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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

KAMAOLE POINTE DEVELOPMENT LP; ALAKU POINTE LP, Plaintiffs, vs. COUNTY OF MAUI, et al., Defendants.	CIVIL NO. CV07-00447 DAE/LEK (Civil Rights) DEFENDANT COUNTY'S MOTION FOR SUMMARY JUDGMENT, MEMORANDUM IN SUPPORT OF DEFENDANT COUNTY'S MOTION FOR SUMMARY JUDGMENT; CERTIFICATE OF SERVICE Judge: Hon. David A. Ezra Trial date: January 13, 2009

DEFENDANT COUNTY'S MOTION FOR SUMMARY JUDGMENT

Defendant COUNTY OF MAUI, (Defendants COUNCIL CHAIR G. RIKI HOKAMA, in his official capacity; COUNCIL VICE-CHAIR DANNY A. MATEO, in his official capacity; COUNCILMEMBER MICHELLE ANDERSON, in her official capacity; COUNCILMEMBER GLADYS COELHO BAISA, in her official capacity; COUNCILMEMBER JO ANNE JOHNSON, in her official capacity; COUNCILMEMBER BILL KAUAKEA MEDEIROS, in his official capacity; COUNCILMEMBER MICHAEL J. MOLINA, in his official capacity; COUNCILMEMBER JOSEPH PONTANILLA, in his official

capacity; COUNCILMEMBER MICHAEL P. VICTORINO, in his official capacity; MAYOR CHARMAINE TAVARES, in her official capacity; and VANESSA A. MEDEIROS, DIRECTOR, MAUI COUNTY DEPARTMENT OF HOUSING AND HUMAN CONCERNS, in her official capacity having been dismissed from this action) ("County"), by and through its attorneys BRIAN T. MOTO, Corporation Counsel, and MADELYN S. D'ENBEAU, Deputy Corporation Counsel, hereby move this Honorable Court for summary judgment as a matter of law.

This Motion is made pursuant to Rules 7(b) and 56 of the Federal Rules of Civil Procedure and is supported by the Memorandum in Support hereof, Concise Statement of Facts, Declarations of Ken Fukuoka, Jeffrey A. Hunt, Vanessa A. Medeiros, David Michaelson and Clayton Yoshia; Request for Judicial Notice; Exhibits "A" - "C", and the records and files herein.

DATED: Wailuku, Maui, Hawaii, August 13, 2008.

BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY DEFENDANTS

By /s/ Madelyn S. D'Enbeau
MADELYN S. D'ENBEAU
Deputy Corporation Counsel

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KAMAOLE POINTE DEVELOPMENT LP; ALAKU POINTE LP, Plaintiffs, vs. COUNTY OF MAUI, et al., Defendants.	CIVIL NO. CV07-00447 DAE/LEK (Civil Rights) MEMORANDUM IN SUPPORT OF DEFENDANT COUNTY'S MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM IN SUPPORT OF COUNTY'S MOTION FOR SUMMARY JUDGMENT

I. COUNTY IS ENTITLED TO SUMMARY JUDGMENT ON REMAINING CONSTITUTIONAL CLAIMS

In its Order Granting in Part and Denying in Part County Defendants' Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment filed on July 3, 2008 ("Order"), this Court held that three of Plaintiffs' constitutional claims survived the County Defendants' Motion for Summary Judgment filed on April 2, 2008 ("First MSJ"). The remaining constitutional claims are: (1) an assertion that the Residential Workforce Housing Ordinance, Maui County Code, Chapter 2.96 ("Ordinance") (appended to Plaintiffs' First Amended Complaint), on its face, violates Plaintiffs' Equal Protection Rights because it discriminates between residential developers and commercial and/or other developers; (2) a claim that the Ordinance, on its face, fails to serve any legitimate governmental objective and is so arbitrary or irrational that it runs afoul of the Due Process Clause; and (3) an equal protection "Class of One" claim based on the Plaintiffs' request for a waiver from the requirements of the Ordinance and the subsequent hearing on that request.

In addition, certain state law claims remain, and will be discussed below.

II. SUMMARY JUDGMENT ELIMINATING CLAIMS THAT CANNOT BE SUSTAINED AT TRIAL IS FAVORED AND IS APPROPRIATE GIVEN PLAINTIFFS' BURDEN OF PERSUASION

A. County Does Not Have the Burden of Persuasion with Respect to the Constitutionality and Validity of the Ordinance and is Entitled to Summary Judgment

In 1986, the United States Supreme Court decided the three cases that transformed summary judgment from an infrequently

granted procedural device into a powerful tool for the early resolution of cases. As discussed below, these three cases establish that, in response to a motion for summary judgement the party with the burden of persuasion must bring forth admissible evidence sufficient to withstand a motion for a directed verdict, employing the standard of proof that would apply at trial. Furthermore, if the non-moving party's argument is inherently improbable, the burden of proof required to withstand the motion for summary judgment is heightened.

B. Celotex Corp. v. Catrett

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986), the most widely cited of the three cases, instructs that a complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial and supports summary judgment. There is no requirement that the moving party negate the other party's claim. "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . ." Id. at 323-324.

In Celotex, the court stated that Rule 56 of the Fed.R.Civ.P. should be construed with due regard for the rights of defendants to demonstrate prior to trial that there is no factual basis for plaintiffs' claims. Before Celotex, a party seeking summary judgment had the burden of both production and persuasion even if the other party would have the burden of persuasion at trial. After Celotex, a party that does not have the burden of persuasion at trial is no longer obliged to present evidence that negates the

non-movant's claim. Arthur R. Miller, The Pretrial Rush to Judgment, 78 N.Y.U. L.Rev. 982, 1038-1039 (2003).

Furthermore, a party moving for summary judgment is entitled to the burden-shifting effect of presumptions in its favor. In Cal-Farm Ins. Co. v. U.S., 647 F.Supp. 1083, 1086 (E.D. Cal. 1986), aff'd 820 F.2d 1227 (9th Cir. 1987), an action challenging the assessment of a deficiency by the Internal Revenue Service, the court held that a determination by the Internal Revenue Service is presumed correct and "the government is entitled to the benefit of that presumption in moving for summary judgment." Accord: Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254 (9th Cir. 1982), in which the court held that, by pointing to the presumption that a trademark is not generic, Coca-Cola met its burden of demonstrating that the question of whether or not the trademark "Coke" is generic "does not raise a genuine issue of material fact." See also, 6 J. Moore, Moore's Federal Practice, 56.15(3), at 2342-43 (2d ed. 1974); U.S. v. General Motors Corp., 518 F.2d 420, 441-42 (D.C. Cir. 1975), in which the court held that "the moving party for summary judgment is entitled to the benefit of any relevant presumptions that support the motion."

C. Matsushita Electric Industrial Co. v. Zenith Radio Corp.

The second case in the trilogy, Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), holds that the inferences drawn in favor of the non-moving party must be reasonable in light of the entire record. If plaintiffs' claims are implausible, a heightened burden of proof is required to defeat

summary judgment. Accord: Swarner v. U.S., 937 F.2d 1478, 1483 (9th Cir. 1991), in which the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") reversed summary judgment in plaintiff's favor because its arguments were implausible in the factual context of the case. The plaintiff, a newspaper publisher, argued that the military command had inexplicably began discriminating against it on the basis of its views despite having allowed the paper to be distributed for nearly forty years.

Tanner v. Heise, 879 F.2d 572, 577-78 (9th Cir. 1989), in which the court affirmed summary judgment despite the inferences that could be drawn from the non-moving party's argument because the factual context made the claim implausible.

D. Anderson v. Liberty Lobby, Inc.

In the third case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Supreme Court held that, in order to defeat summary judgment, the non-moving party must present sufficient evidence to support a favorable jury verdict using the evidentiary standard of proof that would apply at a trial on the merits. In Anderson, a trial on the merits would have required the plaintiffs to prove actual malice because the defendants who allegedly libeled the plaintiffs were public figures. The Court of Appeals held that for purposes of summary judgment, the requirement that actual malice be proven by clear and convincing evidence was irrelevant. The Supreme Court reversed, holding that the higher burden of proof must be considered by the trial court in determining whether or not a case should go to the jury. As the Court stated: ". . . a trial

judge must bear in mind the actual quantum and quality of proof necessary to support liability . . . ." Id. at 254.

In Coca-Cola Co. v. Overland, Inc., supra, 692 F.2d at 1254-55, the defendant had submitted several affidavits stating that the affiants believed that customers ordering "Coke" were using the term in the generic sense. The Ninth Circuit held that the affidavits were "clearly insufficient to rebut the presumption" because they were too speculative and insubstantial and failed to set forth facts that would be admissible at trial.

In order to overcome the presumption of validity and/or constitutionality of a duly enacted ordinance, the party challenging the ordinance on equal protection grounds must convince the court that the legislative facts upon which the classification is apparently based could not reasonably be conceived to be true by the legislative body. The party challenging the classification cannot prevail on a claim that the ordinance is irrational if the question is at least debatable. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981), in which the Supreme Court upheld a state statute that banned retail sale of milk in plastic nonreturnable containers but permitted such sale in nonreturnable paperboard milk cartons.

"In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable basis for the classification." F.C.C. v. Beach Communications,

Inc., 508 U.S. 307, 313 (1993), in which operators of satellite antenna and television facilities objected to their classification as entities requiring franchising.

III. PLAINTIFFS BEAR THE BURDEN OF PROOF ON THEIR CONSTITUTIONAL CLAIMS BASED ON A RATIONAL BASIS REVIEW AND NON-SUSPECT CLASSIFICATION

A. County Has No Burden to Establish a Rational Basis for Distinguishing Between Residential and Commercial Developers

One of the surviving constitutional claims is the assertion that the Ordinance, on its face, violates Plaintiffs' Equal Protection Rights because it discriminates between residential developers and commercial or other developers. County does not have the burden of establishing a rational basis for distinguishing between residential and commercial developers in an ordinance requiring specific pricing for residential developments. In fact, the legislative body need not ". . . articulate the reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line drawing. The task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, (citations omitted) and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial consideration." U.S. Railroad Retirement Board v. Fritz, 499 U.S. 166, 179 (1980). Once the court has identified a plausible basis for the classification, judicial review is at an end. Norlinger v. Hahn, 505 U.S. 1, 17-18 (1992).

The Plaintiffs bear a heavy burden in their attempt to prove that there is no rational basis for the classification in the Ordinance. In Aleman v. Glickman, 217 F.3d 1191, 1201-1202 (9th Cir. 2000), the Ninth Circuit set this forth very clearly.

> "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" Heller v. Doe, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). Therefore, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and must be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Id. at 319-20, 113 S.Ct. 2096. Furthermore, "a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.'" Id. at 320, 113 S.Ct. 2096 (quoting Norlinger v. Hahn, 505 U.S. 1, 15, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992)). Rather, "a statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Beach Communications, 508 U.S. at 313, 113 S.Ct. 2096. In addition, the government "has no obligation to produce evidence to sustain the rationality of a statutory classification"; "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Heller, 509 U.S. at 320, 113 S.Ct. 2637. "Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'" Id. at 321, 113 S.Ct. 2637 (quoting Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970)).

County has no burden to carry on this issue, and in fact would not be required to offer any evidence with respect to its decision to begin addressing the lack of affordable workforce housing by passing an ordinance directed at residential developers. The

burden is entirely on the Plaintiffs. When the burden of proof rests with the non-moving party, summary judgment should be granted unless the non-moving party demonstrates with factual assertions that it can sustain that burden. Celotex Corp. v. Catrett, supra, 477 U.S. at 323-324.

Because the Ordinance is a duly promulgated legislative act, the burden of proof has shifted to Plaintiffs to present admissible facts sufficient to prove clearly that there is no reasonably conceivable state of facts that could have provided the County Council with a rational basis for the classification. F.C.C. v. Beach Communications, Inc., supra, 508 U.S. at 313; Vance v. Bradley, 440 U.S. 93, 110 (1979).

Without waiving the fact that it could stand on the presumption of constitutionality and validity, County offers evidence and argument in support of this motion to demonstrate that the Ordinance has a rational basis for its classification. The Ordinance does not apply to commercial developers because it requires that the developers of five or more residential units price a percentage of those residences to be affordable to designated groups in the population. CSOF, ¶1. It was rational for the Council to begin to address the problem of the lack of affordable housing by adopting an Ordinance directed to residential developers. CSOF, ¶2. The Ordinance provides a logical and methodical system that not only determines affordable requirements but mandates affordable housing rules and standards that are the same for all residential developers. CSOF, ¶3. At a future time,

the Council could consider an Ordinance directed to commercial or other developers. CSOF, ¶19. Commercial linkage fees and exactions are common throughout the country, but are not often implemented, particularly in times of economic downturn. Some jurisdictions fear commercial mitigation may slow job creation and business expansion. An Ordinance directed to commercial or other developers would require a different regulatory set up in order to establish the number of units required because it could not be tied to the number of units being developed. CSOF, ¶¶4-6.

Based on reliable studies that have been done, experienced planners have opined that targeting residential developers with an "inclusive zoning" type of Ordinance is a rational and effective approach to providing affordable housing to the workforce and residents. CSOF, ¶7. Studies have also shown that inclusionary housing programs are not associated with a negative effect on housing productions. CSOF, ¶8. In fact, studies indicate that housing production increases, sometimes dramatically. Planning experts have concluded that inclusionary zoning that is mandatory is much more successful in producing affordable housing than the voluntary approach. CSOF, ¶¶9-10. Likewise on Maui, several Maui developers have entered into Residential Workforce Housing Agreements that comply with the Ordinance and the County is currently in the process of drafting and negotiating Residential Workforce Housing Agreements with other developers who have declared their intention, ability and willingness to comply with the Ordinance. CSOF, ¶11.

Various studies associated with the Maui Island Plan and other planning efforts have established the wide disparity between prevalent wages for local employees and the cost of housing. This is partially due to the strong "off shore" demand for housing which is not linked to local wages. CSOF, ¶¶12-13. Planners in "non-resort" markets would expect housing prices to reflect incomes prevalent in the area, and developers would then be constrained to build housing that the workforce, including professionals and highly-skilled workers, could afford. In "resort communities," such as Maui, the desirability of the location and the amenities it provides give rise to a large market for second homes purchased by buyers more affluent than most of the local community workforce. CSOF, ¶¶14-15. Recent studies show that 37% of all Maui Island housing sales in 2004 were to buyers continuing to reside outside Maui County. CSOF, ¶16.

The Ninth Circuit has consistently instructed litigants that the government's decision to single out a particular group for regulation does not give rise to a constitutional violation where the group possesses distinguishing characteristics relevant to interests the government has the authority to implement. Equity Lifestyle Properties, Inc. v. County of San Luis Obispo, 505 F.3d 860, 871 (9th Cir. 2007), in which the court turned aside a claim that the Ordinance in question singled out mobile home owners from property owners of all other types of housing.

From a planning perspective, approaching on an incremental basis, by starting with residential developers, makes sense. The

Ordinance is a rational first approach to the problem of providing housing affordable to the workforce and residents. CSOF, ¶¶17-18. At a future time, the Council could consider an ordinance directed at commercial or other developers. CSOF, ¶19. It is also well established that the government may take one step at a time and first address itself to the phase of the problem that seems most acute in the legislative mind. "Legislatures may implement their program step by step, . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights not proceed along suspect lines (citations omitted)." City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976), in which, responding to an equal protection challenge, the Supreme Court upheld a municipal ordinance prohibiting pushcart food vendors with the exception of those who had operated within the French Quarter for the past eight years.

B. With Respect to Their Substantive Due Process Claim, Plaintiffs Have The Burden of Proving that the Ordinance Fails to Serve any Legitimate Governmental Objective

The second surviving constitutional claim is the claim that the Ordinance, on its face, fails to serve any legitimate governmental objective and is so arbitrary or irrational that it runs afoul of the Due Process Clause.

Justice Kennedy, in his concurrence on this point in Lingle v. Chevron, U.S.A., Inc., 544 U.S. 528, 548-549 (2005), explains what a substantive due process attack on a valid Ordinance requires,

citing to Eastern Enterprises v. Apfel, 524 U.S. 498, 537-539 (1998). In Eastern Enterprises v. Apfel, the court stated:

> Eastern also claims that the manner in which the Coal Act imposes liability upon it violates substantive due process. To succeed, Eastern would be required to establish that its liability under the Act is "arbitrary and irrational". Turner Elkhorn, supra, at 15, 96 S.Ct. at 2892. Our analysis of legislation under the Takings and Due Process Clauses is correlated to some extent, see Connolly, supra, at 223, 106 S.Ct. at 1025, and there is a question whether the Coal Act violates due process in light of the Act's severely retroactive impact. At the same time, this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation. See Ferguson v. Skrupa, 372 U.S. 726, 731, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963) (noting "our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believ[e] to be economically unwise" (footnote omitted)); see also Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought").

The presumption of validity surrounding the Ordinance shifts the burden to the Plaintiffs to demonstrate that the Ordinance cannot pass the "rational basis" test. In order to violate substantive due process, the Ordinance must fail to serve any legitimate governmental objective. Lingle v. Chevron U.S.A., Inc., supra, 544 U.S. at 542. The Lingle court was not inviting the abrogated "fails to substantially advance" test in the back door. The Court's lengthy discussion of the appropriate role of the Court *vis-a-vis* land use regulations forestalls that argument. Referring to Hawaii's law capping rents for gas stations that was at issue in the case, the Court stated: "We find the proceedings below

remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation . . . the reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here." Id. at 545 (emphasis added).

In addition to meeting this high burden, the Plaintiffs must prove that they possessed a protectable property interest in their proposed developments. In Matsuda v. City and County of Honolulu, 512 F.3d 1148 (2008), cert. denied, 128 S.Ct. 2964 (2008), the Ninth Circuit reviewed a case in which the Plaintiffs maintained that a legislative act of the Honolulu City Council violated their due process rights. The Honolulu City Council had repealed the leasehold conversion ordinance, leaving the Plaintiffs without a means of obtaining condemnation approval for the land underlying their condominium at Discovery Bay. The leasehold conversion ordinance was enacted with the goal of providing affordable housing and thereby strengthening the economy, and the Honolulu City Council determined that its purpose had been satisfied and it was now unnecessary. The Ninth Circuit discussed the "exceedingly high burden" imposed by the Plaintiffs' substantive due process claims as follows:

"To prove that the City's enactment of Ordinance 05-001 violated their substantive due process rights, the Lessees must demonstrate first that their contracts were the type of property

the Due Process Clause protects and, second, that the City deprived them of their rights under the contracts in a way that 'shocks the conscience' or interferes with rights implicit in the concept of ordered liberty. Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998)(quoting Salerno, 481 U.S. at 746)(internal quotation marks omitted)." Id. at 1156.

Plaintiffs cannot meet the first test set out in Matsuda because they do not have a protectable property interest in their proposed developments. In order to determine whether or not a claimed right or benefit is a property interest protected by the Constitution, the court must look to state law. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Under Hawaii law, a landowner does not have a protectable vested interest in a particular project until it has obtained the last discretionary permit. Kauai County v. Pacific Standard Life Ins. Co., 65 Haw. 318, 332, 653 P.2d 766, 776 (1982) (also known as the "Nukolii" case).

Plaintiffs do not have a vested protectable right to develop their properties according to their particular plans because they have not obtained the discretionary approvals required by Hawaii's Coastal Zone Management Act ("CZMA"), Haw.Rev.Stat. Chapter 205A. CSOF, ¶20. Plaintiffs allege that ". . . in Plaintiffs' Kamaole Pointe Project, Plaintiffs or its predecessors-in-interest, prior to the enactment of the Ordinance, applied for a Special Management Use Permit . . . ." FAC, ¶26, CSOF,¶22. Plaintiffs are referring to the requirements in the CZMA with respect to the Special

Management Area ("SMA"). Because the Property is in the SMA, Plaintiffs are required to obtain an SMA permit, which is a discretionary permit issued by the Maui Planning Commission ("MPC") pursuant to state law and usually with numerous conditions. CSOF, ¶21.

Plaintiffs' claims are not ripe because they have not completed the SMA assessment process for either project and cannot apply for building permits until that process is completed. The application of the Workforce Housing Ordinance to Plaintiffs' projects will not be known until they apply for building permits. CSOF, ¶¶24-25.

In addition to the SMA application, the developers of the Kamaole Heights project have submitted a Draft Environmental Assessment pursuant to Haw.Rev.Stat. Chapter 343. The Planning Department has determined that additional information is required before the Draft Environmental Assessment can be submitted to the Maui Planning Commission, the accepting agency. CSOF, ¶23.

Nor can Plaintiffs meet the second Matsuda test that "the City deprived them of their rights under the contracts in a way that 'shocks the conscience' or interferes with rights implicit in the concept of ordered liberty" or, alternatively that the Ordinance lacks any rational basis. Although County has no obligation to do so, it has set forth herein the declarations of planners and housing experts demonstrating that the Ordinance is a rational approach to the affordable housing problem. CSOF, ¶¶2,3,7,17,18.

C. Plaintiffs Failed to Sustain Their Burden of Identifying the Similarly Situated Entities Supporting Their Equal Protection Claim Regarding the Appeal Hearing

The third claim that survived the County Defendants' First MSJ is a "Class of One" equal protection claim arising from participation of a predecessor-in-interest to one of the Plaintiffs in the process set forth in the Ordinance for a developer to request a waiver from the County Council.

A "Class of One" equal protection claim requires the Plaintiffs to show an extremely high degree of similarity between themselves and the persons to whom they compare themselves in order to demonstrate that they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. Cordi-Allen v. Conlon, 494 F.3d 245, 251 (1st Cir. 2007).

In this case, Plaintiffs cannot make such a showing because the waiver request process in which their predecessor-in-interest participated is the only appeal for a reduction, adjustment or waiver from the requirements of the Ordinance that the Maui County Council has reviewed. To date, neither the County Clerk nor the Council has received any properly filed appeals for a reduction, adjustment, or waiver from the requirements of the Ordinance, other than the request for a waiver from No Ka Oi Development LP, Plaintiffs' predecessor-in-interest, for its two projects known as Kamaole Heights and Kamaole Plantation. CSOF, ¶¶26-27.

Plaintiffs' FAC did not indicate that they were treated differently from others who had sought a waiver from the Ordinance

probably because Plaintiffs knew that, on the date they filed their lawsuit, no one else had participated in a hearing on a waiver request.

The fact that Plaintiffs predecessor-in-interest was the first to request a waiver first appears in the record at Exhibit 5 appended to Plaintiffs' Concise Statement of Facts In Support of Its Motion For Partial Summary Judgment filed on February 28, 2008. CSOF,¶¶26-27, Exhibit "A", p.2. The Policy Committee for the Maui County Council Minutes for July 24, 2007 includes the following statement made by Edward Kushi, the attorney advising the Committee:

> "Yes, Chairman Mateo, Members, as we all sit here today this is the first request for an appeal, waiver, adjustment of the residential workforce housing requirement since the passage of the ordinance. As in any case, the initial one may reflect on future appeals." Minutes at p. 5.

CSOF,¶27, Exhibit "A", p.2.

IV. STATE CONSTITUTIONAL CLAIMS

Under Hawaii law, except with respect to suspect classifications, every enactment of the legislature is presumptively constitutional and the party challenging the statute has the burden of showing beyond a reasonable doubt that the legislation is clearly, manifestly and unmistakably in violation of the Constitution. State v. Adler, 108 Hawai'i 169, 177, 118 P.3d 652, 660 (2005); Watland v. Lingle, 104 Hawai'i 128, 85 P.3d 1079 (2004); Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai'i 217, 247-48, 953 P.2d 1315, 1345-46 (1998); State v.

Gaylord, 78 Hawai'i 127, 890 P.2d 1167 (1995); Pray v. Judicial Selection Com'n of State, 75 Haw. 333, 861 P.2d 723 (1993); Blair v. Cayetano, 73 Haw. 536, 836 P.2d 1066 (1992), recon. denied, 74 Haw. 650 (1992); Schwab v. Ariyoshi, 58 Haw. 25, 564 P.2d 135 (1977).

The quantum of proof necessary to overcome the presumption of validity and/or constitutionality of a duly enacted ordinance requires the party challenging the ordinance to establish that the ordinance was a capricious exercise of the legislative power by proof beyond a reasonable doubt. Richardson v. Sport Shinko (Waikiki Corporation), 76 Hawai'i 494, 516, 880 P.2d 169, 191 (Hawai'i 1994).

The County is entitled to summary judgment on the State Constitutional claims.

V. THE AFFORDABLE WORKFORCE HOUSING ORDINANCE DOES NOT CONFLICT NOR IS IT PREEMPTED BY HAW.REV.STAT. §§ 46-141 TO 46-148

A. The Plaintiffs' Double Negative Argument Must Fail

In their FAC, Plaintiffs allege that "the development exactions and in-lieu fee requirements imposed under the Workforce Housing Ordinance are tantamount to imposition of impact fees to fund expenditures for affordable housing. Plaintiffs further allege that because such action conflicts with the authority to impose impact fees granted to Defendant County by the state legislature pursuant to Haw.Rev.Stat. §§ 46-141 to 46-148, Defendant County lacked the specific authority necessary to pass

the Ordinance and the Ordinance should be declared invalid for that reason." FAC, ¶ 87.

Apparently Plaintiffs intend this allegation to set forth a kind of double negative. "Impact fees" are defined in Haw.Rev.Stat. § 141 as: ". . . charges imposed upon a developer by a county or board to fund all or a portion of the public facility capital improvement costs required by the development from which it is collected, or to recoup the cost of existing public facility capital improvements made in anticipation of the needs of a development." The term "Public facility capital improvement costs" is also defined by Haw.Rev.Stat. § 46-141 which states: "Public facility capital improvement costs do not include expenditures for required affordable housing . . . ." (emphasis added).

It is clear from the unambiguous language of the impact fee statute that the County cannot establish impact fees for affordable housing. However, that certainly does not imply that the County cannot condition the issuing of building permits and subdivision approval on affordable housing conditions.

There is no basis for Plaintiffs' argument that the Ordinance is "tantamount" to the imposition of an impact fee. And there is certainly no basis to argue that because impact fees do not include expenditures for affordable housing that there is no authority for the county to impose affordable housing requirements.

Pursuant to Haw.Rev.Stat. § 46-1.5(13), each county in the State of Hawaii has the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order

and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute, provided also that the ordinance does not disclose or express an implied intent that the ordinance shall be exclusive or uniform throughout the State.

A conflict exists between local legislation and state law, "if the local legislation duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith. Similarly, local legislation is contradictory to general law when it is inimical thereto. Finally, local legislation enters an area that is fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area, or when it has impliedly done so." Richardson v. City and County of Honolulu, 76 Hawai'i 46, 61-62, 868 P.2d 1193, 1208-9 (1994), recon. denied, 76 Hawai'i 247 (1994).

It cannot be argued that by excluding affordable housing requirements from the impact fee ordinance, the state legislature meant to "occupy" the area. Quite the opposite, in fact.

B. If this Claim Is Not Dismissed on Summary Judgement, the Preemption Question Should be Certified to the Hawaii Supreme Court

In Richardson v. City and County of Honolulu, 802 F.Supp. 326, 344 (1992), the Bishop Estate contended that the land lease rent ceiling was preempted by Haw.Rev.Stat. Chapters 101, 516, 516D, 519, 514A and 421H. The court in Richardson I certified the

preemption question to the Hawaii Supreme Court, pointing out that the United States Supreme Court has consistently approved the use of certified questions to state supreme courts when a federal court case involves an important question of state law which is both unclear under state legal precedent and would be determinative in the instant case. The court pointed out that the Ninth Circuit has often certified such questions and certifying them at the district court level actually ends up saving time and resources. The Hawaii Supreme Court authorizes certified questions in Rule 13 of the Hawaii Rules of Appellate Procedure ("HRAP") when the question concerns Hawaii law which is determinative and when there is no clear controlling precedent in the Hawaii judicial decisions. The Hawaii Supreme Court may decline to answer the certified question if the facts alleged do not support the claim and therefore the answer would not be determinative. Matsuura v. E.I. du Pont de Nemours & Co., 102 Hawai'i 149, 73 P.3d 687 (2003).

VI. CONCLUSION

It is appropriate to grant summary judgment with respect to the remaining constitutional claims and the state law claims. In the alternative, if the federal claims are dismissed, the Court should decline supplemental jurisdiction and dismiss the state law claims as well. 28 U.S.C.A. § 1367(c)(3).

The interests of justice and judicial economy would be best served if the remaining constitutional claims were dismissed given the fact that at trial the Plaintiffs would have the burden of

proving that there was no rational basis for the enactment of the Ordinance.

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