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Civil and Criminal Trials ▼ Intellectual Property ▼ Business Development ▼ Environment & Land Use



September 10, 2012

Via email

Uschi Snover/Clerk
Kalapana Seaview Estates Community Association

Re: *Opinion letter re application of HRS 421J*

Dear Ms. Snover:

The Directors of Kalapana Seaview Estates Community Association have requested that I provide an opinion whether HRS chapter 421J applies to the Association. In my opinion, it does apply.

I understand that there has been much argument among Association members about whether or not the Association has covenants and whether 421J applies. I also understand that some of your members have interpreted a portion of my prior opinion that "the Association runs with the land" to mean that Kalapana Seaview has covenants. My prior opinion was intended to address the issue whether the Association's ability to impose mandatory assessments continued despite the expiration of the Declaration of Covenants, Conditions and Restrictions. My opinion remains that the Association continues to have such power. Please understand that the power continues because of the original intent of those bound by the Declaration and

September 10, 2012
Uschi Snover/Clerk
Page 2

by implication of the law of servitudes. Authority exists that an expired Declaration may be extended by implication or, more commonly, by amendment by a majority of lot owners to extend the term of the covenants. See Restatement of the Law Third, PROPERTY, Servitudes § 6.10 (American Law Institute 2000): The Association itself exists as a covenant running with the land; this does not necessarily mean that all covenants in the original Declaration continue.

In addressing the specific question of whether Chapter 421J applies to your Association, I respectfully disagree with the statement of Attorney Richard S. Ekimoto that:

Since the Association does not have covenants running with the land (since the CC&Rs have lapsed) or any recorded governing documents, it is not a planned community under HRS Chapter 421J.

I disagree for two reasons. First, § 421J-1 applied to all planned community associations existing as of the 1997 effective date of chapter 421J. There is nothing in the statute that removes this application for associations whose covenants expire later. I understand that the Association's Declaration expired December 31, 1999.

Second, by amendment of Chapter 421J in 2008, the Legislature broadened the definition of "Association" in § 421J-2 to include not just associations created by a declaration, but also those entities defined under HRS § 607-14, as "a nonprofit homeowners or community association existing pursuant to covenants running with the land."

September 10, 2012
Uschi Snover/Clerk
Page 3

Quoting Act 70, § 1 of the 2008 Session Laws, the restated legislative purpose is:

The legislature finds that chapter 421J, Hawaii Revised Statutes, should be construed broadly to apply to all situations in which real property owners or lessees have an express or implied obligation to pay assessments or to comply with covenants related to the use of common areas, architectural control, the maintenance of units, or use restrictions on units.

The legislature further finds that some planned communities and planned community associations that were created prior to the enactment of chapter 421J, may not constitute planned communities and planned community associations as those terms are presently defined, thereby depriving those property owners of the rights and protections provided by chapter 421J.

The purpose of this Act is to assure that planned community associations are able to effectively enforce assessments and restrictive covenants and to ensure that all property owners within planned communities and members of planned community associations are entitled to the rights and protections provided by chapter 421J, Hawaii Revised Statutes.

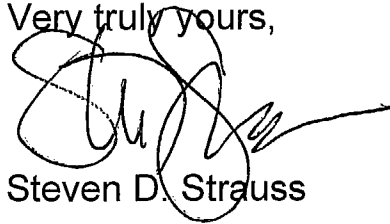
Given this broad application of Chapter 421J and the Legislature's desire to provide common-interest property owners with the rights and protections stated in Chapter 421J, I consider that Chapter 421J applies to Kalapana Seaview Estates Community Association.

September 10, 2012
Uschi Snover/Clerk
Page 4

If there is majority consensus to expressly extend the duration of the Declaration beyond the stated expiration date by an Amended and Restated Declaration effective December 31, 1999, the Association members may also want to consider taking such course.

Thank you for the opportunity to provide this opinion.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Strauss", with a long horizontal flourish extending to the right.

Steven D. Strauss