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.

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

OPENING BRIEF OF APPELLANT MAUI VACATION RENTAL ASSOCIATION, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellant Maui Vacation Rental Association, Inc. hereby affirms that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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A. DISTRICT COURT JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and (4), because the case arose under the Constitution and laws of the United States for violation of federal laws and rights pursuant to 42 U.S.C. § 1983. The district court had pendent and supplemental jurisdiction over all state law claims pursuant to 28 U.S.C. § 1367(a). The district court also had jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

B. COURT OF APPEALS JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291, and this appeal is timely. The district court entered its Order Denying Defendants' Motion to Dismiss Complaint Based on Lack of Standing, and Granting Defendants' Motion to Dismiss Complaint for Failure to State a Claim upon Which Relief Can Be Granted on December 19, 2007. Excerpt of Record (ER) 5. The Notice of Appeal was filed on January 18, 2008. Final Judgment as to all claims by all parties was entered in the district court on January 22, 2008. ER 7. The Amended Notice of Appeal was filed on January 25, 2008. ER 8.

II.
ISSUES PRESENTED FOR REVIEW

Hawaii law recognizes that when an official charged with enforcement of a law provides "official assurances" "within the ambit of his duty" and those assurances are relied upon, the recipient possesses "property rights that cannot be taken away by government regulation." Two questions are presented for this Court's review:

1. Whether those rights are property protected by the Fifth and Fourteenth Amendments.

2. Whether the complaint properly alleged claims for equitable estoppel under Hawaii law.

III.
INTRODUCTION

Although the short-term rental of property to vacationers without a permit is generally not permitted by Maui County's zoning code, until recently, the County had never actively enforced the permit requirement. Instead, the County encouraged vacation rentals, which provide alternate accommodations to Maui's visitors, inject approximately $40 million annually into the County's economy, and provide 600 full-time Maui jobs. The County only sought to enforce the permit requirement against vacation rentals that generated impact-based or nuisance complaints (a complaint other than a vacation rental did not have a permit). As a consequence, few, if any, vacation rentals ever applied for a County permit, an application which costs between $15,000 and $25,000 to prepare.

In 2001, however, the County proclaimed it was on the verge of passing new, comprehensive regulations to regulate existing vacation rentals regardless of their permit status, and which would provide an orderly permitting process. The County appeared to be moving away from its long-standing enforcement policy. The County, however, produced no new legislation. The Maui Vacation Rental Association (MVRA) expressed its concerns to the County Planning Director, the official charged with enforcing the County's zoning code. In response, the Planning

Director assured MVRA and its members, in writing, that the County would undertake a "moratorium" and an "amnesty," and not take enforcement action against unpermitted vacation rental owners who submitted an application to the County for a Conditional Permit (CP), and that the County would continue its established nuisance complaint-driven enforcement policies.

In reliance, many vacation renters submitted applications for CPs. The County processed only 10% of the applications (all of which were approved). The remainder sat unprocessed in the County's inbox. Additionally, the Planning Department discouraged further applications informing vacation renters that new legislation would soon be adopted, while at the same time, the County continued to encourage and promote the industry. The County has never enacted any of the promised comprehensive vacation rental regulations, but for many years and through successive mayoral administrations, the County honored its assurances and did not prosecute vacation renters who did not have a CP.

However, when a new mayor took office and a new Planning Director was appointed, the County summarily declared it would no longer honor the prior Planning Director's assurances, and any vacation rental without an approved permit was in declared violation of the law, and subject to enforcement including ruinous

daily fines and the possibility of criminal prosecution, whether or not the owner had submitted a CP application or otherwise relied on the County's assurances.

After further efforts to compromise failed, MVRA instituted this suit seeking relief for violations of its due process rights and state law estoppel claims, among others. Under Hawaii law, when a government official provides "assurances of some form"[1] on a topic "within the ambit of his duty,"[2] and a person relies on those assurances,[3] the recipient possesses "property rights that cannot be taken away by government regulation."[4] In other words, the government is estopped from repudiating its assurances, and the person possesses a property right protected by the Fifth and Fourteenth Amendments. *See*, *e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) ("the consent of individual official . . . can lead to the fruition of a number of expectancies embodied in the concept of property").

The district court dismissed the complaint for failure to state a claim, holding that while MVRA had standing, it did not possess a property interest, and it

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1. *Denning v. County of Maui*, 485 P.2d 1048, 1050 (Haw. 1971).

2. *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 514 P.2d 861, 864 (Haw. 1973).

3. *Life of the Land, Inc. v. City Council of the City & County of Honolulu*, 606 P.2d 866, 902 (Haw. 1980).

4. *Allen v. City & County of Honolulu*, 571 P.2d 328, 329 (Haw. 1977).

did not plead a claim for equitable estoppel under Hawaii law. The district court erroneously held the only property claimed by MVRA and its members was the unissued CP permits. The court focused exclusively on the discretionary nature of the CP permit process, and concluded that since MVRA could not compel the County to issue CPs to vacation renters, they possessed no property interest worthy of constitutional protection. The district court failed to recognize that MVRA's property interests include the rights which it possessed under state law as a consequence of the County's assurances and MVRA's reliance, and that the lawsuit did not seek to compel the County to issue vacation rental permits. Rather, MVRA sought only to have the County honor its earlier assurances and enforce the zoning laws as it agreed it would. The district court also misapplied Hawaii law and dismissed the state claims for equitable estoppel.

The judgment of the district court should be reversed and the case remanded for further proceedings.

IV.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the district court's dismissal of MVRA's complaint for failure to state a claim upon which relief can be granted under Fed. R.

Civ. P. 12(b)(6). After the County repudiated its earlier assurances and summarily decided any vacation rental without a permit was subject to a notice of violation, MVRA filed suit, alleging violations of substantive and procedural due process, equal protection, and federal civil rights laws. MVRA also asserted state law claims for vested rights and equitable estoppel.

B. PROCEEDINGS IN THE DISTRICT COURT

MVRA filed a five-count complaint on September 28, 2007. ER 2.[5] The County immediately moved to dismiss for lack of standing and for failure to state a claim, asserting among other arguments that the complaint did not allege MVRA possessed "property" entitling it to due process protection, and that the complaint did not properly plead a claim for equitable estoppel under Hawaii law.

On December 19, 2007, the district court held that MVRA had standing to assert the claims of its members, and denied the County's motion to dismiss for

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5. As the district court noted, "The Complaint states the following causes of action: (1) 42 U.S.C. § 1983 violation of Plaintiff's substantive due process rights, procedural due process rights, and equal protection rights; (2) breach of express and implied contract; (3) breach of implied covenant of good faith and fair dealing; (4) equitable estoppel; and (5) maintenance of illegal customs and policies. Plaintiff seeks (1) preliminary and permanent injunctive and declaratory relief as necessary to allow the members of MVRA to conduct their business; (2) an order of specific performance of the express and implied agreement between the parties; and (3) attorneys' fees and costs." *Maui Vacation Rental Ass'n, Inc. v. County of Maui*, 2007 WL 4440962, at *2 (D. Haw. 2007); ER 5, at 5-6.

lack of standing, a ruling the County has not appealed. ER 5, at 14; *Maui Vacation Rental Ass'n, Inc. v. County of Maui*, 2007 WL 4440962, at *5 (D. Haw. 2007). However, the district court granted the County's motion to dismiss the entirety of MVRA's complaint for failure to state a claim. On the two issues germane to this appeal, the court held MVRA did not possess property entitling it to due process, and did not properly plead a claim for state law estoppel. *Maui Vacation Rental Ass'n*, 2007 WL 4440962, at *8, *14; ER 5, at 30, 41. The court dismissed without leave to amend, determining it would be "futile" to do so. *Maui Vacation Rental Ass'n*, 2007 WL 4440962, at *16; ER 5, at 42.[6]

C. RELIEF SOUGHT ON APPEAL

The Final Judgment of the district court dismissing MVRA's complaint should be reversed, and the case remanded to the district court for further proceedings. *See*, *e.g.*, *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 853 (9th Cir. 2008) (Rule 12(b)(6) dismissal reversed and remanded for further proceedings).

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6. The court did allow MVRA the opportunity to amend the equal protection claim, holding if the claim was not amended by January 18, 2008, the entire case would be automatically dismissed. MVRA did not amend this claim.

D. STATEMENT OF RELEVANT FACTS[7]

1. Vacation Rentals Encouraged

"Transient vacation rental" is the term used by the Maui County Code to describe the rental of property for a period of less than 180 days per year by a "visitor or person" who does not use the property as a primary residence. *See* Maui County Code § 19.04. The County's zoning laws require most vacation rentals receive a permit before commencing operation, but for years this requirement was not enforced. *Maui Vacation Rental Ass'n*, 2007 WL 4440962, at *1; ER 5, at 3. Instead, the County's policy was to investigate only those vacation rentals which generated a nuisance complaint, and the County encouraged vacation rentals, regardless of their permit status. *Id.* For over a decade the Maui Visitor's Bureau in cooperation with the Hawaii Tourism Authority, and from 2002-2006 the Maui Office of Economic Development, actively promoted the growth of Maui vacation rentals. Color travel brochures featured visitor accommodations in "less familiar, less advertised communities." The brochures invited visitors to "feast on the seclusion of a romantic hideaway in Huelo or Hana," where vacation rentals and Bed and Breakfasts (B&Bs)

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7. The facts are taken from the complaint (ER 2), the allegations of which must be taken as true, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007), and the district court's opinion, *Maui Vacation Rental Ass'n, Inc. v. County of Maui*, 2007 WL 4440962 (D. Haw. 2007); ER 5.

were not permitted by zoning. ER 2, at 6.

The County actively benefits from this industry. Visitors who rent vacation rentals spend $40 million annually, exclusive of rent, most of which remains in Maui's economy. Spending generates $4 million in state taxes, of which $725,000 returns to the County as "Transient Accommodation Tax." Vacation rentals also provide self-employment for approximately 800 proprietors and create about 600 full-time jobs for other Maui residents. ER 2, at 6-7.[8]

2. New Regulations for Bed and Breakfasts, But None for Vacation Rentals

In 1997, the County decided against broader vacation rental legislation, and instead passed an ordinance governing B&Bs, which are rentals where the operator occupies the same dwelling as the guests and the property is not in a rural or agricultural-zoned area. ER 2, at 5-6. The County asserted it would revisit the vacation rental issue the following year, but it never did.

Under the Maui Charter, the County of Maui Planning Director has the

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8. The complaint set forth extremely conservative figures, and the current amounts are much more significant. For example, a January 8, 2008 study by the Realtors Association of Maui, *Economic Impact of Transient Vacation Rentals (TVRs) on Maui County* concluded that shutting down vacation rentals would remove up to $300 million of revenue from the local economy, and could cost 3,000 jobs. For the purposes of this appeal, however, the figures in the complaint are taken as true. *Outdoor Media Group*, 506 F.3d at 900.

responsibility to enforce the County's zoning ordinances. It is his duty to "[p]repare, administer, and enforce zoning ordinances, zoning maps and regulations and any amendments or modifications thereto." Maui Charter § 8-8.3.6 (2003). Until 2001, the County Planning Department relied upon "enforcement by complaint," meaning it would investigate only vacation rentals which generated a complaint from the public for noise or other nuisance-like activities. ER 2, at 7. After the B&B ordinance passed, the County Planning Department advised other vacation rental owners not to apply for permits because the County was formulating new regulations applicable to all vacation rentals. ER 2, at 6. Based on these assurances, vacation rentals without permits were in compliance with the County's enforcement policy, and many owners withheld applying for permits. *Id.* But despite the County's advice and continuing representations that new vacation rental rules would be forthcoming, however, it has never enacted the promised regulations.

3. Maui County Provided Official Assurances

In 2001, however, the County set aside these policies and began enforcement against unpermitted vacation rentals. ER 2, at 7. After County Council meetings regarding this new approach, Planning Director John Min agreed to return

to "enforcement by complaint," *id.*, and in November 2001, he provided MVRA[9] and others with the County's official, written assurances that any property owner who submitted an application for a Conditional Permit (CP) to conduct vacation rentals would be allowed to continue to use the property for vacation rentals during the time the County processed the application. ER 2, at 7-9. Specifically, the Planning Director agreed:

(1) to an enforcement "moratorium," allowing vacation renters with pending permit applications to operate during the permitting process;

(2) that existing vacation rentals in Agricultural and Rural zoned areas could apply for a CP and State Special Permit (administered by the County Planning Commission for parcels less than 15 acres);

(3) property owners could either initiate the application process, or wait for contact by the County Planning Department's Zoning Enforcement Division before applying. *Id.* Specifically, the Planning Director provided the County's "assurances" of a "moratorium on zoning enforcement" –

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9. MVRA is an association formed "to legitimize the existence of Maui vacation rentals 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." *Maui Vacation Rental Ass'n,* 2007 WL 4440962, at *1; ER 2, at 5.

> 2. You have given your *assurance* that any property owner who submits a Conditional Use Permit application *will be allowed to continue their business while the application is pending*. Ultimately, the outcome of the application will be the result of the established process – and there is no guarantee of a favorable determination. However, *filing the application will place a moratorium on zoning enforcement until the permit process has concluded*.

ER 2, (Exhibit "1" to Complaint), at 2 (emphasis added). On January 11, 2002, the Maui Planning Director confirmed these assurances, and again agreed that property owners who applied for CPs would receive "amnesty from zoning enforcement" until the County finally processed their applications:

> 4. Finally, with respect to transient vacation rental operators who submit a timely and good faith permit application, you stated that their *amnesty from zoning enforcement would remain in effect until there has been a final determination regarding the permits*.

ER 2, (Exhibit "1" to Complaint), at 4 (emphasis added).

The Planning Director did not guarantee a particular outcome from the CP applications (although no CP application for a vacation rental had ever been denied).

These assurances were confirmed when, on February 5, 2002, the Planning Director informed the Mayor and a County Councilperson about the County's policy to enforce the permit requirement only in response to a complaint

that a vacation rental is creating a nuisance :

> Our enforcement policy is to allow short-term vacation operators to seek compliance through our permitting process. They will be allowed to continue operations provided a Notice of Violation was not issued based on enforcement of a complaint. Should a complaint be filed after the permitting process has begun, operators will still be allowed to continue their business since they are taking steps to comply with permit requirements. However, all complaint generated enforcement with a Notice of Violation issued will require that operators cease operations while processing their use permits.

ER 2, (Exhibit "1" to Complaint), at 5.

4. The County's Conditional Permit Process

Applying for a County CP is neither simple, nor cheap. The property owner must obtain the approval of a host of agencies including the Maui Planning Commission, and the application must be approved by the County Council and the Mayor. *See* Maui County Code ch. 19.40. The cost of applying for a CP for a vacation rental ranges from $15,000 to $25,000. ER 2, at 10, 13. Prior to reaching the Mayor's desk, State and County agencies must pass on the application, including: (1) the State of Hawaii Land Use Commission; (2) the State Office of State Planning (Department of Business, Economic Development & Tourism); (3) the Office of Hawaiian Affairs; (4) the State Historic Preservation Division; (5) the State

Department of Hawaiian Homelands; (6) the State Department of Land & Natural Resources, Land Division Engineering Branch; (7) the State Department of Transportation; (8) the County of Maui Department of Water Supply; (9) the County of Maui Department of Public Works and Waste Management; (10) the County of Maui Department of Parks & Recreation; (11) the County of Maui Police Department; (12) the County of Maui Department of Fire Control; (13) the County of Maui Department of Housing & Human Concerns; (14) Maui Electric Company; and (15) the Maui District Health Office. ER 2, at 12-13.

After these agencies review the application, it is considered by the Maui Planning Commission, the County Council's Land Use Committee, and eventually by the full County Council for action in its administrative capacity. *See Sandy Beach Defense Fund v. City Council of the City & County of Honolulu*, 773 P.2d 250, 256 (Haw. 1989) (when a municipal legislative body is considering a permit application, it acts in its administrative capacity). This process may entail three or four public hearings. If the County Council approves, the CP application goes to the Mayor for signature. ER 2, at 12.

5. The County Has Never Complied With the State Law Requiring Expeditious Processing of Permits, and the CP Applications Sat Unprocessed for Years

After the Planning Director's November 2001 assurances, approximately 80 vacation renters submitted applications for CPs. ER 2, at 9. Of these applications, only 8 were processed and approved by the County. The vast majority of the CP applications – 65 to 70 applications – were never processed by the County. ER 2, at 9. The County treated these 65-70 applicants inconsistently: the County contacted some applicants and gave them a choice whether to proceed or delay processing until the new ordinance governing vacation rentals was passed; others were not given a choice and either held in abeyance or processed; and others were approved, but never scheduled for hearing by the County; still others were never contacted by the County after their applications were accepted. ER 2, at 10. Other vacation renters were told by the Planning Department that they should wait to apply for a permit until a new law was enacted. ER 2, at 9. In 2004, for example, Sandy Beck spoke with the Planning Director prior to purchase of a vacation rental. He informed her that the vacation rental would be permitted, and that the "Council and Planning Department were working on a new bill for an easier process." ER 3 at 2-4 (Declaration of Sandy Beck). The Planning Director also informed her that County policy allowed her to

operate while the County worked out a new streamlined process. ER 3, at 3. She spoke to the Planning Director at least three more times, and was informed that "Planning was overrun and so was the Council. They did not want to process permits now. They were overloaded and could not handle any more permit situations unitl this new process was ready." ER 3, at 5.[10] It is estimated that at least 800 applications would have been submitted had the County not ceased processing permits. ER 2, at 9.

In the intervening years, the County never processed the outstanding applications, even though Hawaii law requires counties enact rules to expeditiously process land use permits. ER 2, at 9. Under this statute, if permits are not granted or denied within a certain time, the application is "deemed approved."

> (a) Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval; provided that the application is not subject to state administered permit programs delegated, authorized, or approved under federal law.

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10. This is confirmed by the testimony of Robyn Loudermilk, a County planner, who acknowledged in a deposition that vacation renters were told by the Planning Department to not apply for permits: "The time that [a vacation renter] came in to see me, the Department policy was to advise potential applicants that legislation was currently at Council, and that the legislation may revise the TVR and B&Bs process."

> (b) All such issuing agencies shall clearly articulate informational requirements for applications and review applications for completeness in a timely manner.
>
> (c) All such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved; provided that a delay in granting or denying an application caused by the lack of quorum at a regular meeting of the issuing agency shall not result in approval under this subsection; provided further that any subsequent lack of quorum at a regular meeting of the issuing agency that delays the same matter shall not give cause for further extension, unless an extension is agreed to by all parties.

Haw. Rev. Stat. § 91-13.5 (Supp. 1998). Unlike the other three Hawaii counties, the County of Maui has never enacted the expeditious processing rules required by the statute, so it was not constrained by time deadlines to process the vacation rental CP applications.[11] Consequently, the applications sat in limbo in the County Planning Department, neither granted nor denied, unprocessed for years. ER 2, at 10.

During this time, the County never enacted the promised comprehensive

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11. Other Hawaii counties have enacted rules for expeditious processing. For example, the City & County of Honolulu enacted ordinances with time guidelines regarding Conditional Use Permits. *See*, *e.g.*, Hon. Rev. Ord. § 21-2.40-1(c) (for minor permits, the planning director must approve or deny the application within 45 days of acceptance of the application); *id.* § 21-2.40-2(c) (6) - (8) (establishing deadlines for major permits).

vacation rental regulations, but through successive mayoral administrations, the County honored its assurances and did not prosecute vacation renters who did not have a CP unless a complaint had been lodged. In reliance, Maui vacation renters submitted costly CP applications, and those with applications already on file tolerated years of the County's delay in processing, with a reasonable belief that no harm would come from the delay. Other property owners in effect admitted to zoning violations in writing and identified themselves for enforcement. Others withheld applications. Others were told to wait for a new law. ER 2, at 10-11.

6. A New Political Administration Summarily Abandoned the County's Assurances

However, after the County elected a new Mayor, and a new administration took office in 2007, without any public announcement or notification of any kind, the County unilaterally ceased the moratorium and abandoned all aspects of its enforcement policy. ER 2, at 11. As of July 2007, and retroactive to February 12, 2007, the County declared all vacation renters who did not have a permit were subject to notices of warning or violation. ER 2, at 11. Under the Maui County Code, violation of the zoning ordinance results in the imposition of increasing daily fines: an initial fine of $1,000, with a $100 per day fine that doubles after thirty days to a maximum of $1,000 per day. *See* Maui County Code § 19.530.030; Rules for

Administrative Procedures and Civil Fines for Violation of Title 19, § 15-2-9. The violator is also subject to criminal liability including fines and imprisonment. Maui County Code § 19.530.020.[12]

After meetings and hearing on the matter, the County allowed vacation renters who had applied for a CP to remain open until January 1, 2008. All others were subject to immediate closure. ER 2, at 11-12. In other words, a majority of Maui vacation rentals were immediately subject to prosecution, and those who had applied for a CP could remain open until the end of the year. If those owners had not obtained a CP January 1, 2008 – an obvious impossibility given the County's failure to process applications – they too would be forced to shut down, or risk the penalties noted above. ER 2, at 12.

7. MVRA's Complaint was Dismissed for Failure to Allege a Property Interest or a Claim for Equitable Estoppel

MVRA filed a complaint seeking relief for due process violations and

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12. The current Planning Director has publicly categorized vacation rentals as a "crisis situation" because of the alleged impact on affordable housing, despite the County's awareness that a County-sponsored study of vacation rentals found negligible impact on affordable housing. The County has also justified repudiation of the County's assurances on an "outcry of complaints" about neighborhood impacts allegedly caused by vacation rentals. However, County records reveal that vacation rentals account for only 2-3% of all complaints received (an improvement from 7% at the time the County's assurances were provided in 2001). ER 2, at 11.

for equitable estoppel under Hawaii law, among other claims. ER 2. The County immediately moved to dismiss the case because MVRA had not identified the property interest it claimed to possess. The district court recognized the fundamental unfairness of the County's actions:

> THE COURT: If I sat here solely as sort of judging fairness, what's right or wrong, you might win. But I obviously have these legal principles . . . that I have to apply. And one of those – and a major one – is this protected property interest concept.

ER 3 (Excerpt of Transcript of Dec. 2, 2007 hearing), at 59. In an exchange with the County's attorney, the district court acknowledged the County's summary repudiation of its assurances was unfair:

> THE COURT: Ms. Lovell, I know this isn't really my business, so I understand that. But why is it the county didn't agree, for those who actually applied, to – to give them leeway until the decision is made on those permits?
>
> MS. LOVELL: Well, I think it goes back to the point that the current administration feels that people should not be upgrading businesses without the appropriate underlying --
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> THE COURT: Well, I understand that.
>
> I'm going to apply the legal principles and the law, but I have to say, as a matter of fairness, it just doesn't seem fair.
>
> From a purely ethical standpoint, for one administration to say, don't worry about it, you know, and you actually

> apply, and – (incomprehensible) – and then the next administration – I understand they have policies – (incomprehensible) – I don't have any problem with that, but just in a, sort of, real fundamental sense –
>
> MS. LOVELL: Well –
>
> THE COURT: – to give these people the chance to have their permits run the course.

ER 3, at 65.

The court, however, misidentified the property interest in MVRA's complaint, and focused solely on the unissued CPs as the property at stake. The court held that because the County had the discretion to deny the permit applications, MVRA's members had no protected property right, and thus no due process claim:

> Plaintiff's asserted "property right" relates to the County's laws that an applicant must follow in attempting to receive a permit to operate a [vacation rental].

Maui Vacation Rental Ass'n, 2007 WL 4440962, at *8; ER 5, at 22. The court also held that the Planning Director could not bind the County regarding CPs, and that MVRA's complaint did not adequately allege a claim under Hawaii law for equitable estoppel because the County had discretion to not issue CPs. *Maui Vacation Rental Ass'n*, 2007 WL 4440962, at *15; ER 5, at 39-40. The court dismissed the complaint, and barred MVRA from amending its due process and equitable estoppel claims,

holding it would be "futile" to permit amendment. *Maui Vacation Rental Ass'n*, 2007 WL 4440962, at *11; ER 5, at 41. This appeal followed.

V.
SUMMARY OF ARGUMENT

The district court understood the fundamental unfairness of the County's summary repudiation of its express assurances, but dismissed MVRA's complaint because the court misidentified the property interest at stake in this case. The district court erroneously focused solely on unissued CPs, and held that because the permits had not been granted, and because CPs are discretionary permits which the applicants could not compel approval, they possessed no property rights worthy of constitutional protection.

However, the unissued CPs were not the property interest possessed by MVRA's members. Rather, it was the rights MVRA's members possessed as a result of the County's assurances, and their subsequent reliance. The Planning Director provided written official assurances to property owners that if they were to apply for CPs, then no enforcement action would be taken against them while the County considered those applications. The Planning Director also assured property owners who had been discouraged from applying for a CP or actively turned away that the County would continue its nuisance complaint-driven enforcement policy until such

time as the County adopted comprehensive regulations to fairly deal with vacation rentals. Others were told to not apply for permits at all. Under the Maui Charter, the Planning Director has the discretion to decide how to enforce the County's zoning laws, and under Hawaii law, MVRA and its members were justified in relying upon the Planning Director's assurances. These assurances are the property interest at stake in this case.

As the U.S. Supreme Court has held, government assurances, when relied upon and recognized by law, are constitutional property:

> While the consent of individual officials representing the United States cannot estop the United States, *it can lead to the fruition of a number of expectancies embodied in the concept of property* – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.

Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (citing *Montana v. Kennedy*, 366 U.S. 308, 314-315 (1961); *INS v. Hibi*, 414 U.S. 5, 22 (1973) (per curiam)).

The two issues in this appeal – whether government assurances are a property interest under Hawaii law, and the proper elements of a claim under Hawaii's law of equitable estoppel – are interrelated. First, Hawaii law recognizes that a person who relies upon government's official assurances possesses a "right that

cannot be taken away by government regulation," a property right. Second, to plead a claim for equitable estoppel under Hawaii law, a complaint need only allege the government provided "official assurances of some form," and that the plaintiff relied. There is no requirement under Hawaii law for the plaintiff to seek a permit, or allege or prove it has received the "final discretionary approval" in a permitting process before the government is estopped.

VI.
ARGUMENT

A. STANDARD OF REVIEW – *DE NOVO*

This Court reviews *de novo* the district court's decision to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6). *Manazarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008) (citing *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007)). *See also Ohel Rachel Synagogue v. United States*, 482 F.3d 1058, 1060 (9th Cir. 2007) ("We review *de novo* a district court's dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).").

The factual allegations in MVRA's complaint must be accepted as true, and the pleadings must be construed in the light most favorable to MVRA, the plaintiff. *Outdoor Media*, 506 F.3d at 900. *See also Carvajal v. United States*, ___

F.3d ___, ___, 2008 WL 1043899, at *1 (9th Cir. 2008) ("Because the district court dismissed the relevant claims under Federal Rule of Civil Procedure 12(b)(6), we accept as true the allegations in the complaint.") (citing *Knox v. Davis*, 260 F.3d 1009, 1012 (9th Cir. 2001)).

Exhibits attached to the complaint may also be considered. *Outdoor Media*, 506 F.3d at 899-900 ("When ruling on a motion to dismiss, we may 'generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.'") (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007)).

B. "PROPERTY" INCLUDES ASSURANCES RELIED UPON

By focusing solely on the unissued CPs as the property interest, the district court misapprehended the critical property at stake in this case. It is not the CPs which may or may not be issued by the County. Rather, the property interest in this case is the right possessed by vacation renters (1) to not be shut down while the County processes the CP applications, and (2) to have County maintain its enforcement by complaint policy to those who can show reliance.[13]

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13. This argument was not waived because it was not presented clearly in the district court. As this Court recently held in *Crown Point Dev., Inc. v. City of Sun Valley*:

Where the question presented is one of law, we consider

1. Property Defined by State Law

"Property," as that term is used in the Fifth and Fourteenth Amendments is not limited to real property, but includes interests recognized by state law to which the owner has a legitimate claim of entitlement, such as job tenure, land use permits, and government representations. *See Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) ("the consent of individual officials . . . can lead to the fruition of a number of expectancies embodied in the concept of property"); *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972) ("respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement . . . [and] must be given an opportunity to prove the legitimacy of his claim of such entitlement"). Property is broadly defined by "existing rules or understandings" of state law:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions

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> it in light of all relevant authority, regardless of whether such authority was properly presented in the district court.

506 F.3d 851, 853-54 (9th Cir. 2008) (citing *Ballaris v. Wacker Siltronic Corp*., 370 F.3d 901, 908 (9th Cir. 2004) (quoting *Elder v. Holloway*, 510 U.S. 510, 516, (1994))). *See also Alvarez v. Hill*, 518 F.3d 1152, 1157-58 (9th Cir. 2008) (viewing the complaint most favorably to the plaintiff on a motion to dismiss means that it need not identify the source of the claim, only provide notice under Fed. R. Civ. P. 8).

> are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972). These understandings include rights recognized by contract law. *Lynch v. United States*, 292 U.S. 571, 579 (1934) (contracts are property, "whether the obligor be a private individual, a municipality, a state, or the United States"). Property also includes rights recognized by a state's law of implied contract. *Sindermann*, 408 U.S. at 601 ("[The] absence of . . . an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. . . . [T]he law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.'"); *Bishop v. Wood*, 426 U.S. 341, 344 (1976) (recognizing implied contracts as property). *Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (Navy's custom of permitting hold over tenancies "buttressed [the plaintiff's] property rights"); *Stana v. School Dist. of the City of Pittsburgh*, 775 F.2d 122, 126 (3d Cir. 1985) ("established policy" of the city official responsible created a "legitimate entitlement" in those who qualified under the policy).

2. Hawaii Law Defines Property Broadly to Include Reliance on Official Assurances

Hawaii law defines property very broadly, and treats vested rights and estoppel as property rights.[14] In *Allen v. City & County of Honolulu*, 571 P.2d 328 (Haw. 1977), the court held that once a municipality is estopped, if it wants to prevent exercise of the private right, it must exercise the power of eminent domain:

> Once the City *is estopped* from enforcing the new zoning, if it still feels the development must be halted, *it must look to its powers of eminent domain*. In order for the City to operate with any sense of financial responsibility the choice between continued construction and paying to have it stopped by condemnation, if possible, must rest with the City not property owners.

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14. Hawaii law treats the concept of "property" very broadly. *See*, *e.g.*, *Brown v. Thompson*, 979 P.2d 586, 596 (Haw. 1999) (mooring and live-aboard permits for a derelict boat, although virtually worthless, are property and may not be revoked without due process); *Kernan v. Tanaka*, 856 P.2d 1207, 1218 (Haw. 1993) (driver's licenses are property); *Aguiar v. Hawaii Hous. Auth*., 522 P.2d 1255, 1267 (Haw. 1974) (low-cost public housing is a property interest)*; Silver v. Castle Memorial Hosp.*, 497 P.2d 564, 572 (Haw. 1972) (doctor's interest in continued practice at private hospital); *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 949 P.2d 183, 194 (Haw. Ct. App. 1997) ("[D]ue process principles protect a property owner from having his or her vested property rights interfered with . . . and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.") (citations omitted). One of the few instances where a Hawaii court has not found a property interest involved a case where the plaintiff asserted only "aesthetic and environmental" concerns. *Sandy Beach Defense Fund v. City Council of the City & County of Honolulu*, 773 P.2d 250, 261 (Haw. 1989).

Id. at 331 (emphasis added). In other words, a property right. The Hawaii Supreme Court treats estoppel and vested rights as "property rights that cannot be taken away by government regulation." *County of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766, 772 (Haw. 1982) (quoting *Allen*, 571 P.2d at 329). This is a well-established rule in many other jurisdictions, and is consistent with the U.S. Supreme Court's approach to property interests based on the assurances or consent of government officials:

> While the consent of individual officials representing the United States cannot estop the United States, *it can lead to the fruition of a number of expectancies embodied in the concept of property* – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.

Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979). *See also* David Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urb. L. Ann. 63, 64-5 (rights that cannot be taken away by regulation); *Villas of Lake Jackson, Ltd. v. Leon County*, 796 F. Supp. 1477, 1488 (N.D. Fla. 1992) (equitable estoppel under Florida law results in due process property), *modified on other grounds*, 906 F. Supp. 1509 (N.D. Fla. 1995); *Lanmar Corp. v. Rendine*, 811 F. Supp. 47, 51 (D. R.I. 1993) (complaint pleaded property

under state law by alleging assurances and reliance) *Kasparek v. Johnson County Bd. of Health*, 288 N.W.2d 511, 518 (Iowa 1980) (vested rights are property rights "which cannot be arbitrarily interfered with or taken away without compensation"). Scholars confirm this analysis, holding out Hawaii as one of the jurisdictions where demonstrating vested rights and estoppel under state law will result in a property interest protected by the Fifth and Fourteenth Amendments:

> Landowners possessing vested rights in these states who pursue federal court Substantive Due Process or Takings Clause challenges to regulatory actions that affect their land should have less difficulty establishing standing.

John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 Wash. U. J. Urb. & Contemp. L. 27, 32 (1996) (citing Hawaii as one example of jurisdictions recognizing such rights as property). Hawaii law makes no analytical distinction between equitable estoppel and the concept of vested rights, although the remedy may differ. *Allen*, 571 P.2d at 329 ("Though theoretically distinct, courts across the country seem to reach the same results when applying these defenses to identical factual situations.").

3. Maui Vacation Renters Who Relied Have a Property Interest in the County's Assurances

In the case at bar, the district court erred when it determined the unissued CPs were the claimed property interest. The court should have focused on the Planning Director's express assurances "that any property owner who submits a Conditional Use Permit application will be allowed to continue their business while the application is pending." ER 2, (Exhibit "1" to Complaint), at 2. The Planning Director also assured that "filing the application will place a moratorium on zoning enforcement until the permit process has concluded," and that County enforcement for existing vacation rentals would be complaint-driven. ER 2, (Exhibit "1" to Complaint), at 4. These assurances could not have been plainer (they were labeled "assurances" so there is no mistaking their intent). The Planning Department also advised other vacation rental owners not to apply for permits because the County was formulating new regulations applicable to all vacation rentals. ER 2, at 6.

When the Planning Director and Department provided assurances on how the County would enforce the zoning laws, he was well within the scope of his responsibilities. The State has delegated to the counties the power to regulate transient vacation rentals. Haw. Rev. Stat. § 514E-4 (1993) ("The several counties shall, by amendment of their zoning ordinances, limit the location of time share units,

time share plans and other transient vacation rentals, within such areas as deemed appropriate."). The Maui Charter delegates the County's enforcement power to the Planning Director. Maui Charter § 8-8.3.6 (2003) (Planning Director has authority to "[p]repare, administer, and *enforce zoning ordinances*, zoning maps and regulations and any amendments or modifications thereto") (emphasis added). In *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 514 P.2d 861 (Haw. 1973), the Hawaii Supreme Court held that when a municipal official acts "within the ambit of his duty" and provides assurances regarding a topic within the scope of his responsibilities, the public may rely on these assurances:

> [A]n act of an administrative official which is without any semblance of compliance with or authorization in an ordinance, is beyond his competence and is utterly void; but *if an act of such official, done in good faith and within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance, is no more that an irregularity, and the validity of such act may not be questioned after expenditures have been made and contractual obligations incurred in reliance thereon* in good faith.

Id. at 864 (emphasis added) (citing *Schultze v. Wilson*, 148 A.2d 852 (N.J. Super. Ct. App. Div. 1959)).

In *Waianae Model*, the City enacted the Comprehensive Zoning Code (CZC), which would have prevented the owner's proposed development. The CZC

contained a grandfather provision for building permit applications submitted prior to its effective date. A planning department official charged with reviewing the proposed plans granted the owner's request for an extension of time not explicitly permitted by the CZC to submit revisions to his application. The owner complied, and was issued a building permit. Neighbors filed suit against the City seeking to invalidate the permit since the application revisions were untimely filed, claiming the planning department official had no authority to extend the application deadline. *Waianae Model*, 514 P.2d at 861. The Hawaii Supreme Court held that the authority of the planning official granting the extension was "at least debatable," and although the CZC did not explicitly allow for extensions of time, neither did it specifically prohibit it. *Id.* at 864. *See also Cosmopolitan Fin. Corp. v. Runnels*, 625 P.2d 390, 394 (Haw. Ct. App. 1981) (principal is bound by an agent with apparent authority). In sum, under *Waianae Model*, 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. *Cf. Brescia v. North Shore Ohana*, 168 P.3d 929, 952 (Haw. 2007) (assurances provided by a deputy planning director about the method of determining a setback could not lead to assurances since under Kauai's regulatory scheme, the Planning

Commission makes setback determinations). As in the present case, the actual good faith of the official was not disputed.

Here, the Maui Planning Director was well within the bounds of his authority, and provided assurances only on how the County would enforce the zoning laws. He made no promises the County would issue CPs to vacation renters since the responsibility to issue CPs ultimately resides in the County Council. Indeed, the written agreement reflects that both parties acknowledge "[u]ltimately, the outcome of the application will be the result of the established process – and there is no guarantee of a favorable determination." ER 2, (Exhibit "1" to Complaint), at 2.

Thus, the expectation by MVRA and its members that the County would enforce the zoning laws as it agreed it would was more than an "abstract need or desire." *See Nunez v. City of Los Angeles*, 147 F.3d 867, 872 (9th Cir.1998). Nor was it a "mere 'unilateral expectation' of a benefit or privilege." *Id.* (quoting *Roth*, 408 U.S. at 577). Rather, because the Planning Director was within the "ambit of his duty," and the assurances he provided were "official assurances" upon which MVRA and others reasonably relied, Hawaii law recognized them as "property rights that cannot be taken away by government regulation." *Allen*, 571 P.2d at 329; *Pacific Standard*, 653 P.2d at 772. *See also Matsuda v. City & County of Honolulu*, 512 F.3d

1148, 1156 (9th Cir.) (City's repeal of agreement should be viewed with "heightened scrutiny" because it is the government voiding its own contracts, and district court's determination that plaintiff did not possess due process property reversed and remanded), *petition for cert. filed*, No. 07-1305 (Apr. 14, 2008) (http://www.supremecourtus.gov/docket/07-1305.htm); *Turnquist v. Elliott*, 706 F.2d 809, 812 n.2 (7th Cir. 1983) (plaintiff did not have a property right in assurances he would receive a particular wage because there was no evidence of assurances or reliance, but plaintiff would have possessed property "if a state agent with authority to do so had promised him that he would be paid the prevailing rate").

Here, MVRA sought and received assurances from the County official charged with the responsibility for enforcing the County's zoning laws, who provided assurances the County would enforce the zoning laws in a particular way within his discretion. *See State v. Kailua Auto Wreckers, Inc.*, 615 P.2d 730, 735 (Haw. 1980) (officials have discretion how to enforce the law). Even though the Planning Director's decision to provide assurances was discretionary, revocation of those assurances was nondiscretionary under Hawaii law once they induced detrimental reliance and became "property rights that cannot be taken away by government regulation." *Pacific Standard*, 653 P.2d at 772 (quoting *Allen*, 571 P.2d at 329).

Consequently, the rights of Maui vacation renters who relied upon the Planning Director's assurances are property rights protected by the Fifth and Fourteenth Amendments:

> Therefore, if under applicable state law a landowner acquires a vested right, and thus a property interest deserving protection, an intervening regulation or government action that purports to cut-off that right will almost certainly precipitate a substantive due process claim and arguably a takings claim as well.

Delaney & Vaias, *Recognizing Vested Development Rights as Protected Property*, 49 Wash. U. J. Urb. & Contemp. L. at 35. The district court's determination that MVRA and its members did not possess a property interest should be reversed.

C. HAWAII'S LAW OF EQUITABLE ESTOPPEL REQUIRES ONLY "ASSURANCES OF SOME FORM" AND RELIANCE

The district court held that MVRA did not properly plead a claim for equitable estoppel under Hawaii law. *Maui Vacation Rental Ass'n*, 2007 WL 4440962, at *15; ER 5, at 41. The court held Hawaii law requires the government to provide its "final discretionary approval" before a property owner may assert estoppel, and the County "maintains discretion in determining whether to grant a permit application." *Id.* The court held that until Maui vacation renters had a CP in hand, they had nothing but a good faith expectancy the County "would allow

Plaintiff's members to continue to operate without permits," and the complaint consequently did not adequately plead facts demonstrating an estoppel claim. *Id.*

The district court's conclusions are wrong because Hawaii law recognizes a claim for estoppel even when the plaintiff is not seeking to compel issuance of a permit. The Hawaii Supreme Court characterizes its estoppel rule as flexible, and "the midpoint in a wide spectrum of possibilities represented by the decisions of other jurisdictions." *County of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766, 744 n.8 (Haw. 1982). Unlike jurisdictions such as California, for example, Hawaii does not necessarily require any permit to issue as a prerequisite to estoppel. *Id.* at 780 (rejecting the building permit rule of *Avco Community Developers, Inc. v. South Coastal Reg. Comm'n*, 553 P.2d 546 (Cal. 1976) as "harsh"). MVRA's complaint did not ask the district court to determine the County must issue CP permits to vacation renters. Rather, the equitable estoppel claim only sought to prevent the County from repudiating its express assurances that vacation renters who applied for permits not be issued a notice of violation, and that the County adhere to its enforcement by complaint policy.

Hawaii law does not limit estoppel to cases where the plaintiff seeks issuance of a permit, but also applies the doctrine in cases where government officials

provide assurances about the state of the law. *See*, *e.g.*, *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 514 P.2d 861 (Haw. 1973) (assurances regarding filing times); *Brescia v. North Shore Ohana*, 168 P.3d 929 (Haw. 2007) (assurances about location of setback). *Waianae Model* is the critical case illustrating this principle. In that case, which is detailed earlier in this brief, the property owner relied on a planning official's extension of time in which to file a permit application. *Waianae Model*, 514 P.2d at 861. The Hawaii Supreme Court did not focus on the permit, but on the official's representations about the deadline: "if *an act* of such official, done in good faith and within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance, is no more that an irregularity, and the *validity of such act* may not be questioned." *Id.* at 864 (emphasis added).

1. Discretionary Approvals Not at Issue

Hawaii law requires a complaint state only two elements to support a claim the government is estopped: (1) "official assurances of some form" and (2) reliance. *Denning v. County of Maui*, 485 P.2d 1048, 1050 (Haw. 1971) (for estoppel to apply, "the facts must show that Denning had been given assurances of some form" by the County); *Allen v. City & County of Honolulu*, 571 P.2d 328, 330 (1977) (same); *Life of the Land, Inc. v. City Council of the City & County of Honolulu*, 592

P.2d 26, 28 (Haw. 1979) (same); *Life of the Land, Inc. v. City Council of the City & County of Honolulu*, 606 P.2d 866, 902 (Haw. 1980) (reliance). *See also* Kenneth R. Kupchak, Gregory W. Kugle and Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawaii*, 27 U. Haw. L. Rev. 17, 28-39 (2004) (detailing Hawaii's approach to equitable estoppel).

The district court's determination that "final discretionary action" is a required element of an estoppel claim stems from a misreading of *Pacific Standard.* In that case, the Hawaii Supreme Court held the "official assurance" upon which the property owner could rely was the "final discretionary action" in the regulatory scheme governing the plaintiff's property. *Pacific Standard*, 653 P.2d at 774. The court held that final discretionary action was required because the relief sought by the plaintiff included a right to build its project. The court examined the regulations applicable to the project, and determined the plaintiff did not have a right to build because it had not obtained the last discretionary approval. The court did not repudiate the "official assurances of some form" standard, but rather clarified that when a plaintiff seeks to compel final approvals, the government's final discretionary approvals are the "official assurances." *Id.* at 780. *See also* Kupchak, Kugle & Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development*

Agreements, 27 U. Haw. L. Rev. at 38 (analyzing the *Pacific Standard* decision).[15]

2. MVRA's Complaint Asserted "Assurances of Some Form" and Reliance

The estoppel claim in *Pacific Standard* is much different than MVRA's, since MVRA does not seek to compel the County to issue CPs, only honor its assurances about zoning law enforcement. MVRA's complaint alleged both assurances and reliance. Exhibit "1" to the complaint was the Planning Director's written "assurances," labeled as such:

> 2. You have given your *assurance* that any property owner who submits a Conditional Use Permit application *will be allowed to continue their business while the application is pending*. Ultimately, the outcome of the application will be the result of the established process – and there is no guarantee of a favorable determination. However, *filing the application will place a moratorium on zoning enforcement until the permit process has concluded*.

ER 2, (Exhibit "1" to Complaint), at 2 (emphasis added). This exhibit is part of the complaint. *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899-900 (9th Cir. 2007) (exhibits attached to the complaint may be considered in a 12(b)(6)

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15. To the extent that discretion is at issue under the enforcement scheme applicable to the Maui zoning code's provisions on operation of a vacation rental without a permit, the Planning Director exercised that discretion when he provided the County's assurances about how it would enforce its zoning laws. *See Kailua Auto Wreckers,* 615 P.2d at 735.

motion). Attached to the complaint is a follow up letter, in which the Planning Director provided assurances on an "amnesty from zoning enforcement . . . until there has been a final determination regarding the permits." ER 2, (Exhibit "1" to Complaint), at 4. The complaint also stated that the Planning Department told others not to apply for permits at all. ER 2, at 6. MVRA's complaint stated both essential elements of a claim of estoppel under Hawaii law and it should not have been dismissed for failure to state a claim; it provided the County adequate notice of the basis of MVRA's claims. *Alvarez v. Hill*, 518 F.3d 1152, 1157-58 (9th Cir. 2008) (detailing notice pleading requirements under the federal rules).

VII.
CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and this case remanded to the district court for further proceedings.

Respectfully submitted,

DATED: San Francisco, California, May 5, 2008.

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