IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI VACATION RENTAL ASSOCIATION, INC., a Hawaii corporation, Plaintiff, vs. THE COUNTY OF MAUI; JEFF HUNT, Director of MAUI COUNTY PLANNING DEPARTMENT, as an individual, and DOES 1-10, inclusive; Defendants.	CIVIL NO. CV 07-00495 JMS/KSC MEMORANDUM IN SUPPORT OF MOTION

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

Plaintiff, an association, seeks an order from this Court enjoining enforcement of State and County laws against Plaintiff's members. Specifically, Plaintiff Maui Vacation Rental Association, Inc. (hereafter, "Plaintiff" or "MVRA") asks this Court "[f]or preliminary and permanent injunctive and declaratory relief, as necessary to allow the members of Plaintiff MAUI VACATION RENTAL ASSOCIATION, INC. to conduct their business in Maui County". Plaintiff lacks standing to seek such relief on behalf of its members. Because Plaintiff does not have standing, this Court lacks subject matter jurisdiction, and should dismiss the Complaint filed on September 28, 2007 ("Complaint") in its entirety, with prejudice.

Even if Plaintiff did have standing to bring this action on behalf of its members who are not before the Court, the Complaint fails to state any claims upon which relief could be granted. Plaintiff's members cannot claim any due process deprivation because they do not have any legally-cognizable property interest in the relief Plaintiff seeks. Plaintiff's members cannot claim an equal protection violation because the Complaint does not allege that any of Plaintiff's members belong to a protected class. The statute under which Plaintiff sued does not confer any substantive rights. Moreover, at least some of the conduct that Plaintiff alleges occurred beyond the two-year statute of limitations for actions brought under 42 U.S.C. § 1983.

Counts Two (Breach of Contract/Specific Performance) and Three (Breach of Covenant of Good Faith and Fair Dealing) are supplemental state law claims sounding in contract that likewise have no legal basis. Neither of the letters that make up the first three pages of Exhibit 1 to the Complaint are contracts, let alone contracts that can be specifically enforced.

Another supplemental state claim, Count Four (Equitable Estoppel) fails to state a claim under Hawaii state law precedents. Moreover, prosecution of any estoppel claim would require the participation of those of Plaintiff's members who allege detrimental reliance.

Count Five (Maintenance of Illegal Customs and Policies) requests "[a] declaration as to whether said laws and/or conduct is unconstitutional or otherwise unlawful" without specifying precisely which laws and what conduct Plaintiff is challenging. Enforcement of facially-neutral State and County laws of general application is not an "illegal custom or policy."

Finally, there is no legal basis for suing defendant Jeff Hunt individually. As a public servant whose duty it is to apply and enforce duly-enacted and facially-constitutional State laws and County ordinances, he is entitled to qualified immunity.

Therefore, the Complaint should be dismissed, with prejudice.

II. STATEMENT OF FACTS

This action for injunctive and declaratory relief is brought by an association, none of whose individual members are

named as parties or identified in the Complaint. According to its Charter, Plaintiff MVRA was 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." (Complaint, ¶ 14) However, instead of "promoting compliance with County and State regulations," Plaintiff seeks preliminary as well as permanent injunctive relief designed to prevent the County from enforcing facially neutral and duly-enacted County zoning ordinances and State land use statutes relating to transient vacation rentals, or TVRs.[1]

The Complaint alleges that approximately 80 operators have applied for permits to operate TVRs, but to date, only 8 permits have been issued. (Complaint, ¶ 22) Since 2001, the proliferation of unpermitted TVRs has reached unprecedented proportions. Plaintiff estimates that there are at least 800 TVRs currently operating on Maui without permits. Id. The Complaint does not reveal how many of the operators of these illegal TVRs, if any, are members of Plaintiff.

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

The Complaint alleges that in 2001, the then-Director of the County's Department of Planning promised not to initiate enforcement action against Plaintiff's members who were operating TVRs without the proper permits while a bill for a TVR ordinance was pending before the County Council, unless there was a complaint from the public. (Complaint, ¶ 20)

A TVR bill was in fact considered by the Maui County Council over the course of several years. However, each of the County's three planning commissions (the Lanai Planning Commission, the Maui Planning Commission, and the Molokai Planning Commission) ultimately recommended against its passage. Minutes of the Meeting of the Planning Committee, Council of the County of Maui dated February 13, 2007, at pp. 16-17, Request for Judicial Notice No. 4, Exhibit "D". On February 13, 2007, the Council committee to which the bill had been referred decided to cease further consideration of the bill. Id. at p. 40. On March 16, 2007, the full County Council voted to file the bill, meaning no further action would be taken on it. Minutes of March 16, 2007 meeting of the Council of the County of Maui, Request for Judicial Notice No. 5, Exhibit "E" at pp. 47 - 57.

The Complaint alleges that "[a]fter meetings and hearing[s] on the matter, Defendants mandated that January 1, 2008 is the cutoff date after which no TVR operations will be allowed." (Complaint ¶ 27) Plaintiff responded with the instant lawsuit, which requests preliminary and permanent injunctive relief to prevent the County from enforcing state statutes and County zoning

ordinances against unpermitted TVRs operating illegally in the County of Maui.

III. STANDARD OF REVIEW

A Fed.R.Civ.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint, or may be made as a "speaking motion" that attacks the existence of subject matter jurisdiction as a matter of fact. Wailua Associates v. Aetna Casualty & Surety Company, 27 F.Supp.2d 1211, 1216 (D. Hawaii 1998). If the motion is presented as a "speaking motion," no presumptive truthfulness attaches to the allegations of the complaint. Id. Moreover, the existence of disputed material facts does not preclude the Court from evaluating the existence of subject matter jurisdiction in fact. Id. Therefore, the Court may consider, among other things, affidavits to resolve any factual disputes. Id. If the Court considers such evidence, the motion to dismiss is not converted into a motion for summary judgment. Id. at 1217. The plaintiff bears the burden of proving subject matter jurisdiction. Id.

On a Fed.R.Civ.P. 12(b)(6) motion to dismiss for failure to state a claim, the Court takes all allegations of material fact in the complaint as true, and construes them in the light most favorable to the non-moving party. Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 365 F.Supp.2d 1146, 1152 (D. Nev. 2005). However, the Court need not assume the truth of legal conclusions contained in the Complaint "merely because they are cast in the form of factual allegations."

Western Min. Council v. Watt, 643 F.2d 618, 624 (9th Cir.), cert. denied, Western Min. Council v. Watt, 454 U.S. 1031 (1981). For that reason, "'[c]onclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss.'" In re Stac Electronics Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996), cert. denied, Anderson v. Clow, 520 U.S. 1103 (1997), quoting In Re VeriFone Sec. Litig., 11 F.3d 865, 868 (9th Cir. 1993).

In considering a Fed.R.Civ.P. 12(b)(6) motion, a court is normally limited to the allegations of the complaint itself; however, courts may consider documents attached to or incorporated by reference in the complaint, or matters of which judicial notice may be taken, without converting a motion to dismiss into a motion for summary judgment. U.S. v. Ritchie, 342 F.3d 903, 907-908 (9th Cir. 2003).

IV. ARGUMENT

A. The MVRA Lacks Standing

Article III, § 2 of the United States Constitution limits the jurisdiction of the federal courts to the adjudication of "cases or controversies." In order for there to be a justiciable "case or controversy," a plaintiff must have standing to assert its claims. Western Min. Council v. Watt, supra, 643 F.2d at 623. In addition to constitutional considerations, courts have imposed prudential limitations on standing. Id.

An organization has Article III standing to sue on behalf of its members, in a representational capacity, only if it can meet each of the following three tests: (1) the organization's members

would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation in the lawsuit of individual members of the organization. Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, 365 F.Supp.2d at 1161. Here, the Court need not address the first two prongs of the associational standing test, because the Plaintiff cannot meet the third prong.

In Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, supra, an association challenged a scenic review ordinance that regulated the appearance of residential housing on littoral and shoreland properties. The planning agency moved to dismiss. The court determined that the plaintiff lacked associational standing. The ordinance at issue would affect homeowners in distinctly different ways, depending on a number of factors, such as the type of permit applied for and specific aspects of the home, including the color of the house, the number of windows, and other design features. Id., 365 F.Supp.2d at 1163. The court held that "application of the multi-faceted [ordinance] to the fact-specific situation presented by each different parcel of land, the type of permit sought by the homeowner, and the varied options for compliance presented by the [ordinance] mitigates against finding that the prudential component of associational standing is met in this instance." Id.; see, in addition, Western Min. Council v. Watt, supra, 643 F.2d at 624 n.3,

626 (nonprofit association of miners and owners of unpatented mining claims lacked standing to maintain claim that challenged law violated their constitutional right to be protected from unreasonable searches and seizures.)

The same is true here. Some of the Plaintiff's members may be seeking County Conditional Permits, while others require State Special Permits. Under HRS § 205-6(d), the State Land Use Commission must approve Special Permits for uses on parcels in the State agricultural and rural districts exceeding 15 acres in size. Therefore, it is necessary to know the underlying land use classification and the size of the parcel of land at issue in order to determine whether the County or the State has the final say in granting or denying the required permit.

Some of the Plaintiff's members may be seeking to operate a B&B, governed by Maui County Code § 19.64.010 et seq., while other members may wish to operate some other kind of TVR. See Complaint, ¶¶ 16, 17. Some of Plaintiff's members may live on their property, while others may reside elsewhere in or outside of the County. According to the Complaint, approximately 80 operators of TVRs submitted permit applications, but an estimated 800 TVR operators did not. (Complaint, ¶ 22) Some members may claim to have relied, to their detriment, on representations of the County as alleged in ¶ 49 of the Complaint, while others may not be making any such claim. Some may have exhausted their administrative

remedies by appealing a Notice of Violation to the County's Board of Variances and Appeals, while others may not have.[2]

Furthermore, zoning restrictions applicable to the property will vary, depending on the State land use district and the County's zoning classification. The land may be subject to policies and restrictions contained in the Paia-Haiku Community Plan or the Hana Community Plan, or may be located in a part of the County that is subject to a another Community Plan with different policies and objectives. The neighbors of some of the Plaintiff's members may have complained about some TVRs, while the neighbors of others have not experienced any adverse impact on their neighborhood. The extent of any neighborhood impact will depend on a variety of factors, including the size of the operation, the number of guests, the number of parking spaces available, whether the owner lives on-site, and any number of other variables.

In short, like the property owners in Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, supra, the specific circumstances of one member of the organization will be different from the next. The Court would have to take into account the facts pertaining to individual members of the organization in assessing duty, breach, causation,

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[2] While the Complaint alleges that several TVR operators have received "Notices of Warning," the Complaint does not allege that these individuals are members of Plaintiff, nor does the Complaint allege that any of Plaintiff's members have received Notices of Violation, as opposed to mere warnings. See Complaint, ¶ 40. Thus, in addition to not presenting a "case or controversy," the matter is not yet ripe. See Hale O Kaula Church v. Maui Planning Commission, 229 F.Supp.2d 1050, 1055 (D. Hawaii 2002).

and damage; in determining whether equitable relief was barred under the "unclean hands" doctrine; and in tailoring any equitable relief to the specific circumstances presented.

The fact that the Complaint seeks equitable relief, rather than monetary damages, is not dispositive of the standing issue. Committee for Reasonable Regulation of Lake Tahoe v. Tahoe Regional Planning Agency, supra, 365 F.Supp.2d at 1163. The prayer for relief in the instant suit seeks "preliminary and permanent injunctive and declaratory relief, as necessary to allow the members of Plaintiff MAUI VACATION RENTAL ASSOCIATION, INC. to conduct their business in Maui County". This Court would not be able to determine precisely what specific relief would be "necessary to allow the members . . . to conduct their business" without the participation of those members themselves.

Because the Plaintiff cannot meet the test for associational standing, this Court lacks jurisdiction over Plaintiff's claims. Therefore, the case must be dismissed.

Once the Court determines that it lacks jurisdiction, no further action is necessary. The Court need not read any further, or consider the following points and authorities, unless it has determined that Plaintiff does meet the test for associational standing.

B. The First Count Of Plaintiff's Complaint Does Not State A Claim

1. 42 U.S.C. § 1983 Does Not Create Substantive Rights

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

Furthermore, Plaintiff's first count does not state a claim under the Equal Protection Clause of the U.S. Constitution. City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 359 (2003). In Cuyahoga Falls, the U.S. Supreme Court addressed equal protection and substantive due process rights in the context of a low income

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

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

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

2. The First Count Of The Complaint Does Not State A Claim For A Substantive Due Process Violation

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

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[3] In a concurrence to the majority opinion in City of Cuyahoga Falls, supra, Justice Scalia observed that "...the judicially created substantive component of the Due Process Clause protects only certain fundamental liberty interests from deprivation unless the infringement is narrowly tailored to suit a compelling state interest. Freedom from delay in receiving a building permit is not among these fundamental liberty interests. To the contrary, the Takings Clause allows government confiscation of private property so long as it is taken for a public use and just compensation is paid; mere regulation of land use need not be narrowly tailored to effectuate a compelling state interest. Those who claim arbitrary deprivations of non fundamental liberty interests must look to the Equal Protection Clause. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), precludes the use of 'substantive due process' when a more specific constitutional provision governs." (citations omitted). City of Cuyahoga Falls, supra, 538 U.S. at 200.

The United States Supreme Court has held that zoning ordinances are presumptively constitutional. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130, 133-134 (1962). Zoning regulations that limit the type of uses to which a property owner's land may be put have been upheld as legitimate exercise of the government's police power since 1926, when the Supreme Court decided Village of Euclid v. Ambler Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.3d.303 (1926). In Euclid, the Supreme Court noted that the extent of the government's police power "varies with circumstances and conditions. Id., 272 U.S. at 387. The scope of zoning regulations "must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation." Id.

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

permits are allowed to operate in the County's residential districts. MCC § 19.08.020I. MCC § 19.37.010A. provides that, except as expressly permitted, vacation rentals are prohibited.

Bed and Breakfast ("B&B") operations are regulated under MCC § 19.64.010 et seq. (hereafter, the "B&B Ordinance"). Whether a B&B is a permissible use depends on the underlying zoning (MCC § 19.64.020) and if permitted, B&Bs are subject to the reasonable restrictions and standards found in MCC § 19.04.030. The Complaint alleges that the County's B&B Ordinance is "very limited, including only those TVRs in which the operator occupie[s] the same dwelling as the guests, and it does not apply in Rural or Agricultural-zoned areas." (Complaint, ¶ 16.) However, such reasonable and presumptively valid State and County restrictions do not arise to a violation of Plaintiff's constitutional rights. See Goldblatt, supra, 369 U.S. at 593-596.

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