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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)

COUNTY DEFENDANTS' MOTION FOR
RECONSIDERATION OF ORDER
GRANTING IN PART AND DENYING
IN PART COUNTY DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT FILED JULY 3,
2008; MEMORANDUM IN SUPPORT OF
COUNTY DEFENDANTS' MOTION FOR
RECONSIDERATION; CERTIFICATE
OF SERVICE

Trial date: January 13, 2009

**COUNTY DEFENDANTS' MOTION FOR RECONSIDERATION OF
ORDER GRANTING IN PART AND DENYING IN PART COUNTY
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL SUMMARY JUDGMENT FILED JULY 3, 2008**

Defendants COUNTY OF MAUI, 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 (collectively "County Defendants"), by and through their attorneys BRIAN T. MOTO, Corporation Counsel, MADELYN S. D'ENBEAU and JANE E. LOVELL, Deputies Corporation Counsel, hereby move this Honorable Court to reconsider 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.

This Motion is made pursuant to Fed.R.Civ.P. 60(b)(1) and U.S. Dist. Ct. D. Haw. LR 60.1, the attached memorandum and the entire record herein.

DATED: Wailuku, Maui, Hawaii, July 18, 2008.

BRIAN T. MOTO
Corporation Counsel
Attorney for COUNTY DEFENDANTS

By /s/ Madelyn S. D'Enbeau
MADELYN S. D'ENBEAU
JANE E. LOVELL
Deputies Corporation Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KAMAOLE POINTE DEVELOPMENT LP;
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MEMORANDUM IN SUPPORT OF
COUNTY DEFENDANTS' MOTION FOR
RECONSIDERATION OF ORDER
GRANTING IN PART AND DENYING
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MOTION FOR SUMMARY JUDGMENT,
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SUMMARY JUDGMENT FILED JULY 3,
2008

**MEMORANDUM IN SUPPORT OF COUNTY DEFENDANTS' MOTION FOR
RECONSIDERATION OF ORDER GRANTING IN PART AND DENYING IN
PART COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN
THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT FILED JULY 3, 2008**

**I. COUNTY DEFENDANTS ARE ENTITLED TO RECONSIDERATION ON REMAINING
CONSTITUTIONAL CLAIMS BASED ON PLAINTIFFS' BURDEN OF PROOF**

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 ("Motion"). County Defendants seek reconsideration of the Order with respect to those claims, two of which because they require merely that the government have a "rational basis" to support its legislation and the third because it requires Plaintiffs to identify similarly situated entities, which they failed to do. As County Defendants argued at page 15 of their Memorandum in Support of the Motion ("Memorandum"), the Residential Workforce Housing Policy ("Ordinance") is entitled to a presumption of validity. Therefore,

it is Plaintiffs' burden to overcome the presumption which they failed to do in their responsive pleadings. The government is not required to "prove" the rational basis for its legislative enactments. In any case, as discussed in County Defendants' Memorandum, the purpose is clearly set forth in the Ordinance which is appended to the Concise Statement of Facts ("CSOF") filed in support of the Memorandum as Ex. A.

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

This Court may reconsider its Order on the three issues if it finds "manifest error of law or fact." Fed.R.Civ.P.60.1(b). County Defendants assert that there is a manifest error of law because the County has neither the burden to establish a rational basis for its duly enacted Ordinance, nor the burden to establish similarly situated categories of entities with respect to the "Class of One" claim regarding the appeal to the County Council. The Ordinance is entitled to a presumption of validity and it is the Plaintiffs' burden to rebut that presumption. Plaintiffs claim that the appeal process violated their Equal Protection Rights, and, therefore, they must establish that they were treated differently than similarly situated entities. This they probably cannot do because Plaintiffs' appeal was the only appeal for a waiver heard by the County Council. But, in any case, they offered no evidence about similarly situated entities. The denial of Summary Judgment on the three constitutional issues should be reconsidered.

The United States Supreme Court has instructed 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" Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986).

III. PLAINTIFFS BEAR THE BURDEN OF PROOF ON THE 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 When Requiring Specific Pricing For Residential Developments

One of the surviving constitutional claims that should be reconsidered is the assertion that the Ordinance, on its face, violates Plaintiffs' Equal Protection Rights because it discriminates between residential developers and commercial developers. The Ordinance requires residential developers to price 40-50 percent of their residential units at defined rates affordable to the workforce in Maui County. The Ordinance, stating as its purpose the provision of housing affordable to the workforce, does not apply to commercial (non-residential) developers. The Court determined that the County Defendants are required to demonstrate a rational basis for the distinction between residential and commercial developers and denied summary

judgment on that point. "County Defendants again fall short of meeting this burden." (Emphasis added.) Order, p. 48.

However, the government need not set forth any evidence with respect to a challenge that an ordinance violates equal protection guarantees when that challenge is not based on a suspect classification.

In Aleman v. Glickman, 217 F.3d 1191, 1201-1202 (9th Cir. 2000), the court 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 Nordlinger 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 Defendants have no burden to carry on this issue, and in fact would not be required to offer any evidence in that regard. 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. As such, Plaintiffs' Memorandum in Opposition to County Defendants' Motion was insufficient to allow Plaintiffs' Equal Protection claim based on a lack of rational basis for the Ordinance to survive the County Defendants' Motion.

B. Plaintiffs Have the Burden of Proof on Their Substantive Due Process Claim That the Ordinance Fails to Serve Any Legitimate Governmental Objective

_____The second surviving constitutional claim that should be reconsidered 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. The Court indicated that the County Defendants are required to prove that the Ordinance serves a legitimate governmental objective and is not arbitrary or irrational and that they failed to do so in a manner sufficient to support summary judgment. Order, pp. 53-54, citing Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

However, as discussed above, the Ordinance is presumed valid and an attack that it is so arbitrary that it fails to serve any legitimate governmental objective requires a climb up a very steep mountain. Plaintiffs did not even attempt this journey.

Justice Kennedy, in his concurrence on this point in the Lingle v. Chevron case 544 U.S. at 548-549, 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").

_____ Despite this instruction from the Supreme Court, Plaintiffs argue that the Ordinance is arbitrary and irrational because it is out of harmony with their version of the free market school of thought. Even if this were a proper inquiry, Plaintiffs would have to address the fact that under the free market school of thought,

land prices on Maui will fall until those prices reflect the use to which the land can be put given the Ordinance. In any case, the presumption of validity 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). At the very least, County Defendants' Memorandum establishes that some affordable housing has been obtained by operation of the Ordinance because one developer has already signed an agreement to provide that housing. Motion CSOF 7, Medeiros Declaration, ¶ 6.

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

The third claim that survived the County Defendants' Motion rests on the allegations concerning the County's appeal process. County Defendants determined, incorrectly as it turns out, that those allegations related to the due process claim. County Defendants based that understanding on the allegation in Paragraph 66 of the First Amended Complaint ("FAC") that the appeal process is ". . . without any guidelines, procedures or safeguards to ensure that appeal requests will be treated fairly and with due process." This could not be a procedural due process claim because, as County Defendants argued at length, no protected property interest was involved. For that reason, County Defendants argued the "shocks the conscience" standard that applies to substantive due process claims alleging abusive executive actions. The Court correctly pointed out that if the substantive due process claim was aimed at the Ordinance as a whole rather than at the appeal process, the standard is that it fails to serve any legitimate governmental objective. Order, pp. 52-43.

However, as County Defendants argued in their moving papers, albeit in a different context, an alleged equal protection "Class of One" claim requires that the Plaintiffs 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). Memorandum, at p. 23.

IV. CONCLUSION

Because the Order mistakenly assigns burdens of proof to the County Defendants that properly belong to the Plaintiffs, it is appropriate to grant reconsideration of County Defendants' Motion with respect to the three constitutional claims. If those 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). This would allow the entire matter to precede to the anticipated appeal without the necessity of delay or certification.

DATED: Wailuku, Maui, Hawaii, July 18, 2008.

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By /s/ Madelyn S. D'Enbeau
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