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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI VACATION RENTAL ASSOCIATION, INC., a Hawaii corporation, Plaintiff, vs. THE COUNTY OF MAUI; JEFF HUNT, Director of MAUI COUNTY PLANNING DEPARTMENT, as an individual, and DOES 1-10, inclusive; Defendants.	) Case No.: CV-07-00495 JMS(KSC))) PLAINTIFF'S NOTICE OF MOTION) AND MOTION FOR PRELIMINARY) INJUNCTION; MEMORANDUM IN) SUPPORT; EXHIBITS "A"-"J";) DECLARATIONS OF SANDY BECK;) JOHN AND TAMMI CADMAN; DAVID) DANTES; DAVID GREENBERG; KEVIN) AND CLAUDIA LEDESMA; MAX) LUDWIG; DIANE SWENSON; ILIMA) SZABO; and RONALD WILBUR IN) SUPPORT THEREOF; CERTIFICATE OF) SERVICE)) DATE:) TIME:) CTRM:)) [No Trial Date]

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

TO ALL DEFENDANTS AND THEIR COUNSEL OF RECORD:

Brian T. Moto
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NOTICE IS HEREBY GIVEN that on _____, 2007, at _____ a.m./p.m., or as soon thereafter as this matter may be heard, Plaintiff's Motion for Preliminary Injunction will be heard before the Honorable J. Michael Seabright, Judge Presiding, in Courtroom ____ of the above-captioned court, located at 300 Ala Moana Boulevard, Honolulu, Hawaii, 96813.

COMES NOW Plaintiff, MAUI VACATION RENTAL ASSOCIATION, INC., by and through its undersigned counsel of record, JAMES H. FOSBINDER, to hereby move for preliminary injunctive relief pursuant to Federal Rules of Civil Procedure, Rule 65 enjoining the County of Maui, its employees, officials, agents, and representatives, from lifting the 2001 written settlement agreement signed by then-Planning Director John Min, which imposed a moratorium on enforcement action against transient vacation rental operators, and ordering the County, et al. to accept and to process new and pending transient vacation rental permit applications promptly and in good faith, for a specified period of time.

This motion is made on the grounds that the actions of defendants, and each of them, have caused irreparable harm to Plaintiff by violating Plaintiff's constitutional rights to substantive and procedural due process of law and equal protection, by unduly delaying the processing of permit

applications in violation of Hawaii law, by maintaining unconstitutional customs and policies, and by breach of an implied and express agreement between the parties, and that said defendants should be enjoined and/or equitably estopped from further such conduct.

This motion is based on this Notice of Motion and Motion, the Complaint, the Memorandum of Points and Authorities, the Declarations of Sandy Beck, John and Tammi Cadman, David Dantes, David Greenberg, Kevin and Claudia Ledesma, Max Ludwig, Diane Swenson, Ilima Szabo, and Ronald Wilbur, the attached Exhibits "A"-"J", all filed herewith, all other documents and records on file herein, any additional documents and records as may be presented herein by any party, and any other such matter as this Court may deem appropriate.

DATED: Wailuku, Maui, Hawaii, October 5, 2007.

IVEY FOSBINDER FOSBINDER LLC
A LIMITED LIABILITY LAW COMPANY

___/s/*James H. Fosbinder*_____
JAMES H. FOSBINDER
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MEMORANDUM OF POINTS AND AUTHORITIES

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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF THE CASE

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

For over a decade organizations such as the Maui Visitor's Bureau and the Maui Office of Economic Development [OED participated from 2002-2006], in cooperation with the Hawaii Tourism Authority, actively promoted and encouraged the growth of the vacation rental industry. Color travel brochures were produced featuring 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 & breakfasts were not permitted by zoning.

Starting in or about 1995, Maui County considered legislation to regulate all categories of "home occupations", but determined that it was too large of an issue to tackle in

one ordinance, and instead passed the “Bed and Breakfast” (“B&B”) ordinance in 1997[1]. The vast majority of home businesses were defacto legalized by written “enforcement policies” provided to County staff and the public, which consisted of a series of three memoranda, that explained the changing nature of the County’s position, which also paralleled the County’s position with regard to vacation rentals, one type of home-based business.

According to a study performed by the Kauaian Institute and often referred to by the County of Maui, vacation rentals provide self-employment for approximately 800-1000 proprietors and create about 600 full-time equivalent jobs for other residents. TVR guests spend $40 million annually, exclusive of rent, most of which remains in the local economy. Spending generates $4 million in state taxes, of which $725,000 returns to Maui as Transient Accommodation Tax.

Early in the Apana Mayoral administration, then-Planning Director John Min and the Maui Vacation Rental Association (MVRA), faced with what seemed to be an imminent wave of

[1] Title 19 of the Maui County Code governs the terms of Residential and land use. Activities that are merely “similar, related or compatible” to permitted uses require Conditional Permits rather than special use permits, the difference being that Conditional Permits, require approval by the entire Maui County Council, whereas County Special Use Permits require approval by the County Planning Commissions. MCC § 19.40.010.

litigation, reached an agreement as to a plan for bringing "underground" vacation rentals into compliance with the law.

The County faced an enforcement nightmare because of the estimated 800 TVRs in operation. If it began to enforce the zoning restrictions, it would have been faced with that many permit applications. This would have presented the County with an impossible burden, since the existing permit process required approximately 20 separate actions culminating with a public hearing by both the Planning Commission and the County Council for TVR use on agricultural and rural-zoned land. Alternatively, the County was faced with hundreds of enforcement actions, each of which could result in a formal contested case hearing or some combination of the two.

It appears that the County perceived a growing need for, and inevitable increase in, the number of home-based businesses including vacation rentals. County studies show that in addition to the approximately 800-1000 home-based vacation rental businesses, there are thousands of other home-based businesses operating in the County of Maui. Those home-based businesses other than vacation rentals are dealt with by written policy statements ratified by the Planning Director, which effectively legalize nearly all such businesses simply by establishing a policy of non-enforcement of zoning laws.

Most TVR operators prior to 2001 had not applied for permits because the permit process was lengthy and costly, and because enforcement was seldom applied unless an operator was causing problems for neighbors, so the 2001 agreement was designed to encourage a gradual increase in applications. Faced with the aforesaid gargantuan process just to approve what was already supported at all levels of the County administration, the County offered operators an opportunity to apply for permits and remain in business until their applications were either approved or denied.

Details were worked out in the 2001 written agreement that was memorialized in a writing prepared by MVRA Vice President David Dantes, and signed by Dr. Dantes and Planning Director John Min, in his official capacity. The written agreement was a combination settlement agreement, plea bargain, enforcement agreement and contract.

The October 23, 2001, written agreement consisted of the following:

A. Existing transient accommodations would apply for a Conditional Use Permit; those TVRs in Agricultural and Rural-zoned areas would also concurrently apply for an HRS 205-6 Special Permit (to be heard by the Planning Commissions).

B. Any property owner who submitted a Conditional use Permit application (and if appropriate, a Special Permit application) would be allowed to continue his or her business while the application was pending. A moratorium would be placed on zoning enforcement until the permit process was concluded, with the exception where County enforcement due to a complaint of actual impacts had already been initiated. Furthermore, operators were given a choice to apply for permits proactively, or wait until they were contacted by the County to begin the application process.

C. The Planning Department would take certain measures to make the permit process more “user friendly” including:

(a) Publish a manual to guide applicants through the application process;

(b) Arrange workshops conducted by the Planning Department;

(c) Expedite the permit process;

(d) When the term of a Conditional Use Permit was about to expire, the owner would apply for an extension; and

(e) MVRA would actively promote compliance and the filing of applications for permits under the new system of regulations.

D. Planning Director Min also agreed to consider:

(a) The appointment of two Planners who could focus in processing Conditional Use permit applications;

(b) Increasing the initial term of the Conditional use Permits from one year (another policy that has become de-facto law), to two or three years.

This agreement, which was effectively a plea bargain or settlement for persons otherwise in violation of laws with criminal penalties, was reduced to writing and signed by both Dr. Dantes, as Vice President of the MVRA, and the County of Maui, by Planning Director John Min. A copy of the executed contract between MVRA and John Min, Planning Department Director, County of Maui, is attached as EXHIBIT "A".

Approximately eighty transient vacation rental operators ("TVRs") applied for permits under that 2001 agreement. However, during the past six years, only eight applications have been completely processed by the County. All of them have been approved. (It seems worth noting that the present Mayor Tavares during her four previous Council terms, approved every one of

the ten TVR CP applications which were presented to the Council.) Roughly seventy applicants have not yet had a complete review of their applications. Hundreds of other would-be applicants were turned away and told to wait. Some were told directly by the County and others heard indirectly by word of mouth. The processing of permit applications was apparently halted by former Chairman Wayne Nishiki of the County Council Land Use Committee who refused to schedule permits for hearing during his four years as Land Use Chair.

In 2001 a Ninth Circuit decision was rendered in which the actions of the County Council in voting on individual Conditional Permit Applications were deemed administrative, rather than legislative. This may have been a factor in the decision to stop processing or accepting permit applications under the old law, since Council members would no longer receive legislative immunity for acting on those permits applications.

Of the unprocessed applications, applicants were treated inconsistently: some applicants were contacted and given a choice whether to proceed or delay processing; others were not given a choice, and their applications were held in abeyance by the Planning Department; some were not given a choice and their applications were processed by the Planning Department; and some went through the Planning Commission and were approved, but never scheduled for hearing by the Council. The County asked

other vacation rental operators to wait to file permit applications for the County's own benefit, either because it could not handle the volume of applications, or because, without legislative immunity, Council members chose not to bother.

Hundreds of other potential applicants did not submit their applications solely because the County literally stopped processing pending and new applications, and over and over again advised potential applicants to hold off because a "new law" would be passed. It is estimated that at least 700 additional applications would have been submitted had the cessation of processing not occurred, a situation that, without a revised permit process, would have required vastly more manpower than the County could possibly apply to TVR applicants alone.

Estimates based on knowledge of the time involved in processing prior applications indicate that it could have taken 20 people working 40 hours per week for an entire year to process all of the potential applications. At that time, the Planning Department had approximately 20 people. Applicants were induced not to file their applications, and not to insist on the prompt processing of their applications, by the County's promises.

From 2002-2006, it was openly stated by the Planning Department, Mayor and members of the County Council that the law was going to be simplified, and that there was no real need to

submit permit applications under the "old" law (i.e., the Bed & Breakfast ordinance that had been passed in 1997, or the TVR requirement of obtaining a Condition Permit under Chapter 19.40 of the Maui County Code, and if appropriate, an HRS 205-6 Special Permit). A draft vacation rental ordinance was developed with input from the community, Plaintiff, and others in the industry. The bill had the potential to resolve a broad range of concerns. Public input tallied 383 in favor and just 32 opposed. *See, Exhibit "B".* Despite the public support, the ordinance was rejected.

Because a Conditional Permit ("CP") is required under the existing law, at least 15 different and unique agencies review the application, there are multiple public hearings, and then the Mayor signs a special ordinance authorizing a person to rent to a short-term visitor. Under the current regulations, therefore, it may cost tens of thousands of dollars and take many years to obtain a permit, just to rent a spare bedroom to visitors. Changes to the zoning code were promised with the expectation of a simplified, economical process.

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

written agreement. While the new enforcement policy has been justified by the County stating that it is necessitated by public complaints, in reality the actual number of complaints is very small to begin with, and has actually shrunk. The number is further decreased by accounting for complaints which may have been made by one particular individual who has admitted wishing to "close down competing businesses" for their own financial benefit, having obtained a permit just before the County stopped accepting applications.

Defendant Jeff Hunt, current Director of the Planning Department, has publicly categorized vacation rentals as a "crisis situation", purportedly because of an impact on affordable housing, despite the fact that a Board of Realtors' study of vacation rentals found negligible impact on affordable housing due to vacation rentals. *See, EXHIBITS "C"-"F" for Studies re: Transient Vacation Rentals in Maui County.* Previously, however, the County's elected officials, administrators and employees spoke with a common voice – TVRs had nothing to worry about, because the laws would be changed.

On July 2, 2007 the Planning Department publicly announced an end to the moratorium, but stated for an unknown reason that it ended on February 13, 2007, rather than July 2, 2007. Operators who applied for permits are being ordered to close their businesses immediately, contrary to the 2001 settlement

agreement. After meetings and hearings on the matter, Defendants mandated that January 1, 2008, is the cutoff date after which no unpermitted TVR operations will be allowed. In other words, if a TVR does not have a permit by then (which is of course essentially impossible, given the length of time the application processing takes), then that TVR shall conduct no business after January 1, 2008, effectively putting a TVR out of business.

The County has advised that this cutoff will apply even to those who already submitted an application in accordance with the November 1, 2001, agreement with the Planning Department which specifically stated that, “any property owner who submits a Conditional Use Permit Application will be allowed to continue their business while the application is pending”. It will also apply to those hundreds of would-be applicants who wanted to apply, but who were expressly told to wait.

The Planning Department’s position is that operators who applied during the moratorium are no longer entitled to continue operating as promised. They must now close their businesses by Jan 1, 2008, or suffer fines of $1000 or more per day. In many cases these applicants have been obligated to invest large sums of money in making improvements required by the seventeen agencies which commented on their applications during the past years.

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

II. LEGAL ARGUMENT

A. The Standard for Injunctive Relief

The Ninth Circuit has delineated two tests for determining whether or not a preliminary injunction should issue. In *Miller v. California Pacific Medical Center*, 19 f.3 449, 456 (9th Cir. 1994), the Ninth Circuit set forth the standard for granting a preliminary injunction: 1) the likelihood of the moving party's success on the merits; 2) the possibility of irreparable injury to the moving party if relief is not granted; 3) the extent to which the balance of hardships favors the respective parties; and 4) in certain cases, whether the public interest will be advanced by granting the preliminary relief [citation omitted]. *Cited in, Legal Aid Society of Hawaii v. Legal Services Corp.*, 961 F.Supp 1402, 1407 (Dist. Hawaii 1997) ("standards for granting a TRO and a preliminary injunction are similar").

The Ninth Circuit has also utilized an "alternative test",

which requires the plaintiff to demonstrate *either* 1) probable success on the merits and the possibility of irreparable injury, *or* 2) serious questions as to the matters and a showing that the balance or hardships tips sharply in favor of the plaintiff. *First Brands Corp. v. Fred Meyer, Inc.,* 809 F.2d 1378, 1381 (9th. Cir. 1987). Another Ninth Circuit court held that these two tests are not inconsistent:

> The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not to show as a robust likelihood of success on the merits as when the balance tips less decidedly.

Alaska v. Native Village of Venetie, 856 F.2d 1384, 1398 (9th. Cir. 1988).

Similarly, "'[t]hese two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases [citations omitted].'" *Legal Aid Society of Hawaii v. Legal Services Corp.*, 961 F.Supp at 1407.

B. The MVRA Has Standing To Sue On Behalf Of Its Members

An association has standing to bring suit on behalf of its members when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the

participation of individual members in the lawsuit." *United Food and Commercial Workers v. Brown Group*, 517 U.S. 544, 557, 116 S.Ct. 1529, 1534, 134 L.Ed.2d 758 (1996) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977)).

As stated, Plaintiff Maui Vacation Rental Association, Inc. is an organization formed to promote Maui vacation rentals (in single-family dwellings) "on residential, agricultural and rural zoned land, and to promote compliance with County and State regulations, such that local government, visitors, residents and owners of vacation properties benefit mutually." *MVRA Charter*. Its members are owners and operators of transient vacation rentals (TVRs) in the County of Maui who are in agreement with the goals of the MVRA as set forth in its Charter.

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

C. Plaintiff and Its Members Are Suffering Irreparable Injury From The Deprivation Of Due Process Rights (1) In The Intentional Delay In Processing And Accepting TVR Permit Applications, and (2) In The Withdrawal of The County's Moratorium Agreement, And Institution of Strict Enforcement Policies Without Notice or Hearing To Applicants and Would-Be Applicants; And Are Likely To Prevail On The Merits

(1) *Plaintiffs and Its Members Are Suffering Irreparable Injury*

To qualify for a preliminary injunction, one must only show the possibility of irreparable injury from enforcement of the challenged law. *See*, *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *citing, Dollar Rent A Car v. Travelers Indemnity Co.*, 774 F.2d 1371, 1374 (9th Cir. 1984). The Ninth Circuit has held that when constitutional rights are at issue, irreparable injury is presumed:

> When an alleged deprivation of a constitutional right is involved, the courts hold that no further showing of irreparable injury is necessary.

See, *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984), *quoting*, 11 C. Wright & A. Miller, *Federal Practice & Procedure*, § 2948, at 440 (1973).

Irreparable injury also occurs when a property interest is affected, loss of real property or business enterprise is likely to occur, or reputation is being harmed. Money damages are not an adequate remedy for lost property rights "[b]ecause real property and its attributes are considered unique and loss of

real property rights generally results in irreparable harm ....” *Dixon v. Thatcher,* 103 Nev. 414, 742 P.2d 1029, 1030 (1987); s*ee also, e.g., Varsames v. Palazzolo,* 96 F.Supp.2d 361, 367 (S.D.N.Y. 2000) (holding that deprivation of the movants' ability to make productive use of their own property rises to the level of irreparable injury).

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

As per the Declarations submitted herewith, MVRA members have suffered, are suffering, and will continue to suffer all of these types of injuries if the County is allowed to continue its new enforcement plan after refusing to accept or process applications for the past six years.

Plaintiff MVRA negotiated with the County on behalf of its members to enter into an express moratorium agreement, under

which, as stated, applicants who received no complaints of actual impacts would be not be prosecuted. As part of that agreement, TVR operators who attempted to apply but were told to wait, were similarly not prosecuted for continuing to do business, as long as no complaints of actual impacts were received. This arrangement benefited not only the TVRs, but also the County, who did not have to process hundreds upon hundreds of time-consuming permit applications under the CP laws.

The sudden unreasonable and arbitrary withdrawal of the moratorium agreement, and issuance of Notices of Warning, has violated the rights of both those with applications pending, and those who attempted to apply under the moratorium agreement, but were told to wait, and is causing irreparable harm to many.

The County, on the other hand, will suffer negligible harm from being forced to continue with the policy it has chosen for the last six years. The County will not have to apply hundreds of man hours to an influx of applicants, and will continue to receive the benefit of the estimated $40 million spent annually by those who stay in visitor rentals, as well as the approximately $725,000 in Transient Accommodation Taxes from those same visitors.

Moreover, the public will not be harmed because: if there is a complaint against a TVR operator, alleging some actual

impact, and if that impact is verified, then the County may choose to take enforcement action against that operator. It is the failure of the County to take any targeted enforcement action which is puzzling to the Plaintiff. There has been no indication that the Planning Department has made any effort to determine which, if any, vacation rental might become affordable housing through enforcement action. Indeed, there is no evidence that the County has identified any vacation rental which would become affordable housing.

(2) *The Actual Process for Issuing Conditional Use Permits Violates Hawaii's Administrative Procedure Act Because Of The Processing Delay*

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."

Based on the above analysis, many CPs which have been languishing with the County's planning entities for years should have been deemed approved some time ago, and the fact that they were not so deemed is a violation of procedural and substantive due process rights for many permit applicants.

(3) *The County's Breach Of Their Agreement With The MVRA Violates Procedural and Substantive Due Process Rights*

The Plaintiff contends that the zoning laws have been applied to them in an unconstitutional manner. Applicants have a right to make permit applications, and to have them processed in a procedurally sufficient and timely manner. See, *Nasierowski Bros. Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991). In addition to the violation of procedural and substantive due process rights in the delay in processing and

accepting applications, the MVRA contends that in breaching their agreement with Plaintiff, and in failing to have in place or to observe procedurally and substantively sound procedural mechanisms to avoid the violation of constitutional rights, Defendants have violated the procedural and substantive due process and equal protections rights of Plaintiff and Plaintiff's individual members.

Given the political nature of the vacation rental issue, it is suspicious that the County suddenly stopped accepting permit applications in 2002, after the first one was approved. In addition, it was during this same time period that the Ninth Circuit held that the County Council did not benefit from legislative immunity when it passes Conditional Use Permit "ordinances" for individual applicants. *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1224 (9th Cir. 2003).

The set of circumstances and pattern of conduct by the County in dealing with this matter strongly supports the claim that their conduct is arbitrary and capricious, rather than grounded in any rational basis. In entering into an agreement with the County of Maui, and in acting in reliance upon that agreement and upon the express representations of the County officials and employees, the MVRA and its members were entitled to fair and honest government services.

No advance notice was given of the intent to change the moratorium policy and breach the written agreement. The TVR operators had no opportunity to address the changes to the policies, or to submit their applications before the policy change went into effect. In fact, the revocation of the policy was on July 2, 2007, but was purported to be "retroactive" to February 13, 2007, a date of no stated significance. In withdrawing the moratorium agreement, the County has acted arbitrarily and capriciously and should be enjoined for a period of time to allow TVR operators to submit their permit applications as promised. *See, e.g., Jensen v. Traders & Gen. Ins. Co.*, 52 Cal.2d 786, 345 P.2d 1, 6 (Cal. 1959) ("Parties to a contract may contract on such method of giving notice as they desire and unless public policy is contravened, the contract should be enforced as made.")

In this case the contract simply allowed the County to avoid a massive amount of work it deemed unnecessary to handle in a hurry, by promising to not enforce the existing outdated ordinance.

(4) *A Delay of Five Years In Processing of Permit Applications While Advising Applicants "Not to Worry" Meets The Test For Application of The Doctrine of Laches*

While the County was not processing applications and discouraging any new applications, homeowners were investing

millions of dollars in reliance upon the County's assurances, a fact of which the County was surely aware. "[T]o determine the validity of a laches defense, we look to the entire course of events [citation omitted]. Laches will not provide a valid defense, however, unless two tests are met: the defendant has been prejudiced by delay, and that delay was unreasonable." *American Univ. Park Citizens Ass'n v. Burka,* 400 A.2d 737, 740 (D.C. 1979).

In this case, vacation rental applicants have not only been prejudiced by the County's conduct, they are suffering irreparable harm, as described. The delay was unreasonable because the County created it solely for its own benefit. The County should be estopped under the doctrine of laches.

D. The County Maintained Unconstitutional Customs And Policies

The leading case for claims of either "failure to train and supervise" or "maintenance of illegal customs and policies" is known as *Monell* and *Canton*. *City of Canton, Ohio v. Harris,* 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (re: failure to train)*; Monell v. Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (re: illegal custom or policy).

Monell held that a city may be sued under Section 1983 if the action that is alleged to be unconstitutional implements or

executes a policy statement, ordinance, or decision officially adopted and promulgated by that body's officers, or if it can be shown that the city failed to properly train and supervise its employees to prevent the violation of established constitutional rights. *Monell*, 436 U.S. at 690, 98 S.Ct. at 2035, cited in, *Evers v. Custer County*, 745 F.2d 1196, 1203 (9th Cir. 1982).

In the instant case, the County has a custom and policy of using written “enforcement policies” that are handed out to the public and relied upon, including but not limited to the 2001 agreement signed by Plaintiff MVRA and the highest County Planning official, the Planning Director. Another example of a written policy utilized by the County of Maui is the “home based business” policy statement, which has been revised twice since its inception and which is handed out to the public and relied upon by both the County and the public. *See, Exhibit G1-G3,* Upon information and belief, the County has numerous such “enforcement policies” on various matters, many of which are contrary to actual legislation on the same subject matter.

It is well established that the County's liability may be separately based on a "policy statement, ordinance, regulation, or decision" by which the City has taken some affirmative action to establish the assertedly unconstitutional policy under which the individual was allegedly deprived of his or her constitutional right(s):

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

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

"'Local governing bodies can be sued directly under § 1983 for monetary, declaratory or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.' *Monell*, 436 U.S. at 690, 98 S.Ct. at 2035-36." *Nichols v. Village of Pelham Manor*, 974 F.Supp. 243, 258 (1997); see also, *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 45 (2d Cir. 1983).

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

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

The County of Maui knew or should have known of the existence of Plaintiff’s constitutional rights, specifically procedural and substantive due process rights, right to honest government services, first amendment rights, and the right to equal protection of the laws, under the First, Fourth, Fifth and

Fourteenth Amendments, but nonetheless developed, encouraged, and maintained policies, customs, and/or regulations which caused, encouraged, tolerated and approved the above-described conduct of the individual employees and officials of the County of Maui, causing the deprivation of Plaintiff's well established constitutional rights.

E. Defendants Should Be Equitably Estopped From Cessation of Their Moratorium Agreement and Policy For A Period of Time, To Allow All Applicants A Due and Fair Hearing

Over a period of years, the County and its Planning Directors made certain written, verbal and affirmative representations to Plaintiff and all vacation rental operators that constitute a pattern and practice of misleading actions.

In submitting or not submitting their applications for Conditional Use Permits, and in recommending the same, Plaintiff MVRA and its members reasonably and in good faith relied upon the representations and conduct of the County, and the Defendants should be equitably estopped from taking enforcement action against Plaintiff MVRA and its members contrary to the terms of the express and implied agreement between the parties, both to prevent further irreparable harm and to preserve public confidence in government. Estoppel is a procedural device deriving from the equitable powers of the judiciary.

For purposes of this motion, Plaintiff MVRA members may be divided into three categories: (1) TVR operators who knew of the moratorium policy and applied for the CP while the policy was in effect; (2) TVR operators who wanted to apply under the moratorium policy, but were told to wait to apply because the County was considering new legislation; and (3) TVR operators who knew of the moratorium policy, had no contact with the County regarding a CP application, and either have not applied or have applied after the moratorium policy ended.

As to the first two categories, the County should be estopped from enforcing zoning restrictions against those who applied for CPs and were specifically told that they were immune while their permits were processing. Likewise, the County should not be able to enforce zoning restrictions against TVR operators who wanted to apply for CPs under the moratorium program, but were specifically dissuaded from applying by County officials claiming that the County was going to amend the Code.

Plaintiff does not demand that the moratorium policy apply forever; however, it contends that it is a violation of procedural and substantive due process rights to change the moratorium policy to the detriment of those who have already reasonably and in good faith relied upon the policy.

Blacks Law Dictionary, 7th Edition (1999), defines “equitable estoppel” as, "A defensive doctrine preventing one

party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way."

The doctrine of equitable estoppel in the land use context is defined in Hawaii as: "… [A] change of position on the part of the land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and that he may safely proceed with the project." *Life of the Land, Inc. v. City Council of the City and County of Honolulu*, 61 Haw. 390, 453 (1980); *County of Kauai v. Pacific Standard Life Ins. Co.*, 65 Haw. 318, 327 (1982) (also known as "*Nukolii*"). As the Hawaii Supreme Court explained, the initial estoppel inquiry is whether the government has given official assurances to the developer that the proposed project may proceed. *Nukolii*, 65 Haw. at 327.

In this case, Planning Director John Min, the administrative head of the Planning Department and chief planning officer of the County and the technical advisor to the Mayor, Council and Planning Commission on all planning related matters, had the authority to institute a "moratorium" program

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

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

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

The U.S. Supreme Court has similarly applied estoppel to certain government conduct. In *Heckler v. Community Health Services*, 467 U.S. 51, 60-61 (1984), the U.S. Supreme Court noted that it had previously decided at least two cases which "seem to rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would

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

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

[2] See, e.g., Boulez v. C.I.R., 810 F.2d 209, 218 n.68 (D.C.Cir. 1987); Best v. Stetson, 691 F.2d 42, 44 (1st Cir. 1982); Corniel-Rodriquez v. United States, 532 F.2d 301, 306 (2d Cir. 1976); United States v. Asmar, 827 F.2d 907, 911 & n.4 (3d Cir. 1987); West Augusta Development Corp. v. Giuffrida, 717 F.2d 139, 140-141 (4th Cir. 1983); Fano v. O'Neill, 806 F.2d

assume that the Supreme Court's observations and the lower courts' interpretations, have effectively rendered estoppel against the government an established principle.[3]

In the case at bar, there can be no dispute that the County of Maui entered into and publicized an express moratorium agreement. *See, Arakawa Viewpoint, Maui News August 27, 2007, at Exhibit H.* That agreement was reduced to writing and had all the terms and conditions necessary to induce reliance, and in fact did induce reliance by the MVRA and its members. *See, Declarations filed herewith*.

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

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

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

court which determines to protect reliance on a misrepresentation by treating the misrepresentation as true is not countering the law, but is holding the government to its word.

F. County Employees Committed Promissory Fraud, Therefore An Injunction Will Limit The Accumulation Of Damages Claims Against The County

As discussed, County employees at the lower levels made numerous assurances to Plaintiff and its members, upon which Plaintiff and its members relied in good faith, to their detriment. Members of the plaintiff organization were told that no permit application should be made, because a new ordinance would be much better, and that since there was a moratorium on enforcement potential applicants should go ahead and operate their vacation rental business. These assurances were unequivocal and stated as facts. *See, e.g., Exhibit I, e-mail from staff planner Loudermilk to enforcement officer Charles Villalon confirming policy; Exhibit J, July 2, 2007 letter from Defendant Hunt to Mayor Tavares.* The policy had the effect of dramatically reducing the workload of employees who made these statements. Such conduct meets all of the elements for promissory fraud.

In *Dzick v. Umpqua Community College*, 287 Or. 303, 599 P.2d 444 (Or. 1979), the Oregon Supreme Court held that: (1) representatives of state community college were not exercising a

discretionary function when they falsely represented to a student that he would receive advanced welding training in certain techniques on various machines; thus, defense of governmental immunity was not available to community college; (2) trial court did not err in instructing that the extent of damages only had to be proved by a preponderance of the evidence; and (3) student was not improperly awarded damages on the basis of amount of wages he lost as result of enrolling and continuing in the college rather than having worked during such period of time.

In that case, the court found that there was evidence which indicated that the personnel of the community college made at least some of the alleged representations to the student to the effect that he would receive training in certain techniques on various machines, in reckless disregard of whether the college could actually perform on those representations. Such representations were sufficient to prove promissory fraud. *See also*, *Elizaga v. Kaiser Found. Hospitals*, 259 Or. 542, 548, 487 P.2d 870(1971).

An example of such evidence was plaintiff's testimony that at the beginning of each term, plaintiff would ask if materials would be available and he was told “it's on order and the stuff will be here. Don't worry about it.” Plaintiff further testified he related this conversation to a college instructor who

commented that “the stuff” had been on order for approximately three years.

In the instant case, County staff members acted similarly to the College personnel in the *Dzick* case. Even though they knew or should have known that after more than 10 years of fruitless discussion by the County Council there was no guarantee that new law would be passed, they without reservation told would-be applicants under the 2001 moratorium agreement not to bother to apply, because there would soon be a new easier process. Given the County’s history on the issue, the employees acted with reckless disregard in order to reduce their own workload, wreaking havoc for hundreds of home owners with vacation Rentals.

G. Because The Planning Director Had Authority To Refer Violations For Criminal Prosecution, He Had Authority To Enter Into An Enforceable Plea Agreement, Which Is What The 2001 Agreement Was In Effect And Which Is Being Violated By The County

When acting in good faith with detrimental reliance on a proposed plea bargain the agreement is enforceable. The 2001 agreement between the Maui Vacation Rental Association and the County of Maui, by Planning Director John Min, was akin to a plea agreement because the Planning Director had the authority to refer cases for criminal prosecution. In lieu of such prosecution of known violators, he entered into an agreement not

to enforce the zoning violations in exchange for compliance by applicants and would-be applicants with the County's written policy.

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

In determining whether the government has violated a plea agreement, the court must determine "whether the government's conduct is inconsistent with what was reasonably understood by the defendant when entering the plea of guilty." *United States v. Nolan-Cooper,* 155 F.3d 221, 236 (3d Cir. 1998) (citation and quotation marks omitted). Any ambiguities in the agreement must be construed in favor of the defendant; in "view of the government's tremendous bargaining power [courts] will strictly construe the text against it when it has drafted the agreement." *United States v. Baird,* 218 F.3d 221, 229 (3d Cir. 2000).

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

government warranted the promised downward departure, the court stated:

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

Id. at 518.

The Planning Director's promise to MVRA was to temporarily (until permit was processed) not prosecute vacation rental operators under the zoning laws unless a complaint of actual impacts was filed against a particular owner. MVRA members held to their side of the agreement by submitting applications or not as per the County's express directions. Now, the County is reneging on that promise and the TVR operators should be entitled to an injunction pending an evidentiary hearing.

III. CONCLUSION

Based on all of the foregoing, Plaintiff submits that the balance of hardships weighs in its favor, and that it is likely to prevail on the merits. Therefore, Plaintiff respectfully

requests an order enjoining the County of Maui, its employees, officials, agents, and representatives, from lifting the 2001 written settlement agreement signed by then-Planning Director John Min, which imposed a moratorium on enforcement action against transient vacation rental operators, and ordering the County, et al. to accept and to process new and pending transient vacation rental permit applications promptly and in good faith, for a specified period of time.

DATED: Wailuku, Maui, Hawaii, October 5, 2007.

IVEY FOSBINDER FOSBINDER LLC
A LIMITED LIABILITY LAW COMPANY

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

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

I, James H. Fosbinder, do hereby certify that the foregoing *Memorandum in Support of Motion for Preliminary Injunction* is formatted in monospaced Courier New 12 Point and complies with the word limitation requirements of Local Rule 7.5(b) in that it contains 8,533 words as determined by Microsoft Word 97, including all headings, quotations and footnotes.

DATED: October 5, 2007, Wailuku, Maui, Hawaii.

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