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KAMAOLE POINTE DEVELOPMENT LP
and ALAKU POINTE LP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KAMAOLE POINTE) CIVIL NO. CV07-00447 DAE LEK
DEVELOPMENT LP; ALAKU) (Civil Rights)
POINTE LP,)
Plaintiffs,) PLAINTIFFS' MEMORANDUM
vs.) IN OPPOSITION TO COUNTY
COUNTY OF MAUI; COUNCIL) DEFENDANTS' MOTION FOR
CHAIR G. RIKI HOKAMA;) RECONSIDERATION [FILED ON
COUNCIL VICE-CHAIR DANNY A.) JULY 18, 2008] OF ORDER.
MATEO; COUNCILMEMBER) GRANTING IN PART AND
MICHELLE ANDERSON;) DENYING IN PART COUNTY
COUNCILMEMBER GLADYS) DEFENDANTS' MOTION FOR
COELHO BAISA;) SUMMARY JUDGMENT, OR IN
COUNCILMEMBER JO ANNE) THE ALTERNATIVE, PARTIAL
JOHNSON; COUNCILMEMBER) SUMMARY JUDGMENT FILED
BILL KAUAKEA MEDEIROS;) JULY 3, 2008; CERTIFICATE OF
COUNCILMEMBER MICHAEL J.) SERVICE
)) TRIAL DATE: 1/13/09

MOLINA; COUNCILMEMBER)
JOSEPH PONTANILLA;)
COUNCILMEMBER MICHAEL P.)
VICTORINO; MAYOR CHARMAINE)
TAVARES; VANESSA A.)
MEDEIROS, DIRECTOR, MAUI)
COUNTY DEPARTMENT OF)
HOUSING AND HUMAN)
CONCERNS,)
)
Defendants.)
)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
COUNTY DEFENDANTS' MOTION FOR RECONSIDERATION
[FILED ON JULY 18, 2008] OF ORDER GRANTING IN PART
AND DENYING IN PART COUNTY DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE,
PARTIAL SUMMARY JUDGMENT FILED JULY 3, 2008

I. INTRODUCTION

County Defendants' contention that the Court committed manifest error of law in its July 3, 2008, Order Granting in Part and Denying in Part County Defendants' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment ("Order") is meritless. The County Defendants' Motion for Reconsideration, filed July 18, 2008 ("Motion") is based on a misunderstanding or misconstruction of the Order and the relevant standard for a motion for summary judgment. As such, Plaintiffs respectfully request that the Court deny the Motion.

II. STANDARD OF REVIEW

The Ninth Circuit requires a successful motion for

reconsideration to furnish both a reason why the court should reconsider its prior decision, as well as facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Carnell [v. Grimm], 872 F.Supp. [746,] 758 [(D. Haw. 1994)]. Mere disagreement with a previous order is an insufficient basis for reconsideration and reconsideration may not be based on evidence and legal arguments that could have been presented at the time of the challenged decision. See Haw. Stevedores, Inc. v. HT & T Co., 363 F.Supp.2d 1253, 1269 (D. Haw. 2005).

Isham v. Padi Worldwide Corp., Slip Copy, 2008 WL 2051546, *2-3 (D. Haw. May 13, 2008).

III. ANALYSIS

A. General Equal Protection Claim

The County Defendants misconstrue the Order regarding the Court's ruling that the County Defendants did not carry their burden with respect to Plaintiffs' general equal protection claim. See Motion at 3-5. Contrary to their contention, the Court did not place the burden on the County Defendants to produce evidence establishing a rational basis for the distinction between residential and commercial developers. See Motion at 3-4. In fact, the sentence the County Defendants quote from the Order to support their interpretation of the Court's ruling is entirely out of context. See Motion at 4. Put back in the proper context, it is clear that the Court recognized that the County Defendants, as the moving party, had the burden of establishing no genuine issues of material fact, and then determined that the County Defendants did not carry this burden. See

Order at 48 (“Here, however, County Defendants, as the moving party, bear the burden of establishing that there is no genuine issue of material fact on Plaintiffs’ equal protection claim and, as a result, dismissal of this claim is appropriate as a matter of law. County Defendants again fall short of meeting this burden.”)
(emphasis added). Indeed, the Court did not even reach the rational basis analysis, stating:

In premising their request for summary judgment exclusively on a ‘class of one’ theory, County Defendants do not provide any argument that is germane to the immediate issue of whether there is a genuine issue of fact as to Plaintiffs’ broader equal protection challenge. Accordingly, the court need not even apply the rational relation test here.

Order at 49.

As such, the County Defendants’ argument that “the government need not set forth any evidence with respect to a challenge that an ordinance violates equal protection guarantees when that challenge is not based on a suspect classification” completely misses the point. Motion at 4 (citing Aleman v. Glickman, 217 F.3d 1191, 1200-01 (9th Cir. 2000)). Aleman cannot be read as standing for the proposition that a government need not carry its initial burden of production when it moves for summary judgment. See 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).

Notwithstanding the fact that the County Defendants did not satisfy even their initial burden of production for their motion for summary judgment, Plaintiffs responded with a factual assertion that the Ordinance irrationally targets medium or large scale residential developers, while not affecting, for example, commercial developers who create or attract jobs without adding to the supply of housing. See Plaintiffs’ Memorandum in Opposition to the County Defendants’ Motion for Summary Judgment, filed May 15, 2008, at 30-32. The County Defendants did not assert anything to the contrary. Accordingly, the County Defendants’ argument that the Court committed a manifest error of law in not granting their motion for summary judgment is without merit.

B. Substantive Due Process Claim

As with its first argument, the County Defendants’ second argument is also unavailing due to their erroneous interpretation of the Order. The Court did not impose upon the County Defendants the burden “to prove that the Ordinance serves a legitimate governmental objective and is not arbitrary or irrational.” See Motion at 5. Rather, the Court properly imposed upon them the burden as the moving party to a summary judgment motion of establishing that there are no

genuine issues of material fact and that they are entitled to judgment as a matter of law. The Court stated:

[T]he Court finds County Defendants' contention that the Ordinance is valid based on a comparison with other jurisdictions wholly unpersuasive [because] it says nothing about whether the Ordinance at issue here is valid and, as a result, is an inadequate ground upon which to premise a motion for summary judgment.

Order at 53-54. The Court additionally determined that the County Defendants' reliance on the improper "shocks the conscience" standard "renders their argument legally unsound." Order at 54. No where in the Order does the Court improperly transfer the burden of proof. Again, the case cited by the County Defendants, Eastern Enterprises v. Apfel, 524 U.S. 498, 537-38 (1998), does not stand for the proposition that a government need not carry its initial burden of production when it moves for summary judgment.

C. "Class of One" Equal Protection Claim

County Defendants further contend that the Court manifestly erred in determining that there was a genuine issue of material fact as to the "class of one" claim because Plaintiffs did not carry their burden of demonstrating that they have been intentionally treated differently from others similarly situated during their appeal for a waiver. Motion at 8. Again, County Defendants misconstrue the Court's Order and their burden as the party moving for summary judgment. County Defendants had the initial burden of production to demonstrate the absence

of a genuine issue of material fact. See Celotex, 477 U.S. at 323. Although the Court did not determine that the County Defendants met their initial burden of production, the Court ruled that the treatment Plaintiffs received from the County Council at the July 24, 2007, hearing raised a “genuine issue of material fact as to whether Plaintiffs were intentionally, and without rational basis, treated differently from others similarly situated during their appeal for a waiver.” Order at 49-51 (citation omitted).

The County defendants now assert, for the first time, that Plaintiffs cannot establish that they were treated differently during their appeal for a waiver because the Plaintiffs’ appeal was the only appeal for waiver heard by the County Council. Motion at 2. As this Court has recognized, however, “reconsideration may not be based on evidence and legal arguments that could have been presented at the time of the challenged decision.” Isham, 2008 WL 2051546, *2 (citing Haw. Stevedores, Inc. v. HT & T Co., 363 F.Supp.2d 1253, 1269 (D. Haw. 2005)).

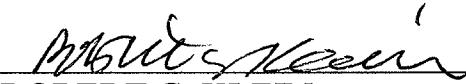
Inasmuch as the County Defendants could and should have raised this assertion earlier, it does not constitute a proper basis upon which the Court should reconsider its Order.

IV. CONCLUSION

For the foregoing reasons and authorities, Plaintiffs respectfully request that the Court deny County Defendants’ Motion for Reconsideration [filed

on July 18, 2008] of Order Granting in Part and Denying in Part County Defendants' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment filed July 3, 2008.

DATED: Honolulu, Hawai'i, July 29, 2008.


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MICHELLE ANDERSON;)
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TAVARES; VANESSA A.)
MEDEIROS, DIRECTOR, MAUI)
COUNTY DEPARTMENT OF)
HOUSING AND HUMAN)
CONCERNS,)
Defendants.)

)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on July 29, 2008 and by the methods of service noted below, a true and correct copy of the foregoing document was duly served upon the following persons at their last known addresses:

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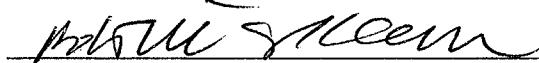
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DATED: Honolulu, Hawai`i, July 29, 2008.



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