DEPARTMENT OF THE CORPORATION COUNSEL 205

BRIAN T. MOTO 5421
Corporation Counsel
MADELYN S. D'ENBEAU 1994
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793
Telephone: (808) 270-7740
Facsimile: (808) 270-7152
madelyn.denbeau@co.maui.hi.us
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Attorneys for Defendant COUNTY OF MAUI

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) DEFENDANT COUNTY OF MAUI'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS KAMAOLE POINTE DEVELOPMENT LP AND ALAKU POINTE LP'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED ON JULY 31, 2009; CERTIFICATE OF SERVICE HEARING: Date: September 28, 2009 Time: 9:45 a.m. Judge: Honorable David A. Ezra Trial Date: December 1, 2009

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

DEFENDANT COUNTY OF MAUI'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS KAMAOLE POINTE DEVELOPMENT LP AND ALAKU POINTE LP'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED ON JULY 31, 2009

I. PLAINTIFFS ARE NOT SEEKING MONETARY DAMAGES AND ARE NOT ENTITLED TO AN ORDER FROM THIS COURT MANDATING A WAIVER

A. The Plaintiffs Have Stated That They are Not Seeking Monetary Damages and Have Denied Discovery on That Issue

This case raises a question that is unusual in the annals of constitutional litigation; namely, what do the Plaintiffs hope to gain by this expensive recourse to the busy federal court? The Plaintiffs' attempt to invalidate Maui County's Residential Workforce Housing Ordinance codified at Maui County Code ("MCC") Chapter 2.96 ("Ordinance") has not succeeded. "Order Denying Plaintiffs' Motion for Partial Summary Judgment Declaring Ordinance 3418 Void On Its Face Under the Doctrine of Unconstitutional Conditions; and Order Granting in Part and Denying in Part County Defendants' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment" entered July 3, 2008, "Order Granting in Part and Denying in Part County Defendants' Motion for Reconsideration" entered on September. 9, 2008, "Order Denying Plaintiffs' Motion for Partial Summary Judgment; and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment" entered on November 25, 2008.

Plaintiffs' remaining claim, that the County Council was not a fair tribunal to hear the request by their alleged predecessor-in-interest to be exempted from the requirements of the Ordinance, is neither ripe nor necessary. Plaintiffs at any time could have and still can make a new application to the County Council and can

request the recusal of Council Members who they believe cannot give them a fair hearing.

Plaintiffs have unequivocally stated that they are not seeking monetary damages. CSOF 1. Instead, Plaintiffs claim that they should be "immune to" the affordable housing ordinance. CSOF 2. They are attempting to convince this court to do what the County Council refused to do. That is, Plaintiffs want this court to grant them a complete waiver from the requirements of the Ordinance despite their refusal to answer Council Members' questions or present adequate evidence. CSOF 18, 30. Plaintiffs' request that this court grant them the complete waiver denied by the County Council would require the court to supplant a discretionary function of the Maui County Council. That is not the authorized remedy. Plaintiffs did not have a waiver that was taken from them so they have nothing that can be returned. There is no need for a court order allowing them to make another presentation to the County Council, that option is and always has been available. Furthermore, it makes no sense to expend attorneys' fees solely in the hopes of recouping those fees.

During the discovery phase, Plaintiffs have stated unequivocally that they are not seeking monetary damages. When asked what remedy was being sought, Dennis Blain, the individual chosen by Plaintiffs as the 30(b)(6) deponent, testified that no monetary damages were being sought, but expressed his view that the court should grant Plaintiffs a complete waiver from the

requirements of the Ordinance for Plaintiffs' projects. CSOF 1-2, 18.

Perhaps through inadvertence, Plaintiffs in their Motion for Partial Summary Judgment filed herein on July 31, 2009 (Memo in Support), request an award of damages. This court clearly should deny the damage request because Plaintiffs have refused to allow discovery on damages based on the unequivocal statement that no damages are being sought. CSOF 1.

As is more fully explained below, the reviewing body, this court or the County Council, would need far more evidence than that originally provided to the County Council before it could be determined whether or not the Plaintiffs are entitled to a complete waiver from the requirements of the valid Ordinance.

B. The Court Now Has Before It the Complete Record Provided to the County Council

The court now has before it all the evidence Plaintiffs/Applicants provided to the Council. The information is in Exhibit 7 to Plaintiffs' Concise Statement Of Facts In Support of Their Motion For Partial Summary Judgment filed on July 31, 2009 (Plaintiffs' CSOF 8-9) and consists of:

(1) A February 23, 2007 letter from Chris Hart and Partners requesting a waiver on behalf of Nokaoi Development for the proposed Kamaole Heights Project (TMK 3-9-020:010, 011, and 012) and the Kamaole Plantation project (TMK 3-9-020-004)("Chris Hart letter").

(2) A May 25, 2007 letter from McCorriston, Miller, Mukai and MacKinnon requesting a waiver on behalf of Nokaoi Development, LP, for the same projects ("McCorriston letter"). The McCorriston letter included five attachments:

(1) A copy of the Chris Hart letter;

(2) The Special Management Area ("SMA") permit application for Kamaole Pointe project. (No SMA permit application for the Kihei Pointe project). Plaintiffs' CSOF 8.

(3) Architect's site plan for the 127-unit planned Kihei Pointe project;

(4) Unit floor plans for the Kihei Pointe project; and

(5) Excerpts from a 2006 Housing Policy Study prepared by the SMS Consulting Firm for the Hawaii Housing Finance and Development Corporation and the Housing Officers/Administrators for Honolulu, Maui, Hawaii and Kauai Counties

As the Council Members pointed out, neither of the letters provides any factual data that would support exempting the proposed projects from the requirements of the Ordinance. CSOF 4. In fact, the data provided by the Plaintiffs/Applicants demonstrates that the projects are no different from any number of high-end apartment complex projects subject to the Ordinance. If the projects were to be exempted on the basis on the information supplied, this would be tantamount to a repeal of the Ordinance.

The Application for the SMA permit provided by the Plaintiffs/Applicants consists chiefly of a copy of the Draft Environmental Assessment ("Draft EA") prepared for Kamaole Heights

in June 2006. Plaintiffs' CSOF 8. The 385 page Draft EA is designed to address environmental concerns and does not contain data relevant to a waiver from the requirements of the Ordinance. In the McCorriston letter, the Council Members are referred to pages 10-14, 19-20, 37 and 38 of the Draft EA. CSOF 4. Said pages describe the developer's efforts to address neighbors' view concerns, a 2003 Hawaii Housing Survey including a table from the Survey which does not indicate any need for housing priced between $700,000 and $800,000 and the statement that "the Applicant is currently in discussions with the Department of Housing and Human Concerns ("DHHC") regarding an appropriate affordable housing contribution to be made to the County of Maui." However, the Plaintiffs/Applicants did not include any evidence of discussions with the DHHC in the packet provided to the Council.

The Council also received a letter from a citizen, James R. Smith, pointing out that the Director of Human Concerns' requirements for the project were not offered into evidence by the developers and that there was no factual basis for the waiver. Plaintiffs' CSOF 1, Exhibit 1. The Council also received a written copy of testimony provided orally by Stan Franco who indicated that his online research listed selling prices for the project apartments between $700,000 and $800,000. These units would not be affordable to any of the groups provided for in the Ordinance, as Mr. Franco explained. Plaintiffs' CSOF 1, Exhibit 1.

C. The Reluctance of the Developers to Provide Evidence or Answer Questions Precluded A Grant of the Waiver by the Maui County Council

At the hearing on the request for a waiver, the Plaintiffs/Appellants refused to answer questions or provide further explanation despite bearing the burden of proof. As the McCorriston letter stated: "To be absolutely clear and avoid any future misunderstandings, the Developer (sic) hereby concludes its presentation of evidence in support of the captioned appellants. . . . The Developer rests on this submission of evidence. The Developer will not present any further evidence in support of its appeal." (emphasis in the original) CSOF 4.

This unequivocal refusal to provide additional substantial evidence of a lack of nexus under any circumstances is hard to understand. Initially, the County deduced that the Plaintiffs/Applicants saw the requirement of seeking a waiver as a hurdle to be crossed on their way to federal court for a ruling on the constitutionality of the Ordinance. The McCorriston letter reflected the desire to cross that hurdle quickly. In fact, the law suit was filed shortly after the final Council action in August 2007. This remains the most probable explanation from the attorneys' perspective.

When the Chris Hart letter requested a waiver for Nokaoi, the project then called Kamaole Heights actually was owned by two entities, Kamaole Pointe Development LP and CDN Maui. CDN Maui, LPP ("CDN Maui"). CDN Maui is an entity owned by Dennis Blain and Phil Archer. CSOF 7. Blain had contracted to purchase the Kamaole

Pointe property for $8.5 million in March, 2006, despite a March 20, 2006 appraisal for $4.75 million. CSOF 8. Prior to the transfer of title from the prior owners, Pointe of View Developments, Inc. agreed to purchase a 50% interest in the property for approximately $7.6 million. CSOF 9. CDN Maui retained, to which Blain had transferred his interest in the contract, retained the other 50% interest which was valued for purposes of the agreement with Pointe of View at approximately $7.6 million. CSOF 9. CDN Maui did not pay cash but contributed its interest in the contract to purchase and Phil Archer provided the $900,000 cash necessary to augment the $7.6 million to be provided by Pointe of View Developments and reach the purchase price of $8.5 million. CSOF 9. CSOF 10. Similarly, the Alaku Pointe property was purchased by Nokaoi Development LLC for $2.2 million on July 8, 2005. CSOF 11. Five month later, Nokaoi (Dennis Blain) sold a 20% interest to Chiate Properties LLC for $2.5 million, and together they formed Alaku Pointe LP in March 2006. Ken Chiate, the principal in Chiate Properties did not appear to be aware of the impediments to the development of Alaku Pointe. CSOF 12. Dennis Blain testified that, even at this price, the net profit on Alaku Pointe and Kamaole Pointe at one time was calculated at $24,791,000.00. CSOF 35.

During his deposition, Dennis Blain, the 30(b)(6) deponent and the other principal in CDN Maui, refused to answer questions about the financing of the projects and his own financial statements that were obtained through subpoena duces by the County from Seattle Funding Group ("SFG"), one of Plaintiffs' funding sources. CSOF 14.

A letter from Plaintiffs' attorney was the main evidence to support its waiver request, but it contained inadequate support for its "factual" assertions. CSOF 4. Council Member Molina interpreted the letter as meaning that some affordable housing was being provided but he could discern how much. CSOF 5. The developer's 30(b)(6) representative, Dennis Blain, has expressed his general disdain for Maui County's government. CSOF 33. Furthermore, the Plaintiffs/Applicants did not even bother to explain to the County Council that Nokaoi Development did not own the property and, in the case of Kamaole Pointe, never had owned the property. A waiver granted to Nokaoi Development would have been of no avail.

Whatever the reason for Plaintiffs' "pro-forma" approach to the waiver hearing, it does not satisfy the requirement that a party exhaust its administrative remedies. In order to avoid lack of ripeness, Plaintiffs must make a good faith attempt to obtain a final decision from the government on a development plan and a reasonable variance, if required. Williamson County Regional Planning Com'n v. Hamilton, 473 U.S. 172, 187-189 (1985). "Judicial elaboration of the exhaustion requirement has imposed an

additional obligation of good faith participation in the administrative process on claimants who wish to bring civil actions." Wrenn v. Secretary, Department of Veterans Affairs, 918 F.2d 1073, 1078 (2nd Cir. 1990)

Plaintiffs knew before purchasing their properties that Maui County would require at least a 15% affordable housing or an in-lieu component. CSOF 15. Plaintiffs' expert consultant, Christopher Hart testified that he told Dennis Blain that he anticipated a 30% requirement in the Ordinance. CSOF 16. Despite this, the Plaintiffs did not request a reduction or adjustment in the affordable housing percentage component to 30% or even 15%. CSOF 17. Instead, they requested a complete waiver. CSOF 10. Plaintiffs did not intend to provide any affordable housing at all, nor did they desire to pay any amount towards an in-lieu affordable development fee. CSOF 18-19. This "zip," "zero," "zilch," "nada" position confused the Council Members who were accustomed to an affordable housing component as a condition of granting entitlements even before the Ordinance was passed. CSOF 20. It made no sense that the arduous work of passing the Ordinance would result in a developer's request to provide no affordable housing at all for two substantial condominium developments.

II. PLAINTIFFS' CLAIM THAT, AS APPLIED TO THEM, THE ORDINANCE VIOLATES DUE PROCESS CANNOT BE SUSTAINED BECAUSE THEY DO NOT HAVE A PROTECTABLE PROPERTY INTEREST AND IT IS UNRIPE

In any case, Plaintiffs' claim that the waiver hearing violated their due process rights cannot be sustained because Plaintiffs do not have a protectable property right in proceeding

with their proposed projects without complying with the Ordinance. This is true for both procedural and substantive due process claims. "We have long held that a substantive due process claim must, as a threshold matter, show a government deprivation of life, liberty or property," Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1026 (9th Cir. 2007) (citations omitted).

In addition, for a substantive due process claim, the Plaintiffs must prove that they were deprived of property rights in a way that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998)(quoting Salerno, 481 U.S. at 746)(internal quotation marks omitted).

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).

Plaintiffs do not have a protectable right to develop their properties according to their particular plans, in part, because they have not obtained the discretionary approvals required by Hawaii's Coastal Zone Management Act ("CZMA"), Haw.Rev.Stat. Chapter 205A. CSOF 21. Plaintiffs allege that ". . . in

Plaintiffs' Kamaole Pointe Project, Plaintiffs or its predecessors-in-interest, prior to the enactment of the Ordinance, applied for a Special Management Use Permit. . . ." FAC, ¶26. 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 22.

Plaintiffs do not have a property interest in their proposed projects 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 23.

In addition to the SMA application, the developers of the Kamaole Heights project have submitted a Draft Environmental Assessment pursuant to Haw.Rev.Stat. 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.

III. THE COUNCIL MEMBERS HAVE APPROVED MANY CONTROVERSIAL RESIDENTIAL PROJECTS AND ARE NOT IRRATIONALLY BIASED AGAINST DEVELOPERS IN GENERAL AND PLAINTIFFS IN PARTICULAR

A. Quasi Judicial Administrative Officers Are Also Presumed To Be Unbiased

Plaintiffs maintain that they were denied their due process rights at the waiver hearing because the Council Members were biased. In Larson v. Palmateer, 515 F.3d 1057, 1067 (9th Cir. 2008), cert. denied Larson v. Belleque, 129 S.Ct. 171 (2008), the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") stated that: "To succeed on a judicial bias claim, however, the petitioner must overcome a presumption of honesty and integrity in those serving as adjudicators." The Ninth Circuit went on to state that: "In the absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases,'" citing to Liteky v. U.S., 510 U.S. 540, 555 (1994). The Larson court concluded: "Because Larson has provided no evidence of the trial court's alleged bias outside of these rulings and remarks-which themselves revealed little more than the occasional mild frustration with Larson's pro se lawyering skills-his claim that he was denied a fair trial also fails." Id. at 1067.

Quasi judicial administrative officers are also presumed to be unbiased. Schweiker v. McClure, 456 U.S. 188, 195 (1982); Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

B. Actual Bias Must Be Shown

The Ninth Circuit has joined other circuits in holding that actual bias must be shown to disqualify administrative judges. An "appearance of impropriety" standard does not apply. Bunnell v. Barnhart, 336 F.3d 1112, 1114 (9th Cir. 2003).

C. The Fact That Council Members Had Supported Passage of the Ordinance Did Not Render Them Biased Adjudicators

In Withrow v. Larkin, 421 U.S. 35 (1975), the United States Supreme Court decided that administrators who conducted investigations could also sit as adjudicators in the same matter without jeopardizing the presumption of impartiality. The Withrow case involved revocation of a physician's license by the Wisconsin Medical Examining Board. In response to the civil rights lawsuit filed by the physician, the Supreme Court quoted with approval the following statement: "(W)e cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required." (Emphasis added.) Id. at 50.

D. Political Opinions Do Not Demonstrate Bias

Plaintiffs claim that the Council Members' campaign promises in support of affordable housing mean that they are too "biased" to

hear a waiver request. This contention reflects a misunderstanding of the type of bias that destroys the impartiality of administrative decision makers. "Bias or prejudice of an agency decision maker related to an issue of law or policy is not disqualifying." 2 Am.Jur.2d Administrative Law § 41 Bias. "It is well established that bias or prejudice of an agency decision maker related to issues of law or policy are not disqualifying." Colao v. County Council of Prince George's County, 109 Md.App. 431, 467, 657 A.2d 148, 166 (Md. App. 1996), cert. granted 343 Md. 745, 684 A.2d 836 (Md. 1996), affirmed 346 Md. 342, 697 A.2d 96 (Md. 1997).

"All men who had thought about controversial issues necessarily have biases in this sense. . . . Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." Davis Administrative Law Treatise, Sec. 12.01 (pp. 130-131).

"Prejudgment of adjudicative facts is not necessarily a ground for disqualification. The holdings are almost uniform that a judge who has announced his findings of fact is not disqualified to hear the case a second time after a remand, and these holdings are generally applied equally to the administrative adjudicator. Prejudgment of facts bearing on law or policy is no more a disqualification than prejudgment of philosophy about law or policy." Davis Administrative Law Treatise, Sec. 12.06 (p. 169).

Of course the Council Members are elected officials with the responsibility of responding to their constituents' varying and often contradictory needs and opinions. However, this does not

disqualify them from adjudicative decisions. See Kramer v. Bd. of Adjust., Sea Girt, 45 N.J. 268, 212 A.2d 153, 159-161 (1965), ("(N)evertheless, the interest which disqualifies a member of the governing body in such a situation is a personal or private one, and not such an interest as he has in common with all other citizens or owners of property. . . . True, from his so-called 'realistic attitude toward the Stockton Hotel,' a reasonable mind might be left with little doubt as to where the Mayor's sentiments lay; but it is equally true that the campaign literature, the statements to the press, and all other official statements represent no more than the views of public officials pertaining to a matter of deep moment to the community.")

Nor is a decision maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances." U.S. v. Morgan, 313 U.S. 409, 421 (1941); see also FTC v. Cement Institute, 333 U.S. 683, 701 (1948), rhng denied 334 U.S. 839 (1948).

E. Council Member Victorino's Comments About a Meeting On Friday Did Not Refer to a Council Meeting

The allegation that the Council Members met privately before the waiver hearing and made up their minds in that meeting was based on an understandable but incorrect interpretation of remarks made by Council Member Michael Victorino at the Policy Committee hearing on the Plaintiffs' waiver application.

In fact, the Council Members did not meet nor did they discuss the matter prior to the hearing. CSOF 25. Council Member Victorino was referring to a public meeting held at the Maui Kaunoa Senior Center, where non-profit groups met to discuss affordable housing issues in general. CSOF 26. Council Member Victorino was the only Council Member who attended that public meeting. CSOF 27.

F. Intemperate Remarks Do Not Demonstrate Bias

Furthermore, "'expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display' do not establish bias." Rollins v. Massanari, supra, 261 F.3d at 858. The comments made by Council Members Mateo and Anderson as cited by this court in its Nov. 25, 2008 Order fall into this category and cannot be held to exhibit the type of bias that would rob the applicant of a fair tribunal.[1]

G. Council Members Did Not Have an Irrational Bias Against Residential Developers

Plaintiffs' claim that the Council Members are biased against residential developers has no basis in fact. The Council Members have all voted for residential projects even in the face of public opposition. CSOF 20.

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[1](Member Mateo: "For too long, the developers have been running the . . . candy shop, enjoying the treats and sweets. This [Ordinance] sends a direct notice that the candy shop is under new management and there will be change."); Ex. 14 at 36 (testifier commented on the Council's perception that "developers are money driven and evil"), at 141 (Member Anderson: "I especially applaud Chairman Danny Mateo for having the guts and the bravery to stand strong despite all the bitching and moaning by those whose pockets are heavy with profits from Maui No Ka Oi.")

IV. THE COUNCIL MEMBERS WERE NOT DETERMINED TO "NEVER GRANT WAIVERS" AND, IN FACT, WERE PREPARED TO DETERMINE WHETHER OR NOT PLAINTIFFS HAD MET THEIR BURDEN OF PROOF

In their Memo in Support, Plaintiffs quote from Chair Mateo's opening remarks which included reading the preamble of the Ordinance and stating that: "Members, by enacting the Residential Workforce Housing Policy, the Council has already made a finding that the impact of any applicable development is presumed to bear a rational relationship to the affordable housing shortage." Memo in Support p. 15. This of course is a perfectly correct statement, although an attorney might have a different understanding of the term "presumed" than a lay person would. Having deposed all of the Council Members who attended the hearing, Plaintiffs are well aware of the undisputed fact that none of the Council Members, including Chair Mateo, have legal training and so they could not have understood the term presumption as having evidentiary weight. And, in any case, the fact that the hearing was being held clearly indicated that any presumption was rebuttable if Plaintiffs/Applicants met their substantial burden of proof. The remaining suppositions that Plaintiffs make in the Memo in Support about the supposed intent of the Council Members never to grant waivers are unsupported. They support a process to provide for a reduction in or waiver of that requirement if a developer can meet its burden of proof. CSOF 29. As the Plaintiffs note, the Maui County Council members are extremely interested in making sure that building depending on Maui's limited infrastructure provides housing for the work force. CSOF 29.

V. THE COUNCIL MEMBERS ADEQUATELY REVIEWED THE PLAINTIFFS' APPEAL, PLAINTIFFS SIMPLY FAILED TO MEET THEIR BURDEN OF PERSUADING THE COUNCIL MEMBERS THAT THEIR PROJECTS WERE ENTITLED TO A COMPLETE WAIVER OF ANY AFFORDABLE HOUSING REQUIREMENT

In their Memo in Support Plaintiffs argue that ". . . the Council Members' failure to recognize many of the documents in the submittal or failure to remember that they received the submittal at all further demonstrates that they did not actually review and fairly analyze the evidence required by the Ordinance to be submitted in support of Plaintiffs' appeal." This statement is based on depositions taken in April and May of 2009. The busy Council Members were questioned about a hearing that took place in July of 2007, nearly two years before. Of course not all of the Council Members remembered each item that they might have reviewed at that time. This is hardly "proof" of the fact that they did not review the materials. Memo in Support p. 24.

VI. THE COUNCIL MEMBERS FOLLOWED THE REQUIREMENTS SET OUT IN THE ORDINANCE WITH RESPECT TO THE PLAINTIFFS/APPLICANTS' BURDEN OF PROOF

The Adjustment provision of the Ordinance states that:

(1) "A developer of any development subject to this chapter may appeal to the council for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus between the impact of the development and the number of residential workforce housing units or in-lieu fees/land required.

(2) Any such appeal shall be made in writing and filed with the County clerk prior to final subdivision approval or issuance of a building permit for development, whichever is applicable. Any such

appeal shall administratively stay the process of the development's subdivision or building permit, which ever is applicable, until a decision on the appeal is rendered. The appeal shall set forth in detail the factual and legal basis for the claim of reduction, adjustment or waiver, and the developer shall bear the burden of presenting substantial evidence to support the appeal, including comparable and relevant technical information." A copy of the Ordinance, including this language, is appended to Plaintiff's CSOF filed herein on July 31, 2009.

The Plaintiffs/Applicants did submit their request in writing and did file it with the County Clerk. But they did not provide substantial evidence to support the factual basis of the claim for a waiver. In fact, they did not present any factual basis for their claim that they were entitled a complete waiver except to say that they were planning to provide upscale housing which, they claimed, might result in residents moving out of less expensive housing to "trade up" and thereby freeing that housing for others. The Plaintiffs/Applicants did provide information that their projects were in an area well known to have serious water shortage problems and extreme traffic congestion, but did not indicate that they would not impact the water shortage or the traffic problems. In fact the Draft EA provided specific information about how the projects impacted both problems. There was nothing offered to distinguish their projects from other proposals of the same kind, all of which are specifically included in the Ordinance. In other

words, their application for a waiver amounted to a facial challenge to the Ordinance.

VII. THE NEXUS BETWEEN DEVELOPING HIGH END PROJECTS AND THE DEARTH OF HOUSING AFFORDABLE TO THE WORKFORCE IS ESTABLISHED BY THE ORDINANCE AND PLAINTIFFS DID NOT OFFER ANY EVIDENCE THAT THEIR PROJECTS WERE DIFFERENT IN SOME WAY THAT WOULD QUALIFY THEM FOR A COMPLETE EXEMPTION

The term "nexus" merely means "a means of connection, a link or tie." American Heritage Dictionary, Second College Edition. The legal definition is no different. According to the Seventh Edition of Black's Law Dictionary, the term "nexus" means "a connection or link." The connection is between the need for affordable housing to Maui's workforce and the construction of high end projects that deplete the extremely limited resources. Nevertheless, such evidence as the developers offered to refute the connection was limited to conclusory statements in the McCorriston letter such as ". . . the Developer expects to hire, where practicable, Maui-based contractors. . . ." Based on this unsupported expectation, the McCorriston letter concludes that the project will not increase the demand for workforce housing. CSOF 4. The letter ignores the fact that by using limited resources to construct high end housing, the projects subtract from the resources remaining to provide the sorely needed workforce housing. Although copies of the Draft EA for Kamaole Pointe and site plans for Kihei Pointe were provided, the data did not support the waiver request.

VIII. PLAINTIFFS WRONGLY ARGUE THAT THE REAL ISSUE IS WHETHER OR NOT THERE IS ANY EVIDENCE THAT PLAINTIFFS' PROJECTS WOULD MAKE THE PROBLEM WORSE

In their Memo in Support, Plaintiffs state that the real issue was "whether or not there is any evidence that Plaintiffs' projects would make the problem worse," disregarding that it was the Plaintiffs' burden to demonstrate that there was no connection between their up-scale project and the need for workforce housing. Memo in Supp., p. 17. This confusion about the burden of proof is demonstrated in a number of places in the Memo in Support.

(1) "However, Mr. Kushi's legal explanation about the 90-day clock and the necessity for a contested case hearing or a pre-hearing decision could not provide a basis on which to find a nexus." Memo in Supp. fn. 2, p. 19

(2) "Additionally, many of the Council Members made sweeping statements that they decided not to grant Plaintiffs' appeal (sic) because they felt that Plaintiffs had not provided enough information, and/or they wished Plaintiffs had made a presentation at the meeting or answered their questions."

(3) "Member Hokama also stated that he would have wanted information about the infrastructure." This was included in Plaintiff's submittal in the Infrastructure section of the SMA Application. See Ex. 7. p. 193.

Despite this statement, page 193 of the Draft EA does nothing more than reiterate the terrible water problems on Maui, and point out that the Iao Aquifer which provides water for Kihei is being over-pumped and has been brought under the jurisdiction of the

State Water Commission. The Draft EA also indicates that, after the remaining 800,000 gallons per day is assigned, the County will not be issuing new water meters until new sources are developed. Plaintiffs' CSOF 8, Ex. 1, Draft EA, pp. 25-26. This illustrates why there is a nexus between affordable housing and luxury housing development. Who will get the remaining water?

Furthermore, the SMS housing study stated that: "Nearly 30 percent of all those who expect to be moving out of Hawaii mentioned housing prices as their main reason for leaving." SMS Housing Policy Study, p. 19 appended to Plaintiffs' MSJ as part of Exhibit 7.

In addition, the Draft EA traffic impact report assumed that project traffic executing westbound to southbound left turns would use the planned North South Collector Road, without which, the report implied, the project unbuildable. Plaintiffs/Applicants deemed it unnecessary for Chris Hart to attend the waiver hearing. Had he done so, he might have told the Council what he told the Plaintiffs: there was no way their project would get approval if it tried to use the terribly overburdened South Kihei Road. CSOF 31. Traffic capacity is limited and if it is made available for high-end units, it is not available for affordable units. Furthermore, the failure to ask Chris Hart to attend the hearing further illustrates the Plaintiffs/Developers' lack of a good faith attempt to meet their burden of proof.

IX. IF THIS COURT FINDS AS A MATTER OF LAW THAT ONE OR MORE OF THE COUNCIL MEMBERS WAS BIASED BY CONFLICT OF INTEREST THEREBY DENYING PLAINTIFFS A COMMON LAW RIGHT TO A FAIR TRIBUNAL, THE REMEDY IS TO REMAND FOR A HEARING WITHOUT THE BIASED COUNCIL MEMBERS

County has not discovered a specific federal common law doctrine prohibiting public officials from participating in governmental decisions when they have a conflict of interest. However, the California state courts have identified that common law doctrine in California that augments the California statutory provisions governing conflicts of interest. If the doctrine is breached, the matter should be remanded. In Clark v. City of Hermosa Beach, 48 Cal.App.4th 1152, 1170-1175, 56 Cal.Rptr.2d 223, 234-237 (1996), cert. denied 520 U.S. 1167 (1997), the court held that the appropriate remedy under the common law doctrine was a remand for further proceedings and noted that ". . . the board cannot be said to have exhausted its power to act until it has given . . . a fair hearing. The court also noted that the question of whether or not a hearing is fair is a question of law, not of fact. The court reversed the lower court's decision reinstating the permits the planning commission had awarded to the Plaintiffs. Id. at 1169-70.

In Clark, the Hermosa Planning Commission had unanimously approved the Plaintiffs' development project because it complied with all planning and zoning conditions. Apparently, the statutory scheme allowed for that decision to be appealed to the City Council which voted to deny the permits. Id. at 1163-64. The Hermosa Beach City Council had tried but failed to impose a moratorium on

the construction of buildings over 30 feet in height. The moratorium required an affirmative vote by four-fifths of the Council Members. The proponents did not have four-fifths but they did have a majority and simply denied requests for 35 foot structures despite the fact that the zoning permitted such structures. It was this that led the court to find that the Council was not impartial with respect to the Plaintiffs project which included 35 foot structures violating the common law doctrine.

However, the appellate court overturned the trial court's finding that the Plaintiffs' Constitutional due process rights had been violated because "a state law requirement that a public entity conduct hearings in a fair manner does not automatically implicate the federal due process clause. The court based its decision dismissing the constitutional claim on the finding that the Plaintiffs did not have a property interest in their application for a permit because of the discretion vested in the Planning Commission and the City Council. Clark v. City of Hermosa Beach, supra, at 1181. Because there was no federal constitutional claim, no attorneys' fees were awarded.

That situation is not analogous to the Maui County Council situation. No one was trying to accomplish by other means the purposes of an ordinance that had failed to pass.

If the Plaintiffs apply a second time for a waiver they will face a different County Council. Former Chair Hokama has "termed out" and been replaced by a new Council Member, Sol Kohalahala.

Council Member Anderson did not run for re-election and her seat is now filled by Wayne Nishiki. Neither of these gentleman were on the County Council when the Ordinance was passed, nor did they participate in the waiver hearing. CSOF 32. The returning Council Members have indicated that they are willing to grant waivers if the requisite burden of proof is met. CSOF 29. None of statements quoted by Plaintiffs in their Memo in Support indicate that the Council Members would not be willing to entertain an application for a waiver during which their questions would be addressed.

X. CONCLUSION

Plaintiffs have failed to meet their burden of demonstrating that there are no undisputed issues of material fact and that they are entitled to judgment as a matter of law on their claims that their due process rights have been violated. Even if there were no disputed fact, Plaintiffs are not entitled to judgment as a matter of law. Their Motion For Partial Summary Judgment should be denied.

DATED: Wailuku, Maui, Hawaii, September 10, 2009.

BRIAN T. MOTO
Corporation Counsel
Attorney for Defendant
COUNTY OF MAUI

By /s/ Madelyn S. D'Enbeau
MADELYN S. D'ENBEAU
Deputy Corporation Counsel