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COUNTY OF MAUI AND JEFF HUNT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI VACATION RENTAL ASSOCIATION, INC., a Hawaii corporation,

Plaintiff,

vs.

THE COUNTY OF MAUI; JEFF HUNT, Director of MAUI COUNTY PLANNING DEPARTMENT, as an individual, and DOES 1-10, inclusive;

Defendants.

CIVIL NO. CV 07-00495 JMS/KSC

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; DECLARATIONS OF JOHN BLUMER-BUELL, PATRICK BORGE, LEO CAIRES, KATHRYN MAHEALANI DAVIS, ZAIDARENE KALIPI, RICHARD D. MAYER, JOHN MIN, WALTER RITTE, AND BARBARA ROARK; EXHIBIT "1" TO THE DECLARATION OF BARBARA ROARK, DECLARATION OF GLEN UENO; EXHIBIT "2" TO THE DECLARATION OF GLEN UENO; CERTIFICATE OF SERVICE

DATE: December 10, 2007
TIME: 10:00 a.m.
JUDGE: Honorable J. Michael Seabright

NO TRIAL DATE

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DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

COME NOW, Defendants COUNTY OF MAUI and JEFF HUNT (collectively referred to as "County," "County Defendants," or "Defendants") by and through their attorneys, Brian T. Moto, Corporation Counsel, and Jane E. Lovell and Mary Blaine Johnston, Deputies Corporation Counsel, and hereby file this Memorandum In Opposition to Plaintiff's Motion for Preliminary Injunction.

I. INTRODUCTION

The Complaint filed in this action by Plaintiff Maui Vacation Rental Association, Inc. (hereinafter "Plaintiff" or "MVRA") alleges that the MVRA is a non-profit corporation whose purpose is "to legitimize the existence of Maui Vacation Rentals on Residential, Agricultural and Rural land and to promote compliance with County and State Regulations." Complaint, ¶ 14. The Complaint does not provide any information about the identity or number of its members. The Complaint does not allege the date on which each member joined, nor does it describe how one becomes a member of the organization. Moreover, the Complaint does not allege that membership in the organization is restricted to any particular race, ethnic group, or other constitutionally protected class.

The Complaint's prayer for relief seeks, among other things, "[p]reliminary and permanent injunctive and declaratory relief, as necessary to allow the members of Plaintiff Maui Vacation Rental Association Inc. to conduct their business in Maui County" and "[a]n order of specific performance of the express and implied agreement between the parties." In the Plaintiff's

memorandum in opposition to the County's motion to dismiss, Plaintiff also states that it is seeking relief on behalf of non-members of the organization. See Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss Complaint filed herein on November 15, 2007, (hereinafter, "Plaintiff's Opposition") at page 13: "The injunctive relief sought applies to limited general categories of applicants, both MVRA members and non-members."

Plaintiff's Motion for Preliminary Injunction and the declarations attached to it reveal that the business of MVRA's members is operating illegal transient vacation rentals in Maui County. Plaintiff is asking that this Court enter an order that would not only compel the County to allow these individuals to continue to maintain illegal businesses, but that would also prevent County employees from enforcing State land use laws and County ordinances.

Plaintiff does not challenge the constitutionality of the relevant ordinances, nor does it claim that the ordinances are void for vagueness. Plaintiff's Complaint does not assert that the County is selectively enforcing the ordinances in an unconstitutional manner. Rather, MVRA's position is that if the TVR owners and operators who are currently running illegal businesses are not allowed to continue in operation, they will be irreparably harmed. In essence, the harm alleged is that these operators will lose money. Plaintiff does not cite to any authority standing for the proposition that an operator of an illegitimate business has a constitutional right to receive

prospective income from that business, or that governmental interference with such "right" forms the basis for an injunction to preserve the cash flow from the illegal enterprise.

II. STANDARD FOR GRANTING INJUNCTIVE RELIEF

Plaintiff invokes the jurisdiction of the federal court, alleging that certain constitutional rights of unpermitted TVR operators, an undetermined number of whom may be members of MVRA, will be violated if the County of Maui enforces its zoning laws.

The Ninth Circuit has "articulated numerous tests by which a movant can meet [its] burden, including a combination of either 1) probable success on the merits and irreparable injury or 2) serious questions raised, and the balance of hardships tips sharply in the movant's favor." Rendish v. City of Tacoma, 123 F.3d 1216, 1219 (9th Cir. 1997), cert. den., 524 U.S. 952 (1998).

Because Plaintiff's request is for a mandatory injunction,[1] this court should apply a "heightened scrutiny" test in evaluating whether the claims of Plaintiff meet legal requirements entitling it to the requested relief. In denying Plaintiff's motion for a preliminary injunction, the Court in Redevelopment Agency of the City of Stockton v. Burlington Northern, 2006 WL 931059 * 3 (E.D. Cal. 2006) held that:

> [g]enerally, the movant must show that there is a "fair chance" of success on the merits. Johnson v. Cal. State Bd. Of Accountancy, 72

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[1] Among other things, Plaintiff has asked that all permit applications be "deemed approved" after 90 days, and that this Court require the County to process permit applications in a particular fashion. See Plaintiff's Opposition at p. 18.

F.3d 1427, 1429-30 (9th Cir. 1995). However, a request for mandatory injunctive relief, like that sought here, is "subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir. 1993). Moreover, the burden on plaintiff "is a heavy one where, as here, granting the preliminary injunction will give [plaintiff] substantially the relief it would obtain after a trial on the merits." Dakota Indus., Inc. v. Ever Best Ltd., 944 F.2d 438, 440 (8th Cir. 1991) (citations omitted); see also Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 808 (9th Cir. 1963) ("[I]t is not usually proper to grant the moving party the full relief to which he might be entitled if successful at the conclusion of a trial.")

The primary focus of Plaintiff's Motion is on the "harm" (loss of income) to unpermitted TVR owners and operators should the County bring enforcement actions against their zoning violations. The motion ignores and utterly fails to address the substantive rights of the public that are and will continue to be negatively impacted by the inability of the County to enforce State land use laws and County zoning ordinances. Further, when Plaintiff's arguments as to the likelihood of success on the merits are examined closely, it becomes clear that Plaintiff fails to meet its burden of showing that it is likely to succeed on the merits of its claims. Therefore, the motion for preliminary injunctive relief should be denied.

III. PLAINTIFF HAS NO COGNIZABLE CONSTITUTIONAL BASIS SUPPORTING ITS REQUEST FOR A PRELIMINARY INJUNCTION

A. Plaintiff Does Not State A Constitutional Basis For Relief.

The first count of Plaintiff's Complaint is captioned "Constitutional Violations, 42 U.S.C. § 1983." This count fails to state a claim upon which relief may be granted because "§ 1983 by itself does not protect anyone against anything, but simply provides a remedy." Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617, 99 S.Ct. 1905, 1908, 60 L.Ed.2d 508 (1979). Section 1983 is not a source of substantive rights but merely provides a method for vindicating federal rights elsewhere conferred. Baker v. McCollan, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694, n. 3, 61 L.Ed.2d 433 (1979); Albright v. Oliver, 510 U.S. 266, 270, 114 S.Ct. 807, 811, 127 L.Ed.2d 114 (1994); Gonzaga University v. Doe, 536 U.S. 273, 285, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). See also Cholla Ready Mix Inc. v. Civish, 382 F.3d 969, 978 (9th Cir. 2004)(an agency's regulation does not create an individual federal right enforceable through Section 1983); Save Our Valley v. Sound Transit, 335 F.3d 932, 936 (9th Cir. 2003).

B. Plaintiff Has Not Established A Cause Of Action Under The Equal Protection Clause Of The U.S. Constitution.

In City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 359 (2003). In Cuyahoga Falls, the U.S. Supreme Court addressed equal protection and substantive due process rights in the context of a low income housing project authorized by a city ordinance. In

response to a petition from citizens, the city had placed repeal of the ordinance on a referendum ballot. Supporters of the project obtained a favorable ruling from the Sixth Circuit Court of Appeals, which found genuine issues of material fact existed as to whether the city violated the Equal Protection Clause and the Due Process Clause. The Supreme Court reversed the Sixth Circuit on the equal protection and substantive due process claims, holding that proof of racially-discriminatory intent or purpose is required for equal protection claims. Id. at 195. Here, Plaintiff's Complaint alleges violations of "equal protections rights of Plaintiff and Plaintiff's individual members" (Complaint, ¶ 32), but the Complaint does not allege discrimination on the basis of race or any other suspect classification, and the Complaint does not allege that its members all belong to a constitutionally protected class.

Casual references to "equal protection" violations do not state a justiciable claim where the Complaint does not allege that Plaintiff or its members belong to a protected class. Moreover, the Complaint does not allege that the facially-neutral and generally-applicable State and County land use laws and ordinances at issue treat Plaintiff differently from similarly situated entities. See Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 75 S.Ct. 461, 465, 99 L. Ed 563 (1955); Child Support Enforcement Agency v. Doe, 109 Hawai'i 240, 248-49, 125 P.3d 461, 469-70 (2005); Mahiai v. Suwa, 69 Haw. 349, 360, 742 P.2d 359, 368 (1987). Because Plaintiff does not contend that it or its members are being discriminated against based on a suspect classification

such as race or religion, the Equal Protection Clause of the U.S. Constitution provides no legal basis for Plaintiff's claims.

C. Plaintiff Has Not Established Any Constitutional Violation of Substantive Due Process.

Plaintiff's Complaint contains conclusory allusions to alleged violations of "procedural and substantive due process" rights. (Complaint, ¶ 32) These claims appear to be based on an assertion that the County's enforcement of State law and County zoning ordinances against operators of illegal transient vacation rentals is arbitrary and capricious. This claim fails because attempting to enforce the law is not the sort of "most egregious official conduct" that arises to the level of "arbitrary in the constitutional sense." City of Cuyahoga Falls, supra, 538 U.S. at 198. Furthermore, in the Ninth Circuit, ". . . use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited". Armendariz v. Penman, 75 F.3d 1311, 1318-1319 (9th Cir. 1996).

The United States Supreme Court has held that zoning ordinances are presumptively constitutional. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130, 133-134 (1962). Zoning regulations that limit the type of uses to which a property owner's land may be put have been upheld as legitimate exercise of the government's police power since 1926, when the Supreme Court decided Village of Euclid v. Ambler Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.3d.303 (1926). In Euclid, the Supreme Court noted that the extent of the government's police power

"varies with circumstances and conditions." Id., 272 U.S. at 387. The scope of zoning regulations "must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." Id.

The type of State land use classification and County zoning applicable to the property determines what uses are legally permissible in each district. The County's zoning ordinance, found in Maui County Code ("MCC") Chapter 19, and the State land use classifications found in Chapter 205 of the Hawaii Revised Statutes ("HRS") determine what types of activities, or "uses," are permitted within a particular district. HRS § 205-4.5(a) sets out the permissible uses within the state agricultural district, and § 205-4.5(b) provides that "[u]ses not expressly permitted in subsection (a) shall be prohibited . . ." See also MCC § 19.04.020B (same, under County zoning ordinance). Hotels and other types of short-term accommodations are expressly permitted to operate in the County's hotel zoning district (MCC § 19.14.020), while only B&Bs with permits are allowed to operate in the County's residential districts. MCC § 19.08.020I. MCC § 19.37.010A provides that, except as expressly permitted, vacation rentals are prohibited.

Bed and Breakfast ("B&B") operations are regulated under MCC § 19.64.010 et seq. (hereafter, the "B&B Ordinance"). Whether a B&B is a permissible use depends on the underlying zoning (MCC § 19.64.020) and if permitted, B&Bs are subject to the reasonable restrictions and standards found in MCC § 19.04.030. The Complaint

alleges that the County's B&B Ordinance is "very limited, including only those TVRs in which the operator occupy[ies] the same dwelling as the guests, and it does not apply in Rural or Agricultural-zoned areas." (Complaint, ¶ 16.) However, such reasonable and presumptively valid State and County restrictions do not arise to a violation of Plaintiff's constitutional rights. See Goldblatt, supra, 369 U.S. at 593-596.

Plaintiff also alleges that the permitting process is "burdensome". (Complaint, ¶ 29)[2] The mere allegation that the regulatory scheme imposed by State statutes and County ordinances is complex does not state a claim for a constitutional violation. Anyone seeking "special" or "conditional" permits to operate businesses that are not allowed as of right by the property's underlying zoning or state land use classification is asking for special treatment, in essence, an individualized zoning exemption. While a particular district may be able to absorb a few "special" uses, allowing hundreds could overwhelm and completely undermine the purpose and intent of the area's zoning.

The Complaint acknowledges that prospective operators of TVRs who cannot or do not wish to meet the requirements of the County's B&B Ordinance can apply for a County Conditional Permit or a State Special Permit. (Complaint, ¶ 21.A.) Conditional Permits (also called "Conditional Use Permits" or "CUPs") are

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[2] In Plaintiff's memorandum submitted in opposition to County's motion to dismiss, however, Plaintiff clarified that it is not asking this Court to make the process "less burdensome". Plaintiff's Opposition, p. 17.

governed by MCC § 19.40.010 et seq. Conditional Permits are intended to provide an opportunity for the County to consider establishing the use in a given zone if the proposed use is similar, related or compatible with uses already permitted within that zoning district. MCC § 19.40.010. Conditional Permits are intended only for enterprises that have some "special impact or uniqueness such that its effect on the surrounding environment cannot be determined in advance . . . ." Id.

State Special Permits (also known as "Special Use Permits" or "SUPs") for "certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified" are governed by HRS §205-6. Although a creature of state law, Special Permits are issued by county planning commissions (HRS §205-6(a)), except for permits pertaining to parcels greater than 15 acres in size, which are issued by the State Land Use Commission. HRS §205-6(d). Enforcement of state land use restrictions falls to the counties. HRS § 205-12.

In addition to zoning restrictions, land uses are governed by the County's General Plan and individual Community Plans. GATRI v. Blane, 88 Hawai`i 108, 115, 962 P.2d 367, 374 (1998). The Community Plans have the force and effect of law. Id. For the visitor industry, the current Maui General Plan states (among others) the following objectives:

> 2. To control the development of visitor facilities so that it does not infringe upon the traditional, social, economic and environmental values of our community.

> a. Limit visitor industry development to those areas identified in the appropriate community plans, and to the development of projects within those areas which are in conformance with the goals and objectives of those plans.

The current General Plan also states as a policy, "[r]estrict the transient rental use of single-family housing in residential areas." County of Maui General Plan, Request for Judicial Notice No. 1, Exhibit "A" at pp. 5-6.[3]

The Paia-Haiku Community Plan notes a lack of affordable housing in the region, affecting a broad cross-section of residents, and that "[t]he housing shortage is exacerbated by the conversion of residential dwellings to short-term rentals which, in turn, negatively affects the character of traditional neighborhoods in the region." Paia-Haiku Community Plan, Request for Judicial Notice No. 2, Exhibit "B" at p. 11.

In the section "Identification of Major Problems and Opportunities of the Region in the Current Hana Community Plan, affordable housing is listed as a problem and "the use of the existing housing inventory for illegal vacation rentals was cited as a factor which decreases the availability of housing for residents." Hana Community Plan, Request for Judicial Notice No. 3, Exhibit "C" at p. 8. The same plan calls for discouraging

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[3] Copies of relevant pages from the County's General Plan and Community Plans were submitted with County's Request for Judicial Notice filed on October 23, 2007 in connection with County's motion to dismiss. All references to "Request for Judicial Notice" in this memorandum are to the Request for Judicial Notice filed on October 23, 2007, unless otherwise indicated.

"transient rental accommodation uses outside of the Hana urban area." (Id., p. 14.)

The policies and objectives of Maui's General Plan and individual Community Plans have the force and effect of law. GATRI v. Blane, 88 Hawai`i at 115. These laws cannot be simply ignored by County officials whose duty it is to enforce them. It is within the context of this statutory framework that one must examine Plaintiff's assertion of a constitutional right to be free from zoning enforcement.

In a case remarkably similar on its facts, the California Court of Appeal upheld a zoning ordinance restricting commercial short term rental of single family residences in residential zones. In Ewing v. City of Carmel-by-the-Sea, 234 Cal.App.3d 1579, 286 Cal.Rptr. 382, cert. denied, Ewing v. City Carmel-by-the-Sea, 504 U.S. 914, 112. S.Ct. 1950, 148 L.Ed. 554 (1992), owners of single-family residential property filed suit against the city, challenging the constitutionality of a zoning ordinance that prohibited transient vacation rentals. The court upheld the ordinance, ruling that maintenance of the character of residential neighborhoods is a proper purpose of zoning, and that tenants who stay only a short period of time harm the residential character of the neighborhood. The court noted that the ordinance upheld the objectives of the city's general plan. Id., 234 Cal.App.3d at 1589. The court also held that the ordinance did not violate the homeowners' substantive due process and equal protection rights. Id., 234 Cal.App.3d at 1598.

In upholding the ordinance, the Ewing Court observed that

> "[s]hort-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow - without engaging in the sort of activities that weld and strengthen a community."

Id., 234 Cal.App.3d at 1591.

The declarations submitted by the County in support of this memorandum demonstrate the negative impacts that TVRs can have on the interests of the public. The Declaration of Leo Caires underscores the need for enforcement of the law to limit unchecked proliferation of unpermitted TVRs in areas zoned for agriculture, while the Declaration of Barbara Roark demonstrates the impact of unpermitted TVRs in quiet residential neighborhoods. The declarations of Kathryn Mahealani Davis and Walter Ritte demonstrate that failure to enforce the laws regulating TVRs has led to violation of native Hawaiian rights protected under Article XII, Section 7 of the Constitution of the State of Hawaii, including the right to engage in traditional and customary practices, such as subsistence hunting and gathering. The declaration submitted by Richard D. Mayer details the economic impact of illegal TVRs. The Declaration of John Blumer-Buell discusses the way that unregulated TVRs violate the Hana Community Plan.

As in Ewing v. City of Carmel-by-the-Sea, supra, the rights of members of the public are adversely impacted when unpermitted TVRs are allowed to invade quiet residential neighborhoods or areas zoned for farming. Native Hawaiian rights and the fragile eco-system on which many of the County's citizens depend for food must be recognized and protected. In short, the rights of the public are violated every day that TVRs operate illegally.

D. Plaintiff Does Not Have a "Vested Property Right" To Operate Transient Vacation Rentals Without Proper Permits.

Whether a claimed right or benefit is a protected property interest is determined by state law. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed 548 (1972). Under Hawaii law, a landowner[4] does not have a vested interest in a particular project until it has obtained the last discretionary permit. Kauai County v. Pacific Standard Life Insurance Company, 65 Haw. 318, 332, 653 P.2d 766, 776 (1982). Under this test, neither Plaintiff nor its members have any vested interest in operating transient vacation rentals illegally. In fact, the Complaint affirmatively alleges that a large number of TVR operators have not even applied for the necessary Special Permits or Conditional Permits to operate a transient vacation rental in a district where such uses are not normally allowed.

[4] Nothing in the Complaint suggests that Plaintiff is itself a landowner, or that it operates any transient vacation rentals itself. Plaintiff purports to bring the action on behalf of "itself and its members." (Complaint, ¶ 7)

(See Complaint at ¶¶ 17, 22) Moreover, under Hawaii law, members of Plaintiff cannot assert estoppel against the government based on oral representations made prior to the last discretionary act needed to obtain a permit. Brescia v. North Shore Ohana, 115 Hawaii 477, 168 P.3d 929, 952 (July 12, 2007), recon. denied, August 31, 2007).

Here, Plaintiff's members do not have any property right in a State Special Permit or County Conditional Permit that has not yet been granted, or for which they have not even applied. See RRI Realty Corp. v. Incorporated Village of Southampton, 870 F.2d 911, 915-918 (2d Cir. 1989), cert. denied, RRI Realty Corp. v. Incorporated Village of Southampton, 493 U.S. 893, 110 S.Ct. 240, 107 L.Ed.2d 191 (1989)(applicant does not have a protected property interest in a permit unless it has clear entitlement to approval; clear entitlement only exists when discretion of issuing agency is so narrowly circumscribed that approval of the application is virtually assured); Alzamora v. Village of Chester, 492 F.Supp.2d 425, 430 (S.D.N.Y. 2007) ("In order for an interest in a particular land-use benefit to qualify as a property interest for purposes of the . . . due process clause[,] a landowner must show a 'clear entitlement' to that benefit."

Neither Plaintiff Maui Vacation Rental Association nor any of its members has a "clear entitlement" to a Conditional Permit that attaches the instant that a permit application is submitted. Nor is there any "clear entitlement" to a permit for TVR operators such as Declarants Claudia and Keven Ledesma, who