

ORIGINAL

CHEE MARKHAM & FELDMAN
Attorneys at Law

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

GREGORY K. MARKHAM (3453-0)

1000 American Savings Bank Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Telephone: (808) 523-0111

AUG 27 2012
at 1 o'clock and 0 min. f M. ch
SUE BEITIA, CLERK

Attorney for Plaintiff
KAUAI BEACH VILLAS—PHASE II, LLC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KAUAI BEACH VILLAS—PHASE II,
LLC,

Civil Action No. CV 12 00483 LEK
COMPLAINT; SUMMONS RLP

Plaintiff,

vs.

COUNTY OF KAUAI, KAUAI
COUNTY COUNCIL, KAUAI
PLANNING DEPARTMENT AND
DOE DEFENDANTS 1-20,

Defendants.

COMPLAINT

Plaintiff Kauai Beach Villas – Phase II, LLC (“KBV”) alleges for its claims for relief against Defendants County of Kaua’i (the “County”), Kaua’i County Coun-

cil (the “**Council**”), Kaua’i Planning Department (the “**Planning Department**”) and Doe Defendants 1–20 (collectively “**Defendants**”) as follows:

NATURE OF THE CASE

1. KBV owns property on Kaua’i that since 1977 has been designated for resort development in the Kaua’i general plan.

2. Consistent with, and in reliance on, the Kaua’i general plan and other assurances from the County, KBV and its predecessors in interest expended substantial sums to develop visitor accommodation units on the property as part of a larger resort project.

3. By voter initiative, the County adopted a charter amendment that capped at one unit the number of visitor accommodation units that may be approved for construction pursuant to Kaua’i’s established land use regulation and planning processes and imposed new land use regulations for the approval of more than one visitor accommodation unit.

4. The stated purpose of the charter amendment is to “implement” the Kaua’i general plan by enforcing the “planning growth range” for visitor accommodation units purportedly set out in the general plan.

5. This stated purpose is actually inconsistent with the general plan because the “planning growth ranges” in the general plan were not intended to set limits on the growth of visitor accommodation units.

6. When the proposed charter amendment was placed on the ballot, the County failed to explain the inconsistency between the general plan and the proposed amendment and failed to provide voters with an objective summary of the proposed amendment. Instead, the County inaccurately described the proposed amendment as “implementing” the general plan.

7. The charter amendment was adopted at the 2008 general election.

8. The Planning Department has admitted that the charter amendment is inconsistent with the general plan and that the “planning growth ranges” in the general plan were not intended to be “limits for growth.”

9. By limiting the construction of new visitor accommodation units pursuant to the charter amendment, the County seeks to restrict the number of visitors to Kaua‘i and part-time residents of Kaua‘i.

10. If the charter amendment were effective, the restrictions on new visitor accommodation units would have a disproportionate impact on visitors to Kaua‘i and part-time residents of Kaua‘i by substantially reducing the number of visitor accommodation units available for rent and purchase and by making the available visitor accommodation units substantially more expensive.

11. The County does not have a legitimate governmental interest in restricting the number of visitors to Kaua‘i or in restricting the number of part-time residents of Kaua‘i.

12. Despite the Planning Department's admissions and the absence of a legitimate governmental interest, the County Council adopted an ordinance to "implement" the charter amendment.

13. The ordinance created various exemptions from the cap on the construction of new visitor accommodation units for existing and planned projects, with the consequence that the number of visitor accommodation units that may be constructed on Kaua'i will significantly exceed the "planning growth range" supposedly implemented by the charter amendment.

14. Disregarding the resort designation in the general plan, ignoring approvals granted by the County for the resort project and overlooking the efforts made and the costs incurred to develop the project and the property, the ordinance does not exempt KBV's property from the cap on new visitor accommodation units.

15. For projects without the benefit of an exemption, the County may only approve a total of 252 new visitor accommodation units between January 1, 2012 and December 31, 2016.

16. Even if KBV were granted the right to construct all 252 new visitor accommodation units, this amount is substantially less than the number of visitor accommodation units planned for the property in the general plan and would be insufficient to support the development of the property as part of the larger resort project.

17. But for the charter amendment, KBV would pursue the development of visitor accommodation units on its property as contemplated by the general plan.

18. Because of the charter amendment, KBV cannot pursue the development of visitor accommodation units on its property as contemplated by the general plan.

19. The only purpose of the ordinance is to implement the charter amendment.

20. The charter amendment and the ordinance prohibit KBV from developing its property as contemplated by the general plan, substantially and negatively affect the value and use of the property, frustrate KBV's investment-backed expectations and do not substantially advance a legitimate state interest.

21. As a result of the foregoing, the charter amendment and the implementing ordinance are unconstitutional as contrary to the mandate of the Fourteenth Amendment to the Constitution of the United States.

22. As a result of the foregoing, the charter amendment and the implementing ordinance violate state law prohibiting the enactment of land use regulations through voter initiative and directing that all land use regulations be enacted by ordinances properly adopted by the respective county councils.

23. As a result of the foregoing, the charter amendment violates the requirement that all measures proposed by ballot initiative and all proposed amendments

to the charter must accurately state the purpose and substance of the initiative or proposed amendment.

24. KBV is entitled to an order declaring that the charter amendment and its implementing ordinance are unconstitutional and invalid on their face.

THE PARTIES

25. KBV is a Hawai'i limited liability company. It owns real property on the Hanamā'ulu coastline on the Island and County of Kaua'i, State of Hawai'i, Tax Map Key No. (4) 3-7-003:007 (the "**Property**").

26. The County is a political subdivision and municipal corporation organized under the laws of the State of Hawai'i with the capacity and power to sue and be sued in its corporate name.

27. The Council is the legislative body of the County.

28. The Planning Department is the authority responsible for the administration and enforcement of zoning ordinances in the County.

29. Doe Defendants 1–20 are sued under fictitious names for the reason that their true names and identities are presently unknown to KBV, except that they are persons or entities who are in some manner presently unknown to KBV engaged in the activities alleged in this Complaint and/or are in some manner responsible for the injuries and damages to KBV. KBV asks for leave to insert their true names and capacities, activities or responsibilities, whether individual, corporate or other,

when the same are ascertained. KBV is entitled to the same relief against the Doe Defendants as against the other Defendants.

JURISDICTION AND VENUE

30. This Court has original jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

31. This Court has supplemental jurisdiction over KBV's state law claims pursuant to 28 U.S.C. § 1337(a) because those claims are related to, and form part of, the same case or controversy as the federal question claims.

32. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202 and by Federal Rule of Civil Procedure 57.

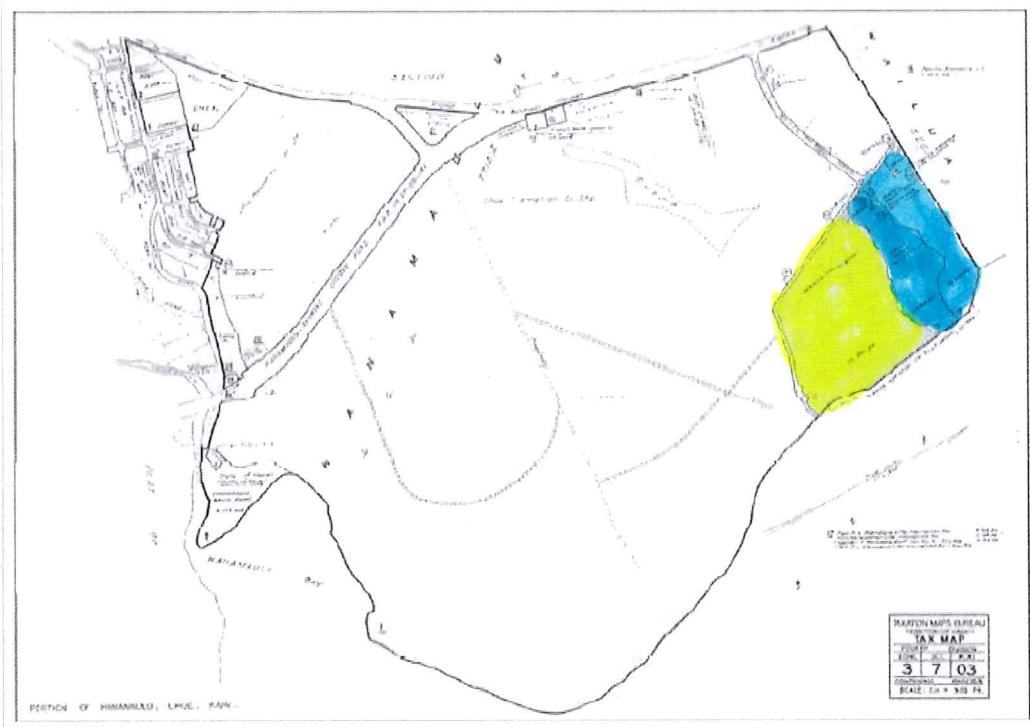
33. Venue is proper in this Court pursuant to 28 U.S.C. § 1331(b) because the events giving rise to KBV's claims occurred in this judicial district and the Property is situated in this judicial district.

THE PROPERTY AND THE PROJECT

34. The Property comprises approximately 33.904 acres of land. The Property is bounded on the east by the ocean.

35. The Property was planned for the final phase of a development project comprising approximately 60 acres of contiguous land (the "Project").

36. The Project and the Property are depicted below on the applicable tax map. The Property is colored yellow. The other portions of the Project are colored blue.



37. In furtherance of the Project, the Council by ordinance amended the Kaua'i General Plan in 1977 to designate the Property and the other lands comprising the Project for "Resort" development.

38. In furtherance of the Project, the Council enacted Kaua'i County Ordinance No. PM-26-79, which rezoned 25 acres of the Project to Resort District RR-20.

39. For "the first phase development on the 25 acres," Ordinance No. PM-26-79 authorized a total of "350 hotel units and 150 multi-family units."

40. Ordinance No. PM-26-79 also imposed several exactions, including a “\$500,000 in-lieu fee for recreational facilities and outright contribution for [the] first phase for the unrestricted use of the County.”

41. Additional exactions included the following:

3. The applicant shall provide acceleration, deceleration lanes and left-turn storage lanes with possible channelization, in accordance to the State Highways Division requirements.
4. As required by the Water Department, and pursuant to its rules and regulations, the applicant shall provide:
 - a) A 16-inch main extension of approximately 8,000 LF from Nonou Tank in Wailua Houselots to the intersection of Ha-leilio Road and Kuhio Highway;
 - b) A 16-inch main extension of approximately 9,800 LF from the intersection of Leho Drive and Kuhio Highway to the intersection of Kuhio Highway and the access road;
 - c) A 12-inch main approximately 1,500 LF along the access road to the project site; and
 - d) An adequately-sized pump with associated controls, piping and appurtenances in the existing Wailua Houselots Well No. 3.

42. As part of the Project, the Kaua‘i County Planning Commission (“**Commission**”) approved Class IV Zoning Permit Z-IV-80-26 and Special Management Area Use Permit SMA(U)-80-11 (“**Commission Approvals**”) for 350 hotel units and 150 multi-family units on the 25 acres that the Council had rezoned to Resort District RR-20.

43. The Commission Approvals were subject to “[a]ll conditions in Ord. No. PM-26-79” and additional exactions and conditions.

44. In significant part, the exactions imposed by Ordinance No. PM-26-79 and the Commission Approvals were for the development of the complete 60-acre Project.

45. If the exactions had not been for the development of the complete 60-acre Project, many of the exactions would have been unconstitutional.

46. On information and belief, KBV’s predecessor in interest accepted the exactions on the understanding that they were imposed for the development of the complete 60-acre Project.

47. On information and belief, all exactions and other conditions imposed by Ordinance No. PM-26-79 and the Commission Approvals have been satisfied.

48. In accordance with Ordinance No. PM-26-79 and the Commission Approvals, 350 hotel units and 150 multi-family units were constructed on the 25-acre parcel.

49. Consistent with the 1977 general plan and the prior approvals for the Project, the 2000 Kaua'i General Plan (the “**General Plan**”) identified the entire Property as a “Planned Project” and designated the Property for “Resort” development.

50. The General Plan stated that the entire Property is “[p]lanned for resort use.”

51. The General Plan contemplated “RR-20 zoning” for the Property “with a total allowable density of 680 multi-family units or 1,360 hotel units.”

52. In accordance with the General Plan, the State Land Use Commission placed most of the Property in the Urban district. At the makai edge of the Property, a 150-foot strip of land was maintained in the Conservation district.

53. The General Plan and Land Use Commission designations for the Property remain the same today.

KBV

54. KBV acquired the Property by Limited Warranty Deed, recorded in the Bureau of Conveyances on December 16, 2005 as Document No. 2005-257611.

55. KBV has the legal right to possess and develop the Property.

56. KBV acquired the Property with the intent to complete the final phase of the Project.

57. KBV and its predecessors in interest have expended substantial sums to complete the Project, including approximately \$5 million in improvements for the County, in reliance on prior governmental approvals and designations relating to the Project and the Property.

58. Any use of the Property other than as designated in the General Plan would substantially diminish the value and use of the Property.

THE CHARTER AMENDMENT

59. On or about June 13, 2008, the Coalition for Responsible Government submitted a petition for a charter amendment (the “**Petition**”) to the Kaua'i County Clerk.

60. The Petition asserted as follows:

Whereas:

1. Section 14.06 of the Charter of the County of Kauai directs the County Council to enact a general plan to govern the future physical development of the county;
2. In the November 2000 Kauai County General Plan, the Planning Department’s estimate for the average daily visitor count for the year 2020 is between 24,000 and 28,000 average daily visitors (compared to 17,200 in 1998). The high-end estimate of 28,000 would, using a conservative occupancy rate, correspond to an increase in the demand for transient overnight accommodation units of approximately 1.5% (or approximately 125) transient overnight accommodation units per year;
3. During the period 2000 through 2007, the Kauai Planning Commission has granted approvals for more than 4,000 transient overnight accommodation units, such that if each of these approved units is constructed, the resulting growth rate would be more than 4 times the high end of the growth range in the November 2000 Kauai County General Plan;
4. Continued approvals by the Kauai Planning Commission at this rate would allow an increase in construction of transient overnight accommodation units of greater than 100% between 2000 and 2020, far exceeding the increase envisioned in the General Plan;
5. The construction and occupancy of such units would lead to a commensurately excessive increase in the average daily visitor count;

6. The rate of growth in transient overnight accommodations in the County has already surpassed the capability of the County's infrastructure, and growth in the average daily visitor count far beyond the planning growth range contemplated in the general plan would create detrimental impacts in areas that include: increased traffic and highway congestion; increased demands for limited police, fire, and emergency services; overcrowding at parks and beaches; unsustainable demands for limited resources including groundwater, wastewater treatment, landfills, energy; low-to-moderate income housing shortages exacerbated by the demand to import additional service-sector workers; additional noise from helicopter tours, motorcycle rentals and other tourist activities; and negative impacts on Kauai's character, pace and quality of life;
7. The negative impacts cited above threaten the clean and healthful environment to which Hawaii's residents are entitled pursuant to Article XI, Section 9 of the Hawaii State Constitution;
8. The County Council is responsible for funding the additional infrastructure necessary to mitigate such impacts pursuant to Section 3.10 of the Charter of the County of Kaua'i;

Therefore the people of Kauai find that the general welfare of the County and its residents requires that the Charter of the County of Kauai be amended as specified below.

61. Based on these assertions, the Petition proposed to amend the County of Kauai Charter (the "**Charter**") by inserting the following provision:

Implementation of the General Plan.

- A. The power to process and to issue any zoning, use, subdivision, or variance permit for more than one transient accommodation unit shall be vested in and exercisable exclusively by the council. As used in this Section, "transient accommodation unit" shall mean an accommodation unit or a portion thereof in a hotel, timeshare facility, resort condominium, fractional ownership facility, vacation rental unit or other similarly-used dwelling that is rented or used by one or more persons for whom such accommodation unit is not the person's primary residence under the Internal Revenue Code.

- B. Any applicant seeking the issuance of a zoning, use, subdivision or variance permit for more than one accommodation unit shall certify to the planning department whether any use of the units as a transient accommodation unit is projected by the applicant. Prior to granting any such permit for a transient accommodation unit, the council shall conduct a public hearing and make a finding that granting such permit would be consistent with the planning growth range of the general plan and in the best interests of the county and its people. Approval of any such application shall require a favorable vote of two thirds (2/3) of the entire membership of the council. Appeals of any decision by the council relating to such permits must be instituted in the circuit court within thirty (30) days after entrance of the final decision of the council.
- C. The council may by ordinance authorize the planning commission to process and issue such permits, or certain of them, on terms and conditions as the council may deem advisable, only upon the council's enactment of a rate of growth ordinance that limits the rate of increase in the number of transient accommodation units in the county to no greater than one-and-one-half percent (1.5%) per annum on a multi-year average basis, or such growth rate that is within the planning growth range of a future general plan adopted pursuant to Section 14.08.

SECTION 2

The council shall adopt such ordinances, laws, rules and regulations as are necessary to carry out the terms and intent of this amendment to the Charter.

SECTION 3

If any provision of this amendment shall be held by a final order of a court of competent jurisdiction to be invalid, all of the other terms of the amendment shall remain in full force and effect.

62. The proposed charter amendment was placed on the ballot for the 2008 general election.

63. The ballot question appeared under the materially inaccurate title "Kauai: Relating to the Implementation of the General Plan."

64. The ballot question asked voters the following question: “Shall Article III of the Charter of the County of Kauai be amended” by adding the new sections to the Charter that were proposed in the Petition.

65. Voters approved the amendment at the November 4, 2008 general election.

66. The amendment became Charter Section 3.19 (the “**Charter Amendment**”).

67. As adopted, the Charter Amendment provides as follows:

Implementation of the General Plan.

- A. The power to process and to issue any zoning, use, subdivision, or variance permit for more than one transient accommodation unit shall be vested in and exercisable exclusively by the council. As used in this Section, “transient accommodation unit” shall mean an accommodation unit or a portion thereof in a hotel, timeshare facility, resort condominium, fractional ownership facility, vacation rental unit or other similarly-used dwelling that is rented or used by one or more persons for whom such accommodation unit is not the person’s primary residence under the Internal Revenue Code.
- B. Any applicant seeking the issuance of a zoning, use, subdivision or variance permit for more than one accommodation unit shall certify to the planning department whether any use of the units as a transient accommodation unit is projected by the applicant. Prior to granting any such permit for a transient accommodation unit, the council shall conduct a public hearing and make a finding that granting such permit would be consistent with the planning growth range of the general plan and in the best interest of the county and its people. Approval of any such application shall require a favorable vote of two thirds (2/3) of the entire membership of the council. Appeals of any decision by the council relating to such permits must be instituted in the circuit court within thirty (30) days after entrance of the final decision of the council.

- C. The council may by ordinance authorize the planning commission to process and issue such permits, or certain of them, on terms and conditions as the council may deem advisable, only upon the council's enactment of a rate of growth ordinance that limits the rate of increase in the number of transient accommodation units in the county to no greater than one-and-one-half percent (1.5%) per annum on a multi-year average basis, or such growth rate that is within the planning growth range of a future general plan adopted pursuant to Section 14.08.
- D. The council shall adopt such ordinances, laws, rules and regulations as are necessary to carry out the terms and intent of this amendment to the Charter.
- E. If any provision of this amendment shall be held by a final order of a court of competent jurisdiction to be invalid, all of the other terms of the amendment shall remain in full force and effect.

68. The Charter Amendment attempts to affect and regulate land use and development in the County.

69. The Charter Amendment creates and defines a new land use classification called "transient accommodation unit" ("TAU").

70. The Charter Amendment applies only to TAUs.

71. The Charter Amendment caps the number of TAUs that may be approved pursuant to the County's established land use regulation and planning processes set out in the Comprehensive Zoning Ordinance ("CZO") at one unit (the "TAU Cap") per application for any zoning, use, subdivision or variance permit.

72. The Charter Amendment imposes new land use regulations for the approval of more than one TAU.

73. The stated purpose of the Charter Amendment is to “implement the General Plan” by limiting the number of TAUs on Kaua‘i to the “planning growth range” established in the General Plan.

74. But, as the Planning Department has admitted, projections in the General Plan were “not intended to be ‘targets’ or ‘limits’ for growth.” Moreover, projections in the General Plan are subject to periodic revision by the Planning Department, including revision at least every five years. The General Plan must be revised every ten years.

75. The Planning Department has further admitted, “[T]here are inconsistencies between Charter Section 3.19 and the General Plan. The policy proposed . . . pursuant to Charter Section 3.19 does not concur with the General Plan’s stated policy for visitor unit and resort growth, and will effectuate a growth rate that is loosely based on projections and studies that are not meant to function as compulsory targets.”

76. The Planning Department has also admitted, “The General Plan did not recommend limiting development within the [Visitor Destination Area] to a prescribed growth rate.”

77. The County did not inform voters of the inconsistencies between the Charter Amendment and the General Plan.

78. On the contrary, the County inaccurately titled the proposed amendment “RELATING TO IMPLEMENTATION OF THE GENERAL PLAN.”

79. In the section titled “BACKGROUND,” the County election materials stated, among other things, “The General Plan serves as a guide to future Council actions concerning land use and development, regulations, and expenditures for capital improvements. However, the County Charter does not require that the number of ‘transient accommodation units’ as defined in the proposed Charter amendment approved by the County be consistent with the General Plan’s growth scenarios.” The “background” failed to inform voters that projections in the General Plan were “not intended to be ‘targets’ or ‘limits’ for growth.”

80. In the section titled “EXPLANATION OF PROPOSED AMENDMENT,” the County election materials stated, among other things, “If approved, this Charter amendment would change the way that any zoning, use, subdivision, or variance permit for more than one ‘transient accommodation unit’ as defined in the proposed Charter amendment is granted for hotels, timeshares and other ‘transient accommodation units . . .’” In the same section, the County election materials further stated, “Anyone applying to develop more than one ‘transient accommodation unit’ as defined in the proposed Charter amendment would be required to seek the approval of either the County Council or the Planning Commission.”

81. The section titled “PROS AND CONS,” the County election materials identified the following “Pros”:

- Gives the County Council, an elected body, two mechanisms to limit the approval of "transient accommodation units" as defined in the proposed Charter amendment to amounts consistent with the projections in present and future General Plans.
- Removes the ability of the Planning Commission, a body whose members are appointed by the Mayor and confirmed by the County Council, to approve more "transient accommodation units" (as defined in the proposed Charter amendment) than would be consistent with the projections in present and future General Plans.
- The approval rate over the past 8 years for hotels, timeshares and other transient accommodations has been far greater than the projections in the 2000 General Plan. Requiring that growth be paced consistently with General Plan growth scenarios could help to ensure that such growth is consistent with Kauai's infrastructure, housing stock, employment needs and desired character.

82. The “Pros” did not inform voters that the Charter Amendment itself was inconsistent with the General Plan, that the projections in the General Plan are subject to periodic revision by the Planning Department, including revision at least every five years, that the General Plan must be revised every ten years, that the Charter Amendment did not concur with the General Plan’s stated policy for visitor unit and resort growth or that the Charter Amendment would effectuate a growth rate that is loosely based on projections and studies that are not meant to function as compulsory targets.

83. The same section identified the following “Cons”:

- Should the County Council choose to not pass an ordinance requiring the Planning Commission to limit the approval of “transient accommodation units” as defined in the proposed Charter amendment, the County Council would be responsible for additional administrative permitting duties.
- Administering a system for allocating a limited number of permits for “transient accommodation units” as defined in the proposed Charter amendment could be more complicated than the present system.
- Setting a limit on the number of new transient accommodation units might result in unintended negative impacts in efforts to attract new capital investment and employment opportunities.

84. The “Cons” failed to identify the numerous inconsistencies between the Charter Amendment and the General Plan.

85. The “Cons” merely suggested that the permitting system created by the Charter Amendment for TAUs “could be more complicated than the present system” and “might result in unintended negative impacts in efforts to attract new capital investment and employment opportunities.” In fact, the permitting system created by the Charter Amendment for TAUs is significantly more complicated than the permitting system for all other uses on Kaua‘i. And the permitting system created by the Charter Amendment for TAUs will significantly impact capital investment and employment on Kaua‘i.

86. For these and other reasons, the “Pros” and “Cons” stated in the County election materials were materially inaccurate and misleading.

87. For these and other reasons, the County election materials failed to provide an objective summary of the substance of the Charter Amendment.

ORDINANCE NO. 912

88. On October 5, 2011, the Council, through Ordinance No. 912, adopted Bill No. 2410, titled “A Bill for an Ordinance to Amend Chapter 8, Kaua'i County Code, 1987, as Amended, Relating to the Permitting Process for Transient Accommodation Units.”

89. The mayor approved Ordinance No. 912 on October 21, 2011. Ordinance No. 912 took effect 30 days after approval.

90. Ordinance No. 912 was adopted solely to implement the Charter Amendment.

91. Ordinance No. 912 is inconsistent with the General Plan.

92. Ordinance No. 912 amends the CZO by adding a new Article 28 titled “Transient Accommodation Unit Certificate Allocation Program.”

93. Ordinance No. 912 applies only to TAUs.

94. To construct, develop or use a TAU under Article 28, an applicant (1) must be issued a TAU certificate by the Planning Commission and (2) must obtain all necessary permits and approvals from the Planning Commission.

95. Article 28 provides that the total number of TAU certificates available for issuance during a five-year allocation cycle shall be equal to 5.1% of the TAU inventory in the allocation base year.

96. For the first authorization period beginning January 1, 2012 and ending December 31, 2016, the Planning Commission may only approve up to 252 new TAUs.

97. The General Plan anticipates and plans for the construction of more than 252 visitor accommodation units on the Property.

98. Article 28 exempts certain “Permitted Projects” and “Eligible Resort Projects” from the TAU cap imposed by the Charter Amendment and the TAU limitations and certificate requirements imposed by Ordinance No. 912.

99. The Planning Department has not identified the final phase of the Project as a Permitted Project or an Eligible Resort Project.

100. On April 26, 2012, KBV applied to the Planning Department Director (“Director”) to exempt 400 units located on the Property from the TAU Cap and the certificate process.

101. By letter dated June 1, 2012, the Director denied KBV’s application. The Director determined that the Property “is not an Eligible Resort Project” and that an “exemption from the TAU Certificate process cannot be considered.”

102. Solely to forestall any misplaced argument that KBV was required to “exhaust” administrative remedies or “ripen” its claims, KBV appealed the Director’s Decision to the Commission on June 19, 2012. At the Department’s

insistence, the Commission referred the appeal to a hearings officer. The hearings officer has not scheduled a hearing.

103. The appeal is futile and irrelevant. The Court should not wait for the resolution of the appeal before deciding KBV's facial challenges to the Charter Amendment and its implementing ordinance, Ordinance No. 912.

104. The final phase of the Project is not exempt from the TAU Cap imposed by the Charter Amendment or the TAU limitations and certificate requirements imposed by Ordinance No. 912.

EFFECT ON KBV

105. The Charter Amendment and Ordinance No. 912 apply to the Project.

106. The Charter Amendment and Ordinance No. 912 substantially and negatively affect KBV's ability to complete the final phase of the Project.

107. The Charter Amendment and Ordinance No. 912 substantially and negatively interfere with KBV's distinct and reasonable investment-backed expectations.

108. The Charter Amendment and Ordinance No. 912 substantially and negatively affect the value and use of the Property.

109. But for the Charter Amendment, KBV would pursue the development of visitor accommodation units on its property as contemplated by the General Plan.

110. Because of the Charter Amendment, KBV cannot pursue the development of visitor accommodation units on its property as contemplated by the General Plan.

111. KBV is injured by the Charter Amendment.

112. KBV asserts legal rights and privileges in which it has concrete interests. Defendants, who also assert concrete interests therein, challenge or deny KBV's legal rights and privileges. A declaratory judgment will serve to terminate the uncertainty or controversy giving rise to this proceeding.

113. KBV is entitled to the declaratory relief requested in this complaint.

COUNT I
(DENIAL OF SUBSTANTIVE DUE PROCESS)

114. KBV realleges and incorporates by reference the allegations contained in the preceding paragraphs.

115. Pursuant to 42 U.S.C. § 1983, “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”

116. KBV possesses constitutionally protected property rights in and to the Property and the development and use of the Property.

117. These constitutional protections include the Due Process Clause of Fourteenth Amendment to the U.S. Constitution, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”

118. The Due Process Clause requires, among other things, that a legislative act substantially advance a legitimate governmental interest.

119. The stated purpose of the Charter Amendment is to “implement the General Plan” by limiting the number of TAUs on Kaua‘i to the “planning growth range” established in the General Plan.

120. “TAU” is defined as “an accommodation unit or a portion thereof in a hotel, timeshare facility, resort condominium, fractional ownership facility, vacation rental unit or other similarly-used dwelling that is rented or used by one or more persons for whom such accommodation unit is not the person’s primary residence under the Internal Revenue Code.”

121. Visitors to Kaua‘i and part-time residents of Kauai use, own or occupy most of the hotel, timeshare facility, resort condominium, fractional ownership facility, vacation rental unit and similar visitor accommodation units on Kaua‘i.

122. By capping at one unit the number of TAUs that may be approved pursuant to the County’s established land use regulation and planning processes and

by imposing new land use regulations for the approval of more than one TAU, the County seeks to limit the number of nonresident visitors to Kaua‘i and part-time residents of Kaua‘i.

123. If the cap on the number of TAUs were effective, it would have a disproportionate impact on visitors to Kaua‘i and part-time residents of Kaua‘i by reducing the number of TAUs available for rent and purchase and by making any available TAUs substantially more expensive.

124. The County does not have a legitimate governmental interest in limiting the number of visitors to Kaua‘i or in limiting the number of part-time residents of Kaua‘i.

125. The County does not have a legitimate governmental interest in regulating land use and development based on the owner, user or occupier’s residency status or on whether the owner, user or occupier owns another residence.

126. The stated purpose of the Charter Amendment is to “implement the General Plan” by limiting the number of TAUs on Kaua‘i to the “planning growth range” established in the General Plan.

127. In fact, the Charter Amendment is inconsistent with the general plan because the “planning growth ranges” in the General Plan were not intended to be limits on growth.

128. The Charter Amendment, as implemented by Ordinance No. 912, cannot accomplish its stated purpose.

129. Under Ordinance No. 912, more than 4,000 TAUs will be exempted from the TAU Cap imposed by the Charter Amendment.

130. Without considering any future TAUs that may be approved under Ordinance No. 912, the total number of exempt TAUs, when added to the number of presently existing TAUs, will exceed the planning growth ranges purportedly established by the General Plan and purportedly implemented through the Charter Amendment.

131. For these and other reasons, the Charter Amendment, as implemented by Ordinance No. 912, does not substantially advance a legitimate state interest.

132. The Charter Amendment and Ordinance No. 912 are arbitrary, unreasonable and not rationally related to the stated purpose of the Charter Amendment or to a legitimate governmental interest.

133. The Charter Amendment is unconstitutional.

134. Ordinance No. 912 cannot implement an unconstitutional charter provision. Accordingly, Ordinance No. 912 is also invalid.

135. Because of the Charter Amendment and Ordinance No. 912, KBV has been, and continues to be, injured and deprived of its right to substantive due process under the Constitution and laws of the United States.

136. KBV is entitled to an order declaring the Charter Amendment and Ordinance No. 912 unconstitutional on their face because they fail to substantially advance a legitimate state interest .

COUNT II
(VIOLATION OF HRS § 46-4)

137. KBV realleges and incorporates by reference the allegations contained in the preceding paragraphs.

138. The counties have only those powers granted to them by the Hawai‘i state legislature and the Hawai‘i Constitution.

139. The counties are subject to the authority of the Hawai‘i state legislature to enact general laws, including laws allocating and reallocating powers and functions.

140. The County derives its power to regulate zoning, land use and development exclusively from HRS § 46-4 (the “**Zoning Enabling Act**”).

141. The Zoning Enabling Act mandates that land use regulations must be accomplished pursuant to a long-range, comprehensive plan.

142. The powers granted by the Zoning Enabling Act may not be exercised by voter initiative.

143. The powers granted by the Zoning Enabling Act may not be exercised through charter amendment.

144. Instead, the powers granted by the Zoning Enabling Act must be exercised by the Council through validly adopted ordinances.

145. The land use regulations and development restrictions expressed in the Charter Amendment were adopted in a manner and in a form that is contrary to the requirements of the Zoning Enabling Act.

146. The Charter Amendment and Ordinance No. 912 are inconsistent with the General Plan and were not adopted pursuant to a long-range, comprehensive plan.

147. The Charter Amendment exceeds the powers granted to the County and is invalid.

148. Ordinance No. 912 cannot implement an invalid charter provision. Accordingly, Ordinance No. 912 is also invalid.

149. As set forth above, KBV is injured by the Charter Amendment and Ordinance No. 912.

150. KBV is entitled to an order declaring that the Charter Amendment and its implementing ordinance, Ordinance No. 912, are invalid on their face because the Charter Amendment violates state law.

COUNT III
(VIOLATION OF CHARTER § 22.07D)

151. KBV realleges and incorporates by reference the allegations contained in the preceding paragraphs.

152. The Charter Amendment was proposed by voter initiative, which placed the amendment on the ballot for the 2008 Kaua'i general election.

153. Voters are entitled to an accurate description of the form and content of all ballot measures.

154. Furthermore, Kaua'i Charter § 22.07D specifically directs that the ballot for measures proposed by initiative "shall contain an objective summary of the substance of the measure."

155. The County failed to provide an objective summary of the Charter Amendment.

156. Therefore, the Charter Amendment was not adopted pursuant to a valid initiative.

157. Ordinance No. 912 cannot implement an invalid charter provision. Accordingly, Ordinance No. 912 is also invalid.

158. As set forth above, KBV is injured by the Charter Amendment, as implemented by Ordinance No. 912.

159. KBV is entitled to an order declaring that the Charter Amendment and its implementing ordinance, Ordinance No. 912, are invalid on their face because the Charter Amendment was adopted pursuant to an invalid initiative.

Wherefore, KBV asks the Court to:

- A. Enter judgment in favor of KBV and against Defendants declaring that the Charter Amendment and Ordinance No. 912 are unconstitutional and invalid on their face;
- B. Enjoin Defendants from enforcing the Charter Amendment and Ordinance No. 912 against KBV and all other landowners;
- C. Award KBV its fees and costs; and
- D. Award KBV such other and further relief as the Court deems just and equitable.

AUG 27 2012

DATED: Honolulu, Hawai'i, _____.


GREGORY K. MARKHAM
Attorney for Plaintiff
KAUAI BEACH VILLAS—PHASE II, LLC