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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 MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE Judge: Hon. David A. Ezra Trial date: January 13, 2009

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant COUNTY OF MAUI, by and through its attorneys, BRIAN T. MOTO, Corporation Counsel, and MADELYN S. D'ENBEAU, Deputy Corporation, hereby move this Honorable Court for summary judgment as a matter of law.

This Motion is made pursuant to Rules 7(b) and 56 of the Federal Rules of Civil Procedure and is supported by the Memorandum in Support hereof, Concise Statement of Facts; Declarations of Gladys Coelho Baisa; Declaration of G. Riki Hokama; Declaration of

Jo Anne Johnson; Declarations of Dennis "Danny" A. Mateo; Declaration of William J. Medeiros; Declaration of Michael J. Molina; Declaration of Joseph Pontanilla; Declaration of Michael Victorino and Declaration of Madelyn S. D'Enbeau; Exhibits "A" - "L", and the records and files herein.

DATED: Wailuku, Maui, Hawaii, July 30, 2009.

BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY

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

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KAMAOLE POINTE DEVELOPMENT LP; ALAKU POINTE LP, Plaintiffs, vs. COUNTY OF MAUI, et al., Defendants.	CIVIL NO. CV07-00447 DAE/LEK (Civil Rights) MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

Page(s)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY

A. Summary of Plaintiffs' Claims

On December 5, 2006, the Maui County Council ("Council") passed the Residential Workforce Housing Ordinance ("Ordinance") codified at Maui County Code ("MCC") Chapter 2.96. The Ordinance generally provides that a developer of five or more residential units either must price a percentage of the development so that it is affordable to various income segments of Maui County's workforce, pay in-lieu fees, or provide the affordable housing off-site. A developer may request that the Council reduce or waive the provisions of the Ordinance with respect to a specific project. MCC § 2.96.030(C)(1)-(4). Plaintiffs, shrewd developers and sophisticated investors, were planning two condominium projects in Kihei, Maui, for which they requested a complete waiver from the Ordinance on February 23, 2007.

On July 24, 2007, the Policy Committee of the Council held a hearing on the waiver request and recommended denial. The full Council denied the requested waiver on August 21, 2007, finding that there was a reasonable nexus between the impact of Plaintiffs' proposed developments and the need for affordable housing.

Two days later, on August 23, 2007, Plaintiffs filed the Complaint herein and, subsequently filed a First Amended Complaint ("FAC"). In an order issued on July 3, 2008, "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"), this Court described the FAC as follows: "In the FAC, Plaintiffs assert the following claims pursuant to 42 U.S.C. § 1983: deprivation of constitutional rights (Count 1); the Ordinance, on its face, effects an impermissible taking (Count 2); the Ordinance, on its face, violates Plaintiffs' substantive due process and equal protection rights (Count 3); the Ordinance violates the Hawai`i Constitution (Count 4); and Defendants lacked authority to enact the Ordinance because imposition of a development exaction for affordable housing by way of in-lieu fees is not authorized by State statute (Count 5); Plaintiffs also seek to enjoin enforcement of the Ordinance (Count 6)." July 3, 2008 Order, p.6.

In addition, discovery has clarified the fact that Plaintiffs are not seeking monetary damages from the County. CSOF #1.

By Orders dated July 3, 2008, September 9, 2008 and November 25, 2008, this Court dismissed Plaintiffs' facial and as-applied constitutional challenges to the Ordinance, the state law preemption claim, the as-applied equal protection claim arising from the Plaintiffs' appeal for a waiver and the claims against individuals in their official capacities. County now seeks summary judgment on the remaining claims.

B. <u>The Court's July 3, 2008 Order</u>

In response to cross motions for summary judgment, this Court's July 3, 2008 Order dismissed claims against the individual defendants and, deeming Plaintiffs' "unconstitutional conditions"

claim (Count 2) to be a "takings" claim, dismissed it, without prejudice, as unripe. Plaintiffs' other claims remained for further disposition. July 3, 2008 Order, pp. 44, 54, 57, 58-59.

The July 3, 2008 Order described the equal protection claim as twofold, "consisting of: (1) a general argument that the Ordinance is arbitrary and irrational, and (2) a "class of one" argument that Plaintiffs were intentionally, and without rational basis, treated differently from others similarly situated during their appeal for a waiver." July 3, 2008 Order, p. 46.

C. September 9, 2008 Order

In response to County's motion for reconsideration of the July 3, 2008 Order, this Court entered its "Order Granting in Part and Denying in Part County Defendants' Motion for Reconsideration" ("Sept. 9, 2008 Order"). The Sept. 9, 2008 Order dismissed Plaintiffs' facial equal protection and facial due process claims. The as-applied equal protection, as-applied due process claims and the preemption claims based on (a) state law and (b) the Maui County Charter ("Charter") remained. Sept. 9, 2008 Order, p. 7.

D. November 25, 2008 Order

On November 25, 2008, this Court, having heard further motions for summary judgment, entered its Order Denying Plaintiffs' Motion for Partial Summary Judgment; and Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment ("Nov. 25, 2008 Order").

The Nov. 25, 2008 Order dismissed the following claims: ". . . (1) application of the Ordinance violates substantive due process

because it is arbitrary, unreasonable, and not rationally related to a legitimate governmental purpose; (2) the Ordinance violates general as-applied equal protection principles because there is no rational relationship between the targeting of Plaintiffs and a legitimate government purpose." Id. at pp. 18-19. The Nov. 25, 2008 Order stated that "it was unclear from Plaintiffs' Motion for Partial Summary Judgment whether Plaintiffs were separately claiming that the denial of the waiver itself violated substantive due process. 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. Plaintiffs' substantive due process claims, if any, concerning the waiver decision are not ripe. In spite of this Court's findings in its July 3, 2008 Order and Defendants' arguments to the contrary, Plaintiffs continue to argue that they are not asserting a violation of "class of one" equal protection. This Court finds nevertheless that either articulation of the equal protection claim is dismissed as unripe according to the final decision rule." Nov. 25, 2008 Order, p. 19, fn.3.

The Nov. 25, 2008 Order also disposed of Plaintiffs' preemption claim based on state law. "For the reasons set forth below, the Court finds that the Ordinance's in-lieu fee provision does not conflict with State statute and, as a result, summary judgment is appropriate on this issue." Nov. 25, 2008 Order, pp. 29-30. The Court declined to dismiss the claim that the Ordinance's delegation of the power to adjudicate appeals requesting a waiver to the Council rather than the Maui County Board of Variances and Appeals ("BVA") is a violation of the Maui County Charter. Nov. 25, 2008 Order, pp. 32-33. Thus, the BVA issue remains to be adjudicated.

The Nov. 25, 2008 Order also identified two remaining procedural due process claims arising from the waiver hearing: "(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.

Pursuant to the various court orders, two claims now remain for adjudication. The first is the procedural due process challenge to the waiver request hearings. The second is the claim that the Council is not authorized to hear the waiver request because the Charter assigns that authority exclusively to the BVA. Based on these claims, Plaintiffs ask this court to issue a declaration that they are entitled to a complete waiver from the

requirements of the Ordinance. "We should be immune to the affordable housing ordinance." CSOF #2.

County hereby seeks summary judgment on the remaining claims and, in any case, disputes the assertion that the appropriate relief would be a complete waiver. "A violation of procedural rights requires only a procedural correction, not the reinstatement of a substantive right to which the claimant may not be entitled on the merits." Raditch v. U.S., 929 F.2d 478, 481 (9th Cir. 1991).

E. Discovery Now Has Been Conducted

In its Sept. 9, 2008 Order, this Court indicated that the parties must have had sufficient opportunity to conduct discovery ". . . before a moving party will be permitted to carry its initial burden of production by showing that the nonmoving party has insufficient evidence." Sept. 9, 2008 Order, p. 15.

Plaintiffs have deposed all eight of the Maui County Council Members who were present at the committee waiver hearing and the former Director of Housing and Human Concerns. The County deposed Dennis Blain, the designated 30(b)(6) representative of the Plaintiffs, and Christopher Hart, Plaintiffs' expert facilitator. Final summary judgment is now appropriate.

II. STANDARD OF REVIEW

A. County Does Not Have the Burden of Persuasion with Respect to Either the Protected Property Question Or the Unbiased Tribunal Question and is Entitled to Summary Judgment

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) instructs that a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts

immaterial and supports summary judgment. After Celotex, a party that does not have the burden of persuasion at trial is no longer obliged to present evidence that negates the non-movant's claim. Arthur R. Miller, The Pretrial Rush to Judgment, 78 N.Y.U. L.Rev. 982, 1038-1039 (2003).

Furthermore, a party moving for summary judgment is entitled to the burden-shifting effect of presumptions in its favor. In Cal-Farm Ins. Co. v. U.S., 647 F.Supp. 1083, 1086 (E.D. Cal. 1986), aff'd 820 F.2d 1227 (9th Cir. 1987), an action challenging the assessment of a deficiency by the Internal Revenue Service, the court held that a determination by the Internal Revenue Service is presumed correct and "the government is entitled to the benefit of that presumption in moving for summary judgment." Accord: Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254 (9th Cir. 1982), in which the court held that, by pointing to the presumption that a trademark is not generic, Coca-Cola met its burden of demonstrating that the question of whether or not the trademark "Coke" is generic "does not raise a genuine issue of material fact." See also, 6 J. Moore, Moore's Federal Practice, 56.15(3), at 2342-43 (2d ed. 1974); U.S. v. General Motors Corp., 518 F.2d 420, 441-42 (D.C. Cir. 1975), in which the court held that "the moving party for summary judgment is entitled to the benefit of any relevant presumptions that support the motion."

County is entitled to the presumption that its ordinance is valid with respect to the waiver provision and that its officials acted properly. Committee of Dental Amalgam Mfrs. and Distributors

v. Stratton, 92 F.3d 807 (9th Cir. 1997), cert. denied, 519 U.S. 1084 (1997). Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1233-34 (1994). Wedges/Ledges of California, Inc. v. City of Phoenix Arizona, 24 F.3d 56, 66 (9th Cir. 1994).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Supreme Court held that, in order to defeat summary judgment, the non-moving party must present sufficient evidence to support a favorable jury verdict using the evidentiary standard of proof that would apply at a trial on the merits. In Anderson, a trial on the merits would have required the plaintiffs to prove actual malice by clear and convincing evidence because the defendants who allegedly libeled the plaintiffs were public figures. The Supreme Court held that the higher burden of proof must be considered by the trial court in determining whether or not a case should go to the jury. As the Court stated: ". . . a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability. . . ." Id. at 254.

III. PLAINTIFFS CANNOT ESTABLISH THE PROTECTABLE PROPERTY INTEREST REQUIRED FOR A DUE PROCESS CLAIM

A. Plaintiffs Have The Burden of Proving Protectable Property Interest

The Plaintiff's showing of a liberty or property interest protected by the Constitution is a threshold requirement for a procedural due process claim. Wedges/Ledges of Calif., Inc. v. City of Phoenix Arizona, supra, 24 F.3d at 62. "A procedural due process claim hinges on proof of two elements: (1) a protectable liberty or property interest and (2) a denial of adequate

procedural protection. Thornton v. City of St. Helens, 425 F.3d 1158, 1164 (9th Cir. 2005)(in which the Ninth Circuit rejected plaintiffs' claim that they had acquired a property interest in renewal of their state wrecking license because it had always been renewed in the past.)

B. Under Hawaii Law, There is No Property Right in a Particular Development Plan Until the Last Discretionary Permit is Obtained

In order to determine whether or not a claimed right or benefit is a constitutionally protected property interest[1] the court must look to state law. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569, 577 (1972); Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 903 (9th Cir. 2007)(in which the court dismissed a due process claim because Plaintiff lacked a vested property right in its unapproved billboard permit application); Lakeview Dev. v. City of South Lake Tahoe, 915 F.2d 1290, 1294 (9th Cir. 1990)(in which the Ninth Circuit rejected the plaintiff's attempt to rely on the statement in Nollan v. California Coastal Commission, 483 U.S. 825, 833-34 n. 2,

[1] The Fourteenth Amendment to the United States Constitution states in part that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

FN17. Article I, section 5 of the Hawai'i Constitution, entitled "Due Process and Equal Protection," provides that:

"No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

(1987), that "the right to build on one's own property-even though its exercise can be subject to legitimate permitting requirements-cannot remotely be described as a 'government benefit.'" Holding that property rights derive from state law, the Ninth Circuit stated: "the Nollan court's reference to a landowner's abstract 'right' to build 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."

Under Hawaii law, a landowner does not have a protectable property right in a particular development plan until the final discretionary permit has been obtained. Kauai County v. Pacific Standard Life Ins. Co., 65 Haw. 318, 332, 653 P.2d 766, 776 (1982) (also known as the "Nukolii" case). Brescia v. North Shore Ohana, 115 Hawai'i 477, 500, 168 P.3d 929, 953 (Hawai'i,2007)(in which the Hawaii Supreme Court upheld the denial of a variance of a required shoreline setback, finding that Plaintiff did not have a property interest in building his home within 31 feet of the shore.)

C. An Application For a Waiver Does Not Give Rise To a Property Right Unless the Government Has No Discretion to Deny the Waiver

Under Hawaii law, an application for an exception to an existing law ("a waiver") does not constitute a property interest unless the entity to whom the application is made has little or no discretion. "A property interest will be seen to exist if discretion is limited by the procedures in question, that is, whether the procedures, if followed, require a particular outcome."

Brescia, supra, 115 Hawaii at 502 (citations omitted). The United States Supreme Court agrees. "Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion." Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005).

Procedural guarantees, like the right to a hearing on a waiver application, do not transform unilateral expectations into constitutionally protected interest. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005)(in which the Court held that Colorado law did not create a personal entitlement to enforcement of restraining orders); Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980).

Applying the applicable law, this Court held that "In this case, the procedural language of the waiver provision leaves ample discretion to the Council..." militating against a finding of a protectable property interest. Nov. 28, 2008 Order, p. 25.

D. Plaintiffs Do Not Have a "Fundamental Right" to Develop Their Properties Without Complying With The Ordinance

Having held that Plaintiffs did not have a protectable property interest in the waiver application, the Nov. 25, 2008 Order nevertheless did not dismiss the due process claim citing language from Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928), stating that "The right of [an owner] to devote [his] land to any legitimate use is property within the protection of the Constitution." The language from this 1928 case seems to indicate a fundamental right to use property but

judicial decisions in the intervening ninety years have limited Roberge more closely to its facts.

In Roberge, the Supreme Court stuck down a Seattle zoning ordinance requiring plaintiffs who sought to build a home for the aged poor to get the written consent of two-thirds of the property owners within four hundred feet of the proposed building. The holding was based on the proposition that an otherwise permitted use could not be denied because an owner could not get permission from his neighbors.

As the Ninth Circuit explained in Young v. City of Simi Valley, 216 F.3d 807, 820 (9th Cir. 2000), cert. denied 531 U.S. 1104 (2001):

> "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.' Geo-Tech Reclamation Indus., Inc. v. Hamrick, 886 F.2d 662, 665 (4th Cir.1989)(holding unconstitutional a statute that gave local residents de facto veto power over the landfill permitting process and quoting Roberge; see also Eubank, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (striking down statute that allowed 2/3 of property owners to direct street committee to establish a building line on other's property). 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."

Likewise, Harris v. County of Riverside, 904 F.2d 497, 503 (9th Cir. 1990), cited in this Court's Nov. 25, 2008 Order, concerned a landowner whose permitted use of his land as an

all-terrain-vehicle rental facility was thwarted by neighbors. Responding to their complaints and without notice to the plaintiff, the county passed a new general zoning ordinance that specifically re-designated his land exclusively for residential use. Id. at 503. The Harris case involved ripeness issues and did not purport to abrogate Board of Regents v. Roth, supra, 408 U.S. 564 (1972), the United States Supreme Court case that establishes that property rights are established by state law.

Because of the lack of notice, Harris suffered an immediate injury and the ripeness requirement set forth in Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) did not apply. Harris at 502.

Six months after deciding Harris, 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, supra, 915 F.2d at 1294.

Likewise, Plaintiffs herein do not have an unconditional right to build a project that does not comply with a valid County Ordinance.

IV. ASSUMING, ARGUENDO, THAT PLAINTIFFS HAD A PROTECTABLE PROPERTY RIGHT, THE WAIVER HEARING MET THE THREE-PART BALANCING DUE PROCESS TEST

A. There was No Risk of Erroneous Deprivation Through the Procedures Actually Provided by the Council

1. Council Hearings Satisfy Due Process

In the City and County of Honolulu, applications for Special Management Area ("SMA") permits are heard by the City Council. In the other counties in Hawaii, the planning commission hears SMA applications. HRS 205(A)(22). In Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (Hawai'i 1989), Plaintiffs alleged that a hearing before the City Council did not satisfy due process. The Hawaii Supreme Court assumed, arguendo, that the Plaintiff had a property interest and concluded that due process requirements were met. Citing, among other cases, Matthews v. Eldridge, 424 U.S. 319, 333 (1976), the Hawaii Supreme Court held that the basic elements of procedural due process of law requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest. The court stated:

. . .

"Assuming for present purposes that Appellants can demonstrate protectible property interests sufficient to trigger procedural due process protection, we must weigh those interests against (1) the risk of erroneous deprivation through the procedures actually provided by the Council, (2) the probable value of providing an adjudicatory-type hearing, and (3) the Council's interest in adhering to its current procedures." (numbering added) Id. at 378.

The Court concluded that a public hearing before the City Council provided a meaningful opportunity to be heard.

"In substance, all interested persons were given the opportunity to present their positions orally and in writing for the purpose of adding to the information and data available to the Council in evaluating the application and deciding whether or not to grant the permit. . . ." Id. at 378-379.

In Brescia v. North Shore Ohana, supra, 115 Hawai'i at 500, the Hawaii Supreme Court found that the Plaintiff did not have a property interest in his application for a variance. Nonetheless, assuming, arguendo, that the Plaintiff had a property interest in his variance request, the court stated that ". . .Brescia was given a full public hearing before the Commission made its ruling on Lot 6. At the public hearing, Brescia was able to present testimony to support his request for a variance. While the variance sought was ultimately denied, Brescia nonetheless received the due process to which he was entitled." Id. at 502.

2. Adjudicative Decision Makers Are Presumed to Be Fair And Unbiased

Plaintiffs maintain that they were denied their due process rights at the waiver hearing because the Council was biased. In Larson v. Palmateer, 515 F.3d 1057, 1067 (9th Cir. 2008), cert. denied Larson v. Belleque, 129 S.Ct. 171 (2008), the Ninth Circuit stated that: "To succeed on a judicial bias claim, however, the petitioner must overcome a presumption of honesty and integrity in those serving as adjudicators." The Ninth Circuit went on to state that: "In the absence of any evidence of some extrajudicial source

of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are 'critical or disapproving of, or even hostile to, counsel, the parties, or their cases,'" citing to Liteky v. U.S., 510 U.S. 540, 555 (1994). The Larson court concluded: "Because Larson has provided no evidence of the trial court's alleged bias outside of these rulings and remarks-which themselves revealed little more than the occasional mild frustration with Larson's pro se lawyering skills-his claim that he was denied a fair trial also fails." Id. at 1067.

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

3. Actual Bias Must Be Shown

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

4. Risk of Erroneous Deprivation Did Not Arise From the Fact That Council Members Had Supported Passage of the Ordinance

In Winthrow v. Larkin, 421 U.S. 35 (1975), the United States Supreme Court decided that administrators who conducted investigations could also sit as adjudicators without jeopardizing the presumption of impartiality. The Winthrow case involved revocation of a physician's license by the Wisconsin Medical Examining Board. In response to the civil rights lawsuit filed by

the physician, the Supreme Court quoted with approval the following statement: "(W)e cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required." (Emphasis added.) Id. at 50.

5. Political Opinions Do Not Demonstrate Bias

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

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

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

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

Nor is a decision maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of

judging a particular controversy fairly on the basis of its own circumstances." U.S. v. Morgan, 313 U.S. 409, 421 (1941); see also FTC v. Cement Institute, 333 U.S. 683, 701 (1948), rhng denied 334 U.S. 839 (1948).

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

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

As the Court noted: "Council Member Victorino's statements are particularly problematic. During the hearing on Plaintiffs' waiver appeal, Council Member Victorino stated: "So I think when someone comes in and asking for a waiver . . . they've gotta understand we're not gonna give waivers. . . . We've talked about it. We had a conference last week Friday on it, and we're not gonna change our mind." (Id.) Such language indicates that the Council may not have given Plaintiffs legitimate, meaningful consideration in violation of their procedural due process rights." Nov. 25, 2008 Order, p. 27.

In fact, the Council Members did not meet nor did they discuss the matter prior to the hearing. CSOF #3. Council Member Victorino was referring to a public meeting held at the Maui Kaunoa Senior Center, where non-profit groups met to discuss affordable housing issues in general. CSOF #4. Council Member Victorino was the only Council Member who attended that public meeting. CSOF #5.

7. Intemperate Remarks Do Not Demonstrate Bias

Furthermore, "'expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women...sometimes display' do not establish bias." Rollins v. Massanari, supra, 261 F.3d at 858. The comments made by Council Members Mateo and Anderson as cited by this Court in its Nov. 25, 2008 Order fall into this category and cannot be held to exhibit the type of bias that would rob the applicant of a fair tribunal.[2]

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

Plaintiffs' claim that the Council Members are biased against residential developers has no basis in fact. The Council Members have all voted for residential projects even in the face of public opposition. CSOF #6.

B. Examining the Probable Value of Providing A Different Forum Reveals that a Hearing Before the BVA Would Be Futile for Plaintiffs

1. A Variance Cannot Be a De Facto Repeal of a Law

The second test that the court should apply to determine if due process was given asks whether a different forum could provide a better result for Plaintiff. The Plaintiffs' position that they

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

should have been allowed to present their request for a waiver to the BVA avails them nothing. The BVA grants variances only under limited and stringent circumstances.

"A variance, by its very nature, is an exception rather than the rule. The person or entity seeking the variance has the burden of proving entitlement thereto and must demonstrate what is unique about its situation so that the granting of variances does not become a de facto repeal of the law." 1 68 ALR 13 Construction and Application of Provisions for Variances (I)(h).

Professor McQuillin in his seminal treatise on Municipal Corporations explains the "variance" concept as follows: "The one applying for or seeking the variance has the burden of showing the hardship to himself or herself. Although economic hardship alone is usually not enough, the landowner must show factually, by dollars and cents proof, that all uses permitted on the land under the existing zoning regulations are economically unfeasible before a use variance may be granted. . . . It is not mere hardship, inconvenience, interference with convenience or economic advantage, disappointment in learning that land is not available for business uses, financial or pecuniary hardship or disadvantage, loss of prospective profits, prevention of an increase of profits, or prohibition of the most profitable use of property. Conclusory testimony of witnesses, unsupported by any underlying concrete facts and figures, that the permitted uses will not yield a reasonable rate of return is not an adequate basis upon which to grant a variance. . . . No undue hardship is shown where the

landowner could accomplish the same objective without a variance by changing his or her plans so that they conform to the existing zoning requirements." McQuillin, The Law of Municipal Corporations (MUNICORP) § 25.166.

Although the elements to be proven in order to obtain a variance differ slightly in each section of the BVA Rules, they all require that the applicant demonstrate a unique or unusual condition not prevailing in the other properties in the area, a finding of hardship that was not the fault of applicant and a determination that granting the variance would not be contrary to the purpose for which the standards were adopted. Rules of Practice and Procedure of the Board of Variances and Appeals, Title MC-12, Department of Planning Subtitle 08 Board of Variances and Appeals Chapter 80 ("BVA Rules"), Variances. BVA Rules §12-801-71, BVA Rules §12-801-72, BVA Rules §12-801-73, BVA Rules §12-801-74,BVA Rules §12-801-75 and BVA Rule §12-801-76.

2. Plaintiffs' "Presentation" at the Waiver Hearing Would Not Meet the BVA's Standards For a Variance

Plaintiffs are shrewd developers and sophisticated investors who knew before purchasing their properties and commencing their development plans that Maui County would require at least a 15% affordable housing or an in-lieu component. CSOF #7. Plaintiffs' expert consultant, Christopher Hart, a former Maui County Planning Director with the County of Maui, testified that he anticipated a 30% requirement in the Workforce Housing Ordinance and that he told Dennis Blain this. CSOF #8. Despite having this knowledge, the

Plaintiffs did not request a reduction or adjustment in the affordable housing percentage component to 30% or even 15%. CSOF #9. Instead, they requested a complete waiver. CSOF #10. Plaintiffs did not intend to provide any affordable housing at all, nor did they desire to pay any amount towards an in-lieu affordable development fee. CSOF #11. This "zip," "zero," "zilch," "nada" position confused the Council Members who were accustomed to an affordable housing component as a condition of granting entitlements even before the Ordinance was passed. CSOF #12. 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.

Despite the clear requirement[3] that "The appeal shall set forth in detail the factual and legal basis for the claim of

[3] At the time of the Plaintiffs' waiver hearing in July 2007, the relevant portions of the Ordinance read as follows:
C. Adjustment.
1. A developer of any development subject to this chapter may appeal to the council for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus between the impact of the development and the number of residential workforce housing units or in-lieu fees/land required.
2. Any such appeal shall be made in writing and filed with the County clerk prior to final subdivision approval or issuance of a building permit for the development, whichever is applicable. Any such appeal shall administratively stay the processing of the development's subdivision or building permit, whichever is applicable, until a decision on the appeal is rendered. The appeal shall set forth in detail the factual and legal basis for the claim of reduction, adjustment, or waiver, and the developer shall bear the burden of presenting substantial evidence to support the appeal, including comparable and relevant technical information.
MCC § 2.96.030(c)(1)-(2).

reduction, adjustment, or waiver, and that the developer shall bear the burden of presenting substantial evidence to support the appeal, including comparable and relevant technical information," Plaintiffs failed to make a presentation to the Policy Committee. CSOF #13. Plaintiffs even instructed their expert consultant, Christopher Hart, that he need not attend the hearing. CSOF #14. Plaintiffs claim that they provided the Council with hundreds of pages of technical data, including maps, site plans, floor plans, photos, a draft environmental assessment, summaries of community meetings, an engineering and hydrological report, a traffic impact study, an archaeological survey report, and relevant excerpts of an affordable housing study. CSOF #15. However, Plaintiffs refused to take and answer questions or to even point out the relevant portions of the information to the Council Members. CSOF #16. It is well established that a tribunal is not expected to search a voluminous record to find support for an applicant's case. Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996)(stating that it is not a district court's task to "scour the record in search of a genuine issue of triable fact").

It was also significant to the Council Members that the applicant was not asking for a reduction or adjustment in the amount of affordable housing. CSOF #9. The applicant did not appear to willing to provide any affordable housing. CSOF #10-11. Essentially by applying for a complete waiver without offering specifics to distinguish its proposed project, the developer was contending that no residential condominium development could have

a nexus with the need for affordable housing, a de facto repeal of the Ordinance. The waiver hearing was a necessary prerequisite to a more fully fleshed out argument for unconstitutionality presented to this court shortly after the waiver was denied. Herrington v. County of Sonoma, 857 F.2d 567, 568 (9th Cir. 1988), cert. denied 489 U.S. 1090 (1989)(in which the Ninth Circuit held that: "A constitutional challenge to land use regulations is ripe when the developer has received the planning commission's 'final definitive position regarding how it will apply the regulations at issue to the particular land in question.' . . . A final decision requires at least: '(1) a rejected development plan, and (2) a denial of a variance.'" Kinzli, 818 F.2d at 1454. (Citing, Williamson County, 473 U.S. at 187-90, 105 S. Ct. at 3117-18.)

This shrewd developer and sophisticated investor did not participate in the waiver hearing in the way one would expect from a petitioner actually seeking an exemption to an ordinance and bearing the burden of proof that it was entitled to such an exemption. CSOF #13, 14, 16-17. The applicant offered no oral presentation at the waiver hearing, nor did it take advantage of the offer to take and answer questions from the Council Members. CSOF #13, 16.

A letter from the appellant's attorney was offered as the main evidence to support its waiver request, yet it contained no support for its "factual" assertions. CSOF #17. Council Member Molina interpreted the letter submitted by the developer's attorney as

meaning that some affordable housing was being provided but he couldn't discern how much. CSOF #18.

The developer's 30(b)(6) representative, Dennis Blain, has expressed his general disdain for Maui County's government. CSOF #19.

3. The Developer's Claim That The Ordinance Rendered The Projects Infeasible Was Based on Their Own Accounting Flim-Flam

Perhaps the developer did not want to take and answer questions from Council because it did not want to be asked about its profit margin and the way in which it had "increased" its basis in the property by selling off portions to investor partners until the property appeared to have drastically increased in value in a relatively short period of time. CSOF #20-27.

An entity owned by Dennis Blain ("Blain") purchased the Alaku Pointe property on July 8, 2005 for $2.2 million. CSOF #21. On December 16, 2005, Blain sold a 20% interest in the Alaku Pointe property to an entity owned by Ken Chiate ("Chiate") for $2.5 million. CSOF #22. Three months later, on March 24, 2006, an entity known as Alaku Pointe LP owned by Blain and Pointe of View Developments, Inc. purchased Blain's 80% interest in Alaku Pointe for $8.8 million. CSOF #23. Thus the developer could represent that the Alaku Pointe property, purchased for $2.2 million late in 2005, represented an investment of $8.8 million three months later.

Similarly, Blain contracted to purchase the Kamaole Pointe property for $8.5 million in March, 2006, despite a March 20, 2006

appraisal for $4.75 million. CSOF #24. On or about March, 2006, Pointe of View Developments, Inc. purchased a 50% interest in the Kamaole Pointe property for approximately $7.6 million and an entity called CDN Maui, owned by Dennis Blain and Phil Archer, obtained the other 50% interest for approximately $7.6 million. CSOF #25. Blain did not pay cash but contributed his interest at this inflated value. CSOF #26. These insider transactions appeared to indicate that the Kamaole Pointe property was purchased for $15.2 million, making a "profit" seem impossible, but this was, in fact the developer's own accounting flim-flam. CSOF #27. Likewise, the Alaku Pointe property purchased for $2.2 million was represented to have been purchased for $11 million. Dennis Blain testified that, even at this price, the net profit on Alaku Pointe and Kamaole Pointe at one time was calculated at $24,791,000.00. CSOF #28.

C. The Government Has A Strong Interest In the Procedure Used

The third test for due process weighs the government's interest in the process actually used. As the Plaintiffs note, the Maui County Council members are extremely interested in making sure that building depending on Maui's limited infrastructure provides housing for the work force. CSOF #29. However, they are also interested in a process to provide for a reduction in or waiver of that requirement if a developer can meet its burden of proof. CSOF #30. The Council was concerned that hearings before the BVA would be too lengthy to be meaningful particularly because the BVA

proceedings are contested cases that allow for intervention. BVA Rules Subchapter 3, Intervention and Contested Cases, and Subchapter 4, Contested Case Procedure. The Council, on the other hand, set itself a limited time frame, originally 90 days, and now 45 days, in which to act on the waiver request. CSOF #31. The recently adopted Rules Relating to the Administration of Chapter 2.96 MCC do not provide for intervention. CSOF #32.

V. THE CHARTER OF THE COUNTY OF MAUI DOES NOT GIVE THE BVA EXCLUSIVE JURISDICTION OVER REQUESTS FOR VARIANCES FROM THE ORDINANCE

A. The BVA Has Exclusive Jurisdiction In Limited Areas

Plaintiffs assert that the Council could not lawfully hear requests for waivers from the strict requirements of the Workforce Housing Ordinance because the Charter of the County of Maui ("Charter") assigns variance jurisdiction exclusively to the BVA.

The Charter provides that the BVA shall hear and determine applications for variances from the strict application of any zoning, subdivision or building ordinances. The Charter provision also allows the BVA to "hear and determine all matters which the board may pass on pursuant to ordinances." Charter Section 8-8.7(1).

However, the BVA does not have jurisdiction over requests for a variance from the Residential Workforce Housing Ordinance because that Ordinance is not part of the zoning, subdivision or building ordinances. The County has interpreted the language of the Charter to require variances from Chapter 16 (Building Code), Chapter 18 (Subdivisions) and Chapter 19 (Zoning) of the Code to be heard by

the BVA. With respect to other chapters of the Code, the Charter provides that the BVA may, but need not, be the body to hear appeals. For example, appeals with respect to the decisions of the Director of Water Supply are heard by the Board of Water Supply. MCC Chapter 14.11. CSOF #33. MCC Chapter 14.11 The County's interpretation of its Charter is entitled to deference. Save Diamond Head Waters LLC v. Hans Hedeman Surf Inc., 2009 WL 2006864 (Hawai'i 2009) at p. 9.

B. Plaintiffs Waived Their Objection to the Alleged Bias of Council by Failing to Timely Object

As the Hawaii Supreme Court held in In re Water Use Permit Applications, 94 Hawai'i 97, 122, 9 P.3d 409, 434 (Hawai'i,2000), "A party asserting grounds for disqualification must timely present the objection, either before the commencement of the proceeding or as soon as the disqualifying facts become known. The unjustified failure to properly raise the issue of disqualification before the agency forecloses any subsequent challenges to the decisionmakers' qualifications on appeal. See, Power v. Federal Labor Relations Auth., 146 F.3d 995, 1002 (D.C. Cir. 1998) ("[I]t will not do for a claimant to suppress his misgivings regarding bias while waiting anxiously to see whether the decision goes in his favor." (Citation and brackets omitted.)

If Plaintiffs felt that the BVA was the only appropriate body to hear their waiver request, they should have raised that issue rather than allowing the hearing before the Council to proceed.

C. The Allegation That The Hearing Process Violated the County Charter Does Not State a Federal Claim

Plaintiffs' claim that "...the Ordinance's waiver provision improperly delegates the power and authority to grant variances to the Maui County Council in violation of the Maui County Charter" (FAC ¶ 88) is not cognizable under § 1983.

The Ninth Circuit has recently held that the federal courts do not have subject matter jurisdiction under § 1983 if the claimed due process violation arises because a county ordinance is invalid under state law. Lone Star Security Video, Inc. v. City of Los Angeles, 2009 WL 1978740 (9th Cir. 2009). In the Lone Star Security case which was decided on July 10, 2009, the Ninth Circuit joined the Seventh and Tenth Circuits in holding that "...error in the administration of state law, though injury may result, is not a matter of federal judicial cognizance under the due process clause of the fourteenth amendment." Id. at p. 4. Lone Star Security holds that such a claim would demote the Constitution to a font of tort law. Id. at p. 6.

VI. CONCLUSION

Plaintiffs' Constitutional claims should be dismissed by summary judgment simply because Plaintiffs do not have a protectable property interest in the waiver request filed with the County Council. This is not a case where the government is alleged to have taken something from the Plaintiffs. Rather, the Plaintiffs were seeking to be relieved from the requirement of complying with a generally applicable law.

The Ordinance provides that a developer seeking a reduction or waiver from the workforce housing requirements can apply to the Maui County Council. Plaintiffs maintain that they should have been allowed to present the request for a waiver to the BVA instead. Had that been the case, an intervention could have triggered a long process including discovery. By choosing to hear requests for waivers on an expedited ninety-day track (later forty-five day track), the Council was providing a benefit to the developers.

Nevertheless, the Plaintiffs claim that the Council Members were all biased in favor of affordable housing and against residential developers and so they could not hear the waiver request in a fair and impartial manner. The type of bias necessary to render a tribunal unable to provide due process is a legal question. The entire hearing was transcribed and there is no dispute about what was said. The Council Members have all indicated that they did not attend any "pre-meeting" as could be inferred from Council Member Victorino's remarks. Council Member Victorino has explained that he was referring to a public meeting he attended. None of the other members attended the meeting.

No reasonable juror could choose to declare seven council members to be liars by accepting a sinister interpretation of Council Member Victorino's somewhat jumbled remarks at the waiver hearing. Summary Judgment should be granted unless Plaintiffs present admissible evidence that would allow a reasonable jury to return a verdict in their favor. Nidds v. Schindler Elevator

Corp., 113 F.3d 912, 916 (9th Cir. 1996), cert. denied, 522 U.S. 950 (1997).

Plaintiffs have a heightened burden of proof to defeat summary judgment on this issue because of its implausibility. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Tanner v. Heise, 879 F.2d 572, 577-78 (9th Cir. 1989) (in which the court affirmed summary judgment despite the inferences that could be drawn from the non-moving party's argument because the factual context made the claim implausible).

For the reasons set forth herein, County should be granted summary judgment on all the remaining claims made by Plaintiffs.

DATED: Wailuku, Maui, Hawaii, July 30, 2009.

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