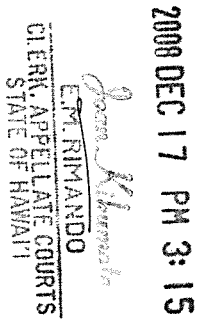
NO. 29179

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

JOSEPH PAVSEK and IKUYO PAVSEK, Plaintiffs-Appellants, vs. TODD W. SANDVOLD; JULIANA C. SANDVOLD; KENT SATHER; JOAN SATHER; WAIALUA OCEANVIEW LLC; HAWAII BEACH HOMES, INC.; HAWAII BEACH TRAVEL, INC; and HAWAII ON THE BEACH, INC., Defendants-Appellees, and JOHN DOES 1-10, JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants.	CIVIL NO. 08-1-0131 APPEAL FROM THE JUDGMENT, filed on May 28, 2008 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII The Honorable Victoria S. Marks



ANSWERING BRIEF OF DEFENDANT-APPELLEES TODD W. SANDVOLD, JULIANA C. SANDVOLD, AND HAWAII BEACH HOMES, INC.

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STATEMENT OF RELATED CASES

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Defendants-Appellees Todd W. Sandvold, Juliana C. Sandvold, and Hawaii Beach Homes, Inc. (all collectively, the "Sandvolds"), by and through their attorneys Damon Key Leong Kupchak Hastert, file their Answering Brief, responsive to the Opening Brief of Plaintiffs-Appellants Joseph Pavsek and Ikuyo Pavsek (collectively "Appellants" or "Pavseks"). Because the Circuit Court was correct in dismissing Appellants' complaint, this Court should affirm.

I. Introduction.

Appellants ask this Court to ignore the well-settled principles of exhaustion and primary jurisdiction and to excuse them from complying with the administrative process adopted by the City and County of Honolulu ("City") for the enforcement of its zoning ordinance, the Land Use Ordinance ("LUO"), Revised Ordinances of Honolulu ("ROH") Chapter 21. Appellants ask this court to create a private cause of action to enforce county zoning laws, through original jurisdiction in the circuit court, allowing them to bypass both the Department of Planning and Permitting ("DPP") and the Zoning Board of Appeals ("ZBA").

There are two reasons why Appellants want to circumvent the City. First, Appellants have a fundamental disagreement with how the City applies and enforces the provisions of the LUO related to the rental of single family residences on Oahu. Both the DPP and the ZBA have held that if a house is provided for rent for at least 30 days, then the LUO is not violated and the house is not a transient vacation unit ("TVU"). Neither the DPP nor the ZBA has ever found that the occasional rental of the Sandvold family's North Shore house is in violation of the LUO. Appellants want a court to re-write the LUO to require a tenant to actually occupy the house for 30 days. Appellants' remedy is with the city council, not this Court.

The Appellants also want to bypass the City because they want to recover money for alleged zoning violations, a remedy which does not exist under the law. Thus, Appellants have tried to bootstrap inapplicable legal theories to their private zoning enforcement claim in an effort to recover damages from the defendants. However, because these facts do not support a claim for nuisance, unjust enrichment or breach of fiduciary duty, the Circuit Court properly dismissed those tag-along claims as well.[1]

The Pavseks have harassed the Sandvolds and their neighbors with many baseless complaints to DPP over the past few years. If the Court finds a private right of action to enforce zoning, where none now exists, the Sandvolds (and homeowners like them all around the State) will be subjected to lawsuits by disgruntled neighbors, potentially a dozen times per year, with no recourse to the innocent homeowner. The Court should not open the legal system to abuse; let the county agencies handle zoning enforcement. Accordingly, the Sandvolds respectfully request that this Court affirm the decision of the Circuit Court to dismiss Appellant's complaint.

II. Statement Of The Case

The Pavseks sue because they claim the defendants' periodic rental of their Papailoa Road homes constitutes an "illegal rental" under the LUO, which they claim has changed the nature of the neighborhood, causing traffic on the public roads and crowding on the public beaches..

A. Papailoa Road And Its Famous Tourist Attractions.

All of the parties' houses are located on Papailoa Road, on Oahu's famous North Shore. Record on Appeal ("ROA") Volume ("Vol.") 1 at 3. Papailoa Road is a cul-de-sac on the

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[1]HBH is alleged to be the booking agent or property manager for the Sandvolds. ROA Vol. 1 at 3. The claims against HBH are dependant on the underlying claims, and were therefore also properly dismissed. Appellants allege no independent claim against HBH.

ocean ("makai") side of Kamehameha Highway between Haleiwa and Laniakea Beach. ROA Vol. 1 at 20. There are approximately thirty two (32) house lots on Papailoa Road, as well as several beach access lots. ROA Vol. 1 at 82. For the convenience of the Court, a copy of the plot plan for a portion of Papailoa Road, ROA Vol. 1 at 82, is attached as Appendix "A."

Papailoa Road is right in the middle of two wildy popular tourist beach attractions: the beach camp set of the hit ABC series "Lost" and "Turtle Beach" (a.k.a. Laniakea Beach). ROA Vol. 1 at 250. Many tourist websites describe how curious Lost fans can locate the famous beach by parking near the vacant lot at the end of Papailoa Road (past the Appellant's house) and using a public right-of-way to the beach. *Id.*; *see also e.g. id.* at 272-75. On the beach at the other end of Papailoa Road is Laniakea Beach, which is commonly known to the tourists as "Turtle Beach" because of the abundance of endangered green sea turtles that rest on the beach and feed in the surf immediately off shore. *Id.*; *see also id.* at 269-71.[2]

B. <u>Appellants Are Not Adjoining Landowners.</u>

Appellant's house is not adjacent to any of the defendants' homes. ROA Vol. 1 at 82; *see also* ROA Vol. 2 at 155-56. In fact, Appellant's house is located several lots down the street

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[2]This Court, like the Circuit Court, may consider facts outside of the Complaint when there is a question of subject matter jurisdiction. *See, e.g., Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 240, 842 P.2d 634, 637 (Haw. 1992). This Court can also take judicial notice of the location of Papailoa Road vis-a-vis the set of the ABC series "Lost" and "Turtle Beach" (a.k.a. Laniakea Beach). "[J]udicial notice may be taken of facts 'either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably be questioned.'...'a court may take judicial notice, whether requested or not,' 'at any stage of the proceeding.'" *Kaho`ohanohano v. State*, 114 Haw. 302, 328, 162 P.3d 696, 722 n.17 (2007) (quoting Haw. R. Evid. 201). In addition to the tourist information in the Record on Appeal, *see,* http://www.govisithawaii.com/2007/07/10/finding-lost-sites-on-oahu/ (last visited December 12, 2008 at 12:00 p.m.); http://en.wikipedia.org/wiki/Two_for_the_Road_(Lost)#cite_note-Tour-3 (last visited December 12, 2008 at 12:04 p.m.); http://gohawaii.about.com/od/abcslost/ig/lost_locationsc/lost_locationsc_008.htm (last visited December 12, 2008 at 12:10 p.m.).

from the Sandvolds' house, and on the opposite side of Papailoa Road. ROA Vol. 1 at 82.[3] Because the Sandvolds' house is closer to Kamehameha Highway and the entrance to Papailoa Road than Appellants' house, people visiting the Sandvolds' house would not have to drive past the Appellant's house. *See* Appendix "A".

C. The Department of Planning and Permitting Enforces Zoning Laws On Oahu.

In the City and County of Honolulu, the DPP consists of has two branches: the Director of Planning and Permitting ("Director") and the ZBA Rev. Charter Hon. ("RCH") § 6-1501. Together, the Director and the ZBA constitute the City's zoning enforcement process, as explained below.

The Director is charged with, *inter alia*, "the administration and enforcement of the zoning, subdivision, park dedication, building and housing ordinances, and rules and regulations adopted thereunder, and any regulatory laws or ordinances which may be adopted to supplement or replace such ordinances." RCH § 6-1503(j). "The director shall administer the provisions of the LUO." ROH § 21-1.30.

The Director can enforce the LUO in several ways. The LUO can be enforced criminally, with fines and imprisonment. ROH § 21-2.150-1(a). In addition, an injunction is available: "[t]he city may maintain an action for an injunction to restrain any violation of the provisions of this chapter and may take any other lawful action to prevent or remedy any violation." ROH § 21-2.150-1(d) (emphasis added). The Director also has administrative enforcement available: "if the director determines that any person is violating any provision of this chapter, any rule adopted thereunder ... the director may have the person served, by mail or delivery, with a notice of violation and order". ROH § 21-2.150-2 (emphasis added). The Director may also enforce an administrative order judicially: "The director may institute a civil action in any court of competent jurisdiction for the enforcement of any order issued pursuant to this section." ROH § 21-2.150-2(d)

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[3]The Sandvolds' house is 61-703 Papailoa Road. ROA Vol. 1 at 3. The Appellants' house is 61-724 Papailoa Road. *Id.*

(emphasis added). The LUO does not contain a private right of action for citizens to enforce its provisions in the circuit court.

The other half of the City's zoning enforcement process is the ZBA: the ZBA "shall hear and determine appeals from the actions of the director [of planning and permitting] in the administration of the zoning ordinances...and any rules and regulations adopted pursuant [thereto]." RCH § 6-1516. "Any person who is specially, personally and adversely affected by an action of the director may appeal the director's action to the board". Department of Land Utilization, Part 3, Rules of the Zoning Board of Appeals ("ZBA Rules") § 22-1,[4] the ZBA Rules are attached as Appendix "B". Appeals by persons adversely affected by a ZBA decision are heard by the Circuit Court pursuant to Haw. Rev. Stat. Ch. 91.

D. DPP's Enforcement Of Short-Term Rental Provisions.

The TVU provision of the LUO provides:

> "Transient vacation unit" means **a dwelling unit or lodging unit which is provided** for compensation to transient occupants **for less than 30 days,** other than a bed and breakfast. For purposes of this definition, compensation includes, but is not limited to, monetary payment, services or labor of employees.

ROH § 21-20.1. The term "provided" is not defined in the LUO, but is defined in Webster's Dictionary as "to make available" or "to furnish." Webster's II, New Riverside University Dictionary (1984).

The DPP has been investigating and enforcing alleged violations of the LUO provisions concerning TVU's for years. In a case not involving any of the parties to this appeal, the Director summarized his position on TVU's:

> The Director interprets the LUO to ... allow[] a land owner to rent their property for thirty (30) day blocks, and theoretically, may rent

[4]According to the ZBA Rules, "'action of the director' means a decision rendered on an application pursuant to the [LUO]; a decision rendered on a request for a zoning variance; a decision rendered on a petition for declaratory ruling; a decision rendered on a request for reconsideration []; and an enforcement order pursuant to section 8.60 of the [LUO]." ZBA Rules § 21-1.

> their property to separate individuals or party [sic] twelve times per year. The Director further interprets the LUO as not requiring those renting for thirty (30) days to be required to actually occupy the dwelling for the full thirty (30) days.

Director Of The Department Of Planning And Permitting's Position Statement, Case No. 2006/ZBA-22, filed May 10, 2007, at 6, attached hereto as Appendix "C." "The Director's interpretation is that the LUO does not require that the renters actually occupy the dwelling for the full thirty days, only that there is an agreement for thirty days." *Id.* at 3, footnote 1.

The ZBA has ratified the Director's enforcement of the LUO. In *In The Matter Of The Appeal Of Judith Ann Pavey et al.*, Case No. 2006/ZBA-22, the ZBA held that Director Eng's interpretation and enforcement of the TVU provision was neither arbitrary nor capricious, and it affirmed the Director's issuance of a violation when the rule was not followed. *See* Findings of Fact, Conclusions of Law, and Decision and Order, Case No. 2006/ZBA-22, dated October 4, 2007, attached hereto as Appendix "D."

E. <u>Appellants' Complaints To The DPP In This Case.</u>

Although Appellants themselves were at one time renters of a house on Papailoa Road, ROA Vol. 1 at 36, they now take issue with the legal rental of Papailoa Road houses to others. Beginning in the summer of 2006, the Appellants allegedly "repeatedly complained about these illegal rentals to investigators and officials with the City and Count[y] of Honolulu, Planning and Permitting Department." ROA Vol. 1 at 37. In the summer of 2006 and again in December 2007, Appellants made two complaints to DPP concerning alleged TVU violations on the Sandvold property. *See, e.g.,* ROA Vol. 1 at 38 ("Ikuyo and I have complained about illegal short-term rentals at the following properties since the Summer of 2006..."); *see also* ROA Vol. 1 at 39 ("In the summer of 2006, I contacted City inspector Todd Lebang on the telephone to complain about illegal rental activity at the Sandvold lot.").

Appellants further admit that DPP investigated their complaints against the Sandvolds. ROA Vol. 1 at 7-8. Appellants also admit these investigations did not result in the issuance of any notice of violation to the Sandvolds. *Id.*

Appellants also admit that the DPP has issued notices of violations to other parties as a result of Appellants' complaints. ROA Vol. 1 at 7-8 ("the Sather Defendants have received one citation from the City and County, arising out of these complaints" and "Defendant Oceanview has received two citations from the City and County arising out of such complaints."). These violations were resolved when the property owners provided DPP with copies of the thirty (30) day rental contracts. *See, e.g.*, ROA Vol. 1 at 65-66.

When the Sandvolds were served with the Pavseks' lawsuit on January 24, 2008, there were no tenants in their house. ROA Vol. 1 at 221. At that time, the Sandvolds had a rental contract with one tenant for three months (February, March, and April). *Id.* They also had two one-month contracts for the months of May and June. *Id.*[5] They entered into negotiations with a woman allegedly named Joelle Strain for the month of July, however Ms. Strain never completed the paperwork, so a contract was not executed. *Id.* at 221-22.

F. Appellants Admit DPP Enforcement Is An Adequate Remedy.

In their complaint, the Appellants admit that enforcement of the LUO by the DPP is an adequate remedy. ROA Vol. 1 at 7 ("Plaintiffs have no adequate remedy other than this action either by means of an action at law or enforcement of the aforementioned LUO by public zoning officials.").

Moreover, in a related case within the meaning of Haw. R. App. P. Rule 28 and during the pendency of this appeal, Appellant Joseph Pavsek made yet another complaint to DPP concerning an alleged rental of the Sandvold property. *See generally In the Matter of the Appeal of*

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[5]The HBH website clearly states that the Sandvolds' house is provided for "monthly rental." ROA Vol. 1 at 90 (website printout indicates "RATES: Monthly Rental" and "Standard Rate: Monthly rental").

Joseph Pavsek, ZBA Case No. 2008/ZBA-6, Findings of Fact, Conclusions of Law, and Decision and Order, filed October 27, 2008, attached as Appendix "E". As before, the Director conducted an investigation of the complaint and determined that the Sandvolds had not violated the LUO:

> The Director's response indicated that an investigation conducted on May 27, 2008, failed to confirm the existence of any illegal short-term rental activities occurring at the residence situated at 61-703 Papailoa Road, Haleiwa, Hawai`i. This letter further indicated that there was no violation of the Land Use Ordinance occurring upon the aforesaid property.

Id. at Finding of Fact No. 4, page 3. Mr. Pavsek appealed the Director's letter to the ZBA. *Id.* at Finding of Fact No. 5, page 3. The Sandvolds intervened in that proceeding because the complaint to DPP by Mr. Pavsek, and a conversation he claimed to have had with the alleged "tenants," was "**a complete fabrication by Pavsek**, orchestrated to continue the pattern of harassment against the Sandvolds, and drag them yet again into another legal proceeding." *See In the Matter of the Appeal of Joseph Pavsek*, ZBA Case No. 2008/ZBA-6, Intervenors Todd W. Sandvold and Juliana C. Sandvold's Reply Memorandum To Petitioner's Opposition To Director of Department of Planning and Permitting's Motion to Dismiss Appeal, filed September 12, 2008, attached as Appendix "F". The ZBA dismissed Pavsek's appeal. FOF, COL, Decision and Order at 7.[6] Mr. Pavsek did not appeal this ruling to the Circuit Court, and it is now final.

III. STANDARD OF REVIEW

A. Motion to Dismiss

"A trial court's ruling on a motion to dismiss is reviewed do novo." *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 104, 176 P.3d 91, 103 (Haw. 2008) (citation omitted). "[I]n reviewing a circuit court's order dismissing a complaint [a court's] consideration is strictly limited to the allegations of the complaint[,]" although the court "must deem those

[6]Mr. Pavsek did not follow the declaratory ruling procedure that is available when an aggrieved party is dissatisfied with the Director's rejection of complaints concerning LUO violations. *See Colony Surf, Ltd. v. Director of the Department of Planning and Permitting*, 116 Haw. 510, 515, 174 P.3d 349, 354 (Haw. 2007)

allegations to be true." *In re Estate of Rogers*, 103 Haw. 275, 281, 81 P.3d 1190, 1196 (2003) (citation omitted). Nevertheless, the reviewing court need not accept as true any legal conclusions asserted by plaintiffs in the complaint. *See, e.g., UFCW Int'l Local 911 v. UFCW Int'l Union*, 301 F.3d 468, 472 (6th Cir.), *reh'g denied*, 301 F.3d 468 (2002) (when reviewing the lower court's dismissal of a claim, the appellate court "need not accept as true unsupported conclusions and unwarranted inferences") (citation omitted); *see also Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 183-84 (3d Cir. 2000), *cert. denied*, 532 U.S. 1038 (2001) ("while our standard of review requires us to accept as true all factual allegations in the complaint, **we need not accept as true unsupported conclusions**") (citations and quotation marks omitted) (emphasis added).

B. Subject Matter Jurisdiction

However, "when considering a motion to dismiss pursuant to Rule 12(b)(1)," the court "is not restricted to the face of the pleadings," but may also review any materials presented to the trial court outside of the pleadings" in order to "resolve factual disputes concerning the existence of jurisdiction." *See, e.g., Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 240, 842 P.2d 634, 637 (Haw. 1992) (citations omitted).

C. Review of Administrative Decision

"[A]n administrative agency's decision within its sphere of expertise is given a presumption of validity." *Topliss v. Planning Comm'n.*, 9 Haw. App. 377, 383-84, 842 P.2d 648, 653 (1993). Indeed,

> [O]ne who seeks to overturn the agency's decision bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.

Id. (citation omitted). In such cases, judicial review is limited to discerning errors of law or abuse of discretion. *Maha'ulepu v. Land Use Comm'n.*, 71 Haw. 332, 335, 790 P.2d 906, 908 (1990) (citation omitted). Furthermore, when factual determinations are made by an agency with special expertise to make such decisions, those factual determinations cannot be disturbed absent clear error.

Int'l Bhd. of Elec. Workers v. Hawaiian Tel. Co., 68, Haw. 316, 322, 713 P.2d 943, 950 (1986) ("Agency fact findings are reviewable for clear error.").

IV. ARGUMENT[7]

A. The Circuit Court Properly Found That It Lacked Subject Matter Jurisdiction Over Appellants' Private Zoning Enforcement Claim

There are three reasons why the Circuit Court was correct in dismissing Appellants' private zoning enforcement claim (Count I). First, the Zoning Enabling Act, Haw. Rev. Stat. § 46-4, does not create a private right of action, but merely allows the counties to design their own zoning enforcement procedures. Second, the doctrine of primary jurisdiction requires Appellants to the let the City's zoning process work before seeking judicial intervention. Finally, the doctrine of exhaustion of administrative remedies precludes Appellants from bypassing the City zoning enforcement agencies and proceeding directly to court.

1. The Zoning Enabling Act Merely Authorizes the Counties to Adopt Enforcement Procedures.

Haw. Rev. Stat. § 46-4 vests the counties with control over the method and manner of zoning regulation, and does not provide for an explicit private right of action, as Appellants contend. Rather, the statute - the Zoning Enabling Act - gives the counties a range of enforcement options to select or reject. The complete text of § 46-4 dispels Appellants' contention about a private right of action.[8]

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[7]As a convenience to the Court, the Sandvolds will not repeat certain arguments that have been ably briefed by the other appellees, but will, where appropriate, incorporate those by reference.

[8]In construing the meaning of a statute, this Court must start with its plain language. *See Moss v. American Int'l Adjustment Co.*, 86 Haw. 59, 62, 947 P.2d 371, 374 (Haw. 1997) ("The starting point in statutory construction is to determine the legislative intent from the language of the statute itself.' We read statutory language **in the context of the entire statute** 'and construe it a manner **consistent with its purpose**.' 'A rational, sensible and practicable interpretation [of a statute] is preferred to one which is unreasonable or impracticable,' because 'the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction[,] and illogicality.'") (brackets in the original) (citations omitted) (emphasis added).

Haw. Rev. Stat. § 46-4 provides in relevant part:

> Zoning **shall** be one of the tools **available to the county** to put the general plan into effect in an orderly manner...The **zoning power granted herein shall be exercised by ordinance**...The council of any **county shall prescribe rules, regulations, and administrative procedures** and provide personnel it finds necessary **to enforce this section and any ordinance enacted in accordance with this section**. The **ordinances may be enforced** by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

Haw. Rev. Stat. § 46-4 (emphasis added). Reading all provisions of the statute together so as to produce a consistent result, it is clear that the Legislature provided both mandatory and discretionary instructions to the county.

Zoning powers granted to the county "**shall be exercised by ordinance.**" Haw. Rev. Stat. § 46-4. The county "**shall**" prescribe rules, regulations, and procedures to enforce the zoning ordinance. *Id.* However, the county "**may**" choose among procedures to enforce **its ordinances**, including "fines and penalties, civil or criminal, or by court order at the suit of the county or the owners of real estate directly affected by the ordinances." *Id.*[9] Thus, under the plain language of the statute, the counties **must** enact zoning laws, including rules and regulations for enforcing zoning, but **may** choose to enact a variety of enforcement procedures. As described in Section II(c), *supra*, the City has established a clear-cut set of procedures to address alleged zoning violations; these include criminal fines and penalties, City-initiated injunctive relief, administrative orders and

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[9]Indeed, the legislature's use of the terms "shall" and "may," in close proximity to each other, is telling. *See, e.g., Gray v. Administrative Dir. of the Court*, 84 Haw. 138, 931 P.2d 580 (Haw. 1997) ("In the past, this court has subscribed to the proposition that, 'where the verbs 'shall' and 'may' are used in the same statute, especially where they are used in close juxtaposition, we infer that the legislature realized the difference in meaning and intended that the verbs used should carry with them their ordinary meanings.' Not surprisingly, we have therefore construed the 'close proximity of the contrasting verbs 'may' and 'shall' to require a *mandatory* effect for the term 'shall.'...the converse would seem to follow, namely, that the close proximity of the contrasting verbs 'may' and 'shall' requires a *non-mandatory, i.e.*, a discretionary, construction of the term 'may.'") (italics in the original) (brackets and citations omitted)).

penalties, and City-initiated judicial enforcement of administrative orders. The array of enforcement options does not include private enforcement of zoning laws by civil suit initiated by citizens invoking the circuit court's original jurisdiction. Appellants' argument fails.

Indeed, despite there being dozens of reported Hawaii land use and zoning cases, and despite the fact that Haw. Rev. Stat. § 46-4 has been in existence in some form **for over fifty (50) years**[10], there is no appellate case which interprets this provision to provide a private right of action by a private citizen zoning enforcer. To the contrary, this Court has twice held there is no private right of action to enforce zoning.

In *Waikiki Discount Bazaar v. Honolulu*, 5 Haw. App. 635, 706 P.2d 1315 (1985), this Court held that a private party could not sue a property owner to enforce alleged zoning code and fire code violations. *Id.* at 641-42, 706 P.2d at 1320. This Court specifically noted that "**no statute provides for enforcement of the CZC or Fire Marshall's Rules and Regulations by an individual; rather, authority for enforcement has been explicitly conferred on specific public officials**." *Id.* (emphasis added). Although § 46-4 was in effect, this Court nevertheless found that "no statute" provided for private enforcement of the zoning code. *Waikiki Discount Bazaar* is indistinguishable from the case at bar.

More recently, in *Pono v. Molokai Ranch, Ltd.*, 119 Hawai`i 164, ___, 194 P.3d 1126 (Haw.Ct.App. 2008) *petition for cert. filed* (Nov. 20. 2008) (No. 28359), this Court determined that there was no private right of action to sue under Haw. Rev. Stat. Chapter 205, the statewide zoning law. The *Molokai Ranch* case, like this one, involved a claim that the land was being used in violation of the zoning, but the county was not enforcing the zoning law the way the plaintiffs wanted it enforced. Rather, as in this case, the Maui county zoning enforcement officers reviewed

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[10]Haw. Rev. Stat. § 46-4 was originally enacted in 1957 as Act 234 by the 29th Legislature of the Territory of Hawaii. The Sandvolds agree with and adopt the legislative history analysis of Haw. Rev. Stat. § 46-4, as set forth in Defendants-Appellees Kent & Joan Sather's ("Sathers") Answering Brief.

the proposed use and determined it was not a violation. *Id.* at *2. Rather than pursue available administrative relief, however, the plaintiffs brought an action for declaratory judgment and injunctive relief in the circuit court, and on appeal tried to abandon their claims against the county. *Id.* at *2-3. Finding that "no private cause of action exists to enforce chapter 205", this Court concluded that appellants in that case "lacked standing to prosecute their chapter 205 claim against [appellees Molokai Ranch, Ltd.]" and that "the circuit court lacked subject-matter jurisdiction to consider this claim." *Molokai Ranch* at *66. Nothing compels a different result in this case.

2. <u>Primary Jurisdiction Doctrine Precludes Subject Matter Jurisdiction.</u>

Assuming *arguendo*, as Appellants contend, that Haw. Rev. Stat. § 46-4 authorizes a private right of action with original jurisdiction in the circuit court, the doctrine of primary jurisdiction mandates that the Director of the DPP, and then the ZBA, be allowed to enforce the zoning before it can be considered by a court.

As explained by the Hawaii Supreme Court:

> 'Primary jurisdiction' . . . applies where a claim is **originally cognizable in the courts**, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, **have been placed within the special competence of an administrative body**.' When this happens, 'the **judicial process is suspended pending referral of such issues to the administrative body for its views**.' In effect, 'the **courts are divested of whatever original jurisdiction they would otherwise possess**.' And '**even a seemingly contrary statutory provision will yield to the overriding policy promoted by the doctrine**.'

Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 168-69 (1987) (ellipses in original) (emphasis added) (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956)).[11] "The primary jurisdiction doctrine is designed to promote **uniformity and consistency**

[11]In *Kona Old*, the plaintiffs objected to a decision by the Hawaii County Planning Director to issue a shoreline use permit. *Id.* at 85 – 86, 734 P.2d at 164. Like Appellants in the case at bar, the plaintiffs in *Kona Old* **did not** appeal the planning director's decision to the county Board of Appeals, but instead sought relief in circuit court. *Id.* at 84, 734 P.2d at 163. Applying the exhaustion and primary jurisdiction doctrines, the Hawaii Supreme Court held that the circuit court

in the regulatory process" and is "closely related to the doctrine of exhaustion of administrative remedies." *The Aged Hawaiians*, 78 Haw. 192, 202, 891 P.2d 279, 289 (1995) (emphasis added). Before invoking the subject matter jurisdiction of the circuit court, plaintiffs must have pursued administrative remedies in the agency with primary jurisdiction. *Kona Old*, 69 Haw. at 93, 734 P.2d at 169; *see also Grace Bus. Dev. Corp. v. Kamikawa*, 92 Haw. 608, 612, 994 P.2d 540, 544 (2000) ("The need to avoid premature adjudication supports a definition of 'dispute' that requires more than a 'difference of opinion' as to policy. The rationale underlying the ripeness doctrine and the traditional **reluctance of courts to apply injunctive and declaratory remedies** to administrative determinations is 'to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.') (citations omitted) (emphasis added); *Chun v. Employees' Retirement Sys.*, 73 Haw. 9, 12, 828 P.2d 260, 262 (1992) (stating that exhaustion and primary jurisdiction doctrines go to subject matter jurisdiction and "reflect the deeply rooted principle of comity between courts and administrative agencies"); *Cunningham v. Kittery Planning Bd.*, 400 A.2d 1070, 1076 (Me. 1979) ("Since plaintiffs were seeking, in effect, collateral judicial review of the substantive merits of their claims of administrative violation of the 1977 Kittery zoning ordinance, their action for equitable relief was barred by the availability of a direct administrative remedy by means of an appeal to the Kittery Zoning Board of Appeals . . ."); *Bd. of Adjustment of the City of San Antonio v. Wende*, 92 S.W.3d 424, 431 (Tex. 2002) ("enforcement or nonenforcement of [a zoning] ordinance is not a matter for judicial discretion").

The crux of the complaint is Appellants' disagreement with how DPP and Director Eng have administered and enforced, or failed to administer and enforce, the LUO against the

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lacked subject matter jurisdiction and should have dismissed the suit. The Hawaii County Charter required *all* decisions by the Planning Director to be reviewed by the Board of Appeals, and thus the Board of Appeals had jurisdiction over the plaintiffs' claims.

Sandvolds. *See, e.g.,* ROA Vol. 1 at 7-8. However, determination and enforcement of the LUO has been "placed within the special competence of an administrative body," the Director and the ZBA. Pursuant to the Honolulu Charter, Director Eng is charged with the "administration and enforcement of the zoning. . . ordinances, and rules and regulations adopted thereunder, and any regulatory laws or ordinances which may be adopted to supplement or replace such ordinances,"[12] and the ZBA has the exclusive authority to "hear and determine appeals from the actions of the director in the administration of the zoning ordinances". RCH § 6-1516; *see also Kona Old*, 69 Haw. at 93, 734 P.2d at 168-69; *accord Pono v. Molokai Ranch, Ltd.*, 119 Hawai`i 164, 194 P.3d 1126 (Haw.Ct.App. 2008). The ZBA has specialization, insight gained by experience, and more flexible administrative procedure. *See Kona Old*, 69 Haw. at 94, 734 P.2d at 169 (Board of Appeals has experience and expertise on zoning issues); *see also Martin v. Bldg. Inspector of Freetown*, 649 N.E.2d 779 (Mass. Ct. App. 1995) (declaratory judgment for zoning issue lacks jurisdiction until administrative avenues are followed). In fact, as demonstrated by Appendices "C" and "D," the ZBA has recently handled a matter involving the interpretation and application of the TVU provisions of the LUO to North Shore rental property. Clearly, it is capable of doing so.

The Hawaii Supreme Court has explained why the courts are to leave land use enforcement to the administrative agencies in the first instance:

> in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by [the legislature] for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by **preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by**

[12]RCH § 6-1503.

> **specialization, by insight gained through experience, and by more flexible procedure.**

Kona Old, 69 Haw. at 94, 734 P.2d at 169 (emphasis added) (quoting *Far East Conference v. United States*, 342 U.S. 570, 574–75 (1952)). When an agency has primary jurisdiction, the remedy is dismissal of the circuit court lawsuit, and "the judicial process is suspended pending referral of such issues **to the administrative body for its views**," because when an agency has special competence, "the **courts are divested** of whatever original jurisdiction they would otherwise possess." *Kona Old*, 69 Haw. at 93, 734 P.2d at 168-69 (emphasis added).

Furthermore, contrary to Appellant's arguments, Haw. Rev. Stat. § 46-4 does not provide any statutory authorization to ignore the agencies charged in the first instance with enforcement of the LUO. Again, the *Kona Old* case is instructive and refutes the argument that Haw. Rev. Stat. § 46-4 allows individuals to bypass the DPP and the ZBA and proceed directly to the circuit court with a private zoning violation claim. In *Kona Old*, the Hawaii Supreme Court explained that an ostensible statutory private right of action did not supercede the county Charter-mandated appeals process:

> The question is whether Kona Old's invocation of HRS § 205A-6, which allows "any person or agency [to] commence a civil action alleging that any agency" has breached the CZMA in some respect, vested the circuit court with jurisdiction over the dispute of the director's grant of a minor permit to Lanihau.
>
> The language of the section in question gives an appearance of permitting anyone to bring a civil action against as agency to remedy any alleged breach of the CZMA and its policies, objectives, and guidelines.[footnote omitted] Taken an face value, section 205A-6 would sanction judicial intervention in the administrative process upon any allegation of an act inconsistent with the CZMA in any respect. Still, we are reluctant to read the language literally and say Kona Old's purported reliance on HRS § 205A-6 and allegations of the planning director's breach of the CZMA were sufficient to vest the circuit court with authority to decide the controversy. Our concern, as it was earlier, is with the timing of the request for judicial relief.

Kona Old, 69 Haw. at 92, 734 P.2d at 168. Thus, because the claim was one within the special competence of the Board of Appeals, the proper recourse was through the administrative process and not a direct suit in court. *Id.* at 94, 734 P.2d at 170.

Accordingly, primary jurisdiction over the Appellants' grievances is with the Director and the ZBA. Appellants' Complaint was properly dismissed.

3. Appellants Failed To Exhaust Available Administrative Remedies.

Contrary to Appellants' assertion, it is a well-settled principle of law that a plaintiff must exhaust its administrative remedies before rushing to court. In the proceedings below, the Circuit Court dismissed Appellants' complaint recognizing, *inter alia*, that Appellants had not followed established administrative procedure, and that it is "best for the county to enforce its zoning regulations or to look at its zoning regulations at least in the first instance rather than the parties coming to court." ROA Vol. 3 ***** (Transcript of Proceedings dated March 17, 2008 ("TR") at 18). Appellants now seek reversal of the Circuit Court's ruling, the effect of which would be to open the circuit court flood-gates to any disgruntled neighbor who wants to enforce the zoning code, or any other City-administered code, and transform the circuit court into a zoning (or other) enforcement officer.

The Circuit Court correctly found that Appellants must pursue all available administrative remedies before invoking its jurisdiction. Indeed, as stated by the Hawaii Supreme Court, the theory of exhaustion applies "where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.'" *Kona Old*, 69 Haw. at 93, 734 P.2d at 169 (1987). The "exhaustion principle asks simply that the avenues of relief **nearest** and **simplest** should be pursued first." *Id.* (emphasis added). "Judicial review of agency action will not be available **unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process.**" *Id.* (emphasis added). *See also Lichter v. United States*, 334 U.S. 742, 792 (1948) (administrative

appeal was not optional and failure to pursue that avenue of redress "left [plaintiffs] no right to present" those issues in court).

Failure to exhaust administrative remedies deprives the trial court of subject matter jurisdiction. *See Fish Unlimited v. Northeast Utilities Service Co.*, 756 A.2d 262, 269 (Conn. 2000) ("It is a settled principle of administrative law that if an adequate administrative remedy exists, it must be exhausted before the [trial] court will obtain jurisdiction to act in the matter."). Therefore, the remedy for failure to exhaust is dismissal. *See, e.g., Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (where "relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress *before* proceeding to the courts; and *until that recourse is exhausted, suit is premature and must be dismissed*"); *Southwest Soil Remediation, Inc. v. Tucson*, 36 P.3d 1208, 1212 (Ariz. Ct. App. 2001) (trial court lacked jurisdiction when plaintiff did not first appeal to zoning board of adjustment).

Again, *Kona Old* is on point. In *Kona Old*, plaintiffs **did not** appeal the planning director's decision to the county Board of Appeals, but instead sought relief in circuit court. *Id.* at 84, 734 P.2d at 163. The Hawaii Supreme Court held that the Hawaii County Charter required *all* decisions by the Planning Director must be reviewed by the Board of Appeals; accordingly, judicial intervention was improper until the plaintiffs exhausted the administrative remedies provided by the Charter. *Id.* at 94, 734 P.2d at 169. This rationale applies to the present case. Like the Hawaii Charter, the Honolulu Charter places the issues that Appellants asked the Circuit Court to determine within the special competence of the DPP and the ZBA, requiring that all zoning decisions of Director Eng be appealed to the ZBA. *See* RCH § 6-1516. Appellants did not exhaust their administrative remedies before rushing to court, and therefore the Circuit Court correctly found that it lacked jurisdiction.

In a recent decision, the Hawaii Supreme Court, in accordance with the established principle of exhaustion and the legislative grant of regulatory authority to the counties, confirmed that people like Appellants, who complain of "**'noise, traffic and congestion' in the residential**

neighborhood 'which severely and negatively affect[ed] the neighborhood quality of life" can bring their zoning enforcement complaints to the DPP and then to the ZBA. *See Colony Surf, Ltd. v. Director of the Department of Planning and Permitting*, 116 Hawai`i 510, 512, 174 P.3d 349, 351 (Haw. 2007) (emphasis added). The Supreme Court described the very procedure that Plaintiffs should have followed in this case.

In *Colony Surf*, the owner of a residential apartment building claimed to be impacted by Michel's Restaurant, which operated as a nonconforming use on the ground floor. Like Appellants here, the owner complained of the noise, traffic and congestion caused by the restaurant. *Id.* at 512-13, 174 P.3d at 351-52. First, the owner wrote to the DPP, complaining that the use of the restaurant for weddings, receptions and other private events was not within the scope of a "restaurant"; the Director disagreed. *Id.* at 512, 174 P.3d at 351. In a subsequent letter, the owner complained of the hours of operation, which was again rejected by the Director. *Id.* Thereafter, the owner filed a petition for Declaratory Ruling with the Director, alleging the hours of operation violated provisions of the LUO. *Id.* at 512-13, 174 P.3d at 351-52. The Director ruled on the petition and concluded there was no violation of the LUO. *Id.* at 513, 174 P.3d at 352.

Not satisfied with the Declaratory Ruling of the DPP, the owner appealed to the ZBA. *Id.* The ZBA affirmed the DPP. *Id.* Again unsatisfied, the owner brought a Chapter 91 administrative appeal to the circuit court, and in doing so also **raised an issue that hadn't been raised before DPP or the ZBA**. The circuit court reversed the ZBA and the DPP. *Id.* Thereafter, the Hawaii Supreme Court reversed the circuit court's ruling finding, *inter alia*, that the circuit court ***exceeded its jurisdiction*** in rendering its ruling. *Id.* at 515, 174 P.3d at 354. Holding that the circuit court **did not have jurisdiction to consider an issue that had not been raised before the DPP director or the ZBA**, the Supreme Court stated:

> Inasmuch as the ZBA did not rule on whether the type of daytime operation itself (a wedding business) constituted an "expansion" of the nonconforming use, the matter was **not properly before the circuit court**, and the circuit court's finding that the daytime

> operation violations [the ROH] **should be reversed...Judicial review of an agency determination must be confined to issues properly raised in the record of the administrative proceedings below.**

Id. (internal parentheses and citations omitted) (emphasis added).[13]

Contrary to Appellants' assertions, *Colony Surf* demonstrates exactly how someone who believes the LUO is being violated can bring their concerns to the DPP and the ZBA, and ultimately to the circuit court.[14] The DPP's Declaratory Ruling procedure is the vehicle, *see* Rule § 3-1 DPP Rules of Practice and Procedure (1993) (the DPP Rules of Practice and Procedure are attached hereto as Appendix "G"), with an appeal then taken to th ZBA. *See* Rules of the ZBA § 22-1; *accord* RCH § 6-156. Indeed, taken in conjunction with the zoning enabling statute and the "fundamental" authority granted to the counties to administer, regulate and enforce zoning ordinances, *Save Sunset Beach Coalition v. City & County of Honolulu*, 102 Haw. 465, 480, 78 P.3d 1, 16 (Haw. 2003) (citations omitted), it is clear that the specific appeal procedures and standards developed by the county agencies responsible for administering the zoning ordinances must be followed.

As confirmed by the Circuit Court in the proceedings below, an original declaratory judgment action in circuit court cannot substitute for pursuing administrative relief in the agency with primary jurisdiction. *See, e.g., Hawaii's Thousand Friends v. City & County of Honolulu*, 75 Haw. 237, 244, 858 P.2d 726, 730 (1993). In *Hawaii's Thousand Friends*, the Hawaii Supreme

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[13]If the Supreme Court had read § 46-4 as Appellants do, the circuit court would not have erred by considering this new issue, because the circuit court would have had original subject matter jurisdiction over the new zoning claim.

[14]Unlike the Appellants in this case, the appellants in *Colony Surf* actually resided on the same property as the restaurant allegedly committing the violations. In this case, the Circuit Court questioned whether the Appellants - who live down the street and "are not even adjoining landowners"- were "directly affected by the zoning ordinance" within the meaning of § 46-4. ROA Vol. 3***** (TR at 18-19). However, because there is no jurisdiction and no private right of action, the Circuit Court did not have to reach this question.

Court held that a plaintiff was not required to exhaust administrative remedies because none existed under the Honolulu Charter. The language of the charter in question is dispositive:

> because the Hawaii County Charter specifically provided an administrative procedure, under which **all** actions of the planning director were appealable to the county Board of Appeals, "the request for judicial intervention in the administrative process should not have preceded the resolution by the Board of Appeals of the question of whether the planning director's action in [not issuing a CZMA use permit] was proper."

Hawaii's Thousand Friends, 75 Haw. at 244, 858 P.2d at 730 (emphasis original) (quoting *Kona Old*, 69 Haw. at 94, 734 P.2d at 169). The difference in outcome between *Hawaii's Thousand Friends* and *Kona Old* is the language of the respective county charters: the Hawaii Charter required "all" of the Planning Director's decisions to be reviewed by the Board of Appeals, while Honolulu's Charter limited administrative appeals to zoning and subdivision issues. Read together, these cases demonstrate that if a county charter delegates authority to review an issue to the appeals board, that agency must review it before the circuit court has subject matter jurisdiction.[15]

Just like the plaintiffs in *Kona Old*, the Appellants here object to Director Eng's zoning enforcement decisions. However, also like the plaintiffs in *Kona Old*, they failed to exhaust the administrative remedies available to challenge Director Eng's actions. Accordingly, the Circuit Court correctly held that it lacked subject matter jurisdiction and the complaint was properly dismissed.[16]

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[15]*See Pele Defense Fund v. Puna Geothermal Venture*, 9 Haw. App. 143, 151–52, 827 P.2d 1149, 1154 (1992) ("The statute, ordinance or regulation under which the agency exercises its power **must establish 'clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties**.'") (emphasis added) (quoting *Rosenfield v Malcolm*, 421 P.2d 697, 701 (Cal. Ct. App. 1967)).

[16]In the alternative, if this Court should determine that § 46-4 provides for a private right of action, thereby allowing Appellants to bypass the DPP and the ZBA, then the City is a necessary party under Haw. R. Civ. P. Rule 19. Interpretation of the LUO is within the exclusive province of Director Eng. *See* RCH § 6-1504. However, Appellants' claims would require the circuit court to interpret DPP rules and the LUO, thereby creating the risk of inconsistent results. Furthermore, any adjudication by the circuit court of the City's rules may "as a practical matter impair or impede" the

B. The Circuit Court Correctly Ruled That Appellants Failed To State A Claim For Nuisance.

Appellees agree with, adopt and hereby incorporate by reference the authorities cited by the other Defendants/Appellees with respect to the nuisance claims, (Count II and III), as it pertains to them.

C. The Circuit Court Correctly Held That Appellees Did Not Owe Any Fiduciary Duties to Appellants.

The Circuit Court correctly determined that the Appellants' claim against the Sandvolds for breach of fiduciary duty should be dismissed (Counts V and VI).[17] Certain Papailoa Road properties that lack direct beach access, such as Appellants' and the Sandvolds', are co-tenants in a private beach access right-of-way. ROA Vol. 1 at 5; *see also* ROA Vol. 1 at 54 (there are 11 owners of the right-of-way, whose duties are governed by the Declarations). None of the other owners were parties to the lawsuit, although they should have been. *See Haiku Plantations Ass'n v. Lono*, 56 Haw. 96, 529 P.2d 1 (Haw. 1974).[18] This fact of co-ownership of the right-of-way was the only basis alleged for the breach of fiduciary duty claim.[19] This fact alone, however, cannot give rise to such a claim against the Sandvolds.

It is a well-settled principle of Hawaii real property law that co-tenants have equal rights to full enjoyment of commonly held property. *Hewitt v. Waikiki Shopping Plaza*, 6 Haw. App. 387, 395, 722 P.2d 1055, 1061 (citing *Moffatt v. Speidel*, 2 Haw.App. 334, 631 P.2d 1205) (1981)).

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ability of the City to protect its interest in the matter. *See, e.g., Lau v. Batista*, 61 Haw. 144, 155, 598 P.2d 161, 168 (1979). Accordingly, in the event that this Court should determine there is a private right of action under § 46-4, this Court should also find that the City is a necessary party, and the Circuit Court properly dismissed the Complaint on that basis.

[17]Count VI of the Complaint against HBH is dependant on the underlying fiduciary duty claim (Count V), and was therefore also properly dismissed.

[18]Appellants did not allege that the Declaration governing ownership of the right-of-way had any bearing on their claim.

[19]The Circuit Court dismissed Appellants' claims for breach of fiduciary duty, noting that Appellants had not made a "sufficient showing" of the same. ROA Vol. 3***** (TR at 19).

Where such property is a roadway, each co-tenant may use the roadway to its fullest extent as a roadway, as long as he or she does not interfere with the other co-tenants' use of the roadway for the same purpose, and as long as the use doesn't result in a desseisen or ouster. *Id.* The right to use the shared roadway is not limited to the actual owner of the properties, but to his/her tenants, subtenants, and invitees. *See, e.g., Hewitt* at 390, 722 P.2d at 1057 (the roadway lot was used by Waikiki Shopping Plaza's tenants, guests and garbage collectors).[20]

In this case, Appellants make no such claim. They do not claim that the Sandvolds' alleged use of the right-of-way has desseised or ousted them from ownership. They do not claim that they cannot use the right-of-way to access the beach. They do not claim their use of the right-of-way is in any way interfered with or prevented by anything the Sandvolds have done. In short, they have failed to state any claim with respect to the co-tenancy in the right-of-way, let alone a fiduciary duty claim.

More importantly, Appellants have not stated a breach of fiduciary duty claim with respect to the right-of-way. They have not alleged a basis for the fiduciary duty, nor alleged the facts constituting a breach. Furthermore, Appellants have not alleged with any specificity how the breach of the duty has caused damages.[21]

Significantly, in Hawaii, co-tenants do not owe the full panoply of fiduciary duties to their co-tenants, unlike the fiduciary duties that exist in other areas of the law, such as trusts. Rather, the fiduciary duties of one co-tenant to another co-tenant are limited to title to the shared

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[20]There is no functional difference between the roadway in *Hewitt* and the beach right-of-way in this case.

[21]Appellants claim only that the Sandvolds breached a fiduciary duty to the Appellants "by overburdening the private right of way through the increased traffic and use associated with their illegal rentals." ROA Vol. 1 at 11. This is not an allegation that Appellants' use of the right of way has been prevented by the Sandvolds. Moreover, this is a legal conclusion that need not be accepted by the court on a motion to dismiss. *See UFCW Int'l Local 911 v. UFCW Int'l Union*, 301 F.3d 468, 472 (6th Cir.), *reh'g denied*, 301 F.3d 468 (2002); *see also Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 183-84 (3d Cir. 2000), *cert. denied*, 532 U.S. 1038 (2001). Finally, this assumes that the DPP has found the rentals to be "illegal", which has never happened.

property. *See, generally In Re Keamo*, 3 Haw.App. 360, 368, 650 P.2d 1365, 1371 (1982); *see also Douglas v. Jepson*, 945 P. 2d 244 (Wash. Ct. App. 1997) (discussing the quasi-fiduciary relationship between co-tenants in the context of sale of the property, but ultimately finding that no duty of disclosure exists as between co-tenants absent an agreement providing as such); *see also Vanderburgh v. Leach*, 1999 Wash. App. LEXIS 194 (Wash. Ct. App. 1999) (discussing the quasi-fiduciary relationship between co-tenants where one co-tenant sought to sell the property without the other co-tenant's approval). More specifically, "a fiduciary relationship exists where cotenants hold under the same instrument, as here under a deed, or under the same devolution of title or are in joint possession . . [but] [t]he fiduciary relationship implies a legal obligation to *sustain and protect the common title*." *Estate of Colquhoun v. Estate of Colquhoun*, 443 A.2d 1045, 1048 (N.J. 1982) (citation omitted) (emphasis added).[22]

Again, Appellants make no claim that the Sandvolds have desseised or ousted them from title to the right-of-way. The Sandvolds, and their tenants and guests, are allowed to use the right-of-way to its fullest extent.[23] Having failed to allege any facts sufficient to allege title has been taken, Appellants have not stated a breach of fiduciary duty claim.

D. Circuit Court Correctly Ruled That Appellants Cannot Maintain A Claim For Unjust Enrichment.

In their quest for money, Appellants attempted to assert an unjust enrichment claim (Count VII):

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[22]Indeed, even *City and County of Honolulu v. Bennett*, 57 Haw. 195, 552 P.2d 1380 (Haw. 1976), the case cited by Appellants for the proposition that "a tenant in common shares a general fiduciary relationship with his cotenants" involved a title dispute dealing with a claim of adverse possession by one co-tenant as against the other co-tenant. *See id.* at 208-09, 552 P.2d at 1390 ("a tenant in common shares a general fiduciary duty relationship with his cotenants, which may require the tenant in possession **to give his cotenants actual notice of an adverse claim**[.]").

[23]Ironically, Appellants' allegation that the Sandvold house is not actually occupied by tenants for the full thirty days it is provided means that the right-of-way would be used with less frequency than if the Sandvolds' house was occupied 365 days a year.

> 61. Defendants have unjustly profited from providing the Sandvold, Sather and Oceanview lots for illegal rentals at the expense of Plaintiffs who have had to bear the burdens caused by Defendants' illegal usage of the Defendants' Lots as described above.
>
> 62. If Defendants were allowed to retain the monies received from their illegal rentals, Defendants would be unjustly enriched.
>
> 63. Defendants should be required to disgorge themselves of all monies received from their illegal rentals.

ROA Vol. 1 at 12-13. However, as recognized by the Circuit Court, these facts simply do not allege that Appellants conferred any benefit on the Sandvolds that would be unjust for them to retain, or why Appellees should recover a windfall.

Under Hawaii law, unjust enrichment is an equitable claim for restitution where one has been enriched at the expense of another person. *See generally, Small v. Badenhop*, 67 Haw. 626, 701 P.2d 647 (1985); *see also Funliner of Alabama, LLC v. Pickard,* 873 So. 2d 198, 209 (Ala. 2003) ("To prevail on this claim, the plaintiffs must establish that the defendants hold money that, in equity and good conscience, ***belongs to the plaintiffs***, or that the defendants hold money that was improperly paid to the defendants because of mistake or fraud.").

As the Hawaii Supreme Court explained in *Small*:

> It is a truism that a person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, ..., or in any way adds to the other's security or advantage. One who receives a benefit is of course enriched, and he would be unjustly enriched if its retention would be unjust. And it is axiomatic that a person who has been unjustly enriched at the expense of another is required to make restitution to the other.

Small, 67 Haw. at 635-36, 701 P.2d at 654 (internal quotations and citations omitted). More recently, the Hawaii Supreme Court explained that the *Small* test is whether the plaintiff conferred a benefit upon the defendant by adding to the defendant's security or advantage. *See Durette v. Aloha Plastic Recycling, Inc.,* 105 Haw. 490, 503, 100 P.3d 60, 73 (2004). In this case, there is no

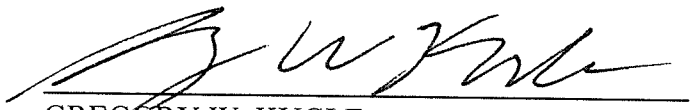
allegation that the Pavseks have conferred any benefit or advantage on the Sandvolds.[24] Accordingly, the Circuit Court correctly held that Appellants cannot maintain a claim for unjust enrichment, and the Complaint was properly dismissed.

V. Conclusion.

For the reasons stated herein and such others as the Court may consider, Defendants-Appellees Todd W. Sandvold, Juliana C. Sandvold and Hawaii Beach Homes, Inc., respectfully request this Court affirm the order and judgment of the Circuit Court.

DATED: Honolulu, Hawaii, December 17, 2008.

DAMON KEY LEONG KUPCHAK HASTERT



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[24]Moreover, allowing an unjust enrichment claim on these facts would expose the defendants to unlimited and multiple liability. If Appellants are allowed to recover all rental income, what prevents any other "neighbor" from suing for the same thing. Appellants did not file a class action to bind the world of potential plaintiffs. *See, e.g., Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982).

APPENDICES

APPENDIX "A"	-	Copy of the plot plan for a portion of Papailoa Road contained in ROA Vol. 1 at 82
APPENDIX "B"	-	Rules of the Zoning Board of Appeals
APPENDIX "C"	-	*In The Matter Of The Appeal Of Judith Ann Pavey et al.*, Case No. 2006/ZBA-22, Director Of The Department Of Planning And Permitting's Position Statement, filed May 10, 2007
APPENDIX "D"	-	*In The Matter Of The Appeal Of Judith Ann Pavey et al.*, Case No. 2006/ZBA-22, Findings of Fact, Conclusions of Law, and Decision and Order, dated October 4, 2007
APPENDIX "E"	-	*In the Matter of the Appeal of Joseph Pavsek*, Case No. 2008/ZBA-6, Findings of Fact, Conclusions of Law, and Decision and Order, filed October 27, 2008
APPENDIX "F"	-	*In the Matter of the Appeal of Joseph Pavsek*, ZBA Case No. 2008/ZBA-6, Intervenors Todd W. Sandvold and Juliana C. Sandvold's Reply Memorandum To Petitioner's Opposition To Director of Department of Planning and Permitting's Motion to Dismiss Appeal, filed September 12, 2008
APPENDIX "G"	-	Rules of Practice and Procedure of the Department of Planning and Permitting

NO. 29179

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

JOSEPH PAVSEK and IKUYO PAVSEK, Plaintiffs-Appellants, vs. TODD W. SANDVOLD; JULIANA C. SANDVOLD; KENT SATHER; JOAN SATHER; WAIALUA OCEANVIEW LLC; HAWAII BEACH HOMES, INC.; HAWAII BEACH TRAVEL, INC; and HAWAII ON THE BEACH, INC., Defendants-Appellees, and JOHN DOES 1-10, JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants.	CIVIL NO. 08-1-0131 APPEAL FROM THE JUDGMENT, filed on May 28, 2008 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII The Honorable Victoria S. Marks

ERRATA TO ANSWERING BRIEF OF DEFENDANTS-APPELLEES TODD W. SANDVOLD, JULIANA C. SANDVOLD, AND HAWAII BEACH HOMES, INC. FILED DECEMBER 17, 2008

EXHIBIT "A"

CERTIFICATE OF SERVICE

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NO. 29179

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

JOSEPH PAVSEK and IKUYO PAVSEK, Plaintiffs-Appellants, vs. TODD W. SANDVOLD; JULIANA C. SANDVOLD; KENT SATHER; JOAN SATHER; WAIALUA OCEANVIEW LLC; HAWAII BEACH HOMES, INC.; HAWAII BEACH TRAVEL, INC; and HAWAII ON THE BEACH, INC., Defendants-Appellees, and JOHN DOES 1-10, JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants.	CIVIL NO. 08-1-0131 APPEAL FROM THE JUDGMENT, filed on May 28, 2008 CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII The Honorable Victoria S. Marks

ERRATA TO ANSWERING BRIEF OF DEFENDANTS-APPELLEES TODD W. SANDVOLD, JULIANA C. SANDVOLD, AND HAWAII BEACH HOMES, INC. FILED DECEMBER 17, 2008

Defendants-Appellees Todd W. Sandvold, Juliana C. Sandvold and Hawaii Beach Homes, Inc. hereby submit an errata sheet for the Answering Brief filed December 17, 2008 ("Answering Brief") as follows (new material bolded and underscored; old material strikeover):

- The citation in the third line of page 14 should read:

  "*The Aged Hawaiians* ***v. Hawaiian Homes Commission***, 78 Haw. 192, 202, 891 P.2d 279, 289 (1995)."

TABLE OF AUTHORITIES

PAGE

FEDERAL CASES

HAWAII STATE CASES

EXHIBIT "A"

- The citation on sixth line of the first full paragraph on page 20 should read:

  "*accord* RCH § ~~6-156~~ **6-1516**."

Additionally, due to a word processing error, the Table of Authorities filed with the Answering Brief was missing some citations and contained some erroneous citation formatting. Attached as Exhibit "A" is the corrected Table of Authorities.

DATED: Honolulu, Hawaii, December 18, 2008.

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TODD W. SANDVOLD,
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HAWAII BEACH HOMES, INC.

OTHER STATE CASES

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HAWAII REVISED STATUTES

HAWAII RULES OF EVIDENCE

REVISED CHARTER OF HONOLULU

REVISED ORDINANCES OF HONOLULU

RULES OF THE ZONING BOARD OF APPEALS

RULES OF PRACTICE AND PROCEDURE OF THE DEPARTMENT OF PLANNING AND PERMITTING

MISCELLANEOUS

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, two (2) true and correct copies of the Errata to Answering Brief of Defendants-Appellees Todd W. Sandvold, Juliana C. Sandvold, and Hawaii Beach Homes, Inc. Filed December 17, 2008, and Exhibit "A" were duly served upon the following individuals by delivering said copy to their last known addresses as follows:

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DATED: Honolulu, Hawaii, December 18, 2008.

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