No. 08-15251

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAUI VACATION RENTAL ASSOCIATION, INC.

Plaintiff-Appellant,

vs.

COUNTY OF MAUI, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
DISTRICT COURT CASE NO. CV-07-00495 JMS

REPLY BRIEF OF APPELLANT MAUI VACATION RENTAL ASSOCIATION, INC.

ROBERT H. THOMAS (HSBN 4610-0)
MARK M. MURAKAMI (HSBN 7342-0)
CHRISTI-ANNE H. KUDO CHOCK (HSBN 8893-0)

OF COUNSEL:
DAMON KEY LEONG KUPCHAK HASTERT
1003 BISHOP STREET
1600 PAUAHI TOWER
www.hawaiilawyer.com
HONOLULU, HAWAII 96813
TELEPHONE: (808) 531-8031
FACSIMILE: (808) 533-2242

COUNSEL FOR PLAINTIFF-APPELLANT
MAUI VACATION RENTAL ASSOCIATION, INC.

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I.
SUMMARY

When the County of Maui official who has been delegated the exclusive discretion by the Maui Charter to enforce zoning laws provides the County's express written assurances of an enforcement "moratorium" and an "amnesty" on zoning enforcement, those assurances cannot be revoked arbitrarily. The County, however, asserts that until the County Council issues a property owner a Conditional Permit (CP) – an indefinite process in which 90% of the applications have been held by the County in legal purgatory for more than six years – he or she may be treated arbitrarily and capriciously, regardless of the County's prior assurances or actions.

It is not surprising the County's Answering Brief glosses over the single most relevant Hawaii Supreme Court precedent, *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 514 P.2d 861 (Haw. 1973), since that case undermines its arguments:

1. Hawaii law recognizes that when a county official acts "within the ambit of his duty" and makes assurances that are "at least debatable" and the recipient relies, the government is bound by those assurances. *Id.* at 864. The County, however, asserts local government officials may not be estopped unless the official has the power to enter contracts on behalf of the County. Ans. Br. at 23-24. Here, the Planning Director was well within the ambit of his duty when he assured the

members of the Maui Vacation Rental Association (MVRA) how the County would enforce zoning laws.

2. Hawaii courts recognize the government may be prohibited from enforcing the law in a way contrary to its assurances. *Waianae Model*, 514 P.2d at 864 (court estopped county from repudiating assurances of 60-day deadline, even though ordinance deadline was 14 days). The County, however, argues it cannot be estopped from "enforcing the law." Ans. Br. at 13.

3. The County also asserts estoppel applies only to the issuance of land use permits, and that property owners are only entitled to rely on the "last discretionary act" in the permitting process. Ans. Br. at 17. *Waianae Model*, however, recognizes a person is entitled to rely on assurances other than the "last discretionary act," depending upon what action the person is seeking to prevent the County from repudiating. *Waianae Model*, 514 P.2d at 864 (plaintiff relied on official's extension of a deadline, and was not seeking to compel issuance of a permit).

The County continues to confuse the actions MVRA's complaint sought to prevent it from repudiating, and focuses on the wrong process. The complaint did not seek to compel the issuance of CP's. The complaint did not seek to forever insulate MVRA's members from Maui's laws. The County wrongly focuses solely on the discretionary CP process, rather than its Planning Director's assurances and

the reliance they induced.[1] *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (standard of review in constitutional challenges to land use actions should be determined by the "nature of the right assertedly threatened or violated rather than the power being exercised or the specific limitation being imposed").

MVRA's complaint sought only to have the County live up to its word, and enforce the law as it said it would. MVRA's complaint was based not merely on the County's decades of active encouragement of the industry and nonenforcement policies, but on express written assurances. The County now asserts the CP process was the exclusive path to legality that MVRA's members should have undertaken, and completed. Ans. Br. at 17. Yet, ironically, this process was for years barred *by the County*: it accepted only 80 applications, processed a mere 10% of them (all were approved), placed the remainder in limbo, and turned away all other potential

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1. The County asserts that any nonresident occupancy of a home or apartment for less than 180 days – even by its owner – is "illegal" unless the County first issues a CP. *See* Ans. Br. at 2 n.1. This extremely broad prohibition does not just bar the classic "vacation rental" where a non-owner rents the property for a short period of time. *See, e.g.*, Haw. Rev. Stat. § 514E-1 (1993) ("Transient vacation rentals" defined as "rentals in a multi-unit building to visitors over the course of one or more years, with the duration of occupancy less than thirty days"). Instead, Maui County Code § 19.04.040 prohibits "transients" from "occupying" a dwelling for less than 180 days. "Transient" is defined at "any visitor or person who owns, rents or uses" the unit, and whose permanent address is not the unit in question. Thus, Maui residents who own a second Maui home are prohibited from even *occupying* it for less than 180 days, and non-Maui residents who own a Maui home are similarly prohibited.

applicants, promising that comprehensive legislative reforms would be forthcoming. While a succeeding mayoral administration honored the County's word, when the present administration gained power, it disavowed the Planning Director's assurances.

This Reply focuses on three issues.

First, government assurances regarding whether or how it will enforce the law, when provided by an official possessing the discretion to enforce the law, are assurances leading "to the fruition of a number of expectancies embodied in the concept of property." *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979). The Due Process Clause protects the legitimate expectation the government will honor its word.

Second, this Court may consider the substantive due process issue, which was raised by MVRA below. This purely legal argument was not waived.

Third, Hawaii law recognizes local government may not repudiate its word if an official acting "within the ambit of his duty" provides "assurances of some form" about the law, and the recipient relies on those assurances. Contrary to the County's argument, the "last discretionary act" is not the general test for government estoppel under Hawaii law. Hawaii law recognizes assurances, once relied upon, are "property rights that cannot be taken away by government regulation."

II.
GOVERNMENT MAY PROVIDE BINDING ASSURANCES IT WILL NOT ENFORCE THE LAW

The County asserts MVRA's members cannot possess a constitutionally-recognized interest in assurances the County would not enforce the law. Ans. Br. at 13-18. However, as this court recognizes, the Due Process Clause protects expectation interests where the government provides assurances it will enforce the law in a particular way, and the recipient relies. *Morgan v. Gonzales*, 495 F.3d 1084, 1091 (9th Cir. 2007) (as a matter of fundamental fairness, promises made by the government to induce either a plea bargain or a cooperation agreement must be fulfilled); *Johnson v. Lumpkin*, 769 F.2d 630, 633 (9th Cir. 1985) ("As a general rule, fundamental fairness requires that promises made during plea-bargaining *and analogous contexts* be respected.") (emphasis added) (citing *Santobello v. New York*, 404 U.S. 257, 262-63 (1971); *United States v. Hudson*, 609 F.2d 1326, 1328 (9th Cir. 1979); *United States v. Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974)). The principle that government must abide by its nonprosecution agreements and plea bargains if they induce reliance is firmly rooted in substantive due process and principles of fundamental fairness. *See United States v. Carillo*, 709 F.2d 35, 37 (9th Cir. 1983) ("under settled notions of fundamental fairness the government was bound to uphold

its end of the [nonprosecution] bargain").[2] Hawaii courts echo these principles. *State v. Yoon*, 662 P.2d 1112, 1116 (Haw. 1983) ("[W]e think the circumstances recounted therein lend ample support to the circuit court's determination that the State should be held to the agreement to clear the defendant's record . . . Anything less might have raised questions concerning fairness in the State's dealings with [the defendant.]"). The system of plea bargains and non-prosecution agreements is built on the foundation that the government must abide by its word it will not enforce the law against a defendant who relies on government assurances. *See, e.g., Rowe v. Griffin*, 676 F.2d 524, 527-28 (11th Cir. 1982) ("A defendant who pleads guilty as a result of a plea bargaining agreement has a due process right to enforcement of the bargain.").

In *Johnson*, this court held the general rule respecting such promises is subject to two conditions: "(1) the agent must be authorized to make the promise; and (2) the defendant must rely to his detriment on that promise." *Johnson*, 769 F.2d at

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2. *Id.* (citing *United States v. Irwin*, 612 F.2d 1182, 1189-91 (9th Cir. 1980) (recognition of enforceability of cooperation agreements); *United States v. Garcia*, 519 F.2d 1343, 1345 & n.2 (9th Cir. 1980) (same); *United States v. Minn. Mining & Mfg. Co.*, 551 F.2d 1106, 1111 (8th Cir. 1977) (where defendants fully discharge their obligations under plea agreement government is bound to fulfill its promise to forego future criminal prosecution); *United States v. Hallam*, 472 F.2d 168, 169 (9th Cir.1973) (same)). *See also State v. Sturgill*, 469 S.E.2d 557, 561-62, 567 (N.C. Ct. App. 1996) (citing *United States v. Carillo*, 709 F.2d 35, 37 (9th Cir. 1983) for the premise that due process rights arise from "settled notions of fundamental fairness" and noting "the standards of due process prohibit the government from 'welshing' on the bargain").

633 (citing *Hudson*, 609 F.2d at 1329; *Goodrich*, 493 F.2d at 393). The Maui Planning Director's assurances, and the reliance by MVRA's members alleged in the complaint in the case at bar are "analogous contexts" mentioned by this court in *Johnson*.

First, violation of the County's zoning ordinances subjects a property owner to serious criminal sanctions. *See* Maui County Code § 19.530.020 (detailing terms of imprisonment, monetary fines, and community service for violation of the zoning ordinances). The property owner is also subject to administrative enforcement, which includes cumulative daily fines:

> In lieu of, or in addition to, enforcement by criminal prosecution, if the director of public works determines that any persons are violating any provision of titles 12, 14, 16, 18, 19 and 20 of this code, any rule adopted thereunder, or any permit issued thereto, the director may have the person served, by mail or personal delivery, with a notice of violation and order pursuant to this chapter and such administrative rules as the director may adopt.

Id. § 19.530.030. These fines quickly reach astronomical proportions. Rules for Administrative Procedures and Civil Fines for Violation of Title 19, § 15-2-9 ($1,000 initial fine, with daily fines of up to $1,000).

Second, the Maui Planning Director has been expressly delegated the discretionary zoning enforcement power by the Maui Charter:

> **Section 8-8.3. Powers, Duties, and Functions.** The planning director shall:
>
> 1. Be the administrative head of the department of planning.
>
> . . . .
>
> 6. Prepare, administer, and *enforce zoning ordinances*, zoning maps and regulations and any amendments or modifications thereto.

Maui Charter § 8-8.3 (2003).[3]

The County acknowledges the Planning Director possesses "prosecutorial discretion." Ans. Br. at 23 ("Although the County's Planning Director is charged with enforcing zoning ordinances and may have a certain amount of prosecutorial discretion in determining enforcement policy and priorities, the

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3. In *Johnson*, federal agents assured the defendant he would not serve time on state charges if he cooperated with their investigation. *Johnson*, 769 F.2d at 631. The state authorities, however, did not honor the federal agents' promises, and the defendant was convicted in state court. *Id.* This court denied the defendant's claim his due process rights had been violated. The court assumed the defendant relied on the federal agents' promises, but noted that as federal agents, they had no authority to bind state authorities to their non-prosecution agreement. *Id.* at 634. In the case at bar, the Planning Director possesses the authority to enforce the County's zoning laws. The State delegated the power to regulate the location of transient vacation rentals to the counties. Haw. Rev. Stat. § 514E-4 (1993) ("The several counties shall, by amendment of their zoning ordinances, limit the location of time share units, time share plans and other transient vacation rentals, within such areas as deemed appropriate."). The County of Maui exercises the enforcement power through the Planning Director.

Planning Director does not have the power to alter the unambiguous language of Maui County Code § 19.37.010A by agreeing to suspend enforcement against illegal transient vacation rentals."). By informing property owners about how the County would enforce the law, the Planning Director was not "altering the language" of the Code.[4] He was merely exercising the discretion delegated to him, deciding how the County would allocate its enforcement resources, a decision the Planning Director and Department make every day since it is obviously impossible for the Planning Department to attempt to prosecute every zoning violation in the County of Maui.

The County also does not explain why, if the Planning Director's assurances were so beyond his powers, the County did not in the intervening years disavow them as *ultra vires*. To sit by silently is extremely inequitable since it should have been obvious the assurances were designed to induce the preparation and submission of very expensive CP applications, or inaction once the County refused to accept them. The County knew MVRA's members relied on the assurances, yet the County did nothing to disavow them. Instead, through two successive County

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4. The County seems to be asserting, for example, that any time a Deputy District or Prosecuting Attorney enters into a nonprosecution agreement or plea bargain with a witness or defendant, she is "altering the language" of criminal statutes. That, of course, is simply nonsense. Similarly, the Planning Director obviously was not attempting to "alter the language" of the Maui zoning code when he provided the County's assurances, just deciding to what situations the County would apply the code.

administrations, the County did not alter its assurances (and indeed, repeatedly ratified them). Only after the present administration came to power did the County begin taking the position MVRA's members should not have believed the Planning Director when he assured them if they filed CP applications, the County would not prosecute them for zoning violations unless their uses generated an independent complaint. Having submitted CP applications, these property owners could do no more: the County was not bound to process these applications in any meaningful time frame (90% of the applications have remained unprocessed in the County's system), and the owners could not compel issuance or even more expeditious consideration by the County. Other owners who attempted to submit CP applications were turned away.

Viewing the allegations of MVRA's complaint in the light most favorable to the plaintiff, *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998), the Planning Director's assurances on behalf of the County are akin to nonprosecution agreements routinely upheld by this court: the County assured MVRA's members if they undertook certain action (such as filing an application for a CP, for example), the Director would not exercise his zoning enforcement discretion and prosecute, either criminally or administratively.

These assurances are binding upon the County, even if, as it argues, the Director does not have the power to enter into contracts. Ans. Br. at 23 (the "Planning Director does not have the legal authority to enter into binding contracts on behalf of the County"). The ability to enter into a contract is not the relevant power at issue. The critical power possessed by the Planning Director is the discretion to enforce the zoning laws. The Maui Prosecuting Attorney does not have the power to enter into contracts binding the County either, but possesses the discretion to enforce the criminal statutes, and there can be little doubt that when the Prosecuting Attorney assures a witness she will not be prosecuted if she cooperates, or enters into a plea agreement with a defendant, that the County is bound by fundamental fairness and due process to honor these assurances. *See, e.g., Thomas v. I.N.S.*, 35 F.3d 1332, 1337 (9th Cir. 1994); *Johnson v. Lumpkin*, 769 F.2d 630, 633 (9th Cir. 1985); *United States v. Carillo*, 709 F.2d 35, 37 (9th Cir. 1983). Due process principles of property and fundamental fairness, and state law equitable estoppel principles are designed to prevent the injustice of a local government expressly inducing reliance, then disclaiming those promises years later, even if the official providing those assurances does not have the formal power to bind the County to a contract.

Thus, the relevant inquiry in the case at bar is not whether nonresident occupancy of a home or apartment for less than 180 days is "illegal," but rather, given the duration and the nature of the assurances provided by the County's authorized officials, whether it should be permitted to summarily disavow these assurances after substantial detrimental reliance by MVRA's members. Holding the County to its promises protects the integrity of the government, and the reasonable expectations of citizens who dealt forthrightly with the County official expressly charged with the discretion to enforce (or not enforce) the County's zoning laws.[5] This court, for example, holds government has a constitutional obligation to honor its promises:

> It has long been the law that the government's failure to keep a commitment which induces a guilty plea requires that judgment be vacated and the case remanded. A cooperation agreement is analogous to a plea agreement. The government is held to the literal terms of the agreement, and ordinarily must bear responsibility for any lack of clarity. Enforcement of the agreement requires that the person making the promise be authorized, and that the promisee rely on the promise to his detriment.

Thomas v. I.N.S., 35 F.3d 1332, 1337 (9th Cir. 1994) (citations omitted). By submitting CP applications, MVRA members in effect admitted guilt; it violates due

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5. Compare this to the situation in *Brescia v. North Shore Ohana*, 168 P.3d 929 (Haw. 2007), where the Hawaii Supreme Court rejected an estoppel claim because the plaintiff received assurances from the wrong official.

process and fundamental fairness for the County to post hoc disclaim its assurances which induced these actions.

The County envisions an entirely different regime where citizens who trust public officials and are induced into action are left twisting in the political wind because a new County administration refuses to honor its predecessors' commitments, offering nothing more than "government cannot be trusted" and "you should have known better" as its rationale. The Maui Planning Director, however, contrary to the argument of the County, possesses more authority and discretion than "the local liquor inspector" when it comes to deciding how to enforce the County zoning code, and unlike the local liquor inspector, has the actual and apparent authority to make such enforcement decisions and bind the County and successive administrations.[6]

The County also argues "the former Planning Director did not have the authority to bind his successors in office," and MVRA's members therefore should

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6. *See, e.g.*, Ans. Br. at 17 ("That an MVRA member may have applied for a Conditional Permit or a Special Permit, that the process is lengthy or cumbersome, or that it may be expensive, does not alter the fact that no one can legally operate transient vacation rentals without the necessary permits, any more than one could open a bar and begin selling liquor to patrons before receiving a liquor license, even if the local liquor inspector had promised to turn a blind eye to such illegal activity."). *Cf. Santobello v. New York*, 404 U.S. 257, 262-63 (1971) (extending constitutional protection to the expectations created in defendants by plea bargains with the state because government cannot be allowed to mislead by providing false information to induce disadvantageous choices).

not have relied on his assurances when new administrations took power. Ans. Br. at 22. There is nothing in Hawaii law, however, suggesting that estoppel against a government official in his official capacity, once established, only prohibits the disavowal of assurances for the term of the officials's tenure, and does not bind the County itself.

III.
MVRA DID NOT WAIVE LEGAL ARGUMENTS

The County asserts MVRA waived the substantive due process argument because it was not raised below. Ans. Br. at 9. First, this legal issue was raised below. As the County correctly acknowledged, "MVRA alleged [in its complaint] that the County had violated its rights to procedural and substantive due process." Ans. Br. at 9. The allegations in the complaint must be viewed in the light most favorable to the plaintiff on a motion to dismiss, which means that it need not identify the source of the claim, only provide notice under Fed. R. Civ. P. 8. *Alvarez v. Hill*, 518 F.3d 1152, 1157-58 (9th Cir. 2008). MVRA's complaint pleads facts providing notice of its substantive due process claim. *See Hansen v. Morgan*, 582 F.2d 1214, 1217-18 (9th Cir. 1978) (the "essence" of the argument was "directed at the same concerns," the parties fully developed the facts below, and the issue was "purely legal"). MVRA's complaint sets forth explicit and detailed allegations of the official

assurances made by the County. *See* ER 1, at 6-14 (Complaint ¶¶ 17-23, 25-30, 32, 34). *Cervantes v. City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1991) ("The district court's order of dismissal will be affirmed 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'") (citation omitted). The County has not suffered any prejudice and was well aware of the claims below. For example, during a hearing in the District Court, MVRA's trial counsel pointed out the County's assurances, and nature of the claims asserted:

> MR. FOSBINDER: This is . . . a case that's pretty much unique, in terms of the multiple layers of government making assurances over such a long period of time.
>
> . . . .
>
> MR. FOSBINDER: What we are asking is simply that the county be required to live up to the agreement that was made, repeatedly, over a period of approximately ten years, at many levels of the government, sometimes in writing, sometimes verbally, but made unequivocally, that they would not prosecute anyone, they would not seek injunctive relief, until people's permit applications were processed.

ER 3 (Excerpt of Transcript of Dec. 2, 2007 hearing), at 6, 56. The County cannot now claim that this argument was newly presented on appeal, since it interpreted the complaint as bringing claims based on official assurances:

> MS. LOVELL: If I understand the complaint correctly, the plaintiff is alleging that certain of its members relied on certain assurances by certain county officials.

ER 3, at 17. *See MacRae v. Commissioner*, 294 F.2d 56, 59 (9th Cir. 1961) (no waiver when the claim "arises out of the same transactions which were considered [below]"). Additionally, when a party is not prejudiced by a failure to advance arguments below, and has had an opportunity to brief the argument on appeal, the court may consider the argument. *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004). The County briefed the issue thoroughly on appeal.[7]

Second, even if MVRA's argument was not presented below as clearly as it could have been, whether the complaint alleged a due process claim is a question of law, and therefore not waived. As this court recently held:

> Where the question presented is one of law, we consider it in light of all relevant authority, *regardless of whether such authority was properly presented in the district court.*

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7. The three cases cited by the County to support its argument that MVRA's claims were raised for the first time on appeal are not applicable since these cases involved entirely new claims or facts. Ans. Br. at 11-12. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1140-41 (9th Cir. 2008) (refusing to consider a claim never before alleged regarding improper actions by the government); *S.E.C. v. Internet Solutions for Bus. Inc.*, 509 F.3d 1161, 1167 (9th Cir. 2007) (refusing to consider a claim never before alleged based on the Hague Convention); *Con. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) (refusing to consider a completely new claim never before alleged as to the scope of an injunction).

Crown Point Dev., Inc. v. City of Sun Valley, 506 F.3d 851, 853-54 (9th Cir. 2008) (emphasis added) (citing *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004)). This court has discretion to determine the purely legal questions presented by this appeal:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases . . . We announce no general rule.

Singleton v. Wulff, 428 U.S. 106, 121 (1976). *See also Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("there may be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below"); *United States v. Merrill*, 211 F.2d 297, 302-03 & n.4 (9th Cir. 1954) (considering a new claim on appeal as a question of law based on the facts as established below); *Douglas County v. Babbit*, 48 F.3d 1495, 1502 (9th Cir. 1995) ("Though in the district court the defendants did not argue [the arguments made on appeal,] there is no bar to their raising new arguments on appeal if those arguments are purely legal . . . A court of appeals has the discretion to consider those new theories.") (citation omitted). If it is determined that MVRA did not present its

substantive due process argument as clearly as it could have in the District Court, this court should exercise its discretion because the arguments are purely legal.

The cases relied upon the County which precluded new arguments are readily distinguishable. *See, e.g., Pfington v. Ronan Eng'g Co.*, 294 F.3d 999, 1004 (9th Cir. 2002) (asserting a claim on appeal for which no facts were asserted below); *Bruntjen v. Liberty Mut. Ins. Co.*, 86 Fed. Appx. 242, 243 (9th Cir. 2003) (asserting an argument contrary to the explicit allegations in the complaint and the arguments as briefed); *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1056 (9th Cir. 1991) (asserting a due process claim when none was made below).

IV.
HAWAII LAW RECOGNIZES ESTOPPEL FOR GOVERNMENT ACTIONS OTHER THAN LAND USE PERMITS

To plead a claim for equitable estoppel under Hawaii law, a complaint need only allege the government provided "official assurances of some form," and that the plaintiff relied. *Denning v. County of Maui*, 485 P.2d 1048, 1050 (Haw. 1971). The County, however, asserts that MVRA's members could rely on nothing less than a permit or a formal contract with the County. *See* Ans. Br. at 23 ("Moreover, the documents attached to MVRA's complaint as Exhibit 1 (ER 2, pp. 25-28) are not the sort of 'official assurances' on which MVRA members had a legal 'right to rely.'"). To the contrary, the assurances alleged in MVRA's complaint are

exactly the type of assurances upon which its members could rely. There is no requirement under Hawaii law for the plaintiff to seek a permit, be a party to a contract with the County, or allege or prove it has received the "final discretionary approval" in a permitting process before the government can be estopped.[8] While a majority of the reported cases involve situations where the plaintiff was seeking discretionary land use approvals through a variance,[9] shoreline certification,[10] or a referendum election,[11] these situations are not exclusive. Hawaii courts have also considered estoppel claims were the action sought to be estopped was a letter from the County of Maui to the property owner that its proposed use "conformed to 'all

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8. Even if discretionary action is required, the Planning Director exercised the last discretionary act in the zoning enforcement process when he provided assurances of how the County would enforce the law.

9. *Life of the Land, Inc. v. City Council of the City & County of Honolulu*, 592 P.2d 26 (Haw. 1979); *Life of the Land, Inc. v. City Council of the City & County of Honolulu*, 606 P.2d 866 (Haw. 1980).

10. *Brescia v. North Shore Ohana*, 168 P.3d 929 (Haw. 2007).

11. *County of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766 (Haw. 1982).

existing zoning requirements,'"[12] and the extension of a jurisdictional filing deadline.[13]

Property interests are "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Thus, the County's reliance on cases detailing the standards for whether the federal government is subject to estoppel under federal common law are not applicable to this case; whether a Hawaii municipal corporation is estopped, and whether government assurances are protected property interests are governed by Hawaii, not federal, law.[14]

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12. *Denning v. County of Maui*, 485 P.2d 1048 (Haw. 1971).

13. *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 514 P.2d 861 (Haw. 1973).

14. The County argues MVRA is precluded from establishing estoppel under the standards governing estoppel against the federal government. *See* Ans. Br. at 24-26 (citing *S & M Inv. Co. v. Tahoe Reg'l Planning Agency*, 911 F.2d 324, 325 (9th Cir. 1990); *Heckler v. Cmty. Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984)). The rule in these cases is not applicable to the case at bar, which is governed by Hawaii law. Furthermore, the County's suggestion that local government is not subject to estoppel under Hawaii law is incorrect. Ans. Br. at 26 ("Hawaii courts are also leery of allowing estoppel to operate against the government.") (citing *Turner v. Chandler*, 955 P.2d 1062 (Haw. Ct. App. 1998)). Hawaii courts hold local governments are subject to equitable estoppel. *See, e.g., Life of the Land, Inc. v. City Council of the City & County of Honolulu*, 592 P.2d 26 (Haw. 1979) (county estopped); *Life of the Land, Inc. v. City Council of the City & County of Honolulu*, 606 P.2d 866 (Haw. 1980) (same case); *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 514 P.2d 861 (Haw. 1973) (county estopped); *Denning v. County of Maui*, 485 P.2d 1048 (Haw. 1971) (county would

The County argues the property interest MVRA seeks to protect is the ability to operate "a transient vacation rental in zoning districts where such businesses are prohibited." Ans. Br. at 17. As set forth in the Opening Brief, this is not the claimed property interest in this case. *Cf.* Op. Br. at 2 (Issues Presented for Review).

The County also erroneously asserts only "vested rights" are recognized as constitutional property under Hawaii law. Ans. Br. at 15-16. To the contrary, Hawaii courts make no distinction between rights arising from equitable estoppel and from those based on vested rights. *See Allen v. City and County of Honolulu*, 571 P.2d 328, 329 (Haw. 1971) ("Appellees base their claim for damages on two distinct legal theories, vested right and equitable estoppel. Though theoretically distinct, courts across the country seem to reach the same results when applying these defenses to identical factual situations."). Thus, under Hawaii law, interests arising from government estoppel, like vested rights, are rights that "cannot be taken away by government regulation" and must be taken by the powers of eminent domain:

> [I]f the facts establish that the doctrine of equitable estoppel should apply to prevent the City from enforcing newly enacted prohibitive zoning, then the property owner is entitled to continue construction. *Once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its powers of eminent domain.*

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be estopped if, on remand, plaintiff established proof of assurances and reliance).

Id. at 439 (emphasis added). The exercise of eminent domain, of course, may only be used to take property. *See* Haw. Const. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation."); Haw. Rev. Stat. § 101-2 (1993) ("Private property may be taken for public use."); Haw. Rev. Stat. § 101-6 (1993) ("Property which may be taken by virtue of this part includes all real estate belonging to any person, together with all structures and improvements thereon, franchises or appurtenances thereunto belonging, water, water rights, and easements of every nature."). The property interests protected by due process "are not limited by a few rigid, technical forms," and the County's attempt to distinguish between equitable estoppel and vested rights in the context of this case elevates form over substance. *See Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

Finally, as noted in this Brief's Summary, the County virtually ignores the most relevant case, *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 514 P.2d 861 (Haw. 1973), which answers most of the County's arguments that Hawaii law only recognizes estoppel after the "last discretionary action," and that estoppel cannot prohibit an official from "enforcing the law." In *Waianae Model*, the Hawaii Supreme Court held that when a municipal official acts "within the ambit of his duty" and provides assurances regarding a topic within the scope of his responsibilities, the public may rely on these assurances. *Id.* at 864. The court in that case prevented the government from enforcing the jurisdictional filing deadline. *See also* Op. Br. at 33-36.

V.
CONCLUSION

For the foregoing reasons, and the reasons set forth in the Opening Brief, the judgment of the district court should be reversed, and this case remanded to the district court for further proceedings.

Respectfully submitted,

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ROBERT H. THOMAS
MARK M. MURAKAMI
CHRISTI-ANNE H. KUDO-CHOCK

OF COUNSEL:
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

Counsel for Plaintiff-Appellant
MAUI VACATION RENTAL ASSOCIATION, INC.