

Mark Murakami esq  
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No. 29179

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

JOSEPH PAVSEK and IKUYO  
PAVSEK,  
  
Plaintiffs-Appellants,  
  
vs.  
  
TODD W. SANDVOLD; JULIANA C.  
SANDVOLD; KENT SATHER; JOAN  
SATHER; WAIALUA OCEANVIEW  
LLC; HAWAII BEACH HOMES,  
INC., HAWAII BEACH TRAVEL,  
INC.; and HAWAII ON THE BEACH,  
INC.,  
  
Defendants-Appellees,  
  
and  
  
JOHN DOES 1-10, JANE DOES 1-  
10; DOE PARTNERSHIPS 1-10;  
DOE CORPORATIONS 1-10; and  
DOE ENTITIES 1-10,  
  
Defendants.

) Civil No. 08-1-0131  
)  
)  
) APPEAL FROM THE  
) JUDGMENT, filed on May 28,  
) 2008  
)  
)  
) FIRST CIRCUIT COURT  
)  
) HONORABLE VICTORIA S.  
) MARKS

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Joan Kikumoto  
NORMA T. YARA  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

FILED

**PLAINTIFFS-APPELLANTS' REPLY BRIEF**

**APPENDIX A**

**and**

**CERTIFICATE OF SERVICE**

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JOSEPH PAVSEK and  
IKUYO PAVSEK

No. 29179

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JOSEPH PAVSEK and IKUYO PAVSEK,	)	Civil No. 08-1-0131
	)	
Plaintiffs-Appellants,	)	APPEAL FROM THE JUDGMENT,
	)	filed on May 28, 2008
vs.	)	
	)	FIRST CIRCUIT COURT
TODD W. SANDVOLD; JULIANA C. SANDVOLD; KENT SATHER; JOAN SATHER; WAIALUA OCEANVIEW LLC; HAWAII BEACH HOMES, INC., HAWAII BEACH TRAVEL, INC.; and HAWAII ON THE BEACH, INC.,	)	HONORABLE VICTORIA S. MARKS
	)	
Defendants-Appellees,	)	
	)	
and	)	
	)	
JOHN DOES 1-10, JANE DOES 1- 10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10,	)	
	)	
Defendants.	)	

**PLAINTIFFS-APPELLANTS' REPLY BRIEF**

Defendants-Appellees each submit Answering Briefs, but fail to address the heart of Plaintiffs-Appellees Joseph and Ikuyo Pavseks' ("Pavseks") arguments. As to Count I, Defendants-Appellees do not address the plain, unambiguous meaning of HRS § 46-4(a), and this Court's duty to give effect to the plain meaning of this unambiguous statutory language. As to Counts II to IV, Defendants-Appellees fail to address the Restatement of Torts provisions

and relevant case law that recognizes that the nuisance claims stand independent of whether there is a direct cause of action under HRS § 46-4(a). As to Counts V and VI, the Sandvold Defendants-Appellees ignore the case law establishing that they can be liable for breach of fiduciary duty through their improper use of the commonly owned easement. Finally, as to Count VII, the Defendants-Appellees opposition to the unjust enrichment claim founders on their inability to rebut the authority acknowledging that a benefit is conferred when one is unjustly enriched by profiting from conduct that requires others to bear unjust burdens.

**I. HRS §46(A) PROVIDES A DIRECT CAUSE OF ACTION, NOT DUPLICATED BY AN ADMINISTRATIVE PROCEEDING.**

Defendants-Appellees scurry to find reasons to ignore the plain language and meaning of HRS § 46(a), which allows owners of real estate directly affected by zoning ordinances to bring suit in court to enforce those ordinances. None of them address the case law requiring this court to interpret the statute according to its plain meaning. *See Thompson v. Kyo-Ya Co., Ltd.*, 112 Hawai'i 472, 474 & 475, 146 P.3d 1049, 1051 & 1052 (2006).

The Sather Defendants make two irrelevant arguments. First, they simply ignore the language in HRS § 46-4(a) and claim that whether a private cause of action exists depends upon applying factors to determine whether an implied cause of action exists in a statute, citing *Reese v. Carlisle*, 113 Hawai'i 446, 458-59, (2007). This makes no sense. HRS § 46-4(a) on its face allows a private party, that is, a directly affected property owner, to bring suit. The

statute does not need to be interpreted to determine whether such a cause of action can be implied. Second, they engage in a bizarre legislative analysis to conclude that HRS § 46-4(a) means exactly the opposite of what it states, that is, the Sather Defendants conclude that this provision applies only when a "directly affected" landowner wants to "contest" or "change", rather than "enforce" an ordinance. Clearly, these analyses are without merit.

All Defendants-Appellees argue that regardless of the plain wording in HRS § 46(a), a directly affected property owner cannot bring suit to enforce an ordinance in court but must, instead, file a declaratory petition with the City Director of Planning and Permitting ("Director"), and appeal that decision to the Zoning Board of Appeals ("ZBA") and then appeal that decision to the Circuit Court. Defendants-Appellees argue that this is required under the doctrines of exhaustion of administrative remedies and primary jurisdiction. However, in their Opening Brief, Plaintiffs had pointed out that this interpretation was contrary to the plain wording of HRS § 46-4, which clearly distinguishes between appeals to the Circuit Court (allowed under HRS § 46-4(b)) and a suit to enforce an ordinance in Circuit Court (allowed under HRS § 46-4(a)). None of the Defendants-Appellees even attempt to reconcile this anomaly, which, of course, violates the duty of a court "to give effect to all parts of a statute, that no clause, sentence, or word shall be construed as superfluous, void or insignificant." *Office of Hawaiian Affairs v. HCDCH*, 117 Hawai'i 174, 191, 177 P.3d 884, 901 (2008) (quoting *Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984)).

Moreover, the Pavseks pointed out in their Opening Brief that the administrative avenue of relief advocated by Defendants-Appellees does not guaranty or provide for the rights accorded to the Pavseks by HRS § 46-4(a). None of the Defendants-Appellees address this fatal incongruity. Defendants-Appellees would require that the Pavseks file a petition for declaratory relief with the Director as an "interested person" under an administrative regime that allows the Director discretion on whether to act on that petition. This procedure emasculates the right of the Pavseks as directly affected property owners under HRS § 46-4(a). If this Court were to mandate this procedure, it would by judicial fiat rewrite the statutory right of directly affected landowners to bring a suit in court as set forth in § 46-4(a).<sup>1</sup>

Indeed, after the Complaint in this matter was dismissed, Defendants-Appellees have continued with their short-term rentals. For example, the Pavseks made a request to the Director on April 6, 2008 to check on an illegal short-term rental of the Sandvold Defendants-Appellees' property. The Pavseks notified the Director at that time that the renters at this property had indicated they had rented the property from April 5, 2008 to April 12,

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<sup>1</sup> The Sandvold Defendants-Appellees and Oceanview Defendants-Appellees rely heavily on language in *Waikiki Discount Bazaar v. City & County of Honolulu*, 5 Haw. App. 635, 641-42, 706 P.2d 1315, 1320 (1985) to argue that this Court has previously determined that HRS § 46-4(a) does not provide a direct cause of action. However, as this Court recognized in *Pono v. Molokai Ranch, Ltd.*, 119 Hawai'i 164, 187, 194 P.3d 1126, 1149 (App. 2008), *Waikiki Discount Bazaar* concerned plaintiffs who complained about the issuance of building permits by the City and County of Honolulu and the City's alleged failure to enforce various Comprehensive Code Provisions. *Waikiki Discount Bazaar* did not address § 46-4(a) and did not address a direct suit to enforce a zoning ordinance by a directly affected landowner.

2008. However, the Director did not investigate the matter until May 27, 2008, more than a month later, and this investigation consisted simply of an interview with someone at the property who was identified as a “long term tenant” and who stated that they “do not have any short term renters.” The Director then issued a letter indicating that there was no violation. The Pavseks then sought to appeal this decision to the ZBA. A copy of the Pavseks’ Petition for Appeal of Director’s Denial of Complaint Regarding Transient Vacation Rental detailing these facts is attached hereto as Appendix A. However, the ZBA ruled that it had no subject matter authority to consider the Pavseks’ desire to appeal the Director’s refusal to enforce a violation of the zoning ordinance. The Sandvold Defendants-Appellees have attached this ruling of the ZBA as their Appendix E. From this ruling, it is clear that there is no administrative procedure comparable to HRS § 46-4(a). Thus, if this Court does not allow the Pavseks to file a suit in court to enforce the zoning ordinance, the Pavseks will be left with no equivalent remedy.<sup>2</sup>

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<sup>2</sup> The Sandvold Defendants go to extreme pains to misrepresent their continuing abuse of the short-term rental law. In their Answering Brief, they attach as an appendix their “Reply Memorandum” in the ZBA proceeding in which they accuse Mr. Pavsek of making a complete fabrication regarding the illegal April 2008 rental. Of course, they fail to address the facts set forth in the Pavsek petition before the ZBA. See Appendix A to this Reply Brief. This petition showed that Mr. Pavsek reported an illegal short-term rental to the Director on April 6, 2008, at which time the Director was told that the renters would be there from April 5, 2008 to April 12, 2008. *Id.* The Director was reminded again on April 12, 2008, that there was a short term vacation renter whose final rental day was April 12<sup>th</sup>. *Id.* However, the Director did not conduct any investigation until May 27, 2008, at which time the renters were long gone, and the Director’s representative accepted at face value the self-serving statement from someone at the property that there had been no violation. *Id.*

In their Opening Briefs, the Pavseks had pointed out that the case authorities relied upon by Defendants-Appellees (*e.g.*, *Colony Surf, Ltd v. Director of the Department of Planning and Permitting*, 116 Hawai'i 510, 174 P.2d 349 (2007) and *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 734 P.2d 161 (1987)) were inapposite because they involved citizen suits in which individuals sought review of an agency's decision under statutes or city ordinances that limited an aggrieved party to contest an agency's decision. Defendants-Appellees continue nonetheless to rely on these cases. In addition, the Sandvold Defendants-Appellees cite to this Court's recent decision in *Pono v. Molokai Ranch, Ltd.*, 119 Hawai'i 164, 194 P.3d 1126 (App. 2008), as further support for their claim that this Court should ignore the plain language of HRS § 46-4(a) and relegate the Pavseks to filing a petition for declaratory relief with the Director.

As this Court is no doubt aware, the *Pono* decision does not help Defendants-Appellees. In that case, this Court held that the statutory provisions under which the plaintiffs sought to bring a claim, HRS Chapter 205, did not expressly authorize a private individual to enforce the chapter. *Id.* at 187, 194 P.3d at 1149. This Court then did an analysis of whether there was an implied private cause of action in this chapter and determined that there was none. *Id.* at 190-91, 194 P.3d at 1152-53.

Here, of course, the Pavseks seek to bring a direct action against absentee neighbors who rented out their properties in violation of City Land Use Ordinances under HRS § 46-4(a), which – unlike Chapter 205 – allows a



private individual to bring a suit. The Pavseks are not seeking to appeal an agency's determination and there is no equivalent agency procedure of which the Pavseks can avail themselves.<sup>3</sup>

Defendants-Appellees also go to lengths to portray the issue of whether they have or have not violated the applicable Land Use Ordinances ("LUOs") as a matter within the special competence of the Director and try to portray the Pavseks as simply upset with a prior administrative agency ruling that there has been no violation of the LUOs if a property is rented out for 30 days, even though it is not occupied for 30 days. This misstates the record. The Pavseks are seeking to exercise their right to enforce an ordinance that prohibits short-term rentals. The Pavseks have not made any allegation that property must be occupied for 30 days. Instead, they are simply demanding that these absentee neighbors abide by the letter of the law, prohibiting rentals for periods of less than 30 days.

## **II. THE PAVSEKS CAN MAINTAIN NUISANCE CLAIMS.**

Only the Sather Defendants-Appellees address the Pavseks arguments that the Pavseks maintain standing to bring claims for public and private nuisance. However, the Sather Defendants-Appellees do not address

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<sup>3</sup> The Pavseks had noted in their Opening Brief that dismissal based on failure to join the City & County of Honolulu would be error. In their Answering Brief, the Sather Defendants-Appellees admit that the failure to join the City was not a basis for dismissal, while the Sandvold Defendants-Appellees simply request that the City be added as a party if this matter is remanded. The Oceanview Defendants-Appellees do not address this matter. Thus, none of the Defendants-Appellees argue in this appeal that dismissal of the Complaint was warranted because the City was not joined as a party.

the clear Restatement of Tort provisions and case law authorizing such actions. For both Public and Private Nuisance, the Sather Defendants-Appellees simply argue that there is an insufficient showing of harm to be a public nuisance. They ignore, however, the allegations in the Complaint that the Defendants-Appellees' uses of their property have:

(1) caused increased traffic noise and congestion in this residential neighborhood; (2) negatively affected the value of Plaintiffs' property; (3) prevented or interfered with Plaintiffs' use and enjoyment of Plaintiffs' lot for residential purposes; (4) imperiled and/or destroyed the residential character of the neighborhood in violation of the intent of the zoning ordinances; (5) overburdened the private right of way, and (6) created increased noise levels, trash, litter, discarded cigarette butts, beer bottles and drug paraphernalia in this residential neighborhood and the beach in front of this neighborhood. ROA1:6.

The Sather Defendants-Appellees' other principle argument is to claim that because there has been no administrative determination that they have violated short-term rentals, they (and the other Defendants) cannot be found to have caused a nuisance. This is absurd. The authorities are clear and clearly stated by the Pavseks in their Opening Brief: The Restatement of Torts and case law grant an individual standing to bring a nuisance claim alleging that a zoning ordinance has been violated, without first seeking an administrative determination, **as long as that individual can allege harm of a**

different kind than that suffered by other members of the public. See

Opening Brief at pages 24-26.

**III. THE PAVSEKS HAVE STATE A BREACH OF FIDUCIARY DUTY CLAIM AGAINST THE SANDVOLD DEFENDANTS-APPELLEES.**

In their opening brief, the Pavseks cited Hawai'i caselaw, showing that a general fiduciary duty exists between co-tenants and that, under *Hewitt v. Waikiki Shopping Plaza*, 6 Haw. App. 387, 395, 722 P.2d 1055, 1060 (1986), the duty extends to whether the use of a commonly owned right-of-way is reasonable. Contrary to the Sandvolds-Appellees' claim, there is no requirement that the Pavseks show that they have been completely dispossessed of the ability to use the shared easement. Under *Hewitt*, they need only show that the use was unreasonable, and the Pavseks have satisfied this requirement by alleging that the Sandvolds-Appellees' use of the easement has overburdened it through increased traffic and use. ROA 1:11.

**IV. THE PAVSEKS HAVE STATED AN UNJUST ENRICHMENT CLAIM AGAINST ALL DEFENDANTS-APPELLEES.**

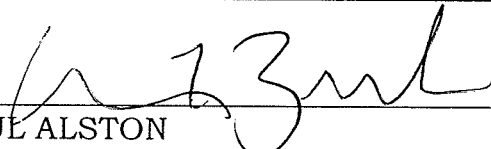
The Defendants-Appellees object to the Unjust Enrichment claim, however, they do not address the Restatement of Restitution authority cited by the Pavseks, which recognizes that the concept of a benefit conferred includes “[a]ny profit realized in consequence of intentional wrongdoing is unjust enrichment because it results from a wrong to the plaintiff.” Restatement (Third) of Restitution § 3 at comment a. To the extent that Defendants-Appellees have enriched themselves by engaging in short-term rentals and

placed the burdens associated with these illegal rentals on the Pavseks, they should be required to disgorge their gains.

**V. CONCLUSION**

For the reasons set forth herein and in the Opening Brief, the Pavseks respectfully request that this Court enter an order reversing the Circuit Court's (1) Order Granting Defendants' Motions to Dismiss as to All Claims and All Parties entered on May 1, 2008 and (2) Final Judgment entered in favor of Defendants-Appellees and against the Pavseks entered on May 22, 2008, and remand this case for further proceedings.

DATED: Honolulu, Hawai'i, DEC 31 2008.

  
\_\_\_\_\_  
PAUL ALSTON  
THOMAS E. BUSH  
KEN T. KUNIYUKI  
Attorneys for Plaintiffs-Appellants  
JOSEPH PAVSEK and  
IKUYO PAVSEK



**PETITION FOR APPEAL OF DIRECTOR'S DENIAL OF  
COMPLAINT REGARDING TRANSIENT VACATION RENTAL**

Petitioner JOSEPH PAVSEK ("Pavsek"), by and through his counsel undersigned, hereby appeals Respondent HENRY ENG, Director ("Director") of Department of Planning and Permitting ("DPP")'s denial of his complaint regarding an illegal transient vacation rental at 61-703 Papailoa Road, TMK: 6-1-004:74, which is owned by TODD W. SANDOVLD and JULIANA C. SANDVOLD ("the Sandvolds"), dated June 3, 2008. See Exhibit 1, Director's denial letter.

This appeal is made pursuant to Hawaii Revised Statutes § 46-4(a); the Department of Land Utilization, Rules of the Zoning Board of Appeals ("ZBA Rules") § 22-1; the Revised Ordinances of Honolulu ("ROH") §§ 21-4.110-1, 21-4.110-2 and 21-10.1; and Section 6-1516 of the Revised Charter of the City and County of Honolulu.

**I. LEGAL BASIS FOR PETITION**

a. HRS § 46-4(a) provides that zoning ordinances "**may be enforced** by appropriate fine and penalties, civil or criminal, or **by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.**" (Emphasis added.)

b. Section 6-1516 of the Revised Charter of the City and County of Honolulu provides that "[t]he zoning board of appeals shall hear and determine appeals from the actions of the director in the administration of the zoning ordinances . . . ."

c. ZBA Rules § 22-1, provides “**any person** who is specially, personally and adversely affected by an action of the director may appeal the director’s decision to the board[.]” (Emphasis added.)

d. On April 6, 2008, Pavsek notified the DPP by email that there was an illegal short term vacation renter at 61-03 Papailoa Road, who was renting the property from April 5, 2008 to April 12, 2008, and requested that the DPP investigate before April 12, 2008. See Exhibit 2, Pavsek’s 4/6/08 email to C. Ishikawa.

e. On April 12, 2008, Pavsek followed up on his April 6th email and requested that action be taken before the short-term renters left. See Exhibit 3, Pavsek 4/12/08 email to C. Ishikawa.

f. On April 15, 2008, Ishikawa indicated that Pavsek’s complaint had been assigned to Todd LeBang who was conducting an investigation.

g. Not having any further communication on this matter, on May 28, 2008, Pavsek’s counsel requested a determination of what action the DPP had taken regarding the Pavsek Complaint. See Exhibit 4, Bush 5/28/08 letter to C. Ishikawa.

h. On June 3, 2008, the Director notified Pavsek’s counsel that an investigation was conducted on May 27, 2008 and that there was no violation. See Exhibit 1, Director’s 6/3/08 letter. This constitutes an “action of the director.”

## II. PETITION CRITERIA

ZBA Rules § 22-1(a), sets forth the eight (8) elements of a petition, identified and responded to below.

**1. The petitioner's name, mailing address and telephone number.**

Name: Joseph Pavsek

Mailing Address: 61-724 Papailoa Road, Haleiwa, Hawai'i  
96712

Telephone No.: (808) 524-1800

**2. Identification of the property by street address and tax map key number.**

Street Address: 61-703 Papailoa Road, Haleiwa, Hawaii  
96712

TMK: 6-1-004:74

**3. The petitioner's interest in the property.**

a. Mr. Pavsek is a homeowner who resides on the same street as, in the same neighborhood as, and in close physical proximity to the property at 61-703 Papailoa Road.

b. Papailoa Road is located off of Kamehameha Highway on the North Shore between Haleiwa Town and Laniakea Beach. Papailoa Road runs parallel to Kamehameha Highway, between this Highway and the beach in an area zoned for residential use. No streets intersect with Papailoa Road, other than the exit from one end of this road onto the Highway. Thus, geographically, Papailoa Road forms a discrete neighborhood distinct from other residential areas. A map of neighborhood is attached hereto as Exhibit 5.



c. Mr. Pavsek's home is on the mauka side of Papailoa Road and is identified with an "X" on a map showing a close-up of the north end of Papailoa Road, attached hereto as Exhibit 6. Todd W. Sandvold and Juliana C. Sandvold own the residential lot located at 61-703 Papailoa Road but do not live there. 61-703 is identified with an "A" on Exhibit 6.

d. Mr. Pavsek and 61-703 Papailoa Road share an easement providing access to the beach. The easement is marked with a "Y" on Exhibit 6.

e. As can be plainly seen from Exhibits 5 and 6, the Pavsek's home is in the immediate vicinity of 61-703 Papailoa Road and shares an easement with this property.

f. Therefore, Mr. Pavsek is directly and adversely affected by the commercial use in violation of zoning ordinances of 61-703 Papailoa Road. As a neighborhood resident, Mr. Pavsek has standing to complain of harm from activity that detracts from the "residential character of the neighborhood." *East Diamond Head Association v. Zoning Board of Appeals*, 52 Haw. 518, 522, 479 P.2d 796, 799 (1971).

**4. How the petitioner is adversely affected by the action appealed.**

a. Mr. Pavsek is adversely affected by the Director's decision because it, in essence, allows the improper commercial use of a residence in the Papailoa neighborhood in close physical proximity to his home and also allows the improper commercial use of the easement that Mr. Pavsek owns.

b. It is well-recognized that “the use of single-family residential property for transient lodging [is] a commercial use inconsistent with the purpose of [a residential] District.” *Ewing v. City of Carmel-by-the-Sea*, 234 Cal.App.3d 1579, 1589, 286 Cal.Rprt. 382, 387 (1991), cert. denied, 504 U.S. 914 (1992). “[C]ommercial use of single-family residential property for such purposes create unmitigable, adverse impacts on surrounding residential uses including, but not limited to, increased levels of commercial and residential vehicle traffic, parking demand, light and glare, and noise detrimental to surrounding residential uses and the general welfare of the City.” *Id.*

c. Here, as a neighbor who must share an easement, Mr. Pavsek has experienced first-hand the loss of the residential character of the neighborhood and the con-commitment increase in noise, traffic and pollution.

d. Mr. Pavsek is thereby adversely affected by the Director’s decision, as additionally detailed in the Response 8 below.

**5. Designation of the specific applicable provisions of the Land Use Ordinance or the Subdivision Ordinance.**

a. The City zoning map clearly shows that Papailoa Road, including Mr. Pavsek’s home and 61-703 Papailoa Road is in an area zoned “R-5”, which means it is a residential district. See Exhibit 5.

b. Per LUO §21-3.70-1 and Table 21-3, properties zoned R-5 are limited to detached one family dwellings, detached two-family dwellings and public uses and structures. All other uses, including use as a bed and

breakfast home or a transient vacation unit, are prohibited without a conditional use permit or a non-conforming use certificate.

- c. A bed and breakfast home is defined as:  
  
... a use in which overnight accommodations are provided to guests for compensation, for periods of less than 30 days, in the same detached dwelling as that occupied by an owner, lessee, operator or proprietor of the detached dwelling.

LUO 21-10.1.

- d. A transient vacation unit is defined as:  
  
... a dwelling unit or lodging unit which is provided for compensation to transient occupants for less than 30 days, other than a bed and breakfast home. For purposes of this definition, compensation includes, but is not limited to, monetary payment, services or labor of employees.

LUO 21-10.1.

e. Based on the LUOs, it is clear that a rental of a residence in a residential district for less than 30 days is illegal absent an appropriate permit or certificate. There is no record that 61-703 Papailoa Road has been issued a conditional use permit or non-conforming use certificate, yet 61-703 Papailoa Road was rented out for a period of less than 30 days.

f. Moreover, for the owner of 61-703 Papailoa Road to maintain that such a short-term rental complies with the 30 day requirement, the owner would need to show, at a minimum, that the renter signed a bona fide contract to rent the property for 30 days and that the contract complies

with the Hawaii Landlord Tenant Code, including the rent provisions set forth in HRS § 521-21. There has been no such showing.

**6. The action of the director and the date the action was taken.**

Director's action: Finding of No Violation. Exhibit1.

Date action was taken: June 3, 2008.

**7. All pertinent facts, including facts to support the Charter's criteria for sustaining an appeal.**

The Revised Charter of Honolulu § 6-1516 provides that an appeal "shall be sustained only if the board finds that the director's action was based on an erroneous finding of material fact, or that the director had acted in an arbitrary or capricious manner or had manifestly abused discretion." The pertinent facts supporting the appeal are set forth in Response to 8 below.

**8. Reasons why the petitioner believes that the director's action was based on an erroneous finding of material fact and/or that the director acted in an arbitrary or capricious manner or manifestly abused his/her discretion.**

a. The Director's action was based on an erroneous finding of material fact and/or was arbitrary or capricious or a manifest abuse of discretion because the Director was informed on April 6, 2008, that there was a short-term vacation renter at 61-703 Papailoa Road, who would be renting the property from April 5, 2008 to April 12, 2008.

b. The Director was reminded again on April 12, 2008, that there was a short term vacation renter whose final rental day would be April 12, 2008.

c. The Director did not conduct his factual investigation until May 27, 2008, and the investigation apparently consisted solely of taking a statement from the current occupant who stated that there were no short-term renters.

d. The Director's factual investigation is patently inadequate and utterly unresponsive to the complaint made to him.

e. The Director did not conduct an investigation until more than a month after the time period when the short-term vacation renter was at 61-703 Papailoa Road and then did not seek information regarding this renter or the relevant time period but simply relates that on May 27, 2008 the property was occupied by a "long term tenant" who stated that they "do not have any short term renters."

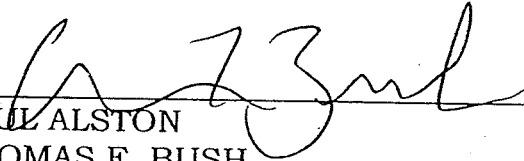
f. The basis for the Director's decision is thus simply non responsive to the complaint made to him.

g. The Director's decision was therefore based on an erroneous finding of material fact and/or was arbitrary or capricious or a manifest abuse of discretion because it in essence, fails to address the complaint made to him.

**III. PROCEDURE**

Pursuant to ZBA Rules § 22-6, Contested case hearing, the hearing before the ZBA “shall be conducted in conformity with the applicable provisions of sections 91-9, 91-10, and 91-11, [Haw. Rev. Stat.]”.

DATED: Honolulu, Hawai'i, JUN 26 2008

  
\_\_\_\_\_  
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MUFI HANNEMANN  
MAYOR



HENRY ENG, FAICP  
DIRECTOR

DAVID K. TANOUÉ  
DEPUTY DIRECTOR

June 3, 2008

(CI)

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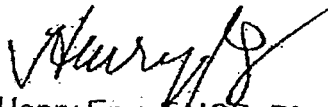
Dear Mr. Bush:

Subject: Transient Vacation Rental  
61-703 Papailoa Road  
Tax Map Key: 6-1-004: 074

This is in reply to your letter dated May 28, 2008, regarding the above-referenced subject. An inspection made on May 27, 2008 revealed the house is occupied by the same long term tenant. They stated that they do not have any short-term renters. There is no violation.

If you have any questions, please call Mr. Wallace Carvalho, of our Residential Code Enforcement Branch, at 768-8159.

Very truly yours,

  
Henry Eng, FAICP, Director  
Department of Planning and Permitting

HE:dkk

EXHIBIT 1

---

From: "joe pavsek" <pavsekj002@hawaii.rr.com>  
To: <cishikawa@honolulu.gov>  
Date: 4/6/2008 9:21 AM  
Subject: Fw: ILLEGAL VACATION RENTAL  
CC: "tom bush" <tbush@ahfi.com>

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----- Original Message -----

From: joe pavsek  
To: cishikawa@honolulu.gov  
Sent: Sunday, April 06, 2008 9:18 AM  
Subject: ILLEGAL VACATION RENTAL

MR ISHIKAWA I AM MAKING ANOTHER! COMPLAINT OF ILLEGAL SHORT-TERM RENTAL AT 61-703 PAPAIOA ROAD YESTERDAY APRIL 5TH 2008 A PARTY OF 4 TWO ADULTS AND TWO CHILDREN MOVED INTO THE RESIDENCE 61-703 PAPAIOA ROAD AS YOU KNOW 61-703 IS OWNED BY TODD SANDVOLD THE PEOPLE WHO MOVED IN ON 4/5/08 TOLD ME THAT THEY HAVE RENTED THE PLACE FOR 7 DAYS AND SHOULD LEAVE 4/12/08. THEY ALSO SAID THEY DO NOT KNOW A BOB KOR! PLEASE INVESTIGATE (BEFORE THE RENTERS LEAVE) IN THE PAST IT APPEARS THAT INVESTIGATIONS OF COMPLAINTS HAVE BEEN MADE TOO LATE THAT IS AFTER THE SHORT-TERM RENTERS HAVE LEFT. ALSO IF THE OWNERS CLAIM THEY HAVE A 30 DAY CONTRACT YOU SHOULD MAKE SURE IT IS NOT BOGUS!!! PLEASE LET ME KNOW IN WRITING THE RESULTS OF YOUR INVESTIGATION OF THIS COMPLAINT ASAP! THANK YOU JOE PAVSEK

**EXHIBIT 2**



---

From: "joe pavsek" <pavsekj002@hawaii.rr.com>  
To: <cishikawa@honolulu.gov>  
Date: 4/12/2008 8:04 AM  
Subject: Re: ILLEGAL VACATION RENTAL  
CC: "tom bush" <tbush@ahfi.com>

---

ANY LUCK ON THIS MR ISHIKAWA????? CAN YOU DO THIS BEFORE THEY LEAVE??? JOE PAVSEK

— Original Message —

From: [joe pavsek](mailto:joe.pavsek)  
To: [cishikawa@honolulu.gov](mailto:cishikawa@honolulu.gov)  
Cc: [tom bush](mailto:tom.bush)  
Sent: Sunday, April 06, 2008 9:20 AM  
Subject: Fw: ILLEGAL VACATION RENTAL

— Original Message —

From: [joe pavsek](mailto:joe.pavsek)  
To: [cishikawa@honolulu.gov](mailto:cishikawa@honolulu.gov)  
Sent: Sunday, April 06, 2008 9:18 AM  
Subject: ILLEGAL VACATION RENTAL

MR ISHIKAWA I AM MAKING ANOTHER! COMPLAINT OF ILLEGAL SHORT-TERM RENTAL AT 61-703 PAPAIOA ROAD YESTERDAY APRIL 5TH 2008 A PARTY OF 4 TWO ADULTS AND TWO CHILDREN MOVED INTO THE RESIDENCE 61-703 PAPAIOA ROAD AS YOU KNOW 61-703 IS OWNED BY TODD SANDVOLD THE PEOPLE WHO MOVED IN ON 4/5/08 TOLD ME THAT THEY HAVE RENTED THE PLACE FOR 7 DAYS AND SHOULD LEAVE 4/12/08. THEY ALSO SAID THEY DO NOT KNOW A BOB KOR! PLEASE INVESTIGATE (BEFORE THE RENTERS LEAVE) IN THE PAST IT APPEARS THAT INVESTIGATIONS OF COMPLAINTS HAVE BEEN MADE TOO LATE THAT IS AFTER THE SHORT-TERM RENTERS HAVE LEFT. ALSO IF THE OWNERS CLAIM THEY HAVE A 30 DAY CONTRACT YOU SHOULD MAKE SURE IT IS NOT BOGUS!!! PLEASE LET ME KNOW IN WRITING THE RESULTS OF YOUR INVESTIGATION OF THIS COMPLAINT ASAP! THANK YOU JOE PAVSEK

**EXHIBIT 3**



Attorneys at Law - A Law Corporation

May 28, 2008

**HAND DELIVERED**

Mr. Colin Ishikawa  
Department of Planning and Permitting  
City & County of Honolulu  
650 S. King Street  
Honolulu, Hawaii 96813

**RE: Joseph Pavsek and Ikuyo Pavsek**

Dear Mr. Ishikawa:


I represent Joe and Ikuyo Pavsek. I am writing you to follow up on a complaint that Mr. Pavsek made to you via email about an illegal short-term vacation rental at 61-703 Papailoa Road.

The complaint was made on April 6, 2008, in which Mr. Pavsek informed you that the rental was from April 5, 2008 to April 12, 2008. You responded to him on April 15, 2008 that you had "assigned this" to Todd Labang and that he had gone out a few times, but had not found anything and that he will "keep trying." Please see as attachment 1, the relevant email communications. Please confirm for me that the Planning & Permitting Department has finished its investigation and found no violation in response to this complaint.

I would appreciate a rapid written response. If I do not hear from you by June 14, 2008, I will assume that the Planning & Permitting Department has, indeed, finished its investigation and found no violation.

If you have any questions or would like to discuss the matter with me, please contact me.

Very truly yours,

  
THOMAS E. BUSH

TEB:blk  
Enclosure  
cc: Client  
Ken Kuniyuki

**EXHIBIT 4**

American Savings Bank Tower  
18th Floor  
1001 Bishop Street  
Honolulu, Hawaii 96813  
Phone: (808) 524-1800  
Fax: (808) 524-4591

Carter Professional Center  
Suite C21  
65-1230 Mamalahoa Highway  
Kamuela, Hawaii 96743  
Phone: (808) 885-6762  
Fax: (808) 885-6011

One Main Plaza  
Suite 521  
2200 Main Street  
Wailuku, Hawaii 96793  
Phone: (808) 244-1160  
Fax: (808) 442-0794

www.ahfi.com

679206\_1/905121

----- Original Message -----

**From:** Ishikawa, Colin K.  
**To:** joe pavsek  
**Sent:** Tuesday, April 15, 2008 11:55 AM  
**Subject:** RE: ILLEGAL VACATION RENTAL

I assigned this to Todd Labang. He went out a few times, but he didn't find the visitors. He will keep trying.

-----Original Message-----

**From:** joe pavsek [mailto:pavsekj002@hawaii.rr.com]  
**Sent:** Saturday, April 12, 2008 8:04 AM  
**To:** Ishikawa, Colin K.  
**Cc:** tom bush  
**Subject:** Re: ILLEGAL VACATION RENTAL

ANY LUCK ON THIS MR ISHIKAWA????? CAN YOU DO THIS BEFORE THEY LEAVE??? JOE PAVSEK

----- Original Message -----

**From:** joe pavsek  
**To:** cishikawa@honolulu.gov  
**Cc:** tom bush  
**Sent:** Sunday, April 06, 2008 9:20 AM  
**Subject:** Fw: ILLEGAL VACATION RENTAL

----- Original Message -----

**From:** joe pavsek  
**To:** cishikawa@honolulu.gov  
**Sent:** Sunday, April 06, 2008 9:18 AM  
**Subject:** ILLEGAL VACATION RENTAL

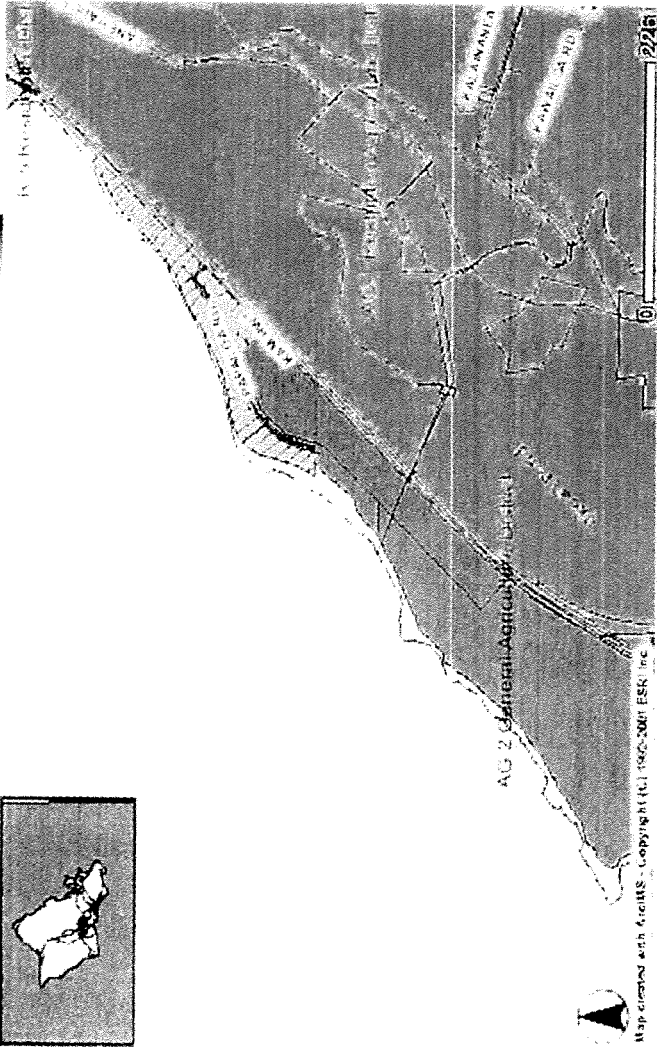
MR ISHIKAWA I AM MAKING ANOTHER! COMPLAINT OF ILLEGAL SHORT-TERM RENTAL AT 61-703 PAPAIOA ROAD YESTERDAY APRIL 5TH 2008 A PARTY OF 4 TWO ADULTS AND TWO CHILDREN MOVED INTO THE RESIDENCE 61-703 PAPAIOA ROAD AS YOU KNOW 61-703 IS OWNED BY TODD SANDVOLD THE PEOPLE WHO MOVED IN ON 4/5/08 TOLD ME THAT THEY HAVE RENTED THE PLACE FOR 7 DAYS AND SHOULD LEAVE 4/12/08. THEY ALSO SAID THEY DO NOT KNOW A BOB KOR! PLEASE INVESTIGATE (BEFORE THE RENTERS LEAVE) IN THE PAST IT APPEARS THAT INVESTIGATIONS OF COMPLAINTS HAVE BEEN MADE TOO LATE THAT IS AFTER THE SHORT-TERM RENTERS HAVE LEFT. ALSO IF THE OWNERS CLAIM THEY HAVE A 30 DAY CONTRACT YOU SHOULD MAKE SURE IT IS NOT BOGUS!!! PLEASE LET ME KNOW IN WRITING THE RESULTS OF YOUR INVESTIGATION OF THIS COMPLAINT ASAP! THANK YOU JOE PAVSEK

No virus found in this incoming message.

Checked by AVG.

Version: 7.5.519 / Virus Database: 269.22.13/1378 - Release Date: 4/15/2008 9:12 AM

City & County of Honolulu  
 Department of Planning and Permitting (DPP)



Map compiled with AerialS - Copyright (c) 1999-2001 ESR, Inc.

Legend

Street

Parcel

Layer 1

Layer 2

Layer 3

Layer 4

Layer 5

Layer 6

Layer 7

Layer 8

Layer 9

Layer 10

Layer 11

Layer 12

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Layer 14

Layer 15

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Layer 100

**ZONING**   **LAND USE**   **UTILITIES**   **OTHER**

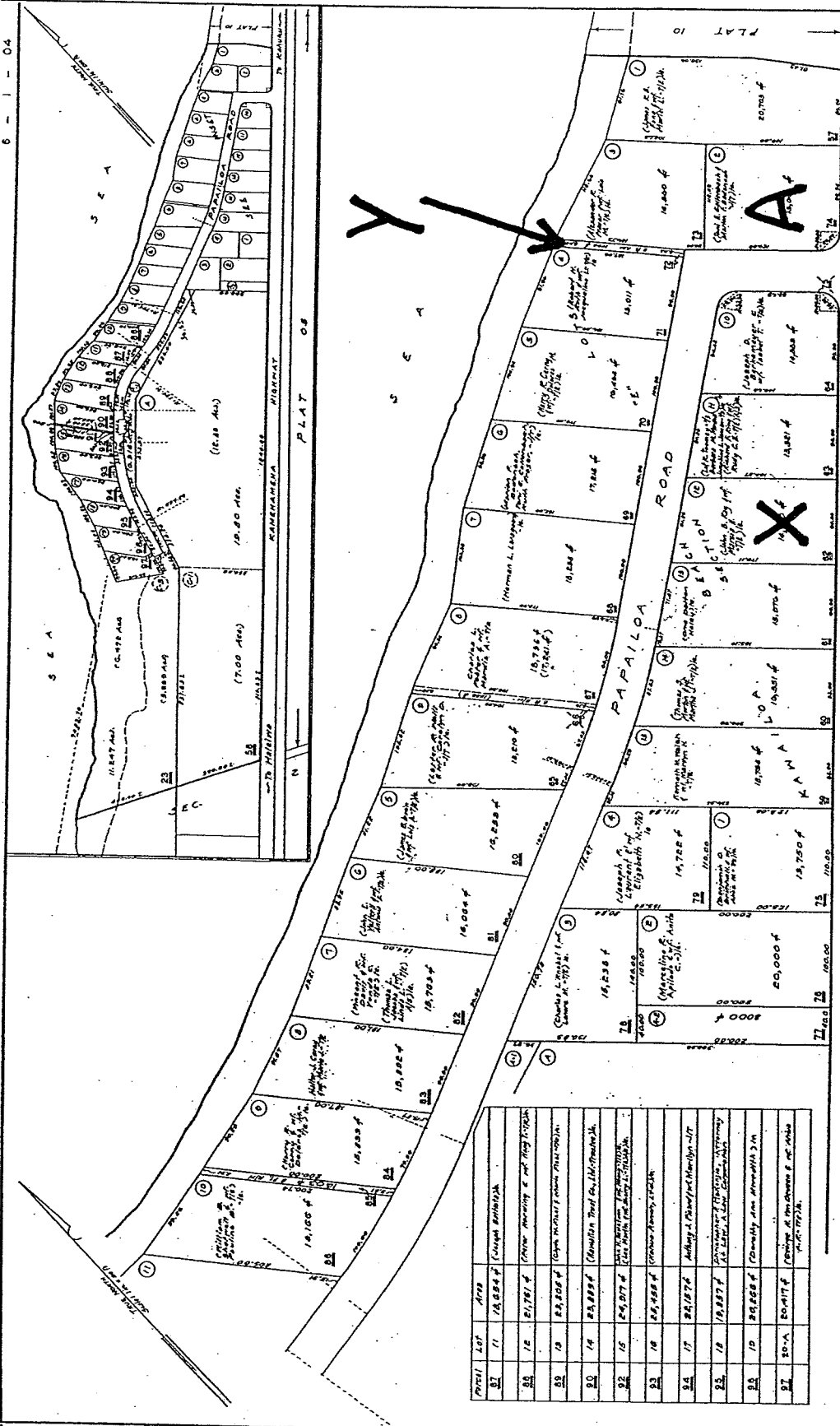
Ohana   Special District Heights   Zoning Special Districts

Regulated U.   Zoning   Plat Maps

Zoned Planned Development Housing

Honolulu Home   GIS Home   DPP Home





PLAT	LOT	AREA	ENCUMBRANCE
21	1	14,854 sq ft	Unsubstantiated
22	2	21,281 sq ft	Unsubstantiated
23	3	22,208 sq ft	Unsubstantiated
24	4	22,208 sq ft	Unsubstantiated
25	5	22,208 sq ft	Unsubstantiated
26	6	22,208 sq ft	Unsubstantiated
27	7	22,208 sq ft	Unsubstantiated
28	8	22,208 sq ft	Unsubstantiated
29	9	22,208 sq ft	Unsubstantiated
30	10	22,208 sq ft	Unsubstantiated
31	11	22,208 sq ft	Unsubstantiated
32	12	22,208 sq ft	Unsubstantiated
33	13	22,208 sq ft	Unsubstantiated
34	14	22,208 sq ft	Unsubstantiated
35	15	22,208 sq ft	Unsubstantiated
36	16	22,208 sq ft	Unsubstantiated
37	17	22,208 sq ft	Unsubstantiated
38	18	22,208 sq ft	Unsubstantiated
39	19	22,208 sq ft	Unsubstantiated
40	20	22,208 sq ft	Unsubstantiated
41	21	22,208 sq ft	Unsubstantiated
42	22	22,208 sq ft	Unsubstantiated
43	23	22,208 sq ft	Unsubstantiated
44	24	22,208 sq ft	Unsubstantiated
45	25	22,208 sq ft	Unsubstantiated
46	26	22,208 sq ft	Unsubstantiated
47	27	22,208 sq ft	Unsubstantiated

STATEMENT OF THE COMMISSIONER  
TAXATION MAPS BUREAU  
TERRITORY OF HAWAII  
TAX MAP

PLAT 05  
SHEET 04

CONTAINS 6 LOTS  
SCALE 1" = 40'

PLAT 05  
KAMEHAMEHA HIGHWAY

Subject to change

PLAT 05  
KAMEHAMEHA HIGHWAY

PLAT 05  
KAMEHAMEHA HIGHWAY

PLAT 05  
KAMEHAMEHA HIGHWAY

PLAT 05  
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PLAT 05  
KAMEHAMEHA HIGHWAY

PLAT 05  
KAMEHAMEHA HIGHWAY

PLAT 05  
KAMEHAMEHA HIGHWAY



HAND  
DELIVERY U.S. MAIL

√

KENNETH R. KUPCHAK, ESQ.  
GREGORY W. KUGLE, ESQ.  
MARK M. MURAKAMI, ESQ.  
NOELLE B. CATALAN, ESQ.  
1600 Pauahi Tower  
1003 Bishop Street  
Honolulu, Hawai'i 96813

Attorneys for Defendants  
TODD W. SANDVOLD,  
JULIANA SANDVOLD and HAWAII  
BEACH HOMES, INC.

ROSEMARY T. FAZIO, ESQ.  
FRANCIS P. HOGAN, ESQ.  
ZACHARY J. ANTALIS, ESQ.  
Ashford & Wriston  
1099 Alakea Street  
Alii Place, Suite 1400  
Honolulu, HI 96813

√

Attorneys for Defendants  
KENT SATHER and  
JOAN SATHER

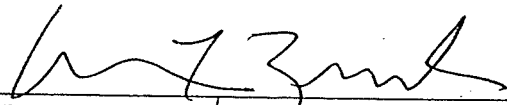
DAVID B. ROSEN, ESQ.  
810 Richards Street, Suite 880  
Honolulu, HI 96813

√

Attorney for Defendants  
WAIALUA OCEANVIEW LLC and  
HAWAII ON THE BEACH, INC.

Dated: Honolulu, Hawai'i, \_\_\_\_\_

JUN 26 2008



PAUL ALSTON  
THOMAS E. BUSH  
KEN T. KUNIYUKI  
Attorneys for Petitioner

No. 29179

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

JOSEPH PAVSEK and IKUYO PAVSEK,	)	Civil No. 08-1-0131
	)	
Plaintiffs-Appellants,	)	APPEAL FROM THE JUDGMENT,
	)	filed on May 28, 2008
vs.	)	
	)	FIRST CIRCUIT COURT
TODD W. SANDVOLD; JULIANA C. SANDVOLD; KENT SATHER; JOAN SATHER; WAIALUA OCEANVIEW LLC; HAWAII BEACH HOMES, INC., HAWAII BEACH TRAVEL, INC.; and HAWAII ON THE BEACH, INC.,	)	HONORABLE VICTORIA S. MARKS
	)	
Defendants-Appellees,	)	
	)	
and	)	
	)	
JOHN DOES 1-10, JANE DOES 1- 10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10,	)	
	)	
Defendants.	)	

---

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this date TWO (2) true and correct copies of the foregoing will be served on the following parties by hand-delivering at their last known addresses as set forth below:



**HAND  
DELIVERED**

**U.S. MAIL**

KENNETH R. KUPCHAK, ESQ.  
GREGORY W. KUGLE, ESQ.  
MARK M. MURAKAMI, ESQ.  
NOELLE B. CATALAN, ESQ.  
1600 Pauahi Tower  
1003 Bishop Street  
Honolulu, Hawai'i 96813

√

Attorneys for Defendants-Appellees  
TODD W. SANDVOLD,  
JULIANA SANDVOLD and  
HAWAII BEACH HOMES, INC.

ROSEMARY T. FAZIO, ESQ.  
FRANCIS P. HOGAN, ESQ.  
ZACHARY J. ANTALIS, ESQ.  
Ashford & Wriston  
1099 Alakea Street  
Alii Place, Suite 1400  
Honolulu, HI 96813

√

Attorneys for Defendants-Appellees  
KENT SATHER and  
JOAN SATHER

**HAND  
DELIVERED**

**U.S. MAIL**

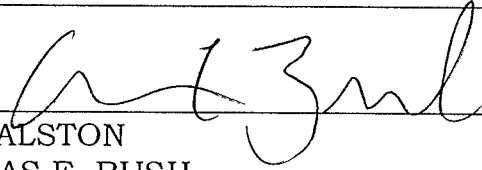
DAVID B. ROSEN, ESQ.  
810 Richards Street, Suite 880  
Honolulu, Hawai'i 96813

√

Attorney for Defendants-Appellees  
WAIALUA OCEANVIEW LLC,  
HAWAII ON THE BEACH, INC., and  
HAWAII BEACH TRAVEL, INC.

DEC 31 2008

DATED: Honolulu, Hawai'i, \_\_\_\_\_

  
\_\_\_\_\_  
PAUL ALSTON  
THOMAS E. BUSH  
KEN T. KUNIYUKI  
Attorneys for Plaintiffs-Appellants  
JOSEPH PAVSEK and  
IKUYO PAVSEK