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Board of Directors
VILLAGE PARK
c/o MAHALO NUI MANAGEMENT, INC.
P.O. Box 700430
Kapolei, HI 96709

Re: View, Air & Light Restrictions and Other Issues

Members of the Board:

You have requested our opinion on the issues itemized below. In preparing this opinion we have, among other things, reviewed the Association governing documents (Declaration, etc.), conferred with the Building Department of the City and County of Honolulu, examined the files and records of the Department of Land Utilization, and researched applicable case decisions.

The issues presented and our responses are as follows:

I. **WHAT IS THE LEGAL INTERPRETATION OF THE TERMS USED IN ARTICLE IV, IMPROVEMENT OF PROPERTY, SECTION 4.02(e)(3), PROVIDING THAT "(3) THE IMPROVEMENT, ALTERATION OR REPAIR SHALL NOT BECAUSE OF ITS DESIGN UNREASONABLY INTERFERE WITH THE LIGHT, AIR OR VIEW OF ADJOINING LOTS", AS SUCH PROVISION RELATES TO THE FOLLOWING:**

A) Whether "adding a second story to an existing home would in fact unreasonably interfere with the light, air or view of a home owner upon an adjoining lot, and should therefore not be authorized"; and

B) Whether "the owner of any home or property can be legally required to remove any tree, palm, bush, rooftop air vent, or any other obstacle placed, constructed, erected or otherwise built on an 'adjoining lot' which may 'unreasonably interfere with the light, air or view....' of any other home owner or property owner with the Village Park Community."

C) Whether a home owner or property owner can legally require the City and County to remove certain trees, bushes, or other obstacle which may "unreasonably interfere with the light, air or view...." of any home owner or

property owner within the Village Park Community.

DISCUSSION

A) Generally, at common law, the landowner owned the surface of the land down to the center of the earth and above to the sky. In re Honolulu Rapid Transit Co., 54 Haw. 402, 408 (1973) This extensive property right was modified with the advent of air travel, but the landowner's rights still include "exclusive control of the immediate reaches of the enveloping atmosphere...(o)therwise buildings could not be erected, trees could not be planted, and even fences could not be run." United States v. Causby, 328 U.S. 256, 264 (1946) Thus, the owner "owns at least as much of the space above the ground as he can occupy or use in connection with the land." Id. See also: HRT, 54 Haw. at 408.

As to the specific rights of landowners to light, air and view, there are two extremes at which American courts have decided cases. At the one end was the English common law doctrine of "ancient lights", under which the owner of a window that has enjoyed unobstructed access to sunlight for a sufficient period of time can acquire a prescriptive easement entitling him to prevent an adjoining landowner from obstructing the accustomed light. Tenn v. 889 Associates, Ltd., 127 N.H. 321, 325; 500 A.2d 366, 369 (1985).

However, for various policy reasons, by 1977 no American common law jurisdiction had affirmatively recognized a right to acquire an easement of light by prescription. Id.

At the other extreme is the case of Fountainebleau Hotel v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. Dist. Ct. App. 1959), in which the court refused to uphold an injunction against construction of a building which would have cast a shadow over the neighboring hotel's cabana, pool, and sunbathing areas. The court found no legal right to the free flow of light and air from the adjoining land. When a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, even if it cuts off the light and air and interferes with the view of another. Id.

While well-settled California rule is that "a landowner has not easement for light and air over adjoining land", that rule is apparently applied only where there is "the absence of an express

grant or covenant." In Hawaii, there is no question that restrictive covenants limiting the height of homes are enforceable for the purpose of protecting a view, as well as the privacy of the homeowners. Sandstrom v. Larsen, 59 Haw. 491, 496; 583 P.2d 971, 976 (1978), citing McDonough v. W.W. Snow Construction Co., 131 Vt. 436, 442; 306 A.2d 119, 123 (1973). And, as we know, Village Park does, indeed, have restrictive covenants in this regard.

[Unfortunately, there is a paucity of decisions dealing with "air and light" restrictions in Hawaii. We cannot, under the circumstances, therefore, predict what the courts would decide, except to comment generally that any factual situations would be dealt with on a case-by-case basis.]

In determining the meaning of language used in a restrictive covenant the court will first look to the plain, ordinary and popular meaning of the words used in the covenant. Collins v. Goetsch,. 59 Haw. 481, 487; 583 P.2d 353, 358 (1978); Clark v. Wodehouse, 4 Haw. App. 507, 511 (1983). The prevailing Hawaii rule is that restrictive covenants are to be liberally construed **in favor of the grantee** (i.e., in the case of Village Park, the homeowner wishing to make the improvement), and substantial doubt or ambiguity is to be resolved **in favor of the free and unrestricted use of property** (to the extent of applicable state land use and county zoning regulations -- as to which a review of Building Department and Land Utilization records reveals none applicable to Village Park). Collins, 59 Haw. at 485, 583; P.2d at 356-357.

We are satisfied that, at first blush, an owner ought to be allowed to add a second floor addition to his/her home in Village Park. On careful consideration, however, such allowance must be balanced against a neighbor's right not to have the addition "unreasonably interfere" with his or her view -- in those instances where view is an issue. What, then, is unreasonable interference?

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The Hawaii courts have upheld restrictive home height covenants, where specific measurements or other express limitations were outlined. See: Clark, 4 Haw. App. at 508-509 and Sandstrom,

59 Haw. at 493. In contrast to the facts in these two case, however, the Village Park restrictive covenant does not have explicit, objectively measurable height limitation language. And, unfortunately, the term "unreasonable" is sufficiently ambiguous as to have the distinct potential to cause substantial confusion in a given case. Under most guidelines concerning ambiguous language, however, the Association will necessarily be obliged to uphold the position of the owner who wishes to add an obstructing improvement.

Having said that, we must add that a court could very well interpret the entire language of the covenant and apply Clark in such a way as to uphold the restriction in favor of the offended neighbor.

B) As to the second question regarding trees, palms, bushes, rooftop vents, etc., the reasoning would be the same. Common sense would dictate that the Association look closely at any obstruction, whether or not built of "bricks and mortar", the same as a second floor addition. Further discussion, therefore, would seem unnecessary on this particular point.

Where does all this lead us, then? The Association looks for guidance in an area where there are, in fact, few guidelines. In other words, the design committee and/or the board will have to "bite the bullet" in each case that comes before it and make a decision, no matter how difficult. And when it concerns ambiguities as seemingly insurmountable as the term "unreasonable", the Association may have a Hobson's choice confronting it. Certainly, neither a committee or a board will be seen to have made the "right" decision. One ruling will displease the owner who wishes to complete his addition or improvement. The other ruling will displease the offended neighbor. And such issues always carry the potential of ending up in court.

The Association is left with the burden of using its own common sense judgment, knowing full well that it may not be the final arbiter of the issue. In such cases, we recommend four guidelines:

1) Approach a light, air or view question first on the basis that the owner-applicant has the right to construct the addition that he/she is applying for.

2) Work backwards from that point in determining as objectively as common sense will allow whether the proposed

improvement will interfere with a neighbor's light, air and/or view.

3) If the decision is that the improvement, as designed, will not constitute an interference, the owner's application should be approved.

4) If the decision confirms that an interference would exist, then consider whether the interference is "unreasonable" -- keeping in mind that the term is so inherently ambiguous that each member of the committee or board will have to rely on his or her own understanding of the meaning of the word.

C) As to an owner's ability to prohibit the City and County, or any other governmental agency for that matter, from obstructing the owner's light, air or view, the Village Park covenants cannot be relied on. The Association's covenants bind all owners contractually, one to the other, and constitute encumbrances against the owners' property which "run with the land." Governmental agencies are not bound by, the Village Park covenants, and any rights an owner might have against public obstructions would be a matter strictly between the owner the government. The Association would have no interest, nor obligation, in the matter.

II. **ARE THERE ANY CITY AND COUNTY ORDINANCES, STATE LAWS, OR ANY OTHER CODES, ARTICLES, OR DECLARATION, OR LAWS WHICH RESTRICT, PROHIBIT, HINDERS OR FORBID THE BUILDING OF A SECOND STORY ADDITION TO ANY EXISTING HOME WITHIN THE VILLAGE PARK COMMUNITY?**

Our research, including a review of the original development plan for Village Park, has not revealed any such prohibitive ordinances, etc.

III. **IF IN FACT THERE ARE NO CITY AND COUNTY ORDINANCES, STATE LAWS OR ANY OTHER CODES, ARTICLES OR DECLARATIONS RESTRICTING, PROHIBITING, HINDERING OR FORBIDDING THE BUILDING OR A SECOND STORY ADDITION TO ANY EXISTING HOME WITHIN THE VILLAGE PARK COMMUNITY, WHAT ARE THE LEGAL RAMIFICATIONS IF THE VPCA EITHER:**

A) Approves the building of such second stories upon request by its members, providing that all the requirements of the City and County of Honolulu are met, or

B) Denies the request by its members to build such a second story upon any existing home within the Village Park Community?

As stated above, any decision by the Association in this regard will prove unpopular with at least one of the parties. And, without intending to sound flippant, we must say that it will be impossible to prevent the Association from being sued by one party or the other in a given case. The fact remains that a decision must be made in each case, and the best protection the Association can have is for the board or committee to make that decision with as much careful consideration and rationality as possible under the circumstances in order that a charge of arbitrariness or capriciousness cannot be supported.

IV. WHAT IS THE LEGAL INTERPRETATION OF ARTICLE III, LAND CLASSIFICATIONS AND APPLICABLE RESTRICTIONS, SECTION 3.02(1) THAT STATES "....VEHICLES NOT IN OPERATING CONDITION SHALL NOT BE KEPT OR MAINTAINED UPON ANY LOT SO AS TO BE VISIBLE FROM NEIGHBORING PROPERTIES OR ADJOINING STREETS;...."?

Restrictions of any kind are always construed most strictly in favor of the party against whom it is directed. Consequently, the homeowner will be given the benefit of the doubt in any enforcement action involving a restriction.

In this case, the phrase "not in operating condition" is not necessarily inherently vague -- either the vehicle is or it is not able to operate. The problem appears to us to be twofold: 1) the restriction does not contain other criteria which could be used as an enforcement tool; and 2) without such other criteria, it may not be possible to determine operability on the basis of, say, a visual inspection alone.

As a first step, we suggest that the board of directors revise the Association Rules. In addition to the "operating condition" requirement, we suggest adding the following: that the vehicle be "street legal"; i.e., that it: i) be currently registered, and ii) have a current safety inspection sticker. We also recommend that the Rules include a provision authorizing the

Association to remove any such vehicles from the common elements of the project. In this latter regard, we would strongly counsel against the board taking unilateral action to have a vehicle removed from private property.

As the board is charged with the duty of enforcing all of the Association's covenants and rules, the Covenant Violation Procedures should be followed (see page 1 of the Rules handbook). In the necessary case, the Association's attorney will have the legal authority, through the board of directors, to take all appropriate action, including the filing of a lawsuit seeking an injunction against the offending owner. (See Article VII, Section 7.05(a) of the Declaration.)

V. DO THE OWNERS HAVE THE AUTHORITY TO TERMINATE ALL OR PARTS OF THE LIMITATIONS, RESTRICTIONS, COVENANTS AND CONDITIONS OF THE VILLAGE PARK DECLARATION OF PROTECTIVE COVENANTS PRIOR TO THE 30 YEAR TERM AS CONTAINED IN ARTICLE VII, MISCELLANEOUS PROVISIONS, SECTION 7.04(b)?

In a word, yes.

VI. IF THE DECLARATION OF PROTECTIVE COVENANTS CAN BE TERMINATED IN ITS ENTIRETY OR IN PART, WHAT ACTIONS MUST THE VILLAGE PARK COMMUNITY MEMBERS TAKE TO TERMINATE THE DECLARATION OR PARTS OF THE DECLARATION AND WHAT CONSEQUENCES, IF ANY, MAY IT HAVE ON ITS MEMBERS?

Section 7.04 provides the procedural guidelines for a repeal of the Covenants, in whole or in part, as follows:

a) A vote must be taken at a meeting of the Association duly called. The meeting can either be the annual meeting or a special meeting called in accordance with Article I, Section 4, of the Village Park Bylaws.

b) Notice of the meeting must be given in accordance with article I, Section 5, of the Bylaws.

c) The notice **must** state "as a purpose the consideration of the amendment or repeal giving the substance of the proposed amendments or indicating the provision to be repealed, as the case may be."

d) The notice of meeting must be given to any mortgagees of record covering lots in Village Park who have provided written requests therefor to the Association.

d) The amendment or repeal must be approved by the affirmative vote of "not less than three-fourths (3/4ths) of the total votes" of the membership.

e) The following must be recorded as to any amendment or repeal approved by the Association:

i) A notarized certificate of the secretary or an assistant secretary of the Association setting forth in full the amendment or amendments of such provisions so approved, including any portion or portions thereof repealed, also certifying that the amendment(s) or repeal has been approved by vote of the owners pursuant to Section 7.04(a)(1); and

ii) A written instrument setting forth in full the amendment or amendments, including any portion or portions of the Declaration repealed. This notarized instrument must be signed by owners having not less than three-fourths (3/4ths) of the total votes of the membership.

The consequences an amendment or repeal may have on the owners will, of course, vary depending on the measure adopted. It is generally thought, however, that the total absence of covenants (particularly as to design, maintenance and upkeep) may, but does not necessarily, result in a devaluation of the property. Any other estimation of the consequences would be purely speculative.

VII. DOES THE VILLAGE PARK DECLARATION OF PROTECTIVE COVENANTS APPLY TO ANY MEMBER'S PROPERTY WITHIN THE VILLAGE PARK COMMUNITY, WHETHER LEASEHOLD OR FEE?

Article II, Section 2.01 of the Covenants provides in pertinent part as follows: "All of the leasehold property comprising Village Park....shall be subject to the provisions of this Declaration...." At first blush, the language appears to distinguish between leasehold and fee properties, when in fact all of the property within Village Park and subject to the Covenants was, in 1979, leasehold.

We deem the language not to be determinative of the type of property covered by the Covenants, but rather a mere recitation of the type of ownership in effect as of the inception of the project. Regardless of conversions to fee, that same Section also provides that the same property:

> "....shall be held, sold, conveyed, encumbered, leased, occupied and improved subject thereto."

To give Section 2.01 the opposite meaning would conceivably enable an owner to defeat restrictive covenants simply by acquiring the fee, thus resulting in a logical and legal absurdity. This has not happened in Hawaii.

Consequently, we conclude that the Covenants cover and encumber all of the members' properties within Village Park, whether leasehold or fee.

Thank you for allowing us the opportunity to be of assistance in the matter. We trust the foregoing is responsive to your inquiry. If you have any questions regarding this opinion, please feel free to contact us at any time.

Yours very truly,

JAMES W. THARP

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