

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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4	KAMAOLE POINTE DEVELOPMENT	) CIVIL NO. 07-00447DAE
5	LP; ALAKU POINTE LP,	)
6		) Honolulu, Hawaii
7	Plaintiffs,	) June 2, 2008
8		) 9:48 a.m.
9	vs.	)
10		) [27] MOTION FOR PARTIAL
11	COUNTY OF MAUI, et al.,	) SUMMARY JUDGMENT DECLARING
12		) ORDINANCE 3418 VOID ON ITS
13	Defendants.	) FACE UNDER THE DOCTRINE OF
14		) UNCONSTITUTIONAL CONDITIONS
15		) [35] MOTION FOR SUMMARY
16		) JUDGMENT, OR IN THE
17		) ALTERNATIVE, PARTIAL SUMMARY
18		) JUDGMENT

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE DAVID ALAN EZRA,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

14	For the Plaintiffs:	ROBERT G. KLEIN, ESQ.
15		CHRISTOPHER J. COLE, ESQ.
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22	For the County	MADELYN S. D'ENBEAU, ESQ.
23	Defendants:	Dept. of the Corporation Counsel
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26	Official Court	Cynthia Fazio, RMR, CRR
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28		P.O. Box 50131
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Proceedings recorded by machine shorthand, transcript produced  
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1 MONDAY, JUNE 2, 2008 9:48 A.M.

2 THE CLERK: Civil 07-447DAE-LEK, Kamaole Pointe  
3 Development, LP, et al., versus County of Maui, et al.

4 This case has been called for various motions.

5 Counsel, please make your appearances for the record.

6 MR. KLEIN: Good morning, Your Honor. Robert Klein,  
7 Lisa Cataldo and Chris Cole representing the plaintiffs Kamaole  
8 Pointe Development LP and Alaku Pointe LP for the Motion for  
9 Summary Judgment and the Motion to Strike.

10 THE COURT: All right. Good morning.

11 MR. KLEIN: And Mr. Cole will be doing the argument.

12 THE COURT: All right. Good morning.

13 MR. KLEIN: Thank you, Your Honor.

14 MS. D'ENBEAU: Good morning, Your Honor. Madelyn  
15 D'Enbeau representing the County of Maui and the various county  
16 defendants who are sued in their official capacity.

17 THE COURT: We're going to have to get you an  
18 apartment over here. You were just here on another matter here  
19 pretty recently.

20 MS. D'ENBEAU: Yes, I was.

21 THE COURT: All right. This is your motion.

22 MS. D'ENBEAU: Yes, I believe we have two motions.

23 THE COURT: Well, I know, but you had the first one.

24 MS. D'ENBEAU: Right, I filed mine first. Thank you.

25 MR. COLE: Your Honor, we filed the motion first.

1           THE COURT: Well, they originally filed it. I believe  
2 I --

3           MR. COLE: Oh.

4           THE COURT: -- dismissed it, then they refiled it, and  
5 then you filed first, but then they refiled, but they actually  
6 had the first one on file.

7           MR. COLE: Fair enough, Your Honor.

8           THE COURT: We have to go back here. We had some  
9 history here.

10          MS. D'ENBEAU: That is correct. I stand corrected, it  
11 is true they filed their Motion for Partial Summary Judgment  
12 first.

13          THE COURT: Yeah, but you filed the original one which  
14 I took off calendar.

15          MS. D'ENBEAU: That's true. Thank you, Your Honor.

16          THE COURT: It really doesn't matter actually.

17          MS. D'ENBEAU: Your Honor, the county is asking for  
18 summary judgment. Essentially -- well, I'm sure the Court has  
19 had a chance to review our lengthy memorandum and I just have a  
20 few points to add or to expand on.

21               Essentially the issue here is ripeness, or to put it  
22 another way, whether or not they have any vested property  
23 interest in these projects that they are proposing.

24               Under Hawaii law -- and Hawaii law establishes whether  
25 or not you have a vested right even though you are in federal

1 court, as the Court is well aware -- under Hawaii law you don't  
2 have a vested right in a particular project until you have  
3 received the final discretionary permit. And it's beyond  
4 question, it's not disputed here that the two projects that the  
5 plaintiffs are talking about have not received their final  
6 discretionary permits. They're both in the SMA area and  
7 neither of them have received SMA permits.

8 THE COURT: Well, my -- my understanding here is that,  
9 certainly with respect to one, and I believe with respect to  
10 both of these projects, they have done a considerable amount of  
11 work. Then during the pendency and before they were in a  
12 position to ask for their final permits, the county council  
13 passed this rather unusual ordinance, unusual not so much in  
14 the fact that it requires some concessions from developers,  
15 because that happens everywhere, but rather unusual in that it  
16 provides an appeal to the very body that went ahead and passed  
17 the ordinance. It's rather -- it's kind of a preordained  
18 result, I would think.

19 But in any event, and then because they're not an  
20 administrative body there's no administrative appeal available.  
21 So their -- their allegation basically is that they went ahead  
22 and asked the county council, the very body that passed this  
23 ordinance, to give them the appropriate exemption. And of  
24 course the county council said no. They basically feel they've  
25 done as much as they can do. Now --

1 MS. D'ENBEAU: Your Honor --

2 THE COURT: -- your contention is that they should  
3 file suit in state court; is that right?

4 MS. D'ENBEAU: My contention is that they have to have  
5 a final discretionary approval. The project --

6 THE COURT: But wait a minute, isn't that a circuitous  
7 argument?

8 MS. D'ENBEAU: No, because the project that they took  
9 to the county council or that they would take to state court or  
10 that they brought to this court, the two projects, neither of  
11 them are in a final form. We don't know what kind of approval  
12 they might get in front of the planning commission for their  
13 SMA permits.

14 It's typical, and they've actually put in some  
15 documents themselves in their reply memo stating that the SMA  
16 process ordinarily results in reduction of the proposed massing  
17 of the project, reduction perhaps in the number of units and so  
18 forth. So they're not there. In other words, they came to the  
19 county council and they're coming to this court and if they  
20 decided at this moment to go to state court, they would be  
21 coming with a project that is not in its complete form. Not in  
22 its final form, I'm sorry. It's not yet been finalized. It  
23 hasn't got its final discretionary approval. So we don't know  
24 what this project will look like when it actually finishes with  
25 the discretionary approval.

1           THE COURT:   Okay.  Let me ask you this:  In accordance  
2 with the ordinances on the books now on Maui.

3           MS. D'ENBEAU:  Yes.

4           THE COURT:  In order to get their discretionary  
5 approval don't they have to commit themselves to this rather  
6 substantial set aside?

7           MS. D'ENBEAU:  No.

8           THE COURT:  They don't?

9           MS. D'ENBEAU:  Not to get their SMA permit, no.  They  
10 have to get their SMA permit first so you know what the project  
11 is going to look like.  And if I could analogize to the Nukolii  
12 case, Your Honor.  Nukolii case, as you know, is the -- the  
13 seminal case in Hawaii.

14          THE COURT:  Yes.

15          MS. D'ENBEAU:  And in the Nukolii, the developers were  
16 trying to build a hotel --

17          THE COURT:  Right.

18          MS. D'ENBEAU:  -- as Your Honor is aware.  Spent a  
19 tremendous amount of money and so forth.  And while they --  
20 they had building permits.  They had SMA permits.  These guys  
21 don't have either of those, but they had that in Nukolii.  In  
22 the meantime there was a certification for a referendum to  
23 change the zoning.  And the Court said, you know, that's your  
24 last discretionary approval and you're out of luck.

25                 So in this case, to analogize, the county council

1     could have changed the zoning on these people's property and  
2     said, Hey, we've decided this isn't apartment zoned after all,  
3     this is going to be a residential zoned property, and they  
4     wouldn't have been able to come to court because they didn't  
5     have their final discretionary approval.

6             So it's a question of, When does your project vest,  
7     what project are you talking about. And this isn't just a pro  
8     forma thing. The SMA process is very onerous and it requires a  
9     lot of input, and at the end of that the planning commission,  
10    who is the sole authority in the SMA for projects under  
11    15 acres, although it's a state law, the planning commission  
12    can say, Well, we don't like this particular project. You  
13    could build something different perhaps but not this particular  
14    project. You need to build fewer units. And actually in their  
15    own papers, they had some papers that were filed in a  
16    condemnation action, they had the court in April 1st order  
17    those papers released and they're part of the court documents  
18    here attached, I believe, to their reply memorandum, although  
19    I'm getting a little mixed up about which documents are  
20    attached to what.

21            But in any case, in that the appraiser said, You know,  
22    ordinarily this mass of a project would not get approved in the  
23    SMA process. That's right in the documents that the county's  
24    appraiser said, We haven't seen this massive of an approval in  
25    the SMA, in the special management area for sometime.

1           So it's not at all clear that this particular project  
2   or these projects that they are talking about would even be the  
3   ones that would come to the final approval stage, final  
4   discretionary approval. And it's at the time after your final  
5   discretionary approval when you --

6           THE COURT: So what you're telling me in essence is  
7   there is a possibility that the council may say, Well, they've  
8   revised their plan in some way, shape or form, and so we're not  
9   going to require them to abide by the ordinance? Is that what  
10   you're saying to me?

11          MS. D'ENBEAU: What I --

12          THE COURT: Because their argument basically is that,  
13   even if otherwise they might be required to go through all of  
14   these hoops that you're suggesting, that they're excused from  
15   doing so in federal court because to do so would be futile.

16          MS. D'ENBEAU: Well, they don't have --

17          THE COURT: So what you're telling me is it's not  
18   futile?

19          MS. D'ENBEAU: It's not futile because what they  
20   haven't -- they haven't taken a final project anywhere yet, not  
21   to this court, not to the county council, nowhere. They don't  
22   have a final project. They have to under Nukolii go through  
23   and get their final discretionary permit. Now we know what  
24   their project looks like. Now you can come to the council.  
25   And as long as we're speaking about that waiver process that



1 was presented to the council, what happened there, and I think  
2 it's clear from the papers, is it was a pro forma. They came  
3 in, said, We're not answering any questions, don't ask us  
4 anything, we gave you what we gave you and that's it. And the  
5 council members wanted to ask questions, but it's one of those  
6 ordinances that requires no approval or disapproval within  
7 45 days deemed approved. So, they made it very clear, Mr. Cole  
8 and his clients, that, you know, you're going to be deemed  
9 approved. We're not answering any questions, just decide.

10 THE COURT: So your basic premise here is that they  
11 basically did that simply so they could come to federal court.

12 MS. D'ENBEAU: They filed suit the next day.

13 THE COURT: Mm-hmm. Okay. Do you have anything else?

14 MS. D'ENBEAU: Let me see. And of course that  
15 provision, that appeal provision is severable, pointed that out  
16 to the Court as well. I mean there is a severability procedure  
17 in the ordinance and we would maintain that that procedure is  
18 not a necessary part, that the ordinance would be  
19 constitutional without the waiver procedure in any case, and  
20 that's one of the arguments that we've made.

21 Oh, and I just wanted to emphasize that we are asking  
22 the Court also to dismiss the duplicative claims. We see  
23 that -- this quite often where a lot of officials will be sued  
24 in their official capacity, and it's pretty clear that that's  
25 not proper, but it can cause problems during discovery phases

1 if we proceed to that. So I wanted to make sure and emphasize  
2 that in my oral argument.

3 Unless the Court has any questions I guess --

4 THE COURT: Not right now, I may have in a minute.

5 MS. D'ENBEAU: Thank you.

6 THE COURT: All right, Mr. Cole.

7 MR. COLE: Thank you, Your Honor. May it please the  
8 court.

9 Just to first off address a couple of points that  
10 counsel raised concerning the Nukolii case. That case we  
11 believe is distinguishable. It involved a zoning estoppel and  
12 rather than a question of ripeness that is before the Court.

13 We believe that the ripeness issue, this case is ripe  
14 because we've gone through all the procedures provided in the  
15 ordinance to get the waiver from the ordinance's provisions.  
16 They were denied.

17 THE COURT: Well, she indicated that -- that your  
18 submission was premature, that you have not in fact gotten the  
19 projects to a point where you have actually applied or been in  
20 a position to apply for the SMA.

21 MR. COLE: Again, the county has still not raised any  
22 issue that would make the SMA process relevant to the issue  
23 that's before the court. There's nothing -- the SMA permit  
24 process addresses --

25 THE COURT: Well, their contention is that you have --

1 have not put a final project so that there has not been, if you  
2 will, a honed, definitive yes or no, so to speak, because you  
3 aren't there yet and therefore there is no case or controversy  
4 for federal court purposes. And as you know, that's  
5 jurisdictional for me. This is not state court.

6 MR. COLE: I understand that. The yes or no, that  
7 issue was raised before the policy committee meeting at the  
8 county level. There was a citizen who wrote a letter saying,  
9 you know, Don't they have to, you know, submit some -- get some  
10 sort of final approval for the project or rejection first  
11 before they can come up on appeal? And the county said -- the  
12 Corporation Counsel said, No, that's not required. The way we  
13 wrote it is anybody who has a project can come to ask for an  
14 exemption from that project. And they emphatically rejected  
15 our request for a waiver.

16 The project submissions were detailed. The Palazzolo  
17 case says you're not required to file an application for a  
18 permit just for its own sake. Essentially that's what they're  
19 asking us to do. The Palazzolo case is clear on that point.  
20 It also stands for the proposition that if you've already filed  
21 an application for a permit, which we've done, you don't have  
22 to continue to pursue that permit application when it's clear  
23 you've got bigger issues with this ordinance. And they have --

24 THE COURT: Well, what about the suggestion in the  
25 Ninth Circuit that you need to go to state court first?

1           MR. COLE: Well, that would be -- that would address  
2 the takings claim, that would be the takings claim, which is  
3 one of the claims in our case but by no means the only one.  
4 The primary claim in this case is the unconstitutional  
5 conditions claim that we are pursuing in this case, and  
6 that's --

7           THE COURT: Well, this is the big issue here,  
8 Mr. Cole, is whether in fact what you've done is some very good  
9 lawyering. In other words, have you taken what amounts to the  
10 substance of the takings claim, dissected out what constitutes  
11 the constitutional basis for takings, and simply restated them  
12 in a separate cause of action such that you in effect have a  
13 takings claim dissected into several causes of action rather  
14 than just simply taking. So that in reality, when I go through  
15 the analysis, I must in federal court, and recharacterize this  
16 as a well pleaded complaint, that I in fact what I really have  
17 here is a takings claim.

18           MR. COLE: Well, the -- there is no -- we're not  
19 trying to just try to massage the case into certain -- I think  
20 what the county defendants would like --

21           THE COURT: Well, there's nothing wrong with doing --  
22 people do that all the time. I mean that's how you get into  
23 federal court is that you make federal constitutional claims.  
24 I mean I'm not suggesting that there is anything inherently  
25 wrong with that. What I'm just saying is, though, that I have

1 to recharacterize your complaint as a well pleaded complaint,  
2 and in doing so I'm having a hard time distinguishing between  
3 your contention that you have a takings claim on the one hand  
4 and over here you've got a constitutional claim which is  
5 really -- amounts to a taking.

6 MR. COLE: Okay. Well, what the constitutional claim  
7 is, isn't -- we're not saying it amounts to a taking. I just  
8 want to clarify that. What we're saying is, it's a shortcut  
9 that the Supreme Court has said you can't do under the  
10 Constitution. It's void, invalid. We're seeking a summary  
11 judgment for --

12 THE COURT: What is your shortcut?

13 MR. COLE: The shortcut is, you can't impose an  
14 exaction as a condition on the issuance of a permit unless it  
15 serves the same governmental purpose as would a denial of that  
16 permit. I have the quote of the case right here.

17 THE COURT: No, I know what the law is.

18 MR. COLE: Yeah. So that is invalid. If -- what they  
19 say, what these two Supreme Court cases say, and Commercial  
20 Builders, is that -- and that's a Ninth Circuit case -- is that  
21 when you have an exaction of that nature, it is void. It  
22 serves no legitimate --

23 THE COURT: What about ordinances which have been  
24 upheld that require a developer to build a public school?

25 MR. COLE: There's a legitimate nexus, then they can

1 do it. It's a shortcut that might work, if it serves the same  
2 governmental purpose.

3 THE COURT: So what is the -- what is the wrong here  
4 with saying, Okay, well, you're going to build housing, you  
5 have to set aside a certain percentage of that housing for the  
6 poor? That -- those ordinances occur all over the United  
7 States.

8 MR. COLE: Well, there's been very little for some --  
9 for whatever reason, primarily I think because the original  
10 cases, the way this evolved back in the '60s, '70s and '80s,  
11 involved exaction ordinances just like this. This is a throw  
12 back because what's happened since then is you had -- you had  
13 Nollan and you had Commercial Builders in the Ninth Circuit, it  
14 upheld it. But if it was the same ordinance that we've got  
15 here, applying the same test, which we've done in our papers,  
16 it doesn't pass muster.

17 Then you have Dolan and then you have a lot of states  
18 enacting all these statutes that imply the same standards and  
19 they don't really reach the issues because they apply their own  
20 standards. We have pendent state law claims addressing those  
21 issues as well.

22 So, because of the way the law has evolved, you don't  
23 have any cases like this and you don't have any cases where  
24 they're imposing a 50 percent exaction. That's unprecedented.  
25 It's way above and beyond the pale. Most developers just go

1 along with it when it's 10 percent and so on. They might  
2 challenge it, they might have no nexus whatsoever, but it's not  
3 worth it for them to pursue it. There's no case law that they  
4 can cite in support of this except for that one Napa Valley  
5 case, which is distinguishable for the reasons we set forth in  
6 our paper, especially if the waiver provision is gone, I mean  
7 it was a sham to begin with. We presented our case and when we  
8 were before the county council, Chair Mateo asked if there was  
9 any questions from the council members; nobody said a peep.

10 THE COURT: Let me ask you a question. Now, you may  
11 or may not know this. Has there been any approvals of any  
12 projects under this 50 percent ordinance since it's been  
13 passed?

14 MR. COLE: We haven't seen them. They say that  
15 there's been some workforce agreements. It's been on the books  
16 for 18 months and they're just starting to trickle in. We  
17 haven't seen them. We've asked for them in discovery.

18 THE COURT: I just wondered, given the high cost of  
19 construction, particularly on the outer islands, how anybody  
20 could build anything 50 percent. It almost seems like an  
21 ordinance designed to keep people from developing additional  
22 housing.

23 MR. COLE: Well, people in the applicable class. I  
24 mean if they wanted to do an impact fee ordinance that really  
25 made sense, they should have hit employers. They're bringing

1 people in, they're not building houses to add to supply. They  
2 could have hit commercial developers. They're attracting  
3 business, they're attracting workers that need houses over  
4 their heads. They're not adding to supply either. We're  
5 adding to supply. I mean the law of supply and demand, all of  
6 the things being equal --

7 THE COURT: Now, of course my role here is not to  
8 second-guess the county council or decide whether this is a  
9 wise or unwise ordinance.

10 MR. COLE: Agreed.

11 THE COURT: I mean there are plenty of people far more  
12 capable of doing that than me and there's been a lot of  
13 discussion about it. And I think a lot of people think the  
14 ordinance is laudatory in its application but foolish in its  
15 practical implementation because of the huge cost to any  
16 developer. But that's not for me to say, I'm not suggesting  
17 that.

18 MR. COLE: Neither am I.

19 THE COURT: I don't know.

20 MR. COLE: Neither am I. We're not -- we're not  
21 challenging the statute because it's unwise. Or, you know -- I  
22 mean we say it is wrong headed in our papers, but that's not  
23 really the theory of our case.

24 The wrong headedness of the policy certainly makes it  
25 more likely that it's arbitrary and unreasonable, and that is



1 one of our claims. If it's arbitrary and it interferes with  
2 our ability to use our property for any legitimate use, then  
3 that's a protectable constitutional interest under the Action  
4 Apartment Association case. It's a Ninth Circuit case, came  
5 out in 2007. So this Nukolii case is really just an offshoot  
6 that -- it's a tangent that doesn't really matter.

7           The Ninth Circuit case, the Supreme Court cases say,  
8 you know, I mean you can't condition improperly, you can't  
9 leverage improperly these sorts of conditions where there's no  
10 impact, there's no evidence of a nexus.

11           Even now, I mean we filed our appeal a year-and-a-half  
12 ago in February -- little over a year ago, in February 2007.  
13 They sat on it for 3 months. So we had to do something to  
14 trigger this. At the beginning of that policy committee  
15 meeting they said, the Corporation Counsel said, Well, if you  
16 can get them to come forward with more evidence, then you get  
17 another 90 days.

18           THE COURT: Well, my understanding of the argument  
19 made by the county is that it doesn't make any difference  
20 whether you're here or you're in state court, their argument  
21 would be the same, that you're not in a position to be in court  
22 at all.

23           MR. COLE: They say that, but they don't demonstrate  
24 any reason why that would make any difference because the SMA  
25 permit process wouldn't -- wouldn't involve affordable housing,

1     it shouldn't involve affordable housing. What conditions could  
2     be imposed in that process. Those conditions have to pass  
3     muster, too.

4             And the Supreme Court is clear on this, you don't have  
5     to waste fees. They have not demonstrated why we should be  
6     wasting fees so that they don't have to come to federal court.  
7     The federal court says, No, you don't have to go through a  
8     wasteful exercise in futility when you know you got a bigger  
9     issue. And they don't even have evidence that the SMA permit  
10    has to go first. But even if it does, it's not addressing the  
11    same issues that this --

12            THE COURT: Now, the county has asked that I certify  
13    an issue to the State Supreme Court.

14            MR. COLE: Yes.

15            THE COURT: What's your position on that?

16            MR. COLE: That's not necessary. We've got numerous  
17    state law decisions that say -- that are -- it's clear,  
18    unless --

19            THE COURT: Well, I have two concerns. First of all,  
20    I'm not sure that it's necessary, but secondly, I don't know  
21    that either the county or this Court is inclined to wait the 2  
22    to 3 years we have to wait to get an answer out of the State  
23    Supreme Court these days.

24            MR. COLE: Right.

25            THE COURT: And what benefit is that to anyone? And

1 I'm not criticizing the State Supreme Court. I have the  
2 greatest respect for the body. I guess they're busy. I don't  
3 know what happens. But we send these requests up and  
4 oftentimes it takes a year, sometimes longer. I've waited  
5 2 years in the past for a decision to come down, and that's  
6 quite troublesome.

7 MR. COLE: Well, they're asking for summary judgment  
8 on those claims. We didn't. But they didn't even make out a  
9 case. They haven't cited any statute that gave them the  
10 authority to issue this ordinance. So I mean they haven't even  
11 gotten to first base on that point, is what we believe.

12 But in any case, I share the Court's concerns about  
13 delay and whether it's even necessary. The case law from the  
14 Hawaii courts I think is, you know, fairly well developed in  
15 this area and I think it's sufficiently adequate for the Court  
16 to make a reasoned judgment on those claims.

17 THE COURT: All right. Is there anything else,  
18 Mr. Cole, you'd like to address?

19 MR. COLE: Well, unless the Court -- Your Honor has  
20 any, let me just briefly look through.

21 I think I would just -- I would just close by saying  
22 that the primary claim here is unconstitutional conditions.  
23 There's absolutely no evidence of a nexus. The state law  
24 decisions that no one relied on all addressed exaction  
25 ordinances. They don't contend that the threshold question of

1    what if these exactions were to be imposed by compulsion, would  
2    they constitute takings or not, they don't dispute that. Of  
3    course they would be. Give us land. And all those -- all  
4    those, you know, force, you have to rent to this person here  
5    selected by lottery at this price. You must. That's what --

6           THE COURT: Okay. Now, this is a -- this is a county  
7    ordinance, it's not a state law. So I don't need to notify the  
8    State Attorney General or have any of that stuff involved here.

9           MR. COLE: Right. It's a county ordinance.

10          THE COURT: The county council is obviously already a  
11   party here. So it's not a --

12          MS. D'ENBEAU: Yes, Your Honor.

13          MR. COLE: Yes.

14          THE COURT: I certainly don't need to send a letter to  
15   the Corporation Counsel and advise Corporation Counsel that  
16   we've got a challenge to their ordinance.

17          MR. COLE: Right. They're fully aware of that. I  
18   don't think there's any issue there.

19          And so we're asking for a judgment invalidating the  
20   ordinance under this doctrine, which is well established, it's  
21   been applied by cases all the way through the --

22          THE COURT: Well, I will tell you, the Court in  
23   looking at the ordinance itself finds it troublesome. I will  
24   also say, however, that I do have to look more carefully into  
25   the issue of whether or not this is ripe --

1           MR. COLE: I understand.

2           THE COURT: -- at this point. But I think that the  
3 ordinance itself is -- is troublesome as far as I am concerned.  
4 Now, that doesn't mean I'm in a position to suggest that it's  
5 unconstitutional yet. I don't know. I have to look at it more  
6 carefully.

7           MR. COLE: Well --

8           THE COURT: But it certainly is troublesome in its  
9 application.

10          MR. COLE: If I could just say one last thing on that  
11 ripeness point. If the takings claim, if -- that's the tail  
12 wagging the dog. If that's an issue, we don't need that claim.  
13 The primary claim --

14          THE COURT: Well, if the takings -- there's no  
15 question under takings, if it's a takings claim, my friend  
16 David Callies would tell us, and he's an expert in this area,  
17 we need to go to state court first. Okay? I think that's --  
18 the only question here is whether your other constitutional  
19 claims are somehow subsumed as a takings claim.

20          MR. COLE: Yes, I think that the -- the Lingle case  
21 has decoupled all those labels. No longer can you just brush  
22 the whole case with one paint brush and say, This is all a  
23 takings case, go to state court. No longer can you do that.  
24 Lingle said you got to decouple those. Really, no amount of  
25 compensation can justify an invalid ordinance.

1 THE COURT: Yeah.

2 MR. COLE: It's got a due process.

3 THE COURT: All right.

4 MR. COLE: And unconstitutional conditions that under  
5 Nollan and Dolan is another potential claim that we're  
6 asserting is the most applicable claim, it says, Void. Go back  
7 to the drawing board, either let the project go forward or if  
8 you really want to impose that exaction, pay for it. And  
9 that's what Nollan and Dolan said. So --

10 THE COURT: All right. Thank you, Mr. Cole.

11 MR. COLE: I'd like to reserve, if I could, any  
12 rebuttal.

13 THE COURT: Yes, counsel.

14 MS. D'ENBEAU: Thank you, Your Honor. Well, Nollan  
15 and Dolan, as we all know, is a taking -- are takings cases.

16 THE COURT: Right, they certainly are.

17 MS. D'ENBEAU: And just what we heard a moment ago  
18 about pay for it, that's also a takings argument. I don't  
19 think there's any question of what they're arguing here is  
20 fundamentally a takings argument. They do make an equal  
21 protection argument as well, and I think we've addressed that.  
22 They're not a suspect classification. It seems to be kind of a  
23 weak argument. But they did say that they feel that they're  
24 being discriminated against because why does -- why is it five  
25 lots rather than four lots or one lot or three lots. And so, I

1 think that those are the only two constitutional claims that I  
2 could see in the pleadings, the takings claim and then this  
3 equal protection claim.

4           And I just wanted to go a little bit more into the  
5 ordinance itself and emphasize for the Court again that this is  
6 a workforce housing ordinance, not an affordable housing  
7 ordinance. And so it doesn't apply -- as Napa was for people  
8 who earned -- Napa is the case in California -- Napa was for  
9 the people who earned substantially less than the median  
10 income. This ordinance is designed for people who are in the  
11 median income and up to 160 percent --

12           THE COURT: Well, you know, what you call it doesn't  
13 mean a lot. I mean what if you were to say to a developer, If  
14 you want to develop on Maui, what you have to do for each house  
15 that you build is set aside \$25,000 of the amount of the cost  
16 of construction or the price of the sale of that home and give  
17 it to the homeless shelter.

18           MS. D'ENBEAU: Well, this is an entirely different --

19           THE COURT: Well, no, basically that's what you're  
20 saying here. Isn't that what it does? You're saying it's a  
21 workforce, but this is supposed to be -- it's a 50 percent and  
22 what it does is goes to do what?

23           MS. D'ENBEAU: What the ordinance says is not anything  
24 to do with you have to give money or any of that. The  
25 ordinance says --

1           THE COURT: No, no, no, there is a provision in the  
2 ordinance where you can give money in lieu of, isn't there?

3           MS. D'ENBEAU: There is.

4           THE COURT: So, that's not entirely correct.

5           MS. D'ENBEAU: But it's not requiring a donation.  
6 What it's saying is, When you build houses, this percentage of  
7 them must be -- well, particularly given the interest rates and  
8 so forth right now -- you must sell these apartments for  
9 between \$287,600 and \$460,200, a certain percentage of your  
10 apartments. So we're not talking about very low, low priced  
11 houses. We're talking about for the workforce. And as we gave  
12 the Court an example, it would be, for example, a police  
13 officer married to a teacher. The kinds of people that we need  
14 in our community but are good wage earners, they just don't --  
15 they're just not millionaires. And so --

16           THE COURT: Well, how about a federal judge married to  
17 a teacher?

18           MS. D'ENBEAU: That would work, too.

19           THE COURT: Does that work?

20           MS. D'ENBEAU: I think so.

21           THE COURT: We're not exactly high wage earners, as  
22 far as our colleagues are concerned at least.

23           MS. D'ENBEAU: Right, that's true. And that's the  
24 point of this ordinance. It's not designed, and it's easy to  
25 mix it up and say, Well, when you're looking at affordable



1     housing in Napa, I assume it was for people working the hotels  
2     and so forth, which certainly people in Napa need, but they  
3     were low wage earners.

4             THE COURT:    Sure.

5             MS. D'ENBEAU:  And this is for people, good solid  
6     middle income people who find themselves priced out of the  
7     market on Maui.  So the county council in its wisdom decided,  
8     All right, since we have limited water, we have limited roads,  
9     we have limited infrastructure, let's not give it all away to  
10    these millionaires from the Mainland who are coming.  And it  
11    doesn't matter if they're from the Mainland, I guess they could  
12    be millionaires on Maui.

13            THE COURT:  That was a really bad thing to say because  
14    I've declared a statute unconstitutional in this state that was  
15    aimed specifically at people coming from the Mainland.

16            MS. D'ENBEAU:  Right.  And I apologize for that.  That  
17    was a bad remark.

18            THE COURT:  That was a really bad thing to say.

19            MS. D'ENBEAU:  Yes, it was.

20            THE COURT:  But it may well have been what motivated  
21    this ordinance.

22            MS. D'ENBEAU:  I don't think it's necessarily.  I  
23    think the thing about, if I could bring -- now that I've -- now  
24    that I've stepped into those treacherous waters of the  
25    Mainland.  I think one of the important things to realize is

1     that various states have various requirements for when your  
2     property interest vests and when something is ripe. And in  
3     Hawaii it isn't even enough to have a building permit, it's not  
4     enough to -- you have to have your final discretionary  
5     approval.

6             So developers, of course, are on notice of this  
7     information. And the developers in this case didn't purchase  
8     the property until 2006. So they knew full well that the  
9     county council was considering an ordinance for this workforce  
10    housing. And that ordinance at some points was discussed at  
11    80 percent. So, they're looking at the property and deciding  
12    to invest in it -- I think in terms of the Penn Central  
13    standards anyway, their investment backed expectations --  
14    depends on the same way the Nukolii people had to know that the  
15    referendum had been certified. You know, you have to look and  
16    make your own investment based decisions.

17            And so, in that case if you were looking at a Penn  
18    Central standard but they would have to be able to show all of  
19    that. So, even though -- you know, the fundamental argument is  
20    they're not there yet because they don't have their final  
21    discretionary approval. So we don't know what their project  
22    will look like at --

23            THE COURT: Well, their contention is that, what about  
24    this opinion that came out of your own office that basically  
25    said they didn't need to wait for that and that was of no

1 consequence, do we just disregard that?

2 MS. D'ENBEAU: I'm not aware that an opinion came out  
3 of our office. I think what Mr. Cole may be referring to, and  
4 I'm not sure if it's part of the record, but --

5 THE COURT: Well, I'm sure he'll tell us since he's  
6 jumping for his file.

7 MS. D'ENBEAU: Later he was saying something like,  
8 During the meeting someone asked this question, and the Corp.  
9 Counsel who was on duty, if you will, during the meeting said,  
10 Looking at the ordinance, it just says a person with a project,  
11 it doesn't say a final finally approved project and so forth.  
12 But that's --

13 THE COURT: Well, if that's what the ordinance says,  
14 what am I supposed to do, write into it something that's not  
15 there?

16 MS. D'ENBEAU: No, but that doesn't -- that waiver  
17 provision isn't a necessary part of the ordinance in the first  
18 place. And in the second place, that would have been, had they  
19 been able to ask questions and had the developer been willing  
20 to address those issues, that might well have come up. But the  
21 developer made it really clear, We're not answering any  
22 questions, we're not doing anything. We gave you our  
23 documents. Because they wanted the 45-day clock to run. I  
24 think Mr. Cole was pretty straightforward in saying that they  
25 didn't -- they were asking for information. If they ask for

1 more information, the clock is going to continue to tick  
2 because that's the way those 45-day ordinances work. Oh, and  
3 now we have more information. So they were really careful not  
4 to do that. And that's why in my view it was pretty pro forma.

5 But in terms of the ordinance itself, you know, the  
6 issue on the takings, and I can't see anything in the claim  
7 that's other than a takings, I know that they've attempted to  
8 show it as an unconstitutional condition, but I hope we've made  
9 it clear in our pleadings that the unconstitutional condition,  
10 what is unconstitutional. What they're saying is  
11 unconstitutional here is that you're taking my property without  
12 just compensation. So, the unconstitutional condition part of  
13 it that was mentioned in the Lingle case isn't -- doesn't get  
14 you out from under the -- the takings analysis.

15 And typically unconstitutional condition claims are  
16 like welfare recipient, for example, we want to look in your  
17 underwear drawer or you don't get welfare. That kind of thing  
18 and that would be a -- an unlawful search and seizure kind of  
19 issue. Do you have to waive your right to have privacy in  
20 order to get your welfare.

21 THE COURT: Well, I don't see a Fourth Amendment issue  
22 here.

23 MS. D'ENBEAU: No, I don't think so. But I think the  
24 issue here is a takings issue and they do have to have a  
25 project that's ripe. Thank you, Your Honor.

1           THE COURT:   Okay.   Mr. Cole?

2           MR. COLE:   Yes.   Just to direct Your Honor's attention  
3 to the record.   In Exhibit 5 that we submitted, which has  
4 been -- you know, I don't think there's any question of  
5 authenticity.   They attached it as an exhibit, but I'm just  
6 referring to our Exhibit 5.   Page 7 is where Mr. Kushi of the  
7 Corporation Counsel said that -- he was addressing a letter  
8 that came in from a constituent questioning whether we had to  
9 go through some sort of hoops before coming before them with  
10 our appeal, said, you know, that he's citing to the ordinance,  
11 said, "If the developer of any development is subject to this  
12 chapter," meaning they're not exempt, "then they can come  
13 directly to the council.   There doesn't need to be any  
14 prehearing decision by any agency to trigger that appeal on a  
15 standing basis."

16           So I mean it was --

17           THE COURT:   Indeed I think they have to go to the  
18 council.

19           MR. COLE:   And we did.

20           THE COURT:   That's the only place they can go under  
21 the ordinance, isn't it?

22           MR. COLE:   And we did.

23           THE COURT:   So it may have gone -- if your client had  
24 immediately filed suit in state court, the state court would  
25 most likely have dismissed and said, You didn't go to the

1 council first.

2 MR. COLE: Right. So we would have just been in a  
3 loop. And --

4 THE COURT: Now, my only concern is whether you need  
5 to go to state court before you can come here. So, I'll have  
6 to look at that.

7 MR. COLE: Okay. And on that point, I just want to  
8 make this one thing very clear, that what the unconstitutional  
9 conditions cases say is that if what the exaction -- the  
10 exaction that's being threatened as a permit condition would be  
11 a taking, then it's invalid unless there's a connection. So,  
12 in Nollan or Dolan they didn't require that the -- that the  
13 developer submit to the condition and then say, I've -- see,  
14 I've had my property taken. And that's what they're basically  
15 requiring us to do, to submit to the condition, which all the  
16 evidence that we've submitted before the Court is, there's no  
17 way we can do that.

18 THE COURT: Well, there --

19 MR. COLE: And even their own --

20 THE COURT: Yeah, I think that's one of their  
21 arguments, but the other argument is that you haven't come to  
22 them with a full enough project upon which they can make a  
23 definitive yes or no. And your contention is that you already  
24 did that and that you had the right to go to them with a --  
25 with a written submission and that you got a no. So that's

1     where they're at.

2                 MR. COLE:   And we had hundreds of papers and it was  
3     all detailed documents, we submitted them all.  We didn't want  
4     to clutter up this record with it, but there are detailed,  
5     detailed project submissions.  On that idea I just close and  
6     ask --

7                 THE COURT:   Okay.  Well, I recognize the -- thank you,  
8     Mr. Cole, you can be seated.

9                 I obviously recognize the importance of this and the  
10    likelihood, quite frankly, of the fact that it would in most  
11    circumstances find its way to the Court of Appeals, regardless  
12    of how I rule.  I have great respect for that.  I sit regularly  
13    on the Court of Appeals by designation.  In fact, I'm just  
14    about to do it again.  And so I have certainly respect for that  
15    process.

16                But that puts an added burden on this Court in that  
17    because it is of some importance and because it is in all  
18    likelihood at some point in time, maybe not after this order,  
19    but at some point in time, likely to find its way to the next  
20    level.  I need to do the very best job I can in laying out a  
21    written opinion that explains the Court's ruling in a way that  
22    any appellate court that might be looking at it, at whatever  
23    level, is going to have the opportunity to discern what I did  
24    and what I didn't do.  And that's in fairness, quite frankly,  
25    to the appellate court but even more important in fairness to

1 the parties.

2           So I'm going to take it under advisement. I will try  
3 to get a decision out as quickly as I possibly can. I promise  
4 you it isn't going to be 2 years or 1 year or 6 months. It'll  
5 probably be in the next 2 to 3 weeks. I'm quite busy, I'm  
6 right in the middle of a trial right now. So, I don't have all  
7 the free time I might have otherwise. But I'll get to it as  
8 quickly as I possibly can. Okay?

9           MR. COLE: Thank you.

10          MS. D'ENBEAU: Thank you, Your Honor.

11          THE COURT: Anything else?

12          MR. COLE: Thank you, Your Honor.

13          THE COURT: Thank you very much for your time and your  
14 arguments.

15               (The proceedings concluded at 10:25 a.m., June 2,  
16 2008.)

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COURT REPORTER'S CERTIFICATE

I, CYNTHIA FAZIO, Official Court Reporter, United States District Court, District of Hawaii, Honolulu, Hawaii, do hereby certify that the foregoing pages numbered 1 through 32 is a correct transcript of the proceedings had in connection with the above-entitled matter.

DATED at Honolulu, Hawaii, June 10, 2008.

/s/ Cynthia Fazio  
CYNTHIA FAZIO, RMR, CRR