modification, or reconfiguration of individual pier walkways to accommodate larger boats.

In June 2009, a Settlement Agreement (“Rosic Agreement”) was reached between Rosic and the Association wherein the parties agreed that Rosic could sell his boat mooring in its modified condition and for any subsequent owner to moor a boat therein.⁹ Pursuant to the Rosic Agreement, the Association Board passed and recorded the Tenth Amendment of the

⁷ *Id.* at Exhibit C.

⁸ See May 30, 1991, Bellingham Marine Industries, Inc. Map, Yoshikawa Exhibit 7.

⁹ See June 9, 2009, Rosic Agreement, Yoshikawa Exhibit 71.

Declaration.¹⁰ The Tenth Amendment includes "Dock and Boat Rules," which contemplate the sale of boat moorings in their modified conditions.¹¹ The Tenth Amendment, including the Dock and Boat Rules, are incorporated into the Kalele Kai House Rules,¹² which means that they thereafter apply to all Kalele Kai owners.

After the Rosic Agreement, Rosic sold the property, the Ariel, and the boat mooring in its modified condition to Yoshikawa in November 2010.¹³

On August 25, 2011, the Association "unanimously approved to grandfather the existing 4 boats which do not meet the 23' rule. Should the owner sell his/her boat or home, the dock will need to go back to its original configuration at the expense of the owner"¹⁴ (the "2011 Board Vote").

On September 9, 2011, Ike and Angela Hung ("Hungs"), who were in the process of selling their townhome and modified boat moorings, demanded mediation and arbitration asking for a declaratory order disallowing the Association's retraction of the sale of modified boat moorings

¹⁰ See August 28, 2009, Tenth Amendment of the Declaration, Yoshikawa Exhibit 74.

¹¹ *Id.* ("(D-6 (a) When a modified boat mooring has one of more finger piers attached in a parallel orientation to the common walkway, upon the sale of the modified boat mooring, the new owner will have up to twelve (12) months from the transfer date to dock a boat in the mooring.")(emphasis added)

¹² See August 27, 2009, Dock and Boat Rules, Yoshikawa Exhibit 73.

¹³ See November 1, 2010, Apartment Deed (with Boat Moorings), Yoshikawa Exhibit 83.

¹⁴ See August 25, 2011, Regular Meeting Minutes, Yoshikawa Exhibit 91.

and challenging the Association's authority to assess boat-mooring owners for repairs to boat docks and walkways.¹⁵

On February 1, 2012, this Arbitrator granted the Hung's motion for a declaratory order, which prohibited the Association's restriction of selling modified boat moorings and deferred ruling on the fairness of the Association's assessments to boat docks and walkways until a full evidentiary hearing clarifying what portions of the marina constitutes common elements versus limited common elements.¹⁶

On August 23, 2013, Yoshikawa received a letter from the Association's management company claiming that the Ariel was in violation of the Declarations' 23-foot rule.¹⁷

On October 28, 2013, the Rola arrived and was moored in Yoshikawa's side-tie slip.

On November 4, 2013, Yoshikawa registered the Rola with the Hawaii Kai Marina Association.¹⁸

¹⁵ See September 9, 2011, Letter to the Board of Directors and Alan Takumi, Account Executive for Certified Management Hawaii from Hungs, Yoshikawa Exhibit 96.

¹⁶ See February 2, 2012, Hung Order, Yoshikawa Exhibit 109.

¹⁷ See August 23, 2013, Takumi Letter to Yoshikawa, Yoshikawa Exhibit 129.

¹⁸ See November 4, 2013 Hawaii Kai Marina Vessel Registration, Yoshikawa Exhibit 136.

On November 6, 2013, Yoshikawa registered the Rola with Kalele Kai.¹⁹

Boat-Mooring Assessments

Also at issue in this proceeding is the Association's decision to renovate the docks in order to apply for Liability Insurance for the Kalele Kai Marina's docks.²⁰

In early 2011, the Board contacted the original designer and manufacturer of Kalele Kai's boat docks, Bellingham Marine ("Bellingham"), regarding the maintenance and the current condition of the Association's marina. Thereafter, Bellingham conducted a site inspection of the boat docks to assess needed repairs.

On April 8, 2011, Bellingham Marine provided a "Maintenance and Rehabilitation" report along with an estimate to perform the renovation work.²¹

The Board also retained Glenn E. Miyasato ("Miyasato") of MKE Associates to review Bellingham's proposal. Miyasato concurred with Bellingham with respect to the marina's severely deteriorated condition,

¹⁹ See November 6, 2013 Yoshikawa's Boat Registration, Yoshikawa Exhibit 137.

²⁰ See June 25, 2011 Email from Tracy Wong to Bryan Liu, Association Exhibit 525.

²¹ See April 8, 2011 Kalele Kai Marina Maintenance and Rehabilitation, Association Exhibit 523.

need for a comprehensive renovation rather than piecemeal repairs, and utilization of Bellingham for the work.²²

On August 12, 2011, Certified sent Kalele Kai owners a letter titled "Boat Dock Update" and enclosed Miyasato's report for review.²³ The letter further notified the owners that the enclosed report would be discussed at the August 25, 2011, Board Meeting.²⁴

On August 25, 2011, the Board unanimously voted to proceed with the renovations proposed by Bellingham (the "Boat Dock Resolution"), which were to be paid by the boat-mooring owners according to the number of boat docks owned.²⁵

Yoshikawa, however, now questions the Board's authority and reasoning in passing the Boat Dock Resolution, as well as the proportion of assessments charged to boat-mooring owners, which they contend are common-area elements that should be paid for by all owners equally.

²² See April 12, 2011 Letter from Certified Hawaii to Kalele Kai Owners, Association Exhibit 528.

²³ *Id.*

²⁴ *Id.*

²⁵ See August 25, 2011, Board Meeting Minutes and Boat Dock Resolution, Association Exhibit 531.

III. DECISION & AWARD

The 23' Foot Boat Length Restriction

Yoshikawa asks the Arbitrator to issue an award permitting the Rola to remain moored at Kalele Kai and to find that the 23-foot limitation does not apply to the Rola or to Yoshikawa's side-tie mooring for Yoshikawa or any subsequent purchaser.

To begin, Yoshikawa argues that the purpose behind the 23-foot limitation is to keep boats moored at Kalele Kai from protruding past the Association's 30-foot easement into the Hawaii Kai Marina. This contention, though not explicit within the Kalele Kai Declaration or other documents, was supported by witness testimony throughout the arbitration proceeding.

For example, current Board President Brad Oakes ("Oakes"), who is seeking to enforce the Declaration's restriction on behalf of the Board, testified that he believed the purpose of the 23-foot limitation "is obviously you can only put 23 feet with the easement and stick out 30 feet."²⁶ Yoshikawa therefore asserts that since his boat is side-tied within a 69-foot mooring area, and does not extend out more than 30 feet, he upholds the original intent behind this limitation.

²⁶ See Arbitration Transcript at 164-165.

The Association argues that despite the original intent, the Declaration provides, unambiguously, that, "[t]he boat mooring shall be restricted to use by boats no larger than twenty-three (23) feet in length."²⁷

Hawaii Law and the Declaration each impose a "comply strictly" obligation on condominium owners, or risk being subject to civil obligations including injunctive relief.²⁸ In this case, it is undisputed that Yoshikawa's 69-foot side-tie mooring does not strictly comply with plain language of the Declaration.

The Association also argues the Hawaii Supreme Court has adopted the "take a chance" doctrine," recognized within *Sandstrom v. Larson*, which acknowledges that a mandatory injunction is appropriate where a party violates a restrictive covenant of which he is aware, irrespective of whether the owner mistakenly relies on incorrect advice from a professional.²⁹ Under this doctrine, it is also unnecessary to consider the relative hardship between the parties, which lowers the typical burden for a mandatory injunction.

In *Sandstrom*, Cyril and Marjorie Larsen lived in the Kaneohe Heights subdivision in Kaneohe, City and County of Honolulu. Each of the original

²⁷ See June 1, 1993, Declaration of CPR of Kalele Kai, Association Exhibit 503 at KK002093.

²⁸ Id. at KK 002105; See Haw. Rev. Stat. §514B-112 (c);

²⁹ See *Sandstrom v. Larsen*, 59 Haw. 491, (Haw. 1978)

thirty lots in this subdivision, including the Larsens, was subject to the Declaration of Restrictive Conditions.³⁰

The Declaration expressly restricted the heights of homes to less than two stories:

1. No lot shall be used except for residential purposes. No building (other than the existing dwelling on Lot 26) shall be erected, altered, placed or permitted to remain on any lot other than one detached single-family dwelling not to exceed one and one-half stories in height and a private garage for not more than two cars."³¹

Additional lots were later subdivided and sold by the Souzas, the original owners of the land encompassing the subdivision, and were not subjected to the one and one-half story height restriction.

After a fire partially destroyed their home, the Larsens hired an architect and proceeded to have their home rebuilt as a two-story structure, in violation of the Declaration for their neighborhood.³² The Larsens argued that the restrictive height covenant had been abandoned as evidenced by other two and three story structures in the subdivision.³³

³⁰ Id. at 492.

³¹ Id. at 492-494.

³² Id. at 493.

³³ Id. at 496.

The Hawaii Supreme Court held, however, that, "[i]n order to support a finding of abandonment, it must be shown that the lot owners of the subdivision acquiesced in substantial and general violations of the covenant within the restricted area."³⁴ The Court explained that other two and three story homes did not defeat the purpose of the covenant, which is to protect the view and privacy of other homeowners in Kaneohe Heights.³⁵ The Court further stated, " the presence of these few multi-story homes does not, in our opinion, constitute such a 'substantial and general' acquiescence on the part of the lot owners in the subdivision as to support a finding of abandonment."³⁶ The Court went on to hold that the Larsens had actual and constructive knowledge of the restrictive covenant at the time they purchased their home, and proceeded to construct a two-story structure in violation of the covenant "at their own risk."³⁷

The Court was not persuaded by the Larsen's argument that they "relied on the advice of their architect"³⁸ stating that such reliance does not

³⁴ Id. at 497.

³⁵ Id. at 497.

³⁶ Id. at 497-498.

³⁷ Id. at 500.

³⁸ Id. at 500.

confer immunity from the rights of homeowners to seek an equitable remedy such as an injunction.³⁹

The *Sandstrom* case, however, is distinguishable from this case for several reasons and the Association's reliance is misplaced.

First, unlike *Sandstrom*, where no approval for two-story homes was ever granted and the Declaration expressly prohibited two-story homes, the Kalele Kai Association allowed owners to keep boats in excess of 23 feet for at least a decade and also entered the Rosic Agreement and the Dock and Boat Rules, which contemplated boats in excess of 23 feet by allowing owners to modify their moorings.

Second, unlike the Larsens in *Sandstrom*, Yoshikawa was not in violation of the purpose behind the boat-length restriction found in the Declaration. Instead, Yoshikawa's boat was always side-tied within their 69-foot slip and never extended past Kalele Kai's 30-foot easement. And while some argument during Arbitration was made that the Yoshikawa's boat impacted views for other homeowners, views are expressly disclaimed as a protected right in the Declaration.⁴⁰

³⁹ *Id.* at 500.

⁴⁰ *See* Declaration of Condominium Property, Yoshikawa Exhibit 15; Arbitration Testimony at 229-230; June 13, Kalele Kurrents, Association Exhibit 562.

Third, at the time Yoshikawa purchased their property, the Association had allowed repeated "violations" of the Declaration's 23-foot limit by allowing larger boats to be kept at Kalele Kai Marina.

While the Association argues it never expressly approved owners to keep boats larger than 23 feet, this argument is disingenuous given the Association's approval of moorings to accommodate larger boats. Over a period of at least ten years, the Association did not object once to any boat over 23 feet, which were being continuously moored in the Kalele Kai marina.

Arbitration testimony also reveals that these boats took Board Members and other homeowners on cruises,⁴¹ participated in dock social events and parades,⁴² and were featured within the Kalele Kurrents newsletters.⁴³ For example, the April 2006 Kalele Kurrents newsletter explains how homeowners can buy and modify boat docks:⁴⁴

The Kalele Kai boat docks are 23 feet long.

⁴¹Arbitration Transcript at 38.

⁴²Arbitration Transcript at 44; September 2002, Kalele Kurrents, Yoshikawa Exhibit 44; October 2002, Kalele Kurrents, Yoshikawa Exhibit 45; November 2002, Kalele Kurrents, Yoshikawa Exhibit 46; Honolulu Star-Bulletin Hawaii News, Yoshikawa Exhibit 47

⁴³ May 2002, Kalele Kurrents, Yoshikawa Exhibit 38; September 2002, Kalele Kurrents, Yoshikawa Exhibit 44; October 2002, Kalele Kurrents, Yoshikawa Exhibit 45; July 2003, Kalele Kurrents, Yoshikawa Exhibit 49; September 2003, Kalele Kurrents, Yoshikawa Exhibit 50; June 2004, Kalele Kurrents, Yoshikawa Exhibit 54;

⁴⁴ See April 2006, Kalele Kurrents, Yoshikawa Exhibit 59.

If an owner has a boat that is too long to fit into a single slip, the piers can be moved to accommodate a larger boat parallel to the shore.

Currently there are 17 boat docks available to owners of Kalele Kai to purchase. Some docks are for single slips and some groups of docks can accommodate larger vessels.

Thus, the Kalele Kai's own newsletter acknowledges boats larger than 23 feet are allowed and even explains how to modify piers to accommodate larger boats.

While the Association argues there are no board minutes supporting the approval of modifications of the piers and that the Declaration is the controlling document for owners to abide, this argument ignores the Association's acquiescence in "substantial and general violations" of the Declaration's 23-foot limit. For example, while it is apparently true the Board never altered the Declaration, the Board's express and implied approval of larger boats is readily apparent by the Board's execution of the Rosic Agreement, the 2009 Dock and Boat Rules within the Tenth Amendment, and the long-standing and well-documented history of the Association not enforcing the Declaration.

Unlike the Larsens in *Sandstrom*, Yoshikawa relied on much more than the advice of one agent because Yoshikawa purchased his property, the Ariel, and modified moorings knowing that he had approval under the Rosic

Agreement, which recognized Rosic's ability to transfer the property to a subsequent purchaser with rights to a larger boat and permitted the subsequent owner to "harbor a boat in the boat dock or else the Board may require the area to be reconfigured."⁴⁵

Further, for seven years leading up to the Rosic Agreement, Rosic's boat, the Ariel, had been moored at Kalele Kai and had never been cited for violating the Declaration's 23-foot boat restriction.⁴⁶ The first time the Ariel received a violation was on August 23, 2013, by which point the boat had been moored in its side-tie slip for over eleven years.⁴⁷

2011 Board Vote

The Board's attempt to negate Yoshikawa's rights through the 2011 Board Vote is also unavailing.⁴⁸

While the 2011 Board Vote purports to "grandfather" four boats while requiring moorings to be returned to their original position upon sale of the

⁴⁵ See June 9, 2009, Rosic Agreement, Yoshikawa Exhibit 71.

⁴⁶ See April 17, 2002, Registration of the Ariel with Hawaii Kai Marina, Yoshikawa Exhibit 37; June 9, 2009, Rosic Agreement, Yoshikawa Exhibit 71.

⁴⁷ See August 23, 2013, Takumi Letter to Yoshikawa re: Notice of Violation, Yoshikawa Exhibit 129.

⁴⁸ See August 25, 2011, Board Minutes, Yoshikawa Exhibit 91 ("The board unanimously approved to grandfather the existing 4 boats which do not meet the 23' rule. Should the owner sell his/her boat or home, the dock will need to go back to its original configuration at the expense of the owner.")

boats, this argument has already been rejected in *Hung* for existing owners who purchased and relied upon the Association's history of allowing larger boats in contradiction to the Declaration.

This result is particularly justified here because Yoshikawa's rights were conferred to him under the Rosic agreement, which expressly allowed Rosic to transfer the property to a subsequent purchaser and authorized the subsequent owner to moor a boat in excess of 23 feet. Importantly, under the Rosic Agreement, the subsequent purchaser was not limited to mooring the Ariel, but was instead allowed to moor any boat so long as the mooring was utilized within a 12-month period.

Thus, the Arbitrator finds that the Board has no authority to alter its commitments found within the Rosic Agreement as they relate to Yoshikawa's property.

Further, as in *Hung*, the Arbitrator notes that the 2011 Board Vote to grandfather only existing boats would be a significant change in the Association's policy and contradicts the Dock and Boat Rules incorporated by the Board's Tenth Amendment for existing owners.

Thus, the Arbitrator finds that the 2011 Board vote cannot restrict Yoshikawa's right to sell his boat moorings in a modified condition since he

was a pre-existing home and boat mooring owner and purchased his property and rights before the 2011 Board vote.

As such, the Arbitrator denies the Association's request for a mandatory injunction and thereby permits the Rola to remain moored at Kalele Kai.

The Arbitrator notes, however, that the 2011 Board Vote may be applied to homeowners who purchase a property with modified boat moorings after the 2011 Board Vote. For example, the subsequent purchaser of Yoshikawa's property may purchase the existing boat moorings in a modified condition, however, he does so with the understanding that should this subsequent purchaser sell his boat or home, the docks would have to go back to their original configuration unless he or she obtains Board approval.

Boat Dock Renovations and Assessments

Decision to Renovate

Yoshikawa also questions the Association's decision to renovate the Kalele Kai Marina docks. Specifically, Yoshikawa argues that the Association entered into a no-bid contract with Bellingham Marine to repair limited common elements that are already in safe condition. Yoshikawa contends the Declaration only confers authority to arrange for maintenance and repair

when an "owner fails to maintain and/or repair the boat mooring in good, safe and clean condition."⁴⁹

Yoshikawa asserts that the definition of a boat mooring is the space in the water where the boat is kept, which is admittedly a limited common element.⁵⁰ To the contrary, the boat docks, including the finger piers, the part of the marina that was renovated and for which Yoshikawa was assessed, are common elements.

The Declaration defines common elements as follows:

1. Common Elements. One Freehold estate is hereby designated in all of the remaining portions and appurtenances of the Project (hereinafter referred to as the "common elements"), including specifically, but not limited to:

(c) All walkways, including the boat mooring walkways, and interior roadways located upon the Land;⁵¹

Yoshikawa argues that the common element boat docks and finger piers did not require repair and, therefore, his assessment was improper.

The Association argues that the proposed Dock and Boat Rules, which are incorporated by the Tenth Amendment defines the Finger Piers and

⁴⁹ See June 1, 1993 Declaration of Condominium Property, Yoshikawa Exhibit 15.

⁵⁰ See Yoshikawa Closing Brief at 18; Arbitration Transcript at 38-39.

⁵¹ See June 1, 1993 Declaration of Condominium Property, Yoshikawa Exhibit 15.

triangles as limited common elements and solely the responsibility of the boat-mooring owners.

Specifically, the Proposed Dock and Boat Rules state:

D-8 Finger Piers & Support Triangles – maintenance and replacement of finger piers and support triangles is the responsibility of boat mooring owners. If proper maintenance is not performed by the owner, the Association has the right to perform the maintenance and assess the owner for all costs incurred to perform such maintenance.

The Association claims that the marina had not been renovated since it had been constructed 20 years prior.⁵² Oakes testified that owners had been asking, “[w]ho is going to fix this, what’s the cost, how do we go about it and get it done. That is what started the whole process.”⁵³

Bellingham Marine is a reputable contractor and made specific renovation recommendations, consistent with its findings, report and annotated photos.⁵⁴

The Board also requested a second opinion from Glenn Miyasato of MKE Associates who concurred with Bellingham with respect to the

⁵² Arbitration Transcript at 726-727.

⁵³ *Id.* 730.

⁵⁴ See April 8, 2011, Kalele Kai Marina Maintenance & Rehabilitation Report, Association Exhibit 523.

renovations and recommended the Bellingham Marine to carry out the repairs.⁵⁵ Miyasato also recommended that the Board avoid a piecemeal approach to repairs and maintenance because "the piers and walkways are connected together to act as one integral floating element and will require a more extensive survey of all components to determine their current integrity and need for replacement." ⁵⁶

The Association states that it thereafter reasonably relied on Bellingham's itemized computation of the renovation cost for the boat moorings (limited common elements) in the amount of the \$95, 400, and the marina common elements, in the amount of \$169, 300. The Board then provided notice to the owners about the plan to renovate.⁵⁷

The Arbitrator finds that Board acted within its discretion to hire Bellingham Marine to perform maintenance and repairs to the docks and finger piers.

⁵⁵ See August 10, 2011, Letter from Glenn Miyasato, Association Exhibit 528.

⁵⁶ *Id.* at KK000092.

⁵⁷ See June 23, 2011, Flyer re: Board Meeting to discuss renovation project, Association Exhibit 524; June 2011, Kalele Kurrents, Association Exhibit 524; June 18, 2011, Owners' Forum Flyer, Association Exhibit 527; August 12, 2011, Memo to Owners and attached letter from Glenn Miyasato, Association Exhibit 528.

Yoshikawa was given notice and seven days to either comply or challenge the assessments.⁵⁸ Yoshikawa failed to respond within that time period and therefore is responsible for the assessments for the work to the finger piers that are currently in the marina.

The Arbitrator finds, however, that Yoshikawa was unfairly assessed for repairs to the two finger piers that were removed by Rosic in 2001 and 2002. Since Yoshikawa is the owner of these piers, he is responsible for their repair and maintenance and all costs associated to reconfiguring the piers if ever executed.

Yoshikawa further contends that the Association acted maliciously and should not only should he not be liable for the assessments, but also an award of punitive damages.

The Arbitrator finds that Yoshikawa has not presented evidence that rises to the level of malicious intent and warranting a finding of punitive damages.

IT IS THEREFORE ORDERED:

1. Based on the totality of the record before the Arbitrator, the Arbitrator denies the Associations request for a Mandatory Injunction.

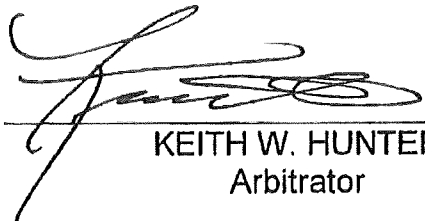
⁵⁸ See August 26, 2011, Memo from Certified to Owners re: Boat Dock Update, Association Exhibit 530.

2. The 23-foot limitation does not apply to the Rola due to the rights granted Yoshikawa as a subsequent purchaser in the Rosic Agreement. Therefore, the Rola is permitted to remain moored at Kalele Kai.
3. The Board may apply the 2011 Board Vote to subsequent homeowners who purchased after the 2011 Board Vote, but not to pre-existing homeowners such as Yoshikawa.
4. The Board acted within its discretion to hire Bellingham Marine to perform maintenance and repairs to the docks and finger piers.
5. The Board properly assessed boat-mooring owners for maintenance and repairs to the finger piers, but Yoshikawa was unfairly assessed for two piers that have been removed from the Marina.
6. The Board shall refund Yoshikawa in the amount of \$4,000 (\$2,000 per pier) for this assessment.
7. Since Yoshikawa is the owner of these piers, he is responsible for their repair and maintenance and all costs associated in reconfiguring the piers if and when the piers are returned;
8. The Arbitrator finds that Yoshikawa has not presented evidence to support his claim for general damages nor has he presented evidence

that rises to the level of malicious intent and warranting a finding of punitive damages.

9. Yoshikawa is determined to be the prevailing party. Yoshikawa's counsel shall submit a petition for an award of fees and costs to opposing counsel and the Arbitrator together with all supporting documentation and evidence of payment on or before December 22, 2014. Billing Invoices may be redacted as necessary. Counsel for the AOO shall submit any response on or before January 5, 2015. Thereafter, the Arbitrator shall issue the Final Award of Arbitrator.
10. The fees for the remuneration of the Arbitrator shall be borne equally by the parties.
11. The Arbitrator retains jurisdiction over the parties, pursuant to Haw. Rev. Stat. §658A-21, to review and address the claim for attorneys' fees and costs. In all other respects this Arbitrator's Partial Final Award is in full and final determination of the issues submitted for determination in this arbitration proceeding.

DATED: Honolulu, Hawaii 12-12-14

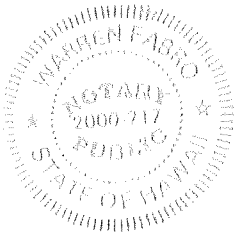


KEITH W. HUNTER
Arbitrator

STATE OF HAWAII)
 : SS
CITY AND COUNTY OF HONOLULU)

On this 12th day of December, 2014, before me personally appeared KEITH HUNTER to me known to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same as his free act and deed.

WITNESS my hand and official seal.



Warren Fabro

Printed: Warren Fabro
Notary Public, State of Hawaii
My Commission Expires: 2/2/18

Doc. Date: 12/12/14 # Pages: 24
Notary Name: Warren Fabro 1st Circuit
Doc. Description: Arbitrator's Partial Final Award
Warren Fabro 12/12/14
Notary Signature Date

NOTARY CERTIFICATION

