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.; 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. 08-1-0131-01 APPEAL FROM THE JUDGMENT, filed on May 28, 2008 FIRST CIRCUIT COURT HONORABLE VICTORIA S. MARKS

DEFENDANTS-APPELLEES KENT SATHER AND JOAN SATHER'S ANSWERING BRIEF

APPENDICES "1" – "8"

and

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

COURT RULES

TREATISES

O

DEFENDANTS-APPELLEES KENT SATHER AND JOAN SATHER'S ANSWERING BRIEF

I. INTRODUCTION

This case concerns a dispute between residential neighbors. Plaintiffs Joseph Pavsek and Ikuyo Pavsek (collectively "Plaintiffs") sued several of their neighbors (all Defendants herein, collectively "Defendants"), including Kent Sather and Joan Sather (collectively the "Sathers"), seeking private judicial enforcement of what they allege to be violations of zoning ordinances due to "illegal rentals". Record on Appeal, Volume 1 ("ROA 1") at 4-8. Plaintiffs also alleged that the Sathers' "illegal rentals" constitute a nuisance, and further alleged "conspiracy and/or aiding and abetting a nuisance" and "unjust enrichment". ROA 1 at 8-13.

The Circuit Court[1] dismissed the Complaint, adopting the arguments set forth in the briefs of the Defendants-Appellants, concluding that Plaintiffs lacked standing as private parties to bring a suit for alleged violations of the City's Land Use Ordinance ("LUO"), that the Circuit Court lacked primary jurisdiction, and that Plaintiffs had not exhausted their administrative remedies in their challenge to the City's enforcement of the LUO. Because no private right to interpret and enforce the Land Use Ordinance exists, the Sathers respectfully urge this Court to affirm the Judgment below for any one of the reasons enumerated herein.

II. STATEMENT OF THE CASE

A. The Parties and Properties

The Plaintiffs and their neighbors own residential property on Papailoa Road near Haleiwa on the North Shore of Oahu. Papailoa Road runs parallel to the ocean and parallel to Kamehameha Highway such that the subject properties in this action are either bordered by both Papailoa Road and the shoreline or both Papailoa Road and Kamehameha Highway.

[1] The Honorable Victoria S. Marks presided.

Papailoa Road is sandwiched between two popular tourist attractions: 1) "Turtle Beach" and 2) the set of the hit ABC sitcom, "Lost." A 2005 article in the Star Bulletin explains that traffic has been backing up on a daily basis at Laniakea, due to the appearance of sea turtles on the beach, causing residents to feel "held hostage to their houses" and "complain about blocked access to their homes and commercialization of the beach" due to the influx of tourists to the area. ROA 1 at 269-271. Curious "Lost" fans are also making their way down Papailoa Road to see for themselves the set of the hit ABC sitcom. At least one website directs tourists to drive by the Plaintiffs property as follows: "turn left onto Papa'iloa Rd and continue almost to the end of the road. There is a dirt parking lot on the left (mauka) side of the road, park here -- it is public parking." ROA 1 at 272-275.

The Sathers own the home at 61-707 Papailoa Road (the "Sather Home"), which is an ocean-front property. The Sathers are residents of California and stay in their home on Papailoa Road from time to time when visiting Hawai'i. When they do not personally occupy their Papailoa home, the Sathers occasionally allow family and friends to stay there. At times when the Sather Home would otherwise be vacant, the Sathers offer their home for rent to others from time to time, in compliance with the restrictions regarding short-term rentals under the Land Use Ordinance of the City and County of Honolulu. ROA 1 at 257-59. Defendant-Appellee Hawaii Beach Homes, Inc. has helped in the booking and managing of rentals at the Sather Home. ROA 2 at 120.

The Plaintiffs are the owners of 61-724 Papailoa Road (the "Pavsek Property"), which is located on the Kamehameha Highway side of Papailoa Road. ROA 1 at 3, 82. Plaintiff Joseph Pavsek owns and operates North Shore Shark Adventures, which is registered as a Hawaii

corporation with a business address at the Pavsek Property on Papailoa Road. ROA 1 at 276-277. Plaintiffs alleged they are also co-owners of a right of way to the beach.

Plaintiffs alleged that "illegal rentals" have harmed them by creating congested street parking and overuse of a beach access right of way. Because their home is oceanfront, the Sathers enjoy beach access and do not have the right to use the right of way. Further, the Sathers' home has ample room for on-site parking for more than eight cars. The Sathers' use of their home has not adversely impacted Plaintiffs. Attached hereto as Appendices "1" and "2," (ROA 2 at 154-155) for illustrative purposes only, are two photographs from Google Earth of the Papailoa Road area showing the relative locations of the Sathers' lot, the beach, and Plaintiffs' property. See also, ROA 1 at 82.

Defendants Todd W. Sandvold and Juliana C. Sandvold own the home at 61-703 Papailoa Road. Defendant Appellee Waialua Oceanview LLC owns the home at 61-715 Papailoa Road, and Defendants Hawaii Beach Travel, Inc. and Hawaii On the Beach, Inc. act as property managers and/or rental agents.

The remaining parties herein are either homeowners on Papailoa Drive or are companies that manage those properties.

B. <u>The Plaintiffs History of Complaints to the City</u>

For more than a year the Plaintiffs have been anonymously reporting their neighbors' suspected rental activity to the City and County of Honolulu (the "City"). ROA 1 at 7, 37-40, 83-85. Plaintiffs alleged that the Sathers have been renting their home in violation of Land Use Ordinance § 21-4.110-1 and/or -2 which do not allow lodging to be provided to a guest or transient occupant for compensation for less than 30 days. ROA 1 at 5. City inspectors allegedly have, at the Plaintiffs' request, visited the Sather Home to investigate the complaints. ROA 1 at 8. Although the City has issued citations to the Sathers, the City has withdrawn all of

the citations after the Sathers demonstrated to the City that their rental activity conformed to the City ordinances. ROA 1 at 265-66. City inspectors investigated several complaints at the request of the Plaintiffs concerning the Sather Home and the homes of other Papailoa neighbors. Plaintiff-Appellant Joseph Pavsek indicated that City inspectors became less responsive to the Plaintiffs' complaints. ROA 1 at 39-40.

C. Plaintiffs' Circuit Court Complaint Relying on § 46-4, Hawai'i Revised Statutes

Not satisfied with the City's less-than-enthusiastic response to Plaintiffs' repeated complaints, Plaintiffs filed their Complaint herein on January 22, 2008. ROA 1 at 1. The Complaint alleged that the Defendants violated the City zoning ordinances, namely LUO § 21-4.110-1, LUO § 21-4.110-2 and/or LUO § 21-10.1.[2] ROA 1 at 8. The Complaint was served on the Sather Defendants on February 6, 2008. ROA 2 at 207. The Complaint relied heavily on § 46-4, Hawaii Revised Statutes, which Plaintiffs allege would allow them to bring suit to privately enforce the LUO against several neighbors, circumventing City's jurisdiction and administrative enforcement mechanisms.

D. Plaintiffs' Motion for Preliminary Injunction and Ex Parte Application to Proceed by Way of an Evidentiary Hearing

Two days after filing the Complaint, on January 24, 2008, nearly two weeks prior to serving the Sathers with the Complaint, Plaintiffs filed their Motion for Preliminary Injunction seeking to restrict the Sathers use of their home. ROA 1 at 16. On February 7, 2008, Plaintiffs filed an *Ex Parte* Application to proceed on the motion by way of an evidentiary hearing. The hearing was set for February 20, 2008. ROA 1 at 124. Prior to the hearing, Defendants Waialua

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[2] LUO §§ 21-4.110-1 and -2 are respectively entitled "Nonconforming use certificates for transient vacation units" and "Bed and breakfast homes—Nonconforming use certificates." LUO § 21-10.1 concerns the provision of lodging or accommodations to persons for compensation for periods of less than 30 days.

Oceanview and Defendants Sandvolds each filed Motions to Dismiss on February 14, 2008, for, *inter alia*, lack of subject matter jurisdiction and failure to state a claim. ROA 2 at 1, 39. At the February 20, 2008 hearing, the Court postponed hearing Plaintiffs' Motion for Preliminary Injunction pending an order on the Motions to Dismiss and stayed Plaintiffs pending discovery requests as well.

E. Motions for Summary Judgment

The Sathers filed a Motion to Dismiss on February 26, 2008 for (1) lack of subject matter jurisdiction, (2) failure to exhaust administrative remedies, (3) failure to state a claim upon which relief can be granted, and (4) failure to name an indispensible party. ROA 2 at 128. On March 17, 2008 Circuit Court convened a hearing on the three pending Motions to Dismiss filed by the Defendants. ROA 3 at 170.

The Circuit Court ruled in favor of all Defendants and against Plaintiffs. In reaching its decision, the Circuit Court stated:

> [Y]ou really need to look at the context of the entire statute [§ 46-4, Hawai'i Revised Statutes] and the structure in a manner consistent with its purpose.
>
> . . .
>
> [T]he scheme of things is that it's best for the County to enforce its zoning regulations . . . at least in the first instance rather than the parties coming to court.

ROA 3 at *****, Transcript of 3/17/08 Proceedings ("TR") at 18, lines 8-19.

On May 1, 2008, the Circuit Court issued its "Order Granting Defendants' Motions to Dismiss as to All Claims and All Parties." ROA 3 at 169. On May 22, 2008, the Circuit Court entered its Hawaii Rules of Civil Procedure Rule 54(b) final judgment. ROA 3 at 174.

III. STANDARD OF REVIEW

A. Dismissal

Dismissal of a Complaint is a conclusion of law, freely reviewable on appeal. Mendes v. Hawaii Ins. Guar. Ass'n, 87 Hawai'i 14, 17, 950 P.2d 1214, 1217 (1998). "Pursuant to the right/wrong standard, a conclusion of law is not binding upon the appellate court and is freely reviewable for its correctness." Id. (quoting State v. Soto, 84 Hawai'i 229, 236, 933 P.2d 66, 73 (1997)).

Under Rule 12(b)(6),HRCP, a Complaint may be dismissed if it fails to state a claim upon which relief can be granted. "[A] complaint may be dismissed if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to relief." Mendes at 17, 950 P.2d at 1217 (quoting Bertelmann v. Taas Assocs., 69 Haw. 95, 98, 735 P.2d 930, 933 (1987)).

When reviewing a motion to dismiss for the failure to state a claim upon which relief can be granted, the allegations contained in the claim are deemed true. Au v. Au, 63 Haw. 210, 626 P.2d 173, reconsideration denied, 63 Haw. 263, 626 P.2d 173 (1981). In weighing the allegations of the complaint as against a motion to dismiss, however, the court is not required to accept conclusory allegations on the legal effect of the events alleged. Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186,cert. denied, 67 Haw. 686, 744 P.2d 781 (1985).

B. Statutory Interpretation

The interpretation of a statute is a question of law reviewable *de novo*. Franks v. City and County of Honolulu, 74 Haw. 328, 334, 843 P.2d 668, 671 (1993). When construing a statute, the 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." Id. (internal quotations omitted). The court must construe statutory language in the context of the entire statute and must construe it in a manner consistent with its purpose. Id. at 335, 843

P.2d at 671. "[I]mplicit in the task of statutory construction is [the court's] foremost obligation 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. Flores v. Rawlings Co., LLC, 117 Hawai'i 153, 158, 177 P.3d 341, 346 (2008) (quoting Peterson v. Hawaii Elec. Light Co., Inc., 85 Hawai'i 322, 327-28, 944 P.2d 1265, 1270-71 (1997), superseded on other grounds by HRS § 269-15.5 (Supp.1999). "[W]hen there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists." Id.

> In the event of ambiguity in a statute, "the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." Id. (quoting HRS § 1-15(1) (1993)). Moreover, the courts may resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law. See HRS § 1-15(2) (1993).

Id..

C. Standing

"Whether the circuit court has jurisdiction to hear the plaintiffs' complaint presents a question of law, reviewable *de novo*. A plaintiff without standing is not entitled to invoke a court's jurisdiction. Thus, the issue of standing is reviewed *de novo* on appeal." Right to Know Committee v. City Council, City and County of Honolulu, 117 Hawai'i 1, 7, 175 P.3d 111, 117 (Hawai'i App. 2007) (quoting Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, Inc., 113 Hawai'i 77, 90, 148 P.3d 1179, 1192 (2006)). See also Mottl v. Miyahira, 95 Hawai'i 381, 388, 23 P.3d 716, 723 (2001)).

Several factors are relevant in determining private party standing:

> First, is the plaintiff one of the class for whose [e]special benefit the statute was enacted; ... that is, does the statute create a ... right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a

> remedy or to deny one? ... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc., 110 Hawai'i 302, 313, 132 P.3d 1213, 1224 (2006) (quoting Reliable Collection Agency, Ltd. v. Cole, 59 Haw. 503, 507, 584 P.2d 107, 109 (1978)). In Whitey's, the Supreme Court explained that "that legislative intent appears to be the determinative factor" in deciding whether a statute provides a private right of action. 110 Hawaii at 313, 132 P.3d at 1224 n. 20.

D. Review of Administrative Decisions

> In an appeal from circuit court review of an agency decision, Hawaii appellate courts apply the same review standards applied by the circuit court. Agency fact findings are reviewable for clear error. In contrast, an agency's legal conclusions are freely reviewable. An agency's interpretation of its rules receives deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose.

International Bhd. of Elec. Workers, Local 1357 v. Haw. Tel. Co., 68 Haw. 316, 322, 713 P.2d 943, 950 (Haw. 1986) (citations omitted).

IV. ARGUMENT

The Sathers urge the Court to affirm the Circuit Court's judgment dismissing the Complaint for the reasons set forth below. In addition to and in conjunction with the arguments set forth below, the Sathers join the arguments set forth in the Answering Brief of Defendants Todd W. Sandvold, Juliana C. Sandvold, and Hawaii Beach Homes, Inc. as such arguments apply to the Sathers.

A. Plaintiffs Did Not Have Authority to Enforce the Land Use Ordinance and, Therefore, Lacked Standing to Invoke the Circuit Court's Jurisdiction under § 46-4(a)

Plaintiffs have no standing to enforce the LUO against the Sathers under HRS § 46-4, a zoning enabling statute whereby the 1957 Hawaii territorial legislature authorized the City to

enact and enforce a zoning scheme. The Plaintiffs' lack of standing is evident upon inquiry as to (1) which potential plaintiffs are contemplated by § 46-4, (2) the legislative intent surrounding the passage of § 46-4, and (3) the underlying purposes of the comprehensive legislative scheme applicable to zoning. Even if the Plaintiffs had recourse to Circuit Court as they allege, the doctrines of exhaustion of remedies and primary jurisdiction preclude the Plaintiffs' action.

1. There is No Private Right of Action to Enforce the Land Use Ordinance under the Plain Meaning of HRS § 46-4.

As their jurisdictional "hook," Plaintiffs take out of context the language in HRS § 46-4(a) that states, "[county] ordinances may be enforced . . . by court order at the suit of the county or the owner . . . of real estate directly affected by such ordinances." (emphasis added). In 1957, the territorial legislature passed Act 234 (later codified as HRS § 46-4). The 1957 territorial legislature did not intend by this Act to provide a cause of action for one neighbor to sue another neighbor to enforce rules and regulations not in existence at the time.

The Hawaii Supreme Court has articulated the three factors it considers when deciding whether a statute creates a right upon which a plaintiff may seek relief:

> First, is the plaintiff one of the class for whose [e]special benefit the statute was enacted; ... that is, does the statute create a ... right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? ... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Rees v. Carlisle, 113 Hawai'i 446, 458, 153 P.3d 1131, 1143 (2007) (quoting Reliable Collection Agency v. Cole, 59 Haw. 503, 507, 584 P.2d 107, 109 (1978)). The Reliable/Rees factors are adopted from the United States Supreme Court's approach from Cort v. Ash, 422 U.S. 66 (1975). The Hawai'i Supreme Court has observed that "subsequent to Cort, decisions of the United States Supreme Court have emphasized that 'the key inquiry is whether Congress intended to

provide the plaintiff with a private right of action.'" Rees, 113 Hawai'i at 458, 153 P.3d at 1143 (quoting Whitey's Boat Cruises, Inc. v. Napali-Kauai boat Charters, Inc., 110 Hawai'i 302, 313 n.20, 132 P.3d 1213, 1224 n.20 (2006)). The Hawai'i Supreme Court recognized that "legislative intent appears to be the determinative factor." Rees, 113 Hawai'i at 458, 153 P.3d at 1143 (citing Whitey's Boat Cruises, 110 Hawai'i at 313 n.20, 132 P.3d at 1224 n.20). To determine whether Plaintiffs have standing under HRS § 46-4, the Court must weigh the Reliable/Rees factors.[3] When the Reliable/Rees factors are applied to HRS § 46-4, it is evident that a private right of action was not contemplated by the statute, and this Court should affirm the Circuit Court's dismissal of Plaintiffs' Complaint.

a. Section § 46-4 does not "create a ... right in favor of the plaintiff" because the Plaintiffs are not "directly affected" within the meaning of statute.

Plaintiffs assert that they are "by context" and "of necessity" "directly affected" under § 46-4, HRS. Plaintiff-Appellants Opening Brief at 16. Plaintiffs failed to examine either the context of § 46-4 or the purposes of the statute. Understandably so; such an inquiry is fatal to their claims.

Section 46-4 was first enacted as Act 234 of the 1957 regular session of legislature for the Territory of Hawai'i. 1957 Haw. Sess. Laws 234. See Appendix "3." Act 234 was the final version of House Bill 3 "relating to the conservation, control and development of forest lands and water resources in the various counties through the establishment and regulation of forest

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[3] In their arguments before the Circuit Court, Plaintiffs cited to an unreported Memorandum of Decision issued by the Circuit Court in Cummings v. Roth, Civ. No. 04-1-0836 (SSM), for the proposition that "HRS § 46-4 entitled plaintiff to injunctive relief in a dispute with her neighbor." ROA 2 at 48 (Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction Filed January 24, 2008 at 2). As Plaintiffs concede, that decision is not authoritative. Moreover, the Cummings court did not discuss why § 46-4 was relevant to Cummings' claim that Roth's violation of the CPR Declaration governing the property provided the basis for the injunction that was issued. Section 46-4 has nothing to do with CPR declarations.

and water reserve zones . . . ." See Appendix "4." As the bill worked its way through the various legislative committees, it was amended to incorporate "closely related county zoning provisions" from S.B. 4, S.D. 1, H.D. 2. See Stand. Comm. Rep. No. 740 (Appendix "6"). The zoning provisions from S.B. 4 were "found, for the most part, in Section 9" of H.B. No. 3, H.D. 1 (Appendix "7"), S.D. 1. Stand Comm. Rep. No. 740 (Appendix "6"). Sections 9 and 6 of Act 234 were codified as § 46-4(a).

Section 9 of Act 234 mentions enforcement of county ordinances enacted pursuant to the Act by "court order at the suit of the county or the owner or owners of real estate directly affected by such ordinances." (Emphasis added). The phrase "directly affected" landowners occurs four times in Act 234, once in Section 9, and three times in Section 2. Section 2 deals with the establishment of boundaries of forest and water reserve zones. In Section 2, landowners who were "directly affected" by the forest and water reserve zone boundary may apply to change those boundaries, and the board had to give notice by mail of the proposed change to other landowners who would be "directly affected" by the proposed change. Plainly, "directly affected" meant "any owner of land within the forest reserve boundaries who shall desire to establish a use or uses for his land . . ." as it was those landowners who were entitled to petition for a change of boundary or permitted use under Section 2(C) of the Act and it was those "directly affected" landowners who then would have standing to bring suit to enforce the regulations of the board by court order pursuant to Section 2(E) of the Act.

Section 9 of the Act was the enabling statute for county zoning ordinances. Its structure paralleled the structure of Section 2 (forest and water reserve zones). The enforcement provisions of Sections 2 and 9 are nearly identical. Section 9 (present day § 46-4(a)) provides:

> The board . . . of any county shall prescribe such rules and regulations and administrative procedures and provide such

> personnel as it may deem necessary for the enforcement of the provisions of this act and any ordinance enacted in accordance therewith. Such ordinances may be enforced by appropriate fines and penalties, or by court order at the suit of the county or the owner or owners of real estate directly affected by such ordinances.

Section 2 similarly provides:

> The board [of commissioners of agriculture and forestry] shall prescribe such administrative procedures, and provide such personnel as it may deem necessary for the enforcement of the provisions of this act, and any zoning regulation enacted in accordance therewith. Such regulations may be enforced by court order at the suit of the board or of the owner or owners of real estate directly affected by such regulation. Any person violating this act or any regulation adopted in accordance with this act shall be fined not more than five hundred dollars.

Section 2(E), Act 234.[4]

Both provisions (Section 2 and Section 9) refer to "the owner or owners of real estate directly affected." There is no reason to think that the phrase "directly affected landowner" has different meanings in the two sections of the same act. When the legislature adopted the phrase in different parts of the same act, it intended that they be construed in a consistent manner.[5] Applied to Section 9, the legislature intended the phrase "directly affected landowner" to mean a landowner whose property had been the subject of a zoning ordinance and who wished to contest the applicability of that ordinance to the landowner's own property or petition for a change to the ordinance. Plaintiffs do not seek such relief.

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[4] Section 2(E) of Act 234 has evolved into § 183C-7, HRS, relating to conservation districts.

[5] The intent of the legislature to use the terms "directly affected" in a consistent manner is further evidenced by comparison of the initial bill, H.B. 3, with its final embodiment. H.B. 3, as introduced, contains a phrase that begins: "[w]hen application is made by any land owner or government agency affected to change the boundaries of any forest and water reserve zone . . . ." In Act 234, this phrase became "Whenever any landowner or government agency whose property will be directly affected makes an application to change the boundaries of any forest and water reserve zone . . ."(emphasis added). The Legislature's consistent use of the terms "directly affected" is compelling evidence of its intention.

b. There is no indication of legislative intent, explicit or implicit, to create a private right of action to enforce the Land Use Ordinance.

Plaintiffs rely on HRS § 46-4 as the basis for their argument that they have standing to bring this suit. They misread the statute. Section 46-4 is an enabling statute under which the State granted to the counties the power to enact and enforce zoning ordinances pursuant to a comprehensive plan. The Statement of Policy found in Section 1 of Act 234 is explained by Justice Nakamura in his dissent in Kaiser Hawaii Kai Development Co. v. City and County of Honolulu:

> The genesis of HRS § 46-4 is traceable to 1957 when the Territorial Legislature found "[t]he pressure of a rapidly increasing population ... require[d] an orderly economic growth within the various counties, and the conservation and development of all natural resources." Session Laws of Hawaii (Haw.Sess.Laws) 1957, c. 234, § 1. "Adequate controls," it said, "must be established, maintained and enforced by responsible agencies of government to reduce waste and put all of our limited land area, and the resources found thereon, to their most beneficial use." Id. The legislature therefore passed an act designed, "by means of zoning ordinances and regulations enacted by and under [the] act, and in accord with a long range, comprehensive general plan, to promote the health, safety, convenience, order, welfare and prosperity of the present and future inhabitants of [Hawaii]." Id.
>
> The section of the act relating to county zoning provided in part that "[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[,]" and "[z]oning shall be one of the tools available to the county to put the general plan into effect in an orderly manner." 1957 Haw.Sess.Laws, c. 234, § 9. "The zoning power granted [under the act was to] be exercised by ... ordinance...." Id. And the granted powers, which included the power of enforcement, were to "be liberally construed in favor of the county or city and county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accord with a long range, comprehensive general plan, and to insure the greatest benefit for [Hawaii] as a whole." The provisions of the section, furthermore, were not to "be construed to limit or repeal any powers [then] possessed by any county to achieve such ends

> through zoning and building regulations except insofar as forest and water reserve zones are concerned." Id.

70 Haw. 480, 495, 777 P. 2d 244, 252-53 (1989) (the majority held that initiative proposals to amend the land use development plan and zoning maps of the City were invalid as "inconsistent with the goal of long range comprehensive planning" as expressed in the Zoning Enabling Act, HRS § 46-4(a)). (Emphasis added.)

In Kaiser Hawaii Kai, the Hawaii Supreme Court reasoned that if the legislature intended to provide for zoning through the initiative process, when it enacted the Zoning Enabling Act, "it would have so legislated." Id. at 486, 777 P.2d at 248. Likewise, if the legislature intended to provide a mechanism for one neighbor to sue another neighbor to enjoin alleged violations of a zoning ordinance, it would have so legislated.[6]

Other states have passed laws that create an explicit private right of action for a landowner to enforce zoning ordinances against another landowner. These statutes differ radically from Hawaii's Zoning Enabling Act.[7] The issue of one neighbor suing another does not appear to have been one of the legislators' intentions when they wrote Act 234, as the focus of the Act was squarely on comprehensive planning, especially in the context of creating forest and water reserve zones.

c. A private right of action to enforce the Land Use Ordinance is not consistent with the underlying purposes of § 46-4.

In enacting § 46-4, the legislature created a framework that would enable a county and its administrative agencies to promulgate ordinances and rules to enact and enforce zoning. The

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[6] The Hawaii legislature knows how to create a private right of action by one private party against another, but they did not do so here. See, e.g., § 480-13, HRS (concerning suit for unfair competition and consumer fraud), which is explicit as to the cause of action created and who may bring suit.

[7] See, e.g. Appendix "8" for examples of state statutes that, unlike Hawaii's law, expressly created private rights of action to enforce provisions of zoning codes.

language of § 46-4, read as a whole, charged the counties with enforcement of their zoning ordinances: "[t]he council of any county shall prescribe rules, regulations, and administrative procedures . . . to enforce . . . any ordinance enacted in accordance with this section." (emphasis added). Section 46-4 also provided that, when prescribing such rules, the county "may" elect to enforce the ordinances by "court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances." Under § 46-4, the State delegated to the counties the power to create a private right of action to enforce zoning laws; it did not create the right of action.

The City chose not to provide in the LUO for enforcement by private action. The enforcement of zoning ordinances by the county and not by private action is consistent with the statutory scheme set forth in HRS § 46-4, which calls for deference to the county's exercise of its powers:

> The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole.

Recourse to the courts was, in fact, contemplated by the enabling act, but only after a final order of a zoning agency. Section 46-4(b) provides:

> (b) Any final order of a zoning agency established under this section may be appealed to the circuit court of the circuit in which the land in question is found. The appeal shall be in accordance with the Hawaii rules of civil procedure.[8]

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[8] Section 46-4(b) is found in Section 6 of Act 234. This provision was added by the Committee on Judiciary to the final version of the H.B. 3, but does not appear in earlier versions. See Stand. Comm. Rep. No. 740 (Appendix "4") ("[a] general appeal provision has been added applying to all zoning regulations enacted under the bill"). This appeal provision added by the Committee on Judiciary evidences the Legislature's intent that an aggrieved party obtain a final order from the zoning agency before appeal be made to the circuit court. In this case, Plaintiffs obtained no such final decision.

Furthermore, the LUO enacted pursuant to the powers delegated under § 46-4 contains specific enforcement provisions that preclude private enforcement. The City has enacted both administrative and criminal enforcement provisions for violations of the zoning ordinance and has provided that "[t]he city may maintain an action for an injunction to restrain any violation of [the zoning ordinance]." Sec. 21-2.150-1(d), Revised Ordinances of Honolulu ("ROH")(emphasis added). In addition, "[t]he director [of the Department of Planning and Permitting] may institute a civil action in any court of competent jurisdiction for the enforcement of any order issued pursuant to [the zoning ordinance]." Sec. 21-2.150-2(d), ROH. Nowhere in Sec. 21-2.150, nor anywhere else in the LUO, does the City confer upon private parties the right to enforce the City's zoning ordinances.

The Revised Charter of Honolulu ("RCH") describes the powers and duties of the heads of executive agencies, including the Director of the DPP (the "Director"). The RCH grants the Director broad powers to manage personnel and promulgate rules to achieve the objectives of the DPP. See Section 4-105, RCH. Similarly, the LUO states unequivocally that "[t]he director shall administer the provisions of the LUO." Sec. 21-1.30, ROH.

The Rules of Practice and Procedure of the DPP (the "DPP Rules"), attached hereto as Appendix "9", were promulgated by the Director pursuant to the powers granted by the RCH and the LUO, and these Rules "have the force and effect of law." Section 4-105, RCH. These Rules describe, inter alia, the DPP's rulemaking process, the Director's procedure for interpreting the LUO, and the manner of enforcement for the LUO.[9] The rules are inherently flexible and enable the Director to reasonably and fairly enforce the LUO as well as deploy personnel as appropriate

[9] For example, the DPP has implemented a civil fines program "to encourage compliance with the provisions of the Land Use Ordinance and facilitate corrections to violations." DPP Rules § 10-1. Even within the confines of the penalty provisions, "the director shall be entitled to assert appropriate flexibility in the administration of the civil fines program." Id.

based on the degree of violation that has occurred. There is no delegation of these duties to private parties.

The zoning scheme authorized by the legislature in Act 234 is a comprehensive zoning scheme administered and enforced by the Counties. This scheme encompasses the Zoning Enabling Act, the City Charter, the City's Land Use Ordinance, and the DPP's administrative rules. Neither the Legislature nor the City intended that zoning interpretation and enforcement be exercised on an ad hoc basis by private parties like Plaintiffs against their neighbors.

2. The Circuit Court lacked Primary Jurisdiction and the Pavseks failed to Exhaust Administrative Remedies

The Circuit Court below adopted the Defendants' arguments that it lacked jurisdiction because the Pavseks' failed, in the first instance, to follow the administrative appeals procedures. Those procedures require that a person first obtain a final decision of the Director and, if not satisfied, appeal that decision to the Zoning Board of Appeals. Under the doctrines of primary jurisdiction and exhaustion of administrative remedies the Circuit Court does not have jurisdiction of this case.

Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987), is the seminal case in Hawaii regarding the doctrines of exhaustion and primary jurisdiction. In Kona Old, the Hawai'i Supreme Court noted the doctrines of primary jurisdiction and exhaustion of administrative remedies were developed to "enable the question of timing of requests for judicial intervention in the administrative process to be answered[.]" Kona Old, 69 Haw. at 92-93, 734 P.2d at 168). The Kona Old court explained:

> 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 provided by the doctrine.
>
> Exhaustion, on the other hand, comes into play 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. The exhaustion principle asks simply that the avenues of relief nearest and simplest should be pursued first. 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. Under this principle, Kona Old clearly had no right to seek judicial review.

Kona Old, 69 Haw. at 93, 734 P.2d at 168-69 (internal quotation marks, ellipses, brackets, and citations omitted). Applying these doctrines to HRS § 205A-6, the supreme court observed:

> Kona Old's claim . . . requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of [an administrative agency]. Id. Thus, 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 . . . director's action in issuing the minor permit was proper. For it is
>
> > now firmly established, that 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 apprised 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 circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Id. at 93-94, 734 P.2d at 169 (quoting Far East Conference v. United States, 342 U.S. 570, 574-75 (1952)) (emphasis added; citations, internal quotation marks, and brackets omitted).

The Hawai'i Supreme Court, in Kona Old, acknowledged that under HRS § 205A-6, the Circuit Court in that case had original jurisdiction; yet, because the administrative agency had "special competence" to resolve regulatory issues and to decide, in the first instance, "cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion," the Hawai'i Supreme Court applied the primary jurisdiction doctrine and affirmed the Circuit Court's dismissal of the case. Kona Old, 69 Haw. at 93-94, 734 P.2d at 169). See also Pono v. Molokai Ranch, Ltd, 119 Hawai'i 164, ___, 194 P.3d 1126, 1143 (App. 2008), petition for cert. filed.

The Plaintiffs argue that the "clear cut language in HRS § 46-4(a)" provides the Circuit Court with jurisdiction to enforce the Land Use Ordinance by way of injunction. To the contrary, a claim for violation of a zoning ordinance is cognizable in the first instance by an administrative agency alone: the Department of Planning and Permitting. Under the exhaustion of administrative remedies doctrine, the Pavseks are required to pursue "the avenues of relief nearest and simplest" first.

The legislative scheme of zoning ordinance enactment and enforcement provides for a Zoning Board of Appeal ("ZBA") under the auspices of the City's Department of Planning and Permitting ("DPP") to "[h]ear and determine appeals from the actions of the director in the administration of the zoning ordinances". Rev. Charter of Honolulu § 6-1516. Plaintiffs have not availed themselves of the appropriate administrative remedy. Thus the Circuit Court lacks primary jurisdiction. See Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 94, 734 P.2d

161, 169 (1987) ("Judicial review of agency action will not be available unless the party has taken advantage of all the corrective procedures provided for in the administrative process").

The Hawai'i Supreme Court recently held that where the ZBA did not rule on an alleged violation of the LUO, "the matter was not properly before the circuit court, and the circuit court's finding . . . should be reversed." Colony Surf, Ltd. v. Director of the Dep't of Planning & Permitting, 116 Hawai'i 510, 515, 174 P.3d 349, 354 (2007). "[J]udicial review of an agency determination must be 'confined to issues properly raised in the record of the administrative proceedings below.'" Id. (quoting Hoh Corp. v. Motor Vehicle Indus. Licensing Bd., Dep't of Commerce & Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987)).

In Colony Surf, plaintiff CSL, the owner of a residential apartment building, subleased space to defendant-owner of Michel's restaurant. CSL complained, inter alia, that:

> The daytime wedding emporium use of Michel's resulted in "noise, traffic and congestion" in the residential neighborhood "which severely and negatively affect[ed] the neighborhood quality of life." On December 3, 1998, CSL sent a letter to the director of the Department of Planning and Permitting, State of Hawai'i ("director") challenging Michel's use of the premises for weddings, receptions, and other private functions. By letter dated February 17, 1999, the director rejected CSL's challenge, informing it that such uses were subsumed within the scope of restaurant uses.

Id. at 512, 174 P.3d at 351. CSL then filed a petition for a Declaratory Ruling with the director. The director concluded that Michel's was not in violation. CSL appealed the director's ruling to the ZBA, and the ZBA affirmed the director's decision. CSL then filed a notice of appeal in the circuit court. The circuit court reversed the decision of the ZBA, considering case law and legal arguments by the plaintiff regarding an alleged violation that was beyond the limited scope of the Director's ruling and the ZBA decision below. The Supreme Court held:

> (1) the issue as to whether the operation of Michel's as a different type of use constitutes an "expanded" nonconforming use . . . was

> not properly before the circuit court, inasmuch as (a) CSL argued before the director that Michel's violated [the LUO] by increasing its hours of operation, (b) the director limited his review of the petition to whether Michel's was precluded from increasing its hours of operation . . . , and (c) the ZBA was limited to rendering a decision regarding the additional hours of operation of Michel's . . .

Id. at 518, 174 P.3d at 357. In so holding, the Supreme Court has recognized that a person's compliance with the administrative appeals process under the City Charter is mandatory before the Circuit Court can take jurisdiction.

Colony Surf (1) illustrates the proper process for a private party to seek relief against another private party who has allegedly violated the LUO, and (2) holds that where the prescribed process is not followed, the Circuit Court does not have jurisdiction to address LUO violations. Under the LUO, the mandatory grievance process must begin with a petition to the Director of the DPP for a Declaratory Ruling. If the petitioner is not satisfied with the Director's decision, the petitioner may appeal it to the ZBA. Only after the ZBA rules does the petitioner have a right to appeal to the Circuit Court. Because this process was not followed by the Plaintiffs, the Circuit Court's dismissal for lack of subject matter jurisdiction should be affirmed.[10]

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[10] Plaintiffs mistakenly represented to the Circuit Court that "Hawaii law has recognized that neighborhood residents have standing to complain of harm from activity that detracts from the 'residential character of the neighborhood.'" ROA 1 at 27. (quoting East Diamond Head Ass'n v. Zoning Board of Appeals, 52 Haw. 518, 522, 479 P.2d 796, 799 (1971)). The Intermediate Court of Appeals has explained the ruling in East Diamond Head:

> In East Diamond Head . . . , the Hawai'i Supreme Court held that owners whose property adjoined a parcel of land for which a zoning variance had been granted by a county zoning board of appeals (the zoning board), thereby allowing the parcel to be used for a movie studio, were "person[s] aggrieved" under HRS § 91- 14(a) (1968) and "must be afforded judicial review should [they be found to have] comported with all other necessary administrative procedures at the lower level." Id. at 522, 479 P.2d

Plaintiffs attempt to distinguish Colony Surf because the plaintiff in Colony Surf "did not bring a direct cause of action against a non-government party based on a statute." ROA 2 at 239. Plaintiffs claim that "there is nothing in the [Colony Surf] decision that indicated that a circuit court can only have appellate jurisdiction over a suit by a directly affected property owner." Plaintiffs Opening Brief at 13. To the contrary, the Colony Surf plaintiffs brought suit both against the defendant-owners of Michel's restaurant and against the City. In addition to appealing the administrative decisions of the ZBA below, the Colony Surf plaintiffs presented a new claim to the Circuit Court that was not previously considered by either the director of the DPP or the ZBA: an alleged violation of Sec. 21-4.110(c)(1), ROH. The Hawaii Supreme Court ruled that the new zoning issue was "not properly before the circuit court" because the issue had not previously been argued before the director of the DPP. Colony Surf at 518, 174 P.3d at 357. Similarly, none of the LUO issues presented by Plaintiffs herein were properly before the Circuit Court because the director of the DPP did not have an opportunity to decide those issues.

Even if, *arguendo*, the Circuit Court had original jurisdiction as Plaintiffs assert, it is divested of that jurisdiction because the "claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body."

> at 798 (brackets omitted). The supreme court noted that the zoning board had not adopted any procedural rules that specified the requirements for formal intervention by property owners in the proceedings before the zoning board, and since the owners had submitted written letters and appeared before the zoning board to voice objections to the variance, they had "done everything possible to perfect an appeal." Id. at 524, 479 P.2d at 799.

E & J Lounge Operating Co., Inc. v. Liquor Comm'n of City and County of Honolulu, 116 Hawai'i 528, 547, 174 P.3d 367, 386 n.30 (Hawai'i App. 2007). Unlike the East Diamond Head plaintiffs, Plaintiffs here have not "done everything possible to perfect an appeal." The Pavseks must first do "everything possible to perfect an appeal" before they can avail themselves of the standards of review set forth in East Diamondhead.

Kona Old, 69 Haw. at 93, 734 P.2d at 168-169. Thus, the doctrine of primary jurisdiction as articulated in Kona Old provides an alternative basis for affirmance of the Circuit Court's dismissal for lack of jurisdiction. Claims relating to the Land Use Ordinance must be resolved as contemplated under the zoning regulatory scheme by the Director of the DPP and by the ZBA.

B. The Circuit Court's Dismissal does not Depend on Plaintiffs' Failure to Join the City as a Necessary Party

Plaintiffs brought this complaint to enforce the City's Land Use Ordinance ("LUO"), namely LUO §§ 21-4.110-1, -2 and § 21-10.1. Under Rule 19, HRCP, an interested person may be joined as a party where "disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

The City is responsible for the enforcement of zoning ordinances. Pursuant to its statutory authorization, the DPP has promulgated detailed rules relating to the policing and enforcement of the LUO. The regulatory activity and authority of the DPP includes the authority to enforce the LUO.

As a practical matter, enforcement of zoning ordinances by Plaintiffs would impede the DPP's ability to protect its interest in enforcing the zoning ordinance as it would result in piecemeal, inconsistent enforcement of the ordinance and would undermine the DPP's authority and discretion in enforcing the ordinances and Rules. Moreover, the Sathers could be exposed to multiple prosecutions for the same alleged violation as enforcement may be sought by the City as well as neighbors other than Plaintiffs. That would leave the Sathers at substantial risk of incurring potentially inconsistent obligations to the City and Plaintiffs. Plaintiffs' assertion that the City is not a necessary party begs the question: what would be the result where an

administrative order from the City is at odds with a court decision concerning the same dispute, but wherein the City is not a party? Certainly the Court's determination could not be binding on the City as a non-party.

In any event, this Court need not reach the Rule 19 issue. The Circuit Court did not find that the City was an indispensible party and the Defendants' motions to dismiss provide more than adequate basis for this Court to affirm the Circuit Court's dismissal of the Complaint.

C. The Plaintiffs Fail to State a Claim for Nuisance.

1. The Circuit Court Properly Dismissed Plaintiffs' Nuisance Claims Because They Rest on Conclusory Allegations of Law and not Allegations of Fact

Plaintiffs alleged the claims of nuisance (Count II), conspiracy and/or aiding and abetting a nuisance (Count III). These claims are entirely dependent upon Plaintiffs' conclusory allegations that the Sathers' violated the zoning ordinances. Plaintiffs' nuisance claims incorporate the central allegations that the Sathers illegally rented their home. Plaintiffs have "simply attached common law labels to allegations that assert no wrong other than the statutory violation." Whitey's, 110 Hawai'i at 318, 132 P.3d at 1229 (quoting Klinger v. Morrow County Grain Growers, Inc., 794 P.2d 811, 813 (Or. Ct. App. 1990)).

In their Opening Brief, Plaintiffs argue that "under the 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**." Plaintiffs-Appellants' Opening Brief at 22 (emphasis in original). Plaintiffs misconstrue the Court's standard of review. "On a motion to dismiss, well-pleaded allegations of fact are taken as admitted, but not so with conclusions of law." Lum v. Fullaway, 42 Haw. 500, 501 (Haw. Terr. 1958) (citing Moore's Federal Practice, 2d Ed., § 12.08). See also 5B

Wright & Miller, Federal Practice and Procedure § 1357 n.22 (3d ed. 2007); Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993).

> [I]t is clear that the . . . judge does not have to accept each and every allegation in the complaint as true in considering its sufficiency. Courts have used varying language to draw the line between what is admitted for purposes of a Rule 12(b)(6) motion to dismiss and what is not considered admitted. For example, federal courts have said that they accept the truth of a pleading's "facts," "factual allegations," "material facts," "material allegations," "well-pleaded facts," "well-pleaded factual allegations," and "well-pleaded allegations."
>
> . . .
>
> Conversely, a number of federal courts also have said that there are other types of allegations that need not be accepted as true on a Rule 12(b)(6) motion. Various phrases have been used by the federal courts to express this point. Among these are that the district court is not bound by a pleading's "legal conclusions," or its "unsupported conclusions," or its "unwarranted inferences," or its "unwarranted deductions," or its "footless conclusions of law," and its "sweeping legal conclusions cast in the form of factual allegations."

5B Wright & Miller, Federal Practice and Procedure § 1357 (3d ed. 2007) (citations omitted). Thus, "in weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged." Marsland v. Pang, 5 Haw. App. at 474, 701 P.2d at 186.

Plaintiffs have alleged Defendants' use of their properties "constitute[s] violations of zoning ordinances . . . ." ROA 1 at 5. Such statements are legal conclusions, not factual allegations, and cannot form the basis of a nuisance claim so as to defeat a motion to dismiss.

2. Plaintiffs Have not Alleged Sufficient Harm for a Private Nuisance Claim

Hawaii law recognizes causes of action for both private nuisances and public nuisances. Littleton v. State of Hawaii, 66 Haw. 55, 67, 656 P.2d 1336, 1344 (1982); Marsland v. Pang, 5

Haw. App. 463, 477, 701 P.2d 175, 187, cert. denied, 67 Haw. 686 (1985); Territory v. Fujiwara, 33 Haw. 428, 430 (1935). "A private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land" and must be both 1) intentional and 2) unreasonable. Restatement (Second) of Torts §§ 821D, 822.[11] An "intentional invasion" is

> An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor
>
> (a) acts for the purpose of causing it, or
>
> (b) knows that it is resulting or is substantially certain to result from his conduct.

Restatement (Second) of Torts § 825. The unreasonable or negligent nature of interference is determined by the injury caused by the condition, not by the conduct of the party creating the condition. Graber v. City of Peoria, 753 P.2d 1209, 1211 (Ariz. App. 1988). "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts § 821F. "[P]roperty depreciation alone is insufficient to constitute a nuisance." Adkins v. Thomas Solvent Co., 487 N.W. 2d 715, 724 (Mich. 1992).

Plaintiffs have not alleged that the Sathers acted for the purpose of causing harm to Plaintiffs. Plaintiffs also have not alleged that the Sathers knew that their alleged conduct would have resulted or was substantially certain to result in harm to Plaintiffs. The absence of an intentional invasion is fatal to a claim for private nuisance.

Additionally, Plaintiffs have not alleged that the Sathers' conduct caused them to suffer harm significant enough to sustain an action for nuisance. ROA 1 at 9. The Sathers' beach front

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[11] The Hawaii Supreme Court has looked to the Restatement (Second) of Torts in interpreting nuisance claims. See Marsland v. Pang, 5 Haw. App. at 485, 701 P.2d at 192 (examining public nuisance and citing to Restatement (Second) of Torts § 821B and comments thereto).

home does not share beach access with the Plaintiffs, has ample on-site parking (eight cars) and does not impact street parking. There is no allegation that the Plaintiffs' alleged injuries would be lessened were Plaintiffs to be granted the relief that they seek. Without the causation element, a claim for nuisance is not cognizable.

Moreover, Plaintiffs' nuisance claim hinges on a finding that the Sathers violated the zoning ordinances. In their brief below, Plaintiffs recognized that their private nuisance claims are dependent on a violation of the zoning law, and cite to the Restatement for the proposition that zoning laws are pertinent "in determining whether an activity is suitable on a particular locality." ROA 2 at 244 (quoting Restatement (Second) of Torts § 831, cmt. b). Under the analysis proposed by Plaintiffs, where there is no violation of the zoning law, an invasion cannot be deemed unreasonable. Plaintiffs are not entitled to the presumption that the Sathers have violated the zoning laws. Therefore, the unreasonableness standard discussed in comment b to § 831 is inapplicable.

3. Plaintiffs Have not Alleged Sufficient Harm for a Public Nuisance Claim

A public nuisance is defined as

> "an unreasonable interference with a right common to the general public . . . . Circumstances that may sustain a holding that an interference with a public right is unreasonable include . . . whether the conduct is proscribed by a statute, ordinance or administrative regulation . . ."

Restatement (Second) of Torts § 821B(1). "There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." Restatement (Second) of Torts § 821F. "The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for

either a public or a private nuisance." Id. cmt. c. Plaintiffs have not alleged that they personally suffered harm caused by the alleged illegal rentals of the Sathers' property significant enough to sustain an action for nuisance.

Paragraph 22 of the Complaint alleges:

> [I]n October-November, 2007, a foreign party rented the Sathers' Lot. On October 29, 2007, Plaintiffs spoke to members of this group, and were told that they had booked the premises for 6 days, and had been there for 4 days. . . .

This allegation does not satisfy the "unreasonable interference" element of public nuisance. This conduct is not proscribed by the LUO. Even if it were proscribed, the conduct is not determinative to a finding of unreasonableness; it is only a factor for the Court to consider.

Plaintiffs rely on Ewing v. City of Carmel-by-the-Sea, 234 Cal. App. 3d 1579 (1991), for the proposition that transient rental activity adversely affects residential uses. See Plaintiffs' Opposition at pp. 7 and 12. Ewing is not a nuisance case and did not present the question of whether a zoning statute has been violated. In Ewing, the plaintiffs sued the city arguing that its zoning ordinance was unconstitutional and the Ewing court noted that the City of Carmel zoning ordinance relating to transient rentals was to be enforced by the "City Attorney." 234 Cal. App. at 1584. Ewing is simply inapposite to the issues under the Sathers' Motion.

Moreover, "if there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations." Id., § 821B cmt. f. The conduct Plaintiffs alleged to be a public nuisance is dependant upon conduct that they alleged violated the LUO. But whether there is a violation is a decision vested in the Director of the DPP, not the Court. Plaintiffs are trying to force the Court to engage in "judicial

zoning" that could result in inconsistent, piecemeal administration and enforcement of the LUO.[12]

Plaintiffs also rely on Akau v. Olomana Corp., 65 Haw. 383, 652 P.2d 1130 (1982), for the proposition 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." Plaintiffs Opening Brief at 26 (citing Akau at 388-89, 652 P.2d at 1134). Plaintiff-Appellants' quote from Akau is taken out of context. The Hawai'i Supreme Court in Akau was not dealing with a nuisance claim, but rather with claims of rights-of-way brought as a class action and through theories under, inter alia, HRS § 7-1, ancient Hawaiian custom, and the law of easements. Akau at 1132, 385.

Even assuming Akau were applicable, Plaintiffs do not meet the standing requirements under Akau. As discussed, supra, Plaintiff-Appellants cannot show sufficient injury in fact. Moreover, the concerns of multiplicity of suits cannot be satisfied by this action because, unlike Akau, this is not a class action and Plaintiff-Appellants are not the only neighbors who would be

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[12] Comment f. to the Restatement (Second) of Torts § 821B explains that:

> [A]t one time courts frequently engaged in "judicial zoning," or the determination of whether a particular land use was unsuitable to a locality and therefore unreasonable. Now that most cities have complete sets of zoning regulations and agencies to plan and administer them, the courts have shown an inclination to leave the problem of the appropriate location of certain types of activities, as distinguished from the way in which they are carried on, to the administrative agencies. The variety and complexity of a problem and of the interests involved and the feeling that the particular decision should be a part of an overall plan prepared with a knowledge of matters not presented to the court and of interests not represented before it, may also promote judicial restraint and a readiness to leave the question to an administrative agency if there is one capable of handling it appropriately.

aggrieved or injured under their theory of nuisance. Papailoa Road and the surrounding area is home to approximately thirty houses, several of which are in much closer proximity to Defendants' properties than the Pavsek property. See Appendices I and II (ROA 2 at 154-55).

For the reasons stated in this Section, Plaintiffs have not, as a matter of law, alleged a claim for nuisance sufficient to withstand the Circuit Court's dismissal of the Complaint, which should be affirmed.[13]

D. The Breach of Fiduciary Duty Claims Do Not Apply to the Sathers

Counts V and VI are not asserted against the Sathers because the Sathers are not cotenants in the right of way, and they have direct beach access from their oceanfront property.

E. The Plaintiffs Cannot Maintain a Claim for Unjust Enrichment

The Circuit Court correctly adopted Defendants' arguments that Plaintiffs could not allege facts sufficient to state a claim for unjust enrichment as a matter of law. TR at 19; ROA II at 13-15, 18. "A valid 'claim for unjust enrichment requires only that a plaintiff prove that he or she conferred a benefit upon the opposing party and that the retention of that benefit would be unjust.'" Porter v. Hu, 116 Hawai'i 42, 55, 169 P.3d 994, 1007 (Haw. App. 2007) (quoting Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 504, 100 P.3d 60, 74 (2004) (emphasis added).

Plaintiffs' unjust enrichment claim does not satisfy the first element of a claim for unjust enrichment: the plaintiff must confer a benefit on the opposing party. Nowhere have Plaintiffs articulated a benefit that they have conferred on the Sathers because they cannot do so.

Plaintiffs relied on the decision of the U.S. District Court for the Northern District of Illinois, Eastern Division, in Muehlbauer v. General Motors Corp., 431 F.Supp 2d 847 (N.D.Ill

[13] Likewise, the Circuit Court properly dismissed Plaintiff-Appellants' Claims for "Conspiracy and/or Aiding and Abetting a Nuisance" (Counts II and IV of the Complaint, ROA 1 at 9-10).

2006) for the proposition that indirect conferral of benefits by the Plaintiff-Appellant on the opposing party is sufficient conferral of benefits to maintain a claim for unjust enrichment. In Muehlbauer, plaintiff car owners purchased vehicles manufactured by defendant car manufacturer. The defendant car manufacturer contended that no benefit had been conferred upon it by the plaintiffs for the purpose of satisfying the first element of unjust enrichment, as the plaintiffs did not purchase their cars directly from the manufacturer. The Muehlbauer court disagreed, noting that a total lack of a benefit conferred, rather than the indirect conferral of a benefit, warrants dismissal. Muehlbauer at 853 (citing In re Cardizem CD Antiturst Litig., 105 F.Supp 2d 618, 671 (E.D. Mich. 2000). Here, there is a "a total lack of a benefit conferred" on the Sathers by the Plaintiffs.

Plaintiffs also point to the tentative draft of the Restatement (Third) of Restitution § 3 which states that "[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, cmt. a (tentative draft). Plaintiffs' application of this theory of restitution is misplaced, as the theory is premised on intentional wrongdoing by a plaintiff that lacks an adequate legal basis (namely a contract between the parties):

> Any profit realized in consequence of intentional wrongdoing is unjust enrichment because it results from a wrong to the plaintiff. It is unjustified enrichment because it results from a transfer to the defendant, direct or indirect, that lacks an adequate legal basis. In the great majority of cases, the legal basis that is lacking is a contract that the defendant consciously neglected to make with the plaintiff. The missing contract is one in which the plaintiff would have authorized the defendant to make use of the plaintiff's property, or licensed some other act by the defendant otherwise constituting an infringement of the plaintiff's legally protected rights.

Restatement (Third) of Restitution § 3, cmt. a (tentative draft). It is difficult to imagine what the contract between the Sathers and Plaintiffs could be. Plaintiffs are not in legal position to waive enforcement of any alleged zoning violation against the Sathers. In any case, there is adequate legal basis for the Sathers' rental income.

Plaintiffs claim for unjust enrichment is wholly premised upon the Sathers' alleged violation of the law, the determination of which lies with the Director of the DPP and not with the Plaintiffs. As such the unjust enrichment claim is effectively a calculation of damages or restitution subsequent to and contingent upon Plaintiffs' success on the merits of Plaintiffs' other claims herein. The Circuit Court correctly adopted the Defendants arguments that Plaintiffs' unjust enrichment claim fails to state a claim upon which relief may be granted and dismissal of the claim was proper.

V. CONCLUSION

In over fifty years following the passage of Act 234, no reported Hawai'i decision has permitted one neighbor to sue another under § 46-4 for an alleged county zoning violation. Rightly so; a Hawai'i homeowner has the right to rely on the county zoning ordinances as enforced by the City.

Affirmance in this case will prevent the erosion of the zoning enforcement system by allowing the Director of the DPP to be the primary enforcer and interpreter of the Land Use Ordinance. When the law, as intended by the Legislature, applies, violations of the Land Use Ordinance are addressed through the county regulatory and enforcement scheme.

Plaintiffs urged this Court to rule in their favor based upon the "plain language" of an isolated sliver of HRS § 46-4. It is not within the province of this Court to sidestep administrative and regulatory schemes authorized by the Legislature and enacted by the Counties to afford meaning to a few words taken out of context. This Court can only apply laws as

enacted and intended by the Legislature. This is precisely what the Circuit Court did in this case when considering the context of § 46-4.

For the reasons discussed above, the Sathers respectfully request that the Intermediate Court of Appeals affirm the Circuit Court's decision below in all respects.

DATED: Honolulu, Hawaii, December 17, 2008.

ROSEMARY T. FAZIO
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