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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KAMAOLE POINTE DEVELOPMENT LP; ALAKU POINTE LP, Plaintiffs, vs. COUNTY OF MAUI, et al., Defendants.	CIVIL NO. CV07-00447 DAE/LEK (Civil Rights) DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT FILED JULY 30, 2009; CERTIFICATE OF SERVICE **HEARING** Date: September 28, 2009 Time: 9:45 a.m. Judge: Honorable David A. Ezra Trial Date: December 1, 2009

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I. INTRODUCTION

This Court's Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment entered on November 25, 2008 ("Nov. 25, 2008 Order") identified only two remaining claims in this case, both procedural due process claims arising from Plaintiffs' request for an exemption from the requirements of the Residential Workforce Housing Ordinance codified at Maui County Code ("MCC") Chapter 2.96. ("Ordinance"). The claims with respect to the waiver hearing are that: "(1) the Council Members' motivations were purely political and evinced an irrational bias against residential developers which did not provide a neutral forum for adjudication of their claims; and (2) the appearance of due process was merely a sham as statements by Council Members indicate that they had prior to the hearing decided not to grant any waivers." Nov. 25, 2008 Order, p. 22.

The first of these claims arose from comments that various Council Members made during the hearing. The second arose from remarks by one of the Council Members, Mike Victorino, about a meeting he attended the previous Friday. The second question has been disposed of. It is undisputed that the meeting Council Member Victorino referred to was a public meeting held at a senior citizen facility. No other Council Member was present. Defendant's Concise Statement of Facts in Support of Its Motion For Summary Judgment ("Defendant's CSOF Memo in Support") Declarations of the Council Members.

There is also no dispute about what was said during the Council meetings because a written verbatim transcript has been submitted to this court by Plaintiffs in their Concise Statement of Facts in Support of Their Motion for Partial Summary Judgment ("CSOF Memo in Support") Exhibits 1 and 2. Plaintiffs maintain that, as a matter of law, those remarks prove that the County Council was not a neutral forum. County maintains in its Motion for Summary Judgment also filed on July 30, 2009 that the remarks of the Council Members do not indicate legal bias and that, as a matter of law, the Council was an appropriate neutral forum. Assuming, arguendo, that Plaintiffs had a property right in their application for an exemption from the Ordinance, the issue is whether or not, as a matter of law, the various statements either demonstrate or fail to demonstrate legal bias to the extent required to determine that Plaintiffs were not provided a meaningful hearing.

Although Plaintiffs continue to argue issues related to substantive due process claims, those claims have been dismissed. In its Nov. 25, 2008 Order, this Court stated:

> In essence, Plaintiffs argued that the Council's finding of a nexus between the impact of their development and the number of workforce housing units was arbitrary and without basis. To the extent that it was Plaintiffs' intention to put forth such an argument, this Court must nevertheless dismiss due to unripeness. As stated above, the final decision requirement applies to as-applied substantive due process claims. In addition, Plaintiffs' state constitutional substantive due process and equal protection claims are dismissed as unripe as well.

Nov. 25, 2008 Order, p. 19, fn.3.

II. THIS COURT HELD THAT PLAINTIFFS HAVE A PROPERTY INTEREST IN ANY LEGITIMATE USE OF THEIR LAND; HOWEVER THAT LEGITIMATE USE INCLUDES COMPLIANCE WITH THE ORDINANCE

Plaintiffs' Memorandum in Opposition To Defendant's Motion for Summary Judgment, Filed July 30, 2009 ("Memo in Op"), correctly states that "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." Memo in Op, p. 4. Plaintiffs claim that they do not need to assert an entitlement to the waiver in order to establish a property interest because they own the land and can use it for any legitimate purpose. Further, they argue they can use the land without complying with the Ordinance which they do not regard as legitimate. Contrary to Plaintiffs' claims, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") has never held that a landowner has a property interest in an application for a discretionary exemption from the requirements of a valid land use ordinance. This Court has already held that the waiver provision in Maui's Ordinance is discretionary.

> In this case, the procedural language of the waiver provision leaves ample discretion to the Council and therefore Jacobson and Parks actually militate against a finding of a protectable property interest. The Ordinance provides that "[a] developer of any development subject to [the Ordinance] may appeal to the council for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus ...." (The Ordinance § 2.96.030.) No mandatory language exists in the Ordinance that demands a particular outcome; rather, the Council is given discretion to grant waivers in light of certain criteria. Accordingly, Plaintiffs are incorrect that the procedural language of the waiver provision presents an entitlement rising to the level of a protectable property right.

Nov. 25, 2008 Order, p. 25.

The Court did go on to state that "Plaintiffs, in applying for the waiver, were attempting to develop their land for the legitimate use of residential housing. Plaintiffs therefore had a protectable property interest in legitimate use of their land and the Council's denial of the appeal for a waiver deprived Plaintiffs of that protected property interest." Nov. 25, 2008 Order p. 26. However, as is more fully explained below, that interlocutory ruling is not the law of the case.

In support of their argument that they have a property interest in their waiver application, Plaintiffs point out that the United States Supreme Court ("Supreme Court") has recognized "protectable property" as something more than tangible property. Commentators and courts tend to refer to this as "new property". The Supreme Court has decided that new property for due process purposes includes, inter alia, certain welfare benefits and tenured or contractual employment. These cases are important because they conclude that the Fifth and Fourteenth Amendments to the United States Constitution require a hearing before a person can be deprived of "new property" to give the person the chance to argue that a mistake has been made and that the "new" property should not be taken. Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

However, as Plaintiffs concede, the Supreme Court has also decided that "new property" requires that a person have an entitlement, not a unilateral expectation, of retaining the property. Board of Regents v. Roth, 408 U.S. 564, 569 (1972)(in

which a non-tenured professor was held not to have a property right in continued employment and, hence, was not entitled to a hearing before being denied renewal of his teaching contract.)

Plaintiffs argue that Roth is limited to "benefits" and does not apply to their claim which is based on traditional common law property rights. "Accordingly, Plaintiffs' land use expectations constitute protected entitlements". Memo in Op., p. 6. Such a holding would require a sea change in existing law. The word "legitimate", in this context, means "complying with the law, lawful". Black's Law Dictionary 912 (7th Ed. 1999). The Ninth Circuit has made it very clear that the word "legitimate" means just what it says.

Six months after deciding Harris v. County of Riverside, 904 F.2d 497, 503 (9th Cir. 1990), the case cited in this Court's Nov. 25, 2008 Order, the Ninth Circuit carefully explained that its reference to a landowner's abstract right to devote his land to any legitimate use as within the constitutional protection ". . . in no way suggests that a landowner has an unconditional right under the taking or deprivation clauses of the federal constitution to build any particular project he chooses." Lakeview Development Corporation v. City of South Lake Tahoe, 915 F.2d 1290, 1294 (9th Cir. 1990).

In Young v. City of Simi Valley, 216 F.3d 807, 820 (9th Cir. 2000), cert. denied 531 U.S. 1104 (2001), the Ninth Circuit discussed Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928), explaining:

> "Finally, courts have been concerned in contexts outside the First Amendment about local governments' attempts to delegate to private landowners the power to determine how another private party may use his or her land 'uncontrolled by any standard or rule prescribed by legislative action.' [citations omitted] Each of those cases held that the delegation of power to private individuals to decide what others could do with their land was 'repugnant to the due process clause.' Roberge, 278 U.S. at 122. The major concern was that administrative decision-making would be 'subservient to selfish or arbitrary motivations or the whims of local taste.' Geo-Tech, 886 F.2d at 666; see also Roberge, 278 U.S. at 122."

A landowner might want to a build a residence in land zoned for business. In the proper zoning district, residential use is a legitimate use. But if it is not a permitted use in the business zoned district, some exception or variance would be required. The application for that variance would not be "protectable" property unless the person or agency reviewing the request had no discretion to deny it. To put it plainly, landowners must comply with applicable laws just like everyone else.

Plaintiffs also argue that the Court need not look to state law to determine when a property right in a particular use of land is vested. Instead, Plaintiffs maintain that the source of their property right in their application for a waiver from the requirements of the valid Ordinance is "the traditional common-law interest in their real property". Memo in Op., p. 8. Plaintiffs do not identify the traditional common law interests in real property specifically. Presumably they do not mean to include such venerable common law land doctrines as primogeniture and coveture, Rather, they are arguing, in effect, that a line of cases beginning

with Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) and including McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008) were wrongly decided. County's search for the term "traditional common law" with twenty-five words of "property rights" in Hawaii and Ninth Circuit cases on Westlaw turned up three cases, two dealing with copyrights and one with the moral rights of artists. There does not appear to be any foundation in case law for Plaintiffs' assertion that the court need not look to state law but can rely on federal common law to define protectable property. [1]

Since 1883, the common law of England, as ascertained by English and American decisions, has been the common law of Hawaii unless it conflicts with Hawaiian judicial precedent or established Hawaiian usage. Haw. Rev. Stat. § 1-1.

In Rooke v. Queen's Hospital, 12 Haw. 375, (1900) the Supreme Court of the Territory of Hawaii discussed Hawaii land use law and its relationship to English common law:

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[1] In a diversity action involving a bad faith action against an insurer that refused to defend an underlying lawsuit brought by artists against insureds for covering up artists' mural on wall of insureds' building, the Ninth Circuit mentioned traditional common law property rights in a discussion of the European recognition of moral rights that artists have in protecting the use of works they no longer own. "In part because moral rights conflict with traditional common law property rights, American law has resisted recognizing moral rights." Cort v. St. Paul Fire and Marine Ins. Companies, Inc., 311 F.3d 979, 985 (9th Cir. 2002). In Smith v. Paul, 174 Cal.App.2d 744, 746, 345 P.2d 546, the California Appellate Court noted that the California Civil Code section 980 accepts the traditional theory of protectable property rights under common law copyright. See also: Taylor v. Metro-Goldwyn-Mayer Studios, 115 F.Supp. 156, 157 (D.C.Cal. 1953), another copyright case.

> "We have no hesitation in holding that estates tail have no place under the laws of Hawaii. It is true, as contended, that ancient Hawaiian land tenures bore a striking resemblance to those which prevailed in Europe in feudal times. A feudal system, not the feudal system of early English history, grew up in these islands. Estates tail were never a part of that system. Even in England they were of statutory origin. Nor was the English system ever imported into these islands. On the contrary the movement was in the opposite direction, as shown, among other things, by the establishment of the Land Commission in 1846 for the purpose of awarding titles in fee simple and abolishing what then remained of the Hawaiian feudal system."

1900 WL 2503 at page 9.

In short, despite Plaintiffs argument, there are neither federal nor state common law property interests in the application for a waiver from a valid law.

III. AN INTERLOCUTORY ORDER OF A TRIAL COURT IS NOT THE LAW OF THE CASE

The doctrine of the law of the case is applicable only to final judgments. Prior to the entry of final judgment in a case, a district court has the inherent, plenary power to revise an interlocutory order. Fed.R.Civ.P. 54(b).[2]

The Ninth Circuit has recognized the rule that, "as long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an

[2] Rule 54(b) provides that in the absence of an entry of final judgment or direction to enter final judgment as to fewer than all of the parties or claims, "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

interlocutory order for cause seen by it to be sufficient." City of Los Angeles, Harbor Division v. Santa Monica Baykeeper, 254 F.3d 882, 889 (9th Cir.2001)(quoting Melancon v. Texaco, Inc., 659 F.2d 551, 553 (5th Cir.1981)).

The power to revise an interlocutory order was recognized at common law and is not derived solely from the Federal Rules of Civil Procedure. See Santa Monica Baykeeper, 254 F.3d at 886-87. The court in Santa Monica Baykeeper explained,

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute. Nothing in the Rules limits the power of the court to correct mistakes made in its handling of a case so long as the court's jurisdiction continues, i.e., until the entry of judgment. In short, the power to grant relief from erroneous interlocutory orders, exercised in justice and good conscience, has long been recognized as within the plenary power of courts until entry of final judgment and is not inconsistent with any of the Rules.

Id. at 887 (quoting United States v. Jerry, 487 F.2d 600, 604 (3d Cir.1973)).

Even if a motion for reconsideration of the interlocutory order would be time-barred in this case, nothing in Local Rule 60.1 prevents the Court from exercising its inherent power to modify, rescind, or revise an interlocutory order prior to the entry of final judgment. As the Ninth Circuit stated in City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d at 888 (9th Cir. 2001): "Here, the law of the case doctrine is wholly inapposite. The doctrine simply does not impinge upon a district court's power to reconsider its own interlocutory order provided

that the district court has not been divested of jurisdiction over the order."

IV. WAIVER PROVISION NOT NECESSARY TO SAVE ORDINANCE FROM CONSTITUTIONAL INFIRMITY

On July 3, 2008, this Court held that the Nollan/Dolan nexus standards did not apply to a facial takings challenge to an ordinance. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994).

> "For the reasons stated below, the Court finds that Plaintiffs' Motion is a facial takings claim and the application of the Nollan/Dolan standard to such a challenge is presently not contemplated by Ninth Circuit or Supreme Court case law.

Order Denying Plaintiffs' Motion for Partial Summary Judgment Declaring Ordinance 3418 Void on its Face under the Doctrine of Unconstitutional Conditions; and Order Granting in Part and Denying in Part County Defendants' Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment ("July 3, 2008 Order") p. 13.

> "The Court also finds significant the fact that both Nollan and Dolan stemmed from a government's demand for a public easement across private property in exchange for a building permit. In other words, Nollan and Dolan are premised upon physical invasion of property. As discussed above, the Court determined in each case that, had the government merely appropriated the easement, there would have been a per se physical taking. Id. at 546. Accordingly, the first inquiry under the Nollan/Dolan standard is whether the government's exaction effects a taking. Garneau, 147 F.3d at 809. The essential nexus and rough proportionality inquiries address whether the government can, without paying the compensation that would normally be required upon effecting such a taking, demand the easement as a condition for granting the permit that the government was entitled to deny. Lingle, 544 U.S. at 547. In light of this formulation, it is clear that Nollan/Dolan cannot exist outside of the takings sphere. The test was created to determine whether a leveraged government exaction that would constitute an

> uncompensated physical invasion of private property and, thus, a taking, could pass constitutional muster under the appropriate conditions. In answering "yes," the Supreme Court firmly established Nollan/Dolan as a test applicable to takings challenges in the land-use exactions context."

July 3, 2008 Order Pp. 24-25.

This Court's ruling that the "nexus" test did not apply except in cases of physical invasion proved to be a correct prediction of the law in the Ninth Circuit. McClung v. City of Sumner, supra, 548 F.3d 1219 (9th Cir. 2008).

In other words, the constitutionality of the Ordinance does not depend on the application of the nexus standards set forth in Nollan and Dolan.

V. PLAINTIFFS HAD A MEANINGFUL OPPORTUNITY TO BE HEARD DURING THE HEARING ON THEIR APPLICATION FOR A WAIVER FROM THE REQUIREMENTS OF THE ORDINANCE

Assuming, arguendo, that Plaintiffs have a property right in their application to be exempted from the requirements of the valid Ordinance, they were granted due process. As County pointed out in its Memorandum in Support of Motion for Summary Judgment filed on July 30, 2009 ("Memo in Support"), the due process requirement allows a person deprived of or about to be deprived of property the opportunity to explain that a mistake is being made. For example, if the government decides to revoke a valid permit for violation of the permit conditions, it must give the permit holder an opportunity to contest the alleged violation. That is the essence of the "property interest" requirement. It defies common sense to require a "due process" hearing if a person is merely applying for

a benefit, unless the benefit must be granted if all the t's are crossed and the i's are dotted. In that case the permit applicant has a right to the permit and also the right to explain that the government made a mistake, that the applicant had done everything required. But if the benefit requested is discretionary, a change in zoning, an exemption from a land use requirement or the like, there is no constitutional due process requirement.

Of course if the request is made to an administrative body, the Hawaii Administrative Procedures Act, Chapter 91, Haw. Rev. Stat. ("HAPA") applies and a contested case is required. However, the HAPA does not apply to the County Council. Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 370, 773 P.2d 250, 257 (1989). In any case, a Council meeting with the opportunity for public testimony satisfies due process. Id. at 70 Haw. 361, 773 P.2d 250. Finally, the facial validity of the process for a waiver application established by the Ordinance has already been determined. Order Granting in Part and Denying in Part County Defendants' Motion for Reconsideration entered on September 9, 2008, page 16.

If one assumes, arguendo, that Plaintiffs have a protectable property interest in their desire to build residential apartments without complying with the Ordinance, the remaining issue in this case is whether or not the County provided due process relative to Plaintiffs' application for a waiver. That, in turn, depends on whether or not the Council Members should have been disqualified from hearing the matter because their position as elected officials

and their statements at the hearing proved that they could not sit fairly in an administrative, quasi-judicial position. Quasi-judicial administrative officers are presumed to be unbiased and Plaintiffs have the burden of rebutting the presumption. Schweiker v. McClure, 456 U.S. 188, 195 (1982); Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

It is important to note that, in 2003, the Ninth Circuit joined those Circuits that have held that the "appearance of impropriety" standard used for federal judges does not apply to administrative judges. In the administrative setting a showing of actual bias is required. Bunnell v. Barnhart, 336 F.3d 1112, 1115 (9th Cir. 2003).

Furthermore, as pointed out in County's Memo in Support, even if the "appearance of impropriety" standard is applied, remarks by the Council Members quoted by Plaintiffs do not disqualify them from hearing the waiver request. The Ninth Circuit has upheld the ability of federal judges to sit in cases where they have made similar comments.

> Similarly, the court's commentary on his role as "represent[ing] the community" and that the community was "tired" of armed robbery and guns does not demonstrate the kind of "truly extreme" remarks that are required for recusal. See United States v. Borrero-Isaza, 887 F.2d 1349, 1357 (9th Cir.1989) ("[t]he fact that a judge has strong feelings on a particular crime does not automatically disqualify him from sentencing those who have committed that crime"); United States v. Nelson, 718 F.2d 315, 321 (9th Cir.1983)(court's belief that defendant was guilty did not disqualify him from presiding over retrial); United States v. Allen, 633 F.2d 1282, 1294 (9th Cir.1980)(statement that importing marijuana was "a very serious crime that had a 'cancer'-like effect on society" was "nowhere near the

> sort of apparent ethnic, political, or personal animus" warranting recusal). To disqualify a judge, the alleged bias must constitute "animus more active and deep-rooted than an attitude of disapproval toward certain persons because of their known conduct." Conforte, 624 F.2d at 881. If the district court's behavior does not rise to the level required by Hernandez and Liteky, then it cannot be said that the provision was violated.

U.S. v. Wilkerson, 208 F.3d 794, 799 (9th Cir. 2000).

VI. CONCLUSION

For the foregoing reasons and based on the cited authorities, Defendant respectfully requests that the Court grant Defendant's Motion for Summary Judgment filed on July 30, 2009.

DATED: Wailuku, Maui, Hawaii, September 16, 2009.

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