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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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| MAUI VACATION RENTAL ASSOCIATION, INC., a Hawaii corporation,<br><br>Plaintiff,<br><br>vs.<br><br>THE COUNTY OF MAUI; JEFF HUNT, Director of MAUI COUNTY PLANNING DEPARTMENT, as an individual, and DOES 1-10, inclusive;<br><br>Defendants. | Case No.: CV-07-00495 JMS (KSC)<br><br>**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT; CERTIFICATE OF SERVICE**<br><br>Date: December 19, 2007<br>Time: 10:00 a.m.<br>Ctrm: Hon. J. Michael Seabright |

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**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM**
**IN OPPOSITION TO MOTION TO DISMISS**

Pursuant to this Court's Order of December 3, 2007, Plaintiff MVRA hereby submits its supplemental memorandum in opposition to Defendants' motion to dismiss.

## I. SUBSTANTIVE DUE PROCESS ANALYSIS

### A. Neither The 'Arbitrary and Capricious' Analysis Nor The 'Ill Will' Analysis For Substantive Due Process Protection Require A State Protected Property Interest

The MVRA asserts a violation of its substantive due process rights given the facts as alleged in the Complaint. "The essence of a substantive due process claim is protection from arbitrary and unreasonable action." *Babineaux v. Judiciary Commission*, 341 So.2d 396, 400 (La. 1976). As discussed in a very thorough law review article on the nature of substantive due process:

> Substantive due process rights are not dependent upon property rights under state law as in the case of procedural due process rights. Rather, substantive due process affords plaintiff a broad residual theory to challenge the root of governmental conduct and typically affords remedies consisting of compensatory and punitive damages along with equitable relief where appropriate. V. Fontana, *Municipal Liability: Law and Practice* § 4.8 (1990). In other words, "**substantive due process rights are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution**." *Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (citing, *Regents of the Univ. of*

*Michigan v. Ewing*, 474 U.S. 214, 228 (1985)) (emphasis added).

McGuinness, McGuinness Parlagreco, *The Reemergence of Substantive Due Process as a Constitutional Tort: Theory, Proof, and Damages*, 24 New Eng. L. Rev. 1129, 1133 (Summer 1990).

As stated by McGuinness, *supra*., substantive due process is often overlooked as an independent claim for relief, "even though it is a constitutional claim more readily applied to a range of governmental conduct where the facts are sufficiently egregious." *Id.* At 1134. "The hallmark of a successful substantive due process claim usually includes facts which present questions of seriously arbitrary or capricious governmental conduct. See, e.g., *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989).

In applying the 'arbitrary and capricious' analysis for a substantive due process violation, in *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the Ninth Circuit affirmed a trial court's decisions finding a substantive due process violation for refusing to issue a building permit, even though it rejected the plaintiff's procedural due process claim because of the lack of a property interest under state law. See also, e.g., *Bellow v. Walker*, 840 F.3d 1124 (3rd Cir. 1988); *Regent of the Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985); *Toney-el v. Franzen,* 777 F.2d 1224 (7th Cir. 1985); *Mangels v. Pena*, 789 F.2d 836, 839

(10th Cir. 1986). All of these courts have recognized that a state law property interest is unnecessary in order to obtain substantive due process protection.

There appears to be significant confusion between the state law property interest required for procedural due process analysis, and the constitutional interest needed for a *substantive* due process deprivation to occur. The County of Maui, and various cases upon which it has relied in arguing against the existence of a "protected property interest", are actually procedural due process cases[1]. See, e.g., *Koloa Marketplace, LLC v. County of Kauai,* 2007 WL 2247797 (D.Haw. 2007) (analyzing the procedural specifics of the zoning laws to determine that they provided no state law protected property interest in the subject permit).

The other Hawaii case mentioned by this Court, *Keahole Defense Coalition, Inc. v. Board of Land and Natural Resources*, 110 Haw. 419, 134 P.3d 585 (Haw. 2006), likewise analyzes a

[1] Procedural due process analysis also calls into review whether or not a property interest is "vested", vis a vis the issuance of the "last discretionary permit". Plaintiff MVRA submits that this line of analysis is not the appropriate framework for a substantive due process analysis under the weight of federal authority. See, e.g., 24 New Eng. L. Rev. 1129, 1134 ("Therefore, the weight of authority provides that individuals are entitled to substantive due process protection without a state law grounded property interest, as in the case of procedural due process. A traditional state law grounded property interest requirement is inconsistent with the broad residual scope of substantive due process protection.")

purely *procedural* due process issue, the right to a contested case hearing. Although that court in *Keahole* went into the "statutory entitlement" analysis used in substantive due process cases, the outcome in *Keahole* (holding that there was no vested property interest triggering the right to a contested case hearing) hinged on the existence of nearly unfettered procedural discretion in the permit process. *Id. at 433-434.* That court's analysis, and the allegations made by the plaintiff, did not involve the 'arbitrary and capricious' nature of the alleged governmental conduct, making that analysis inapposite to the allegations in the case at bar.

In a substantive due process analysis, the existence of a constitutionally protected property or liberty interest is defined differently, and, as stated, such interest need not constitute a specifically protected property interest under state law. In *Standard Materials, Inc. v. City of Slidell*, 700 So.2d 975 (La. 1997), the court elucidated what would appear to be the most commonly employed framework for analyzing a substantive due process claim under the "arbitrary and capricious" standard. There, the court stated that a "plaintiff must *first* establish the existence of a constitutionally protected property or liberty interest[2] (citations omitted;

[2] At fn. 16, the *Standard* court notes that there is a different property interest at stake in a substantive due

emphasis in original)." *Id.* at 985. The court went on to explain the nature of the protected property interest that might be asserted:

> In the zoning context, a property interest requires more than a "unilateral expectation" that a permit or license will be issued; instead, there must be a "legitimate claim of entitlement" to the benefit in question. [citations omitted] A landowner has a legitimate claim of entitlement when, absent the alleged denial of due process, there is **either a certainty or a very strong likelihood that the application or permit would have been granted.** *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985). To have such a property interest supporting a substantive due process claim, Standard must show either that it possessed a **legitimate claim of entitlement** to a permit to operate a concrete batch plant at the Bayou Liberty site **or a justifiable expectation** that the City would issue the permit.

*Standard Materials, Inc. v*. Sidell, *supra. at* 986.

In the case at bar, not only did the County's conduct create a justifiable expectation that the County would issue permits to applicants once it changed its laws as promised, but in fact all of the permit applications actually processed by the County were granted, creating a "very strong likelihood" that the permits would have been granted had the County simply processed them in the regular course of governmental business. This is quite different from the facts in *Standard*, wherein "the

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process claim: "This is an example of the notion that a property right may exist in *what is owned* …in addition to a property right which may exist in *what is sought* … provided there is a legitimate claim of entitlement [citations omitted]." *Id.* at 986, fn. 16 (emphasis in original).

regulations requiring such permits did not yet exist", and therefore in *Standard,* the applicant had no reasonable basis for expecting that its application for a concrete batch plant would be granted.

There are a number of zoning/land use cases in which a violation of substantive due process rights has been found under the "arbitrary and capricious" standard. In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the City of Billings and individual council members were held liable for arbitrary administration of the local regulations, when they denied a building permit to Bateson after he had fulfilled all of the necessary requirements. *Bateson v. Geisse*, 857 F.2d at 1303. See also, *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983); *Littlefield v. City of Afton*,785 f.2d 596 (8th cir. 1986); *Wilkerson v. Johnson*. 699 F.2d 325 (6th Cir. 1983); *Southern Cooperative Development Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983), c*ert. denied,* 463 U.S. 1208 (1983); *Cunningham v. City of Overland*, 804 F.2d 1066 (8th Cir. 1986); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982) (City's conduct held to be arbitrary and capricious where it passed an ordinance forbidding construction of new apartments following a community "uproar" and referendum showing resistance to the proposed housing project).

Another category of cases wherein government conduct has been labeled as 'arbitrary and capricious' has been found where the governmental actors are driven by ill motives, such as partisan political or personal reasons unrelated to the merits of the permit at issue. In *Bello v. Walker*, 840 F.2d 1124 (3rd Cir. 1988), the Third Circuit, in ruling on a developer's Section 1983 action, first rejected the developer's procedural due process claim for lack of a property interest. The court noted that "we need not define … the outer limits of the showing necessary to demonstrate that the governmental action was arbitrary, irrational or tainted by improper motive." *Bello*, 840 F.2d at 1129.

In *Bello*, the court explained that the plaintiffs had presented **sufficient evidence from which a trier of fact could reasonably conclude that the municipality had improperly interfered with the permit process**, and that they did so for partisan political or personal reasons unrelated to the merits of the permit application. The evidence presented in *Bello* indicated that certain council members were strongly opposed to the multi-housing unit, and that two members of the council had personal animosity towards one of the plaintiff's employees.

In another such case, *Marks v. City of Chesapeake,* 883 F.2d 308 (4th Cir. 1989), the Fourth Circuit affirmed a verdict for the plaintiff where the plaintiff was denied a conditional use

permit to operate a palmistry business within the city. In *Marks*, the plaintiff was required to obtain a rezoning and then a conditional use permit; however, at the "public comment" session for the final permit approval by the City Council, several local residents voiced their objection to the palmistry business, and the Council denied Marks' permit application. Rejecting the City's claim that its decision was based upon "financial and commercial considerations", the trial court found that the City "had simply succumbed to irrational neighborhood pressure founded in religious prejudice" and reasoned that "irrational, arbitrary governmental measures taken against a politically unpopular target on the basis of complaining neighbors' fears or negative attitudes are repugnant to constitutional guarantees." *Marks*, 883 F.2d at 310-312.

In all of these cases, there is plainly some degree of "discretion" on the part of the governmental officials to grant or deny the permit application, however the applicant's "legitimate claim of entitlement" (absent the arbitrary and capriciousness, or political motive) is nonetheless assumed to be sufficient to warrant the application of the substantive due process protections to such situations.

Given all of the decisions in this area as discussed above, it is necessarily the case that the mere fact of the County

Council's ability to grant or deny a permit application[3], is not determinative of whether or not an application has an entitlement or strong likelihood of prevailing sufficient to create a property interest in 'what is being sought' for substantive due process purposes.

In the instant matter, Plaintiff MVRA is not even claiming a right to have all of its members' permit applications granted – the protected interest, or claim of entitlement, is even more basic than that. To the extent that a substantive due process claim requires a protected property interest or claim of entitlement, Plaintiff MVRA submits that property owners have a protected interest in the right to avail oneself of the zoning laws, i.e., to apply for a permit and have it processed in accordance with the applicable laws and within the State-mandated time frame, and, consequently, to own and to use one's property as allowed by law.

Plaintiff contends that in entering into a written policy of non-enforcement, failing to process permit applications, affirmatively turning away permit applications, and then withdrawing that policy for purely political reasons (as alleged in the Complaint and supported by evidence in the motion for preliminary injunction pending herein), a case is made for the

[3] The State of Hawaii and County of Maui conditional permit process is addressed more fully at section III hereinbelow, in regard to procedural due process protections.

invoking of substantive due process protections because there has been "grave unfairness in the discharge of [the County government's] responsibilities." *Silverman v. Barry*, 845 F.2d 1072 (D.C. Cir. 1988); *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). Such governmental conduct is "a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law [which] qualifies for relief." *Silverman*, 845 F.2d at 1079, as discussed in 24 New Eng. L. Rev. 1129, 1158-1159.

Furthermore, in the context of land use regulation, "a land-owning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection." *DeBlasio v. Zoning Bd. Of Adjustment*, 53 F.3d 592, 600-601 (3rd Cir. 1995); discussed in detail in *Acierno v. New Castle County*, 1995 WL 704967 (D.Del. 1995).

This is consistent with a recent Ninth Circuit decision broadly interpreting the necessary "constitutionally protected property interest" for substantive due process purposes as their "right to devote [their] land to any legitimate use." *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Board*, --

F.3d --, 2007 WL 4225774 (9th Cir. 2007), citing *Harris v. County of Riverside*, 904 F.2d 497, 503 (9t Cir. 1990); *Lingle v. Chevron U.S.A., Inc.* 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005); *Crown Point Dev. Inc. v. Sun Valley*, 2007 WL 3197049 (9th Cir. 2007).

### B. The 'Shocks the Conscience' Analysis Implicates Not Just A Liberty Interest, But Also Fundamental Notions of Unfairness, Such As When Entrapment Has Occurred

In addition to the "arbitrary and capricious" standard, substantive due process claims may also be tested under the "shocks the conscience" standard, when a specific provision of the Bill of Rights is not involved. See, e.g., *Rochin v. California*, 342 U.S. 165 (1952); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973); *DiSisto College, Inc. v. Town of Howey-In-The-Hills*, 706 F.Supp. 1479 (M.D. Fla 1989).

One way in which the facts of this case may "shock the conscience" is by virtue of the fact that the plaintiffs were essentially entrapped into violating the zoning laws (they were told to go ahead with their TVRs) while at the same time being heavily discouraged from doing anything to remedy that violation, i.e., not being allowed to apply for a permit. This type of active misleading has led to the overturning of convictions by the Supreme Court. See, e.g., *Raley v. Sate of Ohio*, 360 U.S. 423, 79 S.Ct. 1257 (1959).

Although it has been held that entrapment alone is not a constitutional violation, the Supreme Court has acknowledged that there may be a substantive due process violation where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Stokes v. Gann*, 498 F.3d 483 (Miss. 2007), citing U*.S. v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); *Hampton v. U.S.*, 425 U.S. 484, 96 S.ct. 1646, 48 L.Ed.2d 113 (1976).

Enforcement of zoning provisions is set forth in Maui County Code 19.530; which provides for 1) criminal prosecution (19.530.020) with penalties up to $1000 in fines; 140 hours of community service; and 30 days of imprisonment; and 2) administrative enforcement (19.530.030) providing for civil fines of up to $1000 initially, up to $1000 per day; and up to one percent of the project cost. Since violation of the zoning laws in this case constitutes a criminal violation punishable by significant criminal penalties, the entrapment of plaintiff members by affirmatively inducing them to rely on the County's non-enforcement and non-processing of permits invokes not only a property interest, but also a liberty interest[4].

[4] For an interesting discussion of the non-enforcement of laws in various contexts, see Chivers, Corey R., *Desuetude, Due Process, and the Scarlet Letter Revisted*, 1992 Utah L. Rev. 449 (1992).

II. EQUAL PROTECTION ANALYSIS

Substantive due process has been called the "heavy artillery of constitutional litigation…" *Steuart v.Suski,* 867 F.2d 1148, 1150 (8th cir. 1989); see, *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9t Cir. 1989). Closely related to the substantive due process analysis is the doctrine of equal protection. *Benigni v. City of Hemet*, 868 F.2d 307, 312 (9th Cir. 1989) ("the due process and equal protection theories in this case are practically identical, both being grounded on the allegation of arbitrary law enforcement activit[ies]…"); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328-29 (6th Cir. 1988). For example, "[e]qual protection rights may be violated by gross abuse of power, invidious discrimination, or fundamentally unfair procedures." *Dean Tarr Corp. v. Friedlander*, 650 F.Supp. 1544, 1552 (S.D.N.Y. 1987), aff'd 826 F.2d 210 (2d Cir. 1987); *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir. 1988) (to show an equal protection or substantive due process violation, a plaintiff must at least establish "grave unfairness").

Although equal protection is often invoked where there is a "suspect class" such as race[5] or religion, a "suspect class" is

[5] In its Complaint and opposition to the motion to dismiss, MVRA does make reference to a racial animus in the vacation

not necessary for the application of equal protection rights in the zoning and land use context. In the zoning and land use context, equal protection claims arise from legislative zoning classifications or conduct that treat similar lands differently[6], treat similar uses differently[7], or treat land uses differently based upon the status or identity of the users thereof[8].

Also, claims of unlawful discrimination may result from the administration and enforcement of zoning ordinances, or a lack of uniformity in the treatment of lands within a zoning district. Where the dissimilar treatment does not involve "suspect classifications", the applicable standard is whether or

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rental dispute, since nearly all TVR owners are caucasian. However, while racial animus, if proven, would result in a stricter scrutiny being applied, allegations of belonging to a "suspect classification" is patently not requiring to invoke equal protection rights in these types of cases. See, *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

[6] See, e.g., *Fry v. City of Hayward*, 701 F.Supp. 179 (N.D. Cal. 1988) (restrictions placed on plaintiff's open space property, but not on other similar property, not rationally related to city's legitimate open space objectives).

[7] See, e.g., *Bannum, Inc. v. Cit of Louisville, Ky.*, 958 F.2d 1354 (6th Cir. 1992) (different treatment of group home for felony offenders was based on unsubstantiated fear rather than legitimate government purpose, since same legitimate concerns did not become an issue in regard to other similar uses).

[8] Whether involving a suspect class or not. See, e.g., *Kirsch v. Prince George's County*, 331 Md. 89, 626 A.2d 372 (1993) (imposition of more rigid requirements on landlords renting to university students than to nonstudents was not rationally related to purpose of clearing residential neighborhoods of noise, litter and parking congestion).

not there is a “rational basis” for the governmental conduct. See generally, Tribe, *American Constitutional Law* 1000 (1978).

In 2000, the U.S. Supreme Court held that the equal protection clause gives rise to a cause of action when it is alleged that the government has intentionally and arbitrarily treated an individual differently from others similarly situation, even if it is not alleged that the individual is a member of a vulnerable group or class. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

In *Willowbrook*, the Supreme Court held that a homeowner could assert an equal protection claim as a “class of one” based upon allegations that the village demanded a 33-foot easement as a condition to connecting her property to the municipal water supply, while requiring only a 15-foot easement from similarly situated property owners, and that the additional requirement was imposed as a result of ill will against the homeowner for having previously (unsuccessfully) sued the village.

In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), the City’s zoning ordinance required a special use permit in an “apartment house” district for hospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions. The city interpreted that to include a proposed group home for mentally impaired adults and denied the permit.

The Supreme Court held that the denial was not rationally related to any legitimate public purpose for zoning, since the city's concerns for flooding, overcrowding, fire hazards and street congestion were not a reasonable basis for denial of the group home as compared to other similar uses, such as apartment houses, boarding houses, fraternity houses, hospitals and nursing homes, which were allowed without a special permit. The Supreme Court held that the zoning classification in question could not legitimately be supported simply by the irrational fears and prejudices of neighboring property owners. *Id.*

Similarly, as alleged in the MVRA's complaint, there is no rational basis for treating the vacation rental operators differently from other types of home based businesses and multiple-dwelling unit properties, all of which equally violate the same zoning laws but are being treated differently by the County of Maui. Only the TVRs have suffered and are suffering the change in official policy and discriminatory application of the law. The differential treatment is simply because of a political prejudice in the current administration against short-term renters, which prejudice is unfounded (and in fact to the contrary) given any number of studies on the alleged impact of TVRs on affordable housing and neighborhood ambience. *Complaint,* ¶ 26, 18, 19, 51, 52. Courts have held that dissimilar treatment may not be based simply on opposition by

nearby owners. See, *City of Cleburne*, *supra.*, 473 U.S. 432; *Durante v. Town of New Paltz Zoning Bd. Of Appeals*, 90 A.D.2d 866, 456 N.Y.S.2d 485 (3d Dep't 1982).

III. PROCEDURAL DUE PROCESS ANALYSIS

Differing from the substantive due process and equal protection analysis' already discussed, is the protection of procedural due process. Procedural due process has been held to require a state law protected liberty or property interest, and denial of adequate procedural protections. Nonetheless, the U.S. Supreme Court has stated that the "property interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather 'property' denotes a broad range of interests that are secured by 'existing rules or understandings'. [citation omitted] A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit **and that he may invoke at a hearing**." *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694 (1972), citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

Because procedural due process protection hinges on the state law procedure being challenged, it necessarily requires a state law protected interest, whether that interest is explicit

or merely implied. In elaborating upon this notion, the Ninth Circuit further elaborated on the *Perry* guidelines, stating "Our case law provides that in the absence of statutory language creating a property interest, a legitimate claim of entitlement can 'be based on the conduct and representations of government officials when their actions lead to the creation of a 'mutually explicit understanding'." *Doran v. Houle*, 721 F.2d 1182, 1186 (9th Cir. 1983), quoting *Perry v. Sindermann*, 408 U.S. at 601, cited in *Thornton v. City of St. Helens*, 425 F.3d 1158 (9th Cir. 2005); see also, Richardson v. Town of Eastover, 922 F. 2d 1152, 1158 (4th Cir. 1991).

In *Thornton*, wherein the Thorntons claimed a legitimate expectation in future permit renewals because the City's prior practice had been to renew without any compliance review, the court noted that there was no evidence that the Thorntons "were promised automatic approval of their renewal applications in perpetuity or that the city had disclaimed, by ordinance or otherwise, the power to condition approval of a renewal application on compliance with local regulations." *Id.* at 1165.

In the case at bar, unlike in *Thornton* and related procedural due process cases, the City's conduct and representations rose to a much higher level, consisting of a written promise under certain terms and conditions, and

affirmative action to manipulate plaintiff members into not submitting lawful permit applications[9].

As in the cases discussed hereinabove, the conditional permit process and standards contain an objective element such that if an applicant meets the requirements imposed, the permit application will be granted. This is demonstrated not only by the regulations themselves, but also by the fact that all applications to date that have been fully processed, have been granted, as stated in the Complaint.

Hawaii and Maui County law provide a procedural mechanism for submitting land use permit applications, in this case conditional use permit applications, and for having them processed under certain standards and within a certain time frame, that create a right or entitlement to use one's land as allowed by a State Special Permit and County Conditional Permit. Again, the facts of the case at bar differ from most other cases in this area, because the plaintiff's are not claiming a protected interest in the *permit* they might or not get, but rather in the right to avail themselves of the existing law

[9] The Supreme Court has often held that "traditional notions of fairness" require consideration of whether or not the individual has been affirmatively misled by the administrative agency. In *U.S. v. Penn. Indus. Chemical Corp.*, 411 U.S. 655, 93 S.Ct. 1804 (1973), and relying on its own decisions cited therein, the Supreme Court ordered the lower courts to hear evidence in support of PICCO's claim that it had been affirmatively misled.

regulating the use of their land without arbitrary and capricious interference from government officials.

To the extent a state-law based property interest is required for a procedural due process claim, the right or entitlement depends on the degree of official discretion allowed by the applicable law. "At one pole, a state operating license that can be revoked only 'for cause' creates a property interest. See e.g., *Barry v. Barchi*, 443 U.S. 55, 64 (1979). At the opposite pole, a statute that grants the reviewing body unfettered discretion to approve or deny an application does not create a property right. See e.g., *Jacobson v. Hannifin*, 627 F.2d 177, 189 (9th Cir. 1980)."

As stated below in the section describing Conditional Permits, there are clear criteria for granting or denying the permits. The proposed use must be *"similar, related or compatible to those permitted uses".* Where the proposed use is for people to reside in a dwelling for less than 180 days at a time; and the permitted use of the dwelling is for residential use, the Council has limited discretion in finding the proposed use "similar, related or compatible".

*"Upon receipt of a complete application, the planning director shall review the project parameters, including, but not limited to, location, design, configuration, and impact by comparing the proposed project to fixed standards."* The "fixed

standards” are the other applicable aspects of the County code, including the other uses permitted by the zoning of the property. These are clearly stated in the zoning ordinances.

*“The proposed use would not be significantly detrimental to the public interest, convenience and welfare, and will be in harmony with the area in which it is to be located.”* These criteria again compare the proposed use to the uses permitted on the subject property and nearby. In the case of TVR use (rental of less than 180 days) taking place in a permitted dwelling, there is limited discretion to find otherwise.

*“Should the commission determine that the permit requested is for a use which is substantially different from those uses permitted in the use zone, the commission shall recommend denial of the request.”* Again, the criterion for denial is clear. The discretion is limited if, in order to deny the permit, the Council must find that a proposed rental of 179 days is substantially different from a rental of 180 days. Pursuant to the standards set forth in *Thornton*, there are clear limits to any Council discretion in granting or denying a Conditional Permit for TVR use, therefore the right to obtain a Conditional Permit under that limited discretion constitutes a protected property right.

There is a protected right to access to the Conditional Permit process; and to have the permit heard in a reasonably

timely manner. Any property owner or authorized person may, pursuant to Maui County Code, apply for a Conditional Permit to conduct TVR use. In other words, any person is entitled to TVR use of their property if their proposal for TVR use meets the stated criteria in MCC 19.40.

By accepting applications, confirming their completeness, preparing a report and recommendation to the Planning Commission and obtaining a Commission recommendation to the Council, it is clear that the applications and the proposals for the use meet the statutory criteria for having an application processed, and thus the applicants are entitled to a hearing on the application. The Code makes no provision for the County to refuse to process the application.

Pursuant to the 2001-2007 agreement, approximately 70 individual applicants have had their applications pending for as long as six years, including the President of the MVRA, Dr. David Dantes. This delay in processing CPs violated Hawaii's Administrative Procedure Act as well as the due process rights of the applicants.

The Administrative Procedure Act, HRS Chapter 91, includes within it an Automatic Permit Approval Law, HRS § 91-13.5. This law requires that "an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-

related permit, license, or approval." HRS § 91-13.5(a). The statute provides:

> For purposes of this section, 'application for a business or development-related permit, license, or approval' means any state or county application, petition, permit, license, certificate, or any other form of a request for approval required by law to be obtained prior to the formation, operation, or expansion of a commercial or industrial enterprise, or for any permit, license, certificate, or any form of approval required under sections 46-4, 46-4.2, 46-4.5, 46-5 ...

HRS § 91-13.5(g) (emphasis added). This requires all permits applied for under a county's authority to zone to be granted or denied within a defined time period. MCC Chapter 19.40, regulating conditional permit applications, contains no time limit. Indeed, as the MVRA has pointed out, some applicants for CPs have been waiting over four years for the Council to rule on their applications.

The application processing is governed by MCC Chapter 19.510, which prescribe[s] the manner by which permits and approvals are processed and approved and to "ensure that all developments in the county are in compliance with the provisions of this title." MCC 19.510.010(A) (l). This Chapter sets time limits for review of permit applications. For example:

> All applications required by this title shall be submitted to the director of planning. Not more than five business days from the date upon which an application was submitted to the director of planning, the director of planning shall submit the application to the director of public works.

MCC 19.510.010(C) (I) (emphasis added). Additionally:

> Not more than fifteen business days from the date upon which an application is received by the director of public works, the administrator of the land use and codes division of the department of public works shall review the application to determine if the application is complete or incomplete and transmit the application, if complete, to the director of planning for further processing or to the applicant, if incomplete, with a written statement which identifies the portions of the application determined to be incomplete.

MCC 19.5l0.0l0(C) (2) (emphasis added). Most importantly:

> The commission shall transmit to the county council findings, conclusions, and recommendations for all changes in zoning and conditional use permits within ninety days, and within one hundred twenty days for all other applications requiring council approvals, after the application is deemed complete by the planning department.

MCC 19.510.020(A) (7) (emphasis added).

The language of Chapter 19.510 states that it governs all permits applied for under Title 19, Zoning, and mentions CPs specifically. HRS § 9 1-13.5(c) requires that "[a]ll 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."

The only exceptions to this provision are (1) if there is a one-time lack of quorum at a regular meeting of the issuing agency; (2) if "in the event of a national disaster, state

emergency, or union strike, which would prevent the applicant, the agency, or the department from fulfilling application or review requirements," (3) if the agency is a public utilities commission, or (4) if the agency is exempted by a county ordinance from Chapter 91 compliance. HRS § 91-13.5(c), (e) and (f).

MCC Chapter 19.510 specifically refers to HRS Chapter 91 as governing its appeals process, indicating that it is not exempt from the mandates of HRS Chapter 91. MCC § 19.510(B) (5) (a). Nor would the County's abeyance of CPs due to a possible change in the Code with respect to TVRs be considered a "national disaster, state emergency, or union strike."

By refusing to process the applications for years, a delay which cannot genuinely be argued as reasonable, the Council has arguably deprived the applicants of a protected property right (TVR use if criteria are met). Put another way, the Council must hear the application within a reasonable time in order to avoid infringing that right. Otherwise, unreasonable delay is a *defacto* denial of the permit, not only without due process, it is without any process at all. See, e.g., *N.Y.S. National Organization for Women v. Cuomo*, 14 F.Supp.2d 424 (1998) (making a thorough analysis of when delay in the permit process may in and of itself violate procedural due process protection under federal law, and denying qualified and legislative immunity

where the delay caused irreparable harm); *Winger v. Barnhart,* 350 F.Supp.2d 741 (2004); *Meehan Seaway Service Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,* 125 F. 3d 1163 (1997)

Also, this fundamental property right is recognized in and is the basis for the Hawaii Legislature's adoption of HRS § 91-13.5, which requires agencies to adopt timeframes (from application to decision) for development permits. Although HRS § 91 does not expressly apply to legislative bodies, the 9th Circuit case of *Laki Kaahumanu v. County of Maui*, 315 F.3d 1215 (9th Cir. 2003), makes clear that when the Maui County Council decides a Conditional Permit, it is making an administrative (and not a legislative) decision … exactly like the administrative agencies and decisions regulated by HRS § 91. Even if the County Council is not expressly subject to HRS § 91, the fundamental right of the applicant (to have a permit decided in a reasonable time) as recognized by HRS § 91-13.5 remains the same.

## IV. STATE AND COUNTY PROCEDURE AND REGULATIONS

Following is a summary of State and County law governing the Conditional Permit and Special Permit process, quoting the applicable provisions.

**County Regulations**

Transient Vacation Rentals (“TVRs”) are prohibited (MCC 19.37.010.A) in Maui County, except on parcels zoned Hotel (MCC 19.37.010.). “Transient” means any visitor or person who owns, rents or uses a lodging or dwelling unit, or portion thereof for less than one-hundred-eighty days and whose permanent address for legal purposes is not the lodging or dwelling unit occupied by the visitor”. (MCC 19.04.040)

In other than Hotel-zoned districts, for TVR use the County requires either a Bed and Breakfast Home (“B&B”) Permit or a Conditional Permit. The County Residential and Business zoning districts allow (by permit) TVRs that qualify as B&Bs (MCC 19.64). Essentially, B&Bs are a subset of TVRs, in which the guests only stay in the same dwelling unit as the operator.

TVRs that do not qualify as B&Bs, may be allowed by Conditional Permit. “The intent of the Conditional Permit is to provide the opportunity to consider establishing uses not specifically permitted within given use zone…” MCC 19.40.010.

**State Regulations**

HRS 205-6 Special Permit. “The County Planning Commission may permit certain unusual and reasonable uses within [State-designated] Agricultural and Rural or Agricultural districts, other than those for which the districts is classified.”

HRS 205 does not provide a minimum timeframe for tenancy or occupancy of dwellings in state-designated Agricultural or Rural districts. However, the County, in administering HRS 205, requires a Special Permit for occupancy less than 180 days (TVR use).

**Permit Processing**

In other than Hotel-zoned districts, for TVR use the County requires either a B&B permit or a Conditional Permit to comply with County zoning. In State-designated Rural and Agricultural districts, the County also requires a State Special Permit to comply with HRS 205. Because County zoning does not make B&B permits available in County-zoned Rural and Agricultural Districts, the County requires a Conditional Permit for B&B use (and for TVR use) in those County zoning districts.

B&B PERMITS are decided as follows (19.64.050): *Type 1: 1 or 2 guest rooms* by the Planning Director; *Type 2: 3 or 4 guest rooms* by the Planning Commission; or *Type 3: 5 or 6 guest rooms* by the County Council (by Resolution; 1 reading), after review and recommendation by the Planning Commission. The criteria for granting a Conditional Permit are set forth in Maui County Code, in pertinent part, as follows:

> **19.64.010 Purpose and intent.**
>
> The purpose of this chapter is to establish a permitting process and appropriate restrictions and standards for bed and breakfast homes; to allow small, local businesses an opportunity to participate and benefit from tourism; to provide a visitor experience and accommodation as an alternative to the resort and hotel accommodations currently

existing in the County; and to retain the character of the residential neighborhoods in which any bed and breakfast home is located. (Ord. 2609 § 8 (part), 1997)

**19.64.030 Restrictions and standards.**

BED AND BREAKFAST HOMES shall be subject to the following restrictions and standards:

A. The short-term rental use shall be permitted in only one single-family dwelling unit per lot.

B. The owner-proprietor or lessee-proprietor shall have a current transient accommodations tax (TAT) license and general excise tax (GET) license for the bed and breakfast home.

C. The owner-proprietor or lessee-proprietor shall be a resident of the county and shall reside, on a full-time basis, within the single-family dwelling unit being used as the bed and breakfast home.

D. The owner-proprietor shall have legal title to the property on which the bed and breakfast home is located; the lessee-proprietor shall hold a lease of five years or more on the property on which the bed and breakfast home is located.

E. The number of bedrooms used for short-term rental in the bed and breakfast home shall be no greater than six and shall be subject to the provisions of section 19.64.050 of this chapter. The total number of guests shall be limited to two guests per bedroom.

F. A bed and breakfast home shall not operate as a food service establishment, unless a food service establishment is a permitted use in the zoning district.

G. A bed and breakfast home shall be in compliance with all other applicable federal, state, and local laws.

H. In permitting bed and breakfast homes, the planning director, the planning commissions and the council shall not consider, nor be bound by, any private conditions, covenants or restrictions upon the subject parcel. Any such limitations may be enforced against the property owner through appropriate civil action.

I. All advertising for any bed and breakfast home in a residential district shall include the number of the permit granted to the owner-proprietor or lessee-proprietor.

J. Single-station smoke detectors shall be provided in all guest bedrooms.

K. Single-family dwellings used as bed and breakfast homes shall not qualify for real property tax exemptions pursuant to chapter 3.48, Maui County Code.

L. No bed and breakfast home in a residential district shall create any impact greater than those theretofore existing in that residential district. (Ord. 2609 § 8 (part), 1997)

CONDITIONAL PERMITS are reviewed by the Planning Commission and decided by the County Council by Ordinance after 2 readings and approval by the Mayor. Upon receipt of the Planning Commission's recommendation on Conditional Permits, the Council generally refers the "communication" to the Council Land Use (or similar) Committee for consideration, including public meeting testimony. The Committee Chair schedules (or does not) the item for consideration. The Planning Director or staff present and comment on the Commission's recommendation to the Committee; and present the Bill for the Ordinance for the Conditional Permit.

The Committee members vote on a recommendation to the full Council and the Committee staff prepares a report to the Council. The Council chair schedules the hearing of the report and the 1st reading of the Bill for the Ordinance. The Council votes in favor, against, or for deferral or re-committal (to the Committee). If the Council votes in favor, the 2nd reading of the Bill is scheduled and the process repeats. If the Bill is passed at 2nd reading, it will be forwarded to the Mayor for signature or veto. The County has now passed *the law* that is required in order to allow an individual owner to rent out a bedroom for less than 180 days.

The criteria for granting a Conditional Permit are set forth in Maui County Code, in pertinent part, as follows:

**19.40.010 Intent.**

The intent of the conditional permit is to provide the opportunity to consider establishing uses not specifically permitted within a given use zone where the proposed use is similar, related or compatible to those permitted uses and which has some special impact or uniqueness such that its effect on the surrounding environment cannot be determined in advance of the use being proposed for a particular location. (Ord. 1684 § 2 (part), 1988)

**19.40.030 Application.**

A developer, owner, lessee (holding a recorded lease, the unexpired term of which is more than five years from the date of filing of the application) or applicant with notarized written authorization for the application from the owner may file with the department of planning, an application for a conditional permit. Upon filing the planning director shall review the application for completeness. The application shall include the following information and documentation:

A. A written description which sets forth the nature of the request and the conditions justifying the request;
B. Documentation of ownership, or if appropriate, authorization by the landowner;
C. A scaled site plan showing existing and proposed buildings, parking, and access;
D. The names, addresses and tax map key numbers of owners and lessees of record of all real property situated within five hundred feet of the land on which the proposed action is to occur. Said list shall be based on current real property tax assessment records of the County and verified by the department of finance. The applicant shall provide a tax map graphically depicting the areas within five hundred feet of the subject property boundaries; and
E. A nonrefundable filing fee in the amount specified in the annual budget of the County. (Ord. 2984 § 1, 2001: Ord. 1867 § 1 (part), 1989; Ord. 1684 § 2 (part), 1988)

**19.40.050 Application review.**

Upon receipt of a complete application, the planning director shall review the project parameters, including, but not limited to, location, design, configuration, and impact by comparing the proposed project to fixed standards. (Ord. 1684 § 2 (part), 1988) (Emphasis added.)

**19.40.070 Establishment.**

A. Upon finding by the appropriate planning commission that reasons justifying granting of a conditional permit exist, and that the proposed use would not be significantly detrimental to the public interest, convenience and welfare, and will be in harmony with the area in which it is to be located; issuance of a conditional permit may be recommended, subject to such terms and conditions and for such period of time as the facts may warrant.
B. Should the commission determine that the permit requested is for a use which is substantially different from those uses permitted in the use zone, the commission shall recommend denial of the request and may instruct the applicant to seek a change of zoning should the facts warrant such an application.
C. Every conditional permit shall be conditioned upon the proposed development fully complying with all requirements of this title and other applicable governmental requirements.
D. Approval of a conditional permit application shall be through enactment of an ordinance by the council, in accordance with the provisions of the charter. (Ord. 1985 § 1, 1991: Ord. 1684 § 2 (part), 1988)

**19.40.080 Conditions, amendments, modifications**.

A. Conditional permits may be issued subject to such terms and conditions deemed reasonable and necessary to fulfill the intent and purposes of this title. All changes in the use or appearance of land or buildings allowed by the permit shall be in accordance with the specified conditions and the proposal as approved. Such permit shall be issued subject to compliance with and/or fulfillment of such terms and conditions and shall so state.
B. Any person who has been issued a conditional permit may request the commission to review a request to amend or delete any terms, conditions and time stipulations imposed upon such permit.
C. The commission on request or on its own initiative may

> recommend action to revoke any conditional permit or amend or delete any terms, conditions, and time stipulations of such conditional permit if such action is deemed necessary to effectuate the purpose and intent of this chapter. The commission shall provide due notice in writing to the applicant/permittee and an opportunity for a hearing. (Ord. 1684 § 2 (part), 1988)

STATE SPECIAL PERMITS for parcels up to 15 acres are decided by the Planning Commission; parcels over 15 acres are heard by the Planning Commission and decided by the State Land Use Commission. The permit criteria in HRS 205-6 are that the use must be “unusual and reasonable”. HAR 15-15-95 provides 5 “guidelines” for determining whether a use is “unusual and reasonable”.

For proposed TVR use in the State designated Agricultural or Rural districts, the County allows consolidated applications and concurrent processing for the required State Special Permit and County Permit. The Planning Director distributes the applications to many (usually 12-15) County and State Agencies for comment. The Planning Director prepares a Report and Recommendation (on both applications) to the Planning Commission. The Planning Commission decides the State Special Permit, and makes a recommendation to the County Council on the Conditional Permit.

If the Planning Commission approves the State Special Permit, it is effective only upon Council approval of the Conditional Permit. If the Commission denies the Special Permit,

there's not much point in proceeding to Council on the Conditional Permit (unless the Applicant intends to appeal the Commission's denial of the Special Permit) since the Commission will certainly recommend denial, and both permits are needed to conduct the TVR use. Likewise, even if the Commission approves the Special Permit, the Council may still deny the Conditional Permit.

## V. CONCLUSION

Plaintiff MVRA thanks this Court for the opportunity to more fully address and clarify the constitutional rights and issues at stake in this action, and respectfully contends that under the notice pleading requirements of federal law, the motion to dismiss should be denied.

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

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__/s/ *James H. Fosbinder*_____
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