McCORRISTON MILLER MUKAI MacKINNON LLP

ROBERT G. KLEIN 1192-0
LISA W. CATALDO 6159-0
DAYNA H. KAMIMURA-CHING 8350-0
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawai`i 96813
Telephone: (808) 529-7300
Facsimile: (808) 524-8293
klein@m4law.com

Attorneys for Plaintiffs
KAMAOLE POINTE DEVELOPMENT LP
and ALAKU POINTE LP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

KAMAOLE POINTE DEVELOPMENT LP; ALAKU POINTE LP,	CIVIL NO. CV07-00447 DAE LEK (Civil Rights)
Plaintiffs,	PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED JULY 30, 2009; CERTIFICATE OF SERVICE
vs.	
COUNTY OF MAUI; et al.,	
Defendants.	

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, FILED JULY 30, 2009

Plaintiffs Kamaole Pointe Development LP and Alaku Pointe LP ("Plaintiffs") respectfully submit their memorandum in opposition to Defendant's Motion for Summary Judgment, filed on July 30, 2009 ("Motion").

I. INTRODUCTION

Defendant's Motion is based on inapplicable and distinguishable case law and conclusory assertions made by Councilmembers in an attempt to demonstrate that the consideration they gave to Plaintiffs' waiver application satisfied the constitutional requirements of due process of law. The record, however, reflects that Plaintiffs' due process rights were egregiously violated. The Councilmembers based their decision to deny Plaintiffs' request for a waiver on their determination never to grant waivers. This determination was in turn based on the Councilmembers' irrational bias against residential developers, particularly Plaintiffs who, pursuant to the terms of the Ordinance, sought to exempt themselves from the onerous affordable housing requirements by demonstrating a lack of nexus between their projects and the housing shortage. Having made up their mind not to grant waivers, the Council did not afford Plaintiffs' application the process it was due. Based on the evidence in this case, a reasonable juror could not return a verdict for Defendant. Accordingly, Plaintiffs respectfully request that

this Honorable Court deny Defendant's Motion, and instead grant summary judgment in Plaintiffs' favor.

II. FACTS

The background facts of this case are set forth in Plaintiffs' Motion for Partial Summary Judgment and related papers filed on July 31, 2009 ("Plaintiffs' Motion"), adopted herein by this reference. To summarize briefly, Plaintiffs invested millions of dollars to acquire two vacant parcels of land and associated entitlements to two multi-family residential projects in the urban corridor of Kihei, Maui. Thereafter, the Maui County Council passed onerous and unprecedented affordable housing requirements in the Ordinance as pre-conditions for a building permit. Plaintiffs appealed for a waiver from the Ordinance pursuant to its terms, and in support, submitted detailed and uncontested proof of the absence of any adverse impact caused by their projects. The Council arbitrarily and irrationally denied Plaintiffs' appeal, making clear that they would never grant any waivers.

III. STANDARD OF REVIEW

Summary judgment should only be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure ("FRCP") Rule 56(c). The moving party has the initial burden of "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact."

T.W. Elec. Serv., 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) ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.") (citation omitted). If the moving party meets its burden, then the non-movant must present admissible evidence showing that there is a genuine issue for trial. FRCP Rule 56(e); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044 (9th Cir. 1995).

Moreover, Defendant also has the ultimate burden of persuasion on the motion. Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc., 210 F.3d 1099, 1102 (9th Cir. 2000) ("A moving party without the ultimate burden of persuasion at trial-usually, but not always, a defendant-has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. . . . In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.") (citations omitted). The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990).

IV. DISCUSSION

A. This Court Properly Held that Plaintiffs have a Protectable Property Interest

This Court has previously held that Plaintiffs established a protected property interest in the legitimate use of their land, and the Council's denial of Plaintiffs' waiver deprived Plaintiffs of that protected property interest. Kamaole Pointe Dev. v. County of Maui, 2008 WL 5025004, *10 (D. Hawai`i, November 25, 2008). This is the law of the case. Defendant did not file a motion for reconsideration of the Court's decision, but nevertheless makes the same argument as the one rejected, attempting to get another bite at the apple. The Court should again reject Defendant's argument.

1. The Rule in the Ninth Circuit is that Landowners have a Constitutionally Protected Property Interest in their Right to Devote their Land to Any Legitimate Use

Defendant appears to contend that Plaintiffs must assert a vested right or entitlement to a permit or waiver, rather than simply claiming a property interest in land. While this may be the rule in other circuits, it is *not* the rule in the Ninth Circuit. The apparent conflict in the circuits appears to have arisen from the Supreme Court's opinion in Board of Regents v. Roth, 408 U.S. 564, 569 (1972). In that case, the Court looked to several of its decisions in which it had held: (1) a welfare recipient had a property interest entitling him to a hearing before the termination of benefits, Goldberg v. Kelly, 254 U.S. 254 (1970); (2) professors

dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551 (1956), and college professors and staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183 (1952), have interests in continued employment that are safeguarded by due process; and (3) the principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment, Connell v. Higginbotham, 403 U.S. 207, 208 (1971). Roth, 408 U.S. 564, 576-77. The Court then held:

> Certain attributes of "property" interests protected by procedural due process emerge from these decisions. To have a property interest *in a benefit*, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Roth, 408 U.S. at 577 (emphasis added). As the above-emphasized language demonstrates, the requirement of a "legitimate claim of entitlement" applies to these "new" property rights (i.e., *benefits*) that had arisen in Goldberg and other similar cases. In Goldberg, the Court explained its decision to extend property rights to welfare entitlements stating that "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." 397 U.S. at 263 n.8. The Roth Court did not, however, repudiate the Supreme Court's precedent establishing due process protection for

"old" property rights, such as the "traditional common-law" right to use land inherent in fee simple title. Although some circuits may have extended Roth's entitlement standard to the real property context, *the Ninth Circuit has not.*

As this Court recognized, in Harris v. County of Riverside, the Ninth Circuit held that "[t]he right of an owner to devote his land to any legitimate use is properly within the protection of the Constitution." 904 F.2d 497, 503 (9th Cir. 1990) (quoting Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928) ("Roberge")) (brackets omitted). More recently, in Action Apt. Ass'n, Inc. v. Santa Monica Rent Control Board, the Ninth Circuit stated, albeit in the substantive due process context: "We have no difficulty in recognizing the alleged deprivation of rights in real property as a proper subject of substantive due process analysis. . . . [L]andowners have a constitutionally protected property interest in their right to devote their land to any legitimate use." 509 F.3d 1020, 1029 (9th Cir. 2007) (internal quotation signals omitted) (quoting Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 949 (9th Cir. 2004), overruled on other grounds, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)). Accordingly, Plaintiffs' land use expectations constitute protected entitlements.

Defendant asserts that the cases upon which the Court relied are not applicable. Motion at 11-13. Defendant appears to argue that Harris and Roberge only apply in cases in which a local government attempts to delegate to private

landowners the power to determine how another private party may use his or her land. Motion at 11-13. The only case cited in support of this proposition is Young v. City of Simi Valley, 216 F.3d 807 (9th Cir. 2000), cert. denied, 531 U.S. 1104 (2001). Motion at 12. In that case, the issue before the Ninth Circuit was the constitutionality of an ordinance that allows private parties to obtain a zoning permit that effectively blocks adult establishments. The Court held the ordinance facially unconstitutional, and further supported its decision with cases, including Roberge, which held that such delegation of power to private individuals was repugnant to the due process clause. Id. at 820. The Young Court's decision does not support Defendant's assertion.

2. The Cases Cited by Defendant are Not Applicable

Defendant relies on various cases in an attempt to support its position that Plaintiffs do not have a protected property interest, none of which are applicable.

In Outdoor Media Group, Inc. v. City of Beaumont, the Court held that the plaintiff lacked vested rights in its unapproved billboard permit application. 506 F.3d 895, 903 (9th Cir. 2007). The Court relied on California law recognizing a protected property interest in billboard construction only once a permit has been issued. Id. Outdoor Media does not discuss property rights arising out of real property, and therefore, is inapplicable to this case.

Lakeview Dev. Corp. v. South Lake Tahoe concerns whether the plaintiff had a vested rights claim, which the court recognized is not the same as a claim for deprivation of due process. 915 F.2d 1290, 1295 (9th Cir. 1990). The Court explained: "In contrast to a taking or deprivation claim, the gravamen of a 'vested rights' claim is that the landowner has a right to a particular use of his land because he has relied to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use." Id. Here, Plaintiffs are not asserting a vested rights claim based on a formal government promise, and thus, this case is also inapplicable.

Moreover, contrary to Defendant's contention, not all property rights are established by state law. Defendant misconstrues the Supreme Court's opinion in Roth. In that case, the Court stated:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as* state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. State law is one such independent source, but it is not the only source. Here, the source from which Plaintiffs' property interest stems is the "traditional common-law" interest in their real property. See Goldberg, Roberge, Action Apt., and Harris, supra. There is no need for this Court to examine whether an additional property right has been established by state law.

Accordingly, there is no basis for Defendant's argument, and this Court properly held that Plaintiffs established a constitutionally protected property interest. The issue now before the Court is whether Plaintiffs were denied due process of law.

B. Plaintiffs were Denied Due Process of Law

"[I]ndividuals whose property interests are at stake are entitled to 'notice and an opportunity to be heard.'" Dusenbery v. United States, 534 U.S. 161, 167 (2002) (quoting United States v. James Daniel Good Real Property, 510 U.S. 43, 48 (1993)). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and *in a meaningful manner*.'" Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). Due process requires "a fair trial in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955). Here, the Council did not afford Plaintiffs' due process of law.

Section 2.96.030(C)(1) of the Ordinance states that a developer can appeal to the Council "for a reduction, adjustment, or waiver of the residential workforce housing requirements based upon the absence of any reasonable relationship or nexus between the impact of the development and the number of workforce housing units or in lieu fees/land required." This waiver provision could have, but did not save the Ordinance from constitutional infirmity as applied to Plaintiffs.

Defendants made Plaintiffs go through the paces (and expense) of a sham appeal and waiver process, demanding that they submit numerous copies of their hundreds of pages of detailed evidence, only to arbitrarily reject the appeal out of hand.

Defendant cites to the three-part test set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), and quoted in Sandy Beach Defense Fund v. City Council of City & County of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989), and argues that Plaintiffs were afforded due process of law. This test, however, decides whether the procedures provided are constitutionally sufficient. Here, even if the procedures afforded by the Ordinance on their face are constitutionally sufficient, the Council, in its application, did not afford Plaintiffs the very minimum process due—a meaningful opportunity to be heard.

1. Plaintiffs were Erroneously Deprived of their Property Interest

(a) The Councilmembers Improperly Rejected Plaintiffs' Appeal Based on their Bias Against Plaintiffs and their Related Determination to Never Grant Waivers

The Councilmembers not only expressed their general bias against residential developers, but also made known their specific bias against Plaintiffs—and indeed, any developer who would dare request a waiver under the Ordinance. This bias is evidenced, *inter alia*, by the Councilmembers' determinations that they would never grant waivers.

Many of the Councilmembers admitted that they would *always* find a "reasonable relationship or nexus between the impact of the development and the number of workforce housing units or in lieu fees/land required," that they therefore expected all applicable developments to build affordable housing, and thus, that they would never grant waivers. In other words, the Councilmembers believed that because Plaintiffs were not going to build affordable housing pursuant to the Ordinance, Plaintiffs would *ipso facto* exacerbate the affordable housing shortage. Having made this improper predetermination, the Councilmembers "reviewed" Plaintiffs' waiver appeal with this bias and did not give Plaintiffs the process they were due. The Councilmembers, seeing that Plaintiffs were requesting to provide zero affordable housing, rejected Plaintiffs' application on that basis alone, and ignored the issue they were required by the Ordinance to determine: whether there is any evidence that Plaintiffs' projects would make the problem worse.

Member Michael P. Victorino flatly stated: "[W]hen someone comes in and [is] asking for a waiver, A) they've gotta understand *we're not gonna give waivers*; and B) if they want something then they should make sure that they're ready to make that move toward affordable housing." Plaintiffs' Concise Statement of Facts in Support of its Motion for Partial Summary Judgment filed July 31, 2009 ("CSOF"), ¶26 (emphasis added). Member Victorino made it clear he was not just

speaking for himself: "We've talked about it. We had a conference last week Friday on it, *and we're not gonna change our mind*." Id. (emphasis added). Member Victorino later confirmed that he would not grant any waivers, and would require the developer of every applicable development to build affordable housing, and there was nothing Plaintiffs could have told him that would have changed his mind. CSOF, ¶27.

Likewise, at Member Victorino's deposition, the following transpired:

> Q. . . . . When you went through [Plaintiffs' waiver appeal] finding out information about [Plaintiffs'] project, did you have any problems with it other than it didn't provide for affordable housing and was requesting to be waived from the requirement of affordable housing?
>
> A. Not that I can recall, no.
>
> . . . .
>
> A. . . . . I think basically we looked at this project, and the affordable component wasn't included. And I think density and traffic and other issues were brought up, but I think the overlying concern that I had basically was the reluctance on your client's part to provide any affordable housing.
>
> Q. Okay. So, I mean if [Plaintffs] had satisfied the other concerns about density or traffic or satisfied you that those weren't issues, but still requested a waiver, you would have had problems granting that waiver?
>
> A. Very possible, yes.

CSOF, ¶36. The foregoing makes clear that, in line with his declaration that he would never grant waivers, Member Victorino rejected Plaintiffs' appeal for a waiver for the circular reason that Plaintiffs were seeking to invoke the waiver provision of the Ordinance. There is no question, therefore, that Member

Victorino, determined never to grant waivers, did not give Plaintiffs the process they were due.

Defendant contends that Member Victorino was not speaking for the remaining Councilmembers in proclaiming that "we're not gonna give waivers . . . . and we're not gonna change our mind." Motion at 19. Member Victorino attempted to backtrack on his proclamation, making the attenuated argument that by "we" he meant himself and the people of Maui. Even assuming the other Councilmembers did not inappropriately discuss Plaintiffs' waiver application, as insinuated by Member Victorino's remarks, there is ample evidence in the record demonstrating that the other Councilmembers nevertheless had come to the same conclusion as Member Victorino.

Chair Mateo prefaced the Policy Committee's deliberations by quoting from the Ordinance and then observing: "Members, by enacting the Residential Workforce Housing Policy, the Council had *already made a finding* that the impact of any applicable development is *presumed* to bear a rational relationship to the affordable housing shortage." CSOF, ¶14 (emphases added). The presumption upon which Chair Mateo ostensibly reached his "nexus" conclusion is nowhere to be found in the Ordinance. Chair Mateo's statement demonstrates his predetermination that he would never grant waivers in that he believed that all applicable developments would have a "reasonable relationship or nexus."

Notably, Chair Mateo made this statement immediately after quoting from the Ordinance, without indicating that he had stopped quoting and that the statement was his editorial and not the words of the Ordinance. See Ex. 1, p.9.[1] This likely misled the Councilmembers into believing that this improper presumption was part of the Ordinance.

Indeed, Member Gladys Baisa testified that she relied in part on Chair Mateo's advice in reaching her decision.[2] CSOF, ¶30. Member Baisa's comments at the July 24, 2007 meeting demonstrate that her decision was partially based on the fact that Plaintiffs' waiver would have exempted them from building affordable units. See CSOF, ¶31 ("I like every elected official that I can think of in the State of Hawaii this past election promised to provide affordable housing, and I'm gonna try to stay true to that commitment."). She improperly reasoned that the only way to stay true to her commitment was to deny Plaintiff's appeal.

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[1] Unless otherwise noted, references to Exhibits refer to Exhibits filed with Plaintiffs' CSOF.

[2] Member Baisa further testified that her decision was also based on the testimony of Corporation Counsel and the housing director. CSOF, ¶28 ("[I]t was very clearly, I thought, explained to us by corp counsel and Housing and those who have more experience with this matter than I do that there was no – it wasn't appropriate to grant a waiver."). There is no indication that representatives from corporation counsel or the housing director submitted any testimony at the hearing related to a finding of the existence of a nexus. Id., ¶29.

Member Joseph Pontanilla also appears to have been misled by Chair Mateo's failure to inform the Council where his quotation from the Ordinance ended and his editorial began. Member Pontanilla stated:

> I think you stated very clearly looking at the Residential Workforce Housing Policy what you read in regards to the purpose as well as the applicability of the workforce housing policy. You know we shouldn't take this thing lightly, and if we're gonna create affordable housing, we better follow this policy. So I'll be supporting your motion, Chair.

CSOF, ¶32. Like Member Baisa, Member Pontanilla improperly reasoned that the only way to "follow the policy" was to deny Plaintiffs' appeal.

Member Johnson also predetermined the existence of a nexus, stating that Plaintiffs' appeal made "no sense because in . . . they're accusing us of not having a rational nexus." CSOF, ¶33 (ellipses in original). Because Plaintiffs attempted to demonstrate the absence of a nexus (as the Ordinance requires for a waiver), their appeal made "no sense." Member Johnson's comments illustrate her belief that a nexus will always exist, and thus, she would never grant a waiver.

Similarly, other Councilmembers' statements demonstrated that they denied Plaintiffs' appeal for a waiver from the affordable housing requirement for the circular and inappropriate reason that Plaintiffs were not complying with the affordable housing requirement. See Plaintiffs' Motion at 17-20. The record, therefore, is replete with evidence of actual bias against residential developers, particularly those that did not intend to provide affordable housing pursuant to the

Ordinance, and it is apparent that such bias led to the Councilmembers' decision to deny Plaintiffs' waiver request.

Defendant nevertheless contends that Member Mateo's and Member Anderson's statements (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." 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.") were simply expressions of impatience, dissatisfaction, annoyance, and anger. Motion at 20. While the statements certainly demonstrated the Councilmembers' impatience, dissatisfaction, annoyance, and anger, they were not isolated comments. Rather, when viewed together with Member Mateo's and Member Anderson's additional comments,[3] it is apparent that these outbursts constitute further evidence of the Councilmembers' actual bias against residential developers seeking to obtain a waiver.

Defendant contends that because the Councilmembers "voted for residential projects," they could not be biased. Motion at 20. While it is unclear what "voted

[3] See, e.g., CSOF ¶14, supra; CSOF, ¶21, Ex. 5, p.140 (Member Anderson: "It's time for [developers] to get real and get fair with us, and start providing housing for our people . . . . If they can't do it, fine. Aloha oe. We don't need them in Maui County.").

for residential projects" means, it is clear that, since no other developer has attempted to apply for a waiver after Plaintiffs—and it is no wonder given the Council's statements—no Councilmember could have voted in favor of granting a waiver. As such, that Councilmembers may have somehow supported residential projects in other contexts and for various reasons does not demonstrate that they would ever reasonably consider a waiver application, and certainly does not demonstrate that they reasonably and fairly considered Plaintiffs'.

Defendant also contends that Plaintiffs did not timely object to the Councilmembers' biases, relying on In Re Water Use Permit Applications, 94 Hawai`i 97, 9 P.3d 409 (2000), and Power v. Federal Labor Relations Authority, 146 F.3d 995 (1998). While the Councilmembers may have certainly expressed their bias against residential developers prior to the July 24, 2007 hearing, Plaintiffs did not realize until the Councilmembers began speaking at the hearing that the Council was never going to grant waivers. Furthermore, Plaintiffs had a justifiable reason not to immediately object to the Councilmembers' displays of bias during the July 24, 2007 meeting. Given the Councilmembers' statements, it was apparent that such objections would have been futile and fallen on deaf ears, and there was no other authority to which Plaintiffs could report under the terms of the Ordinance. Defendant quotes Power for the proposition that "it will not do for a claimant to suppress his misgivings regarding bias while waiting anxiously to see

was apparent that such objections would have been futile and fallen on deaf ears, and there was no other authority to which Plaintiffs could report under the terms of the Ordinance. Defendant quotes Power for the proposition that "it will not do for a claimant to suppress his misgivings regarding bias while waiting anxiously to see whether the decision goes in his favor." Motion at 29. Here, Plaintiffs were not simply waiting to see whether the decision would go in their favor. Indeed, it was clear that the Council had made up its mind to deny the waiver request, regardless of anything Plaintiffs said. As such, Plaintiffs reasonably asserted their claims of bias at the first opportunity they could—to this Court.

Accordingly, the record demonstrates that the Councilmembers were biased against residential developers and Plaintiffs in particular for attempting to obtain a waiver; the Councilmembers did not intend to ever grant waivers; and therefore, the Councilmembers did not give Plaintiffs a meaningful opportunity to demonstrate the absence of a nexus pursuant to the terms of the Ordinance.

(b) None of the Cases Cited by Defendant are Applicable

Defendant cites to a myriad of inapplicable cases in support of its argument that Plaintiffs' due process rights were not violated. In the end, however, the record demonstrates that the Councilmembers did not afford Plaintiffs a meaningful opportunity to be heard, but rather, capriciously denied Plaintiffs' waiver appeal based on biases and a predetermination to never grant waivers.

on July 24, 2007 satisfied due process. Motion at 14-15. These cases are distinguishable in that in neither case was the court presented, as the Court is here, with allegations that the decision-makers did not provide a fair and meaningful opportunity to be heard. See Sandy Beach, 70 Haw. at 379, 773 P.2d at 262 ("There is no evidence of procedural impropriety or other corruption of the hearing and decision-making processes."); Brescia, 115 Hawai`i at 502, 168 P.3d at 954. Simply being provided an opportunity to show up and be heard is not enough to satisfy due process where such opportunity is not meaningful.

Defendant next cites to various cases in which courts have held that expressions of sarcasm or impatience, Larson v. Palmateer, 515 F.3d 1057, 1067 (9th Cir. 2008), Rollins v. Massanari, 261 F.3d 853, 858 (9th Cir. 2001), and generalized assumptions of possible interest, Schweiker v. Mclure, 456 U.S. 188, 195 (1982), do not violate the due process demands of impartiality. Motion at 15, 16, 20. These cases are factually distinguishable. The Councilmembers were not simply being sarcastic or impatient and Plaintiffs have not merely asserted generalized assumptions of possible interest. Rather, the Councilmembers' statements evidence an actual bias against Plaintiffs' application for a waiver and a predetermination to deny Plaintiffs' waiver application without fairly reviewing it. See supra Section IV.B.1.a and Plaintiffs' Motion at Section IV.

Defendant also cites to Bunnell v. Barnhart, 336 F.3d 1112, 1114 (9th Cir. 2003), for the proposition that recusal based on the "appearance of impropriety" standard set forth in 28 U.S.C. § 455(a), does not apply to administrative law judges. Motion at 16. Bunnell is inapplicable here inasmuch as Plaintiffs do not assert that the Councilmembers should have recused themselves based on the standard set forth in 28 U.S.C. § 455(a). In any event, Plaintiffs have demonstrated actual bias.

Defendant next cites to Withrow v. Larkin, in which the Court discussed whether the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication. 421 U.S. 35 (1975). Defendant relies on a quotation in a footnote in Withrow that "[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 believe that more is required." Motion at 17 (quoting Withrow, 421 U.S. at 50 n.16 (citation omitted)). Plaintiffs do not assert that the Councilmembers served in a combination of investigative and adjudicative functions, or that the Councilmembers were biased because they had contact with the facts of Plaintiffs' waiver appeal in a prior hearing, or that they took a public position on the facts of Plaintiffs' waiver appeal prior to the July 24, 2007 hearing (indeed, it is Plaintiffs'

position that many if not all of the Councilmembers did not adequately review the facts of Plaintiff's waiver appeal, see Plaintiffs' Motion at 20-24). Defendant's citation to Withrow, therefore, is unavailing.

Nevertheless, the Withrow Court did make a notable comparison in the same footnote, notiong that "those cases in which due process violations have been found are characterized by factors not present in the record before us in this litigation . . . ." Withrow, 421 U.S. at 50 n.16. One such case was Texaco, Inc. v. FTC, in which the Court of Appeals found a due process violation where a commissioner made a speech in which he clearly indicated that he had already to some extent reached a decision as to matters pending before that Commission. 336 F. 2d 754 (App. D.C. 1964), vacated on other grounds, 381 U.S. 739 (1965). The instant case is more analogous to Texaco than Withrow. Here, as in Texaco, the Councilmembers made statements indicating that they would never grant waivers. See supra Section IV.B.1.a; Plaintiffs' Motion at Section IV.

(c) The Councilmembers' Statements Went Beyond Mere Statements of Political Opinion

Defendant avers that expression of political opinions does not demonstrate bias, stating that "[b]ias or prejudice of an agency decision maker related to an issue of law or policy is not disqualifying." Motion at 17-19 (quoting 2 Am. Jur. 2d Administrative Law § 41 Bias). The Councilmembers, however, were not simply making general statements supporting the Ordinance or affordable housing.

Rather, their statements reflected actual bias and their related intention never to give effect to the waiver provision in the Ordinance.

As the article upon which Defendant relies further states: "Personal bias or prejudice going beyond sincere political and philosophical views is another matter." 2 Am. Jur. 2d Administrative Law § 41 Bias (citing Colao v. County Council of Prince George's County, 657 A.2d 148, 166 (Md. App. 1996), aff'd, 697 A.2d 96 (Md. 1997)). The article explains: "To be disqualifying, the alleged bias of an administrative law judge must stem from an extrajudicial source, or must demonstrate a deep-seated antagonism or favoritism that would make a fair judgment impossible, and result in an opinion on the merits on some basis other than what the judge learned from his or her participation in the case." 2 Am. Jur. 2d Administrative Law § 41 Bias (citations omitted). The Colao Court also recognized that "[t]o prove that the State demonstrated bias . . ., the Appellees would have to show that the Commissioner acted with 'an unalterably closed mind on matters critical to the disposition of the proceeding.'" 657 A.2d at 166. Here, Plaintiffs have demonstrated that the Councilmembers acted with an "unalterably closed mind" in denying Plaintiffs' appeal, and such denial was based on the Councilmembers' bias and prejudgment as opposed to what they learned from Plaintiffs' application or the July 24, 2007 Hearing. See Section IV.B.1.a and Plaintiffs' Motion at Section IV.

Defendant's reliance on Kramer v. Board of Adjustment, 212 A.2d 153 (N.J. 1965), is similarly misplaced. At issue in that case was the Board of Adjustment's granting of an application for a zoning variance for the Stockton Hotel. Id. at 156. The plaintiffs alleged that a statement in a newspaper advertisement in support of the Mayor's re-election campaign—which listed four members of the Board of Adjustment as endorsing the Mayor's platform—stating that the Mayor "has a realistic attitude toward the Stockton Hotel" evidenced the members of the Board of Adjustment's prejudgment of the Stockton application. Id. at 159. The Kramer Court rejected the plaintiffs' allegation, noting that the statements did not evidence "malice or ill will" toward the parties opposing the Stockton application, and finding that the views expressed were simply political statements and that there was no indication that such statements touched on the actual merits of the Stockton application. Id. at 161. The Court further recognized that "a hearing before an administrative tribunal acting quasi-judicially implies that the factfinder '*shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action.*'" Id. at 159 (citation omitted) (emphasis added). In this case, on the other hand, the Councilmembers' statements evidence "malice or ill will" toward Plaintiffs and other residential developers who would dare to request a waiver from the affordable housing

requirements in the Ordinance, and the Councilmembers' decision was based on extraneous considerations outside the evidence presented. See Section IV.B.1.a and Plaintiffs' Motion at Section IV.

Indeed, Resolution 07-100 denied Plaintiffs' appeal "after due consideration of the evidence *and other relevant facts and circumstances*." CSOF, ¶16 (emphasis added). The Council never identified what extraneous matters it considered. In fact, there was *no evidence* before the Council that Plaintiffs' projects would make housing less affordable to Maui residents. Plaintiffs' evidence that their projects were likely to have a positive or, at worst, neutral effect was undisputed. CSOF, ¶¶8-9; see generally, Exs. 1, 7. "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." Greene v. McElroy, 360 U.S. 474, 496 (1959). If "facts and circumstances" evidencing a nexus actually existed, certainly due process required that Plaintiffs be given the opportunity to review such evidence and demonstrate that it is untrue. See Goldberg v. Kelly, 397 U.S. 254, 269 (1970) ("Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the

reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.") (citations and quotation signals omitted). Otherwise, it appears that the "facts and circumstances" upon which the Council's denial was based were "other than what the [Councilmembers] learned from [their] participation in the case," 2 Am. Jur. 2d Administrative Law § 41 Bias, and that the Council's decision was improperly influenced by "extraneous considerations," Kramer, 212 A.2d at 159, and therefore, denied Plaintiffs due process of law.

The remaining authorities upon which Defendant relies also do not support Defendant's position. Defendant's citation to Davis Administrative Law Treatise, concerning prejudgment of adjudicative facts and the ability of a judge to hear a case on remand, is inapplicable. Motion at 17-18. The Councilmembers, in hearing Plaintiffs' request for a waiver, were not hearing the matter on remand after making findings of fact. Rather, the Councilmembers predetermined Plaintiff's entire waiver application without fairly examining all of the facts, and indeed, the Council did not make any findings of fact to support its decision.

Likewise, both United States v. Morgan, 313 U.S. 409 (1941), and FTC v. Cement Institute, 333 U.S. 683 (1948), rh'g denied, 334 U.S. 839 (1948), are distinguishable inasmuch as the Councilmembers did not simply express a position on a policy issue related to the dispute. Rather, the Councilmembers expressed

their determination that they would never grant waivers regardless of the facts presented before them. Notwithstanding any applicable presumption afforded the Councilmembers, Plaintiffs have set forth specific evidence to rebut the presumption.

2. Probable Value of Additional or Substitute Procedural Safeguards

Defendant next argues that there is little value to providing additional or substitute procedural safeguards and that Plaintiff would not have fared any better in a different forum. Motion at 20-27. To the contrary, as written, the Ordinance uproots all governmental *ad hoc* discretionary decision-making from its usual locus in administrative agencies having actual land use expertise (and subject to contested case procedures and judicial review), and transplants such processes into a legislative body (the County Council) that is ill-equipped, unaccustomed, and disinclined to fairly adjudicate waiver requests. See Ex. 6 § 2.96.030(C). The Council exercises such adjudicatory powers under the Ordinance with no procedural standards and no judicial review. In that forum, as the Councilmembers made clear, such "adjudications" are made, not with reference to any legitimate land use considerations that would justify denying building permits altogether, but rather are rendered with the sole objective of forcing landowners to subsidize affordable housing. Had the waiver application been heard in a more suitable

forum with procedural rules and guidelines by which a neutral adjudicating authority adhered, Plaintiffs certainly would have fared better.

Defendant's unsubstantiated criticisms of Plaintiffs' application do not warrant a contrary finding. Defendant contends that Plaintiffs' request for a waiver "confused" the Councilmembers "who were accustomed to an affordable housing component as a condition of granting entitlements even before the Ordinance was passed. It made no sense that the arduous work of passing the Workforce Housing Ordinance would result in a developer's request to provide no affordable housing at all for two substantial condominium developments." Motion at 23 (citation omitted). This argument is confusing. First, the Ordinance specifically allows for a developer to request a waiver, so it is unclear—although very telling—why the Councilmembers were "confused" by Plaintiffs' request. Second, it is unclear how the Councilmembers could have been "accustomed" to anything since it is undisputed that Plaintiffs' waiver appeal was the first of its kind. Third, this argument further illustrates Plaintiffs' point that the Councilmembers expected all residential developers to provide affordable housing, and never intended to grant any waivers.

Defendant further contends that Plaintiffs' application was properly denied because Plaintiffs failed to make a presentation to the Policy Committee and refused to answer questions. Motion at 24-26. First, the waiver provision clearly

sets forth that the proper procedure to request a waiver from the Ordinance is to provide a written submittal to the Council. See Ex. 6 § 2.96.030(C)(2) ("Any such appeal shall be made in writing and filed with the county clerk . . . ."). There were no other requirements, rules, regulations, or guidelines stating that Plaintiffs needed to make a presentation before the Policy Committee. Indeed, when Plaintiffs sought guidance from the County's housing director, she simply read Plaintiffs the Ordinance verbatim. CSOF, ¶4. As Housing Director Medeiros confirmed at her deposition, there were no rules, guidelines, policies, or forms to follow. CSOF, ¶52.

Second, the Councilmembers did not ask any questions. The record reflects that Chair Mateo asked the Councilmembers for any questions, and the Councilmembers did not respond. CSOF, ¶41; see generally, Ex. 1. The Councilmembers then proceeded to state their opinions, implying, and in some cases, expressly stating, that they would not grant any waivers. See generally, Ex. 1. Certainly, such an environment did not encourage Plaintiffs to believe there was any hope that the Council was open to discussion or would meaningfully listen to any presentation it had. Plaintiffs cannot be expected to have prepared a presentation or otherwise complied with unspoken rules and desires of the Councilmembers that were not contained in the Ordinance and about which the housing director said nothing when Plaintiffs asked. That the Councilmembers

allowed such expectations to affect their decisions deprived Plaintiffs of due process of law. See Plaintiffs' Motion at 24-27.

Furthermore, Defendant's reliance on Keenan v. Allan, 91 F.3d 1275 (9th Cir. 1996), is misplaced. Keenan does not apply to decision-making by the Council, particularly in this case where the Councilmembers were not tasked with looking for a genuine issue of triable fact since there was no evidence presented in opposition to Plaintiffs' evidence, which demonstrated the lack of a nexus. In any event, the May 25, 2007 letter explained Plaintiffs' support for its waiver request, demonstrating that the project would help and not exacerbate the affordable housing shortage. See Ex. 8.[4]

3. Government's Interest in the Procedure

Defendant next appears to contend that the County has an interest in the procedures utilized inasmuch as the Council was concerned that hearings before the BVA would be "too lengthy to be meaningful" because they are contested cases. Motion at 27-28. This argument is curious in that Defendant appears to contend that a more in-depth proceeding governed by rules and with a right to judicial review would be less meaningful than the sham waiver hearing that

[4] Defendant's off-hand remark concerning Plaintiff's representative is entirely irrelevant and inappropriate. Motion at 26. Similarly, Defendant's argument regarding Plaintiffs' accounting is also irrelevant and it is unclear how such argument furthers Defendant's position that Plaintiffs were afforded due process of law. Motion at 26-27.

Plaintiffs were afforded here with no rules—except the unspoken rules upon which the Councilmembers apparently based their decision (see Plaintiffs' Motion at 24-27)—and no right to judicial review. Indeed, this Ordinance simply reflects the Council's attempt to force residential developers to subsidize affordable housing by forcing them to undergo a procedure completely devoid of due process. Certainly, providing a fair and meaningful opportunity to a developer seeking a waiver is not an unreasonable fiscal or administrative burden.

V. CONCLUSION

The Councilmembers egregiously violated Plaintiffs' due process rights by erroneously depriving Plaintiffs of their protected property interest without due process of law. The Councilmembers failed to provide Plaintiffs with a *meaningful* opportunity to be heard, but rather, denied Plaintiffs' application for a waiver based on their irrational biases and refusal to give effect to the waiver provision in the Ordinance. Defendant has not carried its burden to demonstrate otherwise. Accordingly, Plaintiffs respectfully request that this Honorable Court deny Defendant's Motion, and instead grant summary judgment in Plaintiffs' favor.

DATED: Honolulu, Hawai`i, September 10, 2009.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
DAYNA H. KAMIMURA-CHING
Attorneys for Plaintiffs
KAMAOLE POINTE DEVELOPMENT LP
and ALAKU POINTE LP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

KAMAOLE POINTE DEVELOPMENT LP; ALAKU POINTE LP,	)	CIVIL NO. CV07-00447 DAE LEK (Civil Rights)
Plaintiffs,	)	CERTIFICATE OF SERVICE
vs.	)	
COUNTY OF MAUI; et al.,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 10, 2009, and by the methods of service noted below, a true and correct copy of the foregoing document was duly served upon the following persons:

Served Electronically through CM/ECF:

BRIAN T. MOTO, ESQ.
MADELYN S. D'ENBEAU, ESQ. madelyn.denbeau@co.maui.hi.us
JANE E. LOVELL, ESQ. jane.lovell@co.maui.hi.us
Department of the Corporation Counsel
200 South High Street, Suite 915
Wailuku, Hawaii 96793
Attorneys for County Defendants

DATED: Honolulu, Hawai`i, September 10, 2009.

/s/ Robert G. Klein
ROBERT G. KLEIN
LISA W. CATALDO
DAYNA H. KAMIMURA-CHING

Attorneys for Plaintiffs
KAMAOLE POINTE DEVELOPMENT LP
and ALAKU POINTE LP