NO. 08-15251

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAUI VACATION RENTAL ASSOCIATION, INC.,

Plaintiff-Appellant,

vs.

COUNTY OF MAUI, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
DISTRICT COURT CASE NO. CIVIL CV-07-00495 JMS

ANSWERING BRIEF OF DEFENDANTS-APPELLEES

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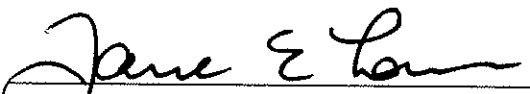
CORPORATE DISCLOSURE STATEMENT
REQUIRED BY RULE 26.1, FRAP

The undersigned counsel for Defendants-Appellees County of Maui and Jeff Hunt states that the County of Maui is a municipal corporation and a political division of the State of Hawaii, and that Jeff Hunt is an individual, sued in his capacity as the County of Maui's Planning Director.

DATED: Wailuku, Maui, Hawaii, June 4, 2008.

By 

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I. STATEMENT OF JURISDICTION

For purposes of this appeal, Defendants-Appellees County of Maui and Jeff Hunt do not contest Plaintiff-Appellant's statement of jurisdiction.

II. COUNTER-STATEMENT OF THE ISSUES

1. Did Plaintiff-Appellant Maui Vacation Rental Association ("MVRA") waive its argument, raised for the first time on appeal, that the Constitutionally-protected "property interests" on which its due process claim are based are "official assurances" that the County's zoning laws would not be enforced?

2. Does the operator of an illegal business have any Constitutionally-protected property interest in alleged assurances that the law will not be enforced?

3. Can the government be estopped from enforcing its laws, to the detriment of the public interest?

III. STATEMENT OF THE CASE

In the County of Maui, it is illegal to operate a transient vacation rental business in zoning districts in which such businesses are prohibited. (Maui County Code, § 19.37.010A) The MVRA brought this action for declaratory and injunctive relief against Defendants-Appellees County of Maui and its Planning Director, Jeff Hunt (collectively, "County") seeking a preliminary and permanent injunction that would have prevented the County from enforcing duly-enacted and facially-valid

County zoning ordinances and State land use laws. (See Appellant's Excerpts of Record, hereafter, "ER" 2, p. 22) The District Court granted the County's motion to dismiss for failure to state a claim upon which relief could be granted. This appeal followed.

IV. STATEMENT OF FACTS

Transient vacation rentals[1] are expressly prohibited under the Maui County Code, except in the County's hotel zoning district. (Maui County Code § 19.37.010A)[2] In addition, transient vacation rentals are not among the uses permitted in the State agricultural and rural land use districts. (§ 205-4.5, Hawaii Revised Statutes)[3] Therefore, the only way to legally operate a transient vacation rental

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[1] The Maui County Code defines "transient vacation rentals" as "occupancy of a dwelling or lodging unit by transients for any period of less than one hundred and eighty days." (Maui County Code § 19.04.040) Maui County Code § 19.04.040 provides in pertinent part that a "transient" is "any visitor or person who owns, rents or uses a lodging or dwelling unit, or portion thereof, for less than one hundred and eighty days and whose permanent address for legal purposes is not the lodging or dwelling unit occupied by the visitor." The definition of "transient" contains a number of exceptions, none of which are relevant to this appeal.

[2] Maui County Code § 19.37.010A, enacted in 1981 by Ordinance 1134 § 3 and amended in 1991 by Ordinance 1989 § 1, provides that "[e]xcept as provided in this section, time share units, time share plans and transient vacation rentals are prohibited." The exceptions referred to in § 19.37.010 provide that transient vacation rentals are allowed in districts zoned "hotel" subject to certain conditions. (Maui County Code § 19.37.010C) Transient vacation rentals that were in operation prior to the adoption of the ordinance are also allowed to continue to operate under certain conditions. (Maui County Code §§ 19.37.010B and D) None of these exceptions are pertinent to MVRA's lawsuit.

[3] Transient vacation rentals are not among the permitted uses listed in § 205-4.5(a), Hawaii Revised Statutes, which enumerates permitted uses within the state agricultural district. Uses not enumerated in § 205-4.5(a) are prohibited. (§ 205-

business outside of the hotel zone is to apply for and receive a County Conditional Permit (see Maui County Code §§ 19.40.010, 19.40.030, 19.40.070, 19.40.080), and in some cases, a State Special Permit (see § 205-6, Hawaii Revised Statutes) before beginning operations.

In order to obtain a County Conditional Permit, the applicant must apply for the permit, the County Planning Commission must make a recommendation, and the County Council must enact an ordinance. (Maui County Code § 19.40.070) Each step in this process is discretionary. (Maui County Code §§ 19.40.070, 19.40.080) Where State Special Permits are required, the permit is issued by either the Maui Planning Commission if the affected parcel is less than 15 acres in size or by the Hawaii State Land Use Commission if the parcel is larger than 15 acres in size or is designated as "important agricultural lands." (§ 205-6, Hawaii Revised Statutes)

Since 2001, the proliferation of illegal transient vacation rentals has reached unprecedented proportions: MVRA estimated that there were at least 800 transient vacation rentals operating on Maui without permits. (Complaint, ¶ 19, ER 2, pp. 6-7)[4]

4.5(b), Hawaii Revised Statutes)

[4] The MVRA's Complaint did not reveal how many of the operators of these illegal transient vacation rentals, if any, were members of the MVRA.

MVRA's complaint alleged that in 2001, John Min (who was at that time the Director of the County's Department of Planning) met with the Vice President of the MVRA and agreed not to initiate enforcement action against MVRA's members while a bill for a transient vacation rentals ordinance was pending before the County Council, unless there was a complaint from the public. (Complaint, ¶ 22, ER 2, p.9) MVRA alleged that the "agreement" between Min and the MVRA was memorialized in a series of documents that were attached to the complaint as Exhibit 1. The first document, which was on the letterhead of the Maui Vacation Rental Association, Inc., dated November 1, 2001, described itself as "minutes" of a meeting. (Complaint, Ex. 1 at p. 2, ER 2, p. 25)[5] The second document was dated January 11, 2002 and is described as a summary of "the main points" covered in another meeting. (Complaint, Ex. 1 at p. 4, ER 2, p. 27) The third document is a letter dated February 5, 2002 from John Min addressed to a member of the Maui County Council and to Alan Arakawa, who at that time was the County's Mayor. (Complaint, Ex. 1 at pp. 5-6, ER 2, pp. 28-29) These three documents do not set forth a single, cohesive and internally-consistent "agreement." [6] Applying Hawaii law and the provisions of the Charter of

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[5] The pages of Exhibit 1 to the Complaint are not numbered in the Appellant's Excerpts of Record. If Exhibit 1 were considered to be a continuation of the Complaint, the November 1, 2001 letter, which is the second page of Exhibit 1 to the Complaint, would start on p. 25 of section 2 of Appellant's Excerpts of Record.

[6] The November 1, 2001 meeting minutes state that any "property owner" who submits an application "will be allowed to continue their business" while an

the County of Maui, the District Court was correct in concluding that none of these alleged "agreements" constituted a valid and enforceable contract. (ER 5, pp. 33-37)[7]

In any event, although a bill to legalize transient vacation rentals was in fact considered by the Maui County Council over the course of several years, each of the County's three planning commissions (the Lanai Planning Commission, the Maui Planning Commission, and the Molokai Planning Commission) ultimately recommended against its passage. (Supplemental Excerpts of Record, hereafter,

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application for a Conditional Permit is pending, but there is an exception where "enforcement due to a complaint has already been initiated." (Complaint, Ex. 1 at p. 2, ER 2, p. 25) The January 11, 2002 meeting summary changed "property owner" to "transient vacation rental operators," and added two exceptions: enforcement will take place if buildings exist on the property without building permits, or if a building has been converted to a different use from the use for which a building permit was issued.) (Complaint, Ex. 1 at p. 4, ER 2, p. 27) Certain exceptions found in the November 1, 2001 meeting minutes (where "a complaint has already been initiated" or enforcement activities initiated by "internet searches") were deleted in the January 11, 2002 letter. (Cf. Complaint, Ex. 1 at p. 2, ER 2, page 25 with Complaint, Ex. 1 at p. 4, ER 2, p. 27) In the February 5, 2002 letter, the Planning Department's enforcement policy was described as allowing operators to continue operating their businesses if they were "taking steps to comply with permit requirements" but "all complaint generated enforcement with a Notice of Violation issued will require that operators cease operations while processing their use permits."

[7] The District Court noted that the elements of a contract include an offer and acceptance, consideration, and parties with both the capacity and authority to enter into the agreement, citing In re Doe, 90 Haw. 200, 208, 978 P.2d 166, 174 (Haw.App. 1999). (ER 5, p. 33) The District Court held that in order to form a binding contract, there must be a meeting of the minds on all essential elements or terms, citing Carson v. Saito, 53 Haw. 178, 182, 489 P.2d 636, 638 (1971). (ER 5, p. 34) The District Court found that the County's Planning Director did not have the authority to enter into contracts on behalf of the County (ER 5, p. 34) and that a contract is only valid where approved by the Corporation Counsel and signed by either the Mayor or (in some instances) the Director of Finance. (Id.) The District Court concluded that the doctrine of estoppel does not apply where the agreement relied on to create the estoppel is beyond the authority of the government official. (ER 5, p. 36)

"SER," 0038-0039) On February 15, 2007, the Maui County Council committee to which the bill had been referred decided to cease further consideration of the bill. (SER 0040)

On March 16, 2007, the full Maui County Council voted to file the bill, meaning no further action would be taken on it. (SER 0043-0049) In voting to file the bill, several members of the Maui County Council emphasized the need to enforce the law as presently written. (SER 0046-0049)

On September 28, 2007, the MVRA filed suit, seeking preliminary and permanent injunctive relief calculated to prevent the County from enforcing facially-valid and duly-enacted State land use statutes and County zoning ordinances against transient vacation rentals operating illegally in the County. (ER 2) On October 23, 2007, the County moved to dismiss. The motion was heard on December 3, 2007, and after further briefing, the District Court issued a written order on December 19, 2007, granting the County's motion to dismiss for failure to state a claim upon which relief may be granted. (ER 5) The District Court gave the MVRA the opportunity to amend its complaint to allege facts supporting an equal protection and/or First Amendment claim (ER 5, p. 42), but the MVRA chose not to do so. (ER 6, p. 2) Judgment was entered on January 22, 2008. (ER 7) This appeal followed.

V. SUMMARY OF ARGUMENT

MVRA's 42 U.S.C. § 1983 claim that the County violated its rights to substantive or procedural due process required MVRA to show that it had a liberty or property interest that is protected by the Constitution. (Wedges/Ledges of Cal., Inc. v. City of Phoenix, AZ, 24 F.3d 56, 62 (9th Cir. 1994)) For the first time on appeal, MVRA argued that "official assurances" are the property interest at issue. MVRA waived this point by not raising it below. Moreover, in Hawaii, despite "official assurances," there is no protected property interest in a particular land use until the final discretionary approval required for that use has been issued. (Brescia v. North Shore Ohana, 115 Hawai`i 477, 501-502, 168 P.3d 929, 953-954 (2007); County of Kauai v. Pacific Standard Life Insurance Co., 65 Haw. 318, 328-239, 653 P.2d 766, 774 (1982); Wedges/Ledges, supra, 24 F.3d at 62 ("A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms."))

The County Conditional Permits and (in some cases) State Special Permits required to operate a transient vacation rental in zoning districts where such businesses are otherwise prohibited are entirely discretionary. (Maui County Code §§ 19.40.070A, 19.40.080A; § 205-6(c), Hawaii Revised Statutes) Thus, MVRA's members do not have any vested property right to operate transient vacation rentals

in zones where such businesses are prohibited, unless they first obtain a Conditional Permit and/or Special Permit, regardless of any alleged "reliance" on "official assurances" that applicable County ordinances and State laws would not be enforced. (See County of Kauai v. Pacific Standard Life Insurance Co., supra; Brescia v. North Shore Ohana, supra.)

MVRA did not state a supplemental state law claim under a theory of promissory estoppel because under Hawaii law, estoppel cannot be used to hinder the government from "enforcing police measures." (Turner v. Chandler, 87 Haw. 330, 334, 955 P.2d 1062, 1066 (Haw.App. 1998)[estoppel cannot be used to prevent government from enacting and enforcing police measures]; see Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984)[when government is unable to enforce the law because the conduct of its agent has given rise to an estoppel, the interest of the community as a whole in obedience to the rule of law is undermined]; see also S & M Inv. Co. v. Tahoe Regional Planning Agency, 911 F.2d 324, 329 (9th Cir. 1990), cert. denied, 498 U.S. 1087 (1991))

VI. STANDARD OF REVIEW

Rule 12(b)(6) motions to dismiss are reviewed de novo. (Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)) Motions to dismiss for failure to state a claim are construed in the light most favorable to the

plaintiff, and therefore, the court generally assumes the factual allegations of the complaint to be true. (Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981)) However, the court need not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. (Id.)

The reviewing court may affirm the dismissal on any basis that is fairly supported by the record. (Burgert v. Lokelani Bernice Pauahi Bishop Trust, supra, 200 F.3d at 663)

VII. ARGUMENT

A. MVRA Waived Its New Argument That "Official Assurances" Are The "Property Interest" On Which MVRA's Due Process Claim Is Based By Failing To Raise It Below

The First Claim For Relief in MVRA's complaint was captioned, "Constitutional Violations, 42 U.S.C. § 1983." MVRA alleged that the County had violated its rights to procedural and substantive due process. (Complaint, ¶ 32, ER 2, p.14) Section 1983 is not a source of substantive rights. Instead, it merely provides a method for vindicating federal rights elsewhere conferred. (Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 978 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005) [an agency's regulation does not create an individual federal right enforceable through § 1983]; Save Our Valley v. Sound Transit, 335 F.3d 932, 936 (9th Cir. 2003)) Thus,

the first step in any civil rights claim is to identify the specific constitutional right allegedly infringed. (Albright v. Oliver, 510 U.S. 266, 271 (1994), rehearing denied, 510 U.S. 1215 (1994))

Therefore, the District Court asked the MVRA to identify the property or liberty interest[8] it was asserting in support of its § 1983 claim. (ER 5, p. 17) In response, the MVRA largely ignored the District Court's request, and instead argued that it did not need to identify a protected property interest, relying on overruled case authorities, state law from other jurisdictions, law review articles, and a misreading of the one Ninth Circuit opinion that the MVRA did cite. (See ER 5, p. 18)

On appeal, however, the MVRA raises an entirely new argument. MVRA now appears to agree with the District Court's ruling that establishing a property interest is a necessary threshold, asserting for the first time that

> "the property interest in this case is the right possessed by vacation renters (1) to not be shut down while the County processes the [ ] applications [for a Conditional Permit]

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[8] MVRA argued unsuccessfully below that it had a liberty interest, as well as a property interest. (See ER 5, p. 21 n.8) On appeal, the MVRA has not asserted any liberty interest, thus waiving the point. (See Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 900 (9th Cir. 2007)[issues not raised and briefed in appellant's Opening Brief are waived, unless the issue goes to the court's jurisdiction.])

and (2) to have County maintain its enforcement by complaint policy to those who can show reliance."

(MVRA's Opening Brief at 26) MVRA acknowledges that this point "was not presented clearly in the district court," id., but asserts that the argument was not waived because the question is "one of law," citing Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 853-854 (9th Cir. 2007).

In Crown Point, supra, 506 F.3d at 853, the Court held that a point was not waived where the same argument was made both to the district court and on appeal, but was supported on appeal by different authorities and reasoning. Even under those circumstances, the Court found the issue to be a "a discretionary call, and a somewhat close one." Here, the Court is not required to make a "close call." Unlike the situation in Crown Point, MVRA acknowledges that the same argument was not made below. (Opening Brief at 26)

It is well settled in this Circuit that arguments raised for the first time on appeal will not be considered "absent exceptional circumstances." (S.E.C. v. Internet Solutions for Business Inc., 509 F.3d 1161, 1167 (9th Cir. 2007); accord, Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878, 882 (9th Cir. 2003)) MVRA has not demonstrated the existence of any "exceptional circumstances," such as a change in the law while the appeal was pending. (See Lane

v. Department of Interior, 523 F.3d 1128, 1130 (9th Cir. 2008)[arguments not presented to the district court need not be considered "unless review is necessary to preserve the integrity of the judicial process, a new issue arose while the appeal was pending due to a change in the law, or the issue is purely one of law and does not depend on the factual record below."])

Here, the points raised by MVRA for the first time on appeal are not purely matters of law. Instead, MVRA's new theories in support of its supplemental state law estoppel claim present mixed questions of law and fact, because at a minimum, MVRA members would have to allege and prove facts demonstrating "reasonable reliance" in "good faith" together with the expenditure of "substantial sums" made in reliance on "official assurances" on which individual MVRA members had the right to rely. (County of Kauai v. Pacific Standard Life Insurance Co., supra, 65 Haw. at 327) No such record was fully developed below.[9] As a consequence,

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[9] Had this argument been made below, the District Court might have ruled differently on the County's argument that the MVRA did not have prudential standing to bring the action on behalf of its members, because the involvement of individual members in the case would be required to prove reliance. (See Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 365 F.Supp.2d 1146, 1161 (D. Nev. 2005)[an organization lacks standing to sue on behalf of its members if the claim asserted or the relief sought requires the participation in the lawsuit of individual members.]) Moreover, had County known that MVRA was going to define its property interest in a way that would require individualized proof of, among other things, "good faith" reliance on official assurances on which the person had a right to rely, and the expenditure of "substantial" sums based on that reliance, see County of Kauai v. Pacific Standard Life Insurance Co., 65 Haw. 318, 327, 653 P.2d 766, 774 (1982), County could have preserved its standing issue by means of a cross-appeal.

this Court should find that MVRA waived its new formulation of "property interest" and all arguments based on this new theory.

In short, MVRA's Opening Brief raises new issues that were not presented to the District Court. MVRA has not demonstrated any "exceptional circumstances" that would require this Court to consider points raised for the first time on appeal. Moreover, the issues as framed present issues of mixed law and fact. Therefore, MVRA has waived any arguments based on a definition of "property interest" not raised below.

B. Operators Of Illegal Businesses Do Not Have Any Constitutionally-Protected Property Interest In Alleged Assurances That The Law Will Not Be Enforced

Even if it had not waived the point, as shown above, MVRA cannot establish as a matter of law that it has a Constitutionally-protected property interest in continued operation of transient vacation rentals where the applicable zoning ordinance prohibits such businesses (see Maui County Code §§ 19.40.010, 19.40.030, and 19.40.080A; see also § 205-4.5(b), Hawaii Revised Statutes), the business does not have the permits needed to operate legally, and issuance of such permits is discretionary. (See County of Kauai v. Pacific Standard Life Insurance Co., supra, 65 Haw. at 327-328 [estoppel will not apply, and developer may not safely proceed with his project, until after the last discretionary approval has been issued])

The MVRA does not contend that an unissued permit is the alleged "property interest" that triggers its substantive and procedural due process rights. (Opening Brief at 23) Instead, MVRA claims that it possesses "rights" solely as a result of its alleged reliance on a former Planning Director's "assurances" that under certain conditions, he would not enforce County ordinances and State statutes prohibiting transient vacation rentals. (Id.)

MVRA bases its argument on a phrase taken out of context from Kaiser Aetna v. U.S., 444 U.S. 164, 179 (1979). In that case, the Court held that the government could not force the owners of a private marina to open the marina to the public unless the government exercised its eminent domain powers and paid just compensation. Here, however, the County is not taking anyone's property or "tak[ing] over the management of the landowner's property." (Id.) Instead, the County is merely trying to enforce its duly-enacted and facially-valid zoning ordinance.

Likewise, the Hawaii cases cited by MVRA at pages 29 - 30 of its Opening Brief do not establish the existence of any vested right to operate a business without the necessary permits. In Allen v. City & County of Honolulu, 58 Haw. 432, 433, 571 P.2d 328, 329 (1977), the issue was whether the city, by re-zoning the plaintiffs' property, was liable for money damages where the plaintiffs made

expenditures in reliance on the zoning applicable to the property when they purchased it. In Allen, the Hawaii Supreme Court expressly declined to decide whether the city was estopped from enforcing a new zoning ordinance. (Id., 58 Haw. at 436, 571 P.2d at 330) The "property interest" in Allen was not "reliance" on "official assurances," but rather, a vested right to develop property in conformity with its existing zoning. The other cases cited at page 29 of MVRA's Opening Brief involved vested property rights in permits or licenses already issued or benefits already conferred.[10] None of the cited cases establish a "vested right" in an expectation that the law will not be enforced.

MVRA also misstates the essential holding of County of Kauai v. Pacific Standard Life Ins. Co., supra, 65 Haw. 318, 653 P.2d 766 (1982). That case does not

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[10] In Brown v. Thompson, 91 Hawai`i 1, 11, 979 P.2d 586, 596 (1999), the plaintiff was deemed to have a "legitimate claim of entitlement" to mooring and live-aboard permits that had already been issued. Here, by contrast, the operators of illegal transient vacation rentals do not have any legitimate claim of entitlement to discretionary permits that have not yet been granted. In Kernan v. Tanaka, 75 Haw. 1, 22, 856 P.2d 1207, 1218 (1993), cert. denied, 510 U.S. 1119 (1994), the court held that a driver's license, "once conferred," was a protected property interest. Kernan does not stand for the proposition that an application for a discretionary permit enjoys the same status. Aguiar v. Hawaii Hous. Auth., 55 Haw. 478, 496, 522 P.2d 1255, 1267 (1974), involved public housing benefits to which the plaintiffs were entitled by statute, rather than a discretionary permit such as those at issue here. The opinion in Silver v. Castle Memorial Hosp., 53 Haw. 475, 486, 497 P.2d 564, 572 (1972), cert. denied, 409 U.S. 1048 (1972), is not particularly helpful because it did not analyze the issue of what constitutes "property." The quoted language from Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals, 86 Hawai`i 343, 353-354, 949 P.2d 183, 193-194 (1997) dealt with "vested" property rights arising from "preexisting lawful uses of property," as opposed to preexisting unlawful uses of property, as is the case here.

stand for the proposition that "zoning estoppel" and "vested rights" are synonymous. Instead, the Hawaii Supreme Court noted that "vested rights" and "equitable estoppel" are "two similar yet theoretically distinct theories." (Id., 65 Haw. at 325, 653 P.2d at 772.) Only "vested rights" are "real property rights which cannot be taken away by government regulation." (Id.) Until receipt of the last discretionary approval, there can be no vested rights; any expenditures made before the last discretionary approval is issued are speculative and do not create a vested property right. (County of Kauai v. Pacific Standard Life Ins. Co., supra, 65 Haw. at 338)

As for the law review articles and case authorities from states other than Hawaii, none of these are useful, because it is Hawaii law that determines the nature and extent of a constitutionally-protected property interest. (See Thornton v. City of St. Helens, 425 F.3d 1158, 1164 (9th Cir. 2005)[protected property interests are not created by the Constitution, but rather by independent sources such as state law]; Wedges/Ledges of Cal., Inc. v. City of Phoenix, AZ, supra, 24 F.3d at 62 [whether one has a reasonable expectation of entitlement is "determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms."])

The Hawaii law is quite clear that MVRA's members have no legal right to operate transient vacation rentals in zones where such businesses are prohibited

unless the operator first obtains a County Conditional Permit and in some cases, a State Special Permit. (See Maui County Code §§ 19.37.010A, 19.40.070; §§ 205-4.5(b), 205-6, Hawaii Revised Statutes) Indeed, MVRA acknowledges as much in its Opening Brief: "the short-term rental of property to vacationers without a permit is generally not permitted by Maui County's zoning code . . . ." (Opening Brief at 3) Under Hawaii law, whether to grant special dispensation from zoning restrictions by means of a Conditional or Special Permit is entirely discretionary. (Maui County Code §§ 19.40.070, 19.40.080; § 205-6(c), Hawaii Revised Statutes) No zoning estoppel operates until the property owner has received the necessary permits, which are the "last discretionary approval." (See County of Kauai v. Pacific Standard Life Ins. Co., supra, 65 Haw. at 326-335; Brescia v. North Shore Ohana, supra, 115 Hawai`i at 501-502)

There is no Constitutionally-protected "property interest" in operating a transient vacation rental in zoning districts where such businesses are prohibited. That an MVRA member may have applied for a Conditional Permit or a Special Permit, that the process is lengthy or cumbersome, or that it may be expensive, does not alter the fact that no one can legally operate transient vacation rentals without the necessary permits, any more than one could open a bar and begin selling liquor to

patrons before receiving a liquor license, even if the local liquor inspector had promised to turn a blind eye to such illegal activity.

Therefore, the District Court was correct in ruling that there is no Constitutionally-protected property interest in the mere hope or expectation of obtaining a discretionary Conditional Permit or Special Permit. As the District Court observed, the "'mere fact a person has received a government benefit in the past, even for a considerable length of time, does not, without more, rise to the level of a legitimate claim of entitlement.'" (ER 5, p. 16, quoting Doran v. Houle, 721 F.2d 1182, 1186 (9th Cir. 1983))

C. MVRA's Complaint Does Not State A Supplemental State Law Claim For Estoppel Against The Government

MVRA misstates Hawaii law regarding the elements of an estoppel claim against the government. MVRA cited Denning v.Maui County, 52 Haw. 653, 485 P.2d 1048 (1971) for the proposition that a plaintiff seeking to estop the government is only required to allege "official assurances of some form" and reliance. (Opening Brief at 39) In fact, the prerequisites for estoppel in Hawaii are more stringent, especially when the plaintiff is suing the government.

1. MVRA's Complaint Does Not State A Claim For Zoning Estoppel

In Denning, supra, a developer sought a writ ordering the county board of adjustment and appeals to determine whether the developer had the right to continue development of a project that did not conform to existing zoning regulations. The Hawaii Supreme Court held that the board did not have jurisdiction. Because the case was remanded, the Hawaii Supreme Court provided some guidance to the trial court, advising that in order to prove he had the right to proceed under the old zoning rules, the developer would have to show that he "had been given assurances of some form by appellants that Denning's proposed construction met zoning requirements [a]nd that Denning had a right to rely on such assurances . . . ." (Id., at 658, footnotes omitted, emphasis added) Thus, Denning stands for the proposition that a business owner must prove more than "assurances of some form" and "reliance." The owner must show that he received official assurances that his proposed business met zoning requirements and that the owner had a legal right to rely on the assurances.

Here, transient vacation rentals do not meet zoning requirements if they are located outside of the hotel zone and no Conditional Permits have been issued. (Maui County Code, §§ 19.37.010A, 19.40.070) Moreover, MVRA cannot show any

"right" to rely on alleged assurances that Maui County's zoning laws would not be enforced.

In Hawaii, to prove equitable estoppel against the government in a land use context, the land owner or developer must prove a change in position

> "by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project."

(Life of the Land, Inc. v. City County of City & County of Honolulu, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980)) The courts in Hawaii have interpreted this standard as raising four questions: "(1) What reliance is 'good faith'; (2) what sums are 'substantial'; (3) what constitutes 'assurance' by officials; and (4) when does a developer have a right to rely on such assurances?" (County of Kauai v. Pac. Standard Life Ins. Co., supra, 65 Haw. at 327)

In County of Kauai, supra, 65 Haw. at 327, the Hawaii Supreme Court held that the government's " f]inal discretionary action constitutes official assurance."

In Brescia v. North Shore Ohana, supra, 115 Haw. at 500, the Hawaii Supreme Court noted that "[z]oning estoppel is not intended to protect speculative business risks. Thus, an expenditure made in compliance with underlying zoning but before final discretionary action will be disregarded for estoppel purposes."

Here, MVRA's members are operating transient vacation rentals illegally in zoning districts in which such businesses are not allowed without first obtaining the necessary permits. Therefore, they cannot prove expenditures "made in compliance with underlying zoning." Moreover, even if a transient vacation rental operator has applied for a permit, until the permit is issued, the "final discretionary action" (namely, the passage of an ordinance by the Maui County Council, approved by the Mayor, granting a County Conditional Permit)[11] has not occurred. (Maui County Code § 19.40.070D; Charter of the County of Maui, Article 4, §§ 4.1, 4.3) MVRA cannot show the expenditure of "substantial" sums in "good faith" reliance on official assurances, because the complaint does not allege any expenditures, other than the costs of consultants who often assist applicants with applying for permits. (ER 2, p. 13, Complaint ¶ 29) Regardless of whether expensive consultants are used, any costs associated with obtaining permits that are legal prerequisites to operating

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[11] Or, in the case of a State Special Permit, final action by the Maui Planning Commission or by the State Land Use Commission, § 205-6, Hawaii Revised Statutes.

the business must be incurred before a transient vacation rental business can operate legally. Thus, permit-related costs cannot be said to be made in reliance on any "official assurances." (See Brescia v. North Shore Ohana, supra, 115 Hawaii at 501-502; County of Kauai v. Pacific Standard Life Ins. Co., supra, 65 Haw. at 328)

Moreover, the MVRA has not demonstrated that its members had a "right to rely" on the alleged "official assurances" because the former Planning Director did not have the authority to bind his successors in office, as well as successive County Planning Commissions, County Councils, and Mayors, in perpetuity, to his alleged promise not to enforce the law. MVRA acknowledges, at page 35 of its Opening Brief, that the County's Planning Director does not have the power to grant Conditional Permits. Therefore, any expenditure made in reliance on an assurance from the Planning Director would be purely speculative, until such time as the last discretionary approval was issued. (See County of Kauai, supra, 65 Haw. at 338)

MVRA also acknowledges that there have been changes in County administrations since the alleged "assurances" of nonenforcement were made by former Planning Director John Min, including the election of a new Mayor and the appointment of a new Planning Director. (Opening Brief at 4) Although the County's Planning Director is charged with enforcing zoning ordinances and may

have a certain amount of prosecutorial discretion in determining enforcement policy and priorities, the Planning Director does not have the power to alter the unambiguous language of Maui County Code § 19.37.010A by agreeing to suspend enforcement against illegal transient vacation rentals. Likewise, he does not have the legal authority to enter into binding agreements that would impose his policies on his successors. (Cf. Charter of the County of Maui, Article 8, Chapter 8, § 8-8.3 enumerating the powers of the Planning Director with Charter of the County of Maui Article 9, § 9-18 describing County contract requirements.)

Moreover, the documents attached to MVRA's complaint as Exhibit 1 (ER 2, pp. 25-28) are not the sort of "official assurances" on which MVRA members had a legal "right to rely." As the District Court noted, the documents in Exhibit 1 to the complaint were not legally-enforceable promises, or "contracts," because they did not include the essential elements of offer, acceptance, consideration, and authority to enter into the agreement. (ER 5, p. 33, citing In re Doe, 90 Haw. 200, 208, 978 P.2d 166, 174 (1999)) The District Court correctly held that Maui County's Planning Director does not have the legal authority to enter into binding contracts on behalf of the County. (ER 5, p. 34, citing to Charter of the County of Maui, Chapter 9, § 9-18) "Estoppel 'cannot be applied to actions for which the agency or agent of

the government has no authority.'" (Brescia v. North Shore Ohana, supra, 115 Haw. at 499, quoting Turner v. Chandler, supra, 87 Haw. at 334)

MVRA's complaint does not allege, and MVRA cannot prove, the legal prerequisites for zoning estoppel against the government under controlling Hawaii law. Therefore, the District Court properly dismissed all claims premised on that theory.

2. MVRA's Complaint Does Not State A Claim For Promissory Estoppel Against The Government

Even under legal precedents decided outside of the land use arena, MVRA's complaint does not state a claim for estoppel against the government. "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." (Heckler v. Community Health Services of Crawford County, Inc., supra, 467 U.S. at 51) That is why the government cannot be estopped on the same terms as any other litigant. (Id.)

Here, the MVRA is seeking to prevent enforcement of the County's zoning laws against transient vacation rentals that were operating illegally when the County's former Planning Director made the alleged "official assurances" on which MVRA claims to have relied. Allowing some 800 transient vacation rentals (see ¶ 22

of the Complaint, ER 2, p. 9) to continue operating illegally for an indefinite length of tim on the strength of such alleged "assurances" undermines obedience to the rule of law in the County of Maui, and favors lawbreakers over the interests of law-abiding citizens. As the County's former Planning Director himself acknowledged,

> "Oftentimes, we place more emphasis on the concerns of the alleged violator when in fact, more emphasis should be placed on the majority of the public who are not violating any of our codes or laws but are impacted by the illegal activities occurring in their neighborhood."

(Complaint, Ex. 1 at p. 6, ER 2, p. 29)

Under the facts alleged in MVRA's complaint, no case for estoppel against the County can be made. In S & M Investment Co. v. Tahoe Regional Planning Agency, supra, 911 F.2d at 329 n.4, this Court held that "traditional estoppel" requires proof of the following: (1) the party to be estopped knew the facts; (2) the party to be estopped intended his conduct to be acted upon; (3) the party asserting the estoppel was ignorant of the true facts; and (4) the party asserting the estoppel justifiably relied on the other party's conduct to his detriment. Where the party to be estopped is a government entity, however, this Circuit requires proof of

additional facts, including that the "imposition of estoppel will not unduly harm the public interest." (Id., 911 F.2d at 329)

Here, it is unlikely that MVRA could meet even the "traditional" standards. MVRA knew that there was not any legal right to operate a vacation rental without first obtaining the necessary permits. Therefore, any alleged reliance on "assurances" that the law would not be enforced was not legally justifiable.

It is even more clear that MVRA cannot meet this Circuit's additional test, that the "imposition of estoppel will not unduly harm the public interest." As the U.S. Supreme Court noted in Heckler, supra, 467 U.S. at 60, when the law cannot be enforced, the "interest of the citizenry as a whole in obedience to the rule of law is undermined." The public interest is not served when the County of Maui cannot enforce its duly-enacted zoning ordinances.

Hawaii courts are also leery of allowing estoppel to operate against the government. In Turner v. Chandler, supra, 87 Hawai`i at 333, the Hawaii Supreme Court noted that "'[t]he application of the doctrine of equitable estoppel against the government is not favored" and that "'estoppel may not be used in such a way as to hinder the state in the exercise of its sovereign power.'" (Id., 87 Hawai`i at 334) Moreover, the doctrine of estoppel cannot be used to prevent the government from enacting and enforcing police measures. (Id.)

MVRA reads too much into Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Haw. 40, 514 P.2d 861 (1973). That case does not stand for the broad proposition that "if a government official charged with responsibility to administer or enforce a law in good faith provides assurances about how that law will be enforced, the public is justified in relying on those assurances under Hawaii law." (Opening Brief, p. 34) In fact, Brescia v. North Shore Ohana, supra, 115 Hawai`i at 501-502, the Hawaii Supreme Court's latest word on the subject, squarely holds that "official assurances" cannot be reasonably relied upon prior to the last discretionary act.

Thus, whether one views MVRA's estoppel argument in the land use context, or under more traditional principles of promissory or equitable estoppel, the result is the same. The citizenry as a whole would be harmed, and respect for the rule of law would suffer, if the County were prevented from enforcing its laws. Therefore, the District Court was correct in ruling that MVRA's complaint did not state a claim for estoppel against the County.

D. MVRA Is Not Entitled To Rely On Matters Outside Of The Appellate Record Or To Resurrect Matters Previously Stipulated Away

1. MVRA's Counsel Stipulated That The Lawsuit Did Not Concern B&Bs

At pages 16-17 of its Opening Brief, MVRA relies on a Declaration of Sandy Beck (ER 4), which did not form the basis for the District Court's ruling on the County's motion to dismiss. That declaration concerns the purchase of a Bed and Breakfast business, and recites alleged reliance on representations made by former Planning Director Michael Foley about getting a permit for a Bed and Breakfast business ("B&B"). (See ER 4, ¶¶ 3, 6, 10) B&Bs are subject to an ordinance passed in 1997 that does not apply to transient vacation rentals. (ER 5, p. 3; Maui County Code § 19.64.010 et seq.) The District Court did not consider any issues pertaining to B&Bs, because during the hearing on the County's motion to dismiss, the MVRA's attorney asserted that the MVRA was not seeking any relief applicable to B&Bs. (ER 5, p. 3 n.1; SER 0020, lines 4-6: "We have nothing in our lawsuit, as far as we're concerned, that has to do with bed and breakfasts.") When the County's attorney pointed out that there was a declaration filed in support of MVRA's motion for preliminary injunction (a motion that was not heard or decided, see Clerk's Record No. 39) from a person who said she relied on representations of a former Planning Director about B&Bs (SER 0020, lines14-17), the District Court did not allow the

County's attorney to argue the point further, saying, "[i]f Mr. Fosbinder is telling us that it's not part of this case; I'll take - I'll accept those representations[.]" (SER 0020 line 25 - 0021 line 3) Later in the hearing, MVRA's lawyer said, "First of all, we're not dealing with any bed and breakfasts[.]" The District Court inquired, "All. right. So we can take that off the table?" The MVRA's lawyer responded, "Yes." (SER 0031, lines 2-6)

MVRA is bound by the representations of its attorney that the lawsuit does not concern B&Bs, rendering the Beck Declaration irrelevant and superfluous. (See CDN Inc. v. Kapes, 197 F.3d 1256, 1259 (9th Cir. 1999)[stipulation limiting issues to be tried precludes raising on appeal issues not included in the stipulation]; see also Mendoza v. Block, 27 F.3d 1357, 1360 (9th Cir. 1994)[express agreement with trial court's procedure precluded objection to the same on appeal.])

2. Reference To A Deposition Transcript Is Improper, As The Transcript Is Not In The Record On Appeal

On page 17 of MVRA's Opening Brief, at note 10, MVRA makes reference to the deposition testimony of Robyn Loudermilk. A transcript of that deposition was never presented to the District Court for consideration, did not form any of the bases for the District Court's decision, and therefore cannot be relied on by MVRA on appeal. (Barcamerica Int'l USA Trust v. Tyfield Importers, Inc., 289

F.3d 589, 594 (9th Cir. 2002)[deposition not filed with district court not properly part of record on appeal]) Therefore, the reference should be disregarded.

E. There Are No Mandatory Time Limits For Conditional Permits

MVRA argues in its Statement of the Case that the County failed to comply with "the State Law Requiring Expeditious Processing of Permits." (Opening Brief at 16) On page 17 of its Opening Brief, MVRA argued that "[u]nder this statute," permits not granted within a certain time are "deemed approved." MVRA did not identify the statute to which it was referring. Although included in the Statement of the Case section of MVRA's Opening Brief, this issue was not briefed or included in the Argument section of the Opening Brief, nor was it included in the Summary of Argument of Issues Presented for Review sections.

If MVRA intended to assert this point as one of its issues on appeal, such an argument would be unavailing. The District Court correctly held that the "deemed approved" language § 91-13.5, Hawaii Revised Statutes, applies only to "agencies" and under Hawaii law, the Maui County Council is not an "agency." (See ER 5, pp. 28-30; Sandy Beach Def. Fund v. City County of the City & County of Honolulu, 70 Haw. 361, 370, 773 P.2d 250, 257 (1989)["We conclude, therefore, based upon the plain language of HRS § 91-1 and its legislative history, that the City Council, as the legislative branch of the County, is not subject to the procedural

requirements of HAPA when acting in either a legislative or non-legislative capacity."]) As for MVRA's references to time limitations in Honolulu Revised Ordinances, those are not pertinent, because the County of Maui is a separate county from the City and County of Honolulu, and each county in Hawaii has its own county code provisions relating to zoning. (See generally §§ 46-1.5 and 46-4, Hawaii Revised Statutes) Furthermore, MVRA admits that "County of Maui has never enacted the expeditious processing rules required by the [uncited] statute, so it was not constrained by time deadlines to process the vacation rental CP applications." (Opening Brief at p. 18)

The District Court ruled correctly on this issue and should be upheld.

VIII. CONCLUSION

For the reasons stated above, County of Maui respectfully requests this Court to affirm the Judgment in County's favor entered on January 22, 2008.

DATED: Wailuku, Maui, Hawaii, June 4, 2008.

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