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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.	Case No.: CV-07-00495 JMS (KSC) PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FILED ON SEPTEMBER 28, 2007; CERTIFICATE OF SERVICE Date: December 3, 2007 Time: 10:00 a.m. Ctrm: Hon. J. Michael Seabright

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FILED ON SEPTEMBER 28, 2007

I. INTRODUCTION

Plaintiffs filed a complaint for injunctive and declaratory relief in federal court against Defendants for their conduct in dealing with owners of property being used as Transient Vacation Rentals in the County of Maui. At its heart, this is a case about the deprivation of honest government services, due process, affirmative misconduct, reliance, and estoppel.

Plaintiff contends that the County's motion to dismiss misses the point of this lawsuit. This is not a lawsuit seeking to force the granting of permits to the individual applicants, as in the *Lake Tahoe* case so heavily relied upon by the County in its moving papers. Instead, this is about fairness and equity in government services – in its simplest form, it's as though a police officer was stopping vehicles to tell them they had to turn around and go back because the bridge was out, but then gave everyone who turned around a ticket for crossing the double yellow line, and telling them they should have tried the bridge.

The citizens represented by the MVRA were similarly "duped". They were told to apply, but when they did apply, either their applications were never processed, or their

applications were purposefully turned away. The evidence is abundant and uncontradicted; as alleged in the Complaint, even the former Mayor has provided his public testimony confirming what Plaintiff's allege.

The County cannot legitimately deny what it has done, it can only attempt to spin the law in an effort to convince this Court that what it has done is legally acceptable, in effect that the County government can do whatever it wants, including affirmatively and specifically misleading its citizenship, in such a way as to cause reliance and provable harm. Plaintiff contends that this is a travesty of justice that simply cannot be constitutional under the provisions cited in the Complaint.

II. STANDARD FOR DISMISSAL ON 12(B)(6)

The law in the Ninth Circuit, as throughout the country, is well established on a 12(b)(6) motion for dismissal. There is a liberal standard *against* dismissal. In ruling on a Rule 12(b)(6) motion for alleged failure to state sufficient facts to support a cognizable legal claim upon which relief can be granted, the Court is to presume that all allegations in the complaint are true, and to resolve all doubts and inferences in the Plaintiffs' favor. *See, Albright v. Oliver*, 510 U.S. 266, 267, 114 S.Ct. 807, 810, 127 L.Ed.2d 114 (1994).

In its liberality, Rule 12(b)(6) erects a powerful presumption against dismissing the pleadings for failing to

state a cognizable claim for relief. *See, Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1496 (10th Cir. 1995); *see also, Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 203 F.3d 790, 794 (Fed. Cir. 2000). Furthermore, even in granting a motion to dismiss, the complaining party should be afforded an opportunity to amend; therefore dismissal if ordered should be made without prejudice. *See, e.g., Morongo Band of Mission Indians v. Rose,* 893 F.2d 1074, 1079 (9th Cir.1990) (leave to amend should be granted with "extreme liberality").

A claim will only be dismissed under Rule 12(b)(6) if it appears beyond doubt that the pleader can prove no set of facts in support of the claims that would entitle the pleader to legal relief under any theory. *See, Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-101, 2 L.Ed.2d 80 (1957). The complaint in this matter is highly specific and detailed in is factual allegations, giving more than mere notice of the specific claims against the County.

III. STANDARD FOR DISMISSAL ON 12(B)(1)

The County also pleads dismissal under Rule 12(b)(1), asserting that the MVRA does not have organizational standing and that therefore this Court lacks subject matter jurisdiction. The County suggests that its jurisdictional attack is not on the fact of the allegations of the Complaint, which makes sense given that the Complaint is highly fact specific and many of

those facts are indisputable (the fact of the written agreement, and what relief Plaintiff is seeking, for example), but rather that the motion is a "speaking motion". Plaintiff disagrees with the County's implication that its motion is, or needs to be, a "speaking motion".

According to The Rutter Group's "Federal Civil Procedure Before Trial" (West 2005), "There is an important difference between 12(b)(1) motions attacking the complaint on its face ('facial attacks'), and 12(b)(1) 'speaking motions': Under the former, the court must consider the allegations of the complaint as true .. whereas under the latter the court determines the facts for itself [citations omitted]." However, it is critical to note that **where the issues of jurisdiction and substance are intertwined,** the court **must** defer the motion until trial. *Roberts v. Corrothers* (9th Cir. 1987) 812 F.2d 1173, 1177.

In the case at bar, the County mentions the possibility of a "speaking motion", but Plaintiff contends that the content of the motion to dismiss is really that of a facial attack on the subject matter jurisdiction. The County contends that the Court lacks jurisdiction because the MVRA lacks organizational standing; however the elements of standing are easily determined by the undisputed allegations of the Complaint and the very nature of Plaintiff's Prayer for Relief.

The Complaint, for example, does not seek specific relief for individual permit applicants, nor does it seek a grant of permits to any particular applicant. This is not a Complaint for damages for individuals. Rather, the complaint seeks injunctive relief to maintain the status quo policy that is written and signed and not denied to exist. Plaintiff contends that the County should accept and process new applications without enforcing their zoning restrictions, at least long enough to allow people to apply under the written policy of the past six years, as promised. Plaintiff contends that no additional testimony or evidence is needed with regard to the standing argument.

However, if the Court does seek additional testimony as to any evidence on the standing issue, Plaintiff respectfully requests that the Court take judicial notice of the multiple declarations presently on file with this Court in support of the Motion for Preliminary Injunction filed by Plaintiffs and scheduled to be heard on December 10, 2007.

The Ninth Circuit has ruled that if the 12(b)(1) motion is resolved on declarations alone, without an evidentiary hearing, then the complaint's factual allegations must still be accepted as true. *McLachlan v. Bell* (9th Cir. 2001) 161 F.3d 908, 909.

IV. SUMMARY OF FACTS

The facts are summarized here, but are more fully set forth in the Complaint on file herein. Plaintiff Maui Vacation Rental Association, Inc. is an organization formed to promote Maui vacation rentals (in single-family dwellings) "on residential, agricultural and rural zoned land, and to promote compliance with regulations,

For over a decade organizations such as the Maui Visitor's Bureau in cooperation with the Hawaii Tourism Authority, actively promoted the growth of the vacation rental industry. The vast majority of other home businesses were de facto legalized by written "enforcement policies" provided to County staff and the public, which consisted of a series of three memorandums, explained the change of the County's position, which paralleled the County's position regarding vacation rentals.

Early in the Apana administration, then-Planning Director John Min and the MVRA, faced with an imminent wave of litigation, reached an agreement as to a plan for bringing vacation rentals into compliance. The County faced an enforcement nightmare because of the estimated 800 TVRs in operation. Enforcing the zoning restrictions would likely have resulted in that many permit applications.

The 2001 agreement was designed to encourage an increase in applications. The County offered operators an opportunity to apply for permits and remain in business until their applications were either approved or denied. The 2001 written agreement was a writing signed by Dr. Dantes and Director John Min, in his official capacity. It was a combination settlement agreement, plea bargain, enforcement agreement and contract enforceable in equity.

From 2002-2006, it was openly stated by the Planning Department, Mayor and members of the County Council that the law was going to be simplified, and that there was no need to submit permit applications under the "old" law (i.e., the Bed & Breakfast ordinance that had been passed in 1997, or the TVR requirement of obtaining a Condition Permit under Chapter 19.40 of the Maui County Code, and if appropriate, an HRS 205-6 Special Permit).

During the "moratorium period" of the last six (6) years, relevant zoning laws were not enforced, as per the 2001 agreement. The current Tavares administration, however, has started enforcing the existing law without regard to whether or not TVRs had applied, or tried to apply but were told to wait, under the 2001 written agreement

Defendant Jeff Hunt, current Director of the Planning Department, has publicly categorized vacation rentals as a

"crisis situation", purportedly because of an impact on affordable housing, despite the fact that a Board of Realtors' study of vacation rentals found negligible impact on affordable housing due to vacation rentals. Previously, however, the County's elected officials, administrators and employees spoke with a common voice – TVRs had nothing to worry about, because the laws would be changed.

On July 2, 2007 the Planning Department publicly announced an end to the moratorium. TVR owners who applied for permits are being ordered to close their businesses immediately, contrary to the 2001 settlement agreement. After meetings and hearings on the matter, Defendants mandated that January 1, 2008, is the cutoff date. Notices of Warning have been issued to various TVR owners.

Plaintiff challenges the County's right to breach an agreement as to those who relied upon the agreement; the way the County has applied its laws to vacation rental applicants; and the way the County induced certain conduct in reliance upon its policy statements that caused irreparable harm, including violation of constitutional rights and loss of real property.

V. PLAINTIFF ORGANIZATION MEETS THE TEST FOR STANDING IN THIS MATTER

As stated, Plaintiff Maui Vacation Rental Association, Inc. is an organization formed to promote Maui vacation rentals (in

single-family dwellings) “on residential, agricultural and rural zoned land, and to promote compliance with County and State regulations, such that local government, visitors, residents and owners of vacation properties benefit mutually.” *MVRA Charter*. Its members are owners and operators of transient vacation rentals (TVRs) in the County of Maui who are in agreement with the goals of the MVRA as set forth in its Charter.

In this case, because of the erratic and inconsistent conduct of the County in dealing with its own laws, the MVRA is seeking to protect its members rights through generally applicable injunctive relief. It cannot “promote compliance” when the rules are being arbitrarily made and applied, any more than its members can be expected to “comply” when the County fails to provide honest government services to those who seek to follow the County’s own written policies and guidelines.

An association has standing to bring suit on behalf of its members when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *United Food and Commercial Workers v. Brown Group*, 517 U.S. 544, 557, 116 S.Ct. 1529, 1534, 134 L.Ed.2d 758 (1996) (quoting *Hunt v.*

Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977)).

Since both (a) and (b) would appear to be undisputedly in favor of Plaintiff, it would appear that the standing question turns on the third prong. As the Supreme Court has stated, "the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *Id*. at 1163. Given the nature of the relief requested, which is generally applicable to all members, Plaintiff contends that the participation of the individuals is certainly not necessary to obtain the relief requested.

As set forth in the Complaint, members of the MVRA include those who have applied for a permit under the 2001 agreement and were either granted a permit or have had their permit held in abeyance, as well as those who attempted to apply for a permit but were refused. Because this action seeks injunctive relief on behalf of the MVRA and its members, individual participation in the lawsuit is not necessary, and the interests sought to be protected by this action are germane to the stated purpose of the MVRA.

The County relies largely on a Nevada District Court case, *Committee for Reasonable Regulation of Lake Tahoe v. Tahoe*

Regional Planning Agency 365 F.Supp.2d 1146 (D.Nev. 2005) (*"Lake Tahoe"* case), for its position that the MVRA lacks standing in this matter. In the *Lake Tahoe* case, however, the court was dealing with a First Amendment case that involved a facial and as-applied attack of how the planning agency ruled on individual permit applications under a complex "multi-faceted" ordinance". The court in that case ruled against the organization's standing with regard to the as-applied challenge on the grounds that the determination of whether to grant permits depended on how the exact details of the home were evaluated in regard to the challenged regulations.

No such detailed case by case analysis is required here, for the relief requested. In the case at bar, Plaintiff is not challenging the ordinance itself, nor how that ordinance has been applied to individual permit applicants. Instead, Plaintiff seeks an injunction under which the County will accept and consider permit applications, but, as a remedy for the County's conduct as alleged in the Complaint, without shutting down the applicants' businesses, as the County promised to do. If individual applicants want to contest how the County processes their specific application, that would be a separate damages lawsuit.

As per the Complaint, the members of MVRA can be divided into three categories, which may include non-members who are similarly situated:

1. Those who have already applied (approximately 70) for a permit, but whose permit has languished for years;

2. Those who would have applied for a permit, but were explicitly told not to by staff, or in at least one case by the Planning Director himself, because a ‘new easier system’ was just around the corner; and

3. Those who would have applied for a permit, but who found out indirectly that the Planning staff was telling people not to bother, and so did not apply.

Unlike in the *Lake Tahoe* case, Plaintiff is not asking the court to force the issuance of permits based on the specific facts of the application; it is only asking that as to the first group of actual applicants, the court find that as a matter of law, due to the delay that violates State law, the permits are deemed issued. If the Court doesn’t find that the permits are deemed issued, than Plaintiff requests injunctive relief allowing the applicants to operate without interference by the County, until the County processes their applications as it was supposed to do under the law. Once again the court need not evaluate any specific facts of any individual application. As to the second and third group of applicants, Plaintiff seeks an

injunction allowing them to apply as they have and should have had a right to do, without being shut down, given the County's promise, the County's affirmative misrepresentations, and the would-be applicants reasonable reliance. The injunctive relief sought applies to limited general categories of applicants, both MVRA members and non-members. This is entirely different from the *Lake Tahoe* case, where each application rested on an extremely complicated set of visual impact relief rules which the court would have to evaluate to determine whether to force the issuance of each individual permit.

VI. PLAINTIFF'S COMPLAINT ADEQUATELY STATES A CLAIM FOR RELIEF

Plaintiff makes a number of claims for relief, not all of which are addressed by the County in its motion to dismiss. The allegation that the up to six year delay in processing applications is a violation of Hawaii's Administrative Procedures Act as well as procedural and substantive due process rights, for example, is not addressed. In addition to responding to the County's specific arguments, Plaintiff refers this Court to its Memorandum in Support of Motion for Preliminary Injunction, already on file in this action.

A. Plaintiff Gives Notice Of An Equal Protection Claim

Plaintiff does not contend that 42 U.S.C. § 1983 creates substantive rights. 42 U.S.C. § 1983 is a facilitating

provision under which violations of constitutional rights and federal laws are actionable.

One of Plaintiff's many claims for relief is grounded in equal protection. If this claim is vital to the relief requested, Plaintiff could amend to more specifically allege the racial nature of the County's conduct. According to the research on the TVR issue prepared for the County, which is part of the Plaintiff's motion for preliminary injunction, 99% of TVR owners are Caucasian.

Other home based businesses, of which more than 30 categories have been identified, which were also encouraged by previous administrations, and which were also de facto 'legalized' by policy memorandum, are not predominantly Caucasian and have not been subject to rescission of the policy. For other home based businesses, the racial makeup of the owners is roughly proportional to population of that ethnic/racial makeup overall on Maui, and is not subject to any current enforcement effort. Plaintiff's position is that the County was and is well aware of these facts, and that given the liberal notice pleading requirement, and the detailed allegations in the Complaint under which this information can be inferred, the Complaint is adequate as to an equal protection claim.

B. Plaintiff Pleads Substantive and Procedural Due Process Violations In The County's Actions

The County has intentionally failed to timely process, for as long as six years after application, permit applications under the Hawaii Administrative Procedure Act, HRS Chapter 91, which includes an Automatic Permit Approval Law, HRS § 91-13.5. Under that law, all permits applied for must be granted or denied within a defined period. Maui County Code 19.510.020(A) requires that the Commission transmit its findings and recommendations on conditional use permits within 90 days after the application is deemed complete by the planning department. Under HRS §91-13.5(c), if action is not taken within the established maximum time period, "… the application shall be deemed approved."

In addition to violating State law, Plaintiff contends that the County's failure and refusal to timely process permit applications, really for its own benefit as alleged in the complaint (because the County was unable to handle the volume of applications and wished to wait for a change in the law), violates the substantive and procedural due process rights of those permit applicants.

As to those who tried to make permit applications but were turned away, Plaintiff contends that applicants have a right to make permit applications, and to have them processed in a procedurally sufficient and timely way. See, *Nasierowski Bros. Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th

Cir. 1991). Further, entering into a written agreement with Plaintiff and then breaching that agreement, regardless of the sufficiency of that agreement as a contract under the law, was a due process violation in and of itself. Fair and honest government services are not afforded to citizens if the government is allowed to act arbitrarily and capriciously.

The County claims that "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' [citation omitted]", *Cty. Mem. P. 13*, Plaintiff has no case. But this of course is not the question. The question is more accurately stated, "Is the County's enforcement of the Conditional Permit requirement against people who would almost certainly already have Conditional Permits *but for* the County's intentionally refusing to accept permit applications, or to process permits which were applied for years ago, 'most egregious official conduct' that rises to the level of 'arbitrary in the constitutional sense'"?

If those facts are not adequate to elevate the County' s conduct to the egregious level, add to that the fact that the applicants might have sued for their permit right long ago, but for the fact that every branch of County government had for many years specifically told people that the County would not enforce the existing law, because in whole or part the existing

law/permit system was too burdensome for the County to bother with, and encouraged people to continue their TVR businesses as being good for the County and State's tourism industry. This case is not just about the County's right to enforce its own laws. It is about the County's "most egregious official conduct" in the way it applied the laws to its citizens and made affirmative representations intended to induce and actually inducing reliance by the public, and took affirmative action that it didn't otherwise need to take if its only interest in the past six years was its right to enforce its own laws.

The County goes into the permit process in detail. However, Plaintiff is not making a facial challenge to the County's permit process, it is only seeking relief to be able to make applications and have them processed pursuant to that law, while estopping the County from breaching its former policy that it caused people to rely upon for the County's own purposes.

This case is not about delay in building permits nor is about the constitutionality of zoning laws, it is about all branches of government publicly declaring an abandonment of a zoning law in full expectation that people will spend hundreds of millions of dollars on investments, and then changing its mind. While Plaintiff does state in its complaint that the permitting process is burdensome, Plaintiff is not asking this court to make it less burdensome.

Plaintiff is asking the Court to require the County to process permits which either were applied for years ago, or would have been applied for years ago but for the statements of all levels and all branches of County government. Plaintiff is also asking this Court to declare permits which have taken over 90 days to process, according to existing law.

Pages 15-22 of the County's Memorandum discuss the system of permits in detail, and seem to suggest that the applicants are not entitled to permits; in essence, the County argues "no harm, no foul". This is a puzzling proposition, since every permit application for a TVR which has been processed has been granted, including Land Use Committee of four more in recent weeks. Unless the County now plans upon retaliating against pending and new permit applicants, there is no reason to believe that every applicant whose application has been sat on for extended periods, would not be granted if processed. Based upon the allegations in the Complaint, on average the County over the last decade has managed to process less than one permit per year, with a backlog of approximately 70 permit applications "pending".

The fact that substantive rights are at issue here is illustrated by the law supporting Plaintiff's claims of several forms of irreparable injury. Irreparable injury occurs when a property interest is affected, loss of real property or business

enterprise is likely to occur, or reputation is being harmed. Money damages are not an adequate remedy for lost property rights "[b]ecause real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm ...." *Dixon v. Thatcher,* 103 Nev. 414, 742 P.2d 1029, 1030 (1987); s*ee also, e.g., Varsames v. Palazzolo,* 96 F.Supp.2d 361, 367 (S.D.N.Y. 2000) (holding that deprivation of the movants' ability to make productive use of their own property rises to the level of irreparable injury).

Likewise, if a party seeking a preliminary injunction can demonstrate that its very business existence is threatened, such as by a loss of customers, the harm is considered irreparable. *American Passage Media Corp.,* 750 F.2d 1470 (9th Cir. 1985). Irreparable injury may also take the form of damage to reputation, *see Regents of Univ. of California v. American Broadcasting Companies, Inc.,* 747 F.2d 511, 520 (9th Cir.1984), loss of customer good will, *see St. Ives Laboratories, Inc. v. Nature's Own Laboratories,* 529 F.Supp. 347, 350 (C.D.Cal.1981), or injury to competition. *See American Passage Media Corp.,* 750 F.2d at 1473. Plaintiff has alleged all of these types of injuries resulting from the County's conduct in this matter.

Again, it is not the ordinance that is challenged herein, it is the County's conduct in dealing with the ordinance(s), which is alleged to violate Plaintiff's due process rights. It

is incorrect for the County to assert that any case it cites is "remarkably similar on the facts". The *Ewing* case, for example, that the County calls "remarkably similar", deals with a challenge to an ordinance prohibiting transient vacation rentals. *Ewing v. City of Carmel By The* Sea, 234 Cal.App.3d 1579 286 Cal.Rptr. 382 (1992). That is not the instant situation. The County cites no case, and Plaintiff knows of no case, that has in its facts such egregious and capricious conduct as that of the County in this case.

Plaintiff is not arguing that they have a right to a certain outcome in permit applications. The complaint is more fundamental than that – citizens have a right to be able to make permit applications under existing law and to have them processed in a timely and fair manner in accordance with existing law. And because the County voluntarily put itself into the position of causing full reliance upon its written policy inviting applicants to enjoy a moratorium while permits were being processed, applicants have a right to equity and estoppel.

C. Plaintiff Pleads A Claim for Specific Performance and Breach of Covenant of Good Faith and Fair Dealing In Seeking Equitable Enforcement Of The Agreement

Plaintiff's "contract based" causes of action do not require a finding of the traditional elements of an express

contract. The question is whether there is a document and/or behavior by the County such that an express or implied contract **enforceable in equity** exists. The same analysis applies to plea bargains/co-operation agreements and settlement agreements, to which Plaintiff analogizes in this case.

The 2001 agreement between the Maui Vacation Rental Association and the County of Maui, by Planning Director John Min, was akin to a plea agreement because the Planning Director had the authority to refer cases for criminal prosecution. In lieu of such prosecution of known violators, he entered into an agreement not to enforce the zoning violations in exchange for compliance by applicants and would-be applicants with the County's written policy.

There is a large body of case law concerning the enforceability of plea bargain agreements, which are considered to be enforceable contracts. Where, as here, the plea bargain contemplates a "downward departure" in the sentence, "… the [court] is free to apply contract principles to determine whether the plea agreement has been satisfied." *U.S. v. Isaac*, 141 F.3d 477, 482 (3rd Cir. 1998). In determining whether the government has violated a plea agreement, the court must determine "whether the government's conduct is inconsistent with what was

reasonably understood by the defendant when entering the plea of guilty." *United States v. Nolan-Cooper,* 155 F.3d 221, 236 (3d Cir. 1998) (citation and quotation marks omitted).

In *U.S. v. Floyd*, 428 F.3d 513 (3rd Cir. 2005), the court analyzed the terms of Floyd's plea agreement under which a downward departure would be requested. In holding that an evidentiary hearing on whether or not her assistance to the government warranted the promised downward departure, the court stated:

> The terms of Floyd's plea agreement promised that in exchange for substantial assistance, the Government would recommend a downward departure. Such agreements are standard operating procedure in the criminal justice system. Because these agreements are common, it is crucial that they be clear to both parties. The agreement here, both under the technical rules of contract interpretation and by what a lay person would understand to be its purpose, offered Floyd the hope of a downward departure from the sentencing guideline range for the crime covered by the agreement. Floyd is entitled to an evidentiary hearing on whether her assistance, without reference to her charge bargain, was substantial enough to warrant a motion for a downward departure by the Government.

Id. at 518.

The Planning Director's promise to MVRA was to temporarily (until permit was processed) not prosecute vacation rental operators under the zoning laws unless a complaint of actual impacts was filed against a particular owner. MVRA members held to their side of the agreement by

submitting applications or not as per the County's express directions. Now, the County is reneging on that promise, causing irreparable loss to Plaintiff members.

D. Plaintiff's Complaint Supports Its Equitable Estoppel Claim

Plaintiff understands that estoppel will not give them their permits, nor do they so seek. The real issue is whether estoppel is appropriate to require the County to process applications *before* imposing fines on applicants. The cases cited by the County do not resolve these facts. The County states that "the alleged misconduct is simply an attempt by the County to enforce duly-enacted laws". This is a misstatement of Plaintiff's case.

The misconduct is years of unqualified, government wide abandonment of a law to the point of universally advising people not to submit permit applications, and not processing what applications were submitted, and then enforcing that same law before accepting or processing permit applications which were or would have been applied for years ago, but for the affirmative misconduct.

Plaintiff does not demand that the moratorium policy apply forever; however, it contends that it is a violation of procedural and substantive due process rights to change the moratorium policy to the detriment of those who have

already reasonably and in good faith relied upon the policy.

The doctrine of equitable estoppel in the land use context is defined in Hawaii as: "… [A] change of position on the part of the land developer 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 that he may safely proceed with the project." *Life of the Land, Inc. v. City Council of the City and County of Honolulu*, 61 Haw. 390, 453 (1980); *County of Kauai v. Pacific Standard Life Ins. Co.*, 65 Haw. 318, 327 (1982) (also known as "*Nukolii*"). As the Hawaii Supreme Court explained, the initial estoppel inquiry is whether the government has given official assurances to the developer that the proposed project may proceed. *Nukolii*, 65 Haw. at 327.

In this case, Planning Director John Min, the administrative head of the Planning Department and chief planning officer of the County and the technical advisor to the Mayor, Council and Planning Commission on all planning related matters, had the authority to institute a "moratorium" program for all TVR owners who applied or attempted to apply for CPs.

Given this authority, the County is now estopped from taking enforcement action against 1) those who have a CP application pending, and 2) those who attempted to apply, or who would have applied, but were told not to bother under the moratorium program.

Plaintiff MVRA and its individual members detrimentally relied upon the representations of the County of Maui and its various officials and employees in recommending the making or not making, and in fact making or not making, CP applications for TVRs, and that reliance was reasonable, satisfying the requirements for equitable estoppel against the County of Maui. *See, AIG Hawai'i Ins. Co. v. Smith*, 78 Hawai'i 174, 179 (1995).

Zoning estoppel in Hawaii is not just used as a defense to fines or tear-down orders (as in *Waikiki Marketplace v. Zoning Board of Appeals*, 86 Haw. 343 (Haw. App. 1997), it is also used as a claim for affirmative relief, such as to force the issuance of permits. *See, e.g., Denning v. County of Maui*, 52 Haw. 653 (1972)**Error! Bookmark not defined.**; *Nukolii*, 65 Haw. at 330 n.12.

The U.S. Supreme Court has similarly applied estoppel to certain government conduct. In *Heckler v. Community Health Services*, 467 U.S. 51, 60-61 (1984), the U.S. Supreme Court noted that it had previously decided at least two cases which "seem to rest on the premise that when the Government acts in

misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Id.* at 60 n.12. The Court further confirmed that the fairness considerations long associated with estoppel were also applicable when the government was the responsible party. In addition to the strong suggestion favoring governmental "decency, honor, and reliability", the Court detailed several instances where Justices and judges had previously emphasized the importance of the equitable considerations innate to estoppel. *Id*. at 61 n.13. Given the holding that estoppel was not warranted because not even the traditional elements were met, it is significant that the Court elaborated at length on the equitable principles which provide the analytical framework of the concept.

The lower courts have responded to these analyses by assuming that estoppel against the government is permitted. *See* 4 K. Davis, *Administrative Law Treatise*, at 17 (2d ed. 1983) *Portmann v. United States*, 674 F.2d 1155, 1163-1164 (7th Cir. 1982). Indeed, every federal appellate court has either explicitly or implicitly accepted that the government could be estopped in certain circumstances.[1] Similarly, the commentators

[1] See, e.g., Boulez v. C.I.R., 810 F.2d 209, 218 n.68 (D.C.Cir. 1987); Best v. Stetson, 691 F.2d 42, 44 (1st Cir. 1982); Corniel-Rodriquez v. United States, 532 F.2d 301, 306 (2d Cir. 1976); United States v. Asmar, 827 F.2d 907, 911 & n.4 (3d

assume that the Supreme Court's observations and the lower courts' interpretations, have effectively rendered estoppel against the government an established principle.[2]

In the case at bar, there can be no dispute that the County of Maui entered into and publicized an express moratorium agreement. That agreement was reduced to writing and had all the terms and conditions necessary to induce reliance, and in fact did induce reliance by the MVRA and its members.

Applying estoppel to the County of Maui is not an effort to force it to stop enforcing its laws; it is instead "an equitable doctrine to be invoked to avoid injustice in particular cases." *Heckler v. Community Health Services,* 467 U.S. 51, 59 (1984). A court which determines to protect reliance on a

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Cir. 1987); West Augusta Development Corp. v. Giuffrida, 717 F.2d 139, 140-141 (4th Cir. 1983); Fano v. O'Neill, 806 F.2d 1262, 1265 (5th Cir. 1987); S.E.C. v. Blavin, 760 F.2d 706, 712 (6th Cir. 1985); Azar v. U.S. Postal Service, 777 F.2d 1265, 1269 (7th Cir. 1985); United States v. Manning, 787 F.2d 431, 436 (8th Cir. 1986); Watkins v. U.S. Army, 875 F.2d 699, 706 (9th Cir. 1989) (en banc); Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984); Eagle v. Sullivan, 877 F.2d 908, 910 (11th Cir. 1989); USA Petroleum Corp. v. United States, 821 F.2d 622, 625 (Fed.Cir. 1987).

K. Davis, Administrative Law of the Seventies, at 404 (1976) [hereinafter Davis 1976]; Comment, Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government, 53 U. Chi. L. Rev. 1026, 1028 (1986) [hereinafter Restrictive Rule]; Note, Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule, 55 Fordham L. Rev. 707, 712 (1987) [hereinafter Proprietary Function]; Note, Estopping the Federal Government: Still Waiting for the Right Case, 53 Geo. Wash. L. Rev. 191, 191-192 (1984-1985)

misrepresentation by treating the misrepresentation as true is not countering the law, but is holding the government to its word.

E. Former Councilmember Wayne Nishiki Is Not A Defendant In This Action

The County asserts that the allegations as to Wayne Nishiki are time barred. Mr. Nishiki is not a defendant in this action, however, and there are no specific claims against him to be barred. He is identified merely to detail the history of the County's conduct in this matter, with specificity. While the refusal by the County to accept permit applications is alleged to have started with Mr. Nishiki, that same conduct continued up until the filing of the instant action. Therefore, the aspect of the Complaint alleging the County's failure and refusal to accept permit applications is also not barred.

F. Plaintiff's Fifth Claim For Relief Satisfies Pleading Requirements for A *Monell* Claim

Plaintiff's Fifth Claim for Relief is a standard *Monell* claim for maintenance of illegal customs and policies. The County does not deny that at the very least, the written agreement and verbal representations constitutes the County's "policy". If the policy was illegal, and the County maintained it, then a *Monell* claim lies.

Although unnecessary under the laws of notice pleading, paragraphs 51-52 of the complaint expressly identify the alleged custom or policy and why Plaintiff contends they are unconstitutional. That is sufficient to satisfy pleading requirements and no further statement should be required of Plaintiff.

"[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. at 47, 78 S.Ct., at 103 (footnote omitted); cited in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167-169, 113 S.Ct. 1160, 1162-1163; *see also, Karim-Panahi v. Los Angeles Police Dept*., 839 F.2d 621, 624 (9th Cir. 1988) **("a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom, or practice")**.

It is well established that the County's liability may be separately based on a "policy statement, ordinance, regulation, or decision" by which the City has taken some affirmative action

to establish the assertedly unconstitutional policy under which the individual was allegedly deprived of his or her constitutional right(s):

> This was the situation in *Monell* itself, where the plaintiff challenged the official policy of the New York Department of Social services and the Board of Education of the City of New York, embodied in certain rules and regulations of those agencies, which compelled pregnant women employees to take unpaid leaves of absence before such leaves were medically necessary. *Monell v. Department of Social Services of the City of New York*, 532 F.2d 259, 260-61 (2d Cir. 1976), reversed, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).
>
> In such a context, it is not necessary to allege anything more than a single incident of unconstitutional conduct coupled with the supposedly unconstitutional affirmative policy that mandated such action in order to state a claim against the city or agency for injury occasioned by its officially adopted position. In most cases involving an affirmative policy statement, statute, ordinance, rule, regulation or decision, the government's official position can be determined by reference to a written codification, memorandum or other document.

Rivera v. Farrell, 538 F.Supp. 291, 295 (D.C. Ill. 1982) (emphasis added).

In the case at bar, the policy is alleged to be unconstitutional because it deprived Plaintiff members of their right to apply for permits and have their permits duly and timely processed under existing law without arbitrary interference from the County. "'Local governing bodies can be sued directly under § 1983 for monetary, declaratory **or injunctive** relief where ... the action that is alleged to be

unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.' *Monell*, 436 U.S. at 690, 98 S.Ct. at 2035-36." *Nichols v. Village of Pelham Manor*, 974 F.Supp. 243, 258 (1997); see also, *Rookard v. Health and Hospitals Corp*., 710 F.2d 41, 45 (2d Cir. 1983).

Here, the County cannot claim that the official policies of its top decision makers were isolated occurrences; to the contrary, such is indisputably its normal policy and procedure. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983 [citation omitted]." *Hyatt v. Town of Lake Lure*, 225 F.Supp.2d 647, 655 (WD NC 2002).

The use of written enforcement policies that are akin to law but do not have the true force of law, and which therefore the County changes at its whim and discretion, without notice or hearing to the public, but on which the public is nonetheless encouraged to rely and does in fact rely, is a violation of substantive and procedural due process rights. To the extent the enforcement policies are enforced discriminately and/or against those the County dislikes for speaking out against it,

they also violate equal protection and first amendment rights, respectively.

G. The Complaint Pleads A Justiciable Case or Controversy

Plaintiffs are seeking injunctive relief to protect against the immediate violation of their constitutional rights. Plaintiff does not seek to prevent the County from enforcing its own laws forever, just to the extent necessary at this time to protect their rights having relied upon the affirmative misconduct of the County as alleged. As stated in the Complaint, individuals have recently been served by the County with warning notices, apparently whenever they have become known to the County, and there is no reason to believe that the County will not continue to do so. Warning notices are a form of enforcement.

H. Planning Director Hunt Is A Necessary Party Because Injunctive Relief, Rather Than Damages, Is Sought, But Only In His Official Capacity

Paragraph 26 of the Complaint identifies Mr. Hunt’s statements and actions in supporting the enforcement of the existing vacation rental laws. However, Plaintiff intended for him to be individually named in his official capacity, rather than personally.

Because this action seeks injunctive relief rather than damages, there is no need for qualified immunity as to Mr. Hunt. Further, Mr. Hunt is a necessary party in order to obtain complete injunctive relief, because as Planning Director, he is the County official in charge of whether or not and how enforcement is conducted. It has been held that officials can always be sued in their official capacities under 42 U.S.C. § 1983 for prospective injunctive relief. See, e.g., *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989).

There is also a well known series of cases involving school desegregation in Yonkers, New York, wherein the failure to name the council and/or school board members directly made it more difficult for the court to enforce its own injunctions. *See, City of Yonkers v. U.S. Dept. of Housing and Urban Development*, 662 F.Supp. 1575 (D. NY 1985).

In ruling against a finding of contempt against the individual governmental officials who allegedly violated the remedial injunctive order, the U.S. Supreme Court discussed in detail, and deemed important to its ruling, the fact that the individual Council Members had not been named as defendants in the original *Yonkers* action: “The order had gone on to require extensive affirmative steps to

disperse public housing throughout Yonkers, **but those portions of the order were directed only against the city. There was no evidence taken at the hearing of July 26, 1988, and the court's order of that date did not make petitioners [City Council members] parties to the action**." *Spallone v. United States*, 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990).

Since no damages are being sought against Mr. Hunt in his official capacity, qualified immunity does not apply and he suffers no harm from being named.

VII. CONCLUSION

Based upon all of the foregoing, and all of the allegations as set forth in the Complaint, and all other such matters as this Court may deem appropriate to consider, Plaintiff respectfully requests that the County's motion to dismiss be denied.

DATED: Wailuku, Maui, Hawaii, November 15, 2007.

IVEY FOSBINDER FOSBINDER LLC
A LIMITED LIABILITY LAW COMPANY

__/s/ *James H. Fosbinder*_____
JAMES H. FOSBINDER
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE (L.R. 7.5(B))

I, James H. Fosbinder, do hereby certify that the foregoing *Plaintiff's Memorandum in Opposition to Motion to Dismiss* is formatted in monospaced Courier New 12 Point and complies with the word limitation requirements of Local Rule 7.5(b) in that it contains **7,432** words as determined by Microsoft Word 2003, including all headings, quotations and footnotes.

DATED: November 15, 2007, Wailuku, Maui, Hawaii.

___/s/ *James H. Fosbinder*____
JAMES H. FOSBINDER,
Attorney for Plaintiff

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.	) Case No.: CV-07-00495 JMS (KSC))) CERTIFICATE OF SERVICE))))))))))))

CERTIFICATE OF SERVICE

I, the undersigned, certify and declare as follows: I am employed in the County of Maui, State of Hawaii, am over the age of 18 years, and am not a party to the within action. My business address is 2233 Vineyard Street, Suite C, Wailuku, Hawaii 96793.

On November 15, 2007, I served the within documents entitled:

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS'MOTION TO DISMISS COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FILED ON SEPTEMBER 28, 2007; CERTIFICATE OF SERVICE

On each of the Defendants in said action (CV-07-00495 JMS (KSC)), as follows:

(XX) by Electronic Case Filing through CM/ECF to each of the following:

///

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Jane E. Lovell (Jane.Lovell@co.maui.hi.us)
Deputy Corporation Counsel
200 S. High Street
Wailuku, HI 96793
(808)270-7575 tel.
Attorneys for All Defendants

I declare under penalty of perjury under the laws of the State of Hawaii that the foregoing is true and correct, and that I have executed this proof of service on November 15, 2007, at Wailuku, Hawaii.

__/S/ James H. Fosbinder_____
JAMES H. FOSBINDER