IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KAMAOLE POINTE DEVELOPMENT LP; ALAKU POINTE LP, Plaintiffs, vs. COUNTY OF MAUI, et al., Defendants.	CIVIL NO. CV07-00447 DAE/LEK (Civil Rights) MEMORANDUM IN SUPPORT OF COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

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MEMORANDUM IN SUPPORT OF COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

I. COUNTY DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AS SET FORTH BELOW

A. Summary of Claims

Kamaole Pointe Development LP and Alaku Pointe LP ("Plaintiffs"), two entities allegedly planning to develop apartment complexes in Kihei, Maui, are requesting that this Court strike down Maui County's Residential Workforce Housing Policy ("Workforce Housing Ordinance") because they claim that it violates their substantive due process and equal protection rights and sets "unconstitutional conditions" resulting in a taking of private property without just compensation. A copy of the Ordinance as codified in the Maui County Code ("MCC") is attached to the Concise Statement of Facts. CSOF, ¶ 2.

Defendants COUNTY OF MAUI, COUNCIL CHAIR G. RIKI HOKAMA, in his official capacity; COUNCIL VICE-CHAIR DANNY A. MATEO, in his official capacity; COUNCILMEMBER MICHELLE ANDERSON, in her official capacity; COUNCILMEMBER GLADYS COELHO BAISA, in her official capacity; COUNCILMEMBER JO ANNE JOHNSON, in her official capacity; COUNCILMEMBER BILL KAUAKEA MEDEIROS, in his official capacity; COUNCILMEMBER MICHAEL J. MOLINA, in his official capacity; COUNCILMEMBER JOSEPH PONTANILLA, in his official capacity; COUNCILMEMBER MICHAEL P. VICTORINO, in his official capacity; MAYOR CHARMAINE TAVARES, in her official capacity; and VANESSA A. MEDEIROS, DIRECTOR, MAUI COUNTY DEPARTMENT OF HOUSING AND HUMAN CONCERNS, in her official capacity ("County Defendants"), request that this court enter summary judgment in their favor on

all issues and claims herein; or, in the alternative, that this court enter partial summary judgment relating to one or more of the issues and claims set forth below. Each will be addressed at length in this memorandum but are summarized here for clarity and convenience.

1. Summary Judgment should be granted with respect to Plaintiffs' "facial" challenge to the Workforce Housing Ordinance, a duly enacted Maui County Ordinance, entitled to a presumption of validity. Furthermore, Plaintiffs cannot present sufficient probative, admissible evidence to establish a genuine issue for trial on their claim that the Workforce Housing Ordinance, on its face, violates their substantive due process, equal protection, and/or that it contains "unconstitutional conditions" effecting a taking of property.

2. Summary Judgment should be granted with respect to Plaintiffs' "as applied" challenge to the Workforce Housing Ordinance because Plaintiffs' claims are not ripe. Furthermore, Plaintiffs cannot present sufficient probative, admissible evidence to establish a genuine issue for trial on their claim that the Ordinance, on its face, violates their substantive due process, equal protection, and/or that it contains "unconstitutional conditions" effecting a taking of property.

3. Summary Judgment should be granted with respect to the claims against the individuals named in their official capacities because said claims are duplicative.

4. Summary Judgment should be granted with respect to the state law preemption and constitutional claims, or in the alternative, said claims should be certified to the Hawai'i Supreme Court.

B. Plaintiffs Cannot Meet Their Burden to Set Forth Sufficient Admissible, Probative Evidence to Establish a Genuine Issue for Trial

Summary Judgment should be granted unless Plaintiffs present admissible evidence that would allow a reasonable jury to return a verdict in their favor. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 916 (9th Cir. 1996), cert. denied, 522 U.S. 950 (1997). County Defendants, as the moving party, have the initial burden of identifying the materials on file that demonstrate the absence of any genuine issue of material fact. However, County Defendants are not required to negate or disprove matters with respect to which Plaintiffs will have the burden of proof at trial. It is sufficient for County Defendants, in that instance, to simply point out to the Court that there is an absence of evidence to support the Plaintiffs' case. T.W. Elec. Ser., Inc. v. Pacific Elec. Contractors Ass'n., 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

Plaintiffs bear the burden of proof on each of their claims and must present sufficient admissible, probative evidence to demonstrate that there is a genuine issue for trial. Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995).

Because the Court's subject matter jurisdiction is at issue, Plaintiffs have the burden of proving that their claims are ripe.

United Phosphorus, Ltd. v. Angus Chemical Company, 322 F.3d 942, 946 (7th Cir. 2003), cert. denied, 540 U.S. 1003 (2003); St. John's United Church of Christ v. City of Chicago, 401 F.Supp.2d 887 (N.D. Ill. 2005), affirmed, 502 F.3d 616 (7th Cir. 2007). The proper disposition of unripe claims is dismissal for lack of jurisdiction. Southern Pacific Transp. Co. v. City of Los Angeles, 922 F.2d 498, 500-02 (1990), cert. denied, 502 U.S. 943 (1991).

II. MAUI COUNTY'S 2006 RESIDENTIAL WORKFORCE HOUSING ORDINANCE IS A VALID INCLUSIONARY ORDINANCE

A. The Workforce Housing Ordinance is Not a Low Income Housing Ordinance

The Maui County Council adopted the Workforce Housing Ordinance on December 5, 2006, based on its determination that providing housing ownership opportunities to median and gap group workforce households will help alleviate the shortage of workers and the resulting downward pull on Maui's economy. CSOF, ¶ 2. MCC § 2.96.010.

The Workforce Housing Ordinance is intended to provide housing ownership opportunities for families with incomes between 100% and 160% of the median income for the County as established by the United States Department of Housing and Urban Development ("HUD").[1] In 2008, that would include families earning between $72,800 and $116,400. Assuming a mortgage interest rate of 6%, three-bedroom, multi-family units priced between $287,600 and $460,200 would be affordable to these families. CSOF, ¶¶ 2-4.

[1]The Ordinance provides for rentals to lower income groups, but that is not relevant herein.

In relevant part, the Workforce Housing Ordinance requires that before final subdivision approval or building permits are issued to developments of five dwelling units or more (with certain exceptions), the developer must enter into a Residential Workforce Housing Agreement with the County's Department of Housing & Human Concerns ("Department"). The terms of the agreement are set out in detail in the Workforce Housing Ordinance and represent the Maui County Council's determination of the best way to ensure that development permits do not decrease the availability of, or preclude the future provision for, housing to the workforce necessary to Maui County's economic well-being. CSOF, ¶¶ 5-6.

Since the Workforce Housing Ordinance was adopted, one developer has entered into the required Workforce Housing Agreement and the Department is negotiating with several other developers who have declared their intention, ability and willingness to comply with the Workforce Housing Ordinance. The second Workforce Housing Agreement is anticipated to be executed within thirty days. CSOF, ¶¶ 7-9.

B. The Workforce Housing Ordinance Addresses Gap Group Housing Needs, a Valid Governmental Purpose

The Workforce Housing Ordinance includes a finding by the Maui County Council that the citizens of Maui County are suffering from "... a critical shortage of affordable housing making home acquisition by the majority of County resident workers extremely difficult and creating a shortage of affordable rental units. The resident workforce is leaving the County in search of affordable

housing, and new employees are being deterred by the high cost of living." MCC § 2.96.010. The Workforce Housing Ordinance was adopted by the Maui County Council in an environment in which it was widely understood that the price of housing in Maui County had doubled between 1997 and 2006. CSOF, ¶ 10. During the same period, Maui experienced a severe labor shortage which is contributing to the slowing of economic growth. Economic Forecast First Hawaiian Bank, CSOF, ¶ 11.

For example, sufficient trained staff at Maui's Planning Department and Public Works Department is needed to review development applications. The starting salary for a Planner I working for the County of Maui is $34,644. Assuming that the Planner I is married to a Civil Engineer I working for the Public Works Department and earning $37,488, the family income would be $72,132, placing them within the "moderate income" definition in the Workforce Housing Ordinance. MCC § 2.96.020(4). CSOF, ¶¶ 12-13. Assuming a 6% interest loan rate, a moderate income family like our hypothetical planner and civil engineer would qualify for a three-bedroom, multi-family unit priced at $287,600. CSOF, ¶ 14.

The lack of affordable housing and its effect on economic growth is exacerbated by the fact that the infrastructure needed to support development in Maui County is severely limited. For example, Maui County suffers from a serious shortage of water for domestic use. On August 23, 2007, the Board of Water Supply of the County of Maui issued a drought declaration. In conjunction with that declaration, all customers on the Central Maui System,

including customers in Kihei, have been requested to voluntarily cut their water usage by 10 percent. If the voluntary cutbacks are not sufficient to bring water use by customers on the Central Maui System in line with the amounts of groundwater the department is permitted to withdraw from the Iao Aquifer by the State Water Commission, mandatory cutbacks, or other measures, to bring demand in line with the limited supply might be required. CSOF, ¶¶ 15-16.

In addition to the insufficiency of the water supply for domestic use, Maui County lacks adequate roadway infrastructure. In Kihei and other areas where the transportation system has insufficient reserve capacity to accommodate the increase in demand, traffic congestion has occurred. The roadway deficiency is particularly acute in Kihei and along Kihei Road where the Property is located. The County's inadequate roadway infrastructure and traffic congestion in the South Maui area continue to present significant challenges to development. CSOF, ¶¶ 17-18.

In other words, the number of development permits that can be issued is limited by infrastructure constraints. CSOF, ¶ 19. By adopting the Workforce Housing Ordinance, the Maui County Council addressed the need to allocate limited resources in order "to maintain a sufficient resident workforce in all fields of employment and to ensure the public safety and general welfare of the residents of the County." MCC § 2.96.010. CSOF, ¶ 20.

Plaintiffs allege that noted expert economists, small and large landowners and others testified to the Maui County Council that the Ordinance would not only "... fail to achieve its intended

purpose of improving the affordable housing problems in Maui County, but would likely serve to worsen the problem." First Amended Complaint ("FAC"), ¶¶18-22. After considering public testimony, it is the responsibility of the County Council to make the final decision under our democratic form of government. And, if the considered judgment of the Council members was wrong, they will answer to the voters of Maui County. FAC, ¶18. "For protection against abuses by the legislators, the people must resort to the polls, not to the courts." Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 488 (1955), rehearing denied, 349 U.S. 925 (1955).

C. Inclusionary Housing Programs Nationwide

Maui County is not alone in facing a severe and economically crippling shortage of workforce housing. Across the country ordinances requiring those seeking development permits to contribute to the construction of housing for the workforce (often described as inclusionary zoning ordinances)[2] have been adopted and passed scrutiny by the courts.

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[2]Since their inception over 30 years ago, inclusionary housing programs have successfully produced a significant amount of affordable housing nationwide, particularly in California. Inclusionary housing has been the subject of much study, including many earlier studies which questioned the effectiveness or legality of the programs. In recent years, however, inclusionary housing programs have grown in popularity "as more jurisdictions view them as innovative ways to increase the supply of affordable housing as well as to combat exclusionary zoning practices." Cecily T. Talbert and Nadia L. Costa, Inclusionary Housing Programs: Local Governments Respond to California's Housing Crisis, Boston College Environmental Law Review, Vol. 30, No. 3 (2003) at p.570.

In Home Builders Ass'n. of Northern California v. City of Napa, 90 Cal.App.4th 188, 108 Cal.Rptr.2d 60 (Cal.App. 1 Dist. 2001), cert. denied, 535 U.S. 954 (2002), the California appellate court turned aside a facial "taking" challenge to the City of Napa's inclusionary housing ordinance. (Note that: this case was appropriately filed in state rather than federal court.) The court also held that the burden shifting does not apply because the inclusionary housing ordinance is a generally applicable legislative enactment and not an individualized assessment imposed as a condition of development. Id. at 192, 194.[3]

The City of Napa's Ordinance was designed to address the problems faced by low income families and required that ten percent of all newly constructed residential units be affordable to persons living in a household that earns significantly less than the area median income.

As explained above, Maui County's Workforce Housing Ordinance does not provide housing ownership opportunities for families earning "significantly less than the median income," rather it provides housing ownership opportunities to those families earning up to 160% of the median income. Therefore, despite the higher percentage of "set aside" housing required, it is mathematically less restrictive than the ordinance adopted by the City of Napa and

[3]Caution: The California appellate court relied on the now-discredited Agins' formula. Without the Agins' formula, the outcome would be even more favorable to the City. See, Agins v. City of Tiburon, 447 U.S. 255 (1980).

upheld by the California appellate court because Maui's Workforce Housing Ordinance allows more expensive homes to be built.

III. PLAINTIFFS' CLAIMS ARE NOT RIPE

The United States Supreme Court has made it clear that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 294-295 (1981).

It is well established that a federal "regulatory takings" claim is not ripe until a litigant has obtained the final position of the government on its development and sought compensation through the procedures the state has provided. In Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), the United States Supreme Court held that a constitutional challenge to land use regulations is not ripe until a final decision regarding the application of the zoning ordinance and subdivision regulations to the property has been obtained and the property owner has utilized the state court to determine if regulation has resulted in a compensable "taking". Id. at 186-87, 196-97.

See also, Lai v. City and County of Honolulu, 841 F.2d 301, 303 (9th Cir. 1988), cert. denied, 488 U.S. 994 (1988); Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453-1454 (9th Cir. 1987); Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1232 (9th Cir. 1994), cert. denied, 513 U.S. 870 (1994); Toigo v. Town of Ross, 70 Cal.App.4th 309, 325, 82 Cal.Rptr.2d 649, 659, (1998); Murphy v.

New Milford Zoning Com'n, 402 F.3d 342, 348 (2nd Cir. 2005); Williamson County Reg'l. Planning Com'n. v. Hamilton Bank, supra, 473 U.S. at 194.

Plaintiffs' claims are not ripe for an additional reason. The Workforce Housing Ordinance and various fee-setting, subdivision and dedication ordinances were amended by Ordinance 3512, effective January 26, 2008. ("Amendments Reducing or Eliminating Fees".) The Amendments Reducing or Eliminating Fees reduced, deferred or eliminated requirements for workforce housing units, including driveway permit fees, fire inspection fees, electrical permit fees, building permit fees, grubbing and grading permit fees, and park dedication requirements. The benefits provided by the "Amendments Reducing or Eliminating Fees" are substantial but vary from year to year as the fees are set in the Annual Budget. However, the Park Dedication requirement is set by Ordinance and the reduction of that requirement confers a substantial, measurable monetary benefit. For each unit that qualifies as a workforce housing unit, the park dedication is reduced from 500 square feet to 250 square feet. The developer may be permitted to pay an in-lieu fee that is calculated by the average assessed value of residential property in the community plan area where the project is located. That in-lieu fee is reduced by half when the park dedication requirement is likewise reduced. Ordinance 3512, Section 8. CSOF, ¶¶ 26-28.

Because Plaintiffs have not yet brought their projects to the stage required before the Workforce Housing Ordinance applies, it

cannot be known what further amendments might be in place if and when Plaintiffs' Projects are ready. CSOF, ¶ 29. Therefore, the claims set forth in the FAC are not ripe for adjudication.

In any case, a regulatory "taking" claim must be filed as an inverse condemnation action in state court for the simple reason that a "taking" of private property by the government is not prohibited by the Constitution of the United States. The only requirement is that the taking be fairly compensated. The state, rather than the federal court, provides the compensation mechanism. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 330-331 (2005).

The Supreme Court's abrogation of the "fails to substantially advance a valid governmental purpose" test in Lingle v. Chevron USA Inc., 544 U.S. 528 (2005), has resulted in anomalies in earlier "ripeness" cases. For example, in Yee v. City of Escondido, Cal., 503 U.S. 519 (1992), the Supreme Court indicated that a takings claim based on the "failure to substantially advance" test would be ripe without requiring the plaintiff to seek compensation through the state process because the test was independent of the compensation requirement. The Ninth Circuit relied on the Yee "fails to substantially advance" argument and found that the Plaintiff's claim was ripe in Richardson v. City and County of Honolulu, 124 F.3d 1150, 1165 (9th Cir. 1997), cert. denied, 525 U.S. 871 (1998). Obviously, a "failure to substantially advance" takings claim no longer trumps the ripeness requirement because the claim no longer exists.

Following the Lingle decision in 2005, the Ninth Circuit has emphasized the abrogation of the "fails to substantially advance test." For example, in Spoklie v. Montana, 411 F.3d 1051 (9th Cir. 2005), the Ninth Circuit explained:

> "Spoklie's takings claim appears to be based in part on the theory that I-143 does not substantially advance a legitimate state interest. However, to the extent Spoklie's takings claim is premised on this theory, it must be dismissed. In Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), the Supreme Court has just disavowed the use of the 'substantially advances' test and ... it has no proper place in our takings jurisprudence. To the extent that Spoklie's takings claim is premised on an asserted failure of I-143 to satisfy the "substantially advances' test, Lingle requires that his claim be dismissed with prejudice."
> Spoklie, 411 F.3d, 1057-58.

Furthermore, a claim with respect to a property right is not "ripe" unless the property right has vested. In order to determine whether or not a claimed right or benefit is a property interest protected by the Constitution, the court must look to state law. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Under Hawaii law, a landowner does not have a protectable vested interest in a particular project until it has obtained the last discretionary permit. Kauai County v. Pacific Standard Life Ins. Co., 65 Haw. 318, 332, 653 P.2d 766, 776 (1982) (also known as the "Nukolii" case).

It is clear that Plaintiffs do not have a vested right to develop their properties according to their particular plans because they have not obtained the discretionary approvals required by Hawaii's Coastal Zone Management Act ("CZMA"), Hawaii Revised

Statute ("HRS") Chapter 205A. CSOF, ¶ 21. Plaintiffs allege that "... in Plaintiffs' Kamaole Pointe Project, Plaintiffs or its predecessors' interest, prior to the enactment of the Ordinance, applied for a Special Management Use Permit ...." FAC, ¶26. CSOF, ¶ 23. Plaintiffs are referring to the requirements in the CZMA with respect to the Special Management Area ("SMA"). Because the Property is in the SMA, Plaintiffs are required to obtain an SMA permit, which is a discretionary permit issued by the Maui Planning Commission ("MPC") pursuant to state law and usually with numerous conditions. CSOF, ¶¶ 21-22.

Plaintiffs' claims are not ripe because they have not completed the SMA assessment process for either project and cannot apply for building permits until that process is completed. The application of the Workforce Housing Ordinance to Plaintiffs' projects will not be known until they apply for building permits. CSOF, ¶¶ 21-22, 25, 29.

In addition to the SMA application, the developers of the Kamaole Heights project have submitted a Draft Environmental Assessment pursuant to HRS Chapter 343. The Planning Department has determined that additional information is required before the Draft Environmental Assessment can be submitted to the Maui Planning Commission, the accepting agency. CSOF, ¶ 24.

The United States Court of Appeals for the Ninth Circuit has held that the ripeness requirement "... applies to facial as well as to as-applied challenges." Southern Pac. Transp. Co. v. City of Los Angeles, supra, 922 F.2d at 505-06; Hotel & Motel Ass'n of

Oakland v. City of Oakland, 344 F.3d 959, 966 (9th Cir. 2003), cert. denied, 542 U.S. 904 (2004); Spoklie v. Montana, supra, 411 F.3d at 1057.

IV. MAUI'S WORKFORCE HOUSING ORDINANCE IS PRESUMPTIVELY CONSTITUTIONAL

In addition to bearing the burden of proving that their claims are ripe, Plaintiffs must overcome the presumption of validity that attaches to legislative enactments. Because legislative enactments are presumed valid, a facial challenge to generally applicable legislation requires the Plaintiffs to prove that there are no conceivable circumstances under which the law would be valid. Committee of Dental Amalgam Mfrs. and Distributors v. Stratton, 92 F.3d 807 (9th Cir. 1996), cert. denied, 519 U.S. 1084 (1997). Kawaoka v. City of Arroyo Grande, supra, 17 F.3d at 1233-34 (in which the Ninth Circuit upheld summary judgment for the city against claims that a revision to its general plan and a temporary water moratorium violated the plaintiffs' substantive due process and equal protection rights). Wedges/Ledges of California, Inc. v. City of Phoenix Arizona, 24 F.3d 56, 66 (9th Cir. 1994) (in which the Ninth Circuit affirmed summary judgment on a substantive due process claim arising from a blanket municipal ban on "crane" amusement games).

Obviously, since other developers have complied with and/or expressed their willingness to comply with the requirements of the Workforce Housing Ordinance, there are not only conceivable but actual situations under which the law does not obliterate property values as alleged in the FAC. CSOF, ¶¶ 7-9.

V. THE FEDERAL "CIVIL ACTION FOR DEPRIVATION OF RIGHTS," 42 U.S.C. § 1983, DOES NOT CREATE SUBSTANTIVE RIGHTS

Plaintiffs seek a declaration that the Workforce Housing Ordinance violates 42 U.S.C. § 1983. However, "... one cannot go into court and claim a violation of § 1983, for § 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 (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, 9 (1979); Albright v. Oliver, 510 U.S. 266, 270 (1994), rehearing denied, 510 U.S. 1215 (1994); Gonzaga University v. Doe, 536 U.S. 273, 285 (2002). Henderson v. City of Simi Valley, 305 F.3d 1052, 1056 (9th Cir. 2002). Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 978 (9th Cir. 2004), cert. denied, 544 U.S. 974 (2005) (an agency's regulations 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).

Therefore, the first step in any civil rights claim is to identify the specific constitutional right allegedly infringed. Albright v. Oliver, supra, 510 U.S. at 271. The Plaintiffs herein claim that their right to be free from unconstitutional conditions, their right to equal protection and their right to substantive due process are infringed by the Workforce Housing Ordinance. Each claim will be addressed in turn.

VI. THE "UNCONSTITUTIONAL CONDITIONS" CLAIM IS A "TAKINGS" CLAIM THAT MUST BE BROUGHT IN STATE COURT

A. The Unconstitutional Conditions Claim Is A Takings Claim By a Different Name

Plaintiffs claim that the Workforce Housing Ordinance requires them to submit to a "taking" of their property as a condition of development in violation of the doctrine prohibiting unconstitutional conditions. Count II of the FAC is entitled: "The Ordinance, on its Face, Effects an Impermissible Taking Under the Doctrine of Unconstitutional Conditions, or Otherwise by Conscripting a Few to Bear the Burden to Provide Affordable Housing Which Ought, in All Fairness and Justice, Be Borne by the Public as a Whole."[4]

Plaintiffs do not dispute that the Workforce Housing Ordinance addresses a valid governmental interest, stating that they do not "... doubt that the County was attempting to address a governmental interest that is of genuine concern to Maui residents i.e., to address the County's affordable housing shortage." FAC, ¶36. CSOF, ¶ 1. However, Plaintiffs do not agree with the method chosen by the Maui County Council to address the affordable housing shortage. Consequently, they have filed this lawsuit "... to prevent an unconstitutional and wrongheaded policy from being implemented which would, *inter alia*, compound rather than alleviate

[4]This statement is a paraphrase of a statement in Armstrong v. U.S., 364 U.S. 40, 49 (1960) (a six to three decision in which the Supreme Court found that the Government could not assert sovereign immunity and was obligated to pay materialmen liens against uncompleted boat hulls and building materials that were transferred to the Government because of a default by the contractor.)

any affordable housing shortage in the County of Maui and unconstitutionally deprive Maui landowners of their property rights". FAC, ¶8. Plaintiffs also "... vigorously dispute the effectiveness, reasonableness, validity, proportionality, constitutionality and legality of the Ordinance and the County's authority to enact it." FAC, ¶36.

In their original Complaint, Plaintiffs claimed that the "... Ordinance, on its face, effects an impermissible taking because ... (it) does not substantially advance legitimate governmental interests ...." At some point, Plaintiffs apparently recognized that the "fails to substantially advance" takings test derived from Agins v. City of Tiburon, supra, 447 U.S. at 261-262 has been abrogated by Lingle v. Chevron U.S.A., Inc., supra, 544 U.S. at 529. In rejecting the use of the "fails to substantially advance a valid government purpose" test, the Lingle Court stated: "Reading it (the Agins formula) to demand heightened means-end review of virtually all regulation of private property would require courts to scrutinize the efficacy of a vast array of state and federal regulations - a task for which they are not well suited. It would also empower - and might often require - courts to substitute their predictive judgments for those of elected legislatures and expert agencies" (parenthetical phrase added to explain the pronoun "it"). Id. at 529.[5] Plaintiffs subsequently filed their FAC deleting

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[5]Prior to the decision in Lingle v. Chevron U.S.A. Inc., supra, 544 U.S. at 548, a facial challenge alleging that an ordinance "failed to substantially advance a valid governmental purpose" was deemed ripe for federal court adjudication because if

some (but not all) of the references to the "fails to substantially advance a legitimate governmental purpose" test, substituted the term "wrongheaded" and styled their claim as arising under the "unconstitutional conditions" doctrine. Following the Lingle decision, it is clear that this Court is not called upon to decide whether or not the Ordinance is a "wrong-headed policy".

B. The "Unconstitutional Conditions" Doctrine Limits the Ability of the Government to Condition a Benefit on the Waiver of a Right

The "unconstitutional conditions" doctrine limits the ability of the government to bestow a benefit on the condition that the beneficiary surrender a constitutional right.

The analysis of an "unconstitutional condition" claim requires the court to determine that:

(1) a constitutional right is implicated; and

(2) the implicated constitutional right is being impinged by standards applicable to a direct violation of said right.

If Plaintiffs satisfy the two pre-conditions set forth above, the burden shifts to the government to demonstrate the legitimacy of its waiver requirement in light of its interest in the waiver

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the court determined that the governmental policy was not the means by which to achieve the ends sought, the ordinance would be invalidated and no compensation would be required. The Lingle case was an appeal from a decision of the United States District Court for the District of Hawaii in which the court decided that a cap on the rent Chevron could charge gas stations failed to substantially advance the avowed purpose of the statute. The United States Supreme Court disavowed the "failure to substantially advance test" holding that the test should focus on whether or not the government has taken property for which the owner deserves just compensation.

and the value of the benefit conferred on the adverse party. The waiver must be rationally and fairly related both to legitimate governmental interest and the benefit conferred. Louisiana Pacific Corp. v. Beazer Materials & Services, Inc., 842 F.Supp. 1243, 1249-1250 (E.D. Cal. 1994).

The doctrine is fairly simple to state in the abstract, but difficult to apply to concrete situations. Writing in the Harvard Law Review, Kathleen Sullivan, a leading constitutional scholar, noted that the doctrine is "... riven with inconsistencies." Kathleen Sullivan, *Unconstitutional Conditions*, 102 Harv.L.Rev. at 1413, 1416 (1989). Twelve years later another scholar, Mitchell Berman, noted that "the Supreme Court's failure to provide guidance on the subject is, alas, legendary." Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo.L.J. 1, 3 (2001).

The United States Supreme Court recently discussed the "unconstitutional conditions doctrine" in Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47 (2006). The Rumsfeld case dealt with a challenge to the Solomon Amendment, a federal statute conditioning university federal funding on the requirement that the universities allow access to military recruiters. The challenge was based on First Amendment Rights including speech and association. The court held that the first prong of the "unconstitutional conditions doctrine" was not met because First Amendment Rights were not implicated by allowing access to military recruiters. Id. at 1313. In other words, if a

constitutional right is not implicated, the "unconstitutional conditions doctrine" does not apply.

In U.S. v. Scott, 450 F.3d 863 (9th Cir. 2006), the court decided that the state could not condition the pretrial release of an accused on the requirement that he waive his Fourth Amendment right to be free from unlawful search and submit to drug testing. On the other hand, in Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006), rehearing denied, 483 F.3d 965 (2006), the Ninth Circuit affirmed summary judgment for a county that conditioned welfare payments on the recipient's consent to warrantless home visits. This pair of 2006 Ninth Circuit cases nicely illustrates the difficulty with the application of the "unconstitutional conditions doctrine" in the Fourth Amendment context. Fortunately, in the instant case, this Court need not delve into these difficulties because it is clear that the "unconstitutional conditions doctrine" asserted by the Plaintiffs is an alleged taking of their property without just compensation, a claim that must be brought in state court. Williamson County Reg'l. Planning Com'n. v. Hamilton Bank, supra, 473 U.S. 172. While it is true that a pair of United States Supreme Court cases apply the "unconstitutional conditions doctrine" to land use exactions, both cases arose in state court. Nollan v. California Coastal Com'n, 177 Cal.App.3d 719, 223 Cal.Rptr. 28 (1986), 483 U.S. 825 (1987). Dolan v. City of Tigard, 317 Or. 110, 854 P.2d 473 (Or. 1993), cert. granted, 510 U.S. 989 (1993), judgment reversed, 512 U.S. 374 (1994).

VII. MAUI'S WORKFORCE HOUSING ORDINANCE IS A GENERALLY APPLICABLE LAW THAT DOES NOT VIOLATE PLAINTIFFS' EQUAL PROTECTION RIGHTS

Unless a regulatory classification implicates a fundamental right or is based on a suspect classification, an equal protection challenge is reviewed under the "rational basis" standard. "There is no fundamental right to build on, sell or subdivide real property absent compliance with government restrictions." Carr HUML Investors, LLC v. Arizona, 2007 WL 4403981 at p.9 (D. Ariz. 2007).

In City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003), the United States Supreme Court addressed equal protection and substantive due process rights in the context of a low income housing project authorized by a city ordinance. With respect to the Equal Protection argument, the court stated: "We have made clear that proof of racially discriminatory intent or purpose is required." Id. at 195. Plaintiffs herein do not allege any racially discriminatory intent, nor do Plaintiffs allege that the County's asserted rationale for the Workforce Housing Ordinance is pretextual rendering its passage malicious, irrational or plainly arbitrary. Wedges/Ledges of California, Inc. v. Phoenix, supra, 24 F.3d at 67.

Instead of asserting membership in a protected class, Plaintiffs appear to be claiming that they are entitled to "Class of One" review under the standards set forth in Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). (In which the plaintiff, having been required to dedicate a 33 feet easement

where others need only dedicate a 15 feet easement allegedly in a spiteful and vindictive effort to "get him," was deemed to have stated an equal protection claim.) A "Class of One" equal protection claim requires that the Plaintiffs show an extremely high degree of similarity between themselves and the persons to whom they compare themselves in order to demonstrate that they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. Cordi-Allen v. Conlon, 494 F.3d 245, 251 (1st Cir. 2007).

The insurmountable problem with Plaintiffs' equal protection claim is that, on its face, the Workforce Housing Ordinance applies equally to all Developers who fall within its minimum development categories. Plaintiffs have not alleged, nor can they prove, that they are being treated differently from those similarly situated.

VIII. THE ORDINANCE DOES NOT INVOLVE EGREGIOUS GOVERNMENT CONDUCT AND DOES NOT, THEREFORE, VIOLATE SUBSTANTIVE DUE PROCESS RIGHTS

A. Under A Recent Ninth Circuit Ruling, A Substantive Due Process Claim is Not Foreclosed in the Land Use Regulatory Context

On November 1, 2007, the United States Court of Appeals for the Ninth Circuit issued Crown Point Development Inc. v. City of Sun Valley, 506 F.3d 851 (9th Cir. 2007), an important decision regarding substantive due process claims. In Crown Point, the Ninth Circuit revisited its holding in Armendariz v. Penman, 75

F.3d 1311 (9th Cir. 1996), cert. denied, 520 U.S. 1240 (1997).[6] In light of the United States Supreme Court's Lingle decision, in explaining its holding in Crown Point, the Ninth Circuit stated: "We now explicitly hold that the Fifth Amendment does not invariably preempt a claim that land use action lacks any substantial relationship to the public health, safety or general welfare." Citing, Lingle v. Chevron U.S.A., Inc., supra, 544 U.S. at 549 for the proposition that "A regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."

Therefore, the Ninth Circuit concluded that Armendariz is "undermined to the limited extent that a claim for wholly illegitimate land use regulation is not foreclosed." Crown Point, supra, 506 F.3d at 852-853.

B. Substantive Due Process Claims Must Involve Conduct that Shocks the Conscience

Plaintiffs claim that the Workforce Housing Ordinance violates their substantive due process rights, in other words, that it is one of those certain actions that the government cannot engage in no matter how many procedural safeguards it employs. This is

[6]Armendariz v. Penman, supra, 75 F.3d. 1311, held that a substantive due process claim could not be brought if it is subsumed by a specific constitutional right. In Armendariz, that specific right was the right to compensation for a government taking of property contained in the Fifth and Fourteenth Amendments to the United States Constitution. However, in Crown Point, the Ninth Circuit recognized that, in Lingle, the United States Supreme Court had disavowed what the Circuit Courts had thought was a "failure to substantially advanced" test whereby a government regulation would be deemed a taking if it failed to substantially advance the governmental interest.

clearly not the case. The Workforce Housing Ordinance is a valid inclusionary ordinance, of the type that has withstood constitutional scrutiny in any number of jurisdictions. Home Builders Assn. of Northern California v. City of Napa, supra, 90 Cal.App.4th 188.

In City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, supra, 538 U.S. at 198, the Supreme Court held that "... only the most egregious official conduct can be said to be "arbitrary" in the constitutional sense."

There is no denial of substantive due process if the question as to whether the government acted arbitrarily and capriciously is "at least debatable." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981), rehearing denied, 450 U.S. 1027 (1981). To establish a substantive due process claim, the Plaintiffs must produce evidence that there was an abuse of governmental power depriving the Plaintiffs of a protectable property interest which shocks the conscience. United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 401 (3rd Cir. 2003), rehearing denied, 324 F.3d 133 (3rd Cir. 2003). In County of Sacramento v. Lewis, 523 U.S. 833 (1998), the United States Supreme Court held that, to prevail on a substantive due process claim, a party is required to show governmental conduct that shocks the conscience. The Supreme Court in Lewis observed that the core concept of due process is protection against arbitrary action by the government and that only the most egregious official conduct can be said to be arbitrary in the constitutional sense. United

Artists Theatre Circuit, Inc. v. Township of Warrington, supra, 316 F.3d at 399.

Federal courts have consistently concluded that a landowner's substantive due process and equal protection rights are not violated even when a municipality acts in violation of state or local law, in bad faith, or beyond its jurisdiction. Chesterfield Dev. Corp. v. City of Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992); PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 32 (1st Cir. 1991), cert. granted in part, 502 U.S. 956 (1991); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988).

In Pennington v. Teufel, 396 F.Supp.2d 715, 727 (N.D. W.Va. 2005), affirmed, 169 Fed.Appx. 161 (4th Cir. 2006), the court made the cogent observation that it is no argument to allege that public officials responded to public opinion because "such give and take between government officials and an engaged citizenry is what democracy is all about." Citing, Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 71 (4th Cir. 1992). (Also holding that a protectable property interest is necessary to assert a substantive due process claim relating to land use regulation.)

C. Even If Plaintiffs Could Bring a Takings Claim in Federal Court Under the "Unconstitutional Conditions Doctrine," They Could Not Prevail

Plaintiffs' claims are based on the regulatory scheme established by the Workforce Housing Ordinance. During the last twenty-five years, the United States Supreme Court has established

a series of standards for reviewing "exactions" arising from land use regulations.[7]

A regulation that eliminates all economically beneficial use of the land is usually a categorical taking and is subject to an intermediate standard of review. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)[8] (the "complete wipe-out" or "Lucas" standard).

A regulation that does not eliminate all economically beneficial use but, on balance, "goes too far" is reviewed under the deferential standard of review set forth in Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978), rehearing denied, 439 U.S. 883 (1978) (the "Penn Central" standard).

An individualized administrative permit process that results in requiring a landowner to dedicate some portion of his property for public use in exchange for the permit is reviewed under ths standards set forth in Nollan v. California Coastal Com'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994) (the "Nollan/Dolan" standards).

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[7]An actual physical invasion of the property is a categorical taking even if the invasion is minimal. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 420 (1982) (holding that even a minimal actual physical invasion of property required compensation). Plaintiffs do not claim an actual physical invasion.

[8]Because a federal district court does not have jurisdiction to decide takings claims, it is important to note that Lorreto and Lucas were both appeals of state appellate court decisions. Lucas v. South Carolina Coastal Council, 304 S.C. 376, 404 S.E.2d 895 (S.C. 1991). Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 423 N.E.2d 320 (N.Y. 1981).

1. The *Lucas* Standard - a Complete Wipeout - Does Not Apply

Plaintiffs make conclusory allegations that the fair market value of their land has been "obliterated" by the Workforce Housing Ordinance and its threatened application. FAC, ¶46. They also allege that, as applied to all landowners, the Ordinance "... improperly effects a taking of private property in violation of Plaintiffs' constitutional rights because the required exactions are so `... high, harsh and extreme...' that they effectively deny landowners who seek to develop their property the economically viable use of their land and leave them no reasonable return on their investment." FAC, ¶65.

Where the validity of a statute is being challenged, there must be a showing that no set of circumstances exists under which the statute would be valid. Committee of Dental Amalgam Mfrs. and Distributors v. Stratton, supra, 92 F.3d at 810. This blanket assertion of a categorical taking arising from the enactment of the ordinance, although necessary because of the facial challenge, is obviously untrue. For example, the proponents of a large development on Maui, known as Wailea 670 or Honua'ula, have assured the Maui County Council that they can and will comply with the Ordinance. CSOF, ¶ 8. The Court also may take judicial notice of the decision of the State Land Use Commission attached hereto that is the basis for a nearly completed subdivision In the Matter of Spenser Homes Inc., reclassifying 94 acres from agriculture to urban for the construction of the 410-unit Waikapu Affordable Housing Subdivision. CSOF, ¶ 9. Fifty-one percent of the

subdivision houses are required to be affordable to families earning 120% or less of the area median income. CSOF, ¶ 9.

Finally, the County has entered into one Workforce Housing Agreement and a second is expected to be finalized within 30 days. In addition, a number of developers have expressed their willingness, ability and intent to comply with the Ordinance. CSOF, ¶ 7.

Obviously, the Workforce Housing Ordinance does not result in a compete wipeout for all property owners subject to its regulations. CSOF, ¶¶ 7-9.

2. The *Nollan/Dolan* Standards Do Not Apply

An administrative requirement that an owner allow portions of his land to be used physically by the public in exchange for a development permit is subject to heightened scrutiny under the standards established in Nollan v. California Coastal Com'n, supra, 483 U.S. 825 and Dolan v. City of Tigard, supra, 512 U.S. 374. This heightened scrutiny is required because an owner's ability to exclude others from his property, an essential stick in his bundle of property rights, is being compromised.

Often referred to as the Nollan/Dolan intermediate standard of review, the heightened standard is intended to prevent the abuse of police power in individual cases. It does not apply to generally applicable legislative enactment. Furthermore, the Nollan/Dolan standards only arise when a physical dedication of land is required of an individual landowner as a condition of development in an adjudicative context. The Dolan court found that heightened

scrutiny was required because the exaction imposed on the property was not a legislative determination classifying entire areas of the city but rather an adjudicative decision to apply a unique condition to an individual parcel, and because it was not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." Dolan v. City of Tigard, supra, 512 U.S. at 384-85.

The Nollan/Dolan standards do not apply to a legislative act that is not part of individualized, discretionary process because the concern that the government will exact property for the public from an individual is not present. San Remo Hotel L.P. v. City and County of San Francisco, 27 Cal.4th 643, 670, 41 P.3d 87, 105 (Cal. 2002).[9] Commercial Builders v. City of Sacramento, 941 F.2d 872, 875 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992). (Nollan is inapplicable to housing mitigation fee); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 703 (1999) (Dolan is inapposite to permit denial); Clajon Production Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny limited to exaction of real property). For example, for the last eighty-five years, rent control ordinances have been approved as part of generally applicable legislation. Block v. Hirsh, 256 U.S. 135 (1921); Yee v. City of Escondido, Cal., supra, 503 U.S. 519;

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[9]Because a federal district court does not have jurisdiction to decide takings claims, it is important to note that Nollan and Dolan were both appeals of state appellate court decisions. Nollan v. California Coastal Com'n, 177 Cal.App.3d 719 (Cal.App.2d Dist. 1986); Dolan v. City of Tigard, 317 Or. 110, 854 P.2d 473 (Or. 1993), cert. granted, 510 U.S. 989 (1993), judgment reversed, 512 U.S. 374 (1994).

Pennell v. City of San Jose, 485 U.S. 1 (1988). Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998) (holding that an analysis involving "unconstitutional exactions" does not apply to a facial challenge to an ordinance requiring landlords to pay one-half the cost of relocating displaced low income tenants).

3. The Deferential *Penn Central* Standard

A development exaction placed on an individual property owner that has a negative economic impact but does not deny all economically viable use of the property and does not involve physical invasion of property is entitled to a deferential review by the court and is governed by the doctrine set forth in Penn Cent. Transp. Co. v. City of New York, supra, 438 U.S. at 124. Penn Central instructs the court to consider the economic impact of the regulation, the character of the government action and, in particular, the degree of interference with distinct, invest-backed expectations. Diminution of value itself is not enough to require heightened scrutiny and does not result in a categorical taking. The Penn Central standards do not apply to this claim that the Ordinance is facially invalid. With respect to the Plaintiffs' claims that the Workforce Housing Ordinance is unconstitutional as applied, they will need to provide extensive data indicating the alleged interference with their distinct, investment backed expectations which are not contained in the allegations in their FAC.

IX. STATE CONSTITUTIONAL CLAIMS

Under Hawaii law, except with respect to suspect classifications, every enactment of the legislature is presumptively constitutional and the party challenging the statute has the burden of showing beyond a reasonable doubt that the legislation is clearly, manifestly and unmistakably in violation of the Constitution. State v. Adler, 108 Hawai'i 169, 177, 118 P.3d 652, 660 (2005); Watland v. Lingle, 104 Hawai'i 128, 85 P.3d 1079 (2004); Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai'i 217, 247-48, 953 P.2d 1315, 1345-46 (1998); State v. Gaylord, 78 Hawai'i 127, 890 P.2d 1167 (1995); Pray v. Judicial Selection Com'n of State, 75 Haw. 333, 861 P.2d 723 (1993); Blair v. Cayetano, 73 Haw. 536, 836 P.2d 1066 (1992), recon. denied, 74 Haw. 650 (1990); Schwab v. Ariyoshi, 58 Haw. 25, 564 P.2d 135 (1977).

With respect to the specific claim that an ordinance, on its face, constitutes an unlawful taking, there is a paucity of Hawaii law. The Constitution of the State of Hawaii states: "Private property shall not be taken nor damaged for public use without just compensation." Article I, Section 20. In Brown v. Thompson, 91 Hawai'i 1, 14, 979 P.2d 586, 598 (1999), cert. denied, 528 U.S. 1010 (1999), the court reviewed the legal history of the lawful exercise of the police power that may incidentally result in the taking or destroying of private property in the context of an impounded vessel. The Hawaii Supreme Court cited Mugler v. Kansas, 123 U.S. 623 (1887), stating that long ago it was recognized that

all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

Relying on the United States Supreme Court's holding in Williamson, the court held that a water user's takings claim based on the State Water Commission's denial of its request to use ground water (for noncompliance with statutory conditions) and the allocation of that water to others was premature. In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409, 492 (2000), citing, Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Hawai'i 425, 452, 903 P.2d 1246, 1273 (1995), cert. denied, 517 U.S. 1163 (1996).

Because of the lack of Hawaii Supreme Court cases specifically addressing whether or not a legislative act, on its face, constitutes an unlawful taking under the State Constitution, this is a question that should be certified to the Hawaii Supreme Court, if this Court decides that it has jurisdiction. Of course, if the federal claims herein are dismissed, the state claims will fail as well.

X. THE AFFORDABLE WORKFORCE HOUSING ORDINANCE DOES NOT CONFLICT NOR IS IT PREEMPTED BY HRS §§ 46-141 TO 46-148

A. Argument

Plaintiffs allege that "the development exactions and in-lieu fee requirements imposed under the Workforce Housing Ordinance are tantamount to imposition of impact fees to fund expenditures for affordable housing. Since such action conflicts with the authority to impose impact fees granted to Defendant County by the state

legislature pursuant to HRS §§ 46-141 to 46-148, Defendant County lacked the specific authority necessary to pass the Ordinance and the Ordinance should be declared invalid for that reason." FAC, ¶87.

A conflict exists between local legislation and state law if the local legislation "duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith. Similarly, local legislation is contradictory to general law when it is inimical thereto. Finally, local legislation enters an area that is fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has implicitly done so." Richardson v. City and County of Honolulu, 76 Hawai'i 46, 61-62, 868 P.2d 1193, 1208-9 (1994).

B. If this Case Is Not Dismissed, the Preemption Question Should be Certified to the Hawaii Supreme Court

In Richardson v. City and County of Honolulu, 802 F.Supp. 326, 344 (1992), the Bishop Estate contended that the land lease rent ceiling was preempted by HRS Chapters 101, 516, 516D, 519, 514A and 421H. The court in Richardson I certified the preemption question to the Hawaii Supreme Court, pointing out that the United States Supreme Court has consistently approved the use of certified questions to state supreme courts when a federal court case involves an important question of state law which is both unclear under state legal precedent and would be determinative in the

instant case. The court pointed out that the Ninth Circuit has often certified such questions and certifying them at the district court level actually ends up saving time and resources. The Hawaii Supreme Court authorizes certified questions in Rule 13 of the Hawaii Rules of Appellate Procedure ("HRAP") when the question concerns Hawaii law which is determinative and when there is no clear controlling precedent in the Hawaii judicial decisions. The Hawaii Supreme Court may decline to answer the certified question if the facts alleged do not support the claim and therefore the answer would not be determinative. Matsuura v. E.I. du Pont de Nemours & Co., 102 Hawai'i 149, 73 P.3d 687 (2003).

XI. CLAIMS AGAINST INDIVIDUALS ARE DUPLICATIVE AND SHOULD BE DISMISSED

Plaintiffs have named the Maui County Council Members, the Mayor, and the Director of the Maui County Department of Housing and Human Concerns, in their respective official capacities, as defendants in this action. Because they are all named in their official capacities only, claims against them are, in fact, claims against the County of Maui and are duplicative and should be dismissed. Joe v. Douglas County School District, 775 F.Supp 1414 (D. Colo. 1991); Monell v. Department of Social Services, 436 U.S. 658, 690, n. 55 (1978).

XII. CONCLUSION

Plaintiffs maintain that "... the Ordinance, on its face, effects an impermissible taking of Plaintiffs' property rights in violation of the Constitution of the United States, Amendments V

and XIV, violates Plaintiffs' rights to due process of laws guaranteed by the Constitution of the United States, Amendments V and XIV, violates the Constitution of the State of Hawaii, Art. 1, §§ 5 and 20 and exceeds the power and authority granted to Defendant County by the State of Hawaii." FAC, ¶11.

Although, Plaintiffs allege that their appeal to the Maui County Council for a waiver of the requirements of the Ordinance was denied, the FAC does not allege any procedural due process violations and, therefore, that issue is not addressed herein. The due process violation referred to in the FAC, at paragraph 11, when read in the context of the lengthy FAC, is limited to substantive due process and cannot be sustained because the case does not involve egregious governmental conduct as the substantive due process doctrine defines that term.

As has been explained above, even if disguised as a "unconstitutional conditions" claim, the facial "taking" challenge is not ripe and, in any case, cannot be sustained because there is no possibility that the Workforce Housing Ordinance could be construed to be an impermissible taking on its face.

If Plaintiffs believe that they have a valid, as-applied takings claim, they are free to file it as an inverse condemnation action in state court. However, the federal court does not have jurisdiction to adjudicate Plaintiffs' claim that the Ordinance is an unlawful taking. Summary Judgment in favor of County Defendants should be granted.

DATED: Wailuku, Maui, Hawaii, April 2, 2008.

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