No. 29179

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI

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 FIRST CIRCUIT COURT HONORABLE VICTORIA S. MARKS

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Of Counsel:
ALSTON HUNT FLOYD & ING
Attorneys At Law
A Law Corporation

PAUL ALSTON 1126-0
THOMAS E. BUSH 4737-0
18th Floor, ASB Tower
1001 Bishop Street
Honolulu, Hawai'i 96813
Telephone: (808) 524-1800

KEN T. KUNIYUKI 1321-0
1003 Bishop Street
2660 Pauahi Tower
Honolulu, Hawaii 96813
Telephone: (808) 524-4111

Attorneys for Plaintiffs-Appellants
JOSEPH PAVSEK and
IKUYO PAVSEK

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PLAINTIFFS-APPELLANTS' OPENING BRIEF

I. INTRODUCTION

Plaintiffs-Appellants, Joe and Ikuyo Pavsek ("the Pavseks") are homeowners who live at 61-724 Papailoa Road, Haleiwa, Hawaii. They appeal from the judgment of the First Circuit Court of the State of Hawaii dismissing their Complaint.

Defendants-Appellees are either absentee owners of neighboring residences or the booking agents for the absentee owners. Defendants-Appellees are engaged in short-term rentals of these neighboring residences in violation of county zoning ordinances. The Pavseks filed their Complaint to, among other things, obtain a court order in Count I to stop these rentals pursuant to HRS § 46-4(a), which allows directly affected property owners to seek a court order that enforces zoning ordinances. The Pavseks filed additional claims for nuisance, aiding and abetting a nuisance, conspiracy to create a nuisance, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and unjust enrichment against the different defendants-appellees for the harm created by engaging in the short-term rentals and to disgorge the benefits they have obtained at the Pavseks' expense.

The Circuit Court ignored the plain language of HRS § 46-4(a) to hold that the Pavseks could not, as a matter of law, bring an action under HRS § 46-4(a), but must bring an administrative action before the Director of Planning and Permitting for the City and County of Honolulu. The Circuit Court further held that all remaining claims were predicated on the allegation

of short term rentals in violation of the zoning ordinances and must also be dismissed.

The Circuit Court's decision was wrong. The plain language of HRS § 46-4(a) allows directly affected owners of real estate **or** the county to seek a court order to enforce zoning ordinances. The statute does not require that a directly affected property owner first seek an administrative hearing, and, in any event, there is no "administrative hearing" that authorizes the injunctive relief mandated by the statute. In addition, the Pavseks have stated claims under the common law of nuisance, which the Circuit Court also ignored. For these and other reasons set forth below, the Pavseks respectfully request that this Court reverse the Circuit Court's order and judgment and remand the case for further proceedings.

II. STATEMENT OF THE CASE

A. Background

1. The Parties and Properties

The Pavseks own the residence and residential lot located at 61-724 Papailoa Road, Haleiwa, Hawaii ("Pavsek's home"). ROA1:3.[1] They are beset by at least three absentee owners of neighboring properties who, with the assistance of booking agents, habitually rent their properties on a short-term basis in violation of applicable zoning ordinances. The absentee owners and their booking agents are as follows:

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[1] The Record on Appeal is cited as "ROA." Documents within the ROA are cited by volume (in Arabic numerals) and page (in Arabic numerals) as follows: ROA [volume]:[pages].

(1) Defendants-Appellees Todd W. Sandvold and Juliana C. Sandvold ("the Sandvolds") own the property located at 61-703 Papailoa Road, Haleiwa, Hawaii, ("the Sandvolds' Lot"). ROA1:3. Defendant-Appellee Hawaii Beach Homes, Inc. ("HBH") acts as their booking agent and/or property manager for rentals. ROA1:3.

(2) Defendants-Appellees Kent Sather and Joan Sather ("the Sathers") own the property located at 61-707 Papailoa Road, Haleiwa, Hawaii ("the Sathers' Lot"). ROA1:3. HBH also acts as their booking agent and/or property manager for rentals. ROA1:3.

(3) Defendant-Appellee Waialua Oceanview LLC ("Oceanview LLC") owns the property located at 61-715 Papailoa Road, Haleiwa, Hawaii ("the Oceanview Lot"). ROA1:3. Defendant-Appellee Hawaii Beach Travel, Inc. ("HBT") and Defendant-Appellee Hawaii On the Beach, Inc. ("HOB") act as Oceanview LLC's booking agent. ROA1:3. HOB also acts as the property manager for the rentals. ROA1:3.

2. The Defendants-Appellees Engage in Short-Term Rentals in Violation of the Applicable Zoning Ordinances and to the Pavseks' Detriment.

The provisions of the Land Use Ordinance ("LUO"), of the City and County of Honolulu, Chapter 21 of the Revised Ordinances of Honolulu, regulate the utilization of land pursuant to Section 6-1504 of the Charter of the City and County of Honolulu ("the City"). LUO § 21-3.70 provides that the purpose of the residential district is to allow for a range of residential densities, and specifies the primary use to be detached residences. LUO § 21-3.70-1 and

Table 21-3 set forth the permitted uses and structures within the residential districts, and limit the permitted uses of residential properties. Properties zoned R7.5, R-5 and R3.5 are limited to detached one family dwellings, detached two-family dwellings and public uses and structures. All other uses of properties zoned R7.5, R-5 and R3.5 are prohibited without a conditional use permit or a non-conforming use certificate, including use as a bed and breakfast home and a transient vacation unit. *See* LUO § 21-4.110-1 and LUO § 21-4.110-2.

A bed and breakfast home is defined as "a use in which overnight **accommodations are provided to guests for compensation, for periods of less than 30 days**, in the same detached dwelling as that occupied by an owner, lessee, operator or proprietor of the detached dwelling." LUO § 21-10.1 (emphasis added).

A transient vacation unit is defined as "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 home**." *Id.* (emphasis added).

It is undisputed that the Pavseks' home and the three lots at issue are zoned R-5 and classified as detached "Single-Family Residential" under the LUOs. LUO § 21-3.30, Zoning Map 17. ROA1:5. The Pavseks' home is on the same street as, in the same neighborhood as, and in close physical proximity to these lots. ROA1:5. In addition, the Pavseks and Sandvolds share a private right-of-way that provides the Pavseks with access from Papailoa Road to the

beach. ROA1:5. The Pavseks are thus directly impacted by activities on these lots in a manner substantially different than the public. ROA1:5.

The three lots at issue have never been issued non-conforming use certificates for transient vacation units or for bed and breakfast homes. ROA1:5. Nonetheless, from at least January 1, 2006, each of the defendant-appellees have been advertising and providing for compensation their lots as transient vacation units and/or as bed and breakfast homes by booking and renting these units for periods of less than 30 days. ROA1:5. In particular,

(a) The Sandvolds and HBH have been advertising and providing for compensation the Sandvolds' lot, booking and renting this property for periods of less than 30 days;

(b) The Sathers and HBH have been advertising and providing for compensation the Sathers' lot, booking and renting this property for periods of less than 30 days; and

(c) Oceanview LLC, HBT and HOB have been advertising and providing for compensation the Oceanview lot, booking and renting this property for periods of less than 30 days.

ROA1:5.

The commercial uses of these lots constitute violations of county zoning ordinances, including, LUO § 21-4.110-1, LUO § 21-4.110-2 and/or LUO § 21-10.1. As alleged in the Complaint, each of the defendants-appellees

has knowingly and intentionally made these short-term rental arrangements. ROA1:5.

As also alleged in the Complaint, the Pavseks have been directly affected by these short-term rentals, which violate the zoning ordinances, and have suffered direct and irreparable injury because such commercial uses have, among other things: (1) caused increased traffic noise and congestion in this residential neighborhood; (2) negatively affected the value of Plaintiffs' property; (3) prevented or interfered with Plaintiffs' use and enjoyment of Plaintiffs' lot for residential purposes; (4) imperiled and/or destroyed the residential character of the neighborhood in violation of the intent of the zoning ordinances; (5) overburdened the private right of way, and (6) created increased noise levels, trash, litter, discarded cigarette buts, beer bottles and drug paraphernalia in this residential neighborhood and the beach in front of this neighborhood. ROA1:6.

B. Procedural Status

On January 22, 2008, the Pavseks filed their Complaint. ROA1:1-15. Two days later, on January 24, 2008, the Pavseks filed a Motion for Preliminary Injunction. ROA: 1:16-112. Thereafter, the named defendants each filed or joined in motions to dismiss as well as oppositions to the Motion for Preliminary Injunction. ROA 1:166-179, 280-235, 236-279; ROA 2:128-202, 217-20, 221-24; ROA 3:166-68. In the meantime, the Pavseks filed their Reply Motion in Support of the Motion for Preliminary Injunction as well as

oppositions to the motions to dismiss. ROA 2:46-84; ROA 2:225-342; ROA V3:1-8; ROA 3:9-123.

On March 17, 2008, the Circuit Court heard the motions to dismiss. The Circuit Court orally granted the motions at the hearing, thus dismissing the Complaint. TR at 18-19.[1] The Order granting the motions to dismiss was entered on May 1, 2008. ROA 3:169-71. Final Judgment was then entered on May 22, 2008. ROA 3:174-75.

III. STATEMENT OF POINTS OF ERROR ON APPEAL

The Court Order dismissing the Complaint, filed May 1, 2008, did not specify the grounds for dismissal but simply adopted arguments made by the defendants-appellees in their motions to dismiss. ROA 3:170. The Court erred in adopting arguments made by the defendants-appellees as follows:

A. The Circuit Court erred in dismissing the Complaint by ruling that, as a matter of law, the Pavseks had no direct statutory right to seek an injunction under HRS § 46-4(a).

Defendants-appellees erroneously argued that the Pavseks could not bring a direct cause of action to seek injunctive relief under HRS § 46-4(a) as a matter of law because the Pavseks lacked standing and that there was no subject matter jurisdiction to bring a claim under HRS § 46-4(a). ROA 2:5-6, 25-35,136-46, ROA 3:4. The Pavseks responded to these arguments in their Reply Memorandum in Support of the Motion for Preliminary Injunction. ROA 2:47-51, as well as their oppositions to the motions to dismiss filed by the

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[1] The March 17, 2008 Transcript of Proceedings at page 12 of the Record on Appeal is cited as "TR." Pages within the TR are cited as follows: TR at [pages].

Sandvolds (ROA 2:234-40), the Sathers (ROA 3:17-23) and Oceanview LLC and HOB (ROA 3:2-5).

B. The Circuit Court erred in dismissing the Complaint by ruling that, as a matter of law, the Pavseks had failed to name the City as an indispensable party.

Defendants-appellees erroneously argued in their motions to dismiss that the Pavseks needed to include the City as a party to the lawsuit and that dismissal was warranted as a matter of law. ROA 2: 6-8,148-49, ROA 3:4. The Pavseks responded to these arguments in their Reply Memorandum in Support of the Motion for Preliminary Injunction. ROA 2:51-52, as well as their oppositions to the motions to dismiss filed by the Sandvolds (ROA 2:240-41), the Sathers (ROA 3:23-24) and Oceanview LLC and HOB (ROA 3:5-6).

C. The Circuit Court erred in dismissing the Complaint by ruling that, as a matter of law, the Pavseks have failed to state a claim for Nuisance.

Defendants-appellees the Sandvolds and the Sathers erroneously argued in their motions to dismiss that the Pavseks failed to state a claim for Nuisance as a matter of law. ROA 2: 8-11, 149-51. The Pavseks responded to these arguments in their oppositions to the motions to dismiss filed by the Sandvolds (ROA 2:241-46), and the Sathers (ROA 3:24-29).

D. The Circuit Court erred in dismissing the Complaint by ruling that as a matter of law the Sandvolds, as cotenants with the Pavseks, owed the Pavseks no fiduciary duties regarding the commonly owned property.

Defendants-appellees the Sandvolds erroneously argued in their motion to dismiss that they owed Pavseks no fiduciary duties regarding the jointly-owned easement as a matter of law. ROA 2: 11-13. The Pavseks

responded to this argument in their opposition to the Sandvolds' motion to dismiss. ROA 2:246-47.

E. The Circuit Court erred in dismissing the Complaint ruling that, as a matter of law, the Pavseks cannot maintain a clam for unjust enrichment where defendants-appellees have profited by wrongs committed against the Pavseks.

Defendants-appellees the Sandvolds and the Sathers erroneously argued in their motions to dismiss that the Pavseks could not maintain a claim for unjust enrichment as a matter of law. ROA 2: 13-15, 18. The Pavseks responded to these arguments in their opposition to the motions to dismiss filed by the Sandvolds (ROA 2:247-48), and the Sathers (ROA 3:30).

IV. STANDARD OF REVIEW

A. Motion to Dismiss.

"A circuit court's ruling on a motion to dismiss is reviewed *de novo.*" *County of Kauai v. Baptiste*, 115 Hawai`i 15, 24, 165 P.3d 916, 925 (2007). In reviewing a motion to dismiss, this Court should not grant such a motion "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. [This court] must therefore review plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein would warrant relief under any alternative theory.'" *Id.* (quoting *In re Estate of Rogers*, 103 Hawai'i 275, 280-81, 81 P.3d 1190, 1195-96 (2003)). Of course, "'[this court] must deem those allegations to be true.'" *Id.*

Where the dismissal is based on lack of subject matter jurisdiction, the circuit court's ruling "is a question of law, reviewable de novo." *Office of*

Hawaiian Affairs v. State of Hawai`i, 110 Hawaii 338, 350, 133 P.3d 767, 779 (2006). Appellate review of the dismissal based upon jurisdictional grounds includes a review of the allegations in the complaint as well as other materials before the trial court in connection with the motion to resolve factual disputes about the existence of jurisdiction. *Norris v. Hawaiian Airlines Inc.*, 74 Haw. 235, 240, 842 P.2d 634, 637 (1992).

B. Standing.

Whether a plaintiff has standing to invoke the circuit court's jurisdiction presents a question of law reviewable *de novo* on appeal. *County of Kauai*, 115 Hawai`i at 24-25, 165 P.3d at 925-26.

V. ARGUMENT

The Pavseks are long-time residents at Papailoa Road, a residential neighborhood on the North Shore. Defendants-Appellees are either speculators, who acquired neighboring properties to use for investment, or booking agents, who rent out and manage these properties for the speculators. In running their commercial enterprises in this residential neighborhood, Defendants-Appellees are engaged in rentals of less than 30 days. These rentals violate county zoning ordinances.

Fed up with the Defendants-Appellees' pattern and practice of engaging in these short-term rentals, the Pavseks asked the Circuit Court to apply the letter of the law to enforce county zoning ordinances prohibiting such short-term rentals and sought to bring common law claims resulting from the short-term rentals. The Circuit Court refused. In do so, the Circuit Court

ignored the plain language of the law and deprived the Pavseks of their statutory and common law rights for relief. This Court is now asked to redress the wrong committed by the Circuit Court.

A. Count I States a Claim as the Pavseks Have a Direct Statutory Right to Seek an Injunction under HRS § 46-4(a).

1. The plain language of HRS § 46-4(a) provides a direct cause of action.

In 1957, the legislature enacted the Zoning Enabling Act. [ROA 3:48-52.] In section 9 of that Act, now codified at HRS § 46-4(a), the legislature allocated zoning powers as set forth therein for "lands not contained within the forest reserve boundaries as established on January 31, 1957, or as subsequently amended." In allocating the enforcement of zoning ordinances on these lands, HRS § 46-4(a) states:

> **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**. (emphasis added)

Rules of statutory construction to determine the meaning of this language are clear and basic: One considers the plain meaning. This Court's "foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself" and "absent an absurd or unjust result, this court is bound to give effect to the plain meaning of unambiguous statutory language." *Thompson v. Kyo-Ya Co., Ltd.*, 112 Hawai`i 472, 474 & 475, 146 P.3d 1049, 1051 & 1052 (2006) (quotations and citations omitted).

Here, the statutory language is unambiguous and there is no "absurd or unjust result": a directly affected property owner may bring a suit to seek a court order to enforce a county zoning ordinance. The statute distinguishes this right from the right of the county to seek appropriate fines and penalties or file its own lawsuit for injunctive relief. HRS § 46-4(a) then makes clear that while a court or zoning agency may impose a fine or penalty as long as the accused had an opportunity for an administrative hearing, no such proceeding is a "prerequisite for any injunctive relief ordered by the circuit court."

2. The Circuit Court Has Subject Matter Jurisdiction.

In seeking to dismiss the Complaint, the defendants-appellees argued that the Circuit Court lacked subject matter jurisdiction because the Pavseks could not seek a court order unless it was an appeal from an administrative procedure. Couched in arguments of failure to exhaust administrative remedies, lack of primary jurisdiction and comity, defendants-appellees maintained that despite the crystal clear language in HRS § 46-4(a), the Pavseks were required to follow a procedure whereby a property owner files a petition for declaratory relief with the City Director of Planning and Permitting ("Director"), then appeals that declaratory relief petition to the County Zoning Board of Appeals ('ZBA") and then appeals that decision to the Circuit Court. [ROA 3:142-43] This is a far cry from the clear cut language in HRS § 46-4(a).

The defendants-appellees argued that this is the procedure required by the Supreme Court in *Colony Surf, Ltd. v. Director of the Department of Planning & Permitting,* 116 Hawai`i 510, 174 P.3d 349 (2007). [ROA 3:141] However, that conclusion misstates this case. In *Colony Surf,* the Supreme Court simply described procedural history of how the case came to circuit court, which was pertinent for its purposes since an issue before it was whether the circuit court – acting solely in its appellate role – had exceeded its appellate jurisdiction under HRS § 91-14. However, the Supreme Court did not address HRS § 46-4(a), and there is nothing in the decision that indicated that a circuit court can only have appellate jurisdiction over a suit by a directly affected property owner.

In fact, such a gloss on HRS § 46-4(a) would be nonsensical. First, HRS §46-4(a) allows **either** the county **or** the directly affected property owner to bring suit to enforce ordinances. The defendants-appellees' reading would create an asymmetry in the interpretation of this clear language by essentially holding that while the county is allowed to bring a suit in court to enforce ordinances; a directly affected property owner can only bring an appeal. Of course, HRS § 46-4(a) makes no such distinction.

Second, HRS § 46-4 clearly distinguishes between appeals to the circuit courts and a suit to enforce an order in the circuit court. HRS § 46-4(b) provides that the final order of a zoning agency can be appealed to the circuit court. This is far narrower than the language in HRS § 46-4(a) authorizing a "suit" to enforce an ordinance in circuit court. *See Territory v. Scully,* 22 Haw.

618, 633 (1915) ("Suit is a generic term of comprehensive signification and applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him for the redress of an injury and the recovery of a right") (Opinion of Watson J., Concurring in Part and Dissenting in Part).

Third, the proceeding advocated by defendants-appellees is inconsistent with the plain language in HRS § 46-4(a). Defendants-appellees assert that the Pavseks would need to first file a petition for declaratory relief with the Director as set forth in Rule § 3-1 of the Department of Planning and Permitting ("DPP") Rules of Practice and Procedure. Rule § 3-1 states that:

> Any interested person may petition the director for a declaratory ruling as to the applicability of any statute or ordinance relating to the department, or of any rule or order of the department.

HRS § 46-4(a) is limited, however, to directly affected real estate owners, not simply interested persons. HRS § 46-4(a) allows these directly affected real estate owners to get a court order that enforces an ordinance. In contrast, Rule § 3-1 simply allows a petitioner ("any interested person") to get a declaratory ruling from the Director on the applicability of any statute or ordinance. Rule § 3-1 does not authorize the petitioner to get an order that enforces an ordinance. There is a difference between the "milder" relief provided by declaratory ruling as compared to the stronger medicine of an order of enforcement. *See Steffel v. Thompson*, 415 U.S. 452, 467, 94 S.Ct. 1209, 1219 (1974) (noting the difference between declaratory relief and injunctive relief).

Further, under the DPP rules, the Director has the discretion to simply refuse to issue a declaratory ruling! DPP Rule § 3-5 grants the Director discretion to refuse to issue a declaratory ruling for several reasons, including, "where the issuance of the declaratory ruling may adversely affect the interests of the city in any litigation which is pending or may reasonably be expected to arise" or "[f]or other good cause." Nothing in HRS § 46-4(a) suggests that a directly affected real estate owner should not be able to get a court order enforcing the law (*i.e.* a zoning ordinance) because the county believes such a ruling would hurt it in litigation or for some other similar "good cause."

In addition to *Colony Surf*, defendants-appellees heavily relied on *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 734 P.2d 161 (1987), and *Hawaii's Thousand Friends v. City & County of Honolulu*, 75 Haw. 237, 858 P.2d 726 (1993), in which the Supreme Court had dismissed lawsuits brought by individuals. These cases, however, are inapposite. They involved citizen suits in which individuals sought review of an agency's decision under, among other provisions, HRS § 205A-6, which specifically limits the aggrieved party to contest an agency's decision under Chapter 205A. That is not the situation here. The Pavseks are not seeking to appeal or otherwise review actions taken by an agency or administrative body. The Pavseks seek to enforce their right to directly seek injunctive relief against the defendants-appellees. HRS § 46-4(a) authorizes such a direct action, though it limits standing to owners of real estate directly affected by the ordinances.[2]

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[2] This similarly distinguishes the other cases cited by the Sandvold

3. The Pavseks Have Standing as Directly Affected Property Owners under HRS § 46-4(a).

As noted previously, HRS 46-4(a) was originally enacted as Section 9 of the 1957 Zoning Enabling Act. This Section explicitly delegated to the counties the right to establish zoning ordinances that govern, among other things:

> B. The areas in which residential uses may be regulated or prohibited
>
> * * *
>
> C. The areas in which particular uses may be subjected to special restrictions;
>
> D. The locations of buildings and structures designed for specific uses and designation of uses for which buildings and structures may not be used or altered.

[ROA 3:51-52]

After listing these and other subjects for zoning, Section 9 of the Act proceeded to provide for the enforcement of these zoning ordinances. As one method of enforcing these zoning ordinances, the Act authorized directly affected property owners to file suit. [ROA 3:52] While the Act does not elaborate on what property owners are "directly affected," by context it would of necessity include a property owner who is directly affected by another's violation of zoning ordinances. That is exactly the situation here.

Defendants, such as *Grace Business Development Corp. v. Kamikawa*, 92 Hawai`i 608, 612-13, 994 P.2d 540, 544-45 (2000) (court action against state to recover tax payment was premature where statute required an actual dispute and there was none); *Swire Properties (Hawaii), Ltd. v. Zoning Board of Appeals*, 73 Haw. 1, 7, 826 P.2d 876, 879 (1992) (neighboring owners appeal to the Zoning Board of Appeals of decision by the City Director of the Department of Land Utilization failed because the Zoning Board of Appeals lacked jurisdiction).

When the City decided in 1989 to enact LUO §§ 21-4.110-1 and 110-2, which, together with LUO § 21-10.1, constitute zoning ordinances that prohibited "transient vacation units" ("TVU's") and bed and breakfast homes in all residential districts except for those with a conditional use permit or a non-conforming use certificate, the City did so because it recognized that there was a "potential for an excessive concentration of such commercial uses in certain neighborhoods, changing their residential character." [ROA 3:54]. The legislative history regarding the adoption of the current TVU and bed and breakfast home ordinances explicitly recognized that "[r]esidents express concern that proliferation of [Transient Vacation Rentals] will transform residential neighborhoods into mini-resorts with associated problems of noise, traffic, lost sense of security, and increased rents and property taxes." [ROA 3:81, 3:101-07]

In fact, the City Council apparently was aware of and sought to review ordinances from other cities, such as Carmel, California, that limited short term rentals in residential districts. *See* Office of Council Services Communication to Councilmember John Henry Felix, 12/9/89. [ROA 108-21] This is significant because the Carmel ordinance, like the LUOs at issue here, had a 30 day requirement for rentals in residential districts intended to protect residents of neighborhoods from commercial encroachment that adversely affects "surrounding residential uses." *Ewing v. City of Carmel-by-the-Sea*, 234 Cal.App.3d 1579, 1589, 286 Cal.Rprt. 382, 387 (1991), *cert. denied*, 504 U.S. 914 (1992).

Here, the Pavseks have specifically alleged that the defendants-appellees have "harm[ed] the residential character of this neighborhood in violation of the intent of the zoning ordinances" as well as increasing associated ills such as noise and traffic. [ROA 1:6]. As the Pavseks live in the same neighborhood, on the same street and in close physical proximity to the defendants-appellees' lots they are residents directly affected by the defendants-appellees' disregard of the zoning ordinances.

a. Hawaii standing law confirms the Pavseks' standing.

The Court stated that it believed there was a "question" about whether the Pavseks would be considered directly affected. (TR at 18-19) Of course, if the Court simply had a "question" about standing, at the stage of a motion to dismiss it was improper to dismiss the Complaint, especially given the liberal construction of standing under Hawai`i law. The Hawai`i Supreme Court has maintained that "[t]he crucial inquiry in any analysis of standing 'is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" *Bremner v. City & County of Honolulu*, 90 Hawai`i 134, 139, 28 P.3d 350, 355 (2001) (quoting *Life of the Land v. Land Use Commission of the State of Hawaii*, 63 Haw. 166, 174, 623 P.2d 431, 438 (1981) (emphasis in original).

In performing this analysis, the Hawai`i Supreme Court has stated that "our basic position has been that standing requirements should not be barriers to justice." *Life of the Land*, 63 Haw. at 174, 623 P.2d at 439.

Moreover, "[d]ue to a modern trend toward a more expansive interpretation of standing, a plaintiff's 'personal stake' in the outcome of a controversy may arise from a defendant's infringement of a personal or special interest that is separate and distinct from the traditional basis of infringement of legal rights or privileges." *Bremner*, 96 Hawai`i at 140, 28 P.3d at 350. In *Bremner*, the Supreme Court stated that such interests included "identifiable aesthetic or environmental harm," and cited *Dalton v. City & County of Honolulu*, 51 Haw. 400, 462 P.2d 199 (1969) as an example. In *Dalton*, plaintiffs, while not adjoining landowners, resided "in very close proximity" to a proposed development, with two plaintiffs residing across the street. *Id.* at 403, 462 P.2d at 202. These plaintiffs brought a declaratory judgment action to challenge certain amendments to the City's general plan and land use ordinances. The Supreme Court held that the landowners had standing under HRS § 632-1 because they would suffer injury if the developer defendants were able to build high rise apartment buildings, "thus restricting the scenic view, limiting the sense of space and increasing the density of the population." *Id.*

Hawai`i has followed a similar liberal standard of standing in determining who has standing to sue as a "person aggrieved" under HRS § 91-14(a). For example, in *East Diamond Head Association v. Zoning Board of Appeals*, 52 Haw. 518, 522, 479 P.2d 796, 798-99 (1971), the Hawaii Supreme Court found that a "person aggrieved" is one who is "specially, personally and adversely affected" such that there is "injury or damage to one's personal or property rights as distinguished from the role of being only a "champion of

causes." In *East Diamond*, the Court thus held that neighbors to a proposed movie development had standing to contest the issuance of a variance because they would be "affected the most," noting the probability of increased noise, traffic, congestion, telephone crews and electric crews. *Id.*

In the present case, the Pavseks have alleged that as a result of their location in close proximity to the Sather Defendants, they will and have suffered economic injuries (loss of property value) as well as non-economic injuries, such as increased noise, congestion and garbage (harm to their aesthetic interests) – that have been recognized in *Dalton* and *East Diamond* as conferring standing. Moreover, clearly the Pavseks, due to their close proximity to the defendants-appellees' lots and residency in the same neighborhood and on the same street as these lots, will be "affected the most."

b. Statutes in other jurisdictions also allow either affected individuals or public officials to enforce zoning ordinances by way of an injunction.

It is worth noting that other states have provisions, like Hawai`i, that grant either private individuals or an administrative body standing to seek injunctive relief to enforce a zoning ordinance. *See* Arkansas Code §§ 14-17-207(f) and 14-56-421(b)(2) (individual "aggrieved" by violation can seek injunctive relief); Illinois Statutes Ch. 24, § 11-13-15 (any owner or tenant of real property located within 1,200 feet of alleged violation can seek injunction who shows that the property or person will be substantially affected by the violation); Minnesota Statute § 366.16 ("any adjacent or neighboring property owner" may seek an injunction); Nebraska Revised Statutes § 23-114.05 (a

person can seek injunction upon showing that he or she or the property will be "affected" by the zoning violation); New Jersey Revised Statute § 40:55D-18 (any "interested party" may bring an action to enjoin violation of zoning law).

B. The City Was Not An Indispensable Party and, Even If It Was, It Was Error to Dismiss the Complaint.

Defendants-Appellees each argued that the City was an indispensable party, apparently because they believed, as the Sandvold Defendants argued, that only the City can enforce zoning ordinances. [ROA 2:7] This is absurd and, if so, would emasculate HRS 46-4(a), which allows a private right of action. To hold that only the City can enforce a zoning ordinance would be incorrect as City ordinances cannot supersede rights provided for by statute. *Cf. Kaiser Hawaii Kai Development Co. v. City and County of Honolulu*, 70 Haw. 480, 489, 777 P.2d 244, 250 (1989) (HRS § 46-4(a) is "superior" to the City Charter). Thus, while the City has authorized the DPP to enforce its zoning ordinances (*see* Rev. Charter of Honolulu § 6-1503), it has not purported to make (nor could it do so) enforcement of zoning ordinances by the DPP the exclusive remedy.

Moreover, even if the City were deemed an indispensable party, it was error to dismiss the Complaint on this ground. Rather, the Circuit Court should properly have ordered that the City be made a party. *See Life of the Land v. Land Use Commission*, 58 Haw. 292, 296, 568 P.2d 1189, 1194 (1977) (holding that it was error to dismiss action based on circuit court's implicit determination that certain parties were indispensable parties, rather the court

should have ordered that they be made parties to the lawsuit before considering dismissal).

C. The Pavseks Stated a Claim for Nuisance under Hawai`i law.

In Count II of the Complaint, the Pavseks stated a nuisance claim against the Sandvolds, the Sathers and Oceanview LLC under theories of both public and private nuisance. At oral argument the Court did not address these theories but believed (erroneously) that because the Pavseks could not bring a claim under HRS § 46-4(a), the nuisance claim (and all other claims in the Complaint) must fall. [TR at 19]. The Court reasoned that any allegation of a violation of an ordinance "must be decided by the administrative agency in the first instance." [TR at 19]

However, the Court did not address the legal authority cited by the Pavseks, which showed that under theories of both public and private nuisance, plaintiffs can maintain causes of action that allege violations of zoning rules and regulations **without first having an administrative determination that such a violation existed**.[3]

1. The Pavseks have a claim under the theory of public nuisance.

In *Akau v. Olomana Corp.*, 65 Haw. 383, 386, 652 P.2d 1130, 1133 (1982), the Hawai`i Supreme Court adopted the Restatement (Second) of Torts as authority to define the parameters of the tort of public nuisance. Section 821B(1), the Restatement (Second) of Torts defines a public nuisance to be:

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[3] Because the Pavseks have stated a claim for nuisance in Count II, their claims regarding conspiracy and aiding and abetting a nuisance in Counts III and IV were wrongfully dismissed and should be reinstated.

> An unreasonable interference with a right common to the general public.
>
> § 821B(2) then proceeds to state that:
>
> Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) Whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect on the public right.

Here, the Pavseks allegations show that the short-term rentals constitute an unreasonable interference with rights common to the general public, and the circumstances support such a holding.

First, consistent with § 821B(2)(a), the short-term rentals significantly interfere with "the public peace, the public comfort, or the public convenience." As made clear by *Ewing*, 234 Cal.App.3d at 1590-91, 286 Cal.Rprt. at 388, there is a strong public interest in enforcing zoning laws that protect the character of residential neighborhoods. The legislative history behind the adoption of the LUOs violated by the defendants-appellees shows that these ordinances were similarly enacted to protect the strong public interest preserving residential neighborhoods from abuse by commercial interests in short-term rentals. *See* ROA 2:272-326.

Second, short-term rentals are subject to § 821B(2)(b) as "proscribed by a statute, ordinance or administrative regulation."

Third, consistent with § 821B(2)(c), when the allegations are construed most favorably to the Pavseks, the defendants-appellees' commercial conduct clearly threatens to produce a permanent or long-lasting effect and has a significant effect upon the public right. Again, *Ewing*, 234 Cal.App.3d at 1591, 286 Cal.Rprt. at 388, is instructive in its recognition that the "residential character of a neighborhood is threatened when a significant number of homes . . . are occupied not by permanent residents, but by stream of tenants staying a weekend, a week or even 29 days." These "transient rentals" "undoubtedly affect the essential character of a neighborhood and the stability of a community." *Id.*

It is no defense under the law of public nuisance that the defendant has not yet been found liable by an administrative body for violating an ordinance. The Restatement and case law grant an individual standing to bring a nuisance claim alleging that a zoning ordinance has been violated, without first seeking an administrative determination, **as long as that individual can allege harm of a different kind than that suffered by other members of the public.**

Thus, Restatement (Second) of Torts § 821C allows an individual to recover damages for a public nuisance if the individual has suffered harm of a different kind than that suffered by other members of the public. In *Towne v. Harr*, 460 N.W.2d 596 (Mich. App. 1990), the Court denied private individuals

standing to bring a complaint regarding another property owner's erection of a pole building in violation of the local ordinances only because the private individuals had not proven special damages. The court noted that the plaintiffs' allegation raised a public nuisance claim and while generally a public nuisance claim must be abated by the appropriate public officer, the Michigan Supreme Court had long "recognized the propriety of private citizens bringing actions to abate public nuisances, arising from the violation of zoning ordinances or otherwise, when the individuals can show damages of a special character distinct and different from the injury suffered by the public generally." *Id.* at 597. Thus, in *Travis v. Preston*, 643 N.W.2d 235, 241 (Mich. App. 2002), the appellate court agreed that private citizens had standing to sue a hog farm directly for violation of zoning ordinances because they had suffered injury "of a 'special character distinct and different from the injury suffered by the public generally' in that the [hog farm] odors affected only the residences located near defendants' hog-farming operation and not the community."

In *Buckelew v. Town of Parker*, 937 P.2d 368, 372 (Ariz. App. 1996), the Court reversed the dismissal of a property owner's complaint about the zoning of an adjoining owner's property, and, in so doing, noted that "[b]ecause the zoning law is rooted in the law of nuisance, a zoning ordinance violation came to be treated as a public nuisance for purposes of determining the standing of the injured party". *See Shults v. Liberty Cove, Inc.*, 146 P.3d. 710, 712 (Mont. 2006) (neighbor who lived in the same zoning district as a proposed development would be "directly affected" because the neighbor would

use the same road as that development to access a highway and thus the neighbor was injured in a manner different than the public and had standing); *Polk v. Axton*, 208 SW.2d 497 (Ky. 1948) (Property owners who resided in the same block on which a four-family lot was to be located could maintain a public nuisance action against the owner of the four-family lot to prevent the impairment or destruction of benefits to be derived from zoning restrictions permitting only two-family residences on the block.)

In addition, the Pavseks can seek to enjoin the public nuisance under Restatement (Second) Torts § 821C(2)(c), which grants "standing to sue as a representative of the general public" or "as a citizen in a citizens' action." In *Akau*, the Supreme Court specifically adopted this section of the Restatement. In doing so, the Court stated it was following the "trend in the law . . . away from focusing on whether the injury is shared by the public, to whether the Plaintiff was in fact injured." 65 Haw. at 386, 652 P.2d at 1133. The Court held that "a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public generally, if he can show that he has suffered an injury in fact, and that the concerns of the multiplicity of suits are satisfied by any means." *Id.* at 388-89, 652 P.2d at 1134. The Court then, consistent with its decisions in *Dalton* and *East Diamond Head Association*, held that "a Plaintiff has standing if he can demonstrate some injury to a recognized interest such as economic or aesthetic, and is himself among the injured and not merely airing a political or an intellectual grievance." *Id.* at 390, 652 P.2d at 1135.

Here, the Pavseks, by virtue of their residency in the same neighborhood and in close physical proximity to the Sather Defendants, have alleged economic and aesthetic injury. [ROA 1:6]. Moreover, concerns about a multiplicity of lawsuits are satisfied because the Pavseks as neighbors in the immediate vicinity are directly affected.[4]

2. The Pavseks have stated a claim under the theory of private nuisance.

Restatement (Second) of Torts § 821D explains that:

> A private nuisance is a **non-trespassory** invasion of another's interest in the private use and enjoyment of land. (Emphasis added.)

Thus, the defendants-appellees' conduct need not trespass onto the Pavseks' property. It is enough if their conduct causes harm that is significant and is unsuited to the character of the locality. *See* Restatement (Second) of Torts § 831. In determining whether an invasion is intentional and unreasonable, the Restatement specifically provides that:

> Zoning laws and regulations are pertinent and often controlling in determining whether an activity is suitable on a particular locality. The law recognizes this general policy by regarding those activities to which a locality is primarily devoted and to which is best suited as preferred, in that locality, over other less suitable activities. Hence, when it is found in a particular case that conduct that is unsuitable to the locality is causing significant harm to an invasion of another's use or enjoyment of land that is suitable to the locality, the invasion is unreasonable although the conduct has social value although the act is taking all

[4] In *Akau*, the plaintiffs sought easements across defendants' property on behalf of all members of the public, necessitating a class action to relieve concerns about a multiplicity of lawsuits. 65 Haw. at 390, 652 P.2d at 1135. Here, of course, not all members of the public are impacted as the Pavseks have been impacted and thus there is no need for a class action.

practical measures to avoid the harm."

Restatement (Second) of Torts § 831 comment (b).

That is the situation here. The Pavseks live in a neighborhood that is zoned residential and it specifically prohibits short-term rentals. Defendants-appellees are violating this use restriction by engaging in commercial short-term rentals. By law, their conduct is unsuitable to the locality and causing significant harm to the Pavseks' use and enjoyment of their property, which is suitable to the locality. Again, the Pavseks have alleged multiple harms, including the destruction of the residential character of the neighborhood, increased traffic noise and congestion, increased noise levels, trash, litter, discarded cigarette butts, beer bottles and drug paraphernalia. These allegations suffice to establish a private nuisance. *See, e.g., Zupa v. Paradise Point Association, Inc.*, 22 AD.3d 843, 803 N.Y.S.2d 179, 181-82 (2005).

In *Zupa,* landowners had standing to prosecute allegations of violation of zoning ordinances and private nuisance against operator of private marina where their properties were subject to excessive light, noise, pollution and smoke, such that their interest were within the zone of interest to be protected by the ordinances allegedly violated and they had alleged interference with the use or enjoyment of their land. There was no requirement that the landowners first seek an administrative determination that zoning ordinances were violated. *See also Stell v. Jay Hales Development Co.*, 11 Cal.App.4th 1214, 1233, 15 Cal. Rprt.2d 220, 232 (1992) (noting "that zoning violations can constitute a private nuisance which may be abated or enjoined").

In seeking dismissal of the private nuisance claim, the Sathers had cited to *Whitey's Boat Cruises v. Napali-Kauai Boat Charters, Inc.*, 110 Hawai`i 302, 132 P.3d 1213 (2006), to argue that the Pavseks have improperly attached common law labels to what is simply a statutory violation. The Sathers are mistaken. First, Restatement (Second) of Torts § 831 comment (b) makes clear that the Court can consider the propriety of the defendants-appellees' use in relation to the zoning ordinance of the locality in determining whether a private nuisance exists. Moreover, in *Whitey's Boat Cruises*, the Hawaii Supreme Court denied common law claims predicated on a statutory violation because the Court found that the intent of the statutes was to promote the preservation and protection of natural resources and not to protect the plaintiffs' commercial interests, which was the gravamen of their claims. 110 Hawai`i at 317-18 & n.25, 132 P.3d at 1228-29 & n.25. Here, of course, the very intent of the zoning ordinances is to protect residents, like the Pavseks, in the use and enjoyment of their land, which is the basis of their claims.[5]

D. The Pavseks Have A Breach of Fiduciary Duty Claim.

The Circuit Court improperly lumped the Breach of Fiduciary Duty claim in Count V against the Sandvolds with all other claims when it made the

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[5] In fact, in *Whitey's Boat Cruises*, the Hawai`i Supreme Court approved the appellees' position that to state a common law claim based on harm to business interests based on a violation of a statute or regulation, the statute or regulation must "have some nexus to commercial business interests or simply provide . . . private rights and remedies." 110 Hawai`i at 317 n25, 132 P.3d at 1228 n.25. Here, there is a nexus between the zoning laws implicated and the interest to be protected, as well as a private right of action under HRS § 46-4(a).

incorrect assertion that all claims cannot be brought before there is an administrative determination that a zoning violation has occurred.

Under Hawaii law, "a tenant in common shares a general fiduciary relationship with his cotenants." *City & County of Honolulu v. Bennett*, 57 Haw. 195, 209, 552 P.2d 1380, 1390 (1976). *See In re Keamo*, 3 Haw.App. 360, 368, 650 P.2d 1365, 1371 (Haw. 1982).

In *Hewitt v. Waikiki Shopping Plaza*, 6 Haw. App. 387, 395, 722 P.2d 1055, 1060 (1986), this appellate court recognized that a general fiduciary duty existed between cotenants in analyzing whether one cotenant could enjoin another from use of a commonly owned street. Plaintiff argued that its cotenant's construction in a commonly owned street was unreasonable. This Court ultimately ruled against plaintiff because the facts showed that there was already heavy use of street by members of the public such that defendant had not altered the use of the street. *Id.* at 396, 722 P.2d at 1061.

Here, in contrast, the right of way at issue is not a public thoroughfare and the Pavseks have alleged that its use has been overburdened and altered by short-term renters occupying the Sandvolds' lot. ROA 1:11. Accordingly, the Pavseks have stated a claim for breach of fiduciary duty. [6]

E. The Pavseks Can Maintain a Claim for Unjust Enrichment.

In its oral ruling the Circuit Court adopted the position of the Sandvolds that the Unjust Enrichment claim in Count VII must fall because the defendants-appellees had not conferred a benefit upon the Pavseks. [TR at

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6 Since the Pavseks can maintain the breach of fiduciary duty claim, it was error to dismiss Count VI for aiding and abetting a breach of fiduciary duty.

19] As pointed out in their opposition memorandum to the Sandvolds motion to dismiss, however, the Sandvolds, and thus the Circuit Court, relied upon an improperly restrictive interpretation of what it means to confer a benefit.

The Hawai`i Supreme Court has confirmed 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.*'" *Small v. Badenhop*, 67 Haw. 626, 635-36 (1985) (emphasis added) (citing Restatement (First) of Restitution § 1 comment b (1937)). The section of the Restatement cited by the Hawai`i Supreme Court further explains that a person "confers a benefit not only where he adds to the property of another, but also where he *saves the other from expense or loss.*" Restatement (First) of Restitution § 1 comment b (emphasis added). "The word 'benefit,' therefore, denotes any form of advantage" and is not limited only to pecuniary advantages. *Id.*

The benefit conferred also includes the "*indirect* conferral of benefits" so that "a plaintiff may recover for unjust enrichment against a defendant who receives *any* benefit from the plaintiff if the defendant's retention of the benefit would be unjust." *Muehlbauer v. General Motors Corp.*, 431 F. Supp. 2d 847, 853 & n.2 (N.D. Ill. 2006) (plaintiffs who purchased cars with defective brakes from car dealers could maintain an unjust enrichment claim against car manufacturers who provided the brakes to the dealers). Thus "[a] person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to

the other for any profit realized by such interference." Restatement (Third) of Restitution § 3. This means that "[a]ny profit realized in consequence of intentional wrongdoing is unjust enrichment because it results from a wrong to the plaintiff." *Id.* at comment a. *See In re Refalen,* 221 F.R.D. 260, 279-80 (D. Mass. 2004) (class action could maintain unjust enrichment claim against drug company for its unlawful delay in introducing a generic drug by wrongfully filing patent lawsuits).

Here, the defendants-appellees have realized a profit by consciously interfering with the legal rights of the Pavseks to reside in a residential neighborhood. By commercial exploitation of their property through short-term rentals in violation of the law, the defendants-appellees have enjoyed financial benefits. However, the ill effects of their misconduct, such as the resulting deterioration of the residential character of the neighborhood, the overburdening of the private right of way, the increased trash and noise, are unjustly borne by the Pavseks. In other words, the Pavseks, who live in the neighborhood, unjustly bear the burdens of the short-term rentals while the defendants-appellees, who do not reside in the neighborhood, avoid these burdens but reap the profits. Clearly, the defendants-appellees have violated the legally protected rights of the Pavseks, thereby earning a profit. They have been unjustly enriched and should disgorge any ill-gotten gains.

VI. CONCLUSION

For the reasons stated above, the Pavseks respectfully request that this Court enter an order reversing the Circuit Court's (1) Order Granting Defendants' Motions to Dismiss as to All Claims and All Parties entered on May 1, 2008 and (2) Final Judgment entered in favor of Defendants-Appellees and against the Pavseks entered on May 22, 2008, and remand this case for further proceedings.

DATED: Honolulu, Hawai`i, OCT 8 2008.

PAUL ALSTON
THOMAS E. BUSH
KEN T. KUNIYUKI
Attorneys for Plaintiffs-Appellants
JOSEPH PAVSEK and
IKUYO PAVSEK

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases pending before the Hawai`i appellate courts.

No. 29179

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI

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 FIRST CIRCUIT COURT HONORABLE VICTORIA S. MARKS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date TWO (2) true and correct copies of the foregoing will be served on the following parties by hand-delivering at their last known addresses as set forth below:

	HAND DELIVERED	U.S. MAIL
KENNETH R. KUPCHAK, ESQ. GREGORY W. KUGLE, ESQ. MARK M. MURAKAMI, ESQ. NOELLE B. CATALAN, ESQ. 1600 Pauahi Tower 1003 Bishop Street Honolulu, Hawai`i 96813 Attorneys for Defendants-Appellees TODD W. SANDVOLD, JULIANA SANDVOLD and HAWAII BEACH HOMES, INC.	√	
ROSEMARY T. FAZIO, ESQ. FRANCIS P. HOGAN, ESQ. ZACHARY J. ANTALIS, ESQ. Ashford & Wriston 1099 Alakea Street Alii Place, Suite 1400 Honolulu, HI 96813 Attorneys for Defendants KENT SATHER and JOAN SATHER	√	
DAVID B. ROSEN, ESQ. 810 Richards Street, Suite 880 Honolulu, Hawai`i 96813 Attorney for Defendants WAIALUA OCEANVIEW LLC, HAWAII ON THE BEACH, INC., and HAWAII BEACH TRAVEL, INC.	√	

DATED: Honolulu, Hawai`i, OCT 8 2008.

PAUL ALSTON
THOMAS E. BUSH
KEN T. KUNIYUKI
Attorneys for Plaintiffs-Appellants
JOSEPH PAVSEK and
IKUYO PAVSEK