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KAMAOLE POINTE DEVELOPMENT LP
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

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

PLAINTIFFS KAMAOLE POINTE DEVELOPMENT LP AND ALAKU POINTE LP'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs Kamaole Pointe Development LP and Alaku Pointe LP, by and

through their undersigned counsel, move this Court pursuant to Rules 7 and 56 of the Federal Rules of Civil Procedure for summary judgment in their favor declaring that the subject Ordinance No. 3418, as applied to Plaintiffs, violated Plaintiffs' due process rights and that Plaintiffs are entitled to a waiver under the Ordinance, and awarding damages, attorneys' fees and costs in Plaintiffs' favor.

This motion is supported by the attached memorandum of law, the pleadings, admissions and records on file in this action, and the separate concise statement of facts, along with the declarations, exhibits and other papers submitted therewith, each of which is adopted herein by this reference.

DATED: Honolulu, Hawai`i, July 31, 2009.

/s/ Robert G. Klein
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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This action arises from the Maui County Council's enactment of Ordinance No. 3418 ("Ordinance")—an unprecedented ordinance that requires Plaintiffs to dedicate 50% of their private property for affordable housing in order to build on their two urban-zoned, vacant real estate parcels. The Ordinance was enacted in response to constituents' concerns that housing prices in Maui County were skyrocketing, leaving many residents unable to afford housing. Many politicians campaigned on promises of providing affordable housing. The Ordinance contains a provision permitting Plaintiffs to apply to the Council, the very body that created the Ordinance, for a waiver from the affordable housing requirement. Plaintiffs submitted hundreds of pages in support of its application for a waiver, demonstrating the absence of a nexus between their projects and the Ordinance's affordable housing requirements. No evidence was submitted to the Council to the contrary. Nevertheless, the Council irrationally refused to grant Plaintiffs' request. While the goal of providing affordable housing to the people of Maui County is certainly laudable, as the record demonstrates and as set forth in more detail below, the members of the Council were so focused on the end goal, they were unable to impartially evaluate Plaintiffs' request for a waiver from the Ordinance. In the end, the politicians made a political decision, which was at the expense of

Plaintiffs' procedural due process rights, and ultimately, at the expense of the goal of providing affordable housing to the people of Maui County. Accordingly, Plaintiffs respectfully request that the Court grant Plaintiff's Motion for Summary Judgment and award damages, attorneys' fees and costs in Plaintiffs' favor.

II. STATEMENT OF FACTS

A. Plaintiffs' Residential Development Projects

Plaintiffs own two parcels of vacant land in the urban corridor of Kihei, Maui, which are zoned and suitable for multi-family residential housing or hotel/resort use. Prior to the passage of the Ordinance, Plaintiffs and their predecessors-in-interest invested hundreds of thousands of dollars into the planning and design of two residential projects on the two parcels: (1) the Kamaole Pointe project (124 units), and (2) the Kihei Pointe project (127 units). Both properties are in an urban district surrounded by developed, high-density residential and commercial sites and mature and ample existing infrastructure. As classic "in-fill" projects (vacant parcels surrounded by existing development of like character to the proposed project), they are consistent with existing zoning. With these entitlements and plans already in place, and in reliance on the projects' feasibility under existing zoning and laws, Plaintiffs invested millions of dollars toward the purchase of the two parcels in March 2006.

B. Passage of the Ordinance

As the County elections heated up in mid 2006, the clamor for affordable housing impacted the political campaigns. Many Councilmembers made campaign promises to meet the needs of Maui residents for affordable housing. Concise Statement of Facts ("CSOF"), ¶1.

Leading up to the elections, the Maui County Council had been considering a bill to enact an ordinance requiring residential developers to dedicate 30% of their projects to affordable housing subject to strict and inflexible price controls. Legal scholars, economists, and other commentators questioned the legality and constitutionality of the proposed ordinance, and urged restraint, cautioning that the unprecedented magnitude of any mandatory affordable housing set-aside over 30% would kill most if not all residential development on Maui, and result in a *de facto* moratorium on residential development that would exacerbate the affordable housing problem in the long run. CSOF, ¶2.

Nevertheless, the Council passed the subject Ordinance in December 2006, which mandated an unprecedented 50% mandatory affordable housing set-aside for any development project of five or more units if more than half of the units were to be sold at $600,000 or more. Id., ¶3; Ex. 6 §§ 2.96.030(A), 2.96.040. If more than half of the units were to be sold at less than $600,000, the developer needed to

devote 40% of the units as affordable housing units. Id. Maui Mayor Alan Arakawa vetoed the Ordinance, but the Council overrode his veto.

No studies were conducted to support the existence of a relationship between residential development projects of five or more units and a worsening of the affordable housing problem. In addition, the County undertook no studies or empirical analyses to assess *the degree* to which such developments would impact the need for affordable housing so as to justify the imposition of *any* specific mandatory affordable housing set-aside, whether at the 80% level, the 50% level, or at any other percentage.

C. Impact of the Ordinance

Plaintiffs immediately sought professional advice and analysis concerning the impact of the Ordinance from their planners who had been working on their projects. Based on such advice and analysis, Plaintiffs determined that complying with the Ordinance was so cost-prohibitive as to render both of their projects infeasible. In response, Plaintiffs halted all work on the Kamaole Pointe and Kihei Pointe projects.

The only relief available to a landowner from the onerous terms of the Ordinance is an "appeal" for a "waiver" that must be presented to the County Council for decision. Ex. 6 § 2.96.030(C). Under the terms of the Ordinance, Plaintiffs were assigned the burden of "presenting substantial evidence" supporting

the *absence* of any reasonable relationship or nexus between their projects and the requirements set forth in the Ordinance. Id. § 2.96.030(C)(1), (2). The Ordinance states that the appeal "shall be made in writing." Id. The Ordinance does not provide for an appeal from the Council's decision, nor are there any other procedural mechanisms to ensure that the appeal review process is meaningful, or to guard against unfairness in the proceedings. See id. § 2.96.030.C. Plaintiffs were advised to pursue the waiver relief under the Ordinance.

D. Plaintiffs Request a Waiver

Plaintiffs began their quest for an appeal in early February 2007 when they met with the County's housing director, Vanessa Medeiros, to ask how to get a waiver. CSOF, ¶4. Ms. Medeiros directed Plaintiffs to appeal to the Maui County Council and read Plaintiffs the Ordinance verbatim. Id. On February 23, 2007, Plaintiffs filed their appeal, asking the County Council for a waiver of the Ordinance's requirements for both projects. Id., ¶5. From February 23, 2007 to June 5, 2007, Defendants did nothing whatsoever in response to the appeal. CSOF, ¶6.

Only after Plaintiffs invoked the Ordinance's "90-day rule" did Defendants finally swing into action. Id., ¶7. The Ordinance required the Council to either approve or deny an appeal within 90 days after the developer "concludes its presentation of evidence," or the appeal would be automatically granted. Ex. 6

§ 2.96.030(C)(3). Because their appeal had languished for three months, Plaintiffs decided to invoke the protections of this rule. See id., ¶¶6-7. When Plaintiffs presented their supplemental submission of facts and evidence supporting their appeal, they gave Defendants fair notice that they had "concluded" their presentation of evidence and that the 90-day "clock" had started to run. Id., ¶7.

Plaintiffs' evidence and analysis was detailed and extensive, consisting of an incisive analysis of market conditions supported by a 2006 housing study commissioned by the State and county governments, including Maui County, as well as hundreds of pages of project documents, including maps, site plans, floor plans, photos, a draft environmental assessment, summaries of community meetings, an engineering and hydrological report, a traffic impact study, and an archaeological survey report. Id., ¶8. Because Defendants issued no procedural or evidentiary rules and the housing director simply told them to follow the Ordinance, there was nothing to guide Plaintiffs' presentation of evidence. Plaintiffs submitted the following facts and evidence in support of their appeal: (1) the land is currently vacant; (2) thus, the projects will not decrease the supply of existing affordable housing; (3) Plaintiffs expected to hire local workers who already live on Maui to build and manage the projects; (4) thus, the projects will not increase the demand for affordable housing in the future; (5) the projects were classic "in-fill" developments consistent with the character of the surrounding

neighborhood and existing zoning in the Kihei urban corridor; and (6) the projects would add 251 residential units to the overall supply of housing in an underserved niche, thereby alleviating price pressures and providing opportunities for Maui residents to rent or buy the units or to rent or buy existing affordable units vacated by Maui residents who move into Plaintiffs' projects. CSOF, ¶9.

The first thing Defendants did in response to Plaintiffs' appeal was to ask Corporation Counsel for an opinion on when the 90-day clock "really" started. Id., ¶10. The next day, County Council Services asked Plaintiffs for extra copies of their submissions, and Plaintiffs complied at great expense, making twelve copies of their submission, each of which was hundreds of pages. Id., ¶11. Defendants then placed Plaintiffs' appeal on the agenda. Id.

E. The July 24, 2007 Meeting

Fully *five months* after filing their appeal, Plaintiffs were invited to, and did attend, the Policy Committee meeting on July 24, 2007. Id., ¶12. At the meeting, Deputy Corporation Counsel Edward Kushi advised the Councilmembers to decide the matter by August 24, 2007, unless they could somehow get Plaintiffs to present more evidence to restart the 90-day clock. See CSOF, ¶13. Kushi further stated that, as he had previously advised the Council, without the waiver provision "this ordinance could be attacked on its face as unconstitutional." Id. He further opined that, unlike other government agencies, the County Council need not conduct a

contested case hearing on Plaintiffs' appeal even when the Council was not acting in a "non-legislative" manner. Id.

The Councilmembers were extremely hostile to Plaintiffs' appeal and waiver request, and each Councilmember explained, quite emphatically, how he or she was going to vote against the appeal. See infra Section IV. Chair Dennis Mateo prefaced the Council's deliberations by 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." Id., ¶14. Chair Mateo then recommended that Plaintiffs' waiver request be rejected. Id. The Councilmembers' comments at this meeting revealed that the waiver process was a sham, and they clearly signaled that no waivers would ever be granted. See infra Section IV.

Just before the Council was about to vote, Plaintiffs watched as Vice Chair Hokama called a "time-out" in order to coach Chair Mateo to invite Plaintiffs to respond to questions one last time, a tactic that Ed Kushi had earlier suggested to restart the 90-day clock. CSOF, ¶15. Not surprisingly, Plaintiffs politely declined Chair Mateo's invitation. Id.

On August 21, 2007, the Council passed a resolution rejecting Plaintiffs' waiver request. The resolution stated: "[A]fter due consideration of the

evidence . . ., the Council finds that there is a . . . nexus between the impact of the development and the residential workforce housing requirements for the development." Id., ¶16; Ex. 10. No facts or evidence, however, were presented in support of this "finding." Id. Plaintiffs' projects remain stalled as a result.

III. SUMMARY JUDGMENT STANDARD

Summary judgment shall 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. Fed. R. Civ. P. 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)).

If the moving party meets its burden, then the opposing party, without relying merely on allegations or denials in its own pleadings, must present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1048 (9th Cir. 1995) (quoting Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)). "If the evidence is merely

colorable, or is not significantly probative, summary judgment may be granted." Id. (quoting Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249-50 (1986)).

A dispute about a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248 (1986).

IV. ARGUMENT

As this Court has previously held, Plaintiffs have 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 Development v. County of Maui, 2008 WL 5025004, *10 (D. Hawai`i, November 25, 2008). The issue now before the Court is whether 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)). Procedural due process requires that a party have an 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 also requires "a fair trial in a fair tribunal." In re Murchison, 349 U.S. 133, 136 (1955). That is to say:

> [D]ue process requires a "neutral and detached judge in the first instance," Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972), and the command is no different when a legislature delegates adjudicative functions to a private party, see Schweiker v. McClure, 456 U.S. 188, 195 (1982). "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." Tumey v. Ohio, 273 U.S. 510, 522 (1927). Before one may be deprived of a protected interest, whether in a criminal or civil setting, see Marshall v. Jerrico, Inc., 446 U.S. 238, 242, and n.2 (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation "'which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true. . . .'" Ward, supra, 409 U.S. at 60 (quoting Tumey, supra, 273 U.S. at 532). Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator. 409 U.S., at 61, 93 S.Ct. at 83.

Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 617-18 (1993). 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.

A. The Councilmembers were Irrationally Biased Against Developers in General and Plaintiffs in Particular

The record demonstrates that a major reason for rejecting Plaintiffs' appeal was the Councilmembers' irrational bias against residential developers, and Plaintiffs in particular, even though Plaintiffs did not contribute to any affordable housing problem. See CSOF, ¶¶17-21; Ex. 2, p.113 (Chair 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. 5, p.36 (testifier noted the Council's perception that "developers are money driven and evil"), p.141 (Member Michelle 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."); Ex. 5, p.132 (Member Jo Anne Johnson: "[Developers] have been getting away with highway robbery for a long time."), 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.").

Councilmembers were biased against residential developers based on the irrational assumption that all housing that was not "affordable" was for the "off-

shore market," a.k.a. "millionaires from the mainland." See CSOF, ¶¶22-23. Vice Chair Hokama said: "[W]e need to make a direction adjustment to provide for those who are living here and not for those who would like to come and move here." Id., ¶22. Member Anderson stated: "Are you . . . aware that in Maui County, specifically over the last five or so years, that most of the housing has been built for people who don't live in Maui County? . . . . Well, that's why we feel there is a nexus." Id., ¶23. Plaintiffs, however, are not creating housing for the "off-shore market." Rather, Plaintiffs' "projects are infill developments, intended to provide non-luxury housing to Maui residents," which is encouraged by the County's General Plan. Id., ¶¶24-25.

"Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 448 (1985) (citation omitted). Far from a "fair trial in a fair tribunal," the Council was unabashedly biased against residential developers and Plaintiffs in particular, thus leading to the rejection of Plaintiffs' appeal.

B. The Councilmembers Improperly Rejected Plaintiffs' Appeal Based on their Determination to Never Grant Waivers

Some 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, Plaintiffs would *ipso facto* exacerbate the affordable housing shortage. Having made this improper predetermination, the Councilmembers did not give Plaintiffs the process they were due.

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." 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). Although Member Victorino later attempted to backtrack on his proclamation, he ultimately admitted 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. Whether Member Victorino misunderstood the Ordinance or he simply did not intend to give effect to the waiver provision in the Ordinance, the record demonstrates that he did not even consider Plaintiffs' appeal.

Similarly, 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." Id., ¶14 (emphasis added). Although not as straightforward as Member Victorino's statements, 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." The presumption upon which Chair Mateo ostensibly reached his "nexus" conclusion is nowhere to be found in the Ordinance. 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. This may have misled Councilmembers into believing that this improper presumption was part of the Ordinance.

Unfortunately, Member Gladys Baisa testified that she relied in part on Chair Mateo's advice in reaching her decision.[1] CSOF, ¶30. Indeed, Member

[1] 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

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 id., ¶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.

Member Joseph Pontanilla also may 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.

Id., ¶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." Id., ¶33 (ellipses in original). Because Plaintiffs attempted to demonstrate the absence of a nexus (as the Ordinance requires for a waiver), their

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corporation counsel or the housing director submitted any testimony related to a finding of the existence of a nexus. Id., ¶29.

appeal made "no sense." Member Johnson's comments illustrate her belief that a nexus will always exist, thus rendering the waiver provision null and void and the Ordinance facially unconstitutional.

Therefore, the record demonstrates that at least some of the Councilmembers did not intend to ever grant waivers based on their belief that there is always a nexus between residential developments and the affordable housing problem. Thus, they did not give Plaintiffs a fair opportunity to demonstrate the absence of a nexus.

C. The Councilmembers Voted to Deny Plaintiffs' Appeal Simply Because Plaintiffs' Sought a Waiver

The Councilmembers proved at the July 24, 2007 meeting that the only "nexus" they cared about was how Plaintiffs' projects were going to provide affordable housing. Councilmembers ignored the real issue: whether there is any evidence that Plaintiffs' projects would *make the problem worse*.

Member Michael Molina stated that Plaintiffs' May 25, 2007 letter mentions "that this project would supply [sic] will be increasing the number of units in the County of Maui, *but the issue is are these units affordable? So that's where you know I have concern 'cause it doesn't appear at this point it* [sic] *they may be affordable.*" CSOF, ¶34. Even after County Housing Director Medeiros explained that she had not calculated the number of units under the Ordinance because Plaintiffs wanted an *exemption* from the Ordinance, Member Molina nevertheless

stated: "So I think this a good first step I think to let all applicants know that you need to comply with the housing policy that is in effect right now with Maui County. . . . [W]e have to address first and foremost the needs of our residents for units that are affordable, Mr. Chairman. So I'll support the motion on the floor." CSOF, ¶35. Member Molina's inquiry was not whether Plaintiffs' projects would exacerbate the affordable housing shortage, but rather, focused on the fact that Plaintiffs did not intend to build affordable housing.

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.

Similarly, Member Bill Medeiros's statements indicate that he voted to deny Plaintiffs' appeal simply because Plaintiffs sought a waiver from building affordable units. He stated that his vote was based, in part, on Mr. Franco's testimony.[2] Id., ¶37. Mr. Franco's testimony provided no support for finding a nexus, but merely concluded that Plaintiffs' appeal should be denied because Plaintiffs' projects were not priced for the residential workforce. Id.

The Councilmembers' decision to deny Plaintiffs' appeal for a waiver from the affordable housing requirement because Plaintiffs were not complying with the affordable housing requirement demonstrates the Councilmembers' miscomprehension of the Ordinance and/or a refusal to abide by the terms of its waiver provision. Indeed, 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

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[2] Member Medeiros stated that his vote was also based on Mr. Kushi's legal explanation. CSOF, ¶38. However, Mr. Kushi's legal explanation about the 90 day clock and the necessity for a contested case hearing or a pre-hearing decision certainly could not provide a basis upon which to find a nexus. See id., ¶13; see also generally Ex. 5.

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 Defendants 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.

D. The Councilmembers Did Not Adequately Review Plaintiffs' Appeal

The reasons given by the Council for rejecting Plaintiffs' appeal for a waiver are simply post hoc excuses, evidencing the Council's failure to adequately review Plaintiffs' appeal. In the August 21, 2007 Policy Committee Report No. 07-85, which recommended to the Council to adopt the proposed resolution denying Plaintiffs' request for a waiver, the reasons given for the recommendation were as follows:

> Your Committee noted that the correspondence submitted by the developer's representatives did not identify the legal basis upon which the appeal was being made.
>
> Your Committee further noted that there was not sufficient information presented on the cost of the units being sold or what the affordable requirements would be.

CSOF, ¶40. Additionally, many of the Councilmembers made sweeping statements that they decided not to grant Plaintiffs' appeal because they felt that Plaintiffs had not provided enough information, and/or they wished Plaintiffs had made a presentation at the meeting or answered their questions. They admit, however, to not asking any questions. Indeed, the record reflects that Chair Mateo asked the Councilmembers for any questions, and the Councilmembers did not respond. Id., ¶41.

The Council's first expressed basis for denying Plaintiffs' appeal is meritless. The legal basis upon which the appeal was being made was Section 2.96.030(c) of the Ordinance, which is clearly set forth in the re: line of the May 25, 2007 appeal letter. Id., ¶42. Pursuant to that provision, Plaintiffs provided hundreds of pages of evidence illustrating the absence of a nexus in that the projects would add to the supply of housing in Maui County, would *not* likely increase the demand for workforce housing, and would not create or exacerbate any affordable housing problem in Maui County. Id., ¶¶8-9; see Ex. 7. Plaintiffs' appeal being the first one under the Ordinance, there were no other cases or decisions to which Plaintiffs could cite. CSOF, ¶43.

Member Johnson's complaint that Plaintiffs did not talk about the number of units they would be producing (see id., ¶44), is also without merit. The number of

units is clearly presented throughout Plaintiffs' appeal—124 for Kamaole Pointe and 127 for Kihei Pointe. CSOF, ¶45.

The Council's statement about Plaintiffs' failure to include the cost of the units being sold and what the affordable housing requirement would have been without the waiver, is also pretextual. The Councilmembers could have easily made the calculation based on the Ordinance—given that the price of Plaintiffs' units was more than $600,000, as Mr. Franco informed the Council during his testimony (Id., ¶37; Ex. 1, p.3), Plaintiffs would be required under the Ordinance to build 50% of 251 units, or 126 units.

Member Johnson also lamented that Plaintiffs did not concede that the construction of their projects would require the importation of off island workers that she apparently *assumed* would be required. CSOF, ¶37. Johnson erroneously claimed that Plaintiffs did not "address the issue." Id. In fact, Plaintiffs specifically stated in their appeal that their projects would not increase the demand for housing because they planned to hire Maui contractors and workers to build their projects. Id., ¶9; Ex. 8, p.2.

Member Johnson further stated that she found it "offensive" that she did not see in Plaintiffs' appeal a traffic impact analysis report, an environmental assessment, community meetings, feedback, letters, and responses from agencies. CSOF, ¶47. Although the Ordinance does not set forth any of these as required to

be presented to the Council in support of an appeal for a waiver, they were all in fact presented in Plaintiffs' submittal with respect to the Kamaole Heights Project to demonstrate the absence of a nexus. See CSOF, ¶8; Ex. 7, pp.157-385.

Members Pontanilla, Medeiros, and Hokama stated that they had a question about the location of the projects. CSOF, ¶48; Ex. 15, p.31, Ex. 3, p.31, Ex. 16, p.44. They did not, however, ask any questions. Nevertheless, the location of the projects was mentioned in various places throughout Plaintiffs' appeal, the most obvious of which was the May 25, 2007 letter requesting the waiver, which included the tax map key numbers, general references to the fact that the projects were located in Kihei, and more specific statements that both projects were located in the Kamaole Superblock near the existing Kihei Regency Apartments. CSOF, ¶10; Ex. 7, p. 106-07. One of the first pages of the SMA application also set forth the property address of Kamaole Heights. Id., Ex. 7, p.161. The SMA application further described the surrounding area in detail. See id., Ex. 7.

Member Hokama also stated that he would have wanted information about infrastructure. CSOF, ¶48; Ex. 16, p.44. This was included in Plaintiff's submittal in the "Infrastructure" section of the SMA Application. See Ex. 7, p.193.

Member Pontanilla stated that he did not remember seeing the May 25, 2007 letter. CSOF, ¶49. Member Hokama testified in his deposition that he may have only received a letter and not any other supporting documents. Id. The

Councilmembers' assertions that they did not receive Plaintiffs' full appeal are unavailing. Although Member Baisa was the only Councilmember to produce the binder containing the hundreds of pages of Plaintiffs' full appeal in response to Plaintiffs' subpoena duces tecum, see CSOF, ¶8, Plaintiffs' complied with the County's request for twelve copies of their submittal at great expense. Id., ¶11. The Councilmembers' failure to recognize many of the documents in the submittal or failure to remember that they received the submittal at all further demonstrates that they did not actually review and fairly analyze the evidence required by the Ordinance to be submitted in support of Plaintiffs' appeal.

The foregoing demonstrates that the Councilmembers did not adequately review the submittal, if they reviewed it at all. Certainly, the Council could not have fairly judged the evidence supporting Plaintiffs' appeal without having done so. Accordingly, Plaintiffs' appeal for a waiver was not given the process it was due.

E. The Councilmembers Based their Decision on Plaintiffs' Failure to Follow Procedures that Did Not Exist

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 rules, regulations, or guidelines to guide Plaintiffs' presentation of evidence. Indeed, when Plaintiffs sought guidance

from the County's housing director, she simply read Plaintiffs the Ordinance verbatim. CSOF, ¶4. Nevertheless, it appears that some Councilmembers rejected Plaintiffs' appeal for failing to comply with unspoken rules.

The depositions of Members Johnson, Hokama, Baisa, and Mateo revealed that, notwithstanding the fact that the Ordinance expressly states that the appeal shall be made in writing, and in fact, does not require a developer to speak with or make a presentation for the Councilmembers, the Councilmembers' decisions were negatively affected because Plaintiffs were expected to do so. CSOF, ¶50; Ex. 14, pp.32-33, 59; Ex.16, p.22; Ex. 13, pp.40-41, 53; Ex. 17, pp.60-61.

There were no requirements or recommendations in the Ordinance or via the housing director that the developer should contact the Councilmembers individually or prepare a presentation for the Council other than the mandated written evidence in support of its appeal. Moreover, Chair Mateo asked if the Councilmembers had any questions. No questions were asked. See 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 adequate notice and a meaningful opportunity to be heard in violation of their due process rights.

Member Johnson also complained about the form of Plaintiffs' submittal, implying that Plaintiffs should have waited until administrative rules had been passed before submitting their appeal, or should have presented their appeal following a format with which she was more familiar. CSOF, ¶51; Ex. 14, pp.50-54, 63-64. Member Johnson explained that she was "insulted" by Plaintiffs' appeal because it did not comply with "the standard format that we are used to seeing as council members which gives you independent justification and verification in a thick file with confirmation of all of the things that you're asserting here." CSOF, ¶51; Ex. 14, p.57. The Ordinance did not require or even recommend any of the procedures Member Johnson took offense to Plaintiffs' apparent failure to follow. As Housing Director Medeiros confirmed at her deposition, there were no rules, guidelines, policies, or forms to follow. CSOF, ¶52.

Based on the record in this case, the Councilmembers did not meaningfully review Plaintiffs' submittal and even if they did, they based their decision to reject

Plaintiffs' appeal on the fact that Plaintiffs did not follow procedures that did not exist.

F. There is No Evidence of a Nexus

The Council's decision to refuse Plaintiffs' request for a waiver was allegedly based on a "finding" of a nexus. See CSOF, ¶16. This Court has the entire verbatim minutes of the Council's policy meeting at which the Council heard Plaintiffs' appeal. See Ex. 1. No evidence was *ever* presented to establish a nexus or relationship between Plaintiffs' projects and an increased need for workforce housing. See Exs. 1, 7. The *only* evidence before the Council was the undisputed evidence presented by Plaintiffs of an *absence of nexus*, and testimony from Stan Franco who merely testified about the pricing of Plaintiffs' units being out of reach of most Maui residents. CSOF, ¶¶8-9, 37. Mr. Franco's testimony did not address the nexus issue at all, and provided no basis to refute Plaintiffs' extensive evidence. See id., ¶37. Rather, Mr. Franco simply concluded that the waiver should be denied because Plaintiffs' projects were not priced for the residential workforce. CSOF, ¶37. How could the Councilmembers have legitimately determined that there was a nexus when there was no evidence in the record other than Plaintiffs' evidence demonstrating the absence of a nexus?

Resolution 07-100 denied Plaintiffs' appeal "after due consideration of the evidence *and other relevant facts and circumstances*." Id., ¶16 (emphasis added).

Defendants never identified what extraneous matters they 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 there were facts and circumstances evidencing a nexus, certainly due process required that Plaintiffs be given the opportunity to review it and demonstrate that it is untrue. See Goldberg v. Kelly, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

V. CONCLUSION

The Ordinance's waiver provision, even if it could have potentially saved an unconstitutional application of the Ordinance to Plaintiffs, did nothing of the sort, but rather, only highlighted the Ordinance's constitutional infirmities. Plaintiffs'

due process rights were egregiously violated. See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 617-18 (1993) ("[J]ustice, indeed, must satisfy the appearance of justice . . . .") (quoting Marshall, 446 U.S. at 243) (citations and internal quotation marks omitted)). The Councilmembers' bald assertions that they read Plaintiffs' appeal and gave it adequate consideration are not supported by the record. All of the information the Councilmembers alleged to be lacking was before them. There was no evidence before them of a nexus between the requirements imposed by the Ordinance and the impacts of Plaintiffs' residential developments. Rather, the Council denied Plaintiffs' waiver request out of hand, irrationally forcing Plaintiffs to carry the burden of a problem they did not exacerbate and for which their projects could have helped solve. The Council's decision was a result of Councilmembers' irrational biases against residential developers and their refusal to grant waivers based on an adamant desire that all developments must build affordable housing according to the Ordinance, notwithstanding the terms of the waiver provision in the Ordinance. There is no genuine issue of material fact that Plaintiffs were capriciously denied due process because the evidence in this matter is such that a reasonably jury could not return a verdict for the County. Anderson, 477 U.S. at 248 (1986). Because a remand to the Council would not alleviate the due process violation, and because all of the evidence before the Council supported the absence

of a nexus, the Court should determine that the waiver appeal, having been illegally denied, should be reversed.

Accordingly, Plaintiffs respectfully ask this Court to grant summary judgment in their favor declaring that the aforementioned "process" afforded to Plaintiffs in the application of the Ordinance to them violated their procedural due process rights, that Plaintiffs are entitled to a waiver, and awarding damages, attorneys' fees and costs in their favor.

DATED: Honolulu, Hawai`i, July 31, 2009.

/s/ Robert G. Klein

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