

No. 29179

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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

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STATE OF HAWAII

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**ANSWERING BRIEF OF DEFENDANTS-APPELLEES WAIALUA OCEANVIEW LLC,
HAWAII BEACH TRAVEL, INC., AND HAWAII ON THE BEACH, INC.**

and

CERTIFICATE OF SERVICE

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**ANSWERING BRIEF OF DEFENDANTS-APPELLEES WAIALUA OCEANVIEW LLC,
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Defendants-Appellees WAIALUA OCEANVIEW LLC (“WAIALUA”), HAWAII BEACH TRAVEL, INC. (“HBT”), and HAWAII ON THE BEACH, INC. (“HOTB”) (collectively, the “Waialua Defendants”) hereby respond to the Opening Brief of Plaintiffs-Appellants JOSEPH PAVSEK and IKOYO PAVSEK (collectively, “Plaintiffs”). In addition to the legal arguments raised by the Waialua Defendants herein, they also incorporate and adopt the arguments and legal authority presented by Defendants-Appellees TODD W. SANDVOLD, JULIANA C. SANDVOLD, KENT SATHER, JOAN SATHER, and HAWAII BEACH HOMES, INC. (collectively, the “Sandvold/Sather Defendants”) in their Answering Briefs.

I. Introduction

WAIALUA is the owner of a beachfront home, located at 61-715 Papailoa Road on the North Shore of Oahu (the “Property”), which it purchased in May 2004. See Declaration of Thomas W. Coulson - Record on Appeal (“ROA”) Vol. 1, pp. 172-174. HOTB is the Manager of WAIALUA. Id. The predominant use of the Property is as an investment/vacation home for the Coulson family, whose primary residence is also in Honolulu. Id. Consequently, Plaintiffs’ assertion that WAIALUA is a speculator or absentee owner is inaccurate.

However, when the Coulson family is not using the Property and when it is not undergoing remodeling, it is occasionally rented to third-parties for extended periods of time. Id. Over the past almost four years, the average number of rentals of the Property in any given year has been less than five. Id. With, at most, only two exceptions during these four years, each of these rentals has reserved the Property for a period of at least 30 days. Id. The Plaintiffs’ Complaint in the underlying case does not allege otherwise. ROA Vol. 1, pp. 1-15.

Contrary to the allegations in Plaintiffs' Complaint, the Property has not been utilized as a "bed and breakfast" or as a "transient vacation unit" ("TVU") as defined by the Land Use Ordinances of the City and County of Honolulu (the "City") and interpreted by the City's Department of Planning And Permitting ("DPP") and Zoning Board of Appeals ("ZBA").¹ Under this standard, Plaintiffs' Complaint in the underlying case does not allege sufficient and/or specific (as opposed to vague and generalized) actions by the Waialua Defendants that would establish that the Property has been used as an illegal TVU. ROA Vol. 1, pp. 1-15.

Likewise, Plaintiffs' claims that they are "directly affected" by the Waialua Defendants' usage of the Property are unsupported. Any contact between WAIALUA, the Coulsons, and their guests and Plaintiffs has been negligible.² The Property is located on the opposite side of the street from Plaintiffs' home, and is closer to the entrance to Kamehameha Highway than Plaintiffs' property. The Coulson family and their guests, therefore, do not pass Plaintiffs' property in getting to the Property. The Property, which is in excess of 16,000 sq. ft. and is surrounded by a wall and gate, also has sufficient onsite parking so that vehicles related to the Property do not park on and are not visible from Papailoa Rd. Finally, the Property has direct beach access, so that its occupants do not utilize any easement shared with Plaintiffs to get to the

¹ See Director Of The Department Of Planning And Permitting's Position Statement, Case No. 2006/ZBA-22, filed May 10, 2007, at 6 and In The Matter Of The Appeal Of Judith Ann Pavey et al., Case No. 2006/ZBA-22, which respectively recognize and reaffirm that "a land owner [is permitted] to rent their property for thirty (30) day blocks, and theoretically, may rent their property to separate individuals or part[ies] 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."

² The only contact the Coulsons and their guests are aware of between themselves and Plaintiffs has been initiated by Mr. Pavsek, who frequently and repeatedly has attempted to engage the Coulsons and their guests in conversations and diatribes about his opinions regarding the usage of the Property.

beach. In short, there is virtually no contact between Plaintiffs and any occupant of the Property.

On these innocuous facts, Plaintiffs brought the underlying case seeking to enjoin the activities of the Waialua Defendants. In dismissing Plaintiffs' case, the Circuit Court adopted the arguments and authority set forth by the Defendants in support of their respective Motions to Dismiss (including their Reply briefs). Because those arguments and authority are equally applicable to this Court's consideration of the issues on appeal, Defendants' Motions to Dismiss are incorporated herein by the Waialua Defendants. ROA, Vol. 2, p. 217 – Vol. 3, p. 165.

II. Standard of Review

Plaintiffs' statement that this Court should consider the matters raised on appeal *de novo* is not disputed by the Waialua Defendants. See County of Kauai v. Baptiste, 115 Haw. 15, 24, 165 P.2d 916, 925 (S. Ct. 2007).

III. Argument

Because this appeal is considered *de novo*, the Waialua Defendants rely upon the arguments and authority previously submitted to the Circuit Court and upon which the Circuit Court based its decision. As indicated above, the Waialua Defendants also incorporate the arguments and authority submitted by the Sandvold/Sather Defendants to the extent applicable (e.g., Plaintiffs' breach of fiduciary duty argument would not appear to apply to the Waialua Defendants).

In particular, the Waialua Defendants assert that the Circuit Court's decision was correct based upon this Court's express holding in Waikiki Discount Bazaar v. City & County of Honolulu, 5 Haw. App. 635, 641-42, 706 P.2d 1315, 1320 (ICA 1985) (emphasis added below), wherein this Court unambiguously concluded that “**no statute** provides for enforcement of the CZC . . . by an individual; rather authority for enforcement has been explicitly conferred on

specific public officials.” The term “no statute” would appear to encompass HRS § 46-4(a). Moreover, as the CZC (Comprehensive Zoning Code) is the predecessor to the City’s current Land Use Ordinances (LUO), the decision in Waikiki Discount Bazaar would bar a private right of action outside of the remedies provided under the LUO. As Plaintiffs’ recognize, the LUO does not allow an individual to bring an enforcement action directly before the Circuit Court.

In addition, recognizing private cause(s) of action under either HRS § 46-4(a) or common law to enforce the City’s zoning ordinances as a nuisance claim would be contrary to the overall purpose of a comprehensive zoning code and this Court’s express holding in Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 70 Haw. 480, 483, 777 P.2d 244, 246 (S. Ct. 1989). As this Court stated in that decision “[z]oning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county.” Id.

Allowing private causes of action and permitting multiple entities such as the DPP/ZBA and the Circuit Court to contemporaneously consider similar zoning disputes would make comprehensive decision making and implementation regarding zoning matters impossible. Furthermore, were private parties such as Plaintiffs permitted to bring enforcement actions there would likely be dozens, if not hundreds, of similar actions being litigated by individuals throughout the City before various judges of the Circuit Court. This would likely result in inconsistent and conflicting interpretations that would be extremely burdensome for the City to monitor, let alone enforce.

Finally, Plaintiffs’ attempt to impede WAIALUA’s legal use of its Property or to get the Circuit Courts to interpret the City’s ordinances in a manner inconsistent with the DPP and ZBA (See f.n. 1 *supra*) would appear to be unconstitutional. As this Court previously held in Waikiki

Marketplace Inv. Co. v. Chair of Zoning Board of Appeals, 86 Haw. 343, 354, 949 P.2d 183, 194 (ICA 1997), zoning laws in general “may not be extended by implication” and any ambiguities presented should not be resolved in further derogation of the property owner’s rights. In this instance, the DPP and ZBA have interpreted the Waialua Defendants’ usage of the Property as being consistent with the applicable LUOs. Were another tribunal, including the Circuit Court, to interpret the LUOs consistent with Plaintiffs’ position and adverse to the Waialua Defendants its decision would conflict with that of the DPP and ZBA, thereby acknowledging an ambiguity in the LUO. However, under the aforementioned rule set forth in Waikiki Marketplace, it would be impossible to construe such an ambiguity against WAIALUA without violating WAIALUA’s constitutional property rights. Consequently, the relief sought by Plaintiffs is unconstitutional.

IV. Conclusion

The Waialua Defendants respectfully request that this Court affirm the decision of the Circuit Court.

DATED: Honolulu, Hawaii, December 17, 2008.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing ANSWERING BRIEF OF DEFENDANTS-APPELLEES WAIALUA OCEANVIEW LLC, HAWAII BEACH TRAVEL, INC., AND HAWAII ON THE BEACH, INC. will be served on this date to the parties and at the addresses stated below via hand delivery.

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