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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KAMAOLE POINTE) CIVIL NO. CV07-00447 DAE LEK
DEVELOPMENT LP; ALAKU) (Civil Rights)
POINTE LP,)
Plaintiffs,) PLAINTIFFS' REPLY IN
COUNTY OF MAUI; et al.,) SUPPORT OF THEIR MOTION
Defendants.) FOR PARTIAL SUMMARY
) JUDGMENT, FILED JULY 31,
) 2009; CERTIFICATE OF
) SERVICE
)
) HEARING
) Date: September 28, 2009
) Time: 9:45 a.m.
) Judge: David Alan Ezra

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR
PARTIAL SUMMARY JUDGMENT, FILED JULY 31, 2009

I. INTRODUCTION

Perhaps this case raises a question that is “unusual in the annals of constitutional litigation” because it concerns such an “unusual” Ordinance enforced in such an “unusual” manner. The Ordinance requires that an unprecedented 50% of the units in Plaintiffs’ Projects must be affordable in order for Plaintiffs to develop them. The Ordinance, by its terms, permits Plaintiffs to request a waiver from this onerous requirement by demonstrating that there is no nexus between the Projects and the requirement. However, based on the County’s and Councilmembers’ interpretation of the Ordinance, Plaintiffs’ Projects, and indeed all residential developments, will never qualify for such a waiver inasmuch as it is presumed that all residential developments that do not provide affordable housing will negatively impact the affordable housing shortage.

Given this bias, the Councilmembers did not give Plaintiffs’ application a meaningful review, but rather, based their denial on pretextual and post hoc excuses. According to Defendant, Plaintiffs should have no recourse for the Council’s rejection of their waiver and denial of due process, except to reapply to the Council. As it has been made clear, however, regardless of the information presented, the Council will never grant waivers. Rather, the Council’s failure to

afford Plaintiffs' application due process renders their act null and void, and thus, pursuant to the Ordinance, Plaintiffs' waiver should be deemed approved.

II. DISCUSSION

A. This Court Properly Held that Plaintiffs have a Protectable Property Interest and that Plaintiffs' Claim is Ripe

This Court has previously held that Plaintiffs established a protected property interest in the legitimate use of their land, and the Council's denial of Plaintiffs' waiver deprived Plaintiffs of that protected property interest. Kamaole Pointe Dev. v. County of Maui, 2008 WL 5025004, *10 (D. Hawai'i, November 25, 2008) ("Kamaole"). This Court also held that Plaintiffs' claim for violation of procedural due process is ripe. Id. at *8. The Court should again reject Defendant's arguments to the contrary. See Plaintiffs' Opposition to Defendant's Motion for Summary Judgment, filed July 30, 2009 ("Plaintiffs' Opp."), incorporated herein by reference, at 4-9.

Plaintiffs' property interest stems from the well-recognized right of an owner of real property to devote his land to any legitimate use. Harris v. County of Riverside, 904 F.2d 497, 503 (9th Cir. 1990) ("The right of an owner to devote his land to any legitimate use is properly within the protection of the Constitution.") (quoting Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928) ("Roberge")) (brackets omitted); see also Action Apt. Ass'n, Inc. v. Santa Monica Rent Control Bd., 509 F.3d 1020, 1029 (9th Cir. 2007) ("We have no

difficulty in recognizing the alleged deprivation of rights in real property as a proper subject of substantive due process analysis. . . . [L]andowners have a constitutionally protected property interest in their right to devote their land to any legitimate use.”) (quoting Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 949 (9th Cir. 2004), overruled on other grounds, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005)) (internal quotation signals omitted). Accordingly, Plaintiffs’ land use expectations constitute protected entitlements.¹

Defendant appears to again assert that Plaintiffs’ due process claim is not ripe because Plaintiffs have not completed the SMA assessment process or submitted a Draft Environmental Assessment. See Defendant’s Memorandum in Opposition (“Opp.”) at 11. Not only has this Court already rejected this argument, Kamaole, 2008 WL 5025004, *8, Defendant still provides no evidence to support its assertion that before a building permit will issue, the SMA permit supposedly must be issued. Defendant does not explain why Plaintiffs must waste time and resources pursuing

¹ There is no need for this Court to examine whether an additional property right has been established by state law. Nevertheless, Plaintiffs again point out that Defendant’s continued reliance on Kauai County v. Pacific Standard Life Ins. Co., 65 Haw. 318, 653 P.2d 766 (1982) is misplaced. That case involved zoning estoppel, which has as one of its elements, official assurance that the project has met zoning requirements. The Court stated that “final discretionary action constitutes official assurance for zoning estoppel purposes.” Id. at 328, 653 P.2d at 774. The Court held that because the government had not taken final discretionary action in that case, the plaintiff could not rely on zoning estoppel. See id. at 332, 653 P.2d at 776. Here, Plaintiffs already have the necessary zoning, and are not asserting zoning estoppel.

an SMA permit or submitting a Draft Environmental Assessment when the Ordinance will continue to stand in the way of a necessary building permit. “Ripeness doctrine does not require a landowner to submit applications for their own sake.” Palazzolo v. Rhode Island, 533 U.S. 606, 622 (2001). Accordingly, this Court properly held that Plaintiffs established a constitutionally protected property interest and that this matter is ripe for review. The issue now before the Court is whether Plaintiffs were denied due process of law.

B. Plaintiffs were Denied Due Process of Law Because the Councilmembers Improperly Rejected Plaintiffs’ Appeal Based on Bias and a Determination to Never Grant Waivers

The Councilmembers’ remarks demonstrated, and Defendant’s Opposition confirms, that the waiver provision in the Ordinance was and is a sham. The County’s Attorney, at the July 24, 2007 meeting acknowledged that without the waiver provision, the Ordinance could be attacked on its face as unconstitutional. Ex. 1, p.8. The Councilmembers, therefore, went through the motions of “reviewing” Plaintiffs’ waiver application, but as the record reflects, the Council did not provide Plaintiffs a *meaningful* opportunity to be heard, and thus, did not afford Plaintiffs due process of law.

The Councilmembers not only expressed their general bias against residential developers, but also made known their specific bias against Plaintiffs—and indeed, any developer who would dare request a waiver under the Ordinance.

This bias is evidenced, *inter alia*, by the Councilmembers' determinations that they would never grant waivers. Having made this improper predetermination, the Councilmembers "reviewed" Plaintiffs' waiver appeal with this bias and did not give Plaintiffs the process they were due. The Councilmembers, seeing that Plaintiffs were requesting to provide zero affordable housing, rejected Plaintiffs' application on that basis alone. See Motion at Section IV.

Defendant nevertheless contends that the Councilmembers' remarks were merely expressions of political opinion and "impatience, dissatisfaction, annoyance, and anger." Opp. at 13-16. While the statements certainly demonstrated such indignation, when viewed together with all of the evidence in the record, the Councilmembers' bias against residential developers seeking to obtain a waiver becomes clear. The Councilmembers were not simply making general statements supporting the Ordinance or affordable housing. Rather, their statements reflected actual bias and their intention never to give effect to the waiver provision in the Ordinance. See Plaintiffs' Opp. at 21-26. There is a difference between, on the one hand, coming to a conclusion after analyzing the facts and policy involved, and on the other hand, making a decision without ever analyzing the facts.² The evidence demonstrates that the Councilmembers did the

² Defendant counters that because the Councilmembers "voted for residential projects," they could not be biased. Opp. at 16. However, that Councilmembers may have supported residential projects in other contexts does not demonstrate that

latter, and therefore, violated Plaintiffs' due process rights. See Texaco, Inc. v. FTC, 336 F. 2d 754 (App. D.C. 1964), vacated on other grounds, 381 U.S. 739 (1965), cited in Withrow v. Larkin, 421 U.S. 35, 50 n.16 (1975) (finding due process violation where commissioner made a speech in which he indicated he had already reached a decision as to matters pending before that Commission).

Defendant contends that Chair Mateo's remarks that "the Council has already made a finding that the impact of any applicable development is presumed to bear a rational relationship to the affordable housing shortage," does not indicate that he would never find an "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" because he did not understand the legal meaning of "presumed." See Opp. at 17. Although Chair Mateo may not have gone to law school, he certainly has experience with the law. In any event, one need not look past the plain meaning of "presumed" to see that Chair Mateo concluded that he would always find a nexus between the impact of an applicable development and the affordable housing shortage, and therefore, would never find the absence of such a nexus. It therefore follows that he would never grant waivers.³ Conclusory

they would ever reasonably consider a waiver application, and certainly does not demonstrate that they reasonably and fairly considered Plaintiffs'.

³ Defendant contends that "the fact that the hearing was being held clearly indicated that any presumption was rebuttable if Plaintiffs/Applicants met their

and self-serving statements to the contrary are of no avail.

As set forth in Plaintiffs' Opposition, none of the cases cited by Defendant support its position. See Plaintiffs' Opp. at 18-26. The Councilmembers demonstrated their bias by acting with "an unalterably closed mind on matters critical to the disposition of the proceeding," Colao v. County Council of Prince George's County, 657 A.2d 148, 166 (Md. App. 1996), aff'd, 697 A.2d 96 (Md. 1997), and by basing their decision on "extraneous considerations." Kramer v. Board of Adjustment, 212 A.2d 153, 159 (N.J. 1965). See Motion at Section IV.

The record demonstrates that 7 of the 8 Councilmembers at the July 24, 2007 meeting made comments that they would never grant waivers—finding there was always a nexus or paradoxically expressing they would only grant waivers to projects that provided affordable housing. It cannot be said that these Councilmembers gave Plaintiffs a fair hearing on their waiver application when they had made such predeterminations. Although Member Anderson did not participate in the July 24, 2007 meeting, there is evidence in the record that she was biased against residential developers and Plaintiffs in particular. E.g., CSOF, ¶¶19, 21. Member Hokama was slightly more careful with his words, but it was

substantial burden of proof." Opp. at 17. It is well-established, however, that simply providing an opportunity to show up and be heard is not the same as providing a *meaningful* opportunity to be heard. See Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and *in a meaningful manner.*'") (citation omitted) (emphasis added).

apparent that his decision was pretextual as well. In fact, none of the Councilmembers articulated a valid reason for their decision. Motion at 20-28. Contrary to Defendant's contention, Opp. at 21, Plaintiffs understand that it was their burden to demonstrate substantial evidence of the absence of a nexus, but that burden does not mean that the Councilmembers can deny Plaintiffs' application without a proper basis or based on pretextual post hoc excuses. The Council did not give Plaintiffs a meaningful opportunity to demonstrate the absence of a nexus pursuant to the terms of the Ordinance.

C. This Court Can Deem Plaintiffs' Waiver Approved

Defendant would have this Court hold that the only recourse under the Ordinance is for a developer to keep submitting applications for a waiver or adjustment until the Council feels like approving it or the developer gives up. Defendant cites to Clark v. City of Hermosa Beach, 48 Cal. App. 4th 1152, 56 Cal. Rptr. 2d 223 (1996), in support of its contention that this Court must remand this matter to the Council. Clark, however, is distinguishable. In that case, property owners sought a writ of administrative mandate pursuant to the California Code of Civil Procedure based on the city council's depriving the property owners of a fair hearing before denying their permits. Id. The Court found that the council had failed to provide them a fair hearing, but determined that the matter should be remanded to the Council with an order to provide a fair hearing, explaining that

“[t]he necessity of another hearing follows from the language of the statute authorizing a writ of administrative mandate.” Id. at 1174. In so holding, the Court distinguished the cases cited by the property owners concerning the Subdivision Map Act, stating “[t]he critical provision in the Subdivision Map Act—deeming the map approved if the council fails to act by a certain deadline—does not appear in the municipal code.” Id. at 1177. In the instant matter, however, the Ordinance contains this critical provision deeming the application for a waiver approved if the Council does not disapprove it. According to Section 2.96.030(C)(3) of the Ordinance in effect at the time of Plaintiffs’ appeal, “[i]f on the ninety-first day after the developer has concluded presenting such evidence the appeal is not disapproved, the appeal, as submitted by the developer, *shall be deemed approved by the council[.]*” (Emphasis added.) Accordingly, Clark does not support Defendant’s position.

Rather, because the Councilmembers were biased and did not provide Plaintiffs a meaningful opportunity to be heard, but simply rejected the appeal out of hand, it was as if the Council did not act at all. See Acierno v. Folsom, 337 A.2d 309, 317 (Del. 1975) (where petitioner denied due process because biased member of board did not disqualify himself, court invalidated member’s vote). The Court would have to determine that a majority of the Councilmembers (at least 5 of them) afforded Plaintiffs a meaningful review of their application in arriving

at their decision to deny Plaintiffs' waiver request. See Maui County Code § 2.05.020 ("A majority of the voting members to which each committee is entitled shall constitute a quorum to do business. Where a majority or supermajority vote is required, the concurrence of a majority or supermajority of all the voting members to which the committee is entitled shall be necessary to make the action of the committee valid."). Given the record before the Court, Plaintiffs maintain this would not be possible. Accordingly, the Council's denial of Plaintiffs' waiver should be invalidated and Plaintiffs' waiver should be deemed approved.

D. Defendant's Newly Created Reasons Do Not Justify the Council's Rejection of Plaintiffs' Waiver

Two years after the Council rejected Plaintiffs' waiver request out of hand, Defendant attempts to now look through Plaintiffs' submissions and create reasons to justify the Council's rejection. Opp. at 3-5, 19-22.⁴ Defendant's arguments boil down to the assertion that Plaintiffs' application did not demonstrate the absence of a nexus because building Plaintiffs' projects would use resources that could be used for affordable housing. Like the Councilmembers' comments, this argument demonstrates that the waiver provision is a sham. By the County's own

⁴ Defendant mentions a letter from James R. Smith, citing to Exhibit 1 of Plaintiffs' Concise Statement of Facts. Opp. at 5. The letter does not appear in that Exhibit, and is not properly before the Court. The July 24, 2007 minutes mention a letter from a "Mr. Smith," but the only discussion related to the letter concerns whether there needs to be a pre-hearing decision prior to Plaintiffs' request for a waiver. There is no mention of the Department of Housing and Human Concerns.

interpretation, there will never be a residential development that can demonstrate the absence of a nexus because all developments will utilize resources that could otherwise be used for affordable housing; therefore, no development will ever qualify for a waiver. Defendant's framing of the issue, therefore, is untenable. Indeed, all developments, residential or otherwise, will have some impact on infrastructure and traffic.

Nevertheless, contrary to Defendant's assertion, Plaintiffs' application demonstrated substantial evidence in support of their request for a waiver. Plaintiffs' application demonstrated, inter alia, that there was a demand for the type of housing Plaintiffs' projects would provide, and accordingly, individuals in higher income bands that purchased the units in Plaintiffs' projects would free up more affordably priced units for persons in the lower income bands. See Ex. 8, p. 2-3. Defendant makes no argument to refute this.

Defendant contends that Plaintiffs did not provide information indicating that the Projects would not impact the water shortage or the traffic problems. Opp. at 19. To the contrary, Plaintiffs' application states:

As noted in the Traffic Impact Assessment Report, all affected intersections, including the project driveway, will operate at Level-of-Service D or better under cumulative plus project conditions. Roadway improvements in the area that are already committed fro by other developers will provide sufficient roadway and street capacity. The project has also been designed to provide convenient pedestrian access between the proposed residences [,] the North-South Collector Road, and neighboring commercial areas, parks, and public facilities.

Id. at 207. Plaintiffs' application further provides: "Section III of this report addressed the impacts that the proposed project would have upon existing public infrastructure, facilities, and service systems. Based upon the analysis, with the incorporation of mitigation measures, existing infrastructure and service systems will not be significantly impacted by the project." Ex. 7, p.205.

In any event, the Councilmembers did not raise or cite these issues as reasons for denying Plaintiffs' application. The Committee Report that recommended to the Council to adopt the proposed resolution denying Plaintiffs' request for a waiver, stated the reasons for the recommendation as Plaintiffs' failing to "identify the legal basis upon which the appeal was being made" and insufficient "information presented on the cost of the units being sold or what the affordable requirements would be." CSOF, ¶40. As set forth in Plaintiffs' Motion, these assertions are meritless. See Motion at 21-22. The only other reasons relied upon by the Councilmembers in reaching their decision were also pretextual and/or without merit. See Motion at 21-23.⁵ As such, the fact that Defendant has now created such issues two years later, does not justify the Council's decision. If the Council is allowed to reject appeals without any basis within 90 days and then later

⁵ The Councilmembers' declarations upon which Defendant relies do not declare that they gave Plaintiffs' application a full review before arriving at their decision, but rather, merely lament that Plaintiffs' should have made an oral presentation, which was not suggested or required under the Ordinance, and answered questions that were not asked. See infra Section II.E.

create excuses to justify their rejection, it renders the 90-day provision meaningless. As the court in Clark v. City of Hermosa Beach, observed:

The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert *amounts to a denial of a hearing*. . . . Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. . . . *The fact that there may be substantial and properly introduced evidence which supports the [Council's] ruling is immaterial*. . . . *A contrary conclusion would be tantamount to requiring a hearing in form but not in substance*, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties. . . .

48 Cal. App. 4th at 1171-72 (ellipses in original) (emphasis added). Accordingly, the Council's denial of Plaintiffs' waiver cannot be now justified by newly created arguments.

E. Defendant's Contention that Plaintiffs' Decision Not to Present Further Evidence "Precluded a Grant of the Waiver" is Baseless

Defendant contends that Plaintiffs' application was properly rejected because Plaintiffs did not answer questions or make a presentation to the Council and did not participate in the process in good faith. Opp. at 6-9. This argument is meritless. 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 County Council and read Plaintiffs the Ordinance verbatim. Id. On February 23, 2007,

Plaintiffs filed their appeal. Id., ¶5. From February 23, 2007 to June 5, 2007, the Council did nothing in response to the appeal. Id., ¶6. Only after Plaintiffs invoked the Ordinance’s “90-day rule” did the Council finally swing into action. Id., ¶7. Plaintiff reasonably invoked the rule because the Council was dragging its feet and apparently attempting to concoct ways in which to restart the 90-day clock, even five months after Plaintiffs originally submitted their appeal. See, e.g., id., ¶ 15. Moreover, Plaintiffs complied with the terms of the Ordinance by presenting their application in writing; no provision, guideline or rule required or suggested a presentation. The Councilmembers did not ask any questions and their biased comments did not lead Plaintiffs to believe there was any hope that the Council was open to discussion or would meaningfully listen to any presentation. See Plaintiffs’ Opp. at 27-29.⁶ As such, there is no merit to Defendant’s contention that Plaintiffs’ decision not to present further oral evidence precluded a grant of the waiver.⁷

⁶ Defendant’s off-hand remark concerning Plaintiff’s representative is entirely irrelevant and inappropriate. Opp. at 8. Similarly, Defendant’s recitation of the purchase history of the Projects and Plaintiffs’ accounting, Opp. at 6-8, is also irrelevant and it is unclear how such argument furthers Defendant’s position.

⁷ Defendant further contends that Plaintiffs’ request for a waiver “confused” the Councilmembers “who were accustomed to an affordable housing component 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” Opp. at 9 (citation omitted). This argument is confusing. First, the Ordinance specifically allows for a developer to request a waiver, so it is unclear—

III. CONCLUSION

The Councilmembers egregiously violated Plaintiffs' due process rights by erroneously depriving Plaintiffs of their protected property interest without due process of law. The Councilmembers failed to provide Plaintiffs with a *meaningful* opportunity to be heard, but rather, denied Plaintiffs' application for a waiver based on their irrational biases and refusal to give effect to the waiver provision in the Ordinance. No reasonable juror could determine otherwise. Accordingly, Plaintiffs respectfully request that this Honorable Court grant summary judgment in Plaintiffs' favor, declare that Plaintiffs' waiver is deemed approved, and award attorneys' fees and costs in their favor.

DATED: Honolulu, Hawai'i, September 17, 2009.

/s/ Robert G. Klein

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although very telling—why the Councilmembers were “confused” by Plaintiffs’ request. Second, it is unclear how the Councilmembers could have been “accustomed” to anything since it is undisputed that Plaintiffs’ appeal was the first of its kind. Third, Defendant’s argument further illustrates that the Councilmembers expected all residential developers to provide affordable housing, and never intended to grant any waivers.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 17, 2009, and by the methods of service noted below, a true and correct copy of the foregoing document was duly served upon the following persons:

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