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Fighting Hawaii condo boards is costly, risky

Harassment of Lanikai resident got nasty and very expensive

By **Rob Perez**
Advertiser Staff Writer

The retaliation started soon after Lanikai resident Paula Osawa sued her homeowners' association.

Two of her guests were improperly ordered to leave Bluestone, the gated condo project where Osawa and her husband have lived since 2003.

The couple's exterior utility line was cut without any advance notice, disrupting phone, fax, Internet and security-alarm service to their unit for days.

A small tree was planted outside their lānai, marring a previously unobstructed view of the Ko'olau mountains and the 17th hole at Mid-Pacific Country Club.

The retaliation wasn't conducted by anonymous detractors upset that Osawa sued the association for failure to adequately maintain

Bluestone's common elements. The retaliation came at the hands of association representatives, including the president, according to an October binding arbitration ruling in the case.

The Bluestone group now must pay a steep price for those and other actions.

Retired state judge Patrick Yim, acting as a private arbitrator, awarded Osawa nearly \$433,000 in damages and attorney fees for a variety of claims, including compensation for the retaliation. Yim ruled that association president Don Machado is personally liable for \$30,000 of the award, describing Machado's conduct as spiteful, harassing and outrageous. Machado would not comment for this article through a Bluestone attorney.

The Osawa case is an extreme example of what condo attorneys, arbitrators, property managers and others say is a growing trend in Hawai'i.

As the economy has tanked and home values dropped, more condo owners have become embroiled in disputes about how their projects are run or whether the association boards are doing enough — or too much — to raise funds to maintain the properties.

The Bluestone case also is being cited by property managers and others as a warning to the 1,600-plus apartment associations statewide, showing what can happen if volunteer board members get out of hand.

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As with any kind of confrontational situation, neighbor-to-neighbor condo disagreements can quickly escalate when emotions go unchecked. In some cases, residents have summoned police to keep the peace or sought restraining orders against their neighbors out of safety concerns.

At one Moloka'i project, homeowners reported that their cars were damaged, tires flattened, windshields shattered or pets killed after some residents questioned the board's actions. One contentious point was the board's frequent hiring of a convicted felon to do repairs around the complex.

Lashing out

Condo disputes are as old as the condominium projects themselves. When a large number of people reside in relatively close quarters, quarrels are bound to erupt, sometimes turning even minor disagreements into outsized fights.

The potential for such spats is especially high in Hawai'i, which easily has the greatest concentration of condo units — nearly 30 percent of the housing stock — of any state in the country.

But the depressed economy has added a new layer of volatility, the aloha spirit notwithstanding.

"Condo disputes are a reality," said Keith Hunter, president of Dispute Prevention & Resolution Inc., the state's largest private arbitration and mediation firm. "They happen in good economies and poor economies. But everything seems to be magnified in a down market."

Since late 2006, Hunter's firm has handled roughly 20 percent to 25 percent more condo disputes, including construction defect cases. During that period, the median sales price of an existing O'ahu condo dropped roughly 7 percent.

If prices decline enough, an owner's equity in the condo can be wiped out, often precluding the

option of selling the unit and moving elsewhere. In a booming market, that option is more viable — and sometimes exercised to flee an out-of-control board or unruly neighbor.

But Hawai'i's struggling economy and lower home values have created a malaise that has added to the potential volatility of living in close quarters, real estate and mediation professionals say. Facing unemployment, reduced wages, forced furloughs or personal bankruptcies, people can get depressed — and more readily lash out at neighbors.

Another factor contributing to the rise in disputes has been that Hawai'i simply has more condominiums, creating more opportunities for bickering to erupt. From 2001 to 2008, the number of units statewide jumped 28 percent, to roughly 151,000, state figures show.

Financial squeeze

Given the tough economic times, the reluctance of board members to raise homeowner fees to keep pace with maintenance and repairs has played a key part in many recent condo disputes, including the Bluestone one, property managers and others say.

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prompted some boards to raid their reserve funds to pay the bills while allowing maintenance to be deferred.

"They want to keep everybody happy, so they don't raise maintenance fees — and that's a big mistake," said Dale Armstrong, a consultant who studies reserve requirements for condo associations.

At one O'ahu project, the board refused to approve a budget because it included a maintenance fee increase recommended by its property manager. By July 2008, the association had run out of money, and several board members had to tap their own funds so the resident manager's salary could be covered. The board members eventually were paid back, and the board ended up approving a special assessment that each homeowner had to pay.

Accurate statistics on the number of condo disputes statewide are hard to come by, primarily because the fights usually don't end up in court or other public forums. Some go through arbitration and are settled confidentially or with only the involved parties generally aware of the outcomes. Many languish for months.

Bluestone battle

Sometimes, the issues are resolved by sheer political muscle. Disgruntled homeowners scramble to get the necessary votes to engineer a board takeover, ousting the leaders of the opposing factions — or the entire board. Lillian McCarthy, newsletter editor at the Community Association Institute, said that wholesale replacements of boards seem to be on the rise.

That's what happened at Bluestone in 2007. Machado and his supporters succeeded in replacing a board led by Osawa after the Osawa group tried to implement a \$20,000-per-owner assessment to address years of backlogged repairs.

With its leaky roofs, cracked sidewalks, fading

paint, degraded common facilities and other problems at the time, the 136-unit, 50-acre Bluestone had been a project noted for its disrepair, according to Yim's ruling. The association had delayed needed maintenance for years, a practice Yim called grossly negligent.

Every Bluestone unit needed exterior carpentry repairs in 2007, for instance, and extensive roof leaks had been a constant concern dating to the early 1990s, Yim wrote. The fence surrounding the tennis courts collapsed from excessive rust and deterioration.

Responding to homeowner complaints, the association merely "patched and prayed," the ruling said.

Yim didn't just question the group's maintenance approach. He noted that Bluestone hired unqualified maintenance workers, including teenage girls to fix drainage problems.

In real estate circles, Bluestone developed such a widespread reputation for its poor upkeep that the notoriety actually diminished the market value of Osawa's unit, and Yim included \$30,000 in the award to compensate for that reduced value, according to his findings. Real estate attorneys say such diminished-value awards are extremely unusual in Hawai'i.

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Osawa, a former music teacher, filed the Bluestone lawsuit in June 2007 after attempts to mediate the dispute were unsuccessful.

Among her claims, upheld by Yim, was that the association's neglect contributed to interior damage to her home from roof leaks and flooding. Yim wrote that extensive roof leaks throughout the project were due not to simple mistakes on the association's part but its utter failure to assess adequate reserves to address the problem.

Even though both sides agreed to binding arbitration, Bluestone has since gone to court to try to get Yim's ruling thrown out on grounds that the arbitrator exceeded his authority and his findings were flawed. The case is pending, and for that reason, William Gilardy, the association's attorney, declined comment.

At its February meeting, the Bluestone board approved paying Machado's \$30,000 portion of the arbitration award, agreeing with Gilardy's assessment that the president's actions did not constitute gross negligence and willful misconduct, according to the association newsletter.

That action already has drawn criticism from some Bluestone owners and may be discussed at the annual homeowners' meeting Tuesday.

Osawa and another Bluestone owner said many of the maintenance problems noted in Yim's report have since been fixed or are being addressed.

'Recipe for disaster'

Homeowners who serve on condo boards typically are volunteers who have little or no experience running large apartment developments. Yet they have the authority to make decisions that can greatly affect scores of their neighbors financially and in other ways. If the board members ignore their fiduciary duties

or fail to follow the advice of the hired experts, the ramifications can be serious and costly, real estate attorneys and property managers say.

"It can be a recipe for disaster," said Terry Revere, Ozawa's lawyer in the Bluestone case.

In one 2004 court case, a Kāne'ohe condo owner was awarded roughly \$430,000 by a jury because her homeowners' association at Puu Alii failed to fix her unit's mold and mildew problem, which stemmed from design defects. She had repeatedly asked that the problem be resolved.

At Ke Nani Kai on Moloka'i, a dispute escalated when the association in 2007 filed a defamation lawsuit against two families who had initiated a campaign to replace board members. The campaign was driven in part by the board's failure to deal with two men with criminal records who damaged property and harassed homeowners to silence and intimidate residents critical of the board, according to documents filed in connection with the court case.

"It was like living in a Nazi regime," said Bob Aldrich, one of the homeowners who was unsuccessfully sued by the association.

A state judge eventually dismissed the defamation lawsuit, and one of the families filed

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a counter suit, seeking punitive damages and other remedies. That case is pending. An association attorney didn't respond to a request for comment.

Homeowners who have done battle with their associations say the stress of the fight can be overwhelming.

"It was several years of fear and frustration," Osawa said of her Bluestone battles. "You might call it a living hell."

But property managers and others say the Bluestone ruling, which is being circulated among boards at other projects, is likely to have an impact well beyond the Lanikai gated community, providing lessons for hundreds of other condo groups statewide.

"What I hope the impact will be is that boards let their management companies manage the properties," said Revere, Osawa's attorney.

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CONFLICT AT THE CONDOS

The down economy has contributed to a rise in condo disputes, according to industry professionals. An increase in condo units also has been a factor. One small indicator – mediations tracked by the Real Estate Commission – shows a high hit in 2008.

	CONDO UNITS	MEDIATION
2001	118,209	13
2002	133,276	24
2003	134,444	47
2004	135,708	26
2005	138,334	24
2006	142,171	6
2007	145,124	22
2008	151,238	51

Source: Hawai'i Real Estate Commission
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In 1990, Hawai'i had the highest concentration of condominium units among the 50 states, based on the percentage of condos in the overall housing market. By 2008, Hawai'i's concentration had increased significantly, while the percentage in Florida, the No. 2 state in 1990, remained virtually unchanged.

	Condo units	% of housing market
1990		
Hawai'i	81,127	20.8%
Florida	944,590	15.5%
2008		
Hawai'i	151,238	29.5%
Florida	1,425,698	16.2%

Source: U.S. Census Bureau, Advertiser research

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