

March 14, 2023

VIA EMAIL and REGULAR MAIL
[\(\[KellyBryant@dprhawaii.com\]\(mailto:KellyBryant@dprhawaii.com\)\)](mailto:KellyBryant@dprhawaii.com)

Ms. Kelly Bryant, Case Manager
Dispute Prevention & Resolution, Inc.
1003 Bishop Street
Pauahi Tower, Suite 1155
Honolulu, Hawaii 96813

Re: Association of Apartment Owners of Royal Mauian

Dear Ms. Bryant:

This law firm represents Schuyler Lininger, Jr., Dirk Camille Alfred De Vuyst, Leonard E. Heyman, and Richard Edward Berkins (collectively "Claimants"), who are all owners in the Association of Apartment Owners of Royal Mauian (the "Association"). The Association is represented by John Morris, Esq., and his contact information is as follows:

John Morris, Esq.
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I am also copying John Morris on this letter.

Claimants **demand mediation** pursuant to HRS §514B-161, and paragraph 31 of the "Second Restatement and Amendment of the Declaration of Covenants, Conditions and Restrictions and Bylaws of Association of the Apartment Owners of Royal Mauian, a Condominium Property Regime" that states:

If a unit owner or the Board of Directors requests mediation of a dispute involving the interpretation or enforcement of the Association's Declaration, these Bylaws, or the House Rules, the other party in the dispute shall be required to participate in mediation. Each party shall be wholly responsible for its own costs of participating in mediation, unless both parties agree that one party shall pay all or a specified portion of the mediation costs. If a party refuses to participate in the mediation of a particular dispute, a court may take this refusal into consideration when awarding expenses, costs, and attorneys' fees. If any mediation under this Section 31 is not

completed within two (2) months from commencement, no further mediation shall be required unless agreed to by the parties. The dispute may then be referred to arbitration for resolution pursuant to Section 514B-162 of the Hawai'i Revised Statutes, as amended.

The issues to be mediated are as follows:

1. The legality of the Resolution Related to Guest Registration Fees as passed by the Association's Board of Directors. See our law firm's letter to the Owner of the Association dated January 13, 2023, that is enclosed, and the "Draft" of the "Resolution of the Board of Directors of the Association of Apartment Owners of Royal Mauian Related to Guest Registration Fees" (the "Resolution") that was adopted and is also enclosed.
2. The Association's Board of Directors' meeting procedures, including meetings and discussions outside of a duly called meeting.
3. Even though there is no authority for the Guest Registration Fee, the Association's Board of Directors did not exercise prudent business judgment in determining the fee that is being charged per the Resolution.

Given that mediation must be completed within two (2) months from the date of this letter (or May 13, 2023), Claimants suggest the following neutral mediators for the Association's consideration:

- Kale Feldman, Esq.
- Judge Daniel R. Foley (Ret.)
- Andrew Winer, Esq.

Lastly, we believe that the issues in dispute meet the requirements for subsidized mediation through the Hawaii Real Estate Commission's Condominium Education Trust Fund. Thank you very much for your assistance in this matter. Please contact me if you have any questions or need additional information.

Very truly yours,

PORTER McGUIRE KIAKONA, LLP



Christian P. Porter

Enclosures (2)

cc: Clients (via email w/enclosures)
John Morris (via email jmorris@hawaiicondolaw.com w/enclosures)

January 13, 2023

Owners
Association of Apartment Owners
Of Royal Mauian

Re: Legality of the Resolution Relating to Guest Registration Fees

Dear Owners:

Our law firm has been retained by several of your fellow owners to comment on the legality of the “Resolution of the Board of Directors of the Association of Apartment Owners of Royal Mauian Relating to Guest Registration Fees” (the “Resolution”). Our law firm was selected in part due to the number of associations that we represent (i.e., over 350) throughout the islands, and our experience in dealing with a similar issue at another condominium project. Given the Condominium Statute, the specific language of the Association of Apartment Owners of Royal Mauian’s (the “Association”) Governing Documents, and the decision of an arbitrator (a Retired Justice from the Hawaii Supreme Court), we are of the opinion that the Resolution is – illegal. In other words, it is unenforceable for the reasons noted below.

The Association’s Board of Directors (the “Board”) obviously does not have the unfettered power to impose any fines or charges that they wish to impose. Their conduct and authority are restricted by specific provisions of Hawaii Revised Statutes (“HRS”) Chapter 514B (the Condominium Statute) and the clear and unambiguous language of the Association’s Governing Documents. First, the Association’s Second Restatement and Amendment of the Declaration of Condominium Property Regime (“Declaration”) provides that there are uniform restrictions, covenants and conditions that benefit owners of units at this Association. As you know, the Project is divided between the apartments and the common elements:

- Paragraph 3. [The Developer] imposed on each of the units and the common elements of said condominium property regime certain uniform restrictions, covenants and conditions for the mutual benefit of all of the owners of such units, and adopted Bylaws for the government of the Association of Apartment Owners. (At Page 2)
- Section 3. Location Of Units.
The condominium property regime consist [sic, recte consists] of one hundred and seven (107) units, and certain common elements, as more particularly shown on the condominium map.⁶ The units are numbered in ascending order, by story, from east to south. Units 101 through 119 are located on the ground floor. Units 201 through 219 are located on the second story. Units 301 through 319 are located on the third story. Units 401 through 419 are located on the fourth story. Units 501 through 519 are located on the fifth story. Units 601 through 619 are located on the sixth story. (There are no units numbered 110, 113, 213, 313, 413, 513 or 613.) (At page 5.)

- The Common Elements include, but are not limited to, the following:
 - Section 4(c) The basement, the ground floor lobby, the manager's unit and office located on the ground floor next to the ground floor lobby, the elevators and elevator shafts, trash chute and trash compactor, parking area, swimming pool and its filtration plant, the lobbies next to the elevator shaft on each floor above the ground floor, janitor's closet on each floor above the ground floor, roof garden/sundeck/community recreation area, sewage disposal system, and outdoor lighting. (At page 6.)

In addition, the Declaration allows the following uses to be enjoyed by all owners at the Association, including, but not limited to, transient accommodations or short-term rentals:

- Section 6. Statement As To Use Of Units.

The units are intended to be used as residential units, but such units may be leased or rented from time to time to transients. The Association of Apartment Owners of the Condominium Property Regime established by the Declaration has the power to enact resolutions, rules and regulations, and the power to amend and repeal the same from time to time, restricting and regulating the use of the units and the common elements; provided, that any such resolution, rule or regulation shall be consistent with the terms of this Declaration and the Bylaws.

Furthermore, the Second Restatement and Amendment of the Declaration of Covenants, Conditions and Restrictions and Bylaws of the Association of Apartment Owners of Royal Mauian, a Condominium Property Regime ("Bylaws") provides that the Board is to administer the affairs of the Association and determine the "common expense" necessary for (i) such administration, (ii) to employ and supervise personnel necessary for the operations of the common elements, and (iii) to care for such common elements, with no mention of any extra fees, usage fee, and/or front desk fee for providing such services:

- Section 7 at page 11 provides that the Power of the Board includes –
 - (b) To determine the common expenses required for the administration of the affairs of the Association of Apartment Owners, and for the operation, care, upkeep, security and maintenance of the common elements.
 - (c) To collect the common expenses from the unit owners.
 - (d) To employ, supervise, and dismiss the personnel necessary for the maintenance, care and operation of the common elements and for the administration of the affairs of the Association of Apartment Owners.
- Section 9 at page 15 also states in relevant part that "**Common expenses**" shall mean all costs, expenses, fees and charges incurred by the Association of Apartment Owners, or which the Board of Directors expect the Association of Apartment Owners will incur, for the administration of the affairs of the Association of the Apartment Owners and for the operation, care and maintenance of the common elements...

As you know, each owner is responsible for their share of the common expenses that are necessary to operate, administer and maintain the common elements. The Board's authority to charge such common expenses is also specifically set out in HRS Section 514B-41(a) that provides that "[t]he common profits of the property shall be distributed among, and the common expenses shall be charged to, the unit owners, including the developer, in proportion to the common interest appurtenant to their respective units, except as otherwise provided in the declaration or bylaws.

The current Resolution states, in relevant part, that:

The Board has determined that the expense of managing and operating the front desk is not a common expense because, as outlined above, that expense is incurred primarily to provide visitor registration, parking pass services and other assistance to short-term renters of the unit.

Pursuant to the clear and unambiguous language of the Association's Governing Documents noted above, owners have always had a right to engage in, among other things, transient accommodations or short-term rentals. If such activity results in expenses related to the administration of the Project, including the front desk, that must be a "common expense", and such administrative expenses are, by contract, included in the "common expenses" of the Association, or all of your maintenance fees. There is no authority to impose a "special charge" or guest registration fee. If such a fee were contemplated by the Developer of this Association, it would have been included in the Association's Governing Documents as within the Board's authority. Since it is not allowed, the Board's conduct is *ultra vires* or without authority.

The Board mistakenly relies on HRS Section 514B-104(a)(10) as giving the Board the power to impose any fees for "services provided to unit owners". **First**, this "right" is restricted by its very language of the statute that states HRS Section 514B-104 is "subject to the provisions of the declaration and bylaws." Here, the Association's Declaration and Bylaws (or Governing Documents) define "common expenses" as including the administration of short-term or transient rentals, and there is no right to charge a separate "fee" of any kind. **Second**, if we were to apply the Board's logic to the use of the pool, which is a "service" being provided, then anyone that uses the pool (or any other common element) "more" can be charged for "overuse". Such a position is, again, not supported by the Association's Governing Documents as such services and the administration thereof are common expenses. **Lastly**, HRS Section 514B-41(a) was held by a retired Hawaii Supreme Court Justice in an arbitration involving the same points addressed herein as being more specific and controlling over HRS Section 514B-104(a)(10), and the board's authority in that case to charge a resort fee or surcharge related to transient accommodations was limited by the language of that association's governing documents.

In other words, the statute cited in the Resolution cannot be used to "justify" imposing a guest registration fee. Such a registration fee would require an amendment to the Association's Governing Documents, i.e., the approval of owners representing 67% of the common interest. Without this authority, the Board cannot impose a guest registration fee in addition to charging maintenance fees to owners.

Owners
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January 13, 2023
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In conclusion, there is no legal support for the Board's Resolution as the Association's Governing Documents allow short-term or transient rentals; therefore, owners' short-term or transient renters are entitled to enjoy the common elements; and if such activity results in certain administrative costs, such costs are "common expenses" that are to be included in the maintenance fees charges to all owners based on their percentage of common interest.¹

Thank you for your time and understanding.

Very truly yours,
PORTER McGUIRE KIAKONA, LLP

A handwritten signature in black ink, appearing to read 'C. Porter', written in a cursive style.

Christian P. Porter

¹ Even if a Guest Registration Fee could be charged, it cannot be a profit-making source for the Association. Associations are to operate on a "zero-based" budget, i.e., the money taken in is supposed to cover costs/expenses and be collected for reserves.

RESOLUTION OF THE BOARD OF DIRECTORS OF THE ASSOCIATION OF APARTMENT OWNERS OF ROYAL MAUIAN RELATING TO GUEST REGISTRATION FEES

WHEREAS:

The Board of Directors of the Association of Apartment Owners of Royal Mauian ("Board") is authorized to oversee the administration and operation of the Royal Mauian condominium project ("Project");

The Project is governed by the Condominium Property Act, Hawai'i Revised Statutes ("HRS") Chapter 514B; the Declaration of Horizontal Property Regime Royal Mauian ("Declaration"); the Declaration of Covenants, Conditions and Restrictions and Bylaws of the Association of Apartment Owners of Royal Mauian, A Condominium Property Regime ("Bylaws"); and the Royal Maui House Rules and Information ("House Rules"), as amended;

Section 7 of the Bylaws: (i) gives the Board all powers necessary for the administration of the affairs of the Association; and (ii) allows the Board to do all acts and things necessary to fulfill those responsibilities, *except such acts and things as by law, the Declaration or these Bylaws are expressly reserved to the voting owners or to the unit owners.*"

Sections 7(a) and (d) make the Board responsible for the supervision of the management and operation of the Project and authorize the Board to employ the personnel necessary for the operation of the Project.

The Association employs personnel that currently register guests, process parking passes for the guests' use of the limited parking at the Project, and collect information to confirm that the guests are complying with the minimum five night stay and occupancy limits imposed by the rules of the Project. The Association front desk personnel also provide advice, information, and additional services to short-term renters and guests.

The Board conducted an analysis of the workload of the front desk personnel and determined that in the past 12 months, Association front desk personnel had spent approximately 60% to 70% of their workday dealing with short-term rental guests and the remainder of their time dealing with owners or Association business. The Board also determined that if the front desk personnel were only providing service to owners or the Association, not short-term guests, the time and expense of staffing the front desk would be reduced from 40 hours to 12 to 15 hours per week.

Section 7 (b) states that the Board is responsible for determining the common expenses required for the administration of the affairs of the Project and for the operation, care, upkeep, security, and maintenance of the common elements. The Board has determined that the expense of managing and operating the front desk is not a common expense because, as outlined above, that expense is incurred primarily to provide visitor registration, parking pass services and other assistance to short-term renters of the unit.

Section 514B-104, which governs the operation of the Project, allows the Board to charge individual owners for services provided to the owners, such as the services provided to

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the renters and guests of those owners who rent their units on a short-term basis. More specifically, the section reads as follows:

§514B-104 Association; powers. (a) *Except as provided in section 514B-105, and subject to the provisions of the declaration and bylaws, the association, even if unincorporated, may:*

* * *

(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in section 514B-35(2) and (4), and for services provided to unit owners;

(Emphasis added.)

On that statutory basis, the Board has determined that those owners who engage in renting their units on a short-term basis receive a large part of the benefit of the services provided by the front desk personnel, so it is only fair that the cost of those services should be billed per transaction, and not as a common expense based on the common interest of each of the owners.

Therefore, the Board has decided to impose a registration fee for those renters and guests of owners who are using the services of the front desk personnel.

NOW, THEREFORE, BE IT RESOLVED that the Board, upon careful consideration of all the information available to it, adopts the following policy relating to registration fees:

I. RESOLVED, EFFECTIVE APRIL 1, 2023:

- (a) Every tenant or guest of an owner who comes to occupy the owner's unit at the Project must register at the front desk of the Project within 24 hours of arrival and provide the Association personnel at the front desk with the following information:
 - (i) Name, home address, cell phone number;
 - (ii) Names of all unit occupants; number of adults/number of children
 - (iii) Unit number rented; Dates of arrival and departure
 - (iv) Make, model and license of vehicle (if any)
- (b) Every unit owner shall pay a registration fee of \$40 for every tenant or guest, other than the owner(s) listed on the deed of record, that registers at the front desk to occupy the unit of the owner; provided that a group of tenants or guests registering at the same time, for the same period of occupancy in the same unit shall pay only a single registration fee for the group. Each unit will be allowed four (4) waivers of registration fees per year to allow for non-owner family or friends to occupy the unit of the owner. These waivers are not transferrable to any other unit than the one to which they were issued.

- (c) The registration fee shall be charged to the account of the owner of the unit whose tenant or guest registers at the front desk.

II. RESOLVED FURTHER, that if the owner fails to pay the registration fee, it will be deemed a special assessment against the owner’s unit.

III. RESOLVED FURTHER, that if an owner or their agent fails to notify the front desk of occupancy by a guest or a guest fails to register in order to avoid the registration fee, the owner’s unit will be assessed the fee and may incur an additional House Rule violation fine as determined by the Board.

IV. RESOLVED FURTHER, that the rights, powers, and authority which this resolution provides shall become effective as of the date of the Board’s adoption of this resolution and shall remain effective until this resolution is revoked in writing by the Board or changed by an amendment to the Association’s Declaration or Bylaws.

CERTIFICATE

I, _____, hereby certify that the above resolution was adopted pursuant to the BYLAWS OF THE ASSOCIATION OF APARTMENT OWNERS OF “ROYAL MAUIAN, by the Board of Directors of the Association, at a Board meeting on _____, 2022.

DATED: Kihei, Hawai’i, _____, 2022.

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 Secretary, Association of
 Apartment Owners of Royal Mauian